

NOV 29 2001

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAN V. STOUT)

Appellant,)

v.)

No. F-2001-319

THE STATE OF OKLAHOMA)

Appellee.)

SUMMARY OPINION

CHAPEL, JUDGE:

Jan V. Stout was charged and tried by jury in Pawnee County, Case No. CF-97-53, with Grand Larceny, in violation of 21 O.S.1991, § 1701. The jury convicted her and recommended a sentence of 3 years imprisonment and a \$10,000 fine. The trial court, the Honorable Thomas P. Thornbrugh, entered an Order of Probation and Deferment of Judgment and Sentence. In this order the court, without entering a judgment of guilty, ordered that Stout be placed on probation for five years, that she pay restitution in the amount of \$8500, along with court costs and fees, and that she serve 90 days in the Pawnee County Jail.

Stout raises the following propositions of error:

- I. The evidence corroborating the accomplice testimony is legally insufficient as there is no evidence which corroborates the participation of the defendant in the crime charged.
- II. This Court should determine the testimony of the accomplice in this case to be inherently unworthy of belief and dismiss this case on that basis.
- III. The Appellant was denied due process by the State's willful misrepresentation throughout the trial of the terms and existence of the plea agreement offered and taken by the accomplice.

Regarding Proposition I, the discovery of the stolen vests in Stout's office adequately corroborated the accomplice testimony of Jacqueline Thompson.¹ Stout is correct that her grand larceny charge required proof that she participated in the plan to steal the trailer,² but this proof was provided through Thompson's testimony, which in turn was adequately corroborated by the discovery of the stolen vests in Stout's office.³

Regarding Proposition II, Thompson's testimony was not so inherently unworthy of belief so as to require dismissal of Stout's case.⁴ Thompson's testimony was not internally inconsistent, though it was inconsistent with the victim's testimony regarding the times when the trailer was parked in Oklahoma. Although Stout has not established that the evidence presented against her was insufficient,⁵ the credibility issues she raises regarding Thompson's testimony do impact this Court's evaluation of her claim under Proposition III.

¹ Oklahoma law requires that an accomplice's testimony "be corroborated by such other evidence as tends to connect the defendant with the commission of the offense." 21 O.S.1991 § 742.

² *Cacy v. State*, 1972 OK CR 307, 502 P.2d 1295, 1297.

³ See *Cullison v. State*, 1988 OK CR 279, 765 P.2d 1229, 1231 ("If the accomplice's testimony is corroborated as to a material fact which links the defendant to the crime, the jury may infer the accomplice speaks the truth as to all, and this Court will take the strongest view of the corroborating testimony that it warrants.") (citation omitted); see also *Howard v. State*, 1977 OK CR 93, 561 P.2d 125, 132 ("Corroborative evidence must of itself . . . tend to link a defendant in some manner to the commission of the offense charged.").

⁴ In evaluating claims like Stout's, this Court will accept "all reasonable inferences and credibility choices that tend to support the trier of fact's verdict." *Probst v. State*, 1991 OK CR 30, 807 P.2d 279, 283 (internal citation omitted); cf. *Carlisle v. State*, 62 P.2d 617, 618 (Okla. Cr. 1936).

⁵ See *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (sufficiency of the evidence challenge requires determination "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") (emphasis in original); *Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202, 203-04 (quoting and adopting *Jackson* standard).

Regarding Proposition III, the State concedes that the prosecutor wrongly informed Stout's jury that the one-year sentence that Thompson received (for pleading guilty and testifying against Stout) was consecutive, rather than concurrent. In fact, the prosecutor repeatedly denied that Thompson received a concurrent sentence, even though he was present for her sentencing and the relevant court records clearly designate the sentence as concurrent. In addition, the trial transcript reveals strenuous efforts on the part of the prosecutor to mislead the jury regarding whether Thompson was offered a deal and the terms of the deal.⁶ The record in this case clearly demonstrates that the State did make a deal with Thompson and that the deal included a concurrent sentence.

Due process claims based upon this kind of prosecutorial misstatement and/or misrepresentation are evaluated under the following three-part test:

(1) The status of a key party (witness or evidence) of the State's case was presented at trial with an element affecting its credibility intentionally concealed. (2) The prosecutor knew or had reason to know of the concealment and failed to bring the concealment to the attention of the trial court. (3) The trier of fact was unable to properly evaluate the case against the defendant as a result of the concealment.⁷

⁶ The prosecutor repeatedly stated (and elicited testimony from Thompson) that no one from the district attorney's office made an offer to Thompson—though an offer was apparently conveyed to her through her attorney or by some other means.

⁷ *Runnels v. State*, 1977 OK CR 146, 562 P.2d 932, 936. The *Runnels* decision relied upon *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The *Giglio* Court recognized that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility" should be treated like a *Brady* violation. *Id.* at 154 (internal citation omitted). Hence a new trial is required if there is "any reasonable likelihood" that the misrepresentation or false testimony would have affected the judgment of the jury. *Id.*

And a new trial is required where false or misleading testimony regarding the credibility of a witness “could have affected the judgment of the jury.”⁸

There is no question that Thompson was *the* key witness in Stout’s trial. In fact, her testimony was the only evidence that Stout played any role in the planning or carrying out of the theft of Pam Bellamy’s trailer. The discovery of the stolen vests in Stout’s office was important corroborative evidence, but it did not establish that Stout asked Thompson to steal the trailer or that Stout later accepted it and paid her for it. The fact that Thompson pled guilty and agreed to testify against Stout with the expectation of receiving a sentence that was concurrent with sentences that she was already serving, along with the fact that she did indeed receive a concurrent sentence, could definitely be seen to diminish her credibility. Furthermore, there is no question that the prosecutor should have known the terms of Thompson’s deal and sentence.

The State argues that Stout’s jurors “likely knew that the term was run concurrently with Thompson’s other sentences, despite the argument from the prosecutor, because they had State’s Exhibit 2 in hand.”⁹ Yet the format of State’s Exhibit 2, *i.e.*, Thompson’s Judgment and Sentence, arguably could have been confusing to persons unfamiliar with such documents, particularly when

⁸ See *Reed v. State*, 1983 OK CR 12, 657 P.2d 662, 664, *cert. denied*, 464 U.S. 933, 104 S.Ct. 337, 78 L.Ed.2d 307, (citing *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)).

⁹ The State also notes that Thompson admitted during trial that she had only eight more days to serve in prison. The State suggests that the jury could have inferred from this statement that Thompson’s sentence was concurrent. Yet because over nineteen months had passed between the time of Thompson’s sentence and Stout’s trial, Thompson’s imminent release did not indicate that her one-year sentence was concurrent with her other convictions.

the prosecutor, who represents the State, repeatedly and unwaveringly told Stout's jury that this court document indicated that Thompson's term was consecutive.¹⁰ Unfortunately, nothing was done to correct the prosecutor's misleading statements and argument or to clarify the meaning of the exhibits submitted to the jury.

Under these circumstances Stout's jury may well have accepted the prosecutor's claim that Thompson's one-year sentence for stealing Bellamy's trailer was "in addition to" or "on top of" her Tulsa sentences. If the jury had properly understood that Thompson was given only a concurrent sentence, it would have given the jury even further reason to doubt or totally reject Thompson's testimony. Even the State acknowledges that Stout's jury likely already had a "well-founded suspicion of Thompson's potential to lie." Thus each prong of the *Runnels* test has been met, and Stout has established prejudice.¹¹

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Stout's conviction for grand larceny should be reversed and remanded.

Decision

Stout's Conviction and Sentence for Grand Larceny is **REVERSED AND REMANDED.**

¹⁰ The prosecutor also effectively told the jury that it should ignore the "CC" in Thompson's guilty plea, since that was not a court document.

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	CONCUR IN RESULTS
JOHNSON, V.P.J.:	DISSENT
STRUBHAR, J.:	CONCUR
LILE, J.:	CONCUR

¹¹ See *Binsz v. Sate*, 1984 OK CR 28, 675 P.2d 448 (reversing under *Runnels* where prosecutor attempted to hide generous deal given to testifying co-defendant, by conveying deal to co-defendant's counsel and instructing counsel to delay conveying specifics to his client).