IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 8, 2022 Session

GREGG MERRILEES v. STATE OF TENNESSEE

Appeal from the Circuit Court for Rutherford County
No. 77445-C James A. Turner, Judge

No. M2021-01324-CCA-R3-PC

TOM GREENHOLTZ, J., concurring in part and dissenting in part.[1]

I have the privilege to join the majority's well-reasoned opinion in large part. For example, I agree that a post-conviction petitioner cannot raise a stand-alone claim seeking dismissal based upon an alleged legal insufficiency of the convicting evidence. I also agree that the Petitioner here has not shown that he received the ineffective assistance of counsel with respect to the victim's testimony and the in-court identification.[2] Finally, I agree that trial counsel rendered deficient performance in failing to raise and argue that the accomplice's testimony was not sufficiently corroborated. Where I respectfully part ways with the majority concerns its analysis of whether the Petitioner has shown that the reliability of his verdict was undermined by trial counsel's failure to argue a lack of corroboration.

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[1] To enhance readability, this opinion sometimes uses the parenthetical "cleaned up" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See, e.g.*, *State v. Bristol*, 654 S.W.3d 917, 925 (Tenn. 2022) (using "cleaned up" parenthetical); *Schrick v. Durham Sch. Services, L.P.*, E2020-00744-COA-R10-CV, 2022 WL 1040909, at *4 (Tenn. Ct. App. Apr. 7, 2022) (using "cleaned up" parenthetical); *see also Brownback v. King*, 141 S. Ct. 740, 748 (2021) (using "cleaned up" parenthetical). For a more thorough discussion regarding the practicality of the parenthetical, see Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (Fall 2017).

[2] The majority suggests, in part, that post-conviction relief is not warranted on this claim because the Petitioner has not shown that "state action" was involved in the in-court identification. If a *Neil v. Biggers* analysis applies to an in-court identification made after a witness was unable to make a pretrial identification, the state action necessary to invoke the Due Process Clause may consist of the government's "introducing the fruits of an impermissibly suggestive and inherently unreliable identification as evidence against the accused." *United States v. Hill*, 967 F.2d 226, 232 (6th Cir. 1992). However, because the Petitioner offered no evidence to the post-conviction court addressing the suggestiveness of the in-court identification or how the *Biggers* factors would have weighed in his favor, I concur with the majority's resolution of this claim.

A. THE NATURE OF THE PREJUDICE INQUIRY & THE RELIABILITY OF THE VERDICT

Both the United States Supreme Court and our own supreme court have been clear that the focus of the *Strickland* prejudice inquiry is on the *verdict's reliability*. Indeed, as the United States Supreme Court has recognized,

> Under our decisions, a criminal defendant alleging prejudice must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.

Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) (cleaned up); *see also Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect").

The focus on the *reliability* of the verdict is important, and it is different from an inquiry examining the legal sufficiency of the evidence. *Pylant v. State*, 263 S.W.3d 854, 875 (Tenn. 2008) ("We emphasize . . . that the test for prejudice under *Strickland* is not an inquiry into the sufficiency of the State's evidence adduced at trial."). Even in cases where the trial evidence *is* legally sufficient for conviction, the analysis for post-conviction purposes nevertheless asks whether trial counsel's deficient performance rendered the trial fundamentally unfair or unreliable.

As such, where the evidence of guilt is overwhelming, it is less likely that trial counsel's performance undermined the fundamental reliability of the trial. However, as *Strickland* itself expressly recognized, clear deficiencies by trial counsel may warrant post-conviction relief *even if* the evidence is legally sufficient for conviction. *Strickland v. Washington*, 466 U.S. 668, 696 (1984) ("Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). We have made similar observations as well:

> The Petitioner correctly notes that the prejudice analysis is not an inquiry into the sufficiency of the evidence. Indeed, the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Instead, a court making the prejudice inquiry must ask if the petitioner has met the burden of showing that the decision

reached by the jury would reasonably likely have been different absent the errors.

Jason Osmond Hines v. State, No. E2013-01870-CCA-R3-PC, 2014 WL 1576972, at *9 (Tenn. Crim. App. Apr. 21, 2014) (cleaned up).

For two reasons, the verdict in the underlying trial was fundamentally unreliable. First, because of trial counsel's deficiency, the jury was wholly unguided in its consideration of how to evaluate a special kind of testimony. Second, the evidence of corroboration of the Petitioner's identity was, at best, only weakly supported. Consequently, even if one assumes that the evidence was legally sufficient to sustain the verdict, I would conclude that trial counsel's deficient performance significantly undermined the verdict's reliability such that the Petitioner is entitled to post-conviction relief.

B. CRITICAL ABSENCE OF JURY INSTRUCTION

As *Strickland* made clear, the "assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Strickland*, 466 U.S. at 695. But this recognition unavoidably presupposes that the jury or decisionmaker *is aware of* the proper standards that govern that decision in the first instance. Thus, where the jury is not properly instructed on its most basic duties under law, our confidence in the verdict's reliability is necessarily diminished. *Moffitt v. State*, 29 S.W.3d 51, 57 (Tenn. Crim. App. 1999) (granting post-conviction relief when the reliability of the verdict was called into question because the jury could not "properly perform its duty" in the absence of an alibi instruction).

Although the State has asked our supreme court to reconsider this issue, *see State v. Laronda Turner*, No. W2019-01202-SC-R11-CD (argued Apr. 5, 2023), accomplice testimony is not like testimony from other witnesses. Indeed, "the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses." *Crawford v. United States*, 212 U.S. 183, 204 (1909). The reason for this principle is simple: without the need for corroboration, the guilty accomplice "could, by his mere oath, transfer to another the conviction hanging over himself." *Clapp v. State*, 30 S.W. 214, 216-17 (Tenn. 1895); *see Emmanuel v. United States*, 24 F.2d 905, 906 (5th Cir. 1928) (observing that the accomplice, "in giving testimony against another or others with whom he admits he participated in committing the crime charged, is liable to be influenced by a hope or expectation of advantage or benefit to himself as a result of his giving testimony implicating another or others in that crime").

Thus, "when the only proof of a crime is the uncorroborated testimony of one or more accomplices, the evidence is insufficient to sustain a conviction as a matter of law." *State v. Collier*, 411 S.W.3d 886, 894 (Tenn. 2013). Emphasizing the importance of this principle under Tennessee law, this court has held that a conviction obtained solely through the uncorroborated testimony of an accomplice must be vacated, and a retrial is barred by double jeopardy. *See State v. Williford*, 824 S.W.2d 553, 554 (Tenn. Crim. App. 1991); *see also State v. Allen*, 10 S.W.3d 286, 292 (Tenn. Crim. App. 1999) (vacating conviction for second degree murder and dismissing case when accomplice testimony linking the defendant to the crime was not corroborated).

To that end, a properly instructed jury cannot convict an accused solely upon an accomplice's testimony unless that testimony is received with other independent evidence sufficient to ensure its basic veracity. *Garton v. State*, 332 S.W.2d 169, 173 (Tenn. 1960) (stating that corroborative evidence must tend "to connect the defendant with the commission of the crime in such a way as may reasonably satisfy a jury that the accomplice is telling the truth" (quoting 2 *Wharton's Criminal Evidence*, § 754, at 1272)). This independent evidence must not only corroborate the fact that a crime has been committed, but, importantly for this case, it must also "include some fact establishing the defendant's identity." *State v. Bough*, 152 S.W.3d 453, 464 (Tenn. 2004). The jury needs to know these special rules because, as this Court has recognized, "the jury must decide whether the evidence adduced was sufficient to corroborate the witness's testimony." *State v. Griffis*, 964 S.W.2d 577, 588 (Tenn. Crim. App. 1997).

In this case, the majority correctly concludes that Mr. Hickerson was an accomplice in the robbery. Nevertheless, despite this being one of those uncommon cases where the accomplice's testimony is the only evidence connecting the Petitioner to the crime, trial counsel's inaction prevented the jury from knowing *how to consider accomplice testimony properly*. Indeed, counsel's inaction ensured that the jury evaluated the accomplice's testimony the same as it did any other witness's testimony, despite the long-standing concern that the law has with this type of testimony.

Because the Petitioner was convicted upon *only* the testimony of his alleged accomplice, the jury necessarily could have reached that verdict only by crediting the accomplice's testimony. And because the jury was not instructed on the law applicable to the evaluation of the proof, including when accomplice testimony may be appropriately considered, the trial lacked a fundamental hallmark of reliability. This error is compounded by the lack of independent evidence to sufficiently corroborate the accomplice's testimony.

C. UNRELIABILITY OF THE VERDICT

In determining whether independent corroboration of an accomplice's testimony exists, our supreme court has stated:

> [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.

State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1992), *superseded by statute on other grounds as stated in State v. Odom*, 137 S.W.3d 572, 581 (Tenn. 2004) (emphasis added); *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001). As noted above, "the corroboration must consist of some fact that affects the identity of the party accused." *State v. Fowler*, 373 S.W.2d 460, 463 (Tenn. 1963); *see Shaw*, 37 S.W.3d at 903.

1. Trial Evidence Against the Petitioner

In this case, Mr. Hickerson testified that he was with the Petitioner and Mr. Phillips on the evening of January 2, 2017, and that the three went to the Hilton Hotel in Smyrna. He testified that, before he went into the hotel, the Petitioner went into the hotel for about twenty minutes because he "had to use the restroom." Mr. Hickerson testified that once the Petitioner returned to the vehicle, the Petitioner gave him a roll of duct tape to use in the robbery. Mr. Hickerson stated that he entered the hotel with Mr. Phillips "maybe five minutes" after the Petitioner returned to the vehicle and that they robbed Mr. Cradle, eventually binding his wrists with the duct tape that the Petitioner provided. Mr. Hickerson testified that after completing the robbery and before exiting the hotel, he saw the Petitioner taking the cash register from the hotel's bar area.

Mr. Cradle testified that on the evening of January 2, 2017, he was robbed by two men while working at the Hilton hotel and that the men bound him at the wrists with duct tape. Before the robbery, Mr. Cradle noticed a "strange" man in a red shirt and fedora who came in to use the restroom, though he did not see this man leave the hotel. Mr. Cradle acknowledged that he could not identify the Petitioner as being the man in the red shirt and

fedora in a photo lineup conducted some three weeks after the robbery. Even though Mr. Cradle identified the Petitioner *at trial* as being the man in the red shirt and fedora, he could not testify that the Petitioner was one of the two men who robbed him. He also could not testify that the Petitioner was the person who took the hotel's cash register. Instead, he testified that his "gut" told him the Petitioner was the lookout for the other two robbers.

Two videos are contained in Trial Exhibit 1: one capturing part of the robbery itself ("Video 1") and another capturing the robbers leaving the hotel ("Video 2"). In my review of Video 1, Mr. Hickerson and Mr. Phillips can be seen entering the hotel and demanding money from Mr. Cradle. Additionally, the two can be seen following Mr. Cradle into the office behind the hotel's reception desk, which is consistent with Mr. Hickerson's testimony that a robbery occurred. I am unable to see the Petitioner at any point in Video 1. However, in Video 2, a third person can be seen entering the hotel, commotion can be heard from the hotel's bar area, and the third individual can be seen leaving with Mr. Hickerson and Mr. Phillips.

Trial Exhibit 6, which contains only a single video ("Video 3"), captures the hotel's bar area. Although an individual can be seen in a dark-colored shirt taking the bar's cash register, Video 3 does not show the individual's face or body apart from his or her forearms. The color of the person's shirt in Video 3 does not appear to be red, and I cannot determine any physical characteristics of the person, including the person's gender, race, or build, from the video.

2. Lack of Corroboration as to Identity

For me, *even if* the corroborative evidence is otherwise legally sufficient for conviction, the evidence is so weak that trial counsel's failure to challenge it undermines the reliability of the verdict. Starting at first principles, it is true that corroboration of an accomplice's testimony need only be slight. *State v. Little*, 402 S.W.3d 202, 212 (Tenn. 2013) ("Only slight circumstances are required to furnish the necessary corroboration."). Indeed, our supreme court has described the required quantum of corroborative evidence as being "when the proof claimed to be corroborative tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy a jury that the accomplice is telling the truth[.]" *Garton v. State*, 332 S.W.2d 169, 173 (Tenn. 1960) (citing 2 *Wharton's Criminal Evidence*, § 754, at 1272).

However, it is also true that "[e]vidence which merely casts a suspicion on the accused or establishes he or she had an opportunity to commit the crime in question is inadequate to corroborate an accomplice's testimony." *State v. Griffis*, 964 S.W.2d 577, 589 (Tenn. Crim. App. 1997). Moreover, "evidence that the accused was present at the

situs of the crime and had the opportunity to commit the crime is not sufficient" to corroborate an accomplice's testimony. *Id.*

In this case, the best that can be said about the victim's testimony is that it placed the Petitioner at the hotel at some point before the robbery. It did nothing more. The victim did not see the Petitioner during the robbery itself. He also did not see who later took the cash register. Indeed, he was bound in another room at the time of that theft. As such, the victim's testimony only establishes "that the accused was present at the situs of the crime" sometime before the robbery.

At worst, the relevance of the victim's identification testimony is based upon conjecture and speculation. This is not a case in which the victim was confident and assured in his identification that the Defendant was involved in the robbery. Instead, he testified that his "gut" told him the Petitioner was the lookout for the other two robbers. At least under current law, testimony that is either conjectural or only places the defendant at the crime scene is insufficient to corroborate the accomplice's testimony. *Griffis*, 964 S.W.2d at 589.

Moreover, none of the video evidence corroborates the identity of the Petitioner as being involved in the robberies. Videos 1 and 2 do not depict the Petitioner at all. While these two videos confirm that a robbery occurred and that Mr. Hickerson and Mr. Phillips were involved in that crime, the videos do not corroborate Mr. Hickerson's testimony that the Petitioner was also involved in the robbery.

Video 2 does capture a third person fleeing from the scene with Mr. Hickerson and Mr. Phillips after the robbery is complete. But the resolution of this video makes it impossible to see any identifying characteristics of this third person. More importantly, Video 2 does not confirm that this third person is carrying anything, such as the cash register, as Mr. Hickerson said that the Petitioner was doing as he left the hotel. Consequently, while this video *may* provide some slight corroboration to the accomplice's testimony that three people were involved in the robbery, it does not tend to link the Petitioner himself to the commission of the crime. Indeed, because the video partially contradicts Mr. Hickerson's testimony as to the Petitioner's role, it tends to undermine, rather than corroborate, his testimony.

Finally, while Video 3 confirms that the cash register was stolen and shows a clue as to this perpetrator, the video contains no identifying characteristics consistent with the Petitioner such that any inference can be made that the Petitioner was involved in this theft. It is important to note that although the victim identified the Petitioner as wearing a red shirt and fedora, no other person, including Mr. Hickerson or the law enforcement witnesses, confirmed what the Petitioner wore the night of the robbery.

It is also significant that the video evidence does not confirm that the Petitioner entered the hotel before the robbery and that he left the hotel to tell the accomplices about what he found, as Mr. Hickerson testified. Mr. Hickerson stated that after the Petitioner returned to the vehicle, he and Mr. Phillips entered the hotel within "maybe five minutes." Detective Anderson testified that he reviewed video footage that began about thirty minutes before the robbery occurred. However, Video 1 does not show that the Petitioner entered the hotel at any time. The video also does not show that the Petitioner left the hotel at any time, much less five minutes before Mr. Hickerson and Mr. Phillips entered to carry out the robbery. In my view, the video evidence provides no corroboration as to the Petitioner's identity.

The State argues that the accomplices' use of duct tape may be *some* potential corroborative evidence tending to connect the Petitioner with the robbery, as Mr. Hickerson testified that he received the duct tape from the Petitioner. I respectfully disagree. The accomplices' *use* of duct tape does not corroborate their testimony as to the *source* of the duct tape, which is the critical fact needed to link the Petitioner to the crime. A different case would be presented if *any* evidence showed that the *Petitioner* possessed duct tape before or after the robbery. *Cf. State v. Will Vaughn*, No. W2020-00366-CCA-R3-CD, 2021 WL 3832380, at *11 (Tenn. Crim. App. Aug. 27, 2021), *perm. app. denied* (Tenn. Jan. 13, 2022) (finding sufficient corroboration of the defendant's identity when a handgun used in the shootings "was recovered at the same location where Defendant was arrested").

On the trial record as it exists, I would conclude that the Petitioner has shown that trial counsel's deficiencies produced an unreliable verdict. This is not a case in which any significant evidence corroborates the accomplice's testimony on the issue of identity. This is also not a case in which there exists clear evidence of the Petitioner's guilt apart from the accomplice's testimony. As such, even if the evidence is legally sufficient for conviction, the margin is so slight that it simply cannot bear the weight needed to produce a reliable verdict following trial counsel's deficiencies.

CONCLUSION

In summary, I would hold that the result of the Petitioner's trial was rendered fundamentally unreliable by trial counsel's deficient representation in violation of the Sixth Amendment. *Cf. Lockhart*, 506 U.S. at 369. On this issue alone, I respectfully dissent.

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TOM GREENHOLTZ, JUDGE