IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1999 SESSION

STATE OF TENNESSEE,	)	No. M1998-00020-CCA-R3-CD
	)	**C.C.A. NO. 01C01-9812-CR-00482**
Appellee,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. J. RANDALL WYATT, JR., JUDGE**
DAVID R. MUNDY,	)	
	)	
Appellant.	)	(Assault; vandalism - 2 counts)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY, Special Judge

O P I N I O N

Defendant was indicted for three counts of assault, two counts of vandalism, and one count of theft of property. A jury convicted him of one count of assault, and two counts of Class E felony vandalism. After a hearing, the trial court sentenced defendant to eleven months, twenty-nine days on the assault conviction, to be served in the county jail at one hundred percent. He was sentenced as a Range I standard offender to two years in the county jail on each of the vandalism convictions, concurrent with each other and with the assault sentence. In this appeal as of right, defendant raises three issues:

> I. Whether the trial court erred in admitting certain hearsay testimony;
>
> II. Whether the trial court erred in allowing the State to cross-examine him about other crimes;
>
> III. Whether the trial court erred in limiting his cross-examination of a witness; and
>
> IV. Whether the evidence was sufficient to support his convictions of vandalism.

Upon our review of the record, we affirm the judgment of the trial court.

We must initially address the procedural history of defendant's attempt to perfect his appeal. Judgments were entered on October 30, 1998. Defendant filed his notice of appeal on November 30, 1998. However, he did not file a motion for new trial until December 7, 1998. A motion for new trial must be filed "within thirty days of the date the order of sentence is entered." Tenn. R. Crim. P. 33(b). This time period is mandatory and may not be enlarged. Tenn. R. Crim. P. 45(b). The effect of defendant's failure to timely file his motion for new trial is the waiver of any issues that were or should have been presented in the motion. T.R.A.P. 3(e); State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997). Accordingly, this Court will review the record only for sufficiency of the evidence, see State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989), and for plain errors which have affected defendant's substantial rights. Tenn. R. Crim. P. 52(b). Defendant's other issues have been waived.

Our consideration of the sufficiency of the evidence requires a brief recitation of the facts. In November 1996, defendant and his then wife, now Julaine Loy, were experiencing marital difficulties. Loy testified that, in early November 1996, defendant came to her bed and demanded sex. She refused and a struggle ensued. Loy fell out of bed, landing on her stomach. Defendant kneeled on her back and began strangling her. She struggled and he eventually stopped and left the room. Loy locked the bedroom door and called 911, requesting the police. By the time the police arrived, defendant had left the house. The attack caused Loy to bleed from her left ear, and caused bruising and some facial swelling. Loy testified that she had to have surgery on her vocal chords as a result of the attack.

On November 21, 1996, Loy entered the hospital for some other surgery. She spent the night there, and the next several days at her parents' house. Loy testified that defendant had told her that if she stayed with her parents after leaving the hospital, "there won't be nothing left for you to come home to." She returned to her home the following Monday morning on her way to taking her two children, Victoria and David, to school. She went to the front door, which was locked, and noticed no signs of forced entry. She unlocked the door and found the contents of the house in disarray. Several pieces of furniture had been gouged, including a cedar chest and end table, and her bed had been slashed. Someone had carved "I love you always, Julie, Victoria and David" in her cedar chest. Similar messages appeared elsewhere. Loy took photographs of the damaged furniture, which were admitted into evidence. She testified that the end table and cedar chest had been given to her by her parents prior to her marriage. She also testified that several items of her daughter's furniture had been gouged and damaged, including her daughter's bed and a dresser. These items had been given to her daughter by Loy's parents. Loy further testified that, to her knowledge, she and defendant were the only persons who had keys to the house.

Loy testified that when she confronted defendant about the damage, he denied having done anything. Another time, she said, he told her that she "deserved it."

She also testified that he told her he had thrown some of her items in the trash. She admitted on cross-examination that she had not seen the defendant destroy anything. Loy filed for divorce in early December 1996.

Victoria Lillian Elene Mundy, Loy's daughter and defendant's step-daughter, testified that when she and her mother had walked into their house that Monday morning, it was "trashed." There was no sign of a break-in.

Sue Loy, Loy's mother, testified that she saw her daughter at work in November 1996, and noticed some red marks on her throat. Her daughter's voice was also "real hoarse." She also testified that she had paid approximately four hundred dollars ($400) for the cedar chest she had given to her daughter, and approximately two hundred dollars ($200) for the end table. She explained that she had given both of these items to Loy prior to Loy's marriage. She further testified that she had paid about three hundred dollars ($300) for the chest she gave Victoria, and five hundred dollars ($500) for the bed they gave her.

Sergeant Ryan Casada responded to Loy's 911 call, and saw blood in her ear when he arrived.

Defendant denied strangling Loy, and denied damaging anything in the house. He testified that he didn't know who gouged the furniture, or who carved "I love you, Julie" on it. He claimed the furniture had been given to the family, and that when he and Loy filed bankruptcy, they listed their property as joint. He did not introduce any of the bankruptcy documents into evidence. He claimed to have no ill will toward Loy, and stated, "I never done nothing to hurt my wife or my family."

Joseph Blaylock, a neighbor of defendant's and Loy's, testified that he helped Loy move her things out of the house after the damage had been inflicted. He testified that he helped move an end table that was undamaged. He also testified that the house "looked like a bomb blew up in it."

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Defendant was convicted of assault, the elements of which are intentionally, knowingly or recklessly causing bodily injury to another. See T.C.A. § 39-13-101(a)(1). "Bodily injury" is defined as including "a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." T.C.A. § 39-11-106(a)(2). The evidence adduced at trial is more than sufficient to establish that, on November 7, 1996, defendant deliberately strangled Loy, causing bruising at a minimum. The evidence therefore supports the conviction, and this issue is without merit.[1]

[1]While defendant does not specifically contest the sufficiency of the evidence supporting the assault conviction in his brief on appeal, he does ask that all of his convictions be reversed. Given the procedural posture of this case, we deem consideration of the issue appropriate.

Defendant was also convicted of two counts of vandalism: one for vandalizing Victoria's property, and one for vandalizing Loy's property. Both convictions are Class E felonies, because the property in each case was valued at over five hundred dollars ($500), but less than one thousand dollars ($1,000). See T.C.A. §§ 39-14-408(c) & 39-14-105(2). An accused vandalizes property when he knowingly causes damage to or destruction of it, knowing that he does not have the owner's effective consent to do so. See T.C.A. § 39-14-408(a). The proof at trial established overwhelmingly that someone had damaged or destroyed pieces of furniture which belonged to Victoria and Loy. Although circumstantial, the evidence was also more than sufficient to establish that defendant was the culprit. Loy testified that only she and defendant had keys to the house, and she and Victoria both testified that there had been no sign of forced entry into the house. Whoever did the carving obviously knew to whom the furniture belonged. According to Loy, defendant had told her she "deserved it."

Although the evidence of the defendant's guilt is circumstantial in nature, it is a well established principle of law in this state that circumstantial evidence alone may be sufficient to support a conviction. State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). In order for this to occur, the circumstantial evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with his [or her] innocence and must exclude every other reasonable theory or hypothesis except that of guilt." State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). In addition, "it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime." Tharpe, 726 S.W.2d at 896. Moral certainty as to each element of the offense is required, but absolute certainty is not. Tharpe, 726 S.W.2d at 896.

The evidence is sufficient to identify defendant as the perpetrator of the vandalism.

The evidence is also sufficient to prove that defendant vandalized between five hundred and one thousand dollars ($500 - $1,000) worth of Loy's property. Although

defendant argues on appeal that the property was marital,[2] and therefore jointly owned, the weight of the evidence is contrary to defendant's assertion. Both Loy and her mother testified that the damaged items had been given to Loy by her parents as gifts prior to the marriage. Defendant's claim that he and Loy identified this property as joint in their bankruptcy filing is unsupported by any documentary proof. "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Loy's mother testified that she had paid approximately six hundred dollars ($600) for Loy's furniture. Loy's mother also testified that she had paid approximately eight hundred dollars ($800) for the vandalized items she had given to Victoria. The evidence is therefore sufficient to support defendant's conviction for vandalizing Loy's and Victoria's property, and this issue is without merit.

The evidence being sufficient to sustain defendant's convictions, and there being no plain error requiring reversal, the judgment of the trial court is affirmed.

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JOHN H. PEAY, Special Judge

CONCUR:

_____
GARY R. WADE, Presiding judge

_____
NORMA MCGEE OGLE, Judge

[2] See T.C.A. § § 36-4-121(b)(1)(A) & (b)(2)(A) & (D).