IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1999

FILED

January 21, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9812-CR-00442**
	)	
Appellee,	)	
	)	**HAMILTON COUNTY**
VS.	)	
	)	
DAVID MICHAEL GAMBLE,	)	**HON. STEPHEN M. BEVIL,**
	)	**JUDGE**
Appellant.	)	
	)	
	)	**(Theft)**

ON APPEAL FROM THE JUDGMENT OF THE CRIMINAL COURT OF HAMILTON COUNTY

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OPINION FILED _____

CONVICTION MODIFIED, REMANDED

DAVID H. WELLES, JUDGE

OPINION

In this appeal as of right, the Defendant, David Michael Gamble, appeals his conviction of theft of property valued at over $60,000.00. After a jury trial, he was convicted of both theft of property valued at over $60,000.00 and possession of drug paraphernalia. He challenges only the former conviction, for which he was given a suspended sentence of eight years, raising the following three issues:

> I. Whether the evidence is sufficient to support the guilty verdict for theft of property over $60,000.00.
>
> II. Whether the trial court erred by failing to instruct the jury on the lesser included offense of unauthorized use of a vehicle.
>
> III. Whether the trial court erred by allowing the State to establish the value of furniture solely through the testimony of the bailee carrier company.

Our resolution of the case addresses all three issues. We conclude that the evidence is insufficient to support the guilty verdict for theft of property over $60,000.00 and accordingly modify the conviction to one for the lesser included offense of unauthorized use of a vehicle.

The evidence at trial established that the Defendant was employed by Volunteer Trucking in Dayton, Tennessee as a truck driver. According to Alvin Harrison, the owner of Volunteer Trucking, the Defendant was assigned to take a load of La-Z-Boy furniture from Dayton, Tennessee to Nicholasville, Kentucky and then to Ohio. At that time, the Defendant had worked for Volunteer Trucking for approximately three and a half weeks. He picked up the loaded trailer in Dayton on Sunday afternoon, September 15, 1996. When Mr. Harrison arrived at work Tuesday morning, he discovered that the Defendant had not delivered

the furniture in Kentucky as expected and that the Defendant had not called the office each day as required. He learned that one of his trucks had been seen in Chattanooga, so he and Frank Booth, the operations manager, went to Chattanooga to look for the Defendant and the missing truck. They found the truck on Chestnut Street in Chattanooga. Mr. Harrison testified that when he first saw the truck, the Defendant was in the cab on the passenger side and that it appeared the Defendant was moving into the driver's seat. Other persons who were looking for the Defendant spotted him before Mr. Harrison and saw him walking toward the truck. Mr. Harrison and Mr. Booth talked to the Defendant and questioned him, but the Defendant "didn't hardly know where he was at." The Defendant responded "I don't know" to all the questions asked.

Mr. Harrison inspected the truck and noticed that the metal DOT seal, which guarantees that the load "has not been tampered with in transit," was missing from the back door. There was a padlock hanging on the back of the door, but it was not secured. Mr. Harrison stated that the lock was bent and that he did not think it was operable. He said that the company does not provide locks for the truck doors.

Inside the truck was a partial load of the La-Z-Boy furniture. Mr. Harrison had signed for sixty-six boxes of furniture, and only forty plus were present in the truck. The manufacturer's identification was missing from one box of furniture that remained in the truck. Mr. Harrison testified that he had people go through the neighborhood where the truck was found looking for the missing furniture, but they did not find anything. He further testified that he paid $79,000 for the truck and $16,200 for the trailer, that he was billed $9,900 for the missing furniture, and

that the entire shipment was valued at $25,000.00. He said that he had purchased the truck and trailer four years earlier, that he had depreciated 4/5 of the value of the truck and 4/7 of the value of the trailer, and that he would need to consult an expert to determine the current value of the truck and trailer. He also reported he had put over 500,000 miles on the truck and trailer.

Mr. Harrison testified that the Defendant did not have permission to use the tractor or trailer for his own purposes or to dispose of any of the furniture in the truck. He further testified that he did not know of any logical reason for the Defendant to deviate to Chattanooga when traveling from Dayton to Kentucky and Ohio. The Defendant did, however, have permission to have possession of the truck and trailer for the purposes of his employment. Mr. Harrison stated that the normal practice for employees is to take the trucks home with them and then leave from their homes, but because the Defendant was a new employee, he did not know whether the Defendant was authorized to take the truck home with him. He also stated that drivers are not given a precise route to follow in their deliveries, although they are expected to take the most practical route.

Frank Booth, the operations manager at Volunteer Trucking, testified that he was with Mr. Harrison when they found the Defendant in Chattanooga. Mr. Booth asked the Defendant where he had been for the past three days, why he had not called into work, and what he was doing in that location, and the Defendant always responded, "I don't know." Mr. Booth stated that the Defendant was "incoherent" when they found him.

Sergeant Kenneth Shrum of the Chattanooga Police Department was eventually called to the location of the tractor and trailer. He obtained permission from Mr. Harrison to search the truck for any evidence pertaining to the case and then discovered a ceramic wire insulator, which is commonly used as a crack pipe, in a cup holder in the cab of the truck. The pipe had burn residue in the bottom of it. Sergeant Shrum testified that the truck was found in a "high crime area." He did not talk to anyone who saw the Defendant take any furniture from the truck or who received any of the furniture from the truck.

Patricia Moore testified that she lived on Huffaker Street in Chattanooga, about ten or eleven blocks from where the truck was found. Her husband worked as a truck driver for Volunteer Trucking in Dayton. She stated that on September 17, 1996, she heard a truck coming and went outside because she thought it might be her husband returning home. She saw a blue Freightliner with the trailer attached drive through the neighborhood. She thought it was strange for the truck to have the trailer attached because the streets are narrow and difficult to navigate. The truck did not stop in her neighborhood. Ms. Moore agreed that she lives in a "high crime area," but stated that she did not know of anyone who had received any of the furniture from the truck.

Arlene Harris was the only witness to testify for the defense. She testified that she and the Defendant lived together at 321 Thrasher Pike in Soddy Daisy and that they shared the responsibility of raising her four children and the Defendant's daughter. At the time of trial, she and the Defendant had known each other for six years and had lived together at that address for four years. She said that the Defendant usually brought the truck home with him from Dayton

and then left from Soddy Daisy. On this occasion, the Defendant went to Dayton on Sunday afternoon to pick up the truck and trailer and then returned to their house in Soddy Daisy. He picked up his clothing for the trip, argued with Ms. Harris over finances, and then left. She did not hear from him again until after he had been arrested. When she asked him what happened, he responded, "I really don't know what was going on and what happened."

The Defendant challenges the sufficiency of the convicting evidence. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). Evidence is sufficient if, after reviewing 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 (1979). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992) (citing State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1976), and State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977)); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Holt v. State, 357 S.W.2d 57, 61 (Tenn. 1962).

In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Tuggle, 639 S.W.2d at 914 (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). The court may not "re-weigh or re-evaluate the evidence" in the record below. Evans, 838 S.W.2d at 191 (citing Cabbage, 571 S.W.2d at 836). Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. Tuggle, 639 S.W.2d at 914.

The indictment in this case alleged that the Defendant

> did unlawfully and knowingly obtain or exercise control over a 1990 Freightline tractor, trailer and sixty-five (65) assorted pieces of La-Z-Boy furniture, valued at over $60,000.00, belonging to Volunteer Trucking without the owner's effective consent and with the intent to deprive the owner of said property, in violation of Tennessee Code Annotated 39-14-103, against the peace and dignity of the State.

A person commits the crime of 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." Tenn. Code Ann. § 39-14-103. Thus, to convict the Defendant of theft of property valued at over $60,000.00, the State was required to prove beyond a reasonable doubt (1) that the Defendant obtained or exercised control over the truck and its contents without the owner's effective consent, (2) that the property was valued at over $60,000.00, and (3) that the Defendant intended to deprive the owner of the property.

Even though the Defendant had the owner's effective consent to originally take and possess the property, we believe that the State did prove beyond a reasonable doubt that the Defendant subsequently exercised control over the

truck and its contents without the owner's effective consent. The evidence showed that the Defendant picked up the loaded truck and trailer as expected, but then spent the next two and a half to three days in Chattanooga instead of delivering the load to Kentucky and Ohio as obligated. The Defendant did not have the owner's effective consent to possess the truck in Chattanooga instead of delivering its contents to Kentucky and Ohio; therefore, by failing to deliver the contents and by instead possessing the truck and its contents in Chattanooga, the Defendant exercised control over the truck and its contents without the owner's effective consent. See State v. Lon Womac, C.C.A. No. 03C01-9405-CR-00186, 1995 WL 276252, *4 (Tenn. Crim. App., Knoxville, May 11, 1995) (upholding guilty verdict of theft when defendant lawfully received property but then exercised control over it with intent to deprive owners of property).

The State did not, however, prove beyond a reasonable doubt that the value of the property was over $60,000.00. While Mr. Harrison testified that he paid $79,000.00 for the truck and $16,200.00 for the trailer four years earlier, he also stated that he had depreciated 4/5 of the truck's value and 4/7 of the trailer's value, that he had put over 500,000 miles on the truck and trailer, and that he would have to consult an expert to determine the value of the truck and trailer on the date that the Defendant took possession of it. He candidly admitted that he did not know how much the tractor-trailer rig was worth at the time it was taken. In light of the owner's admission that he did not know the value of the truck and trailer on September 15, 1996, we do not believe a rational juror could have found beyond a reasonable doubt that the value of the truck and trailer exceeded $60,000.00.

If we could accept Mr. Harrison's testimony as proof that the value of the shipment was $25,000.00, then, arguably, a rational juror could have found that the total value of the property taken, including the truck, trailer, and cargo, was over $60,000.00. However, the trial court allowed Mr. Harrison to testify as to the value of the cargo in the truck "according to the manifest that [Harrison] signed" because the cargo belonged to La-Z-Boy, not to Mr. Harrison. Mr. Harrison was the bailee of the property. Pursuant to Tennessee Rule of Evidence 701(b), a witness may testify as to the value of the witness's own property or services. In the case of State v. Bridgeforth, 836 S.W.2d 591, 593 (Tenn. Crim. App. 1992), we held that this rule permitted only the owner of property to testify as to its value, and we construed the word "owner" to mean only the person who has title to the stolen property. In so doing, we reversed the defendant's conviction for theft where we determined that the president of a trucking company, who testified that his company paid Toshiba $7,463.34 for televisions allegedly taken by the company's employee, was not qualified to testify as to the value of the stolen property because the title owner to the property was Toshiba. Id. at 592-93. As a result, there was no competent proof of the value of the property taken, rendering the evidence insufficient to support the guilty verdict. See id. Such is the outcome in this case as well. Because Mr. Harrison, who was not the owner of the property, was not qualified to testify as to the value of the furniture in the truck and because he said he could not testify as to the value of his truck and trailer on the date in question, the evidence was insufficient to establish beyond a reasonable doubt that the property taken was valued at over $60,000.00.

In addition, we believe the evidence was insufficient to establish that the Defendant intended to deprive the owner of the property. A person acts with

"intent" when "it is the person's conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-106(18). "Deprive" means to

> (A) [w]ithhold property from the owner permanently or for such a period of time as to substantially diminish the value or enjoyment of the property to the owner;
> (B) . . . ; or
> (C) [d]ispose of property or use it or transfer any interest in it under circumstances that make its restoration unlikely.

Id. § 39-11-106(8). While the Defendant may have permanently deprived the owner of some of its property and temporarily deprived the owner of other property, there was not enough evidence for a rational juror to have found beyond a reasonable doubt that it was the Defendant's conscious objective or desire to do so. Taking the evidence in the light most favorable to the State, the Defendant picked up the loaded truck and trailer from Dayton, and instead of delivering the furniture as expected, he spent the next two and a half to three days in Chattanooga. He was found in possession of the truck, which only contained 2/3 of the furniture it should have contained. When he was found, he was "incoherent" and could not offer any explanation of where he had been or what he had been doing. A crack pipe was found in the truck with burn residue on it.

A crime may be established by circumstantial evidence alone. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987). However, before an accused may be convicted of a criminal offense based only upon circumstantial evidence, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 470 S.W.2d 610, 612 (1971). In other words, a "web of guilt must be woven

around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Id. at 613.

From the evidence presented, one could speculate that the Defendant took the property with the intent to sell the furniture to buy crack cocaine and to permanently deprive the owner of the property. However, no one saw the Defendant sell the furniture, and the truck was parked in a "high crime area" of Chattanooga where others would have had access to it. The Defendant was found in an "incoherent" state. It seems just as likely, if not more so, that the Defendant's desire for crack cocaine overcame him, and he stopped in Chattanooga to fulfill that desire. He then spent the next couple of days under the influence of drugs, which prevented him from delivering the furniture. Regardless, this is all speculation, and we cannot "speculate a defendant into the penitentiary or permit a jury to do so." Id. The Defendant's actions were no doubt irrational, irresponsible, and wrongful, and they would most likely give rise to a civil action for damages, but the evidence of intent to deprive is not "so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." Id. at 612. Consequently, we are constrained to hold that the evidence was insufficient to support the conviction for theft of property valued over $60,000.00 or for theft of property of any value.

The Defendant also argues on appeal that the trial court erred by failing to instruct the jury on unauthorized use of a vehicle as a lesser included offense. See Tenn. Code Ann. § 39-14-106. We agree. We first note that at the time of the trial of this case, this Court had specifically held that unauthorized use of a

vehicle was a lesser included offense of theft of a vehicle. State v. Brooks, 909 S.W.2d 854, 860 (Tenn. Crim. App. 1995). In State v. Brenda Anne Burns, No. W1996-00004-SC-R11-CD, 1999 WL 1006315, at *12 (Tenn., Jackson, Nov. 8, 1999), the Tennessee Supreme Court established a new test for determining whether an offense is a lesser included offense. Now, an offense is a lesser included offense if

> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
>
> > (1) a different mental state indicating a lesser kind of culpability; and/or
> >
> > (2) a less serious harm or risk of harm to the same person, property or public interest; or
>
> (c) . . . .

Id. We believe that unauthorized use of a vehicle continues to be a lesser included offense of theft of a vehicle because it meets the requirements of part (b) of the Burns test.

"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." Tenn. Code Ann. § 39-14-103. The unauthorized use of a vehicle statute provides that "[a] person commits a Class A misdemeanor who takes another's automobile, airplane, motorcycle, bicycle, boat or other vehicle without the consent of the owner and the person does not have the intent to deprive the owner thereof." Id. § 39-14-106. Because the unauthorized use of a vehicle statute contains the additional element of the taking of a vehicle, as opposed to just the taking of any property, it does not satisfy part

(a) of the Burns test, which requires that all of the statutory elements of the lesser offense be included within the statutory elements of the greater. See Burns, 1999 WL 1006315, at *12. If a person obtains or exercises control over something other than a vehicle, the person might be guilty of theft, but could never be guilty of unauthorized use of a vehicle; thus, all of the statutory elements of unauthorized use of a vehicle are not included within the statutory elements of theft.

However, we believe that the language of the unauthorized use of a vehicle statute satisfies part (b) of the Burns test, making the unauthorized use of a vehicle a lesser included offense of theft in this case. See Burns, 1999 WL 1006315, at *12. The offense fulfills the requirement of part (b)(1) of the test in that it establishes a different mental state indicating a lesser kind of culpability because the offender need not have the intent to deprive the owner of the vehicle. In State v. Brooks, 909 S.W.2d 854 (Tenn. Crim. App. 1995), we noted that the sole difference between theft of a vehicle and unauthorized use of a vehicle is the offender's intent. Id. at 860. Also, the taking of a vehicle without the intent to deprive the owner of that vehicle causes less serious harm or risk of harm to the owner and the property because the owner is more likely to get the property back; thus the offense meets the requirement of part (b)(2) of the Burns test as well. Therefore, under the facts of this case, unauthorized use of a vehicle is a lesser included offense of theft.

When evidence exists at trial that reasonable minds could accept to establish a lesser included offense and when the evidence is legally sufficient to support a conviction for the lesser included offense, the trial court is under the

mandatory duty to instruct the jury on the lesser included offense. Burns,1999 WL 1006315, at *14; Tenn. Code Ann. § 40-18-110(a). The Defendant here was charged with the theft of a truck, trailer, and cargo. As already noted, the evidence was sufficient to establish that the Defendant exercised control over the truck without the owner's effective consent because he did not have permission to take the truck and then remain in Chattanooga for the next three days. This is all that is required to support a conviction for unauthorized use of a vehicle. See Tenn. Code Ann. § 39-14-106. Consequently, the trial court should have instructed the jury on the lesser included offense. The jury's verdict reflects that it determined that the Defendant took the truck without the owner's effective consent. Because the evidence was sufficient to establish the elements of the lesser included offense, but was insufficient to establish the elements of the greater offense, we modify the conviction to unauthorized use of a vehicle in violation of Tennessee Code Annotated § 39-14-106 and remand this case to the trial court for sentencing for this offense.

The Defendant's conviction for theft is reversed and vacated. The judgment is modified to reflect a conviction for unauthorized use of a vehicle. See Tenn. Code Ann. § 39-14-106. This case is remanded for sentencing for this offense.

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DAVID H. WELLES, JUDGE

CONCUR:

_____
GARY R. WADE, PRESIDING JUDGE

_____
DAVID G. HAYES, JUDGE