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Court of Appeals Opinion

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 08-882

	Opinion Delivered MARCH 11, 2009
TERRANCE LAMONT WALTON APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTH DIVISION, [NO. CR07-4516]
V.	HONORABLE JOHN W. LANGSTON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Terrance Lamont Walton was convicted by a jury of breaking or entering, and he was sentenced as a habitual offender to fifteen years in prison. Pursuant to Ark. Code Ann. § 5-39-202(a)(1) (Supp. 2007), a person commits breaking or entering if for the purpose of committing a theft or felony he breaks or enters into any building, structure, or vehicle. Mr. Walton's sole argument on appeal is that the trial court erred in denying his motion for directed verdict because the State failed to introduce substantial evidence of his identity as the perpetrator. We affirm.

We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State

SEAL OF THE COURT OF APPEALS OF ARKANSAS
OFFICIAL ARKANSAS COURT OF APPEALS OPINION

and consider only the evidence that supports the verdict. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). We affirm a conviction if substantial evidence exists to support it. *Id*. Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Id.*

North Little Rock Police Officer Casey Hanson testified that in the early morning hours of September 27, 2007, the police were on focused patrol due to a rash of burglaries and arsons in the city. At about 1:30 that morning, Officer Hanson was notified of a burglar alarm that went off at Discount Auto, which is a used car dealership. Officer Hanson was just a couple of blocks away and upon arriving at the scene he saw Mr. Walton, dressed in a red t-shirt and shorts, walking south from the business. According to Officer Hanson, Mr. Walton was about forty feet from the fence that encloses the dealership, and he became a suspect because it had only been about a couple of minutes between when Mr. Hanson received the call and arrived on the scene. Mr. Walton was eventually apprehended by another officer, and upon investigation the police found Mr. Walton's car parked about two blocks south of Discount Auto at a vacant house. The car had been backed into the driveway, and Mr. Walton's keys and identification were found above the eaves directly behind the vehicle.

Officer Kenneth Livingston testified that he responded to the burglary at about 1:55 a.m. in his patrol car. When he approached, he observed Mr. Walton walking eastbound

SEAL OF THE COURT OF APPEALS OF ARKANSAS
OFFICIAL ARKANSAS COURT OF APPEALS OPINION

through an alley, about thirty feet from where appellant's vehicle was parked but in the opposite direction. Officer Livingston entered the alley in his patrol unit and observed Mr. Walton walk toward the end of the alley where there was a fence and overgrown vegetation. When appellant got near the fence, Officer Livingston heard a "loud metallic clink and also could see a shadowy object dropping from the left side of his body to the ground." Mr. Walton turned and saw the patrol car, and he ran through the alley and cut north through an empty lot.

Officer Livingston continued his pursuit, and after his patrol car was stopped due to some trees and other obstructions, he gave chase on foot. Mr. Walton continued to run and threw down a white object in a yard. According to Officer Livingston, during the chase he repeatedly yelled, "police, stop." Eventually Mr. Walton gave up and was taken into custody. Officer Livingston subsequently retraced his steps from the chase and found a pair of white gloves. He continued back to the alley where he had heard the loud metallic sound and recovered a sledgehammer and a crowbar.

Officer Paul Riley investigated the crime scene. Officer Riley testified that a hole was cut in the fence that encloses the business. He further testified that he found a pair of wire pliers inside the fenced area and that several wires to the business had been cut. In addition, a rear door to the business was damaged and appeared to have been pried open. Officer Riley recovered a small red fiber on one of the cut fence pieces, and that fiber was compared at the crime lab to the red shirt appellant was wearing that night. A criminalist

SEAL OF THE COURT OF APPEALS OF ARKANSAS
OFFICIAL ARKANSAS COURT OF APPEALS OPINION

from the crime lab testified that the fibers from the fence were microscopically similar to the fibers of the t-shirt, and that the dye was also similar.

Appellant's nephew, Demerius Williams, also testified for the State. He stated that he and Mr. Walton are co-owners of the car that was found in the vicinity of the burglary. Mr. Williams testified that on the night of the burglary Mr. Walton was driving the car and dropped him off at his home at around midnight. When presented with the sledgehammer, crowbar, and white gloves recovered from the chase, Mr. Williams acknowledged that all of these items had been in the trunk of the car.

On appeal, Mr. Walton argues that the trial court erred in denying his motion for directed verdict because there was no substantial evidence of his identity as the perpetrator of the breaking or entering. Mr. Walton asserts that there was no eyewitness testimony that placed him on the Discount Auto lot on the morning of September 27, 2007. Moreover, there was no fingerprint evidence that placed him on the Discount Auto premises, or that connected him with any implements used to break into the premises. Mr. Walton submits that the red fiber evidence did not conclusively establish that he was at the crime scene. Mr. Walton acknowledges in his argument that he was found "very near Discount Auto very near the time that someone broke into the premises." Nonetheless, he submits that even had he been found on the premises that would have been insufficient because mere presence at a crime scene does not establish guilt.

SEAL OF THE COURT OF APPEALS OF ARKANSAS
OFFICIAL ARKANSAS COURT OF APPEALS OPINION

We hold that Mr. Walton is procedurally barred from raising his sufficiency argument on appeal. The record shows that, after the State rested, appellant made the following directed-verdict motion:

> Your Honor, I move for a Motion for Directed Verdict. Both elements, both the breaking and entering into the property and the intent to commit a theft. There's no, there's no basis which this jury could find the Defendant killed the [sic], without resorting to surmise [sic] or conjecture.
>
> Inference[s] are relied upon in this case. They can't say with any, with any doubt that Terrance, any other possibilities are excluded.

After a response by the State, appellant's counsel stated, "Your honor, all reasonable inclinations are timely with just because of the circumstantial evidence they provided." After the trial court denied appellant's directed-verdict motion, the defense rested and then renewed the motion.

Rule 33.1(a) of the Arkansas Rules of Criminal Procedure provides that, in a jury trial, a motion for directed verdict shall be made at the close of the evidence offered by the prosecution and at the close of all the evidence, and shall state the specific grounds therefor. Failure to challenge the sufficiency of the evidence in this manner constitutes a waiver of any challenge pertaining to the sufficiency of the evidence to support the verdict. *See* Ark. R. Crim. P. 33.1(c). Although Mr. Walton made a timely directed-verdict motion, it failed to apprise the trial court of a specific challenge to the proof regarding his identity as the perpetrator of the crime. Therefore, the argument being raised in this appeal is procedurally barred.

SEAL OF THE COURT OF APPEALS OF ARKANSAS
OFFICIAL ARKANSAS COURT OF APPEALS OPINION

Nonetheless, we have concluded that even were the argument preserved, there was substantial evidence that Mr. Walton was the person who committed the breaking or entering. The evidence viewed in the light most favorable to the State showed that Mr. Walton was located just forty yards from the crime scene shortly after the burglar alarm sounded. When confronted by the police, he fled, which is evidence of his consciousness of guilt. *See Alexander v. State*, 78 Ark. App. 56, 77 S.W.3d 544 (2002). During the episode, Mr. Walton dropped a sledgehammer, crowbar, and gloves that were normally kept in the trunk of his car. His car was found parked at a nearby vacant house. And there was evidence that his shirt fibers were similar to those found on the cut fence that was used to gain entry to the lot. Contrary to appellant's argument, there was more incriminating evidence than just his presence near the crime scene.

Circumstantial evidence may constitute substantial evidence if it indicates the accused's guilt and excludes every other reasonable hypothesis. *Lindsey v. State*, 68 Ark. App. 70, 3 S.W.3d 346 (1999). The circumstantial evidence in this case excluded every reasonable hypothesis other than Mr. Walton being the perpetrator of the crime.

Affirmed.

MARSHALL and BROWN, JJ., agree.