

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1994

**FILED**

**November 13, 1995**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

STATE OF TENNESSEE )  
)  
                          APPELLEE )  
)  
V.                                  )  
)  
PRISCILLA ANN LAWSON      )  
)  
                                  APPELLANT )

NO. 03C01-9311-CR-00388  
HAWKINS COUNTY  
HON. JAMES E. BECKNER, JUDGE  
(Vandalism over \$1,000.00, but  
less than \$10,000.00)

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AFFIRMED AS MODIFIED

OPINION FILED: \_\_\_\_\_

JERRY SCOTT, PRESIDING JUDGE

## OPINION

Charged with civil rights intimidation, in violation of Tenn. Code Ann. § 39-17-309(b)(3), the appellant was convicted of vandalism over \$1,000.00, but less than \$10,000.00, in violation of Tenn. Code Ann. § 39-14-408(a). Following a sentencing hearing, the appellant was sentenced to two years and six months to be served with the Tennessee Department of Correction as a Range I standard offender. The jury assessed a fine in the amount of \$625.00 and restitution in the amount of \$625.00.

The appellant has presented four issues for review on appeal, one of which is the sufficiency of the evidence.

Around August 15, 1992, union members at Assured Castings in Rogersville, Tennessee, a subsidiary of Leggett and Platt, Inc., voted to strike. Regina Klepper, a member of the union, decided to continue working instead of striking. When she arrived at work on August 15, 1992, Mrs. Klepper encountered a picket line. One of the people on the line told her to "turn around and go back," but she refused. The appellant, who was a friend of Mrs. Klepper, and a co-defendant in the trial court, Shannon Renee Davis, were in the picket line and told Mrs. Klepper that "they would get even with [her] one way or the other."

As Mrs. Klepper left her home on the morning of September 3, 1992, to catch her ride to work, she noticed two "jackrocks" or roofing nails lying on the side of the road by her car. She did not inform her husband, Ronald Klepper, of their presence at that time because she was in a hurry.

About thirty minutes later, Mr. Klepper left the house to go to his place of employment. Immediately upon leaving the house, he noticed an unknown substance on his automobile. He took the automobile to the car wash and rinsed

it off, but the caustic substance had already consumed the paint down to the metal. Mr. Klepper went on to work from the car wash. When he arrived home from work that afternoon, he discovered a large quantity of nails scattered in the driveway and a broken window in his daughter's bedroom. When Mrs. Klepper subsequently arrived, her daughter told her about the substance on the car and she also saw the broken window. At that point, Mrs. Klepper telephoned the plant manager at Assured Casings and the police department. The fair market value of the damage to the automobile and the bedroom window was estimated to be \$1,200.00.

Patrick Johnson, an officer employed by the Rogersville Police Department, arrived at the Klepper residence and was informed of the events which had transpired at the premises. He was also notified of a possible witness, David Ogle.

Mr. Ogle, a cousin of Mr. Klepper's, was living across the street from the Klepper residence on September 3, 1992. He was employed at Hardee's restaurant and usually awoke at 3:00 A.M. so he could be at work by 4:30 A.M. Mr. Ogle went outside on the front porch that morning between 3:00 and 3:30 A.M. He observed three people "messing around with the [Kleppers'] car." He also observed them throw something on the car and heard what sounded like keys hitting concrete. As the three individuals departed, two of them went under a street light, which allowed Mr. Ogle to have a clear view of them. He immediately recognized one to be the appellant and the other as Shannon Davis, although he was unaware of Ms. Davis' name at that time. He had previously seen both of them dropping off Mrs. Klepper after work in the afternoons. He also testified that he saw the appellant and Ms. Davis at Hardee's restaurant about ten minutes after he arrived at work. On September 4, 1992, Mr. Ogle made a positive identification of the appellant and Ms. Davis to Mr. Johnson from a photograph in the local newspaper, which had no names or other identification

under it.

The appellant testified and presented testimony by several witnesses that she was on the picket line at the time the incident occurred and that she did not patronize the Hardee's restaurant on the morning of September 3, 1992.

The pertinent portion of the statute prohibiting vandalism, codified at Tenn. Code Ann. § 39-14-408(a) and (b)(1) provides:

(a) Any person who knowingly causes damage to or the destruction of any real or personal property of another...knowing that he does not have the owner's effective consent is guilty of an offense under this section(b)(1) ... "Damage" includes, but is not limited to: (A) Destroying, polluting or contaminating property; or (B) Tampering with property and causing pecuniary loss or substantial inconvenience to the owner or a third person.

The principles which govern this Court's review of a conviction by a jury are settled. This Court must review the record to determine if the evidence adduced at trial was sufficient "to support the finding of the trier of fact of guilt beyond a reasonable doubt." Tenn.R.App.P. 13(e). This rule is applicable to determinations of guilt predicated upon direct evidence, circumstantial evidence, or a combination thereof. State v. Matthews, 805 S.W.2d 776, 779 (Tenn.Crim.App. 1990).

In examining the sufficiency of the evidence, this Court does not re-evaluate the weight or credibility of the witnesses' testimony, as those are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Wright, 836 S.W.2d 130, 134 (Tenn.Crim.App. 1992). Nor may this Court substitute its inferences for those

drawn by the trier of fact from circumstantial evidence. Liakas v. State, 1199

Tenn. 298, 305, 286 S.W.2d 856, 859 (1956).

A jury verdict of guilty, approved by the trial judge, accredits the testimony of the state's witnesses and resolves all conflicts in favor of the theory of the state. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal the state is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Moreover, a verdict against the appellant removes the presumption of innocence and raises a presumption of guilt on appeal, State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), which the appellant has the burden of overcoming. State v. Brown, 551 S.W.2d 329, 330 (Tenn. 1977).

Where the sufficiency of the evidence is at issue, the relevant question on appeal is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have determined that the essential elements of the crime were established beyond a reasonable doubt. Tenn.R.App.P. 13(e); Jackson v. Virginia. 443 U.S. 307, 314-324, 99 S.Ct. 2781, 2786-2792, 61 L.Ed.2d 560 (1979). In addition, a conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the [defendant] and the [defendant] alone." State v. Crawford, 225 Tenn. 478, 484, 470 S.W.2d 610, 613 (1971).

Based on the testimony concerning the threats levied at Mrs. Klepper, the evidence discovered at the Klepper residence, and the absolutely positive identification of the appellant by Mr. Ogle, and given the narrow confines of this Court's review, it is clear that there was ample, indeed overwhelming, evidence

from which any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. The sufficiency issue has no merit.

The appellant next contends that the trial court erred by denying her motion for a change of venue. This issue is waived on two distinct grounds. First, the appellant has failed to include appropriate references to the record, State v. Killebrew, 760 S.W.2d 228, 231 (Tenn.Crim.App. 1988); State v. Moore, 713 S.W.2d 670, 675-76 (Tenn.Crim.App. 1985), or to cite any authority to support her contentions.<sup>1</sup> Killebrew, *supra*, at 231; State v. Smith, 735 S.W.2d 831, 836 (Tenn.Crim.App. 1987). Pursuant to Rule 27(a)(7), Tenn.R.App.P., a brief submitted to this Court is required to contain "citations to the authorities and appropriate references to the record...relied on." Moreover, the rules of this Court state that "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Rule 10(b), Tenn.Ct.Crim.App.

Second, the appellant failed to include this issue in her motion for a new trial. It is well settled that issues upon which a new trial is sought not raised in the motion for a new trial are waived and will not be considered by this Court. Tenn.R.App.P. 3(e); State v. Clinton, 754 S.W.2d 100, 103 (Tenn.Crim.App. 1988); State v. Durham, 614 S.W.2d 815, 816 (Tenn.Crim.App. 1981). Clearly, this issue was waived.

The third issue raised by the appellant on appeal is that Assured Casings, her employer at the time the offense occurred, deprived the appellant of her constitutional right to a fair trial. Specifically, the appellant alleges that Assured Castings (a) participated in the prosecution by using its position and leverage to take statements from alibi witnesses, which were provided to the prosecution; (b) had its attorney present during the entire trial to assist in obtaining a conviction;

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<sup>1</sup>The appellant's argument on this issue consisted of one paragraph.

(c) attempted to force the appellant to give a statement or confession; (d) fired the appellant when she refused to give the requested statement or confession; and (e) filed actions in other courts against the appellant and Ms. Davis.

Once again, however, the appellant has failed to properly brief this issue. The appellant's brief lacks appropriate references to the record, State v. Killebrew, supra, at 231; State v. Moore, supra, at 675-76, and citation of authority to support her arguments, Killebrew, supra, at 231; State v. Smith, supra, at 836, and therefore, the issue is waived. Rule 10(b), Tenn.Ct.Crim.App.; see: Ten.R.App.P. 27(a)(7).

The appellant has attempted to avert the requirement that her contentions be edified by references to evidence in the record by attaching two supporting exhibits to her brief. This effort, however, was misguided because there is no evidence that either of the attached exhibits were ever proffered to or considered by the trial court. This Court is not the proper place to introduce evidence, since its jurisdiction is appellate only. Tenn. Code Ann. § 16-5-108(a). Therefore, attachments to appellate briefs, which are not a part of the record, do not constitute evidence to be reviewed by this Court. State v. Matthews, 805 S.W.2d 776, 783 (Tenn.Crim.App. 1990); Wilson v. State, 724 S.W.2d 766, 768 (Tenn.Crim.App. 1986); Best v. State, 708 S.W.2d 421, 423 (Tenn.Crim.App. 1985); see State v. Melson, 638 S.W.2d 342, 351 (Tenn. 1982). This issue has no merit.

The final issue is that the trial court erred in sentencing the appellant to a sentence of two years, six months in Range I as a standard offender with a thirty percent release eligibility classification. Specifically, the appellant contends that the trial court (a) misapplied enhancement factors under Tenn. Code Ann. § 40-35-114, (b) failed to apply certain mitigation factors under Tenn. Code Ann. § 40-35-113, and (c) neglected to take into account sentencing considerations set

forth at Tenn. Code Ann. § 40-35-103(c), and thereby erred by failing to sentence the appellant to community corrections.

In reviewing the length and manner of the service of the sentence imposed on the appellant, this Court must conduct a de novo review based on the record. Tenn. Code Ann. §40-35-401(d). However, this Court must presume that the determinations made by the trial court are correct. Id. Therefore, if our review reveals that the trial court imposed a lawful sentence pursuant to the Tennessee Criminal Sentencing Reform Act of 1989, after having given proper consideration and weight to the relevant sentencing factors under the Act, and the sentence is based on findings of fact which are adequately supported by the record, then we must not disturb the sentence imposed by the trial court. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn.Crim.App. 1991). Furthermore, the appellant has the burden of establishing that the sentence rendered by the trial court was erroneous. Tenn. Code Ann. § 40-35-401(d)(Sentencing Commission Comments); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

\_\_\_\_\_The presumptive sentence shall be the minimum sentence within the range if no enhancement or mitigating factors exist. Tenn. Code Ann. § 40-35-210(c). If enhancement factors exist but there are no mitigating factors, then the trial court may set the sentence above the minimum in that range, but still within the range. Tenn. Code Ann. § 40-35-210(d). Should both enhancement and mitigating factors exist, which is the situation in the present case, the court must start at the minimum sentence in the range and enhance the sentence within the range as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. Id., at § 40-35-210(e); State v. McMurray, No. 01C01-9311-CR-00405, slip op. at 2-3 (Tenn.Crim.App. May 12, 1994).



The jury convicted the appellant of vandalism over \$1,000.00 but less than \$10,000.00, which is punishable as a Class D felony. Tenn. Code Ann. §§ 39-14-408(c); 39-14-105(3). The sentencing range for a standard offender convicted of a Class D felony is not less than two nor more than four years. Tenn. Code Ann. § 40-35-112(a)(4). The trial court sentenced the appellant to serve two years and six months, the minimum sentence plus six months.

In determining the appellant's sentence, the trial court found the following enhancement factors were applicable: (a) the appellant had a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, Tenn. Code Ann. §40-35-114(l); (b) the appellant was a leader in the commission of the offense, which involved two or more criminal actors, Id., at § 40-35-114(2); (c) the offense involved more than one victim; Id., at § 40-35-114(3); and (d) the crime was committed under circumstances under which the potential for bodily injury to a victim was great. Id., at § 40-35-114(16). The trial court further found one mitigating factor, namely, that the offense neither caused nor threatened serious bodily injury. Tenn. Code Ann. §40-35-113(l).

The appellant first contends that the trial court erred in finding that the appellant was a leader in the commission of the offense. Tenn. Code Ann. § 40-35-114(2). The trial court applied this factor based upon the appellant's acquaintance with the Kleppers and because of her age relative to her co-defendant, Ms Davis. From our de novo review of the record, we find that the evidence adduced at trial is insufficient to warrant the application of this enhancement factor, since neither the identity nor the respective roles of all of the perpetrators was ever established. Mr. Ogle saw three people, but only two were identified.

Next, the appellant challenges the trial court's application of the

enhancement factor that she has a previous criminal history. Tenn. Code Ann. § 40-35-114(l). The trial judge noted in finding this factor that the criminal history of the appellant was neither long nor grave, but that it did exist. The pre-sentence report of the appellant indicates that the appellant has had numerous charges against her for writing bad checks and two convictions for that offense. Moreover, in her brief, the appellant admits that she has a "minor criminal record." It is clear that the trial court was keenly aware of the nature and extent of the appellant's criminal record and thus could give it proper weight in ascertaining the appropriate sentence. We find no error in the trial court's application of this factor and this contention has no merit.

The appellant also asserts that the trial court improperly determined that the crime was committed under circumstances where the potential for bodily injury to a victim was great. Tenn. Code Ann. § 40-35-114(16). In finding this fact, the trial court stated that it was foreseeable that the scattered nails could have caused a flat tire which could have resulted in a wreck, which could have involved injuries. We concur with this analysis and further find that the possibility that one of the Kleppers might have stepped on one of the nails in the driveway or touched the caustic substance on the car also constituted a serious risk of bodily injury. It should be noted that the trial court found a mitigating factor, that the appellant's conduct neither caused nor threatened serious bodily injury. Tenn. Code Ann. § 40-35-113(l). However, those findings are not inconsistent because the enhancement factor stated in § 40-35-114(16) concerns a threat of "bodily injury," while the mitigating factor stated in § 40-35-113(l) concerns the potential for "**serious bodily injury**." This issue is without merit.

Concerning the application of mitigating factors, the appellant contends that the trial judge failed to apply two mitigating factors which the proof supported. First, she claims that the trial judge should have found that she was motivated by a desire to provide necessities for her family or herself, since it is

obvious that the strikers were experiencing desperate times. Tenn. Code Ann. § 40-35-113(7). However, we find no evidence in the record as to the appellant's motivation concerning the crime. Even if such evidence was introduced, the causal connection between the destruction of the personal property of the Kleppers and the procurement of necessities for the appellant or her family is fragile at best. This issue is without merit.

The second mitigating factor which the appellant alleges that the trial court should have applied, is that the appellant assisted authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses. Tenn. Code Ann. § 40-35-113(9). Examination of the record reveals insufficient evidence to support this contention. There is no evidence that the appellant gave such assistance or identified the third vandal, which would have been the best possible scenario for the appellant to claim this mitigating factor. This contention has no merit.

Finally, the appellant claims that the trial court erred by failing to sentence her to community corrections. Specifically, she asserts that the trial court failed to consider the sentencing principles codified at Tenn. Code Ann. §§ 40-35-103 and 40-35-106. The record clearly contradicts those assertions, as it is clear from the trial judge's statements during sentencing that he took into account all of the statutory considerations. Furthermore, the trial judge properly determined that confinement was appropriate in this case in order to deter violence and to avoid depreciating the seriousness of the offense. Tenn. Code Ann. § 40-35-103(I)(B).

In conclusion, upon our de novo review of the appellant's sentence, we find that trial court misapplied one enhancement factor. However, we find that the trial court properly applied three enhancement factors and one mitigating factor, and that the sentence was entirely proper for this appellant for this

offense. We find no error in the trial court's decision to refuse alternative sentencing to this appellant. The sentencing issue has no merit.

We note plain error in the record. The jury recommended that the appellant pay restitution to the victims in the amount of \$625.00. The trial judge orally ordered the appellant to pay that amount as restitution and the judgment also includes that requirement.

The power to order restitution by a criminal defendant is limited to defendants who are placed on probation. Tenn. Code Ann. § 40-35-304(a); See also: Tenn. Code Ann. §40-35-303(d)(10). Since the appellant was sentenced to the penitentiary, the judgment must be modified to delete any requirement that she pay restitution.

Finding no merit to any issue, except the plain error noted above, the judgment is affirmed, as modified.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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DAVID H. WELLES, JUDGE

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WALTER C. KURTZ, SPECIAL JUDGE