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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 4, 2023 Session

STATE OF TENNESSEE v. JUSTIN DARNAY GRAVES

Appeal from the Circuit Court for Madison County
No. 20-334 Donald H. Allen, Judge

No. W2021-01478-CCA-R3-CD

A Madison County jury convicted the defendant, Justin Darnay Graves, of two counts of simple possession of heroin, introduction of contraband into a penal facility, tampering with evidence, speeding, and driving while unlicensed, for which he received an effective sentence of six years in confinement. On appeal, the defendant contends the evidence presented at trial was insufficient to support his conviction for tampering with evidence. The defendant also argues the trial court erred in classifying his conviction for introduction of contraband into a penal facility as a Class C felony. Following our review, we affirm the judgments of the trial court with respect to the defendant's convictions for simple possession, introduction of contraband into a penal facility, speeding, and driving while unlicensed. However, we reverse and vacate the defendant's conviction for tampering with evidence because we conclude the evidence is insufficient to support the conviction. Furthermore, we remand to the trial court for a new sentencing hearing reflecting that the introduction of contraband into a penal facility conviction is a Class D felony and for corrected judgment forms in counts one and two.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part and Vacated in Part and Remanded

J. ROSS DYER, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and JOHN W. CAMPBELL, SR., JJ., joined.

M. Todd Ridley, Assistant Public Defender, Tennessee District Public Defenders Conference (on appeal) and Jeremy Epperson, District Public Defender, and Joshua Phillips, Assistant Public Defender (at trial), for the appellant, Justin Darnay Graves.

Herbert H. Slatery III, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Jody S. Pickens, District Attorney General; and Bradley Champine, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

On November 4, 2019, Investigator Paul Bozza with the Jackson Police Department ("JPD") was traveling along Highland Avenue in his patrol car at 1:55 a.m. Investigator Bozza was driving behind a white 2013 Chrysler 200 and, because he noticed the vehicle was speeding, Investigator Bozza began pacing it with his patrol car. He paced the vehicle for approximately a mile and a half, and his speedometer indicated they were traveling 53 mph in a 40 mph zone. Investigator Bozza initiated a traffic stop and, "after a brief moment," the driver pulled over. When Investigator Bozza approached the vehicle, he observed the defendant in the driver's seat and Brittney Harris, the defendant's girlfriend, in the passenger seat. Investigator Bozza asked the defendant if he had a driver's license, and the defendant confirmed that he did not. At that point, Investigator Bozza asked the defendant to exit the vehicle so he could establish why the defendant was not licensed. As he was standing outside the vehicle, the defendant "was very nervous, really sweating, [and] had a hard time standing still."

Ms. Harris, who was still seated in the vehicle, was also "very nervous, crying." Although there was another officer watching her, Investigator Bozza had prior dealings with Ms. Harris and decided to speak with her. Because he knew the vehicle belonged to Ms. Harris's grandfather, Investigator Bozza asked her if there was anything illegal inside the vehicle which she denied. However, as she was talking, she tried to "shov[e] a baggie of some sort down in the back of her pants." A female sergeant searched Ms. Harris and located a bag containing 0.2 grams of methamphetamine, a pill capsule with 0.5 grams of methamphetamine, a dollar bill with 2 grams of methamphetamine inside of it, a dollar bill with 0.2 grams of cocaine inside of it, a bag with 13 and a half Xanax bars, and 4 Oxycodone pills. Investigator Bozza then searched the vehicle and located $532 in cash and a flower purse containing a spoon with methamphetamine residue and a blue medical tourniquet. Both Ms. Harris and the defendant were placed under arrest at that time.

Ms. Harris, a co-defendant in this case, agreed to testify as a State's witness. According to Ms. Harris, she and the defendant were at a friend's house when they decided to get something to eat. On their way back, Ms. Harris noticed the defendant was speeding and attempted to get him to slow down. When Investigator Bozza initiated the traffic stop, the defendant "started getting really nervous and panick[ed], and he was kind of just fidgeting around and trying to hide stuff." The defendant threw a bag on the floorboard of the car, and Ms. Harris picked it up and put it in her pants. During the traffic stop, Ms. Harris was "upset" and "crying," so Investigator Bozza came over to speak with her, and

Ms. Harris told him that she had the bag of drugs. Investigator Bozza called Sergeant Gee over to search Ms. Harris, and she "pretty much gave [the bag] to her." Ms. Harris told Investigator Bozza that the drugs belonged to the defendant. She also saw the defendant put a bag of drugs "in his pants." On cross-examination, Ms. Harris acknowledged she had prior convictions for filing a false police report, reckless endangerment with a deadly weapon, and initiation of a process to manufacture methamphetamine.

Officer Timothy McClain and Officer Andrew Washburn with the JPD transported the defendant to the Madison County Jail. Prior to placing the defendant in the patrol car, Officer Washburn conducted a pat-down search of the defendant. However, the defendant was "real squirmy, [and he] kept moving around" during the search. Whenever Officer Washburn approached the defendant's waist or genital area the defendant would "kind of move away, he wouldn't spread his feet for me to search properly. He would try to press up against the front of the patrol car anytime I got near the front part of his pants." The defendant was warned that it would be an additional offense for him to take anything illegal into the jail and was given the opportunity to let the officers know if he had anything illegal on his person. Officer Washburn did not locate anything during the search, and they proceeded to the jail. During the drive to the jail, Officer McClain was in the passenger seat observing the defendant and noticed the defendant "couldn't sit still" and "kept moving his hands behind his back."

When they arrived at the Madison County Jail, Officers McClain and Washburn walked the defendant down a hallway connecting the garage to the booking area. The hallway, which was approximately 30 feet long, was empty except for the two officers and the defendant. Officer McClain was standing next to the defendant, and Officer Washburn was just behind them. As they were walking, Officer Washburn saw a small bag fall to the ground in front of him, and he recognized the contents of the bag to be narcotics before collecting it. Officer Washburn could see the bag fall from the defendant's body and "believed that it had fallen from his hand," which was still in handcuffs behind the defendant's back. While it would have been "easy" to conceal something in his hand, the defendant also had the ability to reach inside his pants. After the defendant was taken to the dress-out room to have his clothing changed, an officer brought out a syringe that had been found on the defendant. On cross-examination, Officer McClain agreed the defendant was handcuffed behind his back when he was searched and transported to the jail. Officer Washburn also testified that he shined his flashlight on the defendant's hands while the defendant was getting out of the patrol car upon arriving at the jail. However, on redirect examination, he agreed the defendant did not fully open his hands when the light was shining on them. Officer Washburn also clarified that while the bag in the hallway fell from the defendant, he could not say with absolute certainty whether it fell from the defendant's hands or pants.

Officer Dillon Harrell, a detention specialist with the Madison County Jail, responded to a call for additional officers in the dress-out room. When he arrived, the defendant appeared to be in an intoxicated state and was refusing instructions to get undressed. Once the officers were able to calm the defendant down enough to take his clothing off, they discovered a capped syringe "sitting there in his underwear in between his legs." They turned the syringe over to Officer Washburn and asked the defendant if he had taken any narcotics that night. The defendant replied that he had "swallowed meth and heroin."

Special Agent Carter Depew, a forensic chemistry and drug identification expert with the Tennessee Bureau of Investigation, analyzed the evidence recovered from the bag dropped in the hallway of the Madison County Jail. Agent Depew identified the substance as heroin with a net weight of 2.01 grams. A copy of the lab report was entered into evidence.

The defendant then recalled Officer Washburn who testified that his body cam was running during his pat-down search of the defendant. Officer Washburn agreed that he patted the defendant down "the best that [he] could" but nothing fell out. On cross-examination, Officer Washburn agreed the defendant had on "multiple layers of pants" which made it difficult to conduct a thorough pat-down search.

Following deliberations, the jury found the defendant guilty of two counts of simple possession of heroin (counts one and two), introduction of contraband into a penal facility (count three), tampering with evidence (count four), speeding (count five), and driving while unlicensed (count six). The trial court subsequently imposed sentences of eleven months and twenty-nine days for counts one and two, six-years at 30% for count three, and six years at 30% for count four. For counts five and six, the trial court did not impose jail time. The trial court merged counts one and two and ordered all counts to be served concurrently with each other but consecutive to the defendant's prior sentence in Madison County case No. 13-246. This timely appeal followed.

Analysis

On appeal, the defendant contends that the evidence presented at trial was insufficient to support his conviction for tampering with evidence[1] and that the trial court erred in classifying his conviction for introduction of contraband into a penal facility as a Class C felony. The State contends the evidence is sufficient but concedes the trial court erred and requests remand for resentencing on count three as a Class D felony.

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[1] The defendant does not challenge his convictions for simple possession, introduction of contraband into a penal facility, speeding, and driving while unlicensed.

I. Sufficiency

When the sufficiency of the evidence is challenged, the relevant question of the reviewing court is "whether, after viewing 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, 319 (1979); *see also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Our Supreme Court has stated the following rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus, the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere, and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). "A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

Tennessee Code Annotated section 39-16-503(a)(1) sets forth the following definition of tampering with evidence:

> (a) It is unlawful for any person, knowing that an investigation or official proceeding is pending or in progress to:
>
> (1) Alter, destroy, or conceal any record, document or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding[.]

Tenn. Code Ann. § 39-16-503(a)(1).

This statute requires the State to prove "timing, action, and intent" beyond a reasonable doubt. *Hawkins,* 406 S.W.3d at 132 (quoting *State v. Gonzales,* 2 P.3d 954, 957 (Utah Ct. App. 2000)). "The 'timing' element requires that the act be done *only after* the defendant forms a belief that an investigation or proceeding 'is pending or in progress.'" *Id.* (emphasis added); *see also State v. Smith,* 436 S.W.3d 751, 763 (Tenn. 2014). "The 'action' element requires alteration, destruction, or concealment." *Hawkins,* 406 S.W.3d at 132. To "conceal" a thing means "to prevent disclosure or recognition of" a thing or "to place [a thing] out of sight." *Id.* (citing *State v. Majors,* 318 S.W.3d 850, 859 (Tenn. 2010)). For "intent" to be established, the proof must show that through his actions, the defendant intended "to hinder the investigation or official proceeding by impairing the record's, document's or thing's 'verity, legibility, or availability as evidence.'" *Id.* (quoting Tenn. Code Ann. § 39-16-503(a)(1)). Tampering with evidence is a "specific intent" crime. *Id.* (internal citations omitted).

In *State v. Hawkins*, our Supreme Court considered whether abandonment of a piece of evidence satisfies the elements of evidence tampering and concluded that, if the abandoned evidence was not "altered or destroyed, and its discovery was delayed minimally, if at all[,]" the elements have not been met. *Id.* at 131, 138. When considering this issue of first impression, the court offered this analysis:

> In drug cases, for example, convictions for tampering by concealment have been upheld when a defendant swallows drugs and when a defendant flushes drugs down a toilet as police approach and the drugs are recovered. One defendant's conviction was upheld when he tossed the drugs out of his moving vehicle, kept driving for a half mile, and the drugs were never found. Another defendant's conviction was upheld when he tried to hide his drugs in one pocket of a billiards table.
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> Conversely, in other drug cases involving alleged concealment, *courts have found mere abandonment when a defendant hides drugs in his socks or his pocket*, tosses drugs onto the roof of a garage while being pursued, drops drugs off a roof in view of police, or throws drug evidence over a wooden privacy fence while officers are in pursuit. Dropping a marijuana cigarette into a sewer is mere abandonment, but dropping soluble drugs down a sewer train could make them irretrievable and could support a tampering conviction. Hiding drugs in one's mouth without successfully swallowing them also may not constitute tampering.

Id. at 135 (emphasis added) (internal citations omitted). Our Supreme Court declined to adopt a stand-alone abandonment doctrine, because "[i]f the evidence is not actually altered, concealed, or destroyed," the elements of evidence tampering have not been met and "the application of a separate abandonment doctrine would be redundant." *Id.* at 138.

In *State v. Alvina Tinisha Brown*, No. E2016-00314-CCA-R3-CD, 2017 WL 2464981, at *6 (Tenn. Crim. App. June 7, 2017), *no perm. app. filed*, this Court considered whether the evidence was sufficient to support a conviction for tampering with evidence where the defendant concealed a bag of marijuana in her hand and placed it inside her pants during a traffic stop. The bag was retrieved by officers, sent to the crime lab, tested positive for marijuana, and used as evidence at trial. *Id.* Based on *State v. Hawkins*, this Court concluded the evidence was insufficient to support the defendant's conviction for tampering with evidence because the defendant's actions "only slightly delayed" the discovery of the marijuana. *Id.*

Here, the tampering with evidence charge was based on the defendant's placement of a bag of heroin in his pants during a traffic stop which continued during his transport to the Madison County Jail. Accordingly, the State was required to prove beyond a reasonable doubt that by placing the bag of heroin in his pants, the defendant intended to impair its availability as evidence in the police investigation or at trial. Before placing the defendant in the patrol car, Officer Washburn conducted a pat-down search of the defendant but did not locate anything. Prior to exiting the patrol car at the jail, Officer Washburn shined a flashlight on the backseat of the patrol car and the defendant's hands to ensure they were empty. Officer Washburn testified the defendant dropped the bag of heroin in the empty hallway at the Madison County Jail as they were walking to the booking area. Officer Washburn was able to retrieve the bag, and Special Agent Depew later identified it as 2.01 grams of heroin. The bag of heroin was not altered or destroyed. Moreover, because the defendant was in the presence of police officers the entire time he had the bag of heroin in his pants and because he was undressed by officers within minutes of dropping the bag of heroin in the hallway, its discovery was delayed minimally, if at all. His conduct did not impair the heroin's evidentiary value, its availability for testing, or its use at trial. Under the facts of this case, the evidence presented was insufficient to support the defendant's conviction for tampering with evidence. Therefore, we reverse and vacate the conviction.

II. Sentencing

The defendant argues the trial court erred in classifying his conviction for introduction of contraband into a penal facility as a Class C, rather than a Class D, felony. The State concedes the trial court incorrectly sentenced the defendant for a Class C felony.

We agree. Tennessee Code Annotated section 39-16-201 provides, in pertinent part, as follows:

> (b) It is unlawful for any person to:
>
> (1) Knowingly and with unlawful intent take, send, or otherwise cause to be taken into any penal institution where prisoners are quartered or under custodial supervision:
>
> . . .
>
> (B) Any intoxicant, legend drug, controlled substance, or controlled substance analogue . . .

Tenn. Code Ann. § 39-16-201 § (b)(1)(B). A violation of (b)(1)(B) . . . is a Class D felony. *Id.* § 39-16-201(c)(2). Accordingly, the trial court's imposition of a sentence for a Class C felony must be reversed and the case remanded for re-sentencing on count three as a Class D felony.

Finally, we detect some errors in the entry of the judgment forms in this case. At the sentencing hearing, the trial court found that count one merged with count two, and we agree. However, this is not reflected in the judgment forms. Therefore, we must remand the case to the trial court for entry of corrected judgment forms indicating the merger. *See State v. Berry*, 503 S.W.3d 360, 364 (Tenn. 2015) ("The judgment document for the lesser (or merged) conviction should reflect the jury verdict on the lesser count and the sentence imposed by the trial court. Additionally, the judgment document should indicate in the 'Special Conditions' box that the conviction merges with the greater conviction. To avoid confusion, the merger also should be noted in the 'Special Conditions' box on the uniform judgment document for the greater or surviving conviction.").

Conclusion

Based on the foregoing authorities and reasoning, the judgments of the trial court are affirmed with respect to the defendant's convictions for simple possession, introduction of contraband into a penal facility, speeding, and driving while unlicensed. The defendant's conviction for tampering with evidence is vacated and dismissed. Additionally, we remand the matter to the trial court for a new sentencing hearing reflecting that the introduction of contraband into a penal facility conviction is a Class D felony and for corrected judgment forms in counts one and two.

J. ROSS DYER, JUDGE