IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1996 SESSION

FILED

March 20, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE, Appellee

V.

LAVEY HAYES, A/K/A LAVEY MILLER

Appellant.

No. 01C01-9601-CC-00036

RUTHERFORD COUNTY

HON. J. S. DANIEL, JUDGE

(Vandalism)

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OPINION FILED: ___________________

REVERSED AND REMANDED

William M. Barker, Judge

OPINION

The appellant, Lavey Hayes, appeals as of right her conviction in the Rutherford County Circuit Court for vandalism in the amount of $500 or less. She was fined $50 by the jury and the trial court sentenced her to eleven (11) months, twenty-nine (29) days. The sentence was suspended in favor of probation and appellant was ordered to pay restitution in the amount of $1,494.

Appellant raises four issues on appeal:

(1) whether the evidence is sufficient to support the verdict;

(2) whether the trial court erred in allowing the prosecution to make a "missing witness" argument during closing argument and by instructing the jury on that rule;

(3) whether the trial court erred in excluding certain pictures offered by the appellant; and

(4) whether the amount of restitution was proper.

Finding that the trial court erred in excluding relevant photographs offered by the appellant and that such error is not harmless, we reverse the appellant's conviction and remand to the trial court for a new trial.

In the spring of 1994, appellant, appellant's boyfriend, and appellant's two small children moved into a mobile home offered for rent by Janet Lemons in Rutherford County. Lemons did not own the mobile home, but managed it for another party who lived outside the state. The agreed upon rent was $250 per month, a reduction from the usual amount in exchange for the appellant's promise to put new carpet in the trailer. The rent was due on the first day of each month.

Over the course of several months, appellant's boyfriend, Joe Davenport, replaced the carpet in the trailer, repaired the front porch steps and built some railings on the front porch. He also began constructing a brick barbeque pit. On the evening of August 12, 1994, appellant, Joe Davenport, and the Lemons' had a heated argument which resulted in Lemons' husband informing Davenport that he would have

to move. The next day, Lemons gave appellant written notice, as provided by the lease, to vacate the premises within 30 days. Lemons testified that termination of the lease was based upon the appellant's habitual lateness in paying the rent. On September 12, one day before appellant was scheduled to vacate the trailer, Lemons was notified that a large amount of garbage was on the lawn. Lemons drove to the trailer and discovered it in disarray.

She found several bags of garbage on the front lawn, the gate and portions of the front porch partially dismantled, broken windows, a missing pane of glass in the front door, a hole in the floor at the front door, an eight (8) inch tear in the carpet, vinyl flooring removed from the bathroom, numerous holes in the paneling, and a missing panel on the back door. She immediately called the Sheriff's Department. An officer arrived at the scene and took several photographs. Lemons also took numerous pictures.

As a result of a complaint and arrest warrant filed by Lemons, the charges were taken before the grand jury and appellant was indicted for vandalism of the mobile home in excess of $1,000. At trial, Lemons testified about the damage sustained by the trailer, as well as the relationship between the parties prior to this incident.

Ms. Lemons testified that on the evening of August 12, she went to the trailer, at appellant's request, to collect the rent. Davenport offered her only half the rent. Lemons left and later returned with her husband. Lemons' husband and Davenport had a poor relationship and a heated argument ensued, leading to the written notice to vacate the trailer in 30 days. Lemons testified that the trailer was in its regular condition when the notice to vacate was delivered. On September 12, she discovered the damage. The State introduced numerous photographs that Lemons and the officer had taken depicting the damage. Lemons returned to the trailer on September 13, the last day for appellant to vacate, and noticed that several items appellant left in the trailer had been removed. She also found a note in appellant's handwriting on a piece of cardboard. It stated: "Whoever decided to come in here when no one was

here has got a lot of nerve. The last day is tomorrow that we have to move our stuff out, leave my [blank] alone until the 13th of September, 1200 p.m. Have a nice day. Lavey."[1] Finally, Lemons testified that she spent $1,494 to have cleaning and repairs done after appellant left the premises.

Kim Lemons, Lemons' sister-in-law, also testified. She stated that she and appellant were best friends and that she visited the trailer numerous times. She never saw any damage to the property. Kim Lemons stated that she knew Joe Davenport and Lemons' husband had trouble. She also identified the appellant's handwriting on the note.

The State's last witness was Officer Eddie Bogle of the Rutherford County Sheriff's Department. He testified that he was the officer who responded to Lemons' call. He investigated the scene and took pictures of the trailer. The officer also stated that he advised Lemons about the criminal and civil warrant procedures.

At the beginning of defense proof, appellant's counsel notified the court of her intention to introduce photographs she had taken of the trailer the night before trial. In a bench conference, she stated that the pictures had been developed that morning and she had recently received them. She was providing them for the State's inspection under her duty to provide continuing discovery. The trial court excluded the pictures because she had not provided them to the State prior to trial.

The first defense witness was Dia Jackson. She and her mother were the previous occupants of the trailer prior to appellant moving into it. Jackson testified about the generally poor condition of the trailer. While living there, she stated that parts of the floor were rotted and there were numerous holes in the walls. She also said that the front door window and several other windows were broken when she lived there. She also mentioned that the back door was rotting. The State revealed some inconsistencies in her testimony on cross-examination.

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[1] This piece of cardboard entered as an exhibit at trial was retained by the local clerk's office. We rely upon the text of the note as it was quoted in the State's brief.

Carl Lane, a friend of appellant and Davenport, also testified. He stated that he helped appellant and Davenport move into the trailer. Lane also visited regularly because his band practiced there. He testified that the sewer produced a terrible odor in the trailer, that some windows were broken when his friends moved in, and that the yard had debris in it when they moved in. He visited the trailer the day before trial and noticed that several windows were still broken.

Appellant testified in her own behalf. She testified that she did not vandalize the property, nor did she have any knowledge of the damage. She also believed that the damage that Lemons testified to was merely the poor condition of the trailer when she took possession. She stated that the trailer was dirty, had broken windows and holes in the wall when she moved in. She admitted that the rent was late most of the time. On August 12, she stated that Davenport withheld half the rent because of problems with the sewer system. During the argument, Lemons' husband threatened her and Davenport with a lead pipe, which led them to file a complaint with the police. However, appellant denied committing any vandalism on the property. She stated that most of the damage complained of was present when she moved in. As to the removal of vinyl flooring and dismantling of the porch, she did not know how that occurred. When she left the property, there was no garbage on the porch, the porch and barbeque grill were intact, vinyl flooring in bathroom was in place and the carpet was not cut. She admitted writing the note on cardboard, but denied that it was directed to Lemons.

On cross-examination, appellant stated that Davenport was not in court to testify because he could not afford to miss work. She never asked him if he caused the damage because she knew he did not. The State pointed out that everything that Davenport worked on in the trailer was damaged. In conclusion, she again denied doing any of the damage.

Linda Lichtenberger testified that she works for the Building Code Department and that appellant made a complaint with her office about the trailer. However, at the

request of the appellant, an investigation was never pursued. In addition, Jackie Reed, an officer with the Sheriff's Department testified that either appellant or Davenport made a complaint on August 13. This complaint was apparently filed after Lemons' husband threatened appellant and Davenport on August 12. The contents of the report were excluded by the court as hearsay. The defense rested.

The State reduced the charge from felony vandalism to misdemeanor vandalism due to some exclusions of the proof relative to damage and value. Accordingly, the jury was instructed only on misdemeanor vandalism and criminal responsibility. It found appellant guilty of vandalism and fined her $50. Appellant was later sentenced to an eleven (11) month, twenty-nine (29) day suspended sentence and placed on probation for that period of time. As a condition of probation, she was ordered to pay restitution in the amount of $1,494 at a rate of $160 per month.

Appellant first contends that the evidence was insufficient to support her conviction of misdemeanor vandalism. According to appellant, the evidence did not support a jury verdict that she was the one who actually caused the damage, nor was it sufficient to support a conviction on the basis of criminal responsibility. We disagree.

An appellant 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). In our review, we must consider 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 offense 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 re-evaluate 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). We further note that a guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). In light of these considerations, we find the evidence was sufficient.

The State's proof demonstrated that prior to appellant's occupation of the trailer, it was undamaged. During Lemons' visit on August 13, 1994, she observed no damage to the trailer. However, upon appellant's move from the trailer, Lemons found broken windows, garbage on the front lawn, a dismantled front porch and barbeque pit, holes in several walls, and damage to the carpet and vinyl flooring. The jury was aware that appellant, her boyfriend, and her two small children, ages three (3) and five (5), lived in the trailer. It was reasonable for them to conclude that only appellant, her boyfriend, or both committed the damage. As a result, appellant's conviction resulted from the jury's finding that she was directly responsible for at least some of the damage, or that she was criminally responsible for the actions of her boyfriend.

Vandalism occurs when any person 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." Tenn. Code Ann. §39-14-408(a) (1991). Although the State provided no direct evidence that appellant committed the damage, it was reasonable for the jury to infer this from the proof presented. One month before appellant moved out, the trailer was not damaged. On the day before appellant moved out, the trailer had sustained significant damage. The only adults occupying the trailer during this interim were appellant and Davenport. The following day, Lemons found a spiteful note from appellant ordering "whoever came in here" to leave her "stuff" alone. From this testimony and judging the credibility of the witnesses, the jury likely disbelieved appellant's denials and credited Lemons' testimony, leading to a

conclusion that appellant knowingly damaged the property or was criminally responsible for the damage caused by her boyfriend, Davenport.

A person may be found criminally responsible for another's actions if:

> having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

Tenn. Code Ann. §39-11-402(3) (1991). Appellant had a duty to return the premises in the same condition as when she received possession and unimpaired by her negligence. See Bishop v. Associated Transport, Inc., 332 S.W.2d 696, 701 (Tenn. Ct. App. 1959). Furthermore, her duty is not relieved if the damages were caused by a third party. Id. Appellant voluntarily undertook a duty to prevent damage to the property and return it in good condition when she signed the lease agreement with Lemons. The jury certainly could have found that appellant intended to promote or assist in the vandalism because she did not report the damage to the landlord, neither did she make any effort to rectify such damage. She entered the premises after Lemons observed the damage and left a spiteful note about disturbing her belongings. She obviously had knowledge of the damage and chose not to report it or remedy it. As a result, the jury could have reasonably found that appellant promoted the criminal acts and made no effort to prevent commission of the vandalism and thus, she was criminally responsible for Davenport's actions. The evidence is sufficient to support the conviction under either a direct liability or criminal responsibility theory.

Appellant also argues that her prosecution for vandalism was improper because the appropriate remedy was a civil suit by the landlord for damages. We note that appellant raises this issue for the first time on appeal. It was never argued at the trial court level, nor was it raised in the motion for new trial. Thus, we must consider it waived. Tenn. R. App. P. 3(e) and 36(a). Even were we to consider the issue, it is without merit.

Appellant next argues that the trial court erred in allowing the prosecution to make a missing witness argument and in giving the jury a missing witness instruction pertaining to Joe Davenport. She contends that his relationship did not indicate that he would naturally favor the appellant and also that she operated on the belief that the State would call him as a witness. The trial court committed no error.

A prosecutor is permitted to comment upon the failure of the defendant to call an available and material witness whose testimony would ordinarily be expected to favor the defendant. State v. Francis, 669 S.W.2d 85, 88 (Tenn. 1984). A three-prong test is utilized to determine when a missing witness argument is proper. Id. The evidence must show that : (1) the witness had knowledge of material facts; (2) a relationship existed between the witness and the party that would naturally incline the witness to favor the party; and (3) the missing witness was available to the process of the court. Id (citing Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979)). See also State v. Baker, 785 S.W.2d 132, 135 (Tenn. Crim. App. 1989). In light of this test, the argument and instruction were entirely proper.

First, it is apparent that Joe Davenport, the only other adult member of the household, would have knowledge of material facts relating to the damage. As an occupant of the trailer until the time it was vacated, he was in a position to have pertinent knowledge about its condition and any damage to the trailer. At the very least, his testimony would have "elucidate[d] the transaction." See Francis, 669 S.W.2d at 88 (citation omitted). Secondly, the relationship between appellant and Davenport strongly suggests that he would favor the appellant. Davenport was appellant's live-in boyfriend who had been financially supporting her and her children. He remained in that status at the time of trial. Finally, there is no evidence that he was not available to the process of the court. At the time of trial, appellant and Davenport were living in Smyrna which is in Rutherford County. He was clearly subject to process. In sum, it was reasonable for the jury to presume that appellant had "some

apprehension about his testimony" and that it would have been unfavorable.[2] Id. Therefore, we find no error in the prosecutor's argument or the jury instruction in that regard.

Appellant also argues that the trial court erred when it excluded photographs of the trailer that appellant's counsel took the night before trial. The trial court excluded the photos because they were not provided to the State through discovery prior to trial. We believe this was error.

Tennessee Rule of Criminal Procedure 16 outlines specific procedures to be followed for discovery prior to trial. The rule is designed to put the initial decision to pursue discovery in the hands of the defendant. Tenn. R. Crim. P. 16 Advisory Commission Comments. If a defendant so chooses, she may request that the State provide her with several items of information, as well as inspection of documents and tangible objects. Tenn. R. Crim. P. 16(a)(1). When the State complies with a request by the defendant to disclose documents and tangible objects, only then may the State request production of similar items intended to be used in the defendant's case-in-chief. Tenn. R. Crim. P. 16(b)(1)(A). Photographs are explicitly included in these discoverable items. Id. After the process has begun, there is a continuing duty to disclose additional evidence or material previously requested that is subject to the Rule. Tenn. R. Crim. P. 16(c). The duty upon the party is to "promptly notify the other party . . . or the court of the existence of the additional evidence or material." Id.

The record reflects that appellant made a motion for discovery and inspection on May 15, 1995. The State produced its responses on May 17, 1995 and requested reciprocal discovery. No response by the appellant is reflected in the record. At trial when the State rested its case, appellant's counsel requested a jury-out hearing to argue the motion for acquittal and to dispose of other matters. Appellant's counsel

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[2]The appellant's assertion that Davenport was on the State's list of witnesses does not alleviate the missing witness inference. Upon learning that the State would not call Davenport, appellant's counsel could have requested a recess or continuance to obtain his presence, if she had truly relied upon it and if his testimony would have been relevant or favorable to her defense.

informed the court that she had gone to the trailer the night before and made pictures of its condition. The photographs depicted various broken windows, debris, and other damaged areas still remaining after Lemons testified regarding the repairs she caused to be made. A witness was prepared to introduce the photographs. Under her continuing duty to disclose, she then provided duplicate pictures to the State. The district attorney objected to her providing reciprocal discovery halfway through the trial. The trial court agreed, saying that counsel should have made them available earlier and as a result they would be excluded. An offer of proof was made and the pictures are contained in the record.

The record does not reflect that any time constraints were placed on discovery or that a deadline was ordered by the trial court for the production of discovery. See Tenn. R. Crim. P. 16(d)(1). Neither do we find any reference to a local rule of practice requiring all discovery be produced within a certain time prior to trial. Counsel told the trial court that she was unable to procure the pictures any sooner because of her preparation for a trial two days earlier. She took the film to a one-hour developer the morning of trial. Counsel stated that she received the pictures about 11:00. Her disclosure of the pictures at the beginning of defense proof was not a prompt notification. The record reflects that appellant's counsel possessed the pictures during the latter portion of Lemons' direct testimony and concealed them through her cross-examination of Lemons and the testimony of the two other witnesses for the State. As such, she did not act in conformity with her duty to promptly notify the trial court or the district attorney of the new material. We find, as the trial court did, that appellant's counsel violated Rule 16.

A trial court has wide discretion in fashioning a remedy when non-compliance with Rule 16 has occurred. State v. Smith, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995). If the trial court is informed at any time that a party has failed to comply with the procedures in Rule 16, it may order the party to permit discovery or inspection, grant a continuance, or prohibit the party from introducing the evidence not disclosed.

Tenn. R. Crim. P. 16(d)(2). It is the propriety of the trial court's exercise of that discretion which is the basis of appellant's complaint.

Exclusion of evidence for a violation of Rule 16 is the most severe penalty that can be imposed. Smith, 926 S.W.2d at 269-70 (citations omitted). This sanction should only be imposed when it can be shown that a party is actually prejudiced by the failure to comply and that the prejudice cannot otherwise be eradicated. State v. Garland, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981) and State v. Briley, 619 S.W.2d 149, 152 (Tenn. Crim. App. 1981). See also Smith, 926 S.W.2d at 270. We are unable to see any manner in which the State would have been prejudiced by admission of the photographs. Had such pictures been admitted, the State could have recalled Lemons in rebuttal to explain them. The only harm that may have resulted was if Lemons had left the courtroom and was no longer available to testify in rebuttal. Nothing in the record indicates that Lemons had left the court and we cannot presume that was the case. Other reasonable alternatives were available to cure any prejudice that the State might have suffered and thus, the remedy was too severe. See Smith, 926 S.W.2d at 270 (citation omitted). If necessary, a recess to allow the State to locate Lemons and make her available for rebuttal would have been proper. This severe sanction in light of other reasonable alternatives amounted to error. In the absence of any actual prejudice, the most significant factor in fashioning a remedy, and in light of the highly relevant nature of the pictures, we believe the trial court's exclusion of the evidence was too severe a sanction.[3]

Often evidentiary errors are considered harmless in light of the entire trial. However, we are unable to conclude that this was harmless error. These photographs were highly relevant. Appellant's counsel had taken the pictures to depict the condition of the trailer as it existed at the time of trial. Appellant sought to discredit

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[3]We do not condone the actions of appellant's counsel in not complying with the dictates of Rule 16. However, this Court has noted that the proper remedy for deliberate conduct of counsel resulting in non-compliance with Rule 16 is achieved through exercise of the trial court's contempt powers. State v. Garland, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981).

Lemons' testimony that she had repaired all the damage allegedly caused by appellant. The pictures show several windows in the trailer are broken, including at least two of the same ones that appellant allegedly broke. They also show some garbage still remaining in the yard which Lemons testified she paid to have removed. As a result, the pictures were relevant to attack Lemons' credibility and relevant to the amount that Lemons paid to have the damage repaired. If this information had been admitted, the jury may have viewed Lemons' testimony in a different light. We cannot determine how a jury would have evaluated the proof in light of such evidence. As a result, appellant is entitled to a new trial.

Appellant's final argument is with the order of restitution in the amount of $1,494. She argues that this amount is excessive in light of the jury's verdict convicting her of vandalism of $500 or less. Further, she contends that amount of restitution was improper because it was established by hearsay evidence at the sentencing hearing. We find that it was not error for the trial court to order restitution in this amount.

As an element of sentencing, we must review an order of restitution *de novo* with a presumption of correctness. <u>See</u> Tenn. Code Ann. §40-35-401(d) (1990). When restitution is ordered as a condition of probation, the amount is limited to the victim's pecuniary loss. Tenn. Code Ann. §40-35-304(b) (1990). This pecuniary loss may include all special damages, but not general damages and must be substantiated by evidence in the record or agreed to by the defendant. Tenn. Code Ann. §40-35-304(e)(1) (1990). The trial court is directed to consider the financial resources and future ability of the defendant to pay when determining the amount of restitution. Tenn. Code Ann. §40-35-304(d) (1990). Overall, the sum must be reasonable. Tenn. Code Ann. §40-35-303(d)(10) (1990). <u>See</u> <u>also</u> <u>State v. Smith</u>, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994).

The amount in appellant's case fell within these guidelines. The pecuniary loss suffered by the victim was $1,494, Lemons' direct out-of-pocket expenses in repairing and cleaning the trailer. This amount was substantiated by her testimony and by the introduction of receipts from the carpet cleaner and a maintenance company. Although the appellant objects to such information as hearsay, we note that reliable hearsay is admissible at sentencing if the opposing party is given an opportunity to rebut. Tenn. Code Ann. §40-35-209(b) (Supp. 1995). See State v. Rex Blankenship, No. 02C01-9507-CC-00195 (Tenn. Crim. App. at Jackson, January 31, 1996). Lemons' hearsay testimony about the amount she paid, substantiated by receipts, was reliable. In addition, the appellant had the opportunity to rebut this and questioned Lemons about the work done, using the excluded pictures from trial. We also believe the sum was reasonable; it was equivalent to the expenses suffered by the victim. Also, the trial court was aware of the appellant's financial resources and considered those. Although it ordered a monthly payment in excess of what appellant stated she could pay, we do not believe a trial court is limited to ordering merely what an appellant proffers that he or she can pay. Restitution is a method of punishment and is intended to impose some burden on the defendant. The amount is proper.

We find that appellant was denied an opportunity to introduce relevant evidence to the jury and that this error cannot be considered harmless. Therefore, the jury verdict is reversed and a new trial is ordered.

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William M. Barker, Judge

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Joe B. Jones, Presiding Judge

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J. Steven Stafford, Special Judge