Judgment ⟹358

Failure to verify pleading is an amendable defect and supplies no basis for setting judgment aside under statute which requires nonamendable defect on the face of the record or pleadings. Code, § 81A-160(d).

Charles E. Price, Atlanta, for appellant.

Awtrey, Parker, Risse, Mangerie & Dozier, Dana L. Jackel, Marietta, for appellee.

SHULMAN, Judge.

Appellant appeals from the denial of a motion to set aside a judgment for appellee. The basis of the motion was that appellee failed to verify its answer in response to appellant's verified complaint. However, failure to verify a pleading is an amendable defect (*Wall v. Mills,* 126 Ga.App. 149(1), 190 S.E.2d 146) and supplies no basis for setting a judgment aside under Code Ann. § 81A-160(d) which requires a nonamendable defect on the face of the record or pleadings.

Appellant's other enumerations of error are directed to the granting of the judgment to appellee. However, an appeal from that judgment was dismissed by this court in *Dunn v. Lockheed-Ga. Co.,* 143 Ga. App. 66, 237 S.E.2d 531, for failure to timely file a notice of appeal. It is still too late.

Judgment affirmed.

BELL, C. J., and BIRDSONG, J., concur.

146 Ga.App. 857

COLLINS et al.

v.

The STATE.

No. 55554.

Court of Appeals of Georgia.

Argued March 7, 1978.

Decided July 14, 1978.

Rehearing Denied July 28, 1978.

Defendants were convicted in the Mitchell Superior Court, Culpepper, J., of burglary, and they appealed. The Court of Appeals, Quillian, P. J., held that: (1) evidence was sufficient to support conviction of first defendant; (2) absent improperly admitted hearsay evidence, evidence did not support a finding of presence or participation of second defendant in offense of which he was found guilty, and (3) court's charge on alibi did not place burden of persuasion on defendants.

Affirmed in part and reversed in part.

1. Burglary ⟹41(1)

Evidence, in prosecution of defendants for burglary, was sufficient to support conviction of first defendant.

2. Criminal Law ⟹698(1)

Even in absence of objection, hearsay is without probative value to establish any facts.

3. Burglary ⟹41(1)

Absent improperly admitted hearsay evidence, there was no evidence, direct or circumstantial, of presence or participation of second defendant in offense of burglary and, thus, his conviction would be reversed.

4. Criminal Law ⟹775(3)

Court's charge on alibi in burglary prosecution did not improperly place burden of persuasion on defendant.

James W. Smith, King, Phipps & Associates, C. B. King, Albany, for appellants.

A. Wallace Cato, Dist. Atty., George C. Floyd, Asst. Dist. Atty., for appellee.

QUILLIAN, Presiding Judge.

Larry and Wayne Collins, brothers, were charged with the offense of burglary. The evidence of the state was entirely circumstantial. Each defendant offered evidence of alibi. Defendants appeal their conviction. *Held:*

1. The first two enumerated errors will be discussed together as they both address the sufficiency of the evidence. The state presented evidence that a truck which looked "similar" to the defendant's truck was seen near the site of the burglary at the time it occurred. The safe which was stolen from Mr. John Collins' house was painted with a type of paint which was "not a common paint" and the state's crime lab specialist had never seen "this particular type of paint" before. Paint scrapings taken from the bed of defendant's truck and from the safe were compared and found to be "consistent." Photos of tire impressions taken from the carport of the burglarized home were similar to photos of the tires of defendant's truck. Mr. Collins, whose home had been burglarized, stated that the defendant, Larry Collins, was present when Mr. Collins' brother, the grandfather of Larry Collins, asked him: "You got that old safe now with all that money in it?" Mr. Collins answered: ". . . there ain't no money much in it." During the trial, Mr. Collins testified that "I knew I had $1,500.00 in it . . . and Marcus [his son] had this [sic] between 70 and 90 dollars in change that he had left over from paying off pecan help." When the defendant, Wayne Collins, was arrested he had $16.40 in small change in his pocket.

Mr. Williamson, an investigator for the sheriff's office, received the initial report of the burglary "at approximately 7:45 p. m." After notification of the type of vehicle seen at the burglarized home, and knowing that the Collins brothers had access to such a vehicle, he went to the home of the defendant Larry Collins. This was approximately two hours after he had been informed of the burglary. The engine of the truck was warm. When asked if he had been driving the truck, Larry Collins said "no, [his] wife had."

[1] (a) Evidence of defendant Larry Collins: Larry Collins and his wife testified that he was at home the complete day of the burglary and that she had used the truck during the afternoon—from two to four o'clock. Both testified that the truck had been loaned to Junior Parr around 6 o'clock and returned around 8:30 p. m. Mr. Parr was described by the police as a "fugitive from justice" because he was wanted "on another burglary."

The circumstantial evidence of the state is in conflict with the direct evidence of the defendant Larry Collins. Our Supreme Court, in *Harris v. State*, 236 Ga. 242, 244–245, 223 S.E.2d 643, 645, held: "Whether or not in a given case circumstances are sufficient to exclude every reasonable hypothesis save the guilt of the accused, is primarily a question for determination by the jury . . . and where the jury is authorized to find that the evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt, the appellate court will not disturb that finding, unless the verdict of guilty is unsupportable as a matter of law." The defendant would have this court substitute its judgment for that of the jury. The role of this court is to pass not on the weight but on the sufficiency of the evidence. *Ridley v. State*, 236 Ga. 147, 149, 223 S.E.2d 131. The evidence must be viewed by an appellate court in the light most favorable to the verdict rendered. *Harris v. State*, 234 Ga. 871, 873, 218 S.E.2d 583. And, as long as there is "any evidence" to support the jury's verdict which has the approval of the trial court, we will not disturb it on appeal. *Alexander v. State*, 239 Ga. 108, 112, 236 S.E.2d 83. There is sufficient evidence of record to support the verdict of the jury as to the defendant Larry Collins.

(b) Evidence of Wayne Collins: The burglary occurred around 6:30 p. m. A friend of Wayne Collins testified that he helped Wayne repair his motorcycle on the day of

the burglary from around 4 p. m. until 7:15 p. m. Wayne's former sister-in-law testified that Wayne visited her house to see his daughter at 8 p. m. and took the loose change from his daughter's piggy-bank to use in paying a court fine the following day.

Counsel for defendant Wayne Collins contends that the testimony of Mr. John Collins as to the money of his son Marcus being in the safe was hearsay and cannot be considered as it was hearsay. We agree. Mr. Collins' testimony was: ". . . there was $1,500.00 that I knew was in there myself. Now Marcus . . . when he got done with his pecans that fall before he had some change. I don't know, I believe he said between 70 and 90 dollars . . . But anyway he put that in the safe. I didn't even know it was in there until the safe was gone . . . Q. Do you know the denominations of the change he had in there? A. No, I really don't. I didn't know he had that in there until he told me after it was gone, that he had that change in there."

"Hearsay evidence is that which does not derive its value solely from the credit of the witness, but rests mainly on the veracity and competency of other persons. The very nature of the evidence shows its weakness, and it is admitted only in specified cases from necessity." Code § 38-301. This testimony as to the safe's contents including $70 to $90 in change was not within the knowledge of the witness but is credited solely to what he was told by his son after the safe was stolen. Necessity is absent because Marcus Collins testified as a prosecution witness and he was not asked whether he had any money in the stolen safe.

There was no objection by the defendant. Thus, this hearsay was considered by the jury in its deliberations and could have played an important role in connecting the defendant, Wayne Collins, to the commission of the crime. The record is devoid of any direct evidence that he was involved. His brother was in possession of the truck. His brother was the one who was present when it was revealed that there was a safe—which was reputed to possess "all that money . . ." His brother is the one who said his wife used the car—to explain why the engine was still warm at approximately 9:45 p. m.—although she said she returned at 4 p. m. And it was his brother who testified at the trial that he loaned the truck to Junior Parr from 6 to 8:30—when the burglary occurred at approximately 6:30 p. m.

[2] Even in the absence of objection, hearsay is without probative value to establish any fact. *Jones v. State*, 50 Ga.App. 97(1), 176 S.E. 896; *Nesbit v. State*, 71 Ga.App. 744(1), 32 S.E.2d 207; *Gallman v. State*, 127 Ga.App. 849(4), 195 S.E.2d 187; *Winget v. State*, 138 Ga.App. 433(3), 226 S.E.2d 608; *Longstreet v. Longstreet*, 205 Ga. 255(4), 53 S.E.2d 480.

[3] When this sole connecting link between the crime charged and the defendant is removed, the state is left without any evidence, direct or circumstantial, of the presence or participation of Wayne Collins in the offense of which he was found guilty. It is arguable that there is a circumstantial connection, e. g., (1) his brother participated in this offense, and (2) Wayne Collins had access to the vehicle that was used in the robbery. These two circumstances are neutral—not incriminatory. Where a defendant's "conviction rests only on circumstantial evidence . . . to convict this evidence must exclude every other reasonable hypothesis save that of his guilt. Code § 38-109. However, questions of reasonableness are generally for the jury to decide under proper instructions. *Harris v. State*, 236 Ga. 242, 244-245, 223 S.E.2d 643 (1976). Our task on appeal is to judge only the sufficiency of the evidence, not its weight: we ask whether there is any evidence sufficient to authorize the fact finder to return a verdict of guilty. *Ridley v. State*, 236 Ga. 147, 149, 223 S.E.2d 131 (1976)." *Williams v. State*, 239 Ga. 12, 13, 235 S.E.2d 504, 505. We find no evidence having any probative value to identify Wayne Collins as a participant in this offense.

2. Defendants allege as error the failure of the trial court, "on its own motion," to

direct a verdict of acquittal for the defendants. Code Ann. § 27-1802(a) (Ga.L.1971, pp. 460, 461) provides that "[w]here there is no conflict in the evidence, and the evidence introduced, with all reasonable deductions and inferences therefrom shall demand a verdict of acquittal" the court may direct a verdict of acquittal. Suffice it to say, the circumstantial evidence of the state was in conflict with the direct evidence of defendants. Further, all reasonable inferences and deductions from such evidence did not demand a verdict of acquittal—as the jury pointed out. And, as stated above, the circumstantial evidence was sufficient authorize the jury to reach a verdict to of guilty as to the defendant Larry Collins. Thus, defendant Larry Collins was not entitled to a directed verdict. *Welch v. State*, 235 Ga. 243, 246, 219 S.E.2d 151.

[4] 3. Defendants argue that the court's charge on alibi placed the burden of persuasion on the appellants. We can not agree. The state contends the charge given "was taken from the charge of alibi approved by the Justices in *Patterson v. State*, 233 Ga. 724, 730 (fn. 2) [213 S.E.2d 612]." We agree that the charge is similar but the objection by defendants reaches the central theme of that instruction which the trial court failed to charge in the instant case. That omitted section of the *Patterson* charge states: "Presence of the defendant at the scene of the crime(s) alleged or his involvement as a co-conspirator is an essential element of the crime(s) set forth in the indictment, and the burden of proof as to such issue rests upon the State as I have instructed you already." We can not believe that the trial court deliberately omitted such a favorable statement for the defendant from his charge. Rather, we find the charge given to be almost identical to those approved in *Paschal v. State*, 230 Ga. 859, 860, 199 S.E.2d 803, and *Jordan v. State*, 235 Ga. 732, 737, 222 S.E.2d 23. Accordingly, we find no error and if defendants had desired "[a]ny fuller instruction" they should have requested it. *Billups v. State*, 236 Ga. 922, 225 S.E.2d 887.

Judgment affirmed as to defendant Larry Collins.

Judgment reversed as to defendant Wayne Collins.

McMURRAY and BIRDSONG, JJ., concur.

146 Ga.App. 877

BOZARD et al.

v.

J. A. JONES CONSTRUCTION COMPANY et al.

No. 55887.

Court of Appeals of Georgia.

Argued June 7, 1978.

Decided July 14, 1978.

Rehearing Denied July 28, 1978.

Suit was filed to recover for personal injury and loss of consortium. The Fulton Superior Court, Fryer, J., granted summary judgment dismissing insurer as party defendant and plaintiffs' application for immediate review was certified by trial court and granted by Court of Appeals. The Court of Appeals, Webb, J., held that the interlocutory appeal was improvidently granted and must be dismissed for lack of jurisdiction of Court of Appeals to review judgment which had become absolutely final and binding, since no notice of appeal from the summary judgment had been timely filed by plaintiffs and no application had been made or order obtained extending time within which to file notice of appeal.

Appeal dismissed.

1. Appeal and Error ⇐22, 23

Defendant dismissed as party when summary judgment was granted against plaintiffs owed duty to respond to plain-