IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1995

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9412-CR-00450**
	)	
Appellee,	)	
	)	
	)	**MCMINN COUNTY**
VS.	)	
	)	**HON. MAYO L. MASHBURN**
KENNETH R. CHRISMAN, JR.,	)	**JUDGE**
	)	
Appellant.	)	(Passing Worthless Checks)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE CIRCUIT COURT OF MCMINN COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant appeals as of right following a judgment entered on a jury verdict finding him guilty of three counts of passing worthless checks.[1] He was sentenced to concurrent sentences of eleven months and twenty-nine days for each count.

He argues four issues on appeal: (1) That the trial court erred in denying his motion to sever the counts of the indictment; (2) that the trial court erred in denying his motion for a mistrial based on alleged prosecutorial misconduct; (3) that there was insufficient evidence to convict him of each count; and (4) that the trial court erred in revoking his probation which he had been serving for other convictions.

We affirm the judgment of the trial court.

An employee of Citizen's National Bank testified concerning the records of the Defendant's business checking account for the period of February through August, 1993. At the end of March 1993, the Defendant's balance was -$27.93. The Defendant made no deposits during April, but wrote five checks that resulted in check fees. His balance at the end of April was -$99.53. No deposits were made in May, and after the account had remained overdrawn for thirty days, the bank closed the account on May 25. The Defendant made a deposit of $150 in June to reopen his account. He wrote thirty-seven checks during June, twenty of which were returned for insufficient funds. His balance at the end of June was -$184.21. No deposits were made in July and ten checks were returned for insufficient funds. In August, the account balance was $322.71. The bank closed the account again at the end of August after thirty days

[1]Tenn. Code Ann. § 39-14-121.

of inactivity. The bank employee testified that the Defendant would have been sent a notice on each of the days that an insufficient funds situation occurred.

An employee of Sparkle Amoco testified that on May 24, 1993, the Defendant wrote the store a check for $22.71 as payment for some gas. She testified that the check was returned for insufficient funds.

The manager of the Tennessee Mountain Market testified that the Defendant wrote a check in the amount of $30.26 on July 9, 1993, which was returned for insufficient funds. The manager identified another of the Defendant's checks dated July 14, 1993, in the amount of $27.48. Although she was not present at the store the night this check was passed, she received a phone call from the Defendant's wife, who told her that the Defendant would be in to pay the check at 9:00 on August 16, 1993. He did not go to the store to pay off the check.

On the day of the trial, another count of passing a worthless check was dismissed when the assistant district attorney learned that the witness essential to that count was not present.

The Defendant argues that his motion to have the three counts of the indictment tried separately should have been granted. A Defendant has a right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others. Tenn. R. Crim. P. 14(b)(1). This court has held that for the purposes of severance determination, "common scheme or plan" has the same meaning that it does for evidentiary purposes. State v. Peacock, 638 S.W.2d 837, 840 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1982).

Proof of other crimes is not admissible to show mere propensity to commit another crime. Tenn. R. Evid. 404(b). However, proof of another crime may be admitted if it tends to prove a matter at issue in the trial. Id. In the trial herein, the State had to prove that the Defendant acted with fraudulent intent or with a knowing state of mind. Tenn. Code Ann. § 39-14-121(a). Intent would be difficult to prove if the jury could only look to a single instance of passing a bad check. But three instances, close in time, tend to prove that each instance was more than just a mistake. "[T]he probabilities of an honest mistake diminish as the number of similar transactions, indicating a scheme or system, increases." Webster v. State, I Tenn. Crim. App. I, II, 425 S.W.2d 799, 803 (1967), cert. denied, id. (Tenn. 1968) (quoting 1 Wharton's Criminal Evidence 527-30).

Because each count was relevant to proving the Defendant's intent and the existence of a common scheme, the decision by the trial court not to sever the three counts was not error.

The Defendant also argues that the State was guilty of prosecutorial misconduct by not dismissing Count 1 prior to the day of the trial, and that this misconduct should have caused a mistrial. The State had no way to know that the key witness for Count 1 would not show up for the trial. When it became apparent that the witness would not show, the State dismissed the count. There was absolutely no misconduct by the prosecution, and the trial court's decision to deny the Defendant's motion for a mistrial is affirmed.

The Defendant next argues that there was insufficient evidence to convict him on each count. When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence presented during the trial was sufficient "to support the finding of the trier of fact of guilt beyond

a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

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). 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). This court is required to 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. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

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. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee 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." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., the accused 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 and the inferences which may be drawn from the facts are insufficient, as a matter of law,

for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

First, the Defendant contends that he did not write the check dated July 23, 1993, to the Tennessee Mountain Market. (Count IV). Although the store manager was not present during the passing of this check, she did receive a phone call from the Defendant's wife assuring her that the Defendant would make good on the check on August 16. Also, after admitting that he wrote one of the two checks to Tennessee Mountain Market, the Defendant explained that he didn't make a certain mark when signing his name. However, this mark questioned by the Defendant was on the check which the Defendant admitted he wrote. The Defendant effectively admitted that he wrote the check dated July 23. We conclude that there was sufficient evidence for the jury to find that he wrote the check dated July 23.

The Defendant also argues that the State failed on each count to show fraudulent intent or a knowing state of mind as required by Tenn. Code Ann. § 39-14-121(a). At the time the Defendant wrote the check dated May 24, 1993, he had not made any deposits that month after having a negative balance at the end of April. From this, a jury could conclude that the Defendant knew when he wrote the check that he did not have sufficient funds in the bank to cover it. At the beginning of July, the Defendant again had a negative balance. He had not made any deposits in July before or after writing the two checks to Tennessee Mountain Market. Eight other checks were returned that month for insufficient funds. A jury could reasonably conclude from this that the Defendant knew he had insufficient funds to cover either check and intended to defraud the market.

Because there was sufficient evidence for a jury to find that the Defendant wrote each check in question and acted with the requisite intent, beyond a reasonable doubt, the convictions are affirmed.

The Defendant argues that this court should reinstate his probation. A Defendant may appeal as of right from an order revoking probation. Tenn. R. App. P. 3(b). In the case sub judice, however, this issue is not properly before this court. This court may only consider the facts which appear in the record. Tenn. R. App. P. 13(c). An appellate court cannot review error if nothing in the record supports it. State v. Galloway, 696 S.W.2d 364, 368 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1985).

The action of the trial court revoking the Defendant's probation was a ruling in a case which has not been appealed to this court. The record in this case does not contain an order revoking the Defendant's probation. Thus, the Defendant has failed to provide an adequate record for the review of this issue, and this court is therefore precluded from considering it. State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993); State v. Bennett, 798 S.W.2d 783, 789-90 (Tenn. Crim. App. 1990).

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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JOHN A. TURNBULL, SPECIAL JUDGE