IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER SESSION, 1999

STATE OF TENNESSEE,	)	**C.C.A. NO. ~~01C01-9811-CC-00458~~ M1998-00654-CCA-R3-CD**
Appellee,	)	
	)	**ROBERTSON COUNTY**
V.	)	
	)	
	)	**HON. ROBERT W. WEDEMEYER**
TERRY LUCAS,	)	
	)	**(THEFT OF PROPERTY WORTH**
Appellant.	)	**$10,000.00 OR MORE)**

FOR THE APPELLANT:

MICHAEL R. JONES
District Public Defender
110 Sixth Avenue, West
Springfield, TN 37172

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

TODD R. KELLEY
Assistant Attorney General
2nd Floor, Cordell Hull Building
425 Fifth Avenue North
Nashville, TN 37243

JOHN WESLEY CARNEY, JR.
District Attorney General

JOEL PERRY
Assistant District Attorney General
500 South Main Street
Springfield, TN 37172

OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

Defendant Terry Lucas was indicted by the Robertson County Grand Jury for theft of property worth $10,000.00 or more. Following a jury trial, Defendant was convicted of theft of property worth $10,000.00 or more. The trial court subsequently sentenced Defendant as a Range III persistent offender to a term of ten and one half years in the Tennessee Department of Correction. Defendant challenges his conviction, raising the following issues:

> 1) whether the trial court erred when it allowed a police chief to testify about the value of a police vehicle and a police dog;
>
> 2) whether the trial court abused its discretion when it denied a motion for a mistrial;
>
> 3) whether the evidence was sufficient to support Defendant's conviction
>
> 4) whether the prosecutor misstated the law during his closing argument; and
>
> 5) whether the trial court erred when it failed to grant a motion for judgment of acquittal.

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

I. FACTS

Officer Terry Dorris of the Springfield, Tennessee Police Department testified that he responded to a call at a Springfield bar known as Mr. B's on the evening of November 7, 1997. When Dorris arrived at Mr. B's and exited his patrol vehicle, he observed that a customer of the bar had passed out in front of the bar and he also observed that Defendant was in front of the bar.

Officer Dorris testified that he rendered assistance to the customer who had passed out until an ambulance arrived. When the ambulance left the scene, Officer Mark Langford pulled up and asked Dorris who was driving his vehicle. At this point, Dorris turned around and saw that his patrol vehicle and his police dog that was in the vehicle were gone. Dorris also noticed that Defendant was no longer at the

scene. Dorris then reported the incident to dispatch. Dorris' records indicated that his vehicle and dog were taken at 11:52 p.m.

Officer Dorris testified that he subsequently discovered his damaged vehicle and his police dog at 1320 Cheatham Street, where the vehicle had been wrecked against the front of a house. The record indicates that 1320 Cheatham Street is approximately one third of a mile from Mr. B's.

Officer Mark Langford testified that when he was responding to the call from Mr. B's at approximately midnight on November 7, 1997, he observed Officer Dorris' vehicle traveling down Cheatham Street. Langford noticed that the headlights of the vehicle were not on. About ten seconds later, Langford asked Dorris who was driving his vehicle and Dorris reported the missing vehicle to the dispatcher.

Linda Ross testified that while she was in her home at 1320 Cheatham Street at approximately midnight on November 7, 1997, a police vehicle crashed into her home. When Ross looked outside immediately thereafter, she saw a black male running through the alley beside her house that connected Cheatham Street with Parham Street. Although Ross could not identify the individual, she could see that he was wearing dark clothing and she estimated that he was approximately five feet five inches tall. The record indicates that Defendant is an African American male who is five feet seven inches tall.

Officer Ricky Morris testified that on November 7, 1997, he saw Defendant running down Parham Street. Morris also observed that Defendant was wearing dark clothing. When Morris approached Defendant and asked whether anything was wrong, Defendant stated that nothing was wrong. Immediately thereafter, Morris heard a report on the radio that Dorris' car had been stolen and had just been found in the area that Defendant was running away from. Morris then told Defendant he

was not under arrest, but he would like Defendant to accompany him to the police station. Morris' records indicated that he encountered Defendant at 11:54 p.m.

Chief Mike Wilhoite testified that as part of his job as the Springfield Police Chief, he had purchased between thirty and forty police vehicles and he had also purchased several police dogs. Wilhoite opined that the police vehicle and its equipment had a value of $6,500.00 and the police dog had a value of $5,000.00.

II. EXPERT TESTIMONY

Defendant contends that the trial court erred when it allowed Chief Wilhoite to give his opinion about the value of the police vehicle and the police dog.

Expert testimony is governed by Rule 702 of the Tennessee Rules of Evidence, which provides:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tenn. R. Evid. 702. "Questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court, whose ruling will not be overturned in the absence of abuse or arbitrary exercise of discretion." State v. Begley, 956 S.W.2d 471, 475 (Tenn. 1997).

During a jury out hearing, Chief Wilhoite testified that he had been with the Springfield Police Department for twenty-four years and he had been the Chief of Police for approximately eight years. Wilhoite testified that during that time, he had purchased between thirty and forty police vehicles. Wilhoite also testified that he had purchased the police dog assigned to Officer Dorris and he had also participated in the purchase of every police dog in the city since 1976. During cross-examination,

Wilhoite admitted that although the city sold used police vehicles during yearly auctions, he did not participate in the sale of the vehicles and he was not familiar with the price that had been paid for the used vehicles.

In response to questioning from the trial court, Chief Wilhoite stated that he knew that the value of the police car was at least $5,800.00 because the repair estimate from the insurance company was for that amount. Wilhoite also stated that the police vehicle had $2,000.00 of equipment such as the radio and the siren. In response to further questioning from the trial court, Wilhoite stated that based on the purchase price of the dog and the additional cost of training, the dog was worth $5,000.00. The trial court then concluded that based on Wilhoite's experience and knowledge obtained from purchasing numerous police vehicles and police dogs, he would be allowed to give his opinion as to the value of the vehicle and dog.

Although it is admittedly a close call, we are unable to conclude that the trial court abused its discretion when it allowed Chief Wilhoite to give an expert opinion on the value of the police vehicle and police dog. Because of his experience in purchasing numerous police vehicles and police dogs over a twenty-four year period and his familiarity with the costs of police vehicle equipment and the costs of training police dogs, Wilhoite had superior knowledge in determining the value of the police vehicle and police dog in this case. Thus, we conclude that the trial court did not abuse its discretion when it allowed Wilhoite to give his opinion about the value of these items. Defendant is not entitled to relief on this issue.

III. MOTION FOR A MISTRIAL

Defendant contends that the trial court erred when it failed to grant his motion for a mistrial after one of the State's witnesses commented on Defendant's failure to respond to police questioning after he was advised of his constitutional right to remain silent.

During the direct examination of Detective William Watkins, the following colloquy occurred:

> [Prosecutor]: Now, what did you do after going out and taking pictures of the car [at 1320 Cheatham Street]?
> [Watkins]: I was notified that patrol had a person in custody and wanted to know if I wanted to talk with them.
> [Prosecutor]: And did you talk with that person?
> [Watkins]: Yes.
> [Prosecutor]: Who was that person?
> [Watkins]: Terry Lucas.
> . . . .
> [Prosecutor]: Was he under arrest at the time?
> [Watkins]: No, sir.
> [Prosecutor]: In any event, did you inform him of his rights?
> [Watkins]: Yes, I did.
> . . . .
> [Prosecutor]: What was the–-did you make an attempt to question the defendant?
> [Watkins]: Yes, I did.
> [Prosecutor]: Did he answer any questions?
> [Watkins]: No—

At this point, defense counsel objected and moved for a mistrial. The trial court sustained the objection, but did not give any curative instruction.

The decision of whether to grant a mistrial is within the sound discretion of the trial court. State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). This Court will not disturb that decision absent a finding of an abuse of discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990). "Generally, a mistrial will be declared in a criminal case only when there is a 'manifest necessity' requiring such action by the trial judge." State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). In determining whether there is a "manifest necessity" for a mistrial, "'no abstract formula should be mechanically applied and all circumstances should be taken into account.'" State v. Mounce, 859 S.W.2d 319, 322 (Tenn. 1993) (citation omitted).

It is well-established that a defendant has a constitutional right to remain silent in the face of accusation and the prosecution generally may not comment at trial that

a defendant invoked that right. See Braden v. State, 534 S.W.2d 657, 660 (Tenn. 1976); Ware v. State, 565 S.W.2d 906, 908 (Tenn. Crim. App.1978). However, a comment on the defendant's silence may be harmless error that does not require a mistrial. See Honeycutt v. State, 544 S.W.2d 912, 917–18 (Tenn. Crim. App. 1976).

We agree with Defendant that Watkins' comment was improper. However, we do not agree that the comment created a "manifest necessity" for a mistrial. First, there is no implication that the prosecutor deliberately elicited the comment in order to create an inference of Defendant's guilt. See id. at 917. Second, when the brief comment is viewed in context, it does not appear that the jury would necessarily draw an inference of guilt from it. See id. at 917–18. Third, the prosecutor made absolutely no reference to Defendant's silence during the closing argument. See, e.g., State v. Mabe, 655 S.W.2d 203, 204 (Tenn. Crim. App. 1983) (reversing defendant's conviction because prosecutor's closing argument focused heavily on defendant's invocation of his right to remain silent). Finally, we note that although no curative instruction was given after the improper comment, no such instruction was requested. After taking into account all of the relevant circumstances, we conclude that the trial court did not abuse its discretion when it denied the motion for a mistrial. Defendant is not entitled to relief on this issue.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the evidence was insufficient to support his conviction.

Where the sufficiency of the evidence is contested on appeal, the relevant question for the reviewing court is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). 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). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this Court is required to afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Tuttle, 914 S.W.2d 926, 932 (Tenn. Crim. App.1995). Since a verdict of guilt removes the presumption of a defendant's innocence and replaces it with a presumption of guilt, the defendant has the burden of proof on the sufficiency of the evidence at the appellate level. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Under Tennessee law, a person commits Class C felony theft when, "with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent" and the property is worth $10,000.00 or more. Tenn. Code Ann. §§ 39-14-103, -105(4) (1997). In addition, "[d]eprive means to: [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." Tenn. Code Ann. § 39-11-106(a)(8)(A) (1997).

A. Identity

Initially, Defendant contends that the evidence was insufficient to establish that he was the person who took the police property without consent. Specifically, Defendant argues that the circumstantial evidence in this case was insufficient to establish his identity as the perpetrator. It is true that where the evidence is entirely circumstantial, the evidence must allow the jury to exclude every other reasonable theory or hypothesis except that of guilt. State v. Ball, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). Of course, "[l]ike all other fact questions, the determination of whether all reasonable theories or hypotheses are excluded by the evidence is primarily a jury question." Id.

We conclude that when the evidence is viewed in the light most favorable to the State, as it must be, the evidence was sufficient for a rational jury to find beyond a reasonable doubt that Defendant was the person who took the police property without consent. When Officer Dorris arrived at Mr. B's and exited his patrol vehicle, he observed that Defendant was in front of the bar. Shortly thereafter when Dorris realized that his vehicle and dog were missing, he also noticed that Defendant was gone. When Ross looked outside immediately after she heard the police vehicle crash into her house, she saw a black male running through the alley beside her house that connected Cheatham Street with Parham Street. Although Ross could not identify the individual, she could see that he was wearing dark clothing and was approximately the same height as Defendant. Officer Morris then saw the Defendant running down Parham Street away from the area where the crash had occurred. Morris also observed that Defendant was wearing dark clothing. Finally, all of the above events took place between 11:52 and 11:54 p.m. Under these circumstances, we conclude that a rational jury could find beyond a reasonable doubt that Defendant was the person who took the police property without consent. Defendant is not entitled to relief on this issue.

B. Intent

Defendant also contends that even if the evidence was sufficient to establish that he was the person who took the police property without consent, the evidence was still insufficient to support a conviction for theft. Specifically, Defendant contends that the evidence was only sufficient to show that he committed the offense of joyriding because there was no proof that he had the "intent to deprive" the owner of the police property when he took it.

Under Tennessee law, joyriding occurs when a person "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."

Tenn. Code Ann. § 39-14-106 (1997). This Court has previously explained that "the sole difference between theft of a vehicle and joyriding [is] the offender's intent." State v. Brooks, 909 S.W.2d 854, 860 (Tenn. Crim. App. 1995). Unless the offender has "intent to deprive" as defined by statute, the offense is joyriding rather than theft. Id.

The State contends that the evidence was sufficient to support the theft conviction because regardless of Defendant's intent when he took the police vehicle, the offense was automatically converted to a theft when Defendant wrecked the vehicle. We cannot agree with the proposition that when a person commits the offense of joyriding by taking a vehicle without "intent to deprive," the offense is automatically converted to theft if the person accidently wrecks the vehicle while driving away. As previously stated, a person commits theft when the person takes property without consent and with intent to "[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." Tenn. Code Ann. §§ 39-11-106(a)(8)(A), 39-14-103 (1997). Without question, wrecking a vehicle would substantially diminish the value or enjoyment of the vehicle to the owner and thus, a person would be guilty of theft if he or she took a vehicle with the intent to wreck it. However, it is equally clear that under the express terms of the statute, the offense of theft is only committed when property is taken with "intent to deprive" and not when property is taken without "intent to deprive" and is subsequently damaged through accidental means.

Nevertheless, we conclude that when the evidence is viewed in the light most favorable to the State, the evidence was sufficient for a rational jury to find beyond a reasonable doubt that Defendant had "intent to deprive" when he took the police property. The evidence shows that while Officer Dorris was on-duty, he responded to a call at Mr. B's. Dorris exited his vehicle to render assistance, but he left the vehicle running and he left the keys in the ignition. Defendant, who was standing in

front of the bar, then entered the vehicle and drove away. The photographs of the vehicle in the record indicate that the vehicle is clearly identified by the words "Springfield Police" printed on the side of the vehicle and in addition, "K-9" also appears in red letters on the side of the vehicle.

It is well-established "that a jury may infer a criminal defendant's intent from the surrounding facts and circumstances." State v. Roberts, 943 S.W.2d 403, 410 (Tenn. Crim. App. 1996). In fact, in most cases the jury must infer the defendant's intent from circumstantial evidence. Id. We conclude that the jury could properly infer that when Defendant took the clearly identifiable police vehicle and dog away from an officer who was obviously on-duty and would need the vehicle and dog in order to perform his duties, Defendant intended to withhold the police property from the owner "for such a period of time as to substantially diminish the value or enjoyment of the property to the owner." By taking the vehicle and dog away from an on-duty officer, Defendant substantially diminished the value or enjoyment of the property to the Springfield Police Department because the property was of absolutely no use to the department while it was out of the officer's possession, even though it was only out of the officer's possession for a short time. Defendant is not entitled to relief on this issue.

V. CLOSING ARGUMENT

Defendant contends that the trial court erred when it allowed the prosecutor to make the following comment during his closing argument:

> The State's contention is that this could not possibly be joyriding. First off, it possibly could be if the car had [been] sitting there on the side of the road with the keys in it and that type of situation, but it is our contention that the defendant wrecked the car and then fled the scene. It is also our contention that once he wrecked the car and then fled the scene, he diminished the value of the car and that in and of itself is the taking of the car. So any way you slice it, the State believes that this is an out-and-out theft and not a mere joyriding.

We agree that the above argument is based on an incorrect interpretation of the law. However, Defendant waived this issue by failing to make a contemporaneous objection when the comment was made. See State v. Bush, 942 S.W.2d 489, 515 (Tenn. 1997).

Moreover, we note that the trial court instructed the jury that the remarks and arguments of counsel are not evidence. The court then gave proper instructions on the burden of proof, the elements of theft and joyriding, and the definitions of the terms used in the relevant statutes. Thus, any error in the prosecutor's comment was harmless. See Tenn. R. Crim. P. 52(a). Defendant is not entitled to relief on this issue.

VI. MOTION FOR JUDGMENT OF ACQUITTAL

Defendant contends that the trial court erred when it failed to grant his motion for judgment of acquittal. Specifically, Defendant argues that the trial court erred because it based its conclusion on the erroneous proposition that the act of wrecking the vehicle automatically converted any joyriding offense to theft.

Defendant's argument is not entirely accurate. The record indicates that the trial court denied the motion because the jury could have found that Defendant substantially diminished the value of the property during the wreck or because the jury could have found that when Defendant took the police property, he intended to destroy or withhold it from the owner permanently. The standard by which the trial court determines whether to grant a motion for judgment of acquittal is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction. State v. Ball, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). That is, whether, 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. See Tenn. R. App. P. 13(e); Jackson v.

Virginia, 443 U.S. at 319, 99 S.Ct. at 2789. As discussed in Part IV of this Opinion, the evidence in this case was sufficient to support Defendant's conviction. Thus, we conclude that the trial court did not err when it denied the motion for judgment of acquittal. Defendant is not entitled to relief on this issue.

Accordingly, the judgment of the trial court is AFFIRMED.

_____
THOMAS T. WOODALL, Judge

CONCUR:

_____
JOE G. RILEY, JR., Judge

_____
JAMES CURWOOD WITT, JR., Judge