IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

APRIL 1998 SESSION

FILED

May 1, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**NO. 02C01-9706-CR-00204**
Appellee,	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. JOSEPH B. DAILEY, JUDGE**
DAVID L. OWENS,	)	
	)	
Appellant.	)	(Simple Robbery)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

The defendant, David L. Owens, appeals as of right a jury conviction of one (1) count of simple robbery. He was sentenced as a Range II, Multiple Offender, to nine (9) years. The defendant contends that the evidence adduced at trial was not sufficient to sustain a conviction for robbery, and that he was prejudiced by a statement of the prosecutor during closing argument. After a review of the record, we find the judgment of the trial court should be AFFIRMED.

FACTS

The testimony at trial revealed that the defendant was observed by Irma Clark, a Dollar General clerk, leaving the store without paying for some articles of clothing. Clark alerted Derrick Mims, a supervisor, and A.C. Simmons, a security guard, to the situation. The defendant fled the scene on foot and both Mims and Simmons gave chase. At some point in the pursuit, Simmons returned to the store to get his vehicle.

Mims testified that he continued to follow the defendant on foot for several blocks. At one point the defendant stopped, threw the clothes down, turned toward Mims, and waved a box cutter at Mims in a threatening manner. Mims backed away from the defendant, who turned and walked rapidly away. Simmons eventually caught up to the defendant and, by using his pistol, detained him. The police were summoned, and the defendant was taken into custody. A box cutter was discovered in the defendant's back pocket.

The jury was charged as to aggravated robbery and the lesser offenses of simple robbery and theft of property under $500. The jury convicted the defendant of the lesser offense of simple robbery.

SUFFICIENCY OF THE EVIDENCE

A.

The defendant claims the evidence is insufficient to support the conviction. In determining the sufficiency of the evidence, this Court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). A jury verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). On appeal, the state is entitled to the strongest legitimate view of the evidence and all legitimate or reasonable inferences which may be drawn therefrom. Id. This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the defendant demonstrates that the facts contained in the record and the inferences which may be drawn therefrom are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996). Accordingly, it is the appellate court's duty to affirm the conviction if the evidence, viewed under these standards, was sufficient for any rational trier of fact to have found the essential elements of the offense beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789, 61 L. Ed.2d 560 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994).

B.

The defendant was convicted of simple robbery, a lesser offense of aggravated robbery. Simple robbery is "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401. One commits theft "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." Tenn. Code Ann. § 39-14-103.

C.

Mims testified that, during his pursuit of the defendant, the defendant stopped, dropped the clothes, and waved a box cutter at him. It was for the jury to determine whether this testimony was truthful.

The fact that violence or fear was not involved in the original taking of the merchandise is not solely determinative of whether the offense committed was theft or robbery. *See* Burgin v. State, 400 S.W.2d 539, 541 (Tenn. 1966); White v. State, 533 S.W.2d 735, 737 (Tenn. Crim. App. 1975).

> Under other authority, the use of force or intimidation occurring in immediate flight after the theft, as a means of escape, or to resist apprehension, will support a charge of robbery. While it has been held that the use of force to effect an escape after the property taken has been abandoned does not supply the element of force necessary to make the taking a robbery, it has also been held that the element of fear exists notwithstanding that control over the stolen property is relinquished in the process of escaping.

77 C.J.S. Robbery § 16, p. 606 (1994)(citations omitted).

We also note that theft includes not only the unlawful taking of property, but also the unlawful exercise of control over it. Tenn. Code Ann. § 39-14-103. Thus, where a defendant is fleeing from the original taking and causes another to fear present personal peril at the time the defendant is exercising control over the property, the offense of robbery has been committed. Possession may be constructive; anyone who is in a position to take some action to deprive the owner of the property is in a position to exercise control. T.P.I.- Crim. 9.01 (4th ed. 1995).

In this case we find a sufficient nexus between the defendant's actions putting Mims in fear and the theft. Viewing the evidence in a light most favorable to the state, the defendant was fleeing from the original taking and was in constructive possession of the clothes at the time he confronted Mims. The

defendant's actions caused Mims to fear personal peril. The evidence is sufficient to support the conviction for simple robbery.

IMPROPER ARGUMENT

The defendant further contends that he was unfairly prejudiced by the prosecutor's statement during closing argument, and that the trial court's curative instruction was ineffective.

The defendant objects to the following argument by the prosecutor:

> Hey, I got news for you. You know why he wants you to find him guilty of theft of property? It's a misdemeanor. It carries up to eleven twenty-nine. That's the maximum time you can get. What do you think? If I can convince a jury to just give him a misdemeanor, he's gone. That's all I got to do. Go in and concede there was a theft.

The defendant's counsel immediately objected. The trial court then gave the following curative instruction to the jury:

> All right. Ladies and gentlemen, the statement made by Mr. Henry to the effect that if he's convicted with a misdemeanor, he's gone, I'll ask you to disregard that particular statement, because the length of sentence a person serves is not an appropriate matter for your consideration as jurors.

The trial court instructed the jury not to consider potential sentences in arriving at their verdict. The jury is presumed to have followed the trial court's curative instructions, absent evidence to the contrary. State v. Smith, 893 S.W.2d 908, 914 (Tenn. 1994); State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). The defendant was not prejudiced by these remarks.

This issue is without merit.

CONCLUSION

We conclude that the evidence presented, in a light most favorable to the state, was sufficient for the jury to find the defendant guilty of simple robbery. Additionally, we find the defendant was not unfairly prejudiced by the

prosecutor's comments. Accordingly, the judgment of the trial court is AFFIRMED.

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JOE G. RILEY, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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WILLIAM M. BARKER, JUDGE