IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES ALAN WADE,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F 2004-1238
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, James Alan Wade, was convicted by a jury in Jackson County District Court, Case No. CF 2003-218, of Embezzlement of Rented Property, in violation of 21 O.S.Supp.2002, § 1451, after former conviction of two felonies. Jury trial was held before the Honorable Richard Darby, District Judge, on November 15, 2004. The jury set punishment at twenty (20) years imprisonment. Judgment and Sentence was imposed in accordance with the jury's verdict on December 7, 2004. Thereafter, Appellant filed this appeal.

Mr. Wade raises seven (7) propositions of error:

1. Mr. Wade's twenty year sentence must be modified by this Court or remanded for resentencing because the State presented insufficient evidence to prove the two alleged prior felony convictions beyond a reasonable doubt;

2. Defense counsel rendered ineffective assistance in failing to request a Jackson v. Denno hearing to adjudicate the voluntariness of a statement allegedly made by Mr. Wade to Detective Daniel Meyer;

3. Mr. Wade's twenty year sentence is excessive and should be modified by this Court;

4. The State presented insufficient evidence to support Mr. Wade's conviction for Embezzlement of Rented Property;

5. The trial court erred in overruling Mr. Wade's demurrer to the evidence presented at the preliminary hearing and erred in binding Mr. Wade over for trial because the State failed to present evidence establishing all of the statutory elements of the crime charged. Further, the State failed to demonstrate probable cause to show that Mr. Wade committed the crime as charged in the felony information;

6. The arrest warrant was invalid and defense counsel rendered ineffective assistance of counsel in failing to challenge the validity of the warrant; and,

7. Mr. Wade's right to due process was violated because he was given no notice of the offense for which he was ultimately convicted.

After thorough consideration of the propositions raised, the Original Record, Transcripts, briefs and arguments of the parties, we find Mr. Wade's conviction should be reversed and remanded with instructions to dismiss for the reasons set forth below.

In Proposition Four, Mr. Wade claims the State did not present sufficient evidence to support his conviction. Mr. Wade was charged with Embezzlement of Rented Property, in violation of 21 O.S.Supp.2002, § 1451(A)(9). The elements of the crime are: First, fraudulently; Second, appropriated; Third, personal property; Fourth, valued at One Thousand Dollars ($1,000.00) or more but less than Twenty-Five Thousand Dollars ($25,000.00); Fifth, of another; Sixth, possessed or controlled by the defendant; Seventh, by virtue of a lease or rental agreement; Eighth, the defendant willfully or intentionally does not return the property within

ten (10) days after the expiration of the agreement. *See* 21 O.S.Supp.2002, § 1451(A)(9); OUJI-CR 2d. 5-20.

Review of the evidence presented at trial shows the State did not present any evidence relating to fourth element - the value of the property. The State concedes no specific evidence was presented as to the value of the property.

When reviewing claims of insufficient evidence, this Court must determine whether, viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Mitchell v. State*, 2005 OK CR 15, ¶ 51, 120 P.3d 1196, 1209; *Spuehler v. State*, 1985 OK CR 32, ¶ 7, 709 P.2d 202, 203-204. Here, the State did not present evidence on the value of the property and did not prove an essential element of the crime charged. While the jury might have guessed at the car's value from notations on the rental agreement, no specific evidence was presented which proved this element of the crime beyond a reasonable doubt and any such finding would be purely speculative.

Accordingly, we find Mr. Wade's conviction for Embezzlement of Rented Property must be reversed and remanded with instructions to dismiss and the remaining propositions of error need not be addressed.

DECISION

The Judgment and Sentence imposed in Jackson County District Court, Case No. CF 2003-218, is hereby **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF JACKSON COUNTY
THE HONORABLE RICHARD DARBY, DISTRICT JUDGE

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OPINION BY: C. JOHNSON, J.

CHAPEL, P.J. :	CONCURS
LUMPKIN, V.P.J. :	DISSENTS
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	CONCURS

RD

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING

I dissent to the reversal of the conviction in this case as I find the evidence sufficient to support the jury's verdict. When reviewing a challenge to the sufficiency of the evidence on appeal, this Court is to review the evidence in the light most favorable to the prosecution, and determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559, citing *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

In conducting this review, this Court is to accept all reasonable inferences and credibility choices that tend to support the verdict. *Washington v. State*, 1986 OK CR 176, ¶ 8, 729 P.2d 509, 510. Further, there is a presumption of regularity in the trial court proceedings. *Brown v. State*, 1997 OK CR 1, ¶ 33, 933 P.2d 316, 324. As a consequence, it becomes the burden of the convicted defendant on appeal to present to this Court sufficient evidence to rebut this presumption. *Id.* We also adhere to the presumption that jurors are true to their oaths and conscientiously follow their instructions. *Turrentine v. State*, 1998 OK CR 33, ¶ 26, 965 P.2d 955, 968; *Jones v. State*, 1988 OK CR 267, ¶ 10, 764 P.2d 914, 917.

When an error does occur at trial, error alone is insufficient to require reversal. Appellant must show not only that error occurred but that the resulting prejudice from the error was such that reversal is warranted. *Smallwood v. State*, 1995 OK CR 60, ¶ 36, 907 P.2d 217, 228-229. Title 20 O.S.

2001, § 3001.1 provides that no judgment shall be set aside or new trial granted by any appellate court of this state "unless the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right".

The record in this case shows that Mr. Jones agreed on October 20, 2003, to loan Appellant the rental car "for a couple of days". As of December 8, 2003, when the felony Information was filed, Appellant still had not returned the rental car. The State's evidence was sufficient to prove Appellant's intent to not return the property within the ten days after the expiration of the agreement. Even in the absence of an agreed-to return date, Appellant would have had until November 19, 2003, at the latest to return the rental car pursuant to the boilerplate language of the agreement and until November 29, 2003, to return the rental car pursuant to the additional ten days allowed by statute. When charges were filed on December 8, 2003, Appellant's failure to have returned the rental car clearly showed he had not returned it within ten days after the expiration of the rental agreement.

Both Appellant and the State agree that no testimony was introduced as to the specific dollar value of the car. However, sufficient evidence of the car's value as more than $1,000.00 but less than $25,000.00 was introduced through the rental car agreement, introduced as State's Exhibit 1. The rental car agreement clearly indicated in the top right-hand corner that the car rented by Appellant was a 2003 Mercury Sable with only 14,461 miles on its odometer at the time of the rental. One of the instructions given to the jury at the close

of the evidence informed them they were "permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified when considered with the aid of the knowledge which you each possess in common with other persons. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which you find to have been established by the testimony and evidence in the case". *See* OUJI-CR (2d) 9-1. Any rational juror, using common sense, could reasonably infer that a 2003 model vehicle which was embezzled in 2003 would be worth more than $1,000.00 but less than $25,000.00.

Appellant's complaint that he cannot be found guilty under the felony Information since it charged him with embezzlement as of October 30, 2003, at which time the agreement had not had time to expire is not supported by the case law. The purpose of the Information is to put the defendant on notice of the charges against which he must be prepared to defend. *Conover v. State,* 1997 OK CR 6, ¶ 11, 933 P.2d 904, 909. Unless time is a "material ingredient" of the offense charged, the State is not required to prove that an offense took place on a specific date. *Robedeaux v. State,* 1995 OK CR 73, ¶ 8, 908 P.2d 804, 806.

The felony Information in this case was sufficient to put Appellant on notice of the charge against him. Further, the evidence presented at the Preliminary Hearing also put Appellant on notice of the evidence that would be offered at trial. Despite the magistrate's failure to order the information amended to conform to the proof pursuant to 22 O.S. 2001, § 264, pleadings

are conformed to the proof at the conclusion of the trial. In this case, that proof was that Appellant failed to return the rental car by the default date or not more than 30 days as set forth in the rental car agreement.

Further, Appellant was bound over for trial on the same evidence which is now the basis of his conviction. Any failure to fill in the original term of the rental agreement is a "red herring" which is not relevant to the commission of the offense. The evidence clearly showed Appellant kept the rental car almost 50 days, more than sufficient time to satisfy an element of the crime of embezzlement of rented property pursuant to 21 O.S. Supp. 2002, § 1451(A)(9).

Additionally, the record in this case shows there were no surprises at trial. Appellant not only had a Preliminary Hearing, but also raised by motion the same objections now raised on appeal. However, as defense counsel did not renew those objections by a motion to quash in the District Court prior to entering his plea to the charge, he has waived any error. *See Mitchell v. State*, 2005 OK CR 15, ¶ 51, 120 P.3d 1196, 1209 fn. 11., citing *Farmer v. State*, 1977 OK CR 215, ¶ 25, 565 P.2d 1068, 1072.

Based upon the foregoing, and applying the standard of appellate review as set forth above, a rational trier of fact could have found the essential elements of the crime of embezzlement of rental property beyond a reasonable doubt. Appellant has failed to meet his burden of showing that he was prejudiced by any errors which occurred. Just as jurors are instructed to reach their decision "aided by the knowledge which you each possess in common with other persons", OUJI-CR 2d, 10-8, this Court should refrain from pure

academic exercises and apply the same reality of life common sense exercised by these jurors and affirm the judgment and sentence in this case.