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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR10-959

PATRICK LAVELL DAVIS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered September 28, 2011

APPEAL FROM THE HOT SPRING COUNTY CIRCUIT COURT
[NO. CR-2009-209-1]

HONORABLE CHRIS E WILLIAMS, JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

After a jury trial, appellant was found guilty of three counts of breaking or entering, two counts of theft of property valued at less than $500, and one count of theft of property valued at $500 or greater but less than $2500. On appeal, appellant argues that the evidence of his identity as the perpetrator was insufficient to support his convictions; that the evidence was insufficient to permit a finding that the pool cues and bag stolen in one of the thefts were worth $500 or more; and that the trial court erred in failing to interrupt trial on its own motion to cure various alleged errors. We affirm.

When the sufficiency of the evidence to support a criminal conviction is challenged on appeal, we view the proof and all reasonable inferences deducible therefrom in the light most favorable to the State. *Watson v. State*, 2010 Ark. App. 354. We will affirm if the finding of guilt is supported by substantial evidence. *Id.* Substantial evidence is evidence that

passes beyond mere speculation or conjecture and is of sufficient certainty and precision to compel a conclusion one way or another. *Id.*

We first consider appellant's argument that there was insufficient evidence to prove his identity as the person who committed the offenses. A person commits the crime of breaking or entering if, for the purpose of committing a theft or felony, he breaks into or enters any building, structure, or vehicle. Ark. Code Ann. § 5-39-202(a)(1) (Repl. 2006). A person commits theft of property if he knowingly takes or exercises unauthorized control over the property of another person with the purpose of depriving the owner of that property. Ark. Code Ann. § 5-36-103(a)(1) (Repl. 2006). Although it is essential to every case that the defendant be shown as the one who committed the crime, that connection can be inferred from all the facts and circumstances of the case. *Williams v. State*, 308 Ark. 620, 825 S.W.2d 826 (1992).

Here, there was evidence that one of the victims made a 911 call in July 2009 reporting that a black man in a light-colored t-shirt broke into a car on the caller's driveway and was driving a dark-colored vehicle. A detective was dispatched and soon thereafter apprehended appellant in the vicinity—so close, in fact, that the 911 caller was able to see the officer stop appellant's vehicle atop a hill. Appellant and his car matched the description given by the caller, and appellant's car contained property described in detail by the original caller and members of two other victimized families living nearby as that which had been stolen from their three vehicles. No one else was in or near appellant's car when he was apprehended. We hold that this is substantial evidence of appellant's identity.

At the time of the offense, theft of property was a Class C felony if the value of the property was less that $2500 but more than $500. Ark. Code Ann. § 5-36-103(b)(2)(A) (Repl. 2006).[1] Value is the market value of the property at the time and place of the offense. Ark. Code Ann. § 5-36-101(12)(A)(i) (Repl. 2006). The original cost of property is one factor that may be considered by the jury in determining market value, as long as it is not too remote in time and relevance. *Reed v. State*, 353 Ark. 22, 109 S.W.3d 665 (2003). Here, there was testimony by one of the victims that four pool cues and a cue bag were taken from his truck. He stated that he was a retiree and that he shot pool every night at the Moose Lodge to practice for tournaments. He testified that two of the cues, worth $75 apiece, were "a couple of years old." He stated that the other two cues, worth $170 and $140, had been purchased within the last nine months and were "pretty close to brand new" at the time of the theft. He further testified that the cue bag, which was worth $235, was purchased at the same time as the more expensive cues. Given that the latter purchases were so recent, and considering that the Arkansas Supreme Court has held that there was substantial evidence from which a jury could have found the stolen property to be worth more than $35 where the owner of four stolen trophies described them as "new" and testified that they would cost around $10 each, *Williams v. State*, 252 Ark. 1289, 482 S.W.2d 810 (1972), we hold that this testimony is substantial evidence that the stolen property was worth more than $500.

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[1]The threshold amounts pertaining to section 5-36-103 were radically revised by Act 570 of 2011. *Compare* Ark. Code Ann. § 5-36-103(b)(2)(A) (Repl. 2006) and Ark. Code Ann. § 5-36-103(b)(2)(A) (Supp. 2011).

Appellant next argues that the judge should have quashed the entire jury panel because two members of the venire had been victims of the thefts. Essentially, he argues that, even though the trial judge ascertained that these veniremen had not served on any trial during the term and had not discussed their experience with any other members of the venire, including the jurors who ultimately served on this case, the panel was irredeemably tainted because an appearance of impropriety remained. This is not the law. The trial judge's duty is to protect the jury from contamination, and the question for us to decide is whether his actions constituted an abuse of discretion. *Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002). Bias will not be presumed, nor will we presume that a jury was incapable of following the trial court's instructions. *Id*. On this record, we conclude that the trial court's actions were proper and sufficient.

No objections were made regarding the remaining issues. However, appellant argues that none were required because the errors were so obvious and grave that the judge was required under the third exception listed in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), to correct them on his own initiative. We do not agree.

It is a well-settled general rule that we will not consider issues raised for the first time on appeal; a contemporaneous objection is required to preserve an issue for appeal. *Rye v. State*, 2009 Ark. App. 839. However, the supreme court in *Wicks* recognized four narrow exceptions to the contemporaneous-objection rule, known as the *Wicks* exceptions, that are to be rarely applied: (1) when the trial court, in a death-penalty case, fails to bring to the jury's

attention a matter essential to its consideration of the death penalty itself; (2) when defense counsel has no knowledge of the error and thus no opportunity to object; (3) when the error is so flagrant and so highly prejudicial in character that the trial court should intervene on its own motion to correct the error; and (4) when the admission or exclusion of evidence affects a defendant's substantial rights. *Wicks v. State*, *supra*; *Rye v. State*, *supra*. The third exception, which appellant relies upon, applies only to errors affecting the very structure of the criminal trial, such as presumption of innocence and the State's burden of proof. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003).

The errors asserted by appellant pertain to remarks made by the prosecuting attorney during his opening statement, *i.e.*, the recitation of jury instructions and allegedly drawing attention to appellant's failure to testify. The reading of jury instructions by attorneys is not permitted. *See Heard v. Farmer's Bank*, 174 Ark. 194, 295 S.W. 38 (1927). However, in the absence of anything to show that the instructions that were read were incorrect, or any argument explaining how appellant was prejudiced, this is not an error "so highly prejudicial in character that the trial court should intervene on its own motion to correct the error." *Rye v. State*, 2009 Ark. App. 839, at 10.

To comment on a defendant's failure to testify is an egregious error that does fall within the third *Wicks* exception. *See Anderson v. State*, *supra*. When it is alleged that a prosecutor has made an improper comment on a defendant's failure to testify, we first determine whether the statement itself is in fact a comment, overt or veiled, on the

defendant's failure to testify. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000). Should we determine that the prosecutor did refer to the defendant's choice not to testify, we would then determine whether it can be shown beyond a reasonable doubt that the error did not influence the verdict. *Id.* Here, the prosecutor made the following statement during his opening statement:

> Now, we anticipate that the Defense will say, "Wasn't me. Wasn't Mr. Davis." There is a term that we use for that and it's called the "Soddi" defense, S-O-D-D-I, "Some Other Dude Did It." We expect when this is all over with you're going to say, no, this dude did it.

We think that, although the prosecutor was edging toward territory that is best avoided, there is a distinct difference between a statement anticipating that the defense will rely on failure to prove identity and a statement anticipating that the defendant will actually testify that he was not the perpetrator. Here, we cannot say that the statement constituted an error so egregious and prejudicial as to require the trial judge to intervene on his own motion.

Affirmed.

HART and ROBBINS, JJ., agree.

Teresa Bloodman, for appellant.

Dustin McDaniel, Att'y Gen., by: *John T. Adams*, Ass't Att'y Gen., for appellee.