IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9606-CC-00228**
	)	
Appellee,	)	
	)	
	)	**ROANE COUNTY**
VS.	)	
	)	**HON. E. EUGENE EBLEN**
PERRY THOMPSON,	)	**JUDGE**
	)	
Appellant.	)	(Theft)

ON APPEAL FROM THE JUDGMENT OF THE CRIMINAL COURT OF ROANE COUNTY

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OPINION FILED _____

REVERSED AND REMANDED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Perry Thompson, appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted by a Roane County jury of theft of property valued between ten thousand dollars ($10,000) and sixty thousand dollars ($60,000).[1] The trial court sentenced him as a Range II multiple offender to six years with the Tennessee Department of Correction. In this appeal, the Defendant argues that the trial court erred in permitting him to be tried while shackled in leg irons, that there is insufficient corroboration of accomplice testimony, and that the trial judge erred in failing to grant a new trial pursuant to his duty as thirteenth juror. After carefully reviewing the record, we conclude that the Defendant's first issue has merit. Accordingly, we reverse the judgment of the trial court and remand this case for a new trial.

We begin with a summary of the pertinent facts. On November 4, 1993, Richard Chinn, the owner of R&R Rental Properties Development, purchased a 1993 Caterpillar 416B backhoe for use in his business as a general contractor. He kept the backhoe in a parking lot at his business in Oak Ridge, Tennessee. On the Monday after Thanksgiving in 1993, Chinn discovered the backhoe was missing from the parking lot. He had not given anyone permission to remove the backhoe from the lot. According to Chinn, the value of the backhoe at the time of its disappearance was approximately fifty thousand dollars ($50,000). Chinn called the police to report the theft.

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[1] Tenn. Code Ann. §§ 39-14-103 and 39-14-105(4).

In early December of 1993, Danny Wright, a criminal investigator with the Tennessee Highway Patrol, received information that Chinn's backhoe was located at the residence of Michael Gallaher. On December 6, 1993, Wright drove by Gallaher's residence and noticed a backhoe in the yard. He eventually approached the residence and explained the situation to Gallaher. Gallaher informed Wright that he was not certain how the backhoe had arrived on his property, but he thought that the Defendant had brought it there. Officer Wright requested consent to search the area. Gallaher signed a written consent form. According to Officer Wright, Gallaher was very cooperative, although he was obviously upset and nervous. The search revealed that the identification number on the backhoe matched that of Chinn's backhoe.

Gallaher agreed to place a telephone call to the Defendant and to have that conversation recorded. Officer Wright instructed Gallaher to inform the Defendant that police officers had inquired about the backhoe but had just left the premises. It appears that Wright intended to set up a surveillance of Gallaher's residence to see if the Defendant would come to remove the backhoe. Gallaher telephoned the Defendant and spoke with him for about thirty seconds. After Gallaher had hung up the phone, Officer Wright rewound the tape so that he could listen to the conversation. As Wright reached the beginning of the tape, Gallaher's phone rang. Wright decided to tape over the initial conversation and began recording as Gallaher answered the phone. According to Gallaher, the voice on the recording belonged to the Defendant. The substance of the recorded telephone call is unknown, because the record contains neither a copy of the tape nor a transcript of the conversation.

At trial, Michael Gallaher testified that he had known the Defendant for his entire life. Gallaher stated that sometime prior to the disappearance of Richard Chinn's backhoe, he helped the Defendant clean up a lot for the Defendant's grandmother. In return, the Defendant promised to bring a piece of equipment to Gallaher's residence so that Gallaher could clean up his own lot. The Defendant initially brought the Caterpillar 933 front-end loader which they had used to clean up his grandmother's lot. That piece of equipment was not in good condition, however, and Gallaher was unable to use it to clean up his lot. It remained at his residence for approximately two weeks. Gallaher came home one Sunday and discovered a Caterpillar 416B backhoe in his yard. Gallaher telephoned the Defendant shortly thereafter and learned that the Defendant had brought the backhoe to his yard. Gallaher stated that he did not use the backhoe to clean up his lot because the ground was too wet, but he did use it once to pull a car out of a ditch.

On cross-examination, Gallaher admitted that he had initially neglected to inform Officer Wright about the telephone call confirming that the Defendant had brought the backhoe to his lot. Gallaher also recognized that Officer Wright's report stated that Gallaher had used the backhoe off and on for approximately two weeks when the ground was dry enough to permit use. In addition, Gallaher revealed that there were theft charges relating to the backhoe still pending against him as of the date of the Defendant's trial. Gallaher admitted that in exchange for his testimony against the Defendant, those charges were being dropped.

The Defendant elected not to testify in his own behalf and offered no proof at trial. Based on the evidence set forth above, the jury found the Defendant guilty of theft of property. After the denial of his motion for a new trial, the Defendant appealed to this Court.

In his first issue on appeal, the Defendant argues that the trial court erred in permitting him to be tried while shackled in leg irons. The record reveals that the Defendant wore leg shackles throughout the trial. It appears that prior to trial the Defendant's counsel objected to his client's leg and arm restraints during a conference in the trial judge's chambers. The trial judge agreed to remove the handcuffs, but permitted the leg shackles to remain on the Defendant during trial. There is no transcript from the conference in chambers. During trial, the Defendant's counsel requested that the record reflect that the Defendant was wearing leg shackles over his objection. In response, the State requested that the record reflect that the Defendant was an inmate in the custody of the Tennessee Department of Correction and that he had pending charges for aggravated kidnapping and aggravated rape. There were no further comments regarding the leg shackles.

We begin our analysis of this issue by noting the long-standing principle that the decision of whether a defendant should be shackled during trial is left to the sound discretion of the trial court. The trial court's decision will not be disturbed on appeal absent an abuse of that discretion. See State ex rel. Hall v. Meadows, 215 Tenn. 668, 675, 389 S.W.2d 256, 259-60 (1965); State ex rel. Hathaway v. Henderson, 1 Tenn. Crim. App. 168, 177, 432 S.W.2d 503, 507 (1968).

As panels of this Court have often stated, the defendant's right to the physical indicia of innocence is included in the presumption of innocence and is mandated by due process guarantees. See, e.g., Willocks v. State, 546 S.W.2d 819, 820 (Tenn. Crim. App. 1976) (citing Kennedy v. Cardwell, 487 F.2d 101, 104 (6th Cir. 1973), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974)). As a result, there is a legal presumption against the necessity of in-court restraint, and the State bears the burden of showing the necessity of any such restraint. Willocks, 546 S.W.2d at 821. Thus, the rule is now established that a defendant should not be shackled in court during trial except in extraordinary circumstances and only upon a clear showing both of necessity and that less drastic measures are not sufficient to control the defendant.[2] Id. at 822; see also State v. Terry Lynn Anthony, C.C.A. No. 02C01-9408-CC-00173, Tipton County (Tenn. Crim. App., Knoxville, May 10, 1995). Furthermore, if a defendant is shackled in clear view of the jury during trial, the trial court must give a cautionary instruction that the shackling should in no way influence the determination of guilt or innocence or the assessment of punishment. See Willocks, 546 S.W.2d at 822; State v. Smith, 639 S.W.2d 677, 681 (Tenn. Crim. App. 1982).

In addition, it is incumbent upon the trial judge to indicate, on the record, the reasons supporting the restraint of the defendant. Willocks, 546 S.W.2d at 822. As this Court has previously stated, the better practice is for the trial court to hold a hearing so that factual disputes may be resolved, evidence of the facts surrounding the decision may be made part of the record, and proof may be

[2] With regard to appropriate extraordinary circumstances, this Court has recognized that shackles may be permitted to prevent the escape of the defendant, to protect individuals in the courtroom, and to maintain order during trial. See Willocks, 546 S.W.2d at 820 (quoting Woodards v. Cardwell, 430 F.2d 978, 982 (6th Cir. 1970), cert. denied, 401 U.S. 911, 91 S.Ct. 874, 27 L.Ed.2d 809 (1971)).

developed that the restraint used was the least drastic security measure to suffice. Id.; see also State v. Thompson, 832 S.W.2d 577, 580-81 (Tenn. Crim. App. 1991).

Applying those principles to the case sub judice, we first note that there is nothing in the record pertaining to the reasons for restraining the Defendant in leg irons. The conference in chambers prior to trial was not recorded or transcribed. All we can garner from the record is that the trial court ordered the removal of the Defendant's handcuffs but permitted his leg shackles to remain. It appears that the State argued in favor of the restraint of the Defendant by citing his pending charges for aggravated kidnapping and aggravated rape. In light of the teaching of Willocks, we believe that the failure of the trial court to make an appropriate record detailing both the reasons for restraining the Defendant and the evidence indicating that leg irons were the least drastic method of restraint to suffice was a procedural error. See Thompson, 832 S.W.2d at 580.

Moreover, it is clear from the record that the trial court did not give a cautionary instruction to the jury concerning the shackles on the Defendant. In cases involving the use of shackles in the view of the jury, a limiting instruction is a fundamental safeguard, and the trial court's duty to give such an instruction does not depend on a request by the Defendant. Id. at 581. Accordingly, we conclude that the trial court's failure to give a cautionary instruction was also error.

Having determined that the trial court's failures to make an appropriate record and to give a cautionary instruction were erroneous, we turn now to the

question of whether these errors were harmless beyond a reasonable doubt. The Defendant was on trial for theft of property. His conviction rested primarily upon the testimony of Michael Gallaher and, apparently, the tape recording of the telephone conversation between him and Gallaher. Certainly the proof introduced by the State is not overwhelming. More importantly, the value of the State's proof rested principally on a credibility assessment of Gallaher's testimony. As a panel of this Court has noted, the shackling of a defendant could well impinge upon a fair assessment of both a defendant's credibility and the credibility of those witnesses who, free of restraints, testify against the defendant. See Anthony, C.C.A. No. 02C01-9408-CC-00173, slip op. at 5-6. Additionally, the circumstances of this case cannot be said to rebut the inherent prejudice arising from the trial court's errors. Compare Thompson, 832 S.W.2d at 582 (presumption of prejudice actually rebutted due to unique circumstances of case) with Willocks, 546 S.W.2d at 822 (in-court shackling inherently prejudicial in absence of safeguards such as cautionary instruction and clear showing of necessity for restraint). Given the record before us, we cannot conclude that the trial court's errors were harmless beyond a reasonable doubt. The Defendant's conviction must, therefore, be reversed.

In the interest of complete appellate review and to give guidance to the trial court on remand, we will briefly consider the Defendant's remaining issues even though the first issue is dispositive. In his second issue, the Defendant argues that his conviction rests upon insufficiently corroborated accomplice testimony. In particular, he contends that Michael Gallaher was an accomplice and that his testimony was not sufficiently corroborated by the recorded telephone conversation. The Defendant asserts that there is no evidence independent of

Michael Gallaher's testimony which connects him with the commission of the theft. The Defendant correctly points out that no witness other than Gallaher was able to identify the individuals speaking on the recorded telephone conversation and that there is no other evidence linking the Defendant to the theft of the backhoe.

Of course, the rule is well established in Tennessee that a defendant cannot be convicted on the uncorroborated testimony of an accomplice. See Sherrill v. State, 204 Tenn. 427, 321 S.W.2d 811, 814 (1959). To corroborate the testimony of an accomplice, "there should be some fact testified to, entirely independent of the accomplice's evidence, 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." Clapp v. State, 94 Tenn. 186, 30 S.W. 214, 217 (1895). The corroboration must consist of some fact or circumstance which affects the identity of the defendant. In addition, it is for the jury to determine the degree of evidence necessary to corroborate the testimony of an accomplice, and it is sufficient "if there is some other evidence fairly tending to connect the defendant with the commission of the crime." Id.

Given that only Michael Gallaher could identify the Defendant's voice on the recorded telephone conversation, the State concedes that there is insufficient corroborating evidence if Gallaher is deemed an accomplice. The State argues, however, that Gallaher was not an accomplice. Thus, the Defendant's second issue turns upon whether Gallaher was an accomplice.

Contrary to the State's position, the Defendant argues that Gallaher was an accomplice as a matter of law. In support of his argument, the Defendant points out that Gallaher and he were jointly indicted for the theft of the backhoe. The State agreed to dismiss the charge against Gallaher in exchange for his testimony at the Defendant's trial.

An accomplice is typically defined as an individual who knowingly, voluntarily, and with common intent unites with the principal offender in the commission of the crime. See Monts v. State, 214 Tenn. 171, 191, 379 S.W.2d 34, 43 (1964); Marshall v. State, 497 S.W.2d 761, 764 (Tenn. Crim. App. 1973). The test generally applied by our courts is whether the alleged accomplice could be indicted for the same offense charged against the defendant. See Monts, 214 Tenn. at 191, 379 S.W.2d at 43; Casone v. State, 193 Tenn. 303, 311, 246 S.W.2d 22, 26 (1952); Conner v. State, 531 S.W.2d 119, 123 (Tenn. Crim. App. 1975). Our supreme court, however, has also stated that individuals indicted jointly with the defendant are not usually by virtue of that fact alone regarded as accomplices. See Ripley v. State, 189 Tenn. 681, 687, 227 S.W.2d 26, 29 (1950); see also Letner v. State, 512 S.W.2d 643, 647 (Tenn. Crim. App. 1974).

The Defendant argues that because Gallaher was, in fact, indicted for the theft of the backhoe, he was an accomplice as a matter of law. We disagree. We are guided by the established, overriding principle in Tennessee that when the facts pertaining to a witness' participation in a criminal offense are clear and undisputed, the question of whether that witness is an accomplice is one of law for the court to decide; when, on the other hand, the facts are disputed or susceptible of different inferences, the question is one of fact for the jury to

determine. See Ripley, 189 Tenn. at 687, 227 S.W.2d at 29; Conner, 531 S.W.2d at 123.

In the case at bar, the facts regarding whether Gallaher was involved in the theft of the backhoe are sharply disputed. Gallaher maintained that he did not know that the backhoe was stolen while the Defendant suggested that Gallaher was, in fact, responsible for the theft. As a result, the question of whether Gallaher was an accomplice is a question for the jury to resolve under appropriate instructions from the trial court. Following the pattern instruction, the trial court properly charged the jury that they were to determine whether Gallaher was an accomplice.

The State now concedes that there is insufficient corroborating evidence if Gallaher is deemed an accomplice. We therefore believe that, if this case is tried again and the State introduces no additional corroborating evidence, the trial court should modify the pattern instruction relating to the jury's determination of whether Gallaher was an accomplice as a question of fact.[3] We suggest that, rather than charging the jury that they are to determine the necessary degree of corroboration, the trial court should instruct the jury that if they find Gallaher to be an accomplice, they cannot convict the Defendant. Cf. State v. Lawson, 794 S.W.2d 363, 370 (Tenn. Crim. App. 1990).

In his third issue, the Defendant argues that the trial court erred in failing, as thirteenth juror, to grant a new trial.[4] More specifically, the Defendant

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[3] See T.P.I. -- Crim. 42.09.

[4] See Tenn. R. Crim. P. 33(f).

contends that the trial court should have granted a new trial because Gallaher was an accomplice and his testimony was not sufficiently corroborated. The record reflects that the trial judge accepted the verdict of the jury without making detailed comments about his evaluation of the weight of the evidence. The trial judge denied the Defendant's motion for a new trial on January 22, 1996.

Under Rule 33(f) of the Tennessee Rules of Criminal Procedure, the trial judge is empowered to grant a new trial if he or she considers the jury's verdict to be contrary to the weight of the evidence. The trial court's approval of the verdict under this rule is a necessary prerequisite to the imposition of a valid judgment. See State v. Moats, 906 S.W.2d 431, 434 (Tenn. 1995); State v. Burlison, 868 S.W.2d 713, 718 (Tenn. Crim. App. 1993). An explicit statement of approval is not necessary though, and this Court may presume that a trial judge has approved the jury's verdict as thirteenth juror when he or she simply overrules a motion for a new trial. Moats, 906 S.W.2d at 434; State v. Dankworth, 919 S.W.2d 52, 57 (Tenn. Crim. App. 1995).

If the trial court disagrees with or expresses dissatisfaction with the jury's verdict, it is error for it to fail to grant a new trial. See Helton v. State, 547 S.W.2d 564, 566 (Tenn. 1977); Dankworth, 919 S.W.2d at 57; Burlison, 868 S.W.2d at 719. When the trial judge approves the verdict by entering judgment and denying a motion for new trial, however, this Court's appellate review is limited to the legal sufficiency of the evidence. Moats, 906 S.W.2d at 435; Burlison, 868 S.W.2d at 719. We do not reweigh the evidence. See State v. Draper, 800 S.W.2d 489, 499 (Tenn. Crim. App. 1990). Instead, our review consists of a determination of whether the evidence is sufficient to support a finding of guilt beyond a

reasonable doubt by the trier of fact. See T.R.A.P. 13(e); Burlison, 868 S.W.2d at 718-19.

When analyzing the sufficiency of the convicting evidence, our standard is whether, after reviewing 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 (1979). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

After reviewing the record, we conclude that the evidence is sufficient for a rational trier of fact to have found the Defendant guilty beyond a reasonable

doubt. Although the Defendant contends that Michael Gallaher was an accomplice and his testimony was uncorroborated, we believe that a rational trier of fact could have found that Gallaher was not an accomplice and that his testimony supported the guilt of the Defendant. Accordingly, there was sufficient evidence to support the Defendant's conviction, and the trial court did not err in failing to grant a new trial pursuant to Rule 33(f) of the Tennessee Rules of Criminal Procedure.

For the reasons set forth in the discussion above, we conclude that the Defendant's first issue on appeal has merit. We therefore reverse the judgment of the trial court and remand this case for further proceedings consistent with this opinion.

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DAVID H. WELLES, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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THOMAS T. WOODALL, JUDGE