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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-817

JASON WYATT TITSWORTH APPELLANT	**Opinion Delivered** FEBRUARY 18, 2009
V.	APPEAL FROM THE POLK COUNTY CIRCUIT COURT, [NO. CR-2006-198]
STATE OF ARKANSAS APPELLEE	HONORABLE J.W. LOONEY, JUDGE
	AFFIRMED

KAREN R. BAKER, Judge

Appellant, Jason Wyatt Titsworth, was convicted of two counts of theft of property, both Class B felonies, by a jury in Polk County Circuit Court. Appellant was sentenced to ten years' imprisonment on each count to be served concurrently and was ordered to pay restitution in the amount of $43,860.50 to Martin Marietta and $29,873.20 to GCR Tire Center. Appellant raises three points for our review. First, appellant asserts that the trial court erred in not granting his motion for a continuance. Second, appellant asserts that the trial court erred in not suppressing his statement. Third, appellant asserts that the trial court erred in not granting a motion for directed verdict on the two charges of theft where there was insufficient evidence that the appellant knowingly took or exercised unauthorized control over, or made an unauthorized transfer of an interest in, certain items of property valued at

$2,500 or more owned by Martin Marietta or GCR Tire Center. Finding no error, we affirm appellant's conviction.

Danny Gant testified that he was manager of GCR Tire Center, a commercial tire dealer in Longview, Texas. GCR sells tires to companies operating mines and rock quarries. One of his customers was the Martin Marietta Hatton Quarry in Polk County, Arkansas. Gant stated that GCR had a consignment-type agreement with the Hatton Quarry: the Hatton Quarry kept GCR's tires and as the tires were needed, GCR would bill the customer. Gant also testified that he knew appellant. He stated that appellant was a route driver for Crawford Tire Recycling, a company that removed "junk" tires and performed section repairs on large tires used on earth-moving equipment. Appellant had a routine route to the Hatton Quarry. Gant explained that appellant had a flatbed trailer and a truck equipped with a crane for handling this particular type of heavy tire. Gant testified that such equipment was necessary to handle the tires because of their size and weight. (The tires were approximately twelve feet tall and weighed from 1,000 to 5,000 pounds.)

Testimony showed that in October 2006, three of GCR Tire Center's tires, a loader tire and two haul-truck tires, were missing from the Hatton Quarry site. Wheeler, manager for Hatton Quarry, testified that in addition to the consignment tires from GCR, four of Martin Marietta's new tires were also missing from the site. Wheeler testified that Martin Marietta's inventory was reviewed on a monthly basis. Martin Marietta's office manager,

Brenda Pollard, testified that the monthly inventory search revealed the seven missing tires. She testified that GCR's missing tires were valued at $29,873.20 and Martin Marietta's missing tires were valued at $43,860.50.

Being in the tire business, appellant was familiar with Robbie Rodgers, an employee of GCR Tire Center. During an interview with the Texas Department of Public Safety, appellant told officials that he received a call from Robbie, asking him if he knew of anyone that would be interested in purchasing tires. Robbie told him that the tires were not listed on the inventory and that the serial numbers had been removed from the tires. Appellant explained to officials that he found an acquaintance that would be interested in purchasing the tires. Appellant told Robbie that he had a buyer, and arrangements were made for appellant to pick up the tires from the Hatton Quarry. Upon delivery of the tires to the buyer, appellant was given $28,000. In another statement to police, appellant revealed that of the $28,000 he received, he gave Robbie one-half, per their agreement. Also in that statement to police, appellant told officials that Robbie told him that the tires were not on the inventory list, that the tires were "just extra tires," and that these tires would periodically be delivered to the Hatton Quarry for no apparent reason.

Texas officials told appellant before, during, and after the interview that he was free to leave and that appellant was not in custody at any point during the exchange. Testimony showed that appellant drove himself to the station. Appellant was not in handcuffs at any

time prior to or during the interview, and testimony showed that appellant felt free to step outside to smoke a cigarette during the process. After talking with officials, appellant consented to a polygraph test. Testimony showed that after the interview, there was no basis for filing any charges against appellant. He left the police station freely. Texas officials testified that they sent the information gathered from the interview to officials in Polk County, Arkansas, for further investigation.

I. *Denial of Motion for Directed Verdict*

Although appellant's last point on appeal concerns the trial court's denial of his motion for a directed verdict, we address this point first because of double jeopardy considerations. *See Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997) (stating that when an appellant challenges the sufficiency of the evidence, we address that issue prior to all others in order to preserve the defendant's right to freedom from double jeopardy). When a defendant makes a challenge to the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State. *Dendy v. State*, 93 Ark. App. 281, 218 S.W.3d 322 (2005) (citing *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003)). The test for determining sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial; substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture; only evidence supporting the verdict will be considered. *Id.* When a challenge to the sufficiency of the evidence is

reviewed, the conviction will be affirmed if there is substantial evidence to support it. *Id.*

Appellant was charged with two counts of theft of property. Arkansas Code Annotated section 5-36-103(a)(1) (Repl. 2006) provides that 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." In the present case, appellant argues that the State failed to prove that he knowingly took, exercised control over, or made an unauthorized transfer of interest in property of Martin Marietta and GCR Tire Center. He admits that the testimony provided at trial was that the tires were missing, but asserts that the evidence failed to show that appellant was the responsible party. Moreover, he asserts that the testimony at trial failed to show that appellant knowingly took the tires and that he intended to purposely deprive the owners of the property. This argument is unavailing.

There was sufficient evidence presented at trial to show that appellant knowingly took or exercised unauthorized control over the tires. Appellant admitted to police that he indeed removed the tires from the Hatton Quarry pursuant to an agreement that he had with Robbie. He admitted that he knew the tires were not on any inventory list, and he admitted that the serial numbers had been removed from the tires. He admitted selling the tires to another man in the tire industry. Although appellant was employed as a truck driver for Crawford Tire Recycling, a company that repairs and disposes of tires, removal and delivery of these

particular tires was not on his list of job duties. Likewise, there was sufficient evidence that appellant had the intent to deprive the owners of the property. Appellant admitted that he sold the tires for $28,000, one-half of which he gave to Robbie per their arrangement. Appellant's share was $11,000, and $3,000 was the buyer's share. While appellant argues that this is not sufficient evidence to prove his intent to deprive the owners of their property, this court has stated that a criminal defendant's intent is seldom proved by direct evidence and must normally be proved from the circumstances of the crime, and a jury is allowed to draw upon its common sense to infer intent from the circumstances. *DeShazer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006). Considering the evidence in the light most favorable to the State, we find that substantial evidence supports appellant's conviction for two counts of theft of property.

II. *Denial of Motion for Continuance*

We now turn to appellant's first argument, that the trial court erred in denying his motion for a continuance. Appellant asserts that the trial court should have granted the motion where

> the State did not disclose a State police investigator's report indicating there were two sets of inventories of the stolen property until a state police officer provided it the day before trial; the State amended the criminal information two days before trial changing the charges from one count to two counts and adding different owners; the State provided 250 pages of telephone records two days before trial and 800 pages of telephone records one day before trial; and where the defendant's witness had medical problems and couldn't come to the hearing.

The granting or denial of a motion for continuance is within the sound discretion of the trial court, and the trial court's decision will not be reversed absent an abuse of discretion amounting to a denial of justice. *Anthony v. State*, 339 Ark. 20, 2 S.W.3d 780 (1999). The burden of proving an abuse of discretion due to prejudice resulting from the denial of a continuance is on appellant, and appellant must demonstrate prejudice before this court will consider a trial court's denial of a continuance to be an abuse of discretion. *Dodson v. State*, 358 Ark. 372, 191 S.W.3d 511 (2004).

While it is true that the prosecutor provided defense counsel with a new inventory list and a voluminous amount of telephone records (1050 pages) just before trial, appellant failed to point to anything contained in these documents that prejudiced him or otherwise led to his conviction. In fact, a majority of the phone records—approximately 800 of the 1050 pages—were appellant's own personal phone records. This court has held that the prosecution is not required to disclose information that is already accessible by defendant. *See Lowry v. State*, 364 Ark. 6, 216 S.W.3d 101 (2005). Moreover, when denying appellant's motion for a continuance, the trial court gave appellant the opportunity to object to any witness that was not listed in the State's discovery. The record does not show that appellant made any such objection. Outside appellant's contention that counsel was "overwhelmed" with the voluminous telephone records and that counsel did not have the opportunity to evaluate whether additional witnesses were needed, appellant does not

demonstrate how he was prejudiced. It is axiomatic that this court will not presume prejudice where the appellant offers no proof of it, *see, e.g.*, *Rollins v. State*, 362 Ark. 279, 208 S.W.3d 215 (2005), and some prejudice must be shown in order to find grounds to reverse a conviction. *See Woodbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2004).

III. *Denial of Motion to Suppress Custodial Statement*

Our review of a denial of a motion to suppress evidence is de novo, and we make an independent determination based on the totality of the circumstances, giving due deference to the trial court's ability to assess the credibility of the witnesses. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). In *Davis*, our supreme court clarified the standard of review by replacing a view of the evidence "in the light most favorable to the State" with a "proper deference to the findings of the trial court," which was held to be more consistent with the standard announced by the United States Supreme Court. *State v. Harmon*, 353 Ark. 568, 113 S.W.3d 75 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690 (1996)).

In this second point on appeal, appellant asserts that the trial court erred in not suppressing his statement made during a polygraph test. He asserts that pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), once he said that he wished that he had an attorney, all "questioning [should have ceased] until an attorney [was] present."

In *Riggs v. State*, 339 Ark. 111, 118, 3 S.W.3d 305, 309 (1999), our supreme court discussed when the safeguards of *Miranda* should apply:

> It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), *citing California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (per curiam). Stated another way, the Supreme Court defined custodial interrogation as meaning the questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of action in any significant way. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *see also Stansbury v. California*, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (per curiam); and *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (per curiam). The Supreme Court further explicitly recognized that *Miranda* warnings are not required simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Beheler*, 463 U.S. at 1125, 103 S.Ct. at 3517. In resolving the question of whether a suspect was "in custody" at a particular time, the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation. The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being interrogated. *Stansbury*, 114 S.Ct. at 1529; *State v. Spencer*, 319 Ark. 454, 457, 892 S.W.2d 484, 485 (1995). In later cases, we have followed the standards set forth in *Spencer. See, e.g.*, *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997); *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996).

In the present case, a person in appellant's shoes would not have believed that he was in "custody." Appellant spoke with Texas officials on a voluntary basis, and as the trial court noted, he gave statements to Texas authorities with complete and total voluntariness. Appellant drove himself to the interview. During the interview, he was never handcuffed. He was not only free to leave at any point during the process, but actually exercised that right by stepping outside to smoke a cigarette in the parking lot. Moreover, testimony showed that officials repeatedly told appellant during the interview that he was not under arrest and that he was free to leave. Based on the objective circumstances of this interview, we hold that

appellant was not in custody and was free to leave at any time. Because there was no custodial interrogation, *Miranda* did not apply.

Based on the foregoing, we affirm appellant's convictions.

Affirmed.

PITTMAN and GRUBER, JJ., agree.