

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 28, 2023

STATE OF TENNESSEE v. JEREMY WAYNE STEPHENS

Appeal from the Criminal Court for Hamblen County
No. 19-CR-400 Alex E. Pearson, Judge

No. E2023-00334-CCA-R3-CD

The Defendant, Jeremy Wayne Stephens, appeals his conviction for theft of property valued at \$1,000 or less. On appeal, the Defendant argues that (1) the evidence is insufficient to sustain his conviction, (2) the Defendant was subjected to discriminatory prosecution, and (3) the Defendant's due process rights were violated because the Defendant received the ineffective assistance of trial counsel. We affirm the Defendant's conviction.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

KYLE A. HIXSON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Randall F. Crossing, Jefferson City, Tennessee, for the appellant, Jeremy Wayne Stephens.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Senior Assistant Attorney General; Dan E. Armstrong, District Attorney General; and Philip M. Gibson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

On May 18, 2020, a Hamblen County grand jury indicted the Defendant with theft of property valued at \$1,000 or less. *See* Tenn. Code Ann. § 39-14-103. On July 12, 2021, a Hamblen County grand jury returned a superseding indictment, amending the offense date from January 1, 2019, to January 19, 2019. Following a February 17, 2023 trial, a

jury convicted the Defendant as charged. After the denial of his motion for a new trial, the Defendant filed a timely appeal.

Pursuant to Tennessee Rule of Appellate Procedure 24(c), the Defendant has, for the purposes of his appeal, filed the following statement of evidence¹ in lieu of a transcript:

The Defendant was charged with theft under \$1,000.00. After opening statements, two witnesses testified on behalf of the State of Tennessee. The first witness was Walmart's asset protection associate, Tim Johnson. The second witness was Detective Ricky Sanders.

Mr. Johnson testified as follows: Mr. Johnson testified that he was [employed] as an asset protection associate for Walmart. Further, he reviewed the security tapes that occurred at [a] self-checkout counter at the Walmart located at 4331 West Andrew Johnson Highway in Hamblen County, Tennessee.

Upon review of the tape, he noticed an individual scan two items at once with one item in front of the other and placed both items in [a] bag. Therefore, one item was not scanned. Further, he testified that the items which were not scanned were, two kool-aid packs, DAP silicone[,] and Vaseline lotion. He stated the total value of the items not paid for equaled \$14[.]93. He testified that [the Defendant] paid with [a] \$100.00 bill and received \$53.51 in change. Thereafter, the State . . . played and admitted a video of [the Defendant's] arriving in the parking lot and store, scanning the items, and leaving the store with a receipt of the transaction.

The second witness was Detective Ricky Sanders. Detective Sanders testified that he reviewed the store surveillance video that he received from Mr. Johnson. Upon reviewing the store surveillance video, he attempted to identify the individual. He identified the individual by tracking the license

¹ The State argues that the Defendant did not file the statement of evidence in accordance with the requirements of Tennessee Rule of Appellate Procedure 24(c) and (f). Specifically, the State contends that defense counsel did not certify the accuracy of the statement, the record contains no order indicating that the trial court approved the statement, and the Defendant has not shown that a transcript is unavailable. While defense counsel failed to certify that the statement is "an accurate account of the proceedings" below, as required by Rule 24(c), the statement was otherwise filed in accordance with the requirements of the Rule. Because the State did not file an objection to the statement of evidence as allowed by the Rule, we will suspend the certification requirement in this instance. *See* Tenn. R. App. P. 2. We caution litigants to strictly follow the requirements of Rule 24 when preparing the record on appeal.

plate number. He stated the license plate belonged to a woman. He then testified he went to her Facebook page and found a picture of [the Defendant] with said woman. He then issued a warrant for [the Defendant's] arrest.

On cross-examination, both Mr. Johnson and Detective Sanders stated that all of the items were placed over the scanner and that [the Defendant] paid with [a] \$100.00 bill, which was sufficient funds to pay for the alleged stolen items. Further, both witnesses conceded that [the Defendant] scanned several items more than once in order for the register to record the transaction. Further, Mr. Johnson testified that it was Walmart's policy in 2019 not to prosecute thefts when the value was less than \$25.00. At the close of the State[']s proof, the defense motioned the Court for Judgement [sic] of Acquittal. The Judge denied the motion. The defense did not call any witnesses and rested.

After preparation and review of the pre-sentence report, [the] Defendant was sentenced to eleven (11) months and twenty-nine (29) days in jail with six (6) months suspended. A timely notice of appeal was filed.

The record also includes the exhibits entered at the trial. The Walmart surveillance video of the Defendant's using a self-checkout station depicts the Defendant scanning two items at once. The Defendant holds one item in front of the other item so that the second item is not scanned. The unscanned items include two kool-aid packs, DAP silicone, and Vaseline lotion. The Defendant's receipt for this transaction is also included in the record. The receipt contains only fourteen of the sixteen kool-aid packs purchased by the Defendant and does not include DAP silicone or Vaseline lotion.

The case is now before us for our review.

II. ANALYSIS

On appeal, the Defendant argues that (1) the evidence is insufficient to support his conviction for theft valued at \$1,000 or less, (2) the Defendant was subjected to discriminatory prosecution, and (3) the Defendant's due process rights were violated because he received the ineffective assistance of trial counsel. The State responds that the Defendant is not entitled to relief. We agree with the State.

A. Sufficiency of the Evidence

The Defendant argues that the evidence is insufficient to sustain his conviction because he had sufficient funds to pay for all of the items, all of the items passed “over or in the vicinity of the scanner,” and the failure of the scanner to pick up all of the items is the result of a faulty register. The Defendant argues that the State failed to show that he intended to steal the unscanned items. The State responds that there is sufficient evidence to support the Defendant’s conviction.

The United States Constitution prohibits the states from depriving “any person of life, liberty, or property, without due process of law[.]” U.S. Const. amend. XIV, § 1. A state shall not deprive a criminal defendant of his liberty “except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). In determining whether a state has met this burden following a finding of guilt, “the relevant question is 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.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Because a guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, the defendant has the burden on appeal of illustrating why the evidence is insufficient to support the jury’s verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). If a convicted defendant makes this showing, the finding of guilt shall be set aside. Tenn. R. App. P. 13(e).

“Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Appellate courts do not “reweigh or reevaluate the evidence.” *Id.* (citing *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978)). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Therefore, on appellate review, “the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom.” *Cabbage*, 571 S.W.2d at 835.

Pursuant to Tennessee Code Annotated section 39-14-103, a “person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner’s effective consent.” Theft of property is a Class A misdemeanor “if the value of the property or services obtained is one thousand dollars (\$1,000) or less[.]” *Id.* § 39-14-105(a)(1).

Viewed in the light most favorable to the State, there is sufficient evidence to support the Defendant's conviction. The evidence shows that Mr. Johnson reviewed the surveillance video of the Defendant's checking out and noticed the Defendant intentionally failing to scan two kool-aid packs, DAP silicone, and Vaseline lotion. The unscanned items were valued at \$14.93. Mr. Stephens paid with a \$100.00 bill and received \$53.51 in change, and the unscanned items were not included in the total amount due. The surveillance video entered as an exhibit shows the Defendant using a self-checkout station to scan two items at once. The Defendant holds one item in front of the other item so that the second item is not scanned. The video recording clearly shows that the Defendant used this method to avoid scanning two kool-aid packs, DAP silicone, and Vaseline lotion. Detective Sanders identified the man in the Walmart surveillance footage as the Defendant, and the Defendant does not contest that he is the man in the video. Accordingly, the Defendant is not entitled to relief regarding this issue.

B. Discriminatory Prosecution

The Defendant argues that he was subjected to discriminatory or selective prosecution because in 2019, it was not Walmart's policy to prosecute individuals for theft valued at less than \$25. The State responds that the Defendant was not subjected to selective prosecution.

Allegations of prosecutorial vindictiveness or selective prosecution have constitutional implications, and may warrant dismissal of the indictment. *State v. Skidmore*, 15 S.W.3d 502, 508 (Tenn. Crim. App. 1999) (citing *Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (due process may be implicated if a prosecutor vindictively increases a charge to a felony after a misdemeanor has invoked an appellate remedy)); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (equal protection standards prevent selective prosecution on the basis of race, religion, or other arbitrary classification). "However, as long as the prosecutor has probable cause to believe that an accused committed an offense, the determination whether to prosecute rests entirely within the prosecutor's discretion, subject to these constitutional limitations." *Id.*

A defendant claiming selective prosecution must establish that the law enforcement decision had a discriminatory purpose and produced a discriminatory effect. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). The Defendant must establish that "(1) the government has singled out the claimant for enforcement action while others engaging in similar activity have not been subject to the same action; and (2) the decision to prosecute rests on an impermissible consideration or purpose." *State v. Harton*, 108 S.W.3d 253, 261 (Tenn. Crim. App. 2002) (citing *421 Corp. v. Metropolitan Government*, 36 S.W.3d 469,

480 (Tenn. Ct. App. 2000)). The first element requires “proof that other non-prosecuted offenders engaged in similar conduct; those offenders violated the same law the claimant is accused of violating; and the magnitude of their violation was not materially different from that of the claimant.” *Id.* Regarding the second element, “the claimant must establish the government singled out a protected class of citizens for enforcement, or the prosecution was intended to deter or punish the exercise of a protected right.” *Id.*

Regarding the Defendant’s requirement to establish that the government singled out the Defendant for prosecution, the Defendant cites to Walmart’s policy of not prosecuting thefts valued at less than \$25. However, this argument is misplaced because Walmart is a private corporation. The Defendant has failed to show that the government singled him out for selective prosecution. *See Harton*, 108 S.W.3d at 261. Regarding the “impermissible consideration” element, the Defendant failed to present any proof that the government exercised its discretion to prosecute based on the Defendant’s status as a member of a protected class of citizens or that the prosecution was intended to deter the exercise of a protected right. *See id.* The record contains no evidence to support the Defendant’s claim that he was subjected to selective prosecution. Accordingly, the Defendant is not entitled to relief regarding this issue.

C. Ineffective Assistance of Counsel

The Defendant argues that his due process rights were violated because he received the ineffective assistance of trial counsel. Specifically, the Defendant argues that (1) trial counsel failed to file a motion to dismiss the defective indictment, (2) trial counsel did not object to the untimely preliminary hearing, and (3) trial counsel failed to request a speedy trial. The State responds that the Defendant has waived his ineffective assistance of counsel claim because he failed to include the issue in his motion for new trial.

“An appellate court’s authority ‘generally will extend only to those issues presented for review.’” *State v. Bristol*, 654 S.W.3d 917, 923 (Tenn. 2022) (quoting Tenn. R. App. P. 13(b)). Further, the appellate rules do not require relief to be granted “to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of the error.” Tenn. R. App. P. 36(a). Appellate jurisdiction “extends to those issues that ‘ha[ve] been formulated and passed upon in some inferior tribunal.’” *Bristol*, 654 S.W.3d at 925 (alteration in original) (quoting *Fine v. Lawless*, 205 S.W. 124, 124 (Tenn. 1918)). A party must include such issues in a motion for new trial in order to avoid appellate waiver. *See* Tenn. R. App. P. 3(e); *State v. Harbison*, 539 S.W.3d 149, 164 (Tenn. 2018) (“Grounds not raised in a motion for new trial are waived for purposes of appeal.”) (citations omitted).

Here, the Defendant waived appellate review of his ineffective assistance of counsel claim by failing to include it in his motion for new trial. Moreover, the Defendant failed to request plain error review, and we decline to conduct such review sua sponte. The Defendant is not entitled to relief regarding this issue.

III. CONCLUSION

Based upon the foregoing and the record as a whole, the judgment of the trial court is affirmed.

KYLE A. HIXSON, JUDGE