Rel: December 15, 2017

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

CR-16-0789

Patrick Edward Arnold

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-16-914; CC-16-915)

KELLUM, Judge.

Following a bench trial, the appellant, Patrick Edward Arnold, was convicted of burglary in the third degree, a violation of § 13A-7-7, Ala. Code 1975, and theft of property in the first degree, a violation of § 13A-8-3, Ala. Code 1975.

The circuit court sentenced Arnold to 36 months' imprisonment for each conviction; the court split that sentence and ordered Arnold to serve 16 days in jail followed by 2 years of supervised probation. The circuit court ordered that the sentences run concurrently. The circuit court further ordered Arnold to pay $22,698.53 in restitution, $300 to the crime victims compensation fund, and court costs.

The following pertinent evidence was presented at the bench trial. Eyewitnesses Elvis Pettway and Raymond Humphrey testified that on August 24, 2015, Arnold was seen loading furniture onto a truck owned by the victim, William Martin, at Martin's residence. Both Pettway and Humphrey were aware that Martin had moved out of the residence and into an assisted-living facility, leaving his unoccupied house under the supervision of his daughter, Donna Key, who had been married to Arnold's father, Leland Arnold, until his death. Pettway, Martin's across-the-street neighbor, testified that Arnold approached him and asked his assistance in loading a dresser onto the truck sometime during the day. Pettway declined to help Arnold because he suffered from back problems. According to Pettway, their interaction was "quick" and ended with

Arnold "politely" turning around, crossing the street, and continuing to load furniture. (R. 20.)

Humphrey, Martin's next door neighbor, testified that when he returned from work, he learned from his neighbor, Vince Holloway, that there was "a lot of activity going on" at Martin's residence. (R. 33.) Humphrey's wife, Sharon, was a real-estate agent who had listed Martin's house for sale. Humphrey thought Sharon had sold the house, but she responded that she had not.

Humphrey testified that he and Sharon drove over to Martin's house to investigate the situation. When they arrived, it was dark outside. After he saw Martin's truck was filled with furniture, Humphrey told Sharon to telephone the police. Humphrey approached the man he later identified as Arnold and told Arnold that he was there to check on some plumbing issues Martin was having with his sink. Arnold told Humphrey that he was "doing a lot of work" inside Martin's house, and that Humphrey should come back in a couple of days. (R. 35.) Arnold told Humphrey that he was Martin's grandson and that he knew Martin's daughter, Donna Key. At this point, Arnold had convinced Humphrey that he had permission to be at

Martin's residence, so Humphrey turned around and began to walk back to his car. However, Sharon was already on the telephone speaking to police. Arnold, who was close by, overheard Sharon on the telephone and ran into Martin's house. In light of his reaction, Humphrey pulled his car in front of Martin's truck in an attempt to block Arnold's exit. When Arnold came out of the house, he entered Martin's truck, backed it up, and drove across the neighbor's yard. Humphrey pursued Arnold in his vehicle but eventually lost sight of him. Martin's truck was later found by police, abandoned.

Sharon telephoned Key to inform her of the series of events that had transpired. When Key arrived at the scene, she told the police that the burglar might have been a handyman who had worked at her father's house in the past. Key said the handyman, Tim Vernon, had been dishonest with her in previous business interactions.

Detective Marion Williams was assigned to investigate the burglary of Martin's residence. He testified that after receiving the report on the burglary, he telephoned Key. Key supplied Detective Williams with the name of Tim Vernon as a potential suspect. Subsequently, Detective Williams developed

photographic lineups based around the physical appearances of Vernon. Later that night, however, Humphrey and Sharon recognized a photograph of the burglar on Key's Facebook social media page. The individual was Key's stepson, Arnold. The Humphreys informed Key of this fact, and Key told Detective Williams. Thereafter, Detective Williams decided there was no need to go forward with Vernon as a suspect. Instead, he developed a photographic lineup based around Arnold's driver's license photograph. He presented the photographic lineup to Humphrey and Pettway, who separately and independently identified Arnold as the burglar. Arnold was subsequently arrested.

Austin Arnold, Arnold's cousin, testified on Arnold's behalf. Austin testified that he was with Arnold for the duration of the evening of August 24, 2015. At the time, Austin and Arnold lived together with their grandparents. According to Austin, Arnold came home from band practice at 5:30 p.m. Thereafter, Austin and Arnold went out to buy dinner for their grandparents. They brought food home and ate with their grandparents at around 6:30 p.m. Austin testified that after dinner he and Arnold relaxed in the basement together,

watching Netflix, an Internet streaming service, and playing video games. A few hours later, at around 10:00 p.m., they went to a Planet Fitness owned gym and worked out for about an hour and a half. To corroborate this testimony, Arnold proffered evidence that, at 10:06 p.m. on August 24, 2015, his Planet Fitness card was electronically swiped at the Homewood Planet Fitness location. Moreover, Austin's name appeared on the Planet Fitness guest log for the same night.

Arnold also took the stand, reiterating much of Austin's earlier testimony. Arnold testified that he and Key were never close and that Key grew even more distant following the death of his father and Key's husband.

After both sides rested, the circuit court found Arnold guilty of burglary in the third degree and theft of property in the first degree. Arnold filed a timely motion for new trial. Following a hearing, the circuit court denied the motion. This appeal followed.

I.

Arnold first contends that the circuit court abused its discretion when it denied him youthful-offender status without first holding a hearing as required by the Youthful Offender

Act, § 15-19-1 et seq., Ala. Code 1975. Specifically, Arnold contends that the circuit court was "required to examine Arnold to a degree sufficient to enable the trial court to make an intelligent determination as to whether, in its discretion, Arnold was eligible for treatment as a youthful offender." (Arnold's brief, p. 25.)

The record indicates that when the case was initially called for trial on November 15, 2016, the State sought a continuance. At that time and while on the record, Arnold informed the court that he wanted to make application for treatment as a youthful offender. Specifically, Arnold wanted to put his motion "on the record." (R. 6.) Noting that no "paper application" had been made for youthful-offender treatment, the circuit court denied Arnold's oral motion for treatment as a youthful offender and set the case for trial. (R. 6.) At the conclusion of trial, Arnold moved for a new trial arguing, in part, that the circuit court erred by denying his request for youthful-offender status without holding a hearing first.

"'Review on appeal is restricted to questions and issues properly and timely raised at trial.'" Ex parte Coulliette,

857 So. 2d 793, 794 (Ala. 2003) (citing Newsome v. State, 570 So. 2d 703, 717 (Ala. Crim. App. 1989)). The rules of preservation apply equally to constitutional issues. See D.W.L. v. State, 821 So. 2d 246, 248 (Ala. Crim. App. 2001)("'[C]onstitutional issues must first be correctly raised in the trial court before they will be considered on appeal.'" (quoting Hansen v. State, 598 So. 2d 1, 2 (Ala. Crim. App. 1991))). "'An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented.'" Coulliette, 857 So. 2d at 794 (citing Pate v. State, 601 So. 2d 210, 213 (Ala. Crim. App. 1992)). "[T]o preserve an issue for appellate review, it must be presented to the trial court by a timely and specific motion setting out the specific grounds in support thereof." McKinney v. State, 654 So. 2d 95, 99 (Ala. Crim. App. 1995)(citation omitted).

"[A] motion for a new trial or a motion for a judgment of acquittal is not sufficient to preserve the issue where no timely objection was made at [trial]." Newsome v. State, 570 So. 2d at 717. See also Blanton v. State, 886 So. 2d 850, 876 n. 9 (Ala. Crim. App. 2003)(noting that, absent a timely and

sufficient objection at trial, a motion for a new trial does not preserve alleged error for appellate review); Hamrick v. State, 548 So. 2d 652, 655 (Ala. Crim. App. 1989)("The grounds urged for a new trial must ordinarily be preserved at trial by timely and sufficient objections."). Because Arnold did not object to the circuit court's failure to hold a hearing on his application for youthful-offender status before trial or during trial but instead raised his objection in a motion for new trial, Arnold's objection was untimely and was not preserved for appellate review.

II.

Arnold next contends that the circuit court erred by excluding as irrelevant evidence of a will dispute between Donna Key and the Arnold family. Arnold contends that the evidence was relevant to impeach Key for bias, prejudice, and/or interest.

The record indicates that during cross-examination of Key, Arnold asked Key whether there was animosity between her and Arnold's family over the probate of her late husband's estate. The State objected to the question on the basis of

relevancy. The circuit court initially overruled the State's objection, but sustained the objection shortly thereafter.

The admission or exclusion of evidence is a matter within the sound discretion of the circuit court. Taylor v. State, 808 So. 2d 1215 (Ala. 2001). "The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion." Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000).

> "To be competent and admissible, evidence must be relevant -- that is, evidence must tend to prove or disprove the issues before the jury. Rule 401, Ala. R. Evid. The determination of the relevancy and admissibility of evidence rests largely in the sound discretion of the trial judge. The trial judge is obliged to limit the evidence to that evidence that would be necessary to aid the fact-finders in deciding the issues before them, and to preclude evidence that is too remote, irrelevant, or whose prejudice outweighs its probative value. Loggins v. State, 771 So. 2d 1070, 1077-78 (Ala. Crim. App. 1999), aff'd, 771 So. 2d 1093 (Ala. 2000)."

Harrington v. State, 858 So. 2d 278, 293 (Ala. Crim. App. 2002).

Rule 401 Ala. R. Evid., defines relevant evidence as "evidence having any tendency to make the existence of any

fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Evidence which is not relevant is not admissible." Rule 402, Ala. R. Evid. "The determination of relevancy of evidence lies within the sound discretion of the trial judge." McMahon v. State, 560 So. 2d 1094, 1096 (Ala. Crim. App. 1989) (citing Borden v. State, 522 So. 2d 333, 335 (Ala. Crim. App. 1988) (citing C. Gamble, McElroy's Alabama Evidence, § 21.01(6) (3rd ed. 1977))).

In the instant case, we cannot say that the circuit court abused its discretion when it sustained the State's objection. Testimony regarding the purported will dispute had no tendency to prove or disprove the issues before the trial judge, namely, whether Arnold committed burglary and theft of property. Accordingly, the circuit court did not abuse its discretion when it limited cross-examination regarding this testimony.

III.

Arnold also contends that the circuit court erred when it denied his motion for a judgment of acquittal. Specifically, Arnold argues that the State did not present sufficient

evidence to support his convictions in light of the alibi evidence provided by Austin. Arnold also argues that his convictions went against the great weight of the evidence.

> "'"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985). '"The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt."' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992). '"When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision."' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978).
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> > "'The trial court's denial of a motion for judgment of acquittal must be reviewed by determining whether there was legal evidence before the jury at the time the motion was made from which the jury by fair inference could find the defendant guilty.

> Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, this court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983). When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for judgment of acquittal does not constitute error. McConnell v. State, 429 So. 2d 662 (Ala. Cr. App. 1983).'"

Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003), cert. denied, 891 So. 2d 998 (Ala. 2004)(quoting Ward v. State, 610 So. 2d 1190, 1191 (Ala. Crim. App. 1992)).

Arnold was convicted of burglary in the third degree and theft of property in the first degree. Under § 13A-7-7(a)(1), Ala. Code 1975, a person commits the crime of burglary in the third degree "if he or she knowingly enters or remains unlawfully in a building with intent to commit a crime therein." Section 13A-8-2(1), Ala. Code 1975, provides that a person commits the crime of theft of property if he "[k]nowingly obtains or exerts unauthorized control over the property of another, with intent to deprive the owner of his or her property." Pursuant to § 13A-8-3(b), Ala. Code 1975,

"[t]he theft of a motor vehicle, regardless of its value, constitutes theft of property in the first degree."

Although Austin provided Arnold with an alibi and Arnold denied any wrongdoing, the State presented ample evidence to establish that Arnold burglarized Martin's house and stole Martin's truck. Over the course of several days, Arnold removed Martin's furniture and appliances from his house and transferred them to an unspecified location. On August 24, 2015, Raymond Humphrey approached Arnold and engaged him in a face-to-face conversation. When Arnold overheard Sharon Humphrey on the telephone with the police, he entered Martin's truck, drove it away, and parked it on the east side of Birmingham at an abandoned residence. This Court's duty is to determine whether the evidence was legally sufficient to support Arnold's convictions of burglary in the third degree and theft of property in the first degree. See Gavin, 891 So. 2d at 974. Based on the foregoing, we conclude that the State presented sufficient evidence to support Arnold's conviction for first-degree theft and third-degree burglary.

Arnold also challenges the weight of the evidence, arguing that the State's eyewitnesses lacked credibility. He

argues that Humphrey's and Pettway's testimony conflicted with the alibi provided by Austin and that his convictions should not be based on this conflicting evidence. It is not the role of this Court to reweigh the evidence on appeal. The weight of the evidence refers to whether the State's evidence is palpably less persuasive than the defense's evidence. Living v. State, 796 So. 2d 1121, 1141 (Ala. Crim. App. 2000). "'The weight of the evidence, and the credibility of the witnesses, and inferences to be drawn from the evidence, where susceptible of more than one rational conclusion, are for the jury alone.'" Turrentine v. State, 574 So. 2d 1006, 1009 (Ala. Crim. App. 1990) (quoting Walker v. State, 416 So. 2d 1083, 1089 (Ala. Crim. App. 1982)). Although conflicts in the evidence existed, the State presented evidence from which the trial judge could have reasonably concluded that Arnold committed burglary and theft.

Given the evidence presented at trial and the standard by which this Court reviews that evidence, we conclude that the circuit court properly denied Arnold's motion for a judgment of acquittal.

IV.

Arnold next contends that the trial judge erred by not recusing herself after learning that she had extrajudicial knowledge of the will dispute between Key and the Arnold family. The State argues that Arnold did not properly preserve the issue for appellate review and that , even if he did, his claim is without merit. We agree.

The record indicates that when Arnold first brought up the will dispute at trial, the trial judge made it known that she possessed some extrajudicial knowledge on the matter. Specifically, she informed the parties that she grew up with Herbert Arnold, Arnold's uncle, and had heard from friends that there was a heated will dispute between Herbert and Key over the probate of Leland Arnold's estate. After disclosing this information, both parties agreed that the trial judge should continue to preside over the trial.

> "A motion to recuse 'should be filed at the earliest opportunity because "requests for recusal should not be disguises for dilatoriness on the part of the [moving party]."' Johnson v. Brown, 707 So. 2d 288, 290 (Ala. Civ. App. 1997) (quoting Baker v. State, 52 Ala. App. 699, 700, 296 So. 2d 794, 794 (Ala. Crim. App. 1974)). The issue of recusal may be waived if it is not timely asserted. Knight v. NTN-Bower Corp., 607 So. 2d 262, 265 (Ala. Civ. App. 1992)."

Price v. Clayton, 18 So. 3d 370, 376 (Ala. Civ. App. 2008). See also Ex Parte Parr, 20 So. 3d 1266 (Ala. 2008), and Sparks v. State, 450 So. 2d 188 (Ala. Crim. App. 1984). Because this issue was not raised at the earliest opportunity, i.e., during trial when trial counsel first learned of the trial judge's extrajudicial knowledge of the will dispute, it was not properly preserved for review.

Moreover, even if Arnold's motion was timely, his requested disqualification lacked substantive merit.

Canon 3 C.(1) Alabama Canons of Judicial Ethics, states:

> "A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > "(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

This Court has held:

> "'Specifically, the Canon 3(C) test is: "Would a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?" Matter of Sheffield, 465 So. 2d 350, 356 (Ala. 1984). The question is not whether the judge was impartial in fact, but whether another

> person, knowing all of the circumstances, might reasonably question the judge's impartiality -- whether there is an appearance of impropriety. Id.; see Ex parte Balogun, 516 So. 2d 606 (Ala. 1987); see also, Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983).'
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> "Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994)."

State v. Moore, 988 So. 2d 597, 599 (Ala. Crim. App. 2007).

> "A trial judge's ruling on a motion to recuse is reviewed to determine whether the judge exceeded his or her discretion. See Borders v. City of Huntsville, 875 So. 2d 1168, 1176 (Ala. 2003). The necessity for recusal is evaluated by the 'totality of the facts' and circumstances in each case. [Ex parte City of] Dothan Pers. Bd., 831 So. 2d [1, 2 (Ala. 2002)]. The test is whether '"facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge."' In re Sheffield, 465 So. 2d 350, 355-56 (Ala. 1984)(quoting Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982))."

Ex parte George, 962 So. 2d 789, 791 (Ala. 2006).

In this case, the trial judge's knowledge of the will dispute between Key and the Arnold family was extremely limited. The mere fact that the trial judge grew up with Arnold's uncle, Herbert, is not grounds for reasonably questioning the impartiality of the judge toward Arnold. Nothing in the record suggests that the trial judge possessed

information as to the status of Arnold's relationship with his uncle or as to Arnold's relationship to the will dispute at large. Moreover, as discussed in Part II, supra, the will dispute was, at most, a tangential matter that was irrelevant at trial. The issue arose only during the testimony of Key, whose testimony did not affect the credibility of the State's two principal eyewitnesses, Pettway and Humphrey. Because Arnold failed to raise the issue of recusal at the earliest opportunity and because the proposed recusal lacked substantive merit, there was no error in the denial of Arnold's motion for a new trial on this ground.

V.

Arnold also contends that his trial counsel was constitutionally ineffective. Specifically, Arnold argues that trial counsel's decisions to forgo a jury trial and not to request the trial judge's recusal constituted ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish (1) that his counsel's performance was deficient, and (2) that he was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S.

668, 687 (1984); Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987). "The performance component outlined in Strickland is an objective one: that is, whether counsel's assistance, judged under 'prevailing professional norms,' was 'reasonable considering all the circumstances.'" Daniels v. State, 650 So. 2d 544, 552 (Ala. Crim. App. 1994) (quoting Strickland, 466 U.S. at 688)). "[A] Court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690.

> "To meet the second prong of the Strickland test, 'the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' Strickland, 466 U.S. at 687. It is the defendant's burden to 'affirmatively prove prejudice; that is, he "must show that there is a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different."' Lawley, 512 So. 2d at 1372 (quoting Strickland, 466 U.S. at 694). Moreover, '[t]he prejudice prong of the Strickland test requires a showing that a different outcome of the trial probably would have resulted but for counsel's allegedly ineffective performance.' Worthington v. State, 652 So. 2d 790, 796 (Ala. Crim. App. 1994) (internal citations omitted). The defendant must demonstrate deficient performance and prejudice to prevail on an ineffective-assistance-of-counsel claim, or it cannot be said that the conviction 'resulted from a breakdown in the

> adversary process that renders the result unreliable.' Strickland[,] 466 U.S. at 687, 104 S. Ct. 2052."

Surratt v. State, 143 So. 3d 834, 839-840 (Ala. Crim. App. 2013). With those principles in mind, we address Arnold's specific claims of ineffective assistance of counsel.

A.

Arnold argues that his trial counsel was deficient in advising him to waive his right to a jury trial. Specifically, Arnold argues that his waiver was not made knowingly, voluntarily, and intelligently in light of all the surrounding circumstances.

We have stated:

> "Alabama law is clear that a defendant charged with a noncapital felony may waive a jury trial with the consent of the State and the trial court provided the waiver is made knowingly, voluntarily, and intelligently in light of all the surrounding circumstances."

Day v. State, 395 So. 2d 119, 120 (Ala. Crim. App. 1980). Moreover, "'[i]f the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim.'" Davis v. State, 9 So. 3d 539, 546 (Ala. Crim.

App. 2008) (quoting Howard v. State, 239 S.W. 3d 539, 567 (Tex. Crim. App. 2007)).

At the hearing on the motion for new trial, Arnold testified that he was aware of his decision to waive a jury trial and proceed with a bench trial. According to Arnold, the waiver issue only came to his attention at the first trial setting of his case. Arnold testified that trial counsel believed that a bench trial would be an effective approach, and that Arnold deferred to his judgment.

These facts alone are insufficient to overcome the presumption of effective counsel. Arnold's allegations are unsubstantiated, as he provides no testimony or affidavit from his trial counsel regarding counsel's decision to forgo a jury trial. Where the record is silent on such matters, this court presumes that counsel acted reasonably and effectively. See Davis v. State, 9 So. 3d at 546. Therefore, Arnold failed to show deficient performance with regard to his waiver of a jury trial.

B.

Arnold also contends that his trial counsel was deficient in failing to file a motion for recusal. As we have discussed

in Parts II and IV, supra, evidence of the will dispute between Key and the Arnold family was irrelevant in the determination of Arnold's guilt or innocence. Moreover, the trial judge's limited extrajudicial knowledge on the matter provided no grounds to reasonably question her impartiality. Therefore, even if Arnold could show deficient performance on the part of his trial counsel, he fails to demonstrate that he was prejudiced by trial counsel's decision not to immediately file a motion to recuse when counsel learned the trial judge had knowledge of the will dispute.

VI.

Finally, Arnold contends that the circuit court erred by assessing restitution without holding a restitution hearing.

Section 15-18-67, Ala. Code 1975, states:

> "When a defendant is convicted of a criminal activity or conduct which has resulted in pecuniary damages or loss to a victim, the court shall hold a hearing to determine the amount or type of restitution due the victim or victims of such defendant's criminal acts. Such restitution hearings shall be held as a matter of course and in addition to any other sentence which it may impose, the court shall order that the defendant make restitution or otherwise compensate such victim for any pecuniary damages. The defendant, the victim or victims, or their representatives or the administrator of any victim's estate as well as the district attorney

> shall have the right to be present and be heard upon the issue of restitution at any such hearings."
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> We have held that:
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> "[A]ny imposition of restitution must be by the trial court after a hearing, as mandated by § 15-18-67, Ala. Code 1975. See also Jolly v. State, 689 So. 2d 986 (Ala. Crim. App. 1996); Williams v. State, 624 So. 2d 659 (Ala. Crim. App. 1992). Also, a defendant is entitled to a hearing at which evidence is introduced to determine a precise amount of restitution. Alford v. State, 651 So. 2d 1109 (Ala. Crim. App. 1994)."

Walker v. State, 827 So. 2d 863, 869 (Ala. Crim. App. 2001).

While the circuit court maintains wide discretion over the imposition of restitution, it must hold a hearing pursuant to § 15-18-67, Ala. Code 1975, before imposing restitution. "At that hearing, the appellant, represented by counsel, will be given an opportunity to appear and to present evidence in his behalf." Guy v. State, 34 So. 3d 722, 724 (Ala. Crim. App. 2009)(citing Alford v. State, 651 So. 2d at 1113-14).

The record indicates that the circuit court based restitution solely on a victim information sheet submitted by Arnold as evidence to impeach Key on cross-examination. Because the circuit court did not hold a hearing pursuant to § 15-18-67, Ala. Code 1975, Arnold was denied the opportunity to argue the appropriate amount of restitution. Accordingly,

this case is remanded and the circuit court, on remand, shall conduct a hearing on the issue at which Arnold is represented by counsel and allowed to present evidence on the issue of restitution. See Guy v. State, supra.

Based on the foregoing, we affirm Arnold's convictions of burglary in the third degree and theft of property in the first degree. However, we reverse the circuit court's award of restitution and remand this case for the circuit court to conduct a restitution hearing at which time the State is given the opportunity to prove the amount of restitution and Arnold is given an opportunity to object to "the imposition, amount or distribution of restitution or manner or method thereof." § 15-18-69, Ala. Code 1975. Following the hearing, the circuit court shall enter an order pursuant to § 15-18-69 stating its findings of fact and the underlying facts and circumstances regarding the award of restitution. The circuit court shall take all necessary action to see that the circuit clerk makes due return to this Court at the earliest possible date and by no later than 56 days from the release of this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Welch, Burke, and Joiner, JJ., concur.