

Cite as 2010 Ark. 456

# SUPREME COURT OF ARKANSAS

No. CR 09-1111

RICHARD J. BOWER  
a/k/a Richard J. Bauer  
Appellant

v.

STATE OF ARKANSAS  
Appellee

**Opinion Delivered** November 18, 2010

APPEAL FROM THE BAXTER  
COUNTY CIRCUIT COURT, CR  
2008-261, HON. JOHN R. PUTMAN,  
JUDGE

AFFIRMED

## PER CURIAM

In 2009, appellant Richard J. Bower, who is also know as Richard J. Bauer, was found guilty by a jury of aggravated robbery and four counts of felony kidnapping. An aggregate term of life imprisonment was imposed. Appellant represented himself at trial. Again proceeding pro se, appellant brings this appeal of the judgment.

The record on appeal reflects that on November 18, 2008, appellant entered a branch bank in Gassville, Arkansas, and informed the manager that he was there to rob the bank. He opened his jacket to display the handle of what appeared to be a pistol. He then bound the manager and three tellers with plastic bands commonly called “zip-ties,” had them kneel down, and threatened to harm them if the police were contacted. Shortly thereafter, a police officer, alerted by a silent alarm, entered the bank. Fearing gunfire, the victims fled to a storage closet. The officer arrested appellant without further incident.

Appellant raises nine claims of trial error and asks that the charges be dismissed or the matter be remanded for retrial. We find no error and affirm.

Appellant contends that his actions were not sufficient to constitute kidnapping. Appellant made reference in a pretrial hearing to having filed a motion entitled “kidnapping.” The court did not have the motion before it, but appellant explained it as a challenge to the kidnapping charge on the ground that the facts did not support the charge. The court correctly declined at that time to address the matter, advising appellant that appellant could move to dismiss the charge if the State failed to sustain its burden at trial of establishing the elements of the offense. *State v. Jamison*, 277 Ark. 349, 641 S.W.2d 719 (1982); see *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996). Despite the trial court’s suggestion, appellant did not move for a directed verdict on the kidnapping charge, and the issue of the sufficiency of the evidence to support the charge cannot be raised for the first time on appeal. To preserve a sufficiency-of-the-evidence challenge on appeal, a timely, clear, and specific motion for directed verdict must be made in the trial court. *Williamson v. State*, 2009 Ark. 568, 350 S.W.3d 787.

In a related argument, appellant argues that he was denied due process because he was charged with kidnapping his victims with the purpose of facilitating a felony, and the “root crime” had nothing to do with kidnapping. This argument was also not raised below and will not be considered now for the first time on appeal. *Rounsaville v. State*, 372 Ark. 252, 273 S.W.3d 486 (2008).

Appellant also argues that he was denied his right to prepare a defense. He contends that although the trial court offered him continuances to prepare, the time was of no help to him because there was no adequate law library available, and he was not permitted enough time to use computer research tools.

The argument does not demonstrate that there was reversible error at trial. Appellant was permitted stand-by counsel and was afforded access to research materials. By his own admission, he declined to accept the court's offer of additional time to prepare. Under these circumstances, he has not shown that he was denied the right to prepare for trial by any act of the trial court.

Appellant next contends that the trial court set an excessive amount for pretrial bail and denied him assistance of counsel while he was incarcerated. As appellant has been found guilty and is incarcerated by virtue of Class Y felony convictions, he is not entitled to bail at this time pursuant to Arkansas Rule of Appellant Procedure—Criminal 6(b)(3) (2010). The issue is accordingly moot, and this court does not decide moot issues. *See, e.g., Walley v. State*, 353 Ark. 586, 608, 112 S.W.3d 349, 362 (2003). The proper means to challenge a bail decision is by a writ of certiorari, and a party who does not seek a timely writ of certiorari from a bail decision abandons the issue. *Irvin v. State*, 345 Ark. 541, 49 S.W.3d 635 (2001). Appellant chose to wait to raise the issue on appeal after he was convicted. In doing so, he abandoned the issue. *Id.*

Appellant further asserts that he was not afforded effective assistance of counsel at trial. While he concedes that both this court and the United States Supreme Court have held that a defendant who chooses to proceed pro se may not later be heard to claim that he was denied effective assistance of counsel, he argues that that interpretation of the law is unconstitutional. Appellant offers no authority for the proposition that this court can ignore or overrule Supreme Court precedent, and this court will not accept an argument without legal authority to support it. *Barker v. State*, 2010 Ark. 354, 373 S.W.3d 865; *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918.

Appellant bases his claim that he was denied effective counsel on the same grounds that he raised in his first point on appeal; that is, that he was not afforded sufficient time and materials to prepare for trial. Appellant was in custody for more than five months before trial and was allowed in that time access to legal materials. He declined continuances, including one offered the day before trial, and he has not shown that he was deprived of any legal right. It is clear from the record that any lack of time to prepare was of appellant's making.

Appellant's next ground for reversal of the judgment is the claim that he was denied a fair and impartial jury. He argues that the court erred in advising the jury that it must apply the law as instructed by the court. He contends that "jury nullification" should have been explained to the jury so that it would know that it could find him not guilty regardless of the evidence or the instructions given by the court.

During voir dire of the jury, appellant informed the panel that the United States Constitution could override state and federal law. In his opening statement, he further declared to the jury that juries had the power to “nullify” the law by finding a defendant innocent who was “technically guilty.” When the prosecution objected to that and similar statements, the court informed the jury that the court would advise it on the law in due course. The court declined to allow appellant to submit a federal court case for the jury to review that illustrated the concept of jury nullification, but when appellant testified at trial, he was permitted by the court to explain to the jury at length why he was justified in robbing the bank. He was permitted in closing argument to reiterate his claim that he was justified in his actions, and he told the jury, “But you are the judge, you have the right to either honor what he [the court] tells you or to ignore what he tells you.” When the jury instructions were given, the record does not reflect that appellant proffered an instruction on jury nullification or that he objected to the instructions. In short, appellant was allowed to make whatever argument he desired to the jury. If there was some specific jury instruction that he desired to be given, the burden was on him to proffer it. *Davis v. State*, 2009 Ark. 478, 348 S.W.3d 553; *Robertson v. State*, 2009 Ark. 430, 347 S.W.3d 460.

Furthermore, defendants under our laws are not entitled to a jury-nullification instruction. *Jones v. City of Little Rock*, 314 Ark. 383, 862 S.W.2d 273 (1993). Arkansas Code Annotated § 16-89-107(a)(3) (Repl. 2006) provides that all questions of law arising

during trial shall be decided by the court and that the jury shall be bound to take the decisions of the court on points of law.<sup>1</sup>

Appellant contends that the trial court erred in allowing the prosecution to thwart his attempts to explain to the jury the reason that he was justified in robbing the bank. He maintains that he believed himself to have a valid justification for reclaiming money that had been taken from him by means of illegal taxation and that he was denied due process of law in not being allowed to fully explain his position. While the court did advise appellant in the course of the trial to confine himself to the presentation of relevant evidence, appellant does not point to a specific instance when the court erred in granting any particular motion by the prosecution or otherwise acted to deny him due process of law. Under these circumstances, we cannot say that appellant preserved the issue, as it is addressed in his brief, for appeal. This court will not address an issue not specifically raised below. *Talley v. State*, 2010 Ark. 357, 377 S.W.3d 222.

Appellant next takes issue with the prosecutor's having repeatedly referred to him in closing argument as a thief. He asserts that the remarks prejudiced the jury and denied him his right to an impartial jury, a fair trial, and due process of law. As there was no

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<sup>1</sup>Appellant relies on *United States v. Dougherty*, 473 F.2d 1139 (D.C. Cir. 1972), and *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969) for the proposition that the court did not have the authority to dictate the law to the jury. Neither supports appellant's argument. While the courts in those cases acknowledged that a jury may reach a decision that is contrary to law, both held that the defendant was not entitled to an instruction advising the jury that it may disregard the law.

contemporaneous objection to the prosecutor's remarks, the issue will not be addressed now for the first time. *Id.*

In his penultimate assertion of error, appellant again raises jury nullification in claiming that the court wrongly instructed the jury on the sentencing range for a Class Y felony in that the court did not explain that the jury was free to reach its own conclusion on an appropriate sentence. Inasmuch as appellant did not raise the issue at trial or proffer a jury instruction on the matter, the issue was not preserved for appeal. *Id.*

Finally, appellant contends that the sentencing guidelines promulgated by the government are unconstitutional and violate the separation of powers doctrine found in the United States Constitution. The argument was not raised below and was not preserved for our review. A defendant who makes no objection at the time the sentence is imposed has no standing to complain of it. *Brown v. State*, 374 Ark. 324, 287 S.W.3d 587 (2008); see *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997); *Williams v. State*, 303 Ark. 193, 794 S.W.2d 618 (1990); *McGee v. State*, 271 Ark. 611, 609 S.W.2d 73 (1980). Also, appellant was sentenced in accordance with the jury's recommendation, and, pursuant to Ark. Code Ann. § 16-90-803(b)(4), the guidelines did not apply. *Pickett v. State*, 321 Ark. 224, 902 S.W.2d 208 (1995).

The record in this case has been reviewed for other reversible error as required by Arkansas Supreme Court Rule 4-3(i) (2010), and none has been found.

Affirmed.