

**ARKANSAS COURT OF APPEALS**

DIVISION IV

No. CACR12-508

MARCUS WASHINGTON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered:** February 27, 2013APPEAL FROM THE JEFFERSON  
COUNTY CIRCUIT COURT  
[NO. CR-2011-522-5]HONORABLE JODI RAINES  
DENNIS, JUDGEAFFIRMED IN PART; REVERSED  
AND REMANDED IN PART**RHONDA K. WOOD, Judge**

At a bench trial, the circuit court convicted Marcus Washington of felony theft of property and commercial burglary. On appeal, Washington challenges the circuit court's interpretation of the commercial-burglary statute and the sufficiency of the State's evidence for both crimes. We conclude that the court's interpretation of the statute was correct and that substantial evidence supports the commercial-burglary conviction. However, we find that insufficient evidence exists to support the dollar amount for the theft conviction. Accordingly, we affirm the commercial-burglary conviction, but we reverse and remand the conviction for felony theft of property.

*Facts*

At trial, Debra Green, a receptionist at the Jefferson Regional Medical Center surgery-waiting area, testified that she returned to work on Monday, September 19, 2011,

and discovered that her computer was missing. Jonathan Robinson, a security officer, reviewed the surveillance video from the preceding weekend. The video showed Marcus Washington entering a number of areas in the hospital, including a storage closet in the neurology lab. According to Robinson, the storage closet was off limits to the general public, and Washington was not a hospital employee. Washington then exited the storage closet with a linen bag, entered the surgery-waiting area—which is closed on the weekends—and left with a large object in the bag.

Timmy McCorkle, a computer information systems employee at the hospital, testified that the hospital replaced the missing computer for a cost of \$1047.86. However, the hospital originally purchased the missing computer in 2008 for \$850.26. Washington moved for a directed verdict on both charges. The circuit court denied the motions, Washington rested, and the court found him guilty of commercial burglary and felony theft of property. At sentencing, the State presented proof of Washington's four previous felony convictions, and the court sentenced him as a habitual offender to 120 months for commercial burglary and 24 months for theft of property and ordered that the sentences run consecutively.

#### *Standard of Review*

We review questions of statutory interpretation de novo. *Davis v. State*, 94 Ark. App. 240, 228 S.W.3d 529 (2006). We construe the statute just as it reads, giving the words their ordinary and accepted meaning in common language; only if the language is unclear or ambiguous will we resort to the canons of statutory interpretation. *Id.* When a defendant challenges the sufficiency of the evidence, we view the evidence in the light

most favorable to the State and affirm if the verdict is supported by substantial evidence. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). Substantial evidence is evidence, direct or circumstantial, that is forceful enough to compel reasonable minds to reach a conclusion one way or another and that goes beyond mere speculation or conjecture. *Wyles v. State*, 368 Ark. 646, 249 S.W.3d 782 (2007).

#### *Commercial Burglary*

Washington's conduct falls within the language of the commercial-burglary statute, and substantial evidence exists to support his conviction for that crime. A person commits commercial burglary if (1) he or she *enters or remains unlawfully* in a commercial occupiable structure of another person (2) with the purpose of committing in the commercial occupiable structure any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(b)(1) (Repl. 2005). To enter or remain unlawfully means to enter or remain in or upon premises without a license or privilege. Ark. Code Ann. § 5-39-101(2)(A) (Repl. 2005). A person has a license to be on premises open to the public, but that license does not extend to the part of the premises that are closed to the public. *See* Ark. Code Ann. § 5-39-101(B)(i),(ii) (Repl. 2005). Washington argues that he did not violate the "unlawful entry" element of the commercial-burglary statute because the surgery-waiting area was open to the public.

At the trial, the receptionist testified that the surgery-waiting area was closed on the weekend. In addition, the security guard testified that the video showed Washington moving into and out of closets and rooms that, even on the weekdays, are closed to the public. Thus, Washington was without license to be in the surgery-waiting area on the

weekends and was without license to ever be in the storage closets. In sum, the plain language of section 5-39-101(B) embraces Washington's conduct because he entered and remained in areas of the hospital that were closed to the public.

Washington also challenges the second prong of the commercial-burglary conviction and argues that he did not have the purpose to steal. We hold that substantial evidence supports a modified conviction for misdemeanor theft of property for the reasons stated below. Since misdemeanor theft of property is an offense punishable by imprisonment,<sup>1</sup> both elements of the commercial-burglary statute have been satisfied.

*Theft of Property*

Substantial evidence supports Washington's theft-of-property conviction, but the court lacked substantial evidence to find that the dollar amount exceeded \$1000. A person commits theft of property if he or she knowingly:

Takes or exercises unauthorized control over or makes an unauthorized transfer of an interest in the property of another person with the purpose of depriving the owner of the property.

Ark. Code Ann. § 5-36-103(a)(1) (Supp. 2011). Here, surveillance-video footage showed Washington leaving the surgery-center-waiting area with a linen bag that contained a boxy object shaped like a computer. Earlier, Washington had entered the storage closet to steal the linen bag. Both Robinson and another hospital employee identified the person on the video as Washington. Washington was not an employee of the hospital and had no reason to be in the surgery center over the weekend. The circuit court did not have to

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<sup>1</sup> Ark. Code Ann. § 5-4-401(b)(1) (Repl. 2006).

resort to speculation and conjecture to conclude that the linen bag contained the missing computer. The remaining question is whether the value of the computer is more than \$1000.

If the value of the property is between \$1000 and \$5000, the theft is a Class D felony; if the value is less than \$1000, then the theft is a Class A misdemeanor. Ark. Code Ann. § 5-36-103(b)(3),(4) (Supp. 2011). Value means the market value of the property or service at the time and place of the offense, or if the market value cannot be ascertained, the cost of replacing the property within a reasonable time after the offense. Ark. Code Ann. § 5-36-101(12)(A) (Repl. 2006). Whether the stolen computer's value exceeded \$1000 is a question of fact; because this was a bench trial, the court was the factfinder. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004). Our review, therefore, is limited to whether substantial evidence supports the court's conclusion that the stolen computer was worth more than \$1000. *See Baughman, supra*.

Here, the hospital had purchased the stolen computer in 2008 for \$850.26; after the computer was stolen in 2011, the hospital replaced it for \$1047.86. The circuit court found that the value of the computer, when it was stolen, exceeded \$1000. But the only evidence that the computer's value exceeded \$1000 was the testimony regarding replacement value. Replacement value equals "value" under the theft-of-property statute only if the market value cannot be ascertained. Ark. Code Ann. § 5-36-101(12)(A). And here, there was evidence of market value: the original purchase price of \$850.26. The State offered no evidence that the computer had appreciated from 2008, when it was purchased, to 2011, when it was stolen. Thus, in order to conclude that the computer was

worth more than \$1000, the court would have had to speculate that the computer had increased in value from 2008 to 2011. Because the court resorted to speculation, substantial evidence does not support the conclusion that the computer's value exceeded \$1000. Therefore, Washington's conviction for felony theft of property is reversed.

*Sentence*

Substantial evidence supports Washington's conviction for commercial burglary, but we hold that his conviction for felony theft of property is not supported by substantial evidence. Thus, his 120-month prison term for commercial burglary survives, but his 24-month prison term for felony theft of property does not. Where the evidence is insufficient to sustain a conviction for a crime, but where there is sufficient evidence to sustain a conviction for a lesser-included offense, we may sentence the defendant or remand the case for the trial court for resentencing. *Cooper v. State*, 84 Ark. App. 342, 141 S.W.3d 7 (2004). Here, we choose to remand the case with instructions to the circuit court to sentence Washington for theft of property, a Class A misdemeanor.

Affirmed in part; reversed and remanded in part.

HARRISON and VAUGHT, JJ., agree.

*Rebekah J. Kennedy*, for appellant.

*Dustin McDaniel*, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.