IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1998 SESSION

FILED

May 27, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. O1C01-9703-CC-00112**
Appellee,	)	
	)	**WILLIAMSON COUNTY**
VS.	)	
	)	**HON. HENRY DENMARK BELL,**
JOEL GUILDS,	)	**JUDGE**
	)	
Appellant.	)	(Theft of property in excess of $1000)

FOR THE APPELLANT:

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OPINION FILED:____________________

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The Williamson County grand jury returned a two count presentment against the defendant charging him with alternative counts of theft of property in excess of one thousand dollars ($1000). Following a jury trial, he was convicted of the first count and was given a four year sentence. The trial court ordered the defendant to serve 150 days of his sentence, day for day, with the remainder to be served on intensive probation. The defendant now appeals and argues that the evidence was insufficient to convict him of theft, that his sentence is excessive, and that the trial court erred in denying his motion for a new trial. After a review of the record and applicable law, we find no error and affirm the judgment of the court below.

The defendant's conviction stemmed from his employment as the manager of two service stations in Franklin and Brentwood, Tennessee. Deborah Cothran, owner of both stores, hired the defendant in 1991 at her father's suggestion. The defendant had worked for Cothran's father for more than ten years as a mechanic and tow truck driver in Michigan. Cothran originally hired the defendant as a mechanic but later promoted him to manager of both stores. She testified that she had known the defendant for approximately fifteen years and that he had been a trusted friend of her family.

In the course of his duties as manager, the defendant had the task of making the deposits for both service stations. Mary Allen, one of the accountants employed by Cothran at the Franklin office, testified that she would prepare the deposits each day and that the defendant would then take the bank bag with the deposit slip and money to First Tennessee Bank. She testified that the defendant would later return the bank bag to her with the receipt from the bank showing the amount deposited.

Cothran testified that all transactions at each of the stores were run through

the stores' cash registers. Periodically, the cashiers at the stores would make drops into the safe. Drops were made either every hour or when the cash drawer had reached an amount of two hundred dollars ($200). Cothran further testified that it had been the defendant's job to open the Brentwood safe every morning and take the money to the accountants in Franklin. The accountants would then check the money received against the cash registers' tapes and prepare the day's deposits.

Allen testified that she first noticed a problem with the bank deposits when she discovered that some of the deposits had not been made on time. She testified that one deposit in particular had been made two weeks late. Allen mentioned this to Cothran and as a result, Allen called First Tennessee Bank and requested that copies of the bank deposit slips be sent to her. She also testified that around this time, Cothran began to question the absence of some rebate checks. Allen explained that vendors periodically sent checks to the stores as part of rebate offers. The amount of the checks was typically tied to the volume of sales of a particular item. Thus, Allen generally had no advance notice of when a check was being sent or in what amount. She testified that she recorded all rebate checks in a log and then deposited the checks. Allen also explained that rebate checks were sent to both stores. However, she testified that the defendant had instructions to bring her all the mail from the Brentwood store and that the mail was not to be opened.

As Cothran further investigated the irregularities in the bank deposits, she decided to contact the police. She contacted Detective Jeff Hughes with the Brentwood Police Department on December 7, 1994. Cothran made allegations of theft against the defendant but at that time did not have bank records to support her allegations. Cothran later obtained copies of bank deposits and passed this information along to Hughes. Hughes subsequently questioned and then arrested the defendant.

At trial, the State presented three bank transactions that reflected an irregularity. In the first, on June 14, 1994, Allen had prepared a deposit slip showing a cash deposit in the amount of nine hundred and eight dollars ($908). However, the deposit slip that was actually deposited at the bank was not the one that Allen had prepared. The second slip showed a total deposit of nine hundred and eight dollars ($908) but it was not all cash as was the one prepared by Allen. The second slip showed a deposit of six hundred and forty-eight dollars ($648) in cash, sixty-five cents ($.65) in coins, and two hundred fifty-nine dollars and thirty-five cents ($259.35) in checks. Along with the deposit slip were copies of the deposited checks. The checks were rebate checks from R.J. Reynolds Tobacco Company and Purity Dairies.

Allen testified that the second deposit slip had not been in her handwriting. She further testified that she had never deposited any coins at First Tennessee. Rather, all coins were sold to a coin bank. Allen also stated that she had never received the rebate checks and that they had not been placed on her log.

A second similar transaction occurred on October 28, 1994. Again, Allen had prepared a deposit of all cash in the amount of two thousand three hundred and thirty-five dollars ($2,335). However, the bank records contained a bank deposit that showed a deposit of cash, coins, and checks in that same amount. The slip showed a deposit of one thousand three hundred and seven dollars ($1,307) in cash, eighty cents ($.80) in coins, and one thousand twenty-seven dollars and twenty cents ($1027.20) in checks. The check amount totaled the amount of two rebate checks from R.J. Reynolds Tobacco Company and Philip Morris. Again, Allen testified that she had not prepared the second slip and that she would have never deposited coins at First Tennessee. She further testified that the defendant had not been given permission to alter this, or any other, deposit.

Jaxie Gillespie, a second accountant employed by Cothran, testified about a third transaction. She testified that she had prepared a deposit slip on November 11, 1994, of cash only in the amount of three thousand nine hundred and seventy-six dollars ($3,976). The deposit slip from the bank reflected that same amount but in cash, coins, and check. The second slip showed two thousand four hundred and sixty-five dollars ($2,465) in cash, fifty cents ($.50) in coins, and one thousand five hundred ten dollars and fifty cents ($1510.50) in checks. She testified that she had not given the defendant permission to alter the deposit.

The defendant admitted to the court that he had cashed the rebate checks through the deposit and had then completed a new deposit slip. However, he testified that he had done so at Cothran's direction. He further testified that Cothran had called him from time to time and had instructed him to cash out a rebate check and bring the cash to her. He said he performed this task about thirty or forty times during his employment with Cothran and that the amounts ranged from five hundred dollars ($500) to ten thousand dollars ($10,000).

The defendant's wife, Leslie Guilds, testified that she had seen her husband deliver money to Cothran on at least one occasion. She testified that she and the defendant had met Cothran at a sports bar in Brentwood where the defendant had given Cothran a paper bag full of cash. She further testified that she and her husband had not been having any recent financial difficulties.

Cothran testified that she had never talked to the defendant about cashing a check for her. She said that if she had needed cash, she would talk to her accountants and have one of them give her some money. She stated that this money had always been reported as a part of her income. Cothran told the court that when she discovered that rebate checks had been cashed without her knowledge, she questioned the

defendant. She said the defendant first told her that he had not seen the checks but later changed his mind and said he thought he had taken them to Mary Allen. Cothran told the defendant she did not believe him and fired him "on the spot." Cothran said she had been very angry, very shocked, and very disappointed.

Testimony from several witnesses reflected that Cothran and the defendant had been friends as well as employer and employee. Cothran gave the defendant and his family numerous gifts including a family trip to Disney Land, a diamond ring, downpayments for two houses, carpet for one of the houses, and various items of clothing. Cothran testified that she had also loaned the defendant amounts of money over the course of his employment. Immediately prior to firing the defendant, Cothran had him sign a loan agreement stating that she was loaning him one thousand one hundred dollars ($1100). At trial, she testified that this amount reflected the balance of previous loans she had made to him, not a new loan.

In an effort to discredit Cothran, the defendant testified that during his employment he had participated with Cothran in what amounted to tax evasion. He testified that he had been paid two hundred and fifty-three dollars a week ($253) in the form of a check. However, he also received seven hundred dollars ($700) a week in cash. He said that this latter amount was not reported as income. He further said that Cothran had paid herself six hundred dollars ($600) a week in cash that was also unreported. The defendant also told the court that Cothran did not report all the money earned by her two stores. For example, he said that the money made from the towing service was not rung up on the cash register so that it would not have to be reported. Two former employees of Cothran testified that the normal business practice had been to put cash and checks from the towing service in the safe and not ring the amount up on the register. However, neither employee knew what happened to the money after they deposited it in the safe.

Cothran testified that the towing money was handled separately and that all money had been accounted for by her accountants. She further testified that while the defendant had been paid in cash, she had given him an accompanying 1099 tax form which recorded his having received cash payment. She also told the court that a five year tax audit had just been performed on both stores and no problems had been found. In fact, she received a three thousand dollar ($3000) refund from the government.

The defendant now argues that the State failed to prove beyond a reasonable doubt that he committed the theft. 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).

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). 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).

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. Cabbage, 571 S.W.2d 832, 835. 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).

The defendant argues that in order for him to have been convicted, "one would have to believe Ms. Cothran to the exclusion of the defendant." He then states that to do so would be unreasonable considering Cothran's irregular business practices. We cannot agree.

The defendant admitted to cashing the rebate checks by using the cash in the prepared deposits. He also admitted to making a new deposit slip. Thus, the only question is whether he unlawfully kept the money or gave it to Cothran. The defendant testified that he had given the money to Cothran, while Cothran testified that she had never seen the money nor discussed such a practice with the defendant. The jury simply believed Cothran over the defendant. To do so is entirely within the jury's province. See State v. Bigbee, 885 S.W.2d 797, 804 (Tenn. 1994). The defendant has failed to carry his burden of proving to this Court that the evidence is insufficient. We find no reason to disturb the jury's verdict. This issue is without merit.

The defendant next contends that his sentence is excessive. The trial court ordered the defendant to serve 150 days, day for day, and to then spend the remainder of his four year sentence on intensive probation. The defendant submits that he should have been given a three year sentence with immediate probation. He argues that the trial court failed to adequately consider two mitigating factors and erroneously applied one enhancement factor.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d).

The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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).

A portion of the Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-210, established a number of specific procedures to be followed in sentencing. This section mandates the court's consideration of the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

T.C.A. § 40-35-210.

In addition, this section provides that the minimum sentence within the range is the presumptive sentence. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

The Act further provides that "[w]henever the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors

it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

In this case, the trial court applied two enhancement factors, that the defendant had a previous history of criminal convictions and that the defendant abused a position of private trust. T.C.A. § 40-35-114(1) & (15). The defendant does not contest the application of these factors. However, the defendant challenges the application of enhancement factor number eight, that the defendant had a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. T.C.A. § 40-35-114(8). At the sentencing hearing, the trial judge described the application of this factor as "arguable." Apparently, the defendant had been placed on probation following an April 28, 1989, conviction. He was not discharged from that probation until August 3, 1994, but argues that he should have been discharged earlier and should not have been under any probationary restraint at the time of the June 14, 1994, transaction. Since the trial judge merely described this factor as "arguable," it appears that no weight was given to this factor.

The defendant also argues that the trial court should have applied two mitigating factors: that the defendant's conduct neither caused nor threatened serious bodily injury and that substantial grounds existed tending to excuse or justify the defendant's criminal conduct. T.C.A. § 40-35-113(1) & (3). The trial judge said he really did not consider factor one as applying because such a factor is present in every theft. He also noted that even if mitigation factor one applied, it was outweighed by the enhancement factors. We agree and find no error in the trial judge's determination to give the mitigation factor little weight. The trial judge termed mitigation factor three "arguable"

and said he would give it little weight. Again, we see no error in this determination. Furthermore, we find no error in sentencing the defendant to the maximum of four years. Two enhancement factors clearly applied to this defendant while the mitigation factors were entitled to little, if any, weight. We further find that full probation is inappropriate for the defendant and affirm the trial court's order that the defendant serve 150 days, day for day.

As his final issue, the defendant argues that the trial court erred when it denied his motion for a new trial on the basis of newly discovered evidence. The defendant contends that a new trial should have been awarded because he now had new evidence with which to impeach Cothran.

In seeking a new trial based on newly discovered evidence, the defendant must establish (1) reasonable diligence in attempting to discover the evidence; (2) the materiality of the evidence; and (3) that the evidence would likely change the result of the trial. See State v. Goswick, 656 S.W.2d 355, 358-60 (Tenn. 1983). In order to show reasonable diligence, the defendant must demonstrate that neither he [she] nor his [her] counsel had knowledge of the alleged newly discovered evidence prior to trial. See Jones v. State, 2 Tenn. Crim. App. 160, 452 S.W.2d 365, 367 (1970). Whether the trial court grants or denies a new trial on the basis of newly discovered evidence rests within the sound discretion of the trial judge. Hawkins v. State, 220 Tenn. 383, 417 S.W.2d 774, 778 (1967).

The defendant claims that following his trial, his wife found a letter that had been filed away in a chest-of-drawers with other documents relating to child support. The letter had been typed on stationery from the Franklin service station and had been addressed to a child support officer with the State of Michigan. The letter's closing was worded, "Respectfully yours, Deborah L. Cothran." However, there was no signature, only

a blank space. At the top of this letter, someone had written "Joes [sic] copy" in pencil. The letter, dated March 15, 1993, stated that the defendant was employed at a salary of $152.25 per week. There was no mention of the defendant receiving additional commissions in cash. The defendant also produced a copy of this same letter that he said the State of Michigan had recently sent to him at his request.[1] This letter was identical with the exception that the signature line now included the signature, "Deborah R. Cothran." The defendant contends that these letters would have impeached Cothran's testimony about how the defendant was paid which, he claims would then "have corroborated [his] allegation that Ms. Cothran had ensnared [him] in a larger income tax evasion scheme." Furthermore, he claims the letters would have established Cothran's "character of untruthfulness."

At the motion for a new trial, Cothran identified the letter as being written on her service station's stationery. She stated that the defendant, as manager of the two stores, would have had access to the stationery. She testified that she did not recall writing the letter and did not think the words "Joes copy" were her handwriting. She further testified that she was one hundred percent sure that the signature on the photocopied letter was not hers. She testified that her middle name is "Lee," thus, she would not have signed her own name using "R" as a middle initial.

When it appears that the newly discovered evidence can have no other effect than to "discredit the testimony of a witness at the original trial, contradict a witness' statements or impeach a witness," the trial court should not order a new trial "unless the testimony of the witness who is sought to be impeached was so important to the issue, and the evidence impeaching the witness so strong and convincing that a different result at trial would necessarily follow." State v. Rogers, 703 S.W.2d 166, 169 (Tenn. Crim. App.

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[1]While the copy of the letter was not certified, the defendant did produce a letter from the Michigan court dated December 26, 1996, and an envelope postmarked December 27, 1996.

1985). As noted above, the decision to grant or deny a new trial on the basis of newly discovered evidence is a determination for the sound discretion of the trial court.

It is clear that the "new evidence" gathered by the defendant is not so strong and convincing that if it had been introduced, a different result would have been reached. Rather, the defendant's evidence was extremely weak in that he could not even prove that Cothran had written the letter. In fact, it appeared that she had not written the letter as the letter's signature was not in her handwriting and was not even her correct middle initial. This evidence is entirely unconvincing. As such, we see no need to determine whether the defendant meets the due diligence prong of the Goswick test. He clearly cannot meet the other two prongs. Thus, we conclude the trial judge did not abuse his discretion in denying the motion for a new trial. This issue is without merit.

For the foregoing reasons, we affirm the defendant's conviction and sentence.

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JOHN H. PEAY, Judge

CONCUR:

____
JERRY L. SMITH, Judge

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THOMAS T. WOODALL, Judge