IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JULY 1996 SESSION

STATE OF TENNESSEE,	)	**C.C.A. No. 02C01-9602-CC-00060**
	)	
Appellee,	)	**HAYWOOD COUNTY**
	)	
VS.	)	**Hon. Dick Jerman, Jr., Judge**
	)	
STACY JONES REED,	)	**No. 2214 BELOW**
	)	
Appellant.	)	**(Theft)**

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED AS MODIFIED

CORNELIA A. CLARK,
Special Judge

OPINION

The defendant was indicted for theft of property over a value of $1,000.00 but under $10,000.00. She was convicted on a jury verdict of theft of property over $500.00 but under $1,000.00, a Class E felony. She received a sentence of eighteen (18) months. She was ordered to serve the first one hundred twenty (120) days in jail, with the remainder to be served in a community based alternative program. As a part of her sentence she was required to pay $5,354.00 in restitution to the victim. Defendant appeals as of right and presents four issues for review:

> 1. That the evidence at trial was insufficient to support the verdict of guilt;
>
> 2. That the state's placement of a 4' x 6' chart illustrating the state's theory of the case in the jury room with the jury prior to opening statement contaminated the trial;
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> 3. That the trial court erred in failing to declare a mistrial when the state introduced proof the defendant had filed for bankruptcy; and
>
> 4. That the trial court erred in failing to sentence defendant as an especially mitigated offender and in ordering restitution in the amount of $5,354.00.

After reviewing the record, we affirm the judgment of the trial court as modified.

We begin with a brief summary of the facts. The defendant was employed as office manager at the Brownsville office of Enstar Cable, a company providing local cable television service. When customers paid for their cable service, they mailed or brought their money to the office where defendant worked. The money was receipted in the office by one of three customer service representatives working under defendant's direction, each of whom had a separate money drawer. Each day, each representative prepared a bank deposit and deposited the money from her drawer into Enstar's account at the local bank. The defendant told customer service representatives that they were individually responsible for the money placed in their drawers.

Enstar also had an advertising account, known as the Character Generator

Account or the Channel 28 Account. Money in this account came from individuals who purchased television ads. The defendant had direct control of this money and was under an obligation to send it periodically to Enstar's corporate headquarters in California. These monies were not to be commingled with customer service monies.

In addition to the individual customer service funds and the advertising account there was a petty cash fund kept in the office. The defendant was also in charge of this money.

Periodically the defendant took a check from the advertising account and cashed it in one of the customer service representative's drawers. The defendant then took the cash, ostensibly to use for petty cash purposes. This substitution was a violation of office procedures, since it constituted commingling of advertising and subscriber checks. Defendant's supervisor, David Clagg, testified that defendant did not have permission to take a check from the advertising account and cash it from a customer service drawer to obtain petty cash.

In 1993 defendant's employer discovered that money was missing from its accounts. The company conducted an audit to determine the amount of the losses, which totaled $2,015.00 in 1993 and $3,339.00 in 1992. Defendant was interrogated but denied any knowledge of the missing funds. Defendant specifically denied writing an I.O.U. for $100.00 found in one of the cash drawers.

Defendant subsequently was fired for failure to follow office procedures and to maintain proper cash handling procedures. As a result of her termination she filed an employment discrimination lawsuit against her employer. Subsequently she was charged with the criminal offense of theft. It was her theory at trial that she was being accused of theft in retaliation for her filing of the lawsuit.

Several customer service representatives testified at trial. Donna Byrum

stated that on several occasions she found ad checks placed in her customer service drawer with a note from the defendant indicating that the checks should be deposited and that the defendant had taken amounts of cash out of the drawer. Byrum stated that she also had experienced unexplained cash shortages perhaps ten (10) times over a three-year period. She always reported the shortages to defendant, who instructed her to check again or to "adjust" her account to indicate that a customer had paid.

Janice Blackwell testified that she also had found ad checks originally given to the defendant placed in her drawer, along with notes from the defendant indicating that the checks should be deposited and that the defendant had borrowed money from the drawer. Several of the notes were introduced into evidence. She had experienced several cash shortages in her drawer and had on a past occasion been required by defendant to pay back as much as $400.00 our of her own pocket. Blackwell testified that defendant said she was cashing the ad checks to use for petty cash and that she was ostensibly buying money orders to replace the checks. She testified that after the parent corporation began an office audit, defendant admitted to her that she had not sent in all the replacement checks or money orders.

Charlotte Osteen and Felicia Green also testified that they had experienced cash shortages in heir drawers during the relevant time period. They reported the shortages to defendant, who instructed them to make proper entry adjustments. They further stated that defendant cashed advertising account checks out of their drawers, but did not tell them how she planned to use the funds.

I.

Defendant first contends that the evidence is insufficient to support the jury's guilty verdict. In particular, defendant contends that the victim, or owner of the property, was not adequately identified by the proof presented.

When an accused challenges the sufficiency of the convicting 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). This rule is applicable to findings of guilt based on direct evidence, circumstantial evidence, or a combination of the two. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). 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).

A defendant challenging the sufficiency of the proof 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).

In order to support a conviction for theft, the state must prove that the defendant "knowingly obtained or exercised control over the property without the owner's effective consent" and with an "intent to deprive the owner of [the] property." Tenn. Code Ann. §39-14-103. Defendant first contends that the proof is insufficient to establish either the "deprive" or "effective consent" elements of the offense. She argues primarily that no one saw her steal anything.

From a review of the record in this case, we can only conclude that the facts are sufficient, as a matter of law, for a rational trier of fact to find the defendant

guilty beyond a reasonable doubt of obtaining property without the owner's effective consent and with intent to deprive the owner of the property. Defendant was responsible for the ultimate handling of all monies that came into the Enstar Cable's Brownsville office. On a regular basis, defendant moved checks from the advertising account to the customer service account, took cash from the customer service account, and kept the money. Those actions constituted a violation of company policy and were taken without the knowledge or consent of defendant's supervisor. Defendant instructed the customer service representatives to adjust their own accounts if they did not balance, thereby concealing the transactions. Defendant told one customer service representative not to mention the misdirected checks, and she admitted not forwarding all the monies to California. The total of the monies missing over a several-year period exceeded $5,000.00. The jury convicted the defendant of theft of only $550.00.

Defendant also contends that adequate proof was not presented on the issue of ownership of the property in question. She contends the real victim was Falcon Holding Group. Defendant worked for Enstar Cable. Falcon is the managing partner for several partnerships, including Enstar. All checks exhibited at trial were payable to the order of Enstar Cable. Monies received in the Brownsville Enstar office were deposited in a local Enstar account if they represented payments for local service. Monies representing advertising payments were periodically sent to Falcon headquarters in California, where they were deposited to an Enstar partnership account.

Even if we were to find that a variance existed between the indictment and the proof respecting the owner of the money, that variance would not be material because (1) the allegations and the proof substantially correspond and (2) the variance is not of such a character as to have misled the defendant at trial or deprived her of her right not to be prosecuted again for the same offense. See State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984). As in Moss, the variance, if any,

relates only to the corporate or partnership form of operation of two clearly-related entities. Any error would clearly be harmless.

We find there is sufficient proof to support the jury verdict that the defendant obtained the money in question without the employer's consent and intending to deprive it of the money. We further find that the proof of identity of the owner is adequate. This issue is without merit.

II.

The defendant next argues that the trial court erred in overruling her motion for mistrial based on the state's placement of a 4' x 6' chart illustrating its theory of the case in the jury room with the jury prior to opening statements. The record reflects only that after the jury had been empaneled and sworn, a recess was taken and then the state made its opening argument. At the conclusion of that argument counsel for defendant requested a bench conference and the following discussion took place:

> MR. WHITAKER: If the Court please, I'd like to move the Court for a mistrial. The State has produced a bulletin board over here with an elaborate diagram focusing on my client, and I'd like to have a photograph of that bulletin board as it is made a part of this record now. Counsel for the State placed that bulletin board in the jury room prior to the beginning of this trial, but after they were sworn it has remained in there with that jury now and this jury pool is contaminated.
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> GENERAL HARDISTER: In fact, I drew the -- there's nothing but an explanation of what I said and the Court only -- the Court is aware of how long they're in there. It was turned to the wall while they were in there, and then I had the bailiff pull it over to the front of the room and it was still --
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> THE COURT: I'm going to let the Motion for Mistrial be overruled.
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> GENERAL HARDISTER: All right, sir.
>
> MR. WHITAKER: I'd like to have a photograph of it as it is now made a part of the record.
>
> THE COURT: I don't think we have a photograph, but what I'll let you do is I'll let you copy it on a piece of paper and let --
> MR. WHITAKER: Could I have a moment because I'm going to draw it, too?

THE COURT: All right. That's fine.

MR. WHITAKER: Let me have just a moment.

THE COURT: All right.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

(WHEREUPON, Mr. Whitaker handed the Court drawing on piece of paper.)

THE COURT: We'll let that piece of paper be marked as Trial Exhibit #1.

(Exhibit #1 was marked and filed.)

There is no further evidence about this chart contained anywhere in the record. A handwritten copy of the large chart was made an exhibit. Defendant asserts in her brief that this illustrative chart was placed facing the wall in the jury room prior to the beginning of opening statements. During a break before opening statements the members of the jury panel were in the jury room alone with the chart for a period of minutes. During the course of opening statements the state used the chart to illustrate its theory of how the monies had traveled through various hands. The chart was not offered by the state as substantive evidence, but was marked at the request of defense counsel as a part of his motion for mistrial.

A decision whether to grant a mistrial is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). A mistrial will be declared in a criminal case only where there is a "manifest necessity" requiring such action. Id. Here the trial court clearly acted within its discretionary authority when it denied the motion for mistrial. The chart itself was created and utilized in opening argument for illustrative purposes only. It was never offered by the state as a substantive exhibit. It simply helped to illustrate the state's theory. The chart was turned toward the wall in the jury room. There is no proof in the record that any juror turned the chart over or even observed it prior to its introduction during opening statements. Even if the jurors had observed it for a brief period of time earlier, no prejudice could have resulted since the state ultimately showed them the chart and utilized it during

opening statement. Any error that may have occurred was clearly harmless, and not of the kind prohibited in State v. Furlough, 797 S.W.2d 631, 645 (Tenn. Crim. App. 1990). There is no indication that anything pertaining to this event had any effect on the results of the trial. This issue is without merit.

III.

Defendant moved for mistrial a second time after testimony was elicited that she had filed for bankruptcy. Defendant contends both that the evidence was irrelevant, and in the alternative, that any probative value it had was outweighed by its potential prejudice to her upon introduction. Her argument on this issue must fail.

Defendant's financial status was relevant to her possible motive in this theft case. See e.g., State v. Carter, 714 S.W.2d 241, 247 (Tenn. 1986). As a general rule, relevant evidence is admissible unless another rule or law requires exclusion. Tenn. R. Evid. 402. Under Rule 403 relevant evidence may be excluded only if the probative value of the relevance is substantially outweighed by the danger of unfair prejudice resulting from its introduction.

The testimony about defendant's bankruptcy did not rise to the level of "unfair prejudice". It was very brief, consisting of one reference in an answer to a question about defendant's personal financial condition. Defendant has cited no authority for her position that the probative value of such testimony is substantially outweighed by the danger of unfair prejudice resulting from its introduction. This issue is also without merit.

IV.

Finally, defendant contends that the sentence imposed upon her was incorrect, both because she was not found to be an especially mitigated offender, and because she was required as condition of her sentence to make restitution

beyond the amount that the jury found she had stolen.

When a defendant challenges the length, range or manner of service of a sentence, the reviewing court must conduct a de novo review on the record with a presumption that the determinations made by the trial court were correct. Tenn. Code Ann. §40-35-401(d). The presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances". State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In reviewing the record, this court must consider (a) the evidence adduced at trial and the sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel, (e) the nature and characteristics of the offenses, and (f) the appellant's potential for rehabilitation. Tenn. Code Ann. §40-35-210. The burden of showing that a sentence is improper is on the appealing party. Tenn. Code Ann. §40-35-401(d) (Sentencing Commission Comments).

The sentence to be imposed by the trial court for this felony conviction is presumptively the minimum within the applicable range unless there are enhancement factors present. Tenn. Code Ann. §40-35-210(c). That range is one to two years.[1] Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and then reduce the sentence as appropriate for any mitigating factors. Tenn. Code Ann. §40-35-210(d) & (e). The weight to be afforded each factor is left to the trial court's discretion so long as it complies with the purposes and principles of the sentencing act, and its findings are adequately supported by the record. Tenn. Code Ann. §40-35-210 (Sentencing Commission Comments); See State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

[1]On page 23 of her brief defendant recites that she was sentenced to three years as a standard offender. This statement is incorrect. She received a sentence of eighteen months, with 120 days to be served in jail, and the remainder on the Corrections Management Corporation program.

The defendant does not challenge the manner of service of her sentence. She contends only that since she has no prior felony convictions and since the mitigating factors in this case outweigh the enhancement factors, she is entitled to be sentenced as an especially mitigated offender. Defendant misapprehends the law. In order to be sentenced as an especially mitigated offender, the court is required to find that the defendant has no prior felony convictions and there are mitigating but no enhancement factors. Tenn. Code Ann. §40-35-109. In this case the trial judge specifically found as an enhancement factor under Tenn. Code Ann. §40-35-114(15) that defendant had abused a position of private trust by stealing from her employer. We agree with this finding. The court also commented on the defendant's lack of remorse and failure to accept responsibility for her actions.

The trial court did not find the existence of any statutory mitigating factors, but did comment that defendant had previously had a "good record". Defendant does not argue on appeal that other mitigating factors apply and appears to contend only that she is not guilty and therefore the "private trust" enhancement factor should not be applied to her. She cites no authority for this position. This argument has no merit.

The evidence in the case does not preponderate against the sentence imposed by the trial court.

Defendant finally contends that the trial court erred in requiring payment of $5,354.00 in restitution. The state concedes this error. The jury found the defendant guilty of theft of $550.00.[2] Tenn. Code Ann. §40-20-116(a) provides that

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[2]When the jury initially reported its verdict, the following dialogue took place:

THE COURT: Mr. Steele, I'll ask you once again to speak for the jury? With regard to the indictment which charges the defendant with theft of property, what is your verdict?

MR. STEELE: Guilty.

THE COURT: What value do you set it at?

MR. STEELE: $550.00.

when a felon is convicted of stealing property, a jury must ascertain the value of the stolen property and the court thereafter shall order restitution of the property. See State v. Brenda Bryant, 775 S.W.2d 1, 4-5 (Tenn. Crim. App. 1988). We therefore modify the sentence imposed to provide that defendant must pay $550.00 in restitution.

For the reasons set forth above, we find that with the exception of the amount of restitution due, the defendant's issues on appeal are without merit. We therefore affirm the judgment of the trial court as modified to provide for restitution in the amount of $550.00.

_____
CORNELIA A. CLARK
SPECIAL JUDGE

CONCUR:

_____
JOHN H. PEAY, JR.
JUDGE

_____
DAVID H. WELLES
JUDGE

THE COURT: All right. More than $500.00 but less than $1,000.00?

MR. STEELE: Less than $1,000.00 -- yes, sir.

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STATE OF TENNESSEE,	)	**C.C.A. No. 02C01-9602-CC-00060**
	)	
Appellee,	)	**HAYWOOD COUNTY**
	)	
VS.	)	**Hon. Dick Jerman, Jr., Judge**
	)	
STACY JONES REED,	)	**No. 2214 BELOW**
	)	
Appellant.	)	**(Theft)**

J U D G M E N T

Came the appellant, Stacy Jones Reed, by counsel, and also came the Attorney General on behalf of the State, and this case was heard on the record on appeal from the Circuit Court of Haywood County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court except as to that portion of the sentence dealing with restitution.

In accordance with the Opinion filed herein, it is therefore, ordered and adjudged by this Court that the judgment of the trial court is affirmed as to the conviction and sentence except as to the amount of restitution ordered, which is modified to the amount of $550.00, and the case is remanded to the Criminal Court of Haywood County for execution of the judgment of that court as modified and for collection of costs accrued below.

Costs of the appeal will be paid by the appellant, Stacy Jones Reed, for which let execution issue.

Per Curiam
Peay, Welles, Clark