IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1995 SESSION

STATE OF TENNESSEE,	)	NO. 03C01-9505-CR-00145
	)	
Appellee	)	SEVIER COUNTY
	)	
V.	)	HON. REX HENRY OGLE
	)	JUDGE
BARBARA BYRD,	)	
	)	(Theft - Over $1,000.00)
Appellant	)	

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Barbara Ann Byrd, appeals as of right the judgment of conviction entered against her by the Sevier County Criminal Court for theft of property valued at over one thousand dollars ($1,000.00). On appeal she presents three issues for review.

1) Whether the evidence was sufficient to support the conviction.

2) Whether the indictment was duplicitous and, therefore, should have been dismissed.

3) Whether the State failed to provide the appellant with exculpatory evidence in violation of Brady v. Maryland.

We affirm the judgment of the trial court.

FACTS

The appellant and three others, Robbie Poole, Janie Carlton, and Richard Devon Ewing journeyed from Hickory, North Carolina, to Pigeon Forge, Tennessee, to implement their plan to systematically steal merchandise from various Sevier County outlet malls. This case concerns the appellant's involvement in the theft of $2,644.92 worth of merchandise from nine merchants located in the Tanger Outlet Mall in Pigeon Forge.

The undisputed proof at trial was that on April 28, 1993, nine merchants had a total of $2,644.92 in property stolen from them, all of which was recovered that day in a gray 1976 Oldsmobile Delta 88 in the parking lot of the Tanger Outlet Mall. The car, owned by Richard Devon Ewing's father, was the same car in which the appellant and her companions drove from North Carolina to Pigeon Forge. Robbie Poole testified that he and the three others, including the appellant, engaged in a systematic scheme of stealing from the nine merchants involved in this case. The basic strategy employed was that once inside a store, two of the four would distract the sales staff while the other two would place merchandise into a shopping bag and then leave the store without paying for the goods. The stolen goods were then routinely placed in the trunk of the Delta 88. The appellant was seen by at least one merchant placing

shopping bags into the car. The foursome used this basic strategy in nine different shops with the pairings changing and occasionally using only three of them to steal merchandise. Poole testified that the stolen merchandise was to be divided equally between the four.

When several merchants caught onto the scheme of the appellant and her companions, the police were called and located the stolen merchandise in the Delta 88 automobile.

SUFFICIENCY OF THE EVIDENCE

The appellant claims that the evidence adduced at the trial was insufficient to support the jury's finding of guilt.

When an accused challenges the sufficiency of the evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "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, 61 L. Ed. 2d 560 (1979). We do not reweigh or reevaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W. 2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Id. 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).

There was no question that the property in the vehicle was stolen and that the fair market value was over $1,000.00. Robbie Poole testified that he, the appellant, and two others embarked on a deliberate plan to steal and did steal the merchandise

recovered from the car. Sometimes the appellant was actively engaged in the takings and sometimes she was not. The appellant claims that because she was not linked to the taking of each stolen item she cannot be found guilty of theft. Tennessee Code Annotated section 39-11-402(2) provides that an accused is criminally responsible for an offense of another if he or she acts with the "intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense . . . ." (emphasis added). Poole testified that although the appellant actively participated in the taking of only some of the merchandise, she was to share equally in the proceeds of all merchandise stolen on the day in question. Several witnesses testified that the appellant and her companions entered their shops, created distractions, and that shortly after their departures from the store, the shopkeepers noticed that merchandise had been stolen. At least one witness saw the appellant place bags of merchandise into the Delta 88 automobile. There was no dispute that the merchandise was stolen or that the value exceeded $1,000.00.

Robbie Poole's testimony, coupled with that of various shopkeepers as to the suspicious behavior of the appellant and her cohorts shortly before they discovered that items had been stolen from each shop, provided the jury with ample evidence that the appellant was guilty of theft of property valued at over $1,000.00. Accordingly, this issue is without merit.

VALIDITY OF THE INDICTMENT

The appellant asserts that the prosecution was required to charge her with nine separate offenses because the stolen property belonged to nine different owners. She argues that the trial court should have dismissed the one count indictment on grounds that it was duplicitous. We disagree.

Our analysis of this issue begins with the well-settled principle that as officers of the executive branch, the district attorneys general for this State have broad discretionary authority in the control of criminal prosecutions. State v. Gilliam, 901

S.W.2d 385, 389 (Tenn. Crim. App. 1995). A prosecutor has broad discretion to determine whether to prosecute an individual and what charge or charges to file or bring before a grand jury, provided he or she has probable cause to believe that the individual committed an offense defined by statute. Id.

Tennessee Code Annotated section 39-14-103 states:

> 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.

With the passage of this statute, the legislature eliminated the traditional distinctions between various unlawful takings in favor of one general theft statute. Tennessee Code Annotated section 39-14-101 and the Sentencing Commission Comments thereto provide that the present general theft statute "embraces" the principles of the former theft crimes including "receiving or concealing stolen property" and "shoplifting."

The facts of this case support the prosecutor's decision to charge the appellant with one count of theft of property valued at over $1,000.00. She participated directly and indirectly in the activities which culminated in the police recovering over $1,000.00 worth of stolen property from the automobile in which the appellant had ridden to Pigeon Forge and into which she had been seen placing bags of merchandise. She clearly had access to and control over the stolen merchandise in the car. Additionally, the police investigation of the activities of the appellant and her cohorts established that they had a pattern of entering a store, and while one or two of the four distracted the sales staff, the other one or two would steal merchandise by placing it in large shopping bags. The bags of stolen merchandise would then be taken to the car and the process repeated in another store. In other words, at the time the indictment was obtained, the prosecutor had probable cause to believe that the four individuals, including the appellant, were involved in a scheme to steal merchandise from the Tanger Outlet Mall. Additionally, the appellant was to share

equally in the proceeds of the criminal conduct. These facts all support the charging of one count of theft.

We find analogous support for this conclusion from cases prosecuted under the former receiving or concealing stolen property statute. The appellant herself acknowledges that under the former receiving or concealing statute, the state was permitted, indeed required, to charge one offense, notwithstanding the number of victims involved in the theft. In State v. Goins, 705 S.W. 2d 648, 651-52 (Tenn. 1986), our Supreme Court held that the state could not "divide a cache of stolen property . . . by the number of the victims of the thefts and thereby obtain that number of indictments absent some other evidence that identified goods have been received or concealed separately." The appellant acknowledges the rule of law from Goins but argues that this theory of theft was not available to the prosecutor because the state could not prove that the appellant received or concealed stolen property from a third party rather than directly from the victim. While we agree that this was an element under the old receiving or concealing statute, we do not agree that the state was required to prove the elements of that former crime merely because its theory of the case was similar to the former crime of receiving or concealing stolen property.

While the general theft statute prohibits the same conduct as did the receiving or concealing statute, the state is not required to prove the elements of the receiving or concealing statute in order to gain a conviction under the current theft statute. In State v. Young, 904 S.W.2d 603, 604 (Tenn. Crim. App. 1995), this court recognized that with the enactment of the new theft statute the legislature changed the elements of the crime of theft while continuing to prohibit the criminal conduct of the former theft statutes. To hold as the appellant requests would be to restore the "antiquated and confusing" requirements of common law theft crimes in direct contravention of the legislature's intent. See Tenn. Code Ann. § 39-14-101, Sentencing Commission

Comments. Accordingly, we hold that the prosecutor acted within his discretion in charging the appellant with one count of theft of property valued at over $1,000.00.

BRADY VIOLATION

Finally, the appellant contends that the indictment should have been dismissed because the State failed to preserve and furnish to the appellant signed statements of the co-defendants. Robbie Poole testified that he gave a written statement to police in which he stated that the appellant and Janie Carlton were not involved in the theft. The arresting officer testified that he had no recollection of taking a written statement from Poole and had been unable to find such a statement in any files. Further, the district attorney informed the court that he had never seen a written statement from Poole, although he had made a thorough search.

In Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held that, upon request, the prosecution has a duty to furnish the accused with all exculpatory evidence pertaining to the accused's guilt or innocence or the punishment which may be imposed. Further, suppression by the prosecution of evidence favorable to the accused subsequent to a proper request violates the accused's right to due process if the evidence is material. Id. See also Branch v. State, 4 Tenn. Crim. App. 164, 469 S.W.2d 533 (1969). The ultimate question in determining whether there has been a Brady violation is whether in the absence of the suppressed evidence the defendant received a fair trial. Kyles v. Whitley, ___ U.S. ___, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995).

We are confident that the verdict in this case reflects a fair trial for the appellant. The information contained in the alleged written statement was known to the appellant prior to trial. In addition, Mr. Poole testified to the substance of the written statement he claims to have given the police. Ultimately, the appellant was able to cross-examine Mr. Poole regarding the statement. Mr. Poole admitted that when he made the statement he was lying and reiterated his testimony that the

appellant was fully involved in the plan to steal merchandise from the merchants at the Tanger Outlet Mall. The appellant had the full benefit of the alleged statement although the State was unable to find either the document or any record of its existence.

Accordingly, the judgment of the trial court is, in all respects, affirmed.

_____
WILLIAM M. BARKER, JUDGE

CONCUR:

_____
DAVID G. HAYES, JUDGE

_____
JERRY L. SMITH, JUDGE