Cite as 2009 Ark. App. 723

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA09-174

ROMORIOUS WESTBROOK APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** November 4, 2009 APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT, [NO. JV-2008-160] HONORABLE LEE FERGUS, JUDGE REVERSED AND DISMISSED

JOSEPHINE LINKER HART, Judge

Romorious Westbrook was adjudicated a delinquent juvenile in Crittenden County Circuit Court based upon a finding that he had committed Class B felony residential burglary and Class C felony criminal mischief. He received twenty-four months' supervised juvenile probation and ninety days' detention in the Crittenden County Detention Center with forty-five days' suspended. He was also ordered to pay $10,000 in restitution to Farm Bureau Insurance. He appeals, arguing that there was insufficient evidence corroborating the testimony of his accomplice, Joseph "Jo Jo" Quinn, as is required by Arkansas Code Annotated section 16-89-111 (Repl. 2005). We reverse and dismiss.

While the Deese family was away for two days over the 2007 Christmas holiday, vandals broke into their home and caused more than $135,000 worth of damage. Joseph Quinn, a student at Marion High School, confessed to the crime and implicated two others, Anthony

Smith and Westbrook. It is not disputed that without Quinn's testimony, there was insufficient evidence to support Westbrook's adjudication. At the conclusion of the hearing, the trial court made the following findings of fact in support of its conclusion that Westbrook and Quinn were accomplices:

> 1) The victim was a school teacher at Marion School District and the walls inside the house were spray painted in blue and gold, the Marion High School colors;
> 2) "Marion High School" appeared in many of the spray painted epithets;
> 3) Testimony from Jo Jo's mother, Eva Quinn, established that the crime occurred in the overnight hours of December 26-December 27, when Westbrook spent the night at Anthony Smith's home along with Quinn;
> 4) The presence of a flashlight on the kitchen counter, that the victims testified was not there when they left their residence, indicating that the crime occurred at night;
> 5) The amount of time spent in the house was consistent with other individuals assisting in the destruction;
> 6) David Anthony Smith, Sr., testified that when the window to his son's room was raised, even if the alarm was de-activated, it would "chime." Quinn testified that the window chimed when they opened it.

We first consider the law regarding the requirement that accomplice testimony be corroborated. Arkansas Code Annotated section 16-89-111(e)(1) states in pertinent part:

> (A) A conviction or an adjudication of delinquency cannot be had in any case of felony upon the testimony of an accomplice, including in the juvenile division of circuit court, unless corroborated by other evidence tending to connect the defendant or the juvenile with the commission of the offense.
>
> (B) The corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof.

The corroborating evidence need not be sufficient standing alone to sustain the conviction, but it must, independent from that of the accomplice, tend to connect to a substantial degree the accused with the commission of the crime. *Stephenson v. State*, 373 Ark. 134, 282 S.W.3d 772

(2008). The corroborating evidence may be circumstantial so long as it is substantial; evidence that merely raises a suspicion of guilt is insufficient to corroborate an accomplice's testimony. *Id.* The presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime in a manner suggestive of joint participation, are relevant facts in determining the connection of an accomplice with the crime. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996).

In arguing that there was insufficient corroboration of Quinn's testimony, Westbrook attacks each of the trial court's findings and asserts that they are insufficient to connect him with the crime. We find this argument persuasive. When we consider the evidence as it pertains to the factors listed in *Passley*, we conclude that the evidence does nothing more than raise a bare suspicion of guilt.

We first examine the evidence of Westbrook's proximity to the crime. Eva Quinn's testimony placed Quinn in the Smith household as an overnight guest, along with Westbrook, on the night of December 26–27, and Crittenden County Assessor William E. Eddings, Jr., established that the Smith residence and the Deese residence were approximately 1200 feet apart. We hold that this evidence is not substantial. First, as we shall discuss later at greater length, there is no conclusive proof that the crime took place during the nighttime hours of December 26–27. Second, Westbrook's location during this time was approximately a quarter of a mile away. We are aware of only a single case, *Fort v. State*, 52 Ark. 180, 11 S.W. 959 (1889), where sufficient corroboration was found where a perpetrator was located so far

removed from the crime scene. In *Fort*, the corroborating evidence merely put the perpetrator in the same town where the crime was committed. However, there were additional factors, such as the perpetrator's untruthful denial that he was present in town during the time the burglary was committed. Conversely, in *Pickett v. State*, 55 Ark. App. 261, 935 S.W.2d 281 (1996), we held that proof that an alleged accomplice was present on the victim's next-door neighbor's property some sixty to ninety minutes before the crimes were discovered was insufficient to corroborate accomplice testimony.

We find the proof no more compelling regarding Westbrook's opportunity to commit the crime. David Smith testified that after chiding his son Anthony, Quinn, and Westbrook for being "too loud" at approximately 12:30 a.m. on December 27, 2007, he had no further contact with the boys until some six hours later. This evidence established an extremely narrow window of time in which Westbrook could have committed the crime. During this time, he would have had to travel a quarter of a mile to and from the crime scene, find a tool for forcing entry into the house, and spend what was obviously a considerable amount of time vandalizing the property. Moreover, as alluded to previously, there was scant evidence that the crime actually took place during the brief time that Westbrook had this "opportunity." We acknowledge that police found a clock inside the Deese home that was smashed at 3:10 and the presence of a flashlight on the kitchen counter. It would, however, require rank speculation to conclude that the clock was smashed on a specific day and at night, as opposed to 3:10 in the afternoon. We do not believe that the discovery of the flashlight in the kitchen alleviates

any of the necessity to speculate. Every room in the Deese residence was ransacked, and a large number of their possessions were dislodged from where the Deeses had left them.

Finally, substantial evidence is also lacking with regard to Westbrook's association with a person involved in the crime in a manner suggestive of joint participation. We note the testimony of David Smith, Eva Quinn, Westbrook's mother Myra Warren, and Andrew Simmons established that Westbrook was an associate of Quinn, but the nature of that association was one of being a teammate on the Marion High School football team, and as a friend of a friend.

While the extent of the damage—more than $135,000 worth—along with Eva Quinn's testimony that Jo Jo was wearing a cast at the time, tends to show that there was more than one perpetrator involved in the crime, that fact does not tend to establish that Westbrook was one of the other persons. Likewise, while the presence of epithets that were spray painted inside the Deese home suggested that the perpetrators were Marion High School students, that evidence failed to substantially point to Westbrook rather than any number of other students at Marion or even some other high school. Accordingly, because we have found no substantial evidence that tends to connect Westbrook with the commission of this crime, we must reverse and dismiss.

Reversed and dismissed.

PITTMAN and GLOVER, JJ., agree.

Shaun Hair, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.