IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
JUNE SESSION, 1996

FILED

November 22, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 01C01-9508-CC-00251
Appellee	)	
	)	DICKSON COUNTY
vs.	)	
	)	Hon. Robert E. Burch, Judge
WILLIAM T. COWART,	)	
	)	(Theft Over $500)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, William Thomas Cowart, appeals the judgment of the Circuit Court of Dickson County finding him guilty of theft over $500, a class E felony. The appellant presents two issues on appeal: (1) whether the evidence sufficiently supports his conviction for theft over $500, and (2) whether the evidence supports the trial court's order of restitution.

After a review of the record, we affirm the judgment of the trial court.

I. Background

On February 22, 1993, the Grand Jury of Dickson County indicted the appellant for one count of theft over $500. Subsequently, the appellant waived his right to a jury trial, and a bench trial was held on May 18, 1994. At trial, the following facts were developed.

Kim Holland, the assistant manager of D & C Parts Company in Dickson, testified that, at approximately 12:30 p.m. on February 13, 1992, he observed a man, wearing a ball cap and a blue plaid shirt, removing the Dial-A-Snack vending machine from the store. However, Holland admitted that, because the store was very busy, he only looked at the man for five to ten seconds. In September 1992, Holland identified the appellant, from a photo line up, as the person who had removed the machine from the D & C Parts premises. Jeff Cavender, an employee of D & C Parts, also noticed a man removing the snack machine on February 13. Cavender testified that he had just returned from lunch when a man, wearing a "flannel, maybe a checkered shirt," approached him and stated that "he was going to take [the machine] outside, service it, and bring it

back in." In September 1992, Cavender identified the appellant, from a photo line up, as the person who had removed the machine from the D & C premises.

Detective Mike Fleaner of the Dickson Police Department investigated the theft of the vending machine from D & C Parts. Through his investigation, he developed a description of the perpetrator: "a white male, about 6'4" tall, around 180 pounds, brown hair, bushy in the back, glasses on, wearing a red checkered shirt, blue jeans." Additionally, he discovered that the perpetrator had entered D & C Parts and advised an employee that he was going to change the coin tumblers in the machine. The perpetrator then went to a truck, returned with a dolly, and loaded the machine into a U-Haul trailer with a Florida license plate. The truck pulling the trailer was a red or maroon Toyota pick up with a Tennessee license plate. Fleaner also stated that he was able to compile a photo line up from information supplied by other law enforcement personnel.

Virginia Walp, the owner of the stolen vending machine, testified that she first became aware of the theft on February 13, 1992, when employees of D & C Parts telephoned her inquiring when she would return the vending machine. Walp indicated that the missing machine had been at D & C Parts for five years, that the machine was in excellent condition, and that it had a value of approximately $7500.00. She later admitted that the purchase price was $2,696.00.

At trial, the appellant asserted his innocence maintaining that he had never been to the D & C Parts Store before September 9, 1992. At the time of the trial, the appellant was employed in advertising sales. However, he admitted that he had previously been involved in the vending machine business from 1982 to 1990 or 1991. In his defense, he asserted that, at the time of the incident, he was traveling in East Tennessee between Rockwood and Morristown. To

support this alibi, the appellant stated that, in January 1992, he received a telephone call from Nancy Hobbs, a former vending machine customer. Hobbs stated that she was interested in selling her machines. Subsequently, the appellant and Hobbs agreed on a purchase price and arranged to meet in Rockwood on February 12, 1992.

On February 11, 1992, the appellant obtained a cashier's check for $4200 made to the order of Nancy Hobbs. On February 12, 1992, the appellant testified that he drove to Rockwood and checked into the Whitley Motel.[1] The following day, February 13, he stated that he and Ms. Hobbs discussed inspection of machines located "on Leavell Road in Knoxville, Kingston Pike, and on Rutledge Road near Morristown."[2] Early that morning, the appellant and Ms. Hobbs drove to Knoxville, where they purchased gas and got something to eat. They then proceeded to inspect the machines, the first stop being a U-Haul business. The appellant stated that the entire trip totaled 150-160 miles and that their inspection was not completed until “after lunch.” Before returning to his motel in Rockwood, the appellant again purchased gasoline in Knoxville. During this period, the appellant maintains that he was driving his white Toyota 4-Runner. To prove these activities, the appellant introduced a copy of a purchase agreement between himself and Ms. Hobbs dated February 12, 1992, for the vending machines and a cashier's check made payable to Hobbs which was purchased February 11, 1992. He also produced three gasoline receipts from two service stations in Knoxville, one dated February 12 and two dated February 13.

The appellant admitted that, once in October and again in November 1992, he went into D & C Parts. He informed the court that neither Cavender nor

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[1]The appellant produced motel receipts for the room rental.

[2]Ms. Hobbs did not testify at trial. The appellant testified that he was unable to locate her.

Holland, the two eyewitnesses, recognized him. Although the appellant testified that his appearance was identical to that on February 13, 1992, on cross-examination, he admitted that, in February, he had a "perm" and wore a beard and mustache.

Ismus Patel, the owner of the Whitley Motel, testified on the appellant's behalf. He identified the receipts made out to the appellant and stated that his wife had prepared them. However, he could not identify who filled out the registration card, although he admitted that only he and his wife fill out such cards. Moreover, Patel testified that he filled in the year, "92," at a later time. He could not verify what time the appellant checked in or out or that it was even the appellant who checked into his motel. He further admitted that, if the appellant came back and told him that he needed a receipt for staying at his motel, he "would want to help him out and would provide a receipt for him."

The trial judge found the appellant guilty of theft over $500. The record reflects that the court's finding of guilt was based upon the identification of the appellant by the two employees of D & C Parts, in addition to their identification of the appellant from a photo line up of individuals with similar features. Additionally, the court concluded that, while the appellant provided documentary evidence of his whereabouts on February 11 and 12, 1992, only the appellant's testimony supported his presence in East Tennessee on February 13, 1992. With respect to the February 13 gas tickets, the court opined, "[T]here is no way to indicate who bought this gas. It could be anybody's gas tickets ... ."

At the sentencing hearing, the appellant admitted that he had a total of five convictions for crimes relating to vending machines. The court found the appellant to be a range 2 offender based upon two prior felony convictions.

Additionally, the court found that the prior crimes showed a continuing course of criminal conduct that did not occur over a brief period. The appellant was also on probation at the time the instant offense was committed. Thus, the court determined that probation was inappropriate and sentenced the appellant to four years incarceration. Additionally, the court ordered restitution of $5410.00.

II. Sufficiency of the Evidence

In his first issue, the appellant questions the sufficiency of the evidence supporting his conviction for theft over $500. Specifically, the appellant asserts that the trial court did not consider evidence offered to support an alibi defense and that the witness identification of the appellant by Cavender and Holland is insufficient to establish the appellant as the perpetrator, beyond a reasonable doubt. We disagree.

A defendant is initially cloaked with the presumption of innocence. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). However, a conviction by the trier of fact removes this presumption of innocence and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of proving that the evidence is insufficient.[3] Id. In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). On appeal, the State is entitled to the strongest legitimate view of the evidence and all legitimate or reasonable inferences which may be drawn therefrom. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). It is the appellate court's duty to affirm the conviction if the evidence viewed under these standards was sufficient for any rational trier of fact to have found the

[3]This case involved a bench trial. The findings of the trial judge who conducted the proceedings carry the same weight as a jury verdict. State v. Tate, 615 S.W.2d 161, 162 (Tenn. Crim. App. 1981).

essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13 (e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In order to obtain a conviction for theft of property over $500, the State must show, beyond a reasonable doubt, that "a person . . . , with intent to deprive the owner of property, . . . knowingly obtains or exercises control over the property without the owner's effective consent."[4] Tenn. Code Ann. § 39-14-103 (1991 Repl.). At trial, the State produced two eyewitnesses who identified the appellant as the person observed removing the vending machine from D & C Parts on February 13, 1992. Additionally, the proof established that the appellant did not have the effective consent of the owner, Ms. Walp, to remove the machine from D & C Parts. Ms. Walp also testified that the value of the vending machine exceeded $500. Thus, the evidence presented by the State sufficiently establishes the offense of theft of property over $500 beyond a reasonable doubt.

Nonetheless, the appellant contends that the trial court disregarded his alibi defense and that the identification of the appellant by the two eyewitnesses is insufficient to convict him of the offense. The proof in the record indicates that the trial court, clearly, did not disregard alibi evidence. Although the trial judge is not required to enter findings in a bench trial, the record indicates that the judge thoroughly addressed the specific offers of proof introduced by the appellant in support of his alibi. Cf. State v. Hood, 868 S.W.2d 744, 749 (Tenn. Crim. App.

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[4]Tenn. Code Ann. § 39-14-105(1991 Repl.) provides for the grading of theft offenses. Accordingly, a theft of property or services, where the value of the property or services obtained exceeds $500, is a class E felony. Tenn. Code Ann. § 39-14-105(2).

1993). Consequently, the court rejected the appellant's theory of alibi and accredited the testimony of the two independent witnesses who identified the appellant as the person who removed the machine from the D & C Parts Company. Moreover, we agree with the trial court that the photo line up used to identify the appellant was "fair," "not suggestive," and "consisting of individuals with similar features." Additionally, to ask this court to find that the eyewitness identifications of the appellant are insufficient to sustain a conviction amounts to asking the court to reweigh or reevaluate the evidence, which this court is not entitled to do. See Cabbage, 571 S.W.2d at 835. E.g., State v. Bly, No. 03C01-9209-CR-00322 (Tenn. Crim. App. at Knoxville, Mar. 19, 1993); State v. Randle, No. 88 (Tenn. Crim. App. at Jackson, Dec. 31, 1985). Accordingly, this issue is without merit.

III. Restitution

At the conclusion of the sentencing hearing, the trial court found the appellant to be a range 2 offender of a class E felony. Accordingly, the court sentenced the appellant to four years incarceration in the Department of Correction. Additionally, the trial court ordered the appellant to pay restitution to the victim in the amount of $5,410.00. The appellant contends that the amount of restitution imposed by the trial court is not supported by the evidence in the record. We disagree.

Initially, although not raised in this appeal, the trial court has the authority, in cases involving theft, to order restitution in conjunction with a sentence of

confinement in the state penitentiary.[5] Tenn. Code Ann. § 40-20-116 (1991 Repl.). Cf. State v. Dyer, C.A.A. No. 02C01-9201-CC-00011 (Tenn. Crim. App. at Jackson, Feb. 3, 1993) (holding Tenn. Code Ann. § 40-20-116 only applicable when "a felon is convicted of stealing or feloniously taking or receiving property, or defrauding another thereof," and not when he is convicted of aggravated burglary); State v. Narramore, C.C.A. No. 165 (Tenn. Crim. App. at Knoxville, May 19, 1989) (recognizing that, although the "record does not contain the requisite predicate findings," restitution is permitted in conjunction with a sentence of incarceration). But see State v. Davis, No. 03C01-9311-CR-00387 (Tenn. Crim. App. at Knoxville, Nov. 14, 1995) (stating "[t]he power to order restitution by a criminal defendant is limited to defendants who are placed on probation." (citation omitted)), perm. to appeal granted, (Tenn. Mar. 11, 1996);[6] State v. Bowman, No. 03C01-9405-CR-00184 (Tenn. Crim. App. at Knoxville, Sept. 21, 1995), perm. to appeal denied, (Tenn. Jan. 8, 1996) (holding that "there is no authority to order restitution by one being sentenced to the penitentiary."). Tenn. Code Ann. § 40-20-116 provides,

> **Order of restitution.** --- (a) Whenever a felon is convicted of stealing or feloniously taking or receiving property, or defrauding another thereof, the jury shall ascertain the value of such property, if not previously restored to the owner, and the court shall, thereupon, order the restitution of the property, and, in case this cannot be done, that the party aggrieved recover the value assessed against the prisoner, for which execution may issue as in other cases.
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> (b) If the property has been feloniously destroyed, the jury shall ascertain the damages sustained, upon which judgment shall be rendered in favor of the party aggrieved against the defendant, and execution shall issue as before provided.

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[5]Restitution is an important tool in the punishment of criminals; it not only punishes the defendant, but also compensates the victim. State v. McKinney, No. 03C01-9309-CR-00307 (Tenn. Crim. App. at Knoxville, Oct. 26, 1994). However, restitution is only warranted when it serves rehabilitative or deterrent purposes. State v. Lewis, C.C.A. 03C01-9401-CR-00027 (Tenn. Crim. App. at Knoxville, Sept. 14, 1995) (citations omitted).

[6]In response to this opinion, the State filed a petition to rehear arguing that restitution is applicable to a defendant sentenced to the penitentiary. The State based its argument on Tenn. Code Ann. § 40-20-116. In its order denying the petition, this Court determined that Tenn. Code Ann. § 40-20-116 only applies "to cases now denominated 'theft.'" See State v. Davis, No. 03C01-9311-CR-00387 (Tenn. Crim. App. at Knoxville, Dec. 4, 1995) (order denying petition to rehear). The court reasoned that, since Davis was a case of vandalism and not theft, "the cited section of our Code has no applicability to this case." Id.

> (c) The provisions of this section are cumulative, and do not deprive the party injured of any other right he may have for the recovery of his property or its value.

(Emphasis added).

If, in cases involving theft, the court orders restitution and the defendant challenges the amount of that restitution on appeal, this court shall conduct a *de novo* review with a presumption that the determination made by the trial court is correct.[7] See State v. Blankenship, No. 02C01-9507-CC-00195 (Tenn. Crim. App. at Jackson, Jan. 31, 1996) (citing State v. Stewart, No. 01C01-9007-CC-00161 (Tenn. Crim. App. at Nashville, Jan. 31, 1990); Tenn. Code Ann. § 40-35-401(d) (1990 Repl.)). Additionally, in reviewing orders of restitution, this court has held that "our restitution law does not require the sentencing court to determine a defendant's criminal liability for restitution in accordance with the strict rules of damages applicable to a civil case." Id.

Nonetheless, damages in a civil proceeding for conversion are comparable to restitution in a criminal case for theft. "As a general rule, plaintiff's damages in an action for conversion are measured by the sum necessary to compensate him for all actual losses or injuries sustained as a natural and proximate result of the defendant's wrong." Lance Productions v. Commerce Union Bank, 764 S.W.2d 207, 213 (Tenn. App.), perm. to appeal denied, (Tenn. 1988) (citations omitted). "The ordinary measure of damages for conversion is the value of the property converted at the time and place of conversion, with interest." Id. (citation omitted). However, special damages may also be recovered if specifically pleaded and proved. Id. There can be no recovery for

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[7]Tenn. Code Ann. § 40-20-116 states "the jury shall ascertain the value of such property . . . and the court shall thereupon, order the restitution of the property." See also State v. Bryant, 775 S.W.2d 1, 4-5 (Tenn. Crim. App. 1988), perm. to appeal denied, (Tenn. 1989) (distinguishing separate roles of judge and jury in cases deciding amount of restitution). In a bench trial, the judge acts as the jury, i.e., the trier of fact, thus enabling the court to determine the value of the property as well as ordering restitution. Cf. Tate, 615 S.W.2d at 162.

losses which are too remote or uncertain, which are not substantiated by the record, or which the plaintiff could have avoided by the exercise of ordinary diligence. Id. (citation omitted). See also 89 C.J.S. *Trover & Conversion* §§ 103, 136, 170, 174,180 (1955); MAYO L. COINER, TENNESSEE LAW OF DAMAGES § 1-5, at 10 (1988).

At trial, the victim, Virginia Walp, provided a detailed description of the vending machine located at D & C Parts. She testified that the value of the machine is $7,500. On cross-examination, Walp admitted that the machine was five or six years old and that she paid $32,362.27 for twelve like machines, including the one at D & C Parts. She testified that the stolen machine was in "A-1 shape" and that the fair market value of the machine was "only a dollar or two less than that of the machine when purchased new." Additionally, Ms. Walp filed a victim impact statement, which was included in the pre-sentence report. Her statement revealed that the theft had placed a financial burden on her household and that she was requesting restitution. Specifically, Ms. Walp itemized her damages as follows:

Cost of Machine[8]	$ 1,250.00
Lost Wages[9]	120.00
Mileage to Court[10]	100.00
Product/Money in Machine	65.00
Lost Income[11]	3,900.00
Bank Note	179.61
TOTAL	$ 5,614.61

Ms. Walp also indicated that she had to "pull [an] existing machine to replace

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[8]An invoice verified the purchase price of $1,250 per machine for a total of twelve machines in 1990, making the machine two years old at the time of the theft.

[9]Ms. Walp was employed as a substitute teacher with the Maury County Board of Education. Due to various court dates, she was unable to work three days. She earned approximately $40 per day.

[10]Walp had to drive from Santa Fe, TN., to Charlotte, TN., a minimum of five times to be present for court dates. The trip averages 133 miles.

[11]To arrive at $3900 for lost wages, the victim multiplied the weekly income from the machine, $65.00, by the number of weeks since the theft, 120.

[the] machine [at D & C Parts.]"

To rebut Ms. Walp's proof, the appellant testified that, depending on the location, a vending machine has a life span of about four to five years. He added that, given reasonable wear and tear on the machine, the machine would have a value between $400 and $500. To support his position, the appellant introduced a copy of the "Trader's Post," a weekly magazine advertising business equipment and other merchandise. Specifically, the appellant testified that a similar used machine sells for around $375. He added that, within two weeks, he would purchase a new machine for the victim and personally have it delivered to her.

In setting the appropriate amount of restitution in this case, the trial judge stated:

> [G]iven the facts in the pre-sentence report, the Court finds that the machine is worth $1,250.00, plus $65.00 of either money or product that was in the machine. The victim has lost $139.95 in mileage, and wages $120.00, and a potential income from the machine from the time of the theft until today's hearing of $3900.00 Therefore, the restitution is set at the rounded off sum of $5,410.00.

The appellant contests this decision, arguing that the State introduced no proof of ownership, no proof of the value of the items in the vending machine, and no proof of profit making from the machines. The appellant also argues that Ms. Walp's testimony at trial was inconsistent with her victim impact statement.

Initially, we note that, as the owner of the property, Ms. Walp was entitled to testify concerning its value. State v. Earls, No. 03C01-9202-CR-52 (Tenn. Crim. App. at Knoxville, Dec. 16, 1992), perm. to appeal denied, (Tenn. Dec. 28, 1993) (citing Tenn.R.Evid. 701(b)). Additionally, the victim presented

documentation as to the purchase price of the vending machine. The court, in its discretion as the trier of fact, relied upon Ms. Walp's testimony to establish ownership of the vending machine and relied upon her victim impact statement as a guide in determining the amount of her loss. Specifically, in addition to the value of the property, we find the remaining damages, awarded by the trial judge, to be justified, reasonable, and substantiated by the proof. See, e.g., McKinney, No. 03C01-9309-CR-00307 (reasonable out of pocket expenses incurred by victim resulting from the prosecution of the offense recoverable); State v. Schroyer, No. 03C01-9112-CR-406 (Tenn. Crim. App. at Knoxville, July 9, 1992) (loss of use of property recoverable); State v. Vanderford, No. 01C01-9101-CC0004 (Tenn. Crim. App. at Nashville, Aug. 22, 1991) (lost wages recoverable). Accordingly, we find that the proof supports the court's imposition of restitution in the present case. This issue is without merit.

IV. Conclusion

After a review of the evidence before the trial court and the applicable law, we conclude that the evidence was sufficient to find the appellant guilty of theft over $500. Additionally, we conclude that restitution in the amount of $5410.00 was appropriate in this case. Accordingly, we affirm the judgment of the trial court.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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WILLIAM M. BARKER, Judge