IN THE TENNESSEE COURT OF CRIMINAL APPEALS

AT KNOXVILLE

MARCH 1996 SESSION

FILED

March 18, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9511-CC-00367
	)	
v.	)	Jefferson County
	)	
GREGG DUNCAN,	)	Honorable Ben W. Hooper, II, Judge
	)	
Appellant.	)	
	)	(Robbery)

For the Appellant:

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(AT TRIAL)

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(ON APPEAL)

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Gregg Duncan, was convicted in a jury trial in the Jefferson County Circuit Court of robbery, a Class C felony. He was sentenced to serve five years as a Range I, standard offender.[1] The defendant appeals as of right contending that the record contains insufficient evidence corroborating the testimony of two accomplices and that his sentence is excessive. We disagree with the defendant's claims and affirm the defendant's conviction and sentence.

Because the defendant questions the sufficiency of the evidence, we discuss the facts of this case in some detail. At around 9:00 p.m. on December 27, 1993, James Barbee reported to the Jefferson County Sheriff's Department that he had been the victim of a robbery in which two men attacked him, struck him on the head and took his wallet. He told the police that a young woman, Tiffany Collins[2], had called him earlier that evening and invited him to "party" with her. He picked her up at Wal-Mart, and because she said she needed some money, they stopped at the bank. Barbee put the money in his right pants pocket. She drove him to a secluded area on a muddy gravel road and said "let's get out." He got out on the passenger side and started to walk down the road. Tiffany Collins was behind him when two men charged out of the bushes. Someone hit him in the stomach and on the head. He was unconscious briefly and when he regained his senses, he was alone. His wallet and car keys were missing. The money, however, was still in his pants pocket. Barbee could neither identify nor describe the men who attacked him. At approximately 11:00 p.m., Bud McCoig of the Jefferson County Sheriff's

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[1] The defendant remains on bond pending the outcome of this appeal.

[2] Tiffany Collins was not married when the offense occurred. At the time of trial, she was married to David Collins. We refer to her throughout the opinion by the name she used at trial.

Department found Tiffany and David Collins at the mobile home where Tiffany's father was staying.[3] At the time of McCoig's arrival, the defendant was sitting in a white automobile outside the mobile home where he was talking with a young woman. After speaking to the Collinses, McCoig took them to the police station in Jefferson City. Several hours later, both confessed and named the defendant as the other man who participated in the robbery. The police arrested the defendant at his father's home on the morning of the 28th, but he made no statement to the police. All three were released on bail.

Tiffany and David Collins testified for the state at the defendant's trial. According to Tiffany Collins' testimony, the defendant had dropped by the trailer on the evening before the robbery. Because Mr. and Mrs. Collins needed money in order that they could return to Kansas, the defendant suggested that they rob J.D. Barbee whom David Collins had met in a drug rehabilitation program. The discussion ended when Tiffany Collins protested that they did not need to rob Barbee because he gave her money anytime she asked for it. The next day, however, David Collins changed his mind, and Tiffany Collins decided to participate. She testified that at about 8:30 p.m. she drove Barbee to the place where the two men were waiting. The defendant hit Barbee and then the three ran for the defendant's car that was parked nearby. She dropped the keys to Barbee's car on the ground.[4] After buying some beer, they drove to the defendant's house where he showered and changed clothes before returning to the trailer sometime after 10:30 p.m.[5]

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[3] The defendant's brother, Dean, lived in the mobile home. Dean Duncan suffers from certain medical problems that cause seizures, especially when he drinks. The defendant and the defendant's father testified that they checked on him a couple of times each day.

[4] The police found Barbee's car keys in the grass near his automobile.

[5] In her statement to the police, Tiffany Collins said that they drove immediately from the scene of the robbery to the trailer. Deputy McCoig testified that he could not recall her telling him

David Collins testified that he was very drunk on the date of the robbery. Because he was so high, the defendant drove his car and took the lead in the actual robbery. The ground where they hid was very muddy. The defendant hit Barbee with a beer bottle and took his wallet. However, David Collins testified that he threw the wallet either into the lake or into a nearby dumpster when he found that it contained no cash.[6] When they returned to the trailer, Dean Duncan was passed out on the couch, and Bob French, Tiffany's father, was drunk. Collins had just taken a shower when the police arrived.

Barbee was unable to identify the defendant positively as one of the men who attacked him. The prosecutor asked, "Do you see anybody here in the courtroom that looks like anybody that came toward you?" And Barbee replied, "yeah, him down there, Duncan, one . . . ." During cross-examination, Barbee conceded that he did not know who hit him, and Tiffany Collins could have hit him from behind. He was unable to provide any details of his attackers' appearance such as clothing or hair because it all happened too fast. Barbee conceded that after her release from custody, Tiffany Collins told him that the defendant was one of the persons who robbed him. He said that he could not specifically identify the defendant as the person who hit him.

The defendant presented an alibi defense. He testified that he spent the entire day except for two brief periods of time at his father's home. At about 3:30 p.m. and again at about 10:30 p.m., he went at his father's request to check on his brother. His father was worried because his brother was drinking heavily. When he arrived at the trailer at about 10:30 p.m., he found his brother

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that the defendant had showered and changed clothes before they returned to the trailer.

[6] The wallet was never recovered.

passed out on the couch. He spent a few minutes talking to Bob French, and then Mr. and Mrs. Collins arrived. The couple went immediately to another part of the trailer, and he had no conversation with them. When his girlfriend came to the trailer, he took his bottle of beer and went out to talk with her in the car. At that point, McCoig arrived. When the Collinses left with McCoig, the defendant went into the trailer to find out what had happened. French told him that he did not know why McCoig had taken the Collinses with him. Because the defendant was worried about driving home after drinking a couple of beers, he asked his girlfriend to drive him.[7] He and his father returned for his car sometime after midnight.

The defendant's father and two other persons testified that the defendant was at home the entire evening except for the time period between about 10:15 and 11:30 p.m. Bob French confirmed that the defendant had arrived at the trailer before Mr. and Mrs. Collins returned and that he was clean and neatly dressed. When David Collins came in shortly afterward, he was covered with mud. French said that David and Tiffany did not come in by the front door and that they went immediately to the back of the trailer. French also testified that David Collins planned the entire robbery when the defendant was not present and that he had heard no discussions between the defendant and Collins about the robbery.

William Mayford Barbee, the victim's cousin, testified that he was present in the courthouse when Mr. Jollay, the defense attorney, approached

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[7] The defendant was on parole at the time. He had previously had a serious problem with alcohol. The record indicates that at the parole revocation hearing, the board heard Barbee's testimony and overturned the revocation. The defendant's sentence for his previous conviction expired shortly thereafter. At trial the jury heard portions of Barbee's testimony at the revocation hearing in which he stated at first that the defendant was one of the assailants and then flatly denied that he could identify him.

James Barbee and introduced him to the defendant. The victim shook hands with the defendant and did not react in any way.

The state recalled McCoig as a rebuttal witness. He testified that just before the preliminary hearing French told him that he heard the three defendants discussing the robbery together. At the time, McCoig made a brief note to that effect. The note was admitted into evidence at the trial. The defense did not object to this testimony except to question why the statement had not been provided earlier.[8] McCoig also testified that when he arrived at the trailer, he was dressed in plain clothes and was driving his personal vehicle.

The trial court found that Tiffany and David Collins were accomplices as a matter of law and gave the jury an appropriate instruction requiring corroboration of their testimony. The jury found the defendant guilty of robbery.

On appeal, the defendant argues that Barbee's identification of the defendant is so weak and ineffectual and so tainted by his conversations with Tiffany Collins that the evidence in the record is insufficient to corroborate the accomplices' testimony. The state contends that Barbee's questionable identification when considered with the defendant's presence at the trailer, his knowledge of Mr. and Mrs. Collins' arrest when he could not have known that McCoig was a police officer, and French's statement that he heard the defendant

[8] The defense did not request nor did the trial court give an instruction limiting the statement to impeachment purposes. Since the defense has not raised the issue in his motion for new trial or on appeal, we do not address it here.

discuss the robbery with David Collins is sufficient to satisfy Tennessee's standard for corroborative testimony.[9] This is a very close question indeed.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). It is well established that a jury verdict, approved by the trial court accredits the testimony of the state's witnesses. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

In Tennessee, a conviction may not be based upon the uncorroborated testimony of an accomplice. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). An accomplice is an individual who knowingly, voluntarily, and with common intent participates with the principal offender in the commission of an offense. State v. Lawson, 794 S.W.2d 363, 369 (Tenn. Crim. App. 1990). The testimony of one accomplice may not be used to corroborate the testimony of another. Bethany v. State, 565 S.W.2d 900, 903 (Tenn. Crim. App. 1978). Whether other evidence sufficiently corroborates the testimony of an accomplice is a question of fact entrusted to the jury. State v. Bigbee, 885 S.W.2d at 803. The general rule is:

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[9] The record contains no physical evidence, such as muddy clothing, footprints, muddy tires, or tire tracks, to connect the defendant to the offense.

> [T]here must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's evidence. The corroboration need not be conclusive, but it is sufficient if this evidence, of itself, tends to connect the defendant with the commission of the offense, although the evidence is slight and entitled, when standing alone, to but little consideration.

State v. Gaylor, 862 S.W.2d 546, 552 (Tenn. Crim. App. 1992) (quoting Hawkins v. State, 4 Tenn. Crim. App. 121, 133-34, 469 S.W.2d 515, 520 (1971)).

The trial court, in denying the motion for judgment of acquittal, held that the proof just barely met the test. We conclude that the corroborating evidence is slight and that, standing on its own, none of it would be sufficient to convict. However, based on our standard of review, we agree that the evidence contained in the record is sufficient to corroborate Mr. and Mrs. Collins' testimony that the defendant was a participant in the robbery. He was present at the trailer when the accomplices said the crime was planned. After the offense was committed, he arrived at the trailer just before Mr. and Mrs. Collins. The Collinses had no vehicle and were dependent on others for transportation. Moreover, Deputy McCoig testified in rebuttal that Bud French, Tiffany Collins' father, told him that he heard the three discussing the robbery. The victim's identification of the defendant is weak and limited to his statement that Duncan "looked like" one of the men who came charging at him. However, when considered as a whole, the evidence in the record, although admittedly

inconclusive when taken separately, constitutes sufficient corroboration under our case law to sustain the defendant's conviction.

Next, the defendant contends that the trial court sentenced him to serve five years as a Range I, standard offender based on unproven or inapplicable enhancement factors. Robbery is a Class C felony. T.C.A. § 39-13-401(b). A Range I standard offender may be sentenced to not less than three nor more than six years. T.C.A. § 40-35-112(a)(3). The prosecution argued that five of the enhancement factors provided in T.C.A. § 40-35-114 applied:

> (1) The defendant has a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range;
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> (4) The victim was particularly vulnerable because of age;
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> (5) The defendant treated or allowed the victim to be treated with exceptional cruelty;
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> (8) The defendant has a previous history of unwillingness to comply with conditions of a sentence involving release into the community; and
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> (13)(B) The felony was committed while on release from parole.

The trial court made no specific findings regarding the enhancement factors, stating only that "the enhancement factors as set out by the State bear great weight, and are very appropriate to [this] case." It referred briefly to the defendant's past record and gave some weight to the fact that the defendant had not had any problems for some time.[10]

[10] The trial court also noted that the closeness of the corroboration question had influenced its decision to allow the defendant to remain free on bail both pending sentencing and on appeal.

When there is a challenge to the length, range or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. T.C.A. § 40-35-401, Sentencing Commission Comments. Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103 and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

On appeal, the defendant does not argue that factor (13) is inapplicable, and the state concedes that factors (4) and (5) should not apply. However, the state contends that factors (2) and (10) are also supported by the record.[11] Because the trial court did not make specific findings on the record showing that he had considered the sentencing principles and all relevant facts and circumstances in sentencing the defendant, we review the record de novo without the presumption of correctness.

[11] The defendant was the leader in the commission of the crime, T.C.A. § 40-35-114(2), and the defendant had no hesitation about committing a crime when the risk to human life was high. T.C.A. § 40-35-114(10).

We conclude that the record supports the application of four enhancement factors. The presentence report reflects that the defendant has a lengthy juvenile history of difficulties with the law, as well as several felony convictions as an adult. The defendant does not dispute the information provided in the report. He has a significant history of previous criminal behavior and convictions sufficient to justify the use of factor (1). The record also establishes that the defendant was on parole for burglary and larceny when this offense occurred. Factor (13) may appropriately be used to enhance the defendant's sentence in this case. Further, we give some weight to factor (8), because the presentence report shows that, as a juvenile, the defendant had several times violated the conditions of probation. He ran away from programs where he had been placed, broke curfew, and possessed alcohol and marijuana. We likewise note, though, that most of these difficulties were related to drug and alcohol abuse. The defendant's parole officer testified that the defendant had managed to control his alcohol problem after a 1992 D.U.I. conviction and had recently made moderate progress in keeping a steady job.

Also, the record supports the application of enhancement factor (2), regarding the defendant being a leader. Although Bud French's testimony contradicts the accomplices' assertions that the defendant suggested and carried out the plan with their help, the Collinses' testimony is sufficient to justify the trial court's findings under a preponderance of the evidence standard. See State v. Carter, 908 S.W.2d 410, 413 (Tenn. Crim. App. 1995). According to them, the defendant suggested the robbery, helped plan it, provided his car, and struck the victim. The fact that the Collinses had their own motives for

participating does not negate the defendant's role. We conclude that the defendant was a leader in the commission of the offense.

The state also contends that the defendant had no hesitation about committing this crime when the risk to the victim's life was high, enhancing factor (10), and that his sentence should be increased accordingly. However, the defendant was indicted for "feloniously, knowing, and by violence" obtaining property from the person of James Barbee pursuant to T.C.A. § 39-13-401. This court has previously held that a great risk to a victim's life exists in virtually all robbery cases and will ordinarily not be applicable to the offenses of aggravated robbery or robbery. State v. Claybrooks, 910 S.W.2d 868, 872 (Tenn. Crim. App. 1994); State v. Charles Thomas Kelso, No. 03C01-9305-CR-00141, Hamilton County, slip op. at 5 (Tenn. Crim. App., Dec. 17, 1993). We do not believe factor (10) is appropriate for this case.

The trial court sentenced the defendant to serve five years. The four enhancement factors supported by the record provide ample justification for the enhanced sentence. The judgment of the trial court is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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Paul G. Summers, Judge

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Charles Lee, Special Judge