IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDDIE COTTON, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39068

FILED

APR 0 8 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery and robbery with use of a deadly weapon. Freddie Cotton, Jr. was sentenced to thirteen to sixty-months' imprisonment for conspiracy and two consecutive thirty-three to one hundred fifty-six month terms for robbery with use of a deadly weapon. On January 8, 2002, Cotton appealed.

Cotton asserts that the State's case rested entirely on the testimony of Marquese Pickett, an accomplice, and that Pickett's testimony was insufficiently corroborated. NRS 175.291(1) provides that a conviction cannot be had based on accomplice testimony, unless corroborated by other evidence, which "tends to connect the defendant with the commission of the offense." Neither party disputes that Pickett is an accomplice. Thus, this court need only determine if there is sufficient evidence in the record to corroborate Pickett's testimony.[1] In order to determine if there is sufficient corroborating evidence, this court "must

[1]See Austin v. State, 87 Nev. 578, 584, 491 P.2d 724, 728 (1971) (noting that NRS 175.291 requires this court to determine if the individual testifying is an accomplice and if there is sufficient evidence to corroborate the accomplice's testimony); Evans v. State, 113 Nev. 885, 891, 944 P.2d 253, 257 (1997).

eliminate from the case the evidence of the accomplice, and then examine the evidence of the remaining witness or witnesses with the view to ascertain if there be inculpatory evidence."[2]

Pickett testified that it was Cotton's idea to order pizza and rob the delivery man at gunpoint, and that he agreed to the idea. Pickett also testified that Cotton was nearby when he robbed the delivery man with a semiautomatic weapon in the parking lot. Pickett stated that he ran to an apartment and when he got there, Cotton was already there. He testified that he split the money with Cotton and the other accomplices, gave Cotton the gun, and they ate the pizza along with everyone in the apartment, including children and several other adults.

Even when viewing the evidence in a light favorable to the prosecution,[3] evidence independent of Pickett's testimony only places Cotton at the scene of the crime, running away from the scene, and at the apartment after the crime. While this evidence casts a grave suspicion on Cotton, it does not independently connect Cotton with the commission of the offense.[4] It only proves Cotton had an opportunity to commit the

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[2]Austin, 87 Nev. at 585, 491 P.2d at 728 (quoting People v. Shaw, 112 P.2d 241, 255 (Cal. 1941)).

[3]See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (holding that for an insufficiency of evidence claim, this court must review the evidence more favorably for the prosecution).

[4]Evans, 113 Nev. at 892, 944 P.2d at 257 (holding that corroborating evidence must independently connect the defendant to the crime); Eckert v. State, 91 Nev. 183, 186, 533 P.2d 468, 471 (1975) (finding that evidence casting a grave suspicion is not sufficient for corroboration).

crime, which is not sufficiently corroborative.[5] Further, this court has held that an accomplice's testimony is not sufficiently corroborated merely by showing that the defendant was near the scene of the crime.[6] Additionally, police officers did not find money or a gun on Cotton when they searched him at the apartment soon after the robbery, and the officers testified that a gun was not found in the apartment, contrary to Pickett's testimony. Therefore, we hold that there is insufficient inculpatory evidence to corroborate Pickett's testimony.

Cotton also argues that the district court erred by not sua sponte instructing the jury that accomplice testimony must be independently corroborated. "An instruction in a criminal case need only be given sua sponte when its absence would be "'patently prejudicial'" to the defendant."[7] The instruction given to the jury only provided that the jury should consider accomplice testimony with great caution. The instruction did not state that accomplice testimony must be independently corroborated, as required by NRS 175.291(1). There is a vast difference between viewing testimony with caution and determining whether an accomplice's testimony was corroborated. A jury could easily find an accomplice credible, even when viewing his testimony with caution, and

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[5]Heglemeier v. State, 111 Nev. 1244, 1250-51, 903 P.2d 799, 803-04 (1995).

[6]See Cheatham v. State, 104 Nev. 500, 505, 761 P.2d 419, 422 (1988) (noting that being near the scene is not sufficiently corroborative); Austin 87 Nev. at 585, 491 P.2d at 729; Ex Parte Hutchinson, 76 Nev. 478, 480-82, 357 P.2d 589, 590-91 (1960).

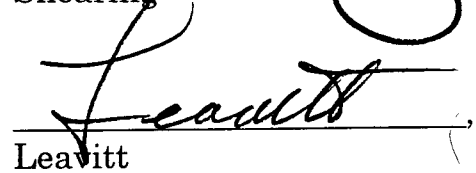
[7]Williams v. State, 99 Nev. 797, 798, 671 P.2d 635, 636 (1983) (quoting Globensky v. State, 96 Nev. 113, 117, 605 P.2d 215, 218 (1980) (quoting Gebert v. State, 85 Nev. 331, 334-34, 454 P.2d 897, 899 (1969))).

find a defendant guilty based on that testimony, despite the fact that the accomplice's testimony was uncorroborated as required by law. In Cotton's case, inculpatory evidence, independent of that presented by the accomplice, was not substantial, and therefore, the district court's failure to sua sponte issue a corroboration instruction was patently prejudicial.[8] Thus, the district court erred by failing to sua sponte issue the corroboration instruction.

Accordingly, we,

ORDER the judgment of conviction REVERSED.

_____, J.
Shearing



_____, J.
Leavitt

cc: Hon. Sally L. Loehrer, District Judge
Daniel J. Albregts, Ltd.
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[8]See Globensky, 96 Nev. at 118, 605 P.2d at 218 (noting that without the accomplice's testimony, there was still sufficient inculpatory evidence that failure to give accomplice instruction was not patently prejudicial).

BECKER, J., concurring in part and dissenting in part:

I concur with the majority analysis on the issue of the corroboration instruction. While the district court is not mandated to give such an instruction in every accomplice case, under the facts of this case, failure to give the instruction is patently prejudicial. I dissent, however, as to the majority's conclusion that there is insufficient corroborating evidence. Cotton was not merely present at the scene of a crime, he watched the crime being committed, ran to the same apartment as the gunman, stayed in the apartment with the gunman while the stolen pizza was consumed, and remained in the apartment when the police arrived and recovered the stolen property. Taken as a whole, I conclude this is sufficient corroboration of the accomplice testimony to sustain a conviction. Rather than reverse the conviction for insufficient evidence, I would reverse and remand for a new trial.

Becker, J.
Becker