IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST 1996 SESSION

FILED

March 19, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE, Appellee V. DONALD PHILLIPS a.k.a. DONALD ROSS Appellant	))))))))))	NO. 02C01-9511-CR-00345 SHELBY COUNTY HON. JOSEPH B. DAILEY, JUDGE (Robbery)

FOR THE APPELLANT

A.C. Wharton, Jr.
District Public Defender
201 Poplar Avenue, Ste. 201
Memphis, Tennessee 38103-1947

Walker Gwinn
Assistant Public Defender
201 Poplar Avenue, Ste. 201
Memphis, Tennessee 38103-1947

William Moore
Assistant Public Defender
201 Poplar Avenue, Ste. 201
Memphis, Tennessee 38103-1947

FOR THE APPELLEE

John Knox Walkup
Attorney General and Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

Clinton J. Morgan
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

J. Robert Carter, Jr.
Assistant Attorney General
201 Poplar Avenue, 3rd Floor
Memphis, Tennessee 38103-1947

OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

Opinion

The Appellant, Donald Phillips, appeals as of right his Shelby County conviction of robbery. He was sentenced to seven years imprisonment. He argues on appeal that the evidence presented at trial was insufficient for the jury to find him guilty of robbery. After a careful review of the record on appeal we find that there is no merit to the Appellant's claim and, therefore, affirm his conviction and sentence.

On March 22, 1994, around noon, Ms. Theresa Hatt was eating lunch in her blue Nissan pick-up truck in the Eastgate Shopping Center parking lot. A man approached the truck, brandished a small gun, and told her to get out of the truck. Ms. Hatt complied with the man's request and he got into the truck and drove away. From some distance Ms. Lori Parish witnessed Ms. Hatt step out from her truck and a man get into it, but she did not realize that something was wrong until a few seconds later when Ms. Hatt yelled out. The man drove the truck in Ms. Parish's direction until he was approximately twenty or thirty feet from her and then suddenly turned away.

Three days later, on March 25, a Memphis police officer discovered Selina Taylor driving a blue Nissan pick-up truck into a hotel parking lot. The truck was registered to a room occupied by the Appellant and Taylor. While the police officer questioned the Appellant and Taylor, Melvin Bradshaw telephoned from a nearby filling station, and the Appellant implicated Bradshaw as the person responsible for stealing the truck. The Appellant, Taylor and Melvin Bradshaw were all arrested in connection with the stolen truck, but only the Appellant was indicted.

At trial, Bradshaw testified that he had seen the Appellant drive the truck on at least one occasion and that Taylor had told him that the Appellant had somehow gotten hold of the truck. Taylor testified that she had first seen the truck a few days before their arrest. It had been morning and she was with the Appellant when his Cadillac broke down. While the Appellant went to get some assistance, Taylor remained with the car, and a few hours later the Appellant showed up with the blue Nissan truck. According to Taylor, the Appellant told her that he had stolen the truck

from a woman by holding her at gun point. Both Ms. Hatt and Ms. Parish testified that they were fairly sure that the Appellant was the robber, but neither one of them could identify him with any certainty.

On appeal the Appellant contends that his conviction was improperly based upon on the uncorroborated testimony of an accomplice, Taylor. In Tennessee a defendant cannot be convicted solely on uncorroborated accomplice testimony. Sherrill v. State, 321 S.W.2d 811,814 (Tenn. 1959); State v. Gaylor, 862 S.W.2d 546, 552 (Tenn. Crim. App. 1992). An accomplice is "a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime." Clapp v. State, 30 S.W.2d 214, 216 (Tenn 1895); State v. Lawson, 794 S.W.2d 363, 369 (Tenn. Crim. App. 1990). Accomplice testimony will be considered corroborated if "there is some other evidence fairly tending to connect the defendant with the commission of the crime." Marshall v. State, 497 S.W.2d 761, 765-66 (Tenn. Crim. App. 1973); see Clapp, 30 S.W.2d at 216. This other evidence "must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference . . . that the defendant is implicated in [the commission of a crime] . . . . This corroborative evidence may be . . . entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction . . . ." Hawkins v. State, 469 S.W.2d 515 (Tenn. Crim. App. 1971) quoted in Gaylor, 862 S.W.2d at 552.

We do not believe that Taylor was the Appellant's accomplice when he robbed Ms. Hatt, and Taylor's testimony, therefore, does not require corroboration. The evidence presented at trial showed that Taylor was with the Appellant on the morning of March 22 when his Cadillac broke down. Taylor, however, remained in the Cadillac while the Appellant went to get help with his car and there is no evidence indicating that she intended, or even knew, that he was going to steal a truck at gun point. The robbery was also committed by one person and no evidence has placed Taylor anywhere near the scene of the crime. Moreover, even if Taylor were found to be an

accomplice, her testimony was corroborated by that of Ms. Hatt, Ms. Parish, and Bradshaw.

Having established that Taylor's testimony did not need corroboration, we will now consider whether the convicting evidence was sufficient. When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "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, 61 L.Ed. 560 (1979). Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this court. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

We find that a rational trier of fact could have found the Appellant guilty of robbery. Selina Taylor testified that the Appellant had told her that he had obtained the blue Nissan truck by holding a woman at gun point and that both she and the Appellant had driven the truck. Bradshaw also testified that he had seen the Appellant driving the truck on at least one occasion. Ms. Hatt testified that although she was not entirely certain that the Appellant was the man who committed the robbery, she was fairly certain that the robber and the Appellant looked the same. Finally, the victim, Ms. Hatt testified that she thought that the Appellant and the robber were of the same build and color. The jury chose to credit the testimony of the witnesses and the circumstantial evidence presented at trial and found that the evidence was sufficient to convict the Appellant of robbery.

The Appellant also contends that the jury's finding that the Appellant was guilty of robbery instead of aggravated robbery is an indication that the jurors could not agree whether to convict him of aggravated robbery or whether to acquit him and that

they, therefore, found him guilty of robbery as a compromise. The Appellant argues that he was either guilty of aggravated robbery or not guilty at all. Tennessee case law, however, provides that "[w]here the jury is instructed that an offense is a lesser included offense of that charged in the indictment, whether it be or not, a conviction on such lesser offense may stand where the evidence shows the greater offense was committed." State v. Hicks, 835 S.W.2d 32, 36 (Tenn. Crim. App. 1992); see also State v. Mellons, 557 S.W.2d 497 (Tenn.1977). Here, the jury was instructed upon the lesser offense of robbery.

The judgment of the trial court is affirmed.

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WILLIAM M. BARKER, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JERRY L. SMITH, JUDGE