IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A.# 01C01-9406-CC-00234
APPELLEE,	*	LINCOLN COUNTY
VS.	*	Hon. Charles Lee, Judge
WADE JAMES ODUM,	*	(Theft over $10,000)
APPELLANT.	*	

For the Appellant:

Robert H. Stovall, Jr.
117 South Main Street
Shelbyville, TN 37160

For the Appellee:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Gordon W. Smith
Associate Solicitor General
450 James Robertson Parkway
Nashville, TN 37243-0493

W. Michael McCown
District Attorney General

and

Weakley E. Barnard
Assistant District Attorney
P.O. Box 904
Fayetteville, TN 37334

OPINION FILED:_____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Wade James Odum, appeals from his conviction for theft in excess of $10,000. The trial court found the defendant to be a career offender and imposed a fifteen year sentence to be served consecutively with sentences in Georgia and Florida.

In addition to his challenge to the sufficiency of the evidence, the defendant presents the following issues for review:

> (1) whether the trial court erred in allowing the jury to view the defendant in prison clothes throughout the trial; and
>
> (2) whether the trial court erred in allowing into evidence a portion of the videotape of the defendant's arrest in Florida.

At approximately 9:00 a.m. on February 1, 1993, the defendant drove onto the lot of Howard Bentley Olds Pontiac in Fayetteville, introduced himself to car salesman Jim Brown, and asked if he could test drive a white, 1992 Oldsmobile Cutlass. Because he was waiting on other customers at the time, Brown gave the defendant permission to drive the car around the block. Brown told him that the vehicle had a dealer tag and the keys were inside. The defendant drove away and, about fifteen minutes later, called the dealership, saying that he was at the state line and could not get the steering wheel to turn. Because Brown was with another customer, he did not answer his page and Jim Skelton, another salesman, took the call. When an hour had passed and the defendant still had not returned, Brown worried that something

had happened to the car. He searched the defendant's car for identification and, when he found none, contacted the police.

Dwight Locker, also employed by the car dealership, was assigned the demonstrator automobile taken by the defendant. On the morning of the theft, he drove the car to work, arriving at approximately 8:15 a.m. After a sales meeting, Locker went to his office, looked out his window, and observed Brown talking with the defendant. Thereafter, Brown came inside the dealership to get the keys to the Oldsmobile so that the defendant could test drive the vehicle. Locker gave him the keys, but did not go outside to speak with the defendant. He did not see the vehicle again until some three weeks later when he picked it up at the Orlando Police Department in Orlando, Florida. At trial, Locker made a positive identification of the defendant.

Howard Bentley testified that the dealership paid General Motors $12,500.00 for the automobile taken by the defendant. It had been assigned to Dwight Locker at the time of the theft. Some weeks after the vehicle was taken, Bentley received confirmation from Florida authorities that they had recovered the vehicle. He checked his records for the serial number and, once the car had been returned to the lot, confirmed that it was the vehicle taken. Later, the dealership sold the car for $12,235.00.

About two weeks after the theft, Detective Larry Slimick of the Orange County Sheriff's Department in Orlando participated in the arrest of the defendant. Acting on an

informant's tip, the department's felony squad located the defendant. He was driving the stolen vehicle at the time of his arrest. The dealer tag had been replaced by an Alabama license plate. After being warned of his Miranda rights, the defendant admitted that he had stolen the vehicle by posing as a customer at "the Howard Bentley car lot." A portion of a videotape of his arrest was shown to the jury.

Detective Steve Forgy, also with the Orange County Sheriff's Department, testified that he had also participated in the defendant's arrest. He confirmed that the defendant had confessed to the theft of the vehicle.

Fayetteville Police Department Captain Mike Hopson, who returned the defendant to Tennessee, testified that the defendant acknowledged having taken the car. The defendant also told him that the dealership "needed to work on their security measures a little bit."

On appeal, the state is entitled to the strongest legitimate view of the evidence and all inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

The defendant claims that the evidence was insufficient because the two car salesmen had not seen him drive off the lot in the stolen vehicle and that neither of the two Florida police officers actually saw him behind the wheel. We disagree. Three law enforcement officers testified that the defendant confessed to the theft and, even if he had not confessed, circumstantial evidence alone may be sufficient to convict. When the evidence is entirely circumstantial, the jury must find that the proof is not only consistent with the guilt of the accused but inconsistent with his innocence. The jury must be able to exclude every other reasonable hypothesis except that of guilt. Pruitt v. State, 3 Tenn. Crim. App. 256, 267, 460 S.W.2d 385, 390 (1970). Whether the defendant had confessed or not, we would have found the evidence sufficient to convict the defendant of theft.

Next, the defendant contends that the trial court committed prejudicial error by allowing him to be tried in prison clothing. Again, we disagree. It is well settled that the accused is entitled to not only the presumption of innocence, but also to the appearance of innocence. See State v. Smith, 639 S.W.2d 677, 680 (Tenn. Crim. App. 1982). Requiring a defendant to wear prison attire before the jury will generally be considered a constitutional violation of the first order. See Kennedy v. Cardwell, 487 F.2d 101, 104 (6th Cir. 1973), cert. denied, 416 U.S. 959 (1974). The right to be tried in civilian clothing can be waived, however, when the defendant fails to make known to the court, prior to the impaneling of the jury, his desire to exercise this right and

fails to otherwise timely object. See Carroll v. State, 532 S.W.2d 934, 936 (Tenn. Crim. App. 1975). Here, the defendant did not do so. Moreover, the defendant did not object to wearing prison garb at any point during the course of his trial. Id. That results in a waiver. Id. at 936.

The trial court raised the issue sua sponte during a jury-out hearing on another matter, resulting in the following colloquy:

> THE COURT: While we are waiting for Officer Forgy to set that up, would the defendant stand and turn around for a minute? What does the tag on the back say?
>
> MR. MARLOW: That is a prison uniform from Madison, Florida. This is the way he was transported up. We have no clothing.
>
> THE COURT: Let me see what the jury can see.
>
> Get a piece of white tape and cover the number back there unless counsel would rather have them as they are.
>
> Let the court record reflect that the Court observed the attire of the defendant and noticed that it had other than Levi patches on it -- and then inspected the uniform and no more than patches of dimensions of three-quarters of an inch to a two-inch rectangle in lettering --
>
> MR. MARLOW: It is a 1 by 3.
>
> THE COURT: -- 1 by 3 in faint lettering there appears to be numbers in white above the pocket of the defendant that has been covered by eyeglass holders as well as right above both back pockets there appears a blue patch that has the word "west" written on it and a white patch over the right pocket which has also some numbers on it.
>
> The record should also reflect that these numbers are not observable unless one is very close to him. I will offer to the

> counsel for the defense either covering those numbers if you feel that a jury may draw some inference from them by Magic Marker or by white tape.
>
> The Court does not feel that the jury would attach any significance to them, but out of an abundance of caution --
>
> MR. MARLOW: Your Honor, we feel that a change of appearance at this point in time, that would draw more attention to it than what otherwise would happen.
>
> THE COURT: All right.
>
> MR. BARNARD: If your Honor please, have you also put in the record for the purpose of the record that he has been seated the whole time the jury has been in here and covered.
>
> MR. MARLOW: He has stood when the jury enters or exits.
>
> THE COURT: Yes. That is true, but the record should reflect that the jury, at least so far, has not gone behind the defendant to take their seats.
>
> MR. MCCOWN: Your Honor, we have been here six hours and nobody has noticed it.

In summary, the trial of this matter was almost complete before anyone noticed that the defendant might be wearing prison clothing. Even then, the trial judge had to ask if the defendant's clothing was a prison uniform. The numbers on the front of the defendant's shirt were above the pocket and had been covered by an eyeglasses case. The jury had not seen the defendant from behind. When a curative measure was offered, the defendant declined. The issue was raised for the first time in the motion for new trial.[1] Under these circumstances, we find no error.

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[1]Apparently, defense counsel had asked prison officials, prior to trial, to provide the defendant with civilian clothing. Due to his large size, the jail had none that would fit him. The request was not made to the trial court.

As his final issue, the defendant claims that the trial court erred by allowing as evidence select portions of a videotape showing the defendant's arrest in Florida. He asserts that the probative value was substantially outweighed by the prejudicial effect because the same information could have been provided by two Florida police officers who testified at trial.

Much like photographs, the admission of videotaped evidence rests within the sound discretion of the trial judge and his decision will not be overturned in the absence of an abuse of that discretion. See, e.g., State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993), cert. denied, _____ U.S. _____, 114 S.Ct. 1577 (1994); see also State v. Banks, 564 S.W.2d 947 (Tenn. 1978). Tennessee Rule of Evidence 403 provides the test for admissibility:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Here, the trial court allowed the jury to view only that portion of the videotape which showed the defendant's close proximity to the stolen automobile at the time of his arrest. The defendant argues that the prejudicial effect was considerable because the officers shown in the video were wearing black masks, bullet proof vests, and uniforms which bear insignia from the COBRA and DRUG INTERVENTION teams. He contends that a jury might have inferred that the defendant

was "one of the meanest terrorists or felons the world has ever seen."

In the limited portion of the video shown, the only visible insignia on a uniform was that of the Sheriff's Department. There was no violence during the arrest. The videotape demonstrated that the defendant fully cooperated with law enforcement officials. Other than the black masks, the procedure appeared to have been fairly routine. Moreover, defense counsel strenuously objected to either officer testifying to the defendant's presence inside the stolen vehicle. The two officers did not arrive until their fellow officers had already removed the defendant from the vehicle and had been limited, at trial, to describing the defendant's proximity to the vehicle. We agree with the assessment of the trial judge: "a witness sometimes cannot describe in words all that a picture would depict." Here, the trial judge carefully narrowed what the jury would view. The portion of the video shown was limited to placing the defendant with the vehicle at the time of his arrest. While somewhat prejudicial due to the appearance of the felony squad, the tape was also probative. In this instance, we cannot find that the probative value was substantially outweighed by the danger of unfair prejudice.

Accordingly, the judgment is affirmed.

_____
Gary R. Wade, Judge

CONCUR:

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David H. Welles, Judge

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William S. Russell, Special Judge