Cite as 2010 Ark. App. 225

# ARKANSAS COURT OF APPEALS

DIVISION II
**No.** CACR09-679

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| | **Opinion Delivered** March 10, 2010 |
| DUSTIN C. TORRENCE<br>APPELLANT | APPEAL FROM THE CLEVELAND COUNTY CIRCUIT COURT [NO. CR-08-30-5] |
| V. | HONORABLE LARRY W. CHANDLER, JUDGE |
| STATE OF ARKANSAS<br>APPELLEE | REVERSED AND REMANDED |

**JOHN MAUZY PITTMAN, Judge**

Appellant was convicted of arson and sentenced to ten years' imprisonment. On appeal, he argues that the trial court erred, *inter alia*, in refusing to submit his proffered AMI Crim. 2d 403 instruction to the jury so as to allow the jury to decide the accomplice status of State's witness Michael Pennington. Appellant is correct, the error is prejudicial, and therefore we reverse and remand for retrial.

An accomplice is a person who could himself be convicted of the crime charged against the defendant, either as principal or accomplice. *Havens v. State*, 217 Ark. 153, 228 S.W.2d 1003 (1950). A person cannot be convicted of a felony based upon the testimony of an accomplice unless that testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense. Ark. Code Ann. § 16-89-111(e)(1) (Repl. 2005). An appellant bears the burden of proving that a witness is an accomplice whose

testimony must be corroborated. *Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006). Whether a witness is an accomplice is ordinarily a mixed question of law and fact to be submitted to the jury. *Odom v. State*, 259 Ark. 429, 533 S.W.2d 514 (1976). The court should not instruct the jury that a certain witness is an accomplice if there is any dispute in the testimony upon that point. *Id.* The corroborating evidence need not be sufficient standing alone to sustain the conviction, but it must, independent from that of the accomplice, tend to a substantial degree to connect the defendant with the commission of the crime; the test is whether, if the testimony of the accomplice were completely eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Gibson v. State*, 41 Ark. App. 154, 852 S.W.2d 326 (1993).

Fire destroyed the Kingsland school on May 24–25, 2003. Appellant was a volunteer firefighter at Kingsland at the time of the fire and for some time thereafter. Appellant was friends with Chris Jones and Michael Pennington. Captain Young of the Cleveland County Sheriff's Office testified that his investigation revealed that appellant, Pennington, and Jones were involved in more than a dozen arson fires committed in the vicinity of Kingsland over a period of years. According to Captain Young, all three of these men were motivated by the desire to fight the fires. Jones and Pennington aspired to be members of the fire department. Not all of the fires were set by all three men acting in concert, but there was evidence that every fire involved at least two of them.

The proof of appellant's participation in the Kingsland school arson that was the subject of this trial consisted of the testimony of Pennington and Jones. Pennington's testimony was the sole corroboration of the testimony of Jones, who was an accomplice to the Kingsland school arson. At trial, appellant asserted that Pennington was also an accomplice and moved at the appropriate times for a directed verdict on the ground that the testimony of one accomplice cannot provide corroboration for that of another. *See Olles v. State*, 260 Ark. 571, 542 S.W.2d 755 (1976). The trial court denied the motions, ruling that Pennington was not an accomplice as a matter of law. At the close of the evidence, appellant proffered a jury instruction based on AMI Crim. 2d 403, which would have had the jury decide as a factual matter whether Pennington was an accomplice whose testimony had to be corroborated and, if so, whether sufficient corroboration had been proved. The trial court refused to give the requested instruction.

We find no merit in appellant's assertion that the trial court erred in refusing to declare Pennington to be an accomplice as a matter of law. Such a declaration is proper only where the facts show conclusively that the witness was an accomplice. *McGehee v. State*, 348 Ark. 395, 72 S.W.3d 867 (2002). We do, however, agree that the trial court erred in refusing to submit the proffered instruction to the jury. There was clearly a fact question as to Pennington's accomplice status: Pennington admitted that he himself had told some people that he started the fire. Even though Pennington later claimed to investigators that he was "only kidding," we think that Pennington's admission of making a statement against his own

penal interest is more than sufficient to raise a jury question as to whether he was an accomplice. Even where the verdict is supported by substantial evidence, we will reverse where a witness's testimony raises a question as to his accomplice status and the trial court refuses to give a correct instruction permitting the jury to decide the question. *King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996). We reverse and remand on this ground.

Appellant also argues that the trial court erred in allowing the introduction of evidence of his prior arson convictions before he took the stand to testify, asserting that he did not open the door to such testimony by questioning Captain Young regarding the convictions of Pennington and Jones for arson committed in 2005.[1] We do not reach this issue because it is not sufficiently developed to show that appellant was prejudiced by any error that may have occurred. Appellant concedes that he admitted his prior arson convictions in his own trial testimony, but offers only a conclusory argument, unsupported by authority, asserting that he was nevertheless prejudiced because he was compelled to testify in order to deny testimony by Jones and Pennington that he was involved in setting other fires with them in 2003. There are several legal theories that might be applicable to this argument—*see Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996); *but cf. Towe v. State*, 304 Ark. 239, 801 S.W.2d 42 (1990), and *Pool v. State*, 29 Ark. App. 234, 780 S.W.2d 350 (1989)—but appellant invokes none of them specifically. The Arkansas case law is less than clear, and appellant's argument

[1] We note that appellant also advances an argument under this point based on *modus operandi*, but we cannot address it because it has been raised for the first time on appeal. *See Stokes v. State*, 359 Ark. 94, 194 S.W.3d 762 (2004).

on this point is unsupported by convincing argument or authority; we therefore decline to address it. *See Swint v. State*, 356 Ark. 361, 152 S.W.3d 226 (2004).

Finally, appellant maintains that the trial court erred on hearsay grounds in allowing introduction of a letter from the Kingsland school's insurer demonstrating the extent of the financial loss. However, even assuming *arguendo* that the letter was not admissible as a record of a regularly conducted business activity under Ark. R. Evid. 806(3) because it was not created at or near the time of the fire loss, appellant suffered no prejudice because copies of the cancelled checks constituting the loss payment to the school were also introduced, and the dates inscribed on these checks were contemporaneous to the fire and insurance claim.

Reversed and remanded.

VAUGHT, C.J., and ROBBINS, J., agree.