IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1995 SESSION

STATE OF TENNESSEE	)	NO. 02C01-9503-CC-00058
	)	
Appellee	)	LAKE COUNTY
	)	
V.	)	HON. JOE G. RILEY, JUDGE
	)	
KENNY CLAY,	)	(Burglary - 2 Counts;
	)	Theft Over $1,000 - 2 Counts)
Appellant	)	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Kenny Clay, appeals as of right from four judgments of conviction entered on August 22, 1994, by the Circuit Court of Lake County following jury verdicts finding the appellant guilty of two (2) counts of burglary and two (2) counts of theft over one thousand ($1,000) dollars. In this appeal, the appellant presents two issues for review. First, he argues that the evidence is insufficient to support the guilty verdicts. Second, he contends that the State engaged in prosecutorial misconduct in connection with its presentation of the testimony of state witness Michael Foster.

Following a review of the record in this appeal, we find no reversible error and affirm the trial court.

On March 14, 1994, the appellant was indicted by the Grand Jury of Lake County in a four-count indictment. Count one charged the appellant with the January 6, 1994, burglary of a Piggly Wiggly Grocery Store owned and operated by Jack Ervin. Count two charged the appellant with the theft of $2,895 in cash as a result of the January burglary of the Piggly Wiggly Grocery Store. Count three charged the appellant with the February 20, 1994, burglary of the same Piggly Wiggly Grocery Store. Finally, Count four charged the appellant with the theft of $3,100 cash and twenty-one cartons of cigarettes taken during the February 1994 burglary.

The evidence introduced at trial established that on January 6, 1994, a burglary occurred at the Piggly Wiggly Grocery Store located in Tiptonville, Tennessee. The business was owned and operated by Mr. Jack Ervin, and the burglary occurred sometime between the hours of 3:00 a.m. and 4:00 a.m. Entrance to the building was obtained by breaking a glass door on the north side of the building. Thereafter, the burglar went into the business office and pried open certain filing cabinets apparently by using a tire tool and screwdrivers which were later found on the floor of the office close to the filing cabinets. Approximately $2,300 was taken from the cash box located within the filing cabinet in the January burglary. The tire tool used to pry open the filing cabinet was discovered by members of the Tiptonville

Police Department, and it was introduced in evidence. The tire tool was identified by John Higgins as belonging to him. Higgins testified that the appellant, a friend, had borrowed his tire tool in January 1994, along with a screwdriver. Higgins testified that he later asked the appellant to return the tools to him, but the appellant did not.

Cheryl Tate, appellant's live-in companion, testified that the appellant had no job in January or February 1994, and in fact had not maintained any regular job for approximately two years. She testified that on the evening prior to the January burglary, the appellant left home at about 6:00 or 6:30 p.m., saying he was going to shoot pool and drink some beer. He asked Ms. Tate for some money before leaving for the evening. He did not return home until early the next morning, and when he returned he was in the possession of "folding" money. Cheryl Tate estimated the total amount to be "maybe over one hundred dollars." Later that morning she discovered paper quarter-roll wrappers in the house which had not been there earlier.

A second burglary of the Piggly Wiggly Grocery Store occurred just after 1:00 a.m. on the morning of February 20, 1994. The second burglary bore a striking resemblance to the one which had occurred in January. Entrance to the building was obtained through the back door of the Piggly Wiggly, and once again the same or similar filing cabinet located in the office of the grocery store had been pried open and approximately $3,100 removed from the cash box inside of the filing cabinet.

Terrance Montgomery, a friend of the appellant, testified that he lived in the Oak Haven Apartments which were located behind the Piggly Wiggly store. Montgomery testified that he had seen and talked with the appellant earlier the night of the February burglary when the appellant came to Montgomery's apartment at 12:39 a.m. The appellant came inside the apartment and visited with Montgomery for a very short period of time and thereafter left. Montgomery testified that a little after 1:00 a.m. he looked from his apartment and saw the back door of the Piggly Wiggly being opened. He could tell that the door was open because he could see the light

from inside the building shining out. He reported the break-in to the sheriff's department.

Montgomery testified that after the break-in the appellant came back to Montgomery's apartment and asked for a ride home. Montgomery testified that he did not give the appellant a ride, but believed Lynn Kimball and Avis Flowers drove the appellant. About one hour later, however, Montgomery saw the appellant at a neighbor's home in the Oak Haven apartment complex. Montgomery testified that approximately thirty minutes later he went to the neighboring apartment. The appellant was there and at that time he saw the appellant in possession of about "two inches" of folded paper money. Although he said he was not certain, Montgomery believed the appellant told him he got the money at the Piggly Wiggly store. The appellant told Montgomery to say that he had not seen the appellant if asked.

John Higgins, the owner of the tire tool identified as being used in the January burglary, testified that on the day after the second burglary, the appellant gave Higgins twenty dollars to drive him to Ridgely, Tennessee. At that time Higgins saw the appellant in possession of a roll of money "like maybe two or three hundred dollars." The appellant told Higgins the money had come from the Piggly Wiggly break-in, but that was going to be his "last job."

Regarding the second burglary, Cheryl Tate, who lived with the appellant until his arrest, testified that on February 20, 1994, the appellant left before dark and did not return home until the following day. When he did return, he had a lot of money, and Tate saw him counting it. She described the money as "stacks of hundreds." The appellant told Cheryl Tate to "keep her mouth shut." On cross-examination, Tate said she saw the appellant counting the money a couple of days after the February burglary, not the following day.

Michael Foster, a close friend of the appellant, testified that the appellant had admitted the burglaries to him.

The appellant offered no evidence.

An earlier trial of the appellant resulted in a mistrial when the jury was unable to reach a unanimous verdict. During that initial trial, Michael Foster testified that he had never had any discussions with the appellant following the burglaries. It is apparent from reading his testimony during the first trial that the prosecutor was surprised when Foster denied under oath that the appellant had admitted to Foster that he had burglarized and stolen money from the grocery store. Apparently Foster had previously met with Mr. Jack Ervin, the owner of the Piggly Wiggly store, and several police officers in Mr. Ervin's office at the Piggly Wiggly store and advised them that the appellant had admitted to Foster his involvement in one or both burglaries.

Following the mistrial Foster was indicted for perjury in connection with his testimony in the May 12, 1994, aborted trial of the appellant.

Prior to the appellant's second trial on July 20, 1994, which resulted in his convictions, the district attorney general advised Foster that he would dismiss the perjury charge against him if Foster would testify truthfully regarding his conversation with the appellant wherein the appellant admitted his guilt to Foster.

Prior to Foster testifying in the second trial, counsel for the appellant advised the trial court of the situation regarding the district attorney's agreement with Foster to secure his testimony, but made no objection to the proposed testimony. Counsel concluded his statement to the court by saying, "It just is a deal that I just don't like, and I just think the court ought to be aware of it, and I also think the jury ought to be aware of it." The trial court advised counsel that he certainly could cross-examine the witness so as to make the jury aware of his previous testimony, the agreement with the State to drop the perjury charge, and how his anticipated testimony varied from his previous testimony. The trial judge was of the opinion that Foster's testimony would be admissible and that the weight to be given to it and the credibility of the witness would be a matter for the jury. We agree.

By not objecting to the proposed testimony of Foster in the second trial, the appellant has waived consideration by this Court of the issue on appeal. See Teague

v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App. 1988); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988); T.R.A.P. 36(a).

From a reading of the record in this case, however, it is clear that the agreement made by the district attorney general with Foster was that the perjury charge against Foster would be dismissed conditioned upon Foster testifying truthfully during the appellant's second trial. It can hardly be said to be prosecutorial misconduct for the district attorney general to pressure a witness to give truthful testimony. There is no indication anywhere in this record that the district attorney general pressured Michael Foster or made an agreement with him to secure untruthful testimony. This issue is without merit.

The appellant contends that the evidence was insufficient to convict him of any of the offenses with which he was indicted. Initially, we note that our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing 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, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). 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).

A defendant challenging the sufficiency of the evidence 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).

With regard to the burglary and theft of January 6, 1994, the evidence of the defendant's guilt is circumstantial in nature. However, 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 a conviction to be sustained based on circumstantial evidence, the 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 guilty 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.

While following the above guidelines, this Court must remember that the jury decides the weight to be given to circumstantial evidence and that "the inferences to be drawn from such evidence, and extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury." Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958); State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985); Pruitt v. State, 460 S.W.2d 385, 391 (Tenn. Crim. App. 1970).

Viewing the evidence of the January offenses in the light most favorable to the State, and based upon the above principles, we conclude that the evidence was more than sufficient to support a conviction for the burglary and theft of the Piggly Wiggly Grocery Store. The evidence established that, at about the time of the January burglary, the appellant had borrowed a tire tool from his friend, John Higgins. The tire tool was never returned by the appellant to Mr. Higgins, but instead was found on the floor of the office of the grocery store next to the pried-open filing cabinet. Moreover, the evidence established that the appellant, who was unemployed, had no money on

the evening prior to the burglary, his whereabouts the night of the burglary were not accounted for, and he was seen the following day with a substantial amount of "folding" money after being away from home the entire evening. Additionally, paper quarter wrappers were found after his arrival at home. The foregoing evidence and circumstances were sufficient for a rational trier of fact to find the appellant guilty of the January offenses beyond a reasonable doubt.

Likewise, we conclude that the evidence regarding the February burglary and theft amply supported the jury's verdict of guilt. The appellant was seen a short distance from the Piggly Wiggly store several minutes before the burglary, the burglary bore a striking resemblance to the one which occurred a month earlier, he was seen shortly after the burglary with a large amount of paper money, and he admitted his guilt to John Higgins, Michael Foster, and perhaps Terrance Montgomery. We conclude that the evidence against the appellant regarding the burglary and theft of February 20, 1994, was not only sufficient but was indeed overwhelming.

Accordingly, the judgment of the trial court is affirmed.

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WILLIAM M. BARKER

CONCUR:

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JOE B. JONES, JUDGE

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PAUL G. SUMMERS, JUDGE