IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1999 SESSION

FILED

June 4, 1999

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	C.C.A. No. 01C01-9801-CR-00050
	)	
vs.	)	Dickson County
	)	
MARK ALLEN SEYLER,	)	Hon. Robert E. Burch, Judge
	)	
Appellant.	)	(Vandalism)

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OPINION FILED:________________

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendant, Mark Allen Seyler, appeals from his conviction for vandalism[1] in the Dickson County Circuit Court. The trial court imposed a sentence of eleven months, 29 days to be served in the Dickson County Jail. In this direct appeal, the defendant raises three issues:

I. Whether there was sufficient evidence to convict the defendant of vandalism.

II. Whether the trial court erred in allowing the state to introduce evidence concerning the defendant's prior arrests for misdemeanors.

III. Whether the trial court erred in allowing the defendant to be seen by the jury in leg-irons.

After a review of the record, the briefs of the parties, and the applicable law, we affirm the judgment of the trial court.

The facts of this case were presented on appeal through a Statement of Evidence pursuant to Tennessee Rule of Appellate Procedure 24(c).[2] The state presented the following proof at trial. On May 4, 1997, Sergeant Ken Bone of the Dickson County Sheriff's Department drove his police car to the garage area of the Dickson County Jail to have it washed by the trustees. The defendant was a trustee at the jail, but he was not assigned to wash cars. After the car was washed, it was running correctly. The car remained in the garage for two hours until Officer Thrasher drove the car to the sergeant. Upon reaching the sergeant, Officer

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[1] Tenn. Code Ann. § 39-14-408(a) (1997).

[2] This rule allows the appellant to prepare and file a statement of the evidence when a transcript is unavailable. In this case, the appellant filed a statement of the evidence, and the state filed its own statement of the evidence. However, under Tennessee Rule of Appellate Procedure 24, the proper procedure is for the appellant to file a statement of the evidence, then the appellee can object to any portions, and the trial judge determines the properly includable information. See Tenn. R. App. P. 24(c), (e). In this case, the trial judge approved both of the statements of evidence. Because the statements of evidence are substantially similar and no important differences are apparent, we will proceed to review the appellant's claims by treating the combined statements as the statement of the evidence.

Thrasher told him that the car was running roughly. The sergeant noticed bird droppings on the car, therefore, he returned the car to the garage to have it cleaned. As he drove the car to the garage, he observed the car running roughly. He left the engine running as the car was being cleaned, but before the trustees finished washing the car, the engine quit running and would not restart. A local repair shop discovered water in the gas tank.

The sergeant testified that he knew the defendant from having arrested him on several occasions in the past. Defense counsel objected to this testimony, but his objection was overruled. Sergeant Bone testified that he did not see the defendant in the garage when he drove the car there to be cleaned, nor did he see the defendant put water in the gas tank.

Jailer Darick Wall testified that the defendant had access to the garage at the time of the incident, even though he was not assigned to the garage area. After the sergeant told Officer Wall that water was placed in the gas tank, Officer Wall informed all the trustees that they would lose their privileges as trustees unless someone admitted to the vandalism. At this point, James Bain, one of the trustees assigned to the garage area, said he saw the defendant put water in the gas tank. Officer Wall questioned the defendant, who admitted his guilt. However, the defendant refused to sign a written statement admitting his guilt. In refusing to sign the written statement, Officer Wall testified that the defendant said he would not admit doing something which he did not do. When Officer Wall asked the defendant why he was recanting his earlier admission of guilt, the defendant responded that he would not tell Officer Wall the truth.

The last witness for the state was James Bain. Mr. Bain testified that

he "apparently" saw the defendant put water in the gas tank. He testified that the defendant was present in the garage when the sergeant's car was being washed. He identified his written statement, given immediately following the incident, accusing the defendant of placing water in the gas tank. After Mr. Bain's testimony, the state rested. The defendant offered no proof. The jury found the defendant guilty of vandalism.

I.

Before we reach the issues presented by the defendant, we must first address the state's contention that the defendant has waived these issues by the untimely filings of his motion for new trial and notice of appeal. The state concedes that this court may waive the requirement for a timely filing of a notice of appeal in the interest of justice. See Tenn. R. App. P. 4(a). However, the state contends that waiver of the requirement of timely filing is inappropriate because the defendant has not filed a motion requesting that relief. The state argues that if this court waives the timely filing requirement, then we should only address the defendant's challenge to the sufficiency of the evidence.

A motion for a new trial must be filed "within thirty days of the date the order of sentence is entered." Tenn. R. Crim. P. 33(b). This is a mandatory filing period which cannot be extended. Tenn. R. Crim. P. 45(b). The trial court does not possess jurisdiction over an untimely filed motion for new trial. State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997) (citations omitted). "The trial judge's erroneous consideration of ruling on a motion for new trial not timely filed . . . does not validate the motion." Id. (citing State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989)). An untimely filed motion for new trial "not only results in the appellant losing the right to have a hearing on the motion, but it also deprives the appellant of the opportunity to argue on appeal any issues that were or should have been presented

in the motion for new trial." Id. (citations omitted). Waiver of these issues occurs pursuant to Tennessee Rule of Appellate Procedure 3(e), which states the following:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

However, this court may address issues which would result in an outright dismissal of the prosecution, such as the sufficiency of the evidence. See State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989); State v. Williams, 675 S.W.2d 499, 501 (Tenn. Crim. App. 1984); State v. Durham, 614 S.W.2d 815, 816 n. 1 (Tenn. Crim. App. 1981). Additionally, this court may review the record for plain errors when necessary to do substantial justice. Tenn. R. Crim. P. 52(b).

In this case, the sentence was entered on January 27, 1997 and the motion for new trial was filed on May 6, 1997. Defense counsel claims he made an oral motion for a new trial immediately following the sentencing hearing on January 27, 1997, and the trial judge set a hearing date for May 12, 1997.[3] However, the oral motion was not reduced to writing until May 6, 1997. The oral motion must be reduced to writing within thirty days from the entry of the sentencing order. Tenn. R. Crim. P. 33(b). Although counsel argues that the defendant's issues should not be waived due to counsel's action, this court has consistently held that counsel's untimely filing of a motion for new trial is imputed to the defendant for the purpose of waiver. See Dodson, 780 S.W.2d at 780; Williams, 675 S.W.2d at 501; Durham,

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[3] This information was contained in the defendant's reply brief, but not in the statement of evidence. Facts recited in a party's brief, but not included in the record on appeal, are not evidence. See Betsy Jane Pendergrast v. State, No. 01C01-9707-CC-00307, slip op. at 4 (Tenn. Crim. App., Nashville, Sept. 15, 1998) (citing State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988)).

614 S.W.2d at 816 n. 1; Cf. House v. State, 911 S.W.2d 705, 713 (Tenn. 1995)(waiver in a post-conviction context where the conduct of counsel is imputed to the client). Arguing that the untimely filing of the motion for new trial was counsel's fault does not assist the defendant's case. This court lacks the authority to waive the timely filing of a motion for new trial. See State v. Donald Wallace, No. 01C01-9711-CC-00526, slip op. at 7-8 (Tenn. Crim. App., Nashville, Sept. 30, 1998) (citing Tenn. R. App. P. 4(a)). Therefore, the only issue which has not been waived is the sufficiency of the evidence.

To reach the defendant's sufficiency issue, we must waive the time requirement for filing a notice of appeal. The defendant filed an untimely notice of appeal. The time period for filing a notice of appeal is "within 30 days after the date of entry of the judgment appealed from." Tenn. R. App. P. 4(a). This court may waive the timely filing of a notice of appeal in the interest of justice. Id. We find that this is an appropriate case to waive the timely filing requirement for the notice of appeal. Accordingly, we will address the sufficiency of the evidence issue.

II.

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, *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, 324, 99 S. Ct. 2781, 2791-92 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court should not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); Farmer v. State, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). On the contrary, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. Cabbage, 571 S.W.2d at 835.

To be found guilty of vandalism, the state must prove that the defendant "knowingly cause[d] damage to or the destruction of any real or personal property of another or of the state, the United States, any county, city, or town knowing that [he] d[id] not have the owner's effective consent." Tenn. Code Ann. § 39-14-408(a) (1997). One definition of damage is "tampering with property and causing pecuniary loss or substantial inconvenience to the owner or a third person." Tenn. Code Ann. § 39-14-408(b)(1)(B) (1997).

The defendant contends that the evidence is insufficient because there was no corroboration of James Bain's testimony. Essentially the defendant is challenging the credibility of this witness. The defendant had ample opportunity at trial to discredit Mr. Bain's testimony and his character. The jury chose to accredit Mr. Bain's testimony. This court does not reweigh or reevaluate the evidence. Matthews, 805 S.W.2d at 779. In the light most favorable to the state, Mr. Bain observed the defendant putting water in the sergeant's gas tank. Additionally, the defendant admitted his guilt to Officer Wall. The car was used for

police business; therefore, it was owned by the state, county, city or town. Sergeant Bone testified that the car had to be repaired, which caused substantial inconvenience to him. By this evidence, the state proved every element of the offense. Accordingly, the evidence was sufficient to support the defendant's conviction for vandalism.

The judgment of the trial court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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JOHN EVERETT WILLIAMS, JUDGE