

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 26, 2002

STATE OF TENNESSEE v. WILLIAM J. BURNS

Appeal from the Circuit Court for Sevier County

No. 7361 Rex Henry Ogle, Judge

No. E2001-01601-CCA-R3-CD

May 29, 2002

William J. Burns appeals from his aggravated burglary and theft convictions. He was convicted at a jury trial in the Sevier County Circuit Court, and he is presently serving an effective fifteen-year sentence as a persistent offender for these crimes. He claims in this appeal that the evidence is insufficient to support his aggravated burglary conviction and that the lower court erred in denying his motion for a mistrial. Because we disagree, we affirm.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Ed Miller, Public Defender, Dandridge, Tennessee, for the Appellant, William J. Burns.

Paul G. Summers, Attorney General & Reporter; Thomas E. Williams, III, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and Charles Atchley, Jr., Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In the light most favorable to the state, the evidence at the defendant's trial demonstrated that on the day that Clara Allen's home was burglarized, the defendant went into Foothills Market in Gatlinburg about 4:00 or 4:30 p.m. He was without sufficient funds to purchase beer. An employee, Sherry Hickam, loaned him enough money for his purchase. The defendant came back about 8:30 that evening. He had money this time. He also had some jewelry, which he exhibited to Ms. Hickam and offered to sell to her.

After the defendant left the market, Ms. Hickam told Gatlinburg Police Department Officer Jeff Justice that the defendant had offered to sell her some jewelry. Later that evening, Officer Justice learned of a burglary at the home of Clara Allen, in which jewelry, cigarettes, cash, a quilt, eyeglasses, hand tools, and a toaster were taken. Ms. Hickam's description of the jewelry

the defendant offered to sell her was consistent with some of the jewelry taken from Ms. Allen's home. Moreover, a ring found on the defendant's person when he was arrested was identified by Ms. Allen as belonging to her. Several packs of cigarettes were recovered from the defendant's residence shortly after the crimes and returned to Ms. Allen.

The defendant lived at the time of the crimes a short distance from the Foothills Market. Ms. Allen's home is located between the market and the defendant's residence.

I

We first consider the defendant's challenge to the sufficiency of the convicting evidence for the crime of aggravated burglary. When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable 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), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000).

In determining the sufficiency of the convicting evidence, this court does not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this court is required to afford the state 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. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this court. *Id.* at 835. In *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973), our supreme court said, "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."

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. *Id.*

The defendant in this case appeared at Foothills Market without sufficient funds to buy beer. Mere hours later, he had not only money but jewelry which he was attempting to sell. The jewelry was the same as that taken from the victim's home. The defendant had one item of the

victim's jewelry in his possession when he was arrested, and the victim's cigarettes were found in his home shortly after the crime. These facts support an inference that the defendant committed the aggravated burglary of Ms. Allen's home. *State v. Tuttle*, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995) ("Possession of recently stolen goods gives rise to an inference that the possessor has stolen them," as well as that the possessor committed burglary.); *see Bush v. State*, 541 S.W.2d 391 (Tenn. 1976); *State v. Land*, 681 S.W.2d 589, 591 (Tenn. Crim. App. 1984) (inference that defendant committed theft of property); *State v. Hamilton*, 628 S.W.2d 742, 746 (Tenn. Crim. App. 1981) (further inference that defendant committed burglary antecedent to theft). There is no evidence to controvert this inference of guilt, and the jury was warranted in making it upon the facts of this case. Accordingly, the evidence sufficiently supports the defendant's conviction of aggravated burglary.

II

The defendant also alleges error in the trial court's refusal to grant a mistrial after Officer Justice testified that, based upon a prior encounter with the defendant, he felt uneasy when he saw the defendant standing in the back of the Foothills Market near an "employees only" entrance.

The entry of a mistrial is appropriate when the trial cannot continue for some reason, or if the trial does continue, a miscarriage of justice will occur. *State v. McPherson*, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994). The decision to grant a mistrial is within the sound discretion of the trial court, and this court will not disturb the trial court's determination unless a clear abuse of discretion appears on the record. *Id.*

The evidence in this case was mentioned briefly. The evidence was relatively innocuous in view of the cogent evidence offered by the state to establish the defendant's guilt. Further, although this evidence was offered by a state's witness, it was not directly elicited by the prosecutor's questioning of the witness. While the witness was still on the stand, the judge gave a curative instruction to the jury that it should disregard this irrelevant evidence. We presume that the jury followed these instructions. *See, e.g., State v. Woods*, 806 S.W.2d 205, 211 (Tenn. Crim. App. 1990) (the jury is presumed to follow the instructions given it by the trial court). Moreover, we are unpersuaded that the injection of this evidence created a manifest necessity for a mistrial. *See, e.g., State v. David T. Jones*, No. 01C01-9710-CC-00445, slip op. at 3-4 (Tenn. Crim. App., Nashville, Dec. 21, 1998) (no abuse of discretion to deny motion for mistrial based upon testimony that defendant "had just got [sic] out of jail" where testimony was unsolicited by state, immediate curative instruction given, and evidence of guilt was overwhelming); *State v. Hall*, 947 S.W.2d 181, 184 (Tenn. Crim App. 1997) (trial court did not err in denying motion for mistrial where victim testified that defendant had previously been in the workhouse, after which curative instruction was given); *State v. McKinney*, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996) (in view of the strength of convicting evidence, trial court did not err in denying motion for mistrial following testimony that defendant had a "prior charge," even though no curative instruction was given). We therefore conclude that the lower court did not err in denying the defendant's motion for a mistrial.

Because we are unpersuaded of insufficiency of evidence or trial error, we affirm.

JAMES CURWOOD WITT, JR., JUDGE