

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01298 COA

STANLEY NASH

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MARCUS D. GORDON

COURT FROM WHICH APPEALED: NEWTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

EDMUND J. PHILLIPS, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: KEN TURNER

NATURE OF THE CASE: FELONY

TRIAL COURT DISPOSITION: GRAND LARCENY HABITUAL OFFENDER: SENTENCED
TO SERVE A TERM OF 5 YRS.. IN THE CUSTODY OF THE MDOC WITHOUT PAROLE,
SUSPENSION OR REDUCTION

BEFORE FRAISER, C.J., BRIDGES, P.J., BARBER AND DIAZ, JJ.

FRAISER, C.J., FOR THE COURT:

Appellant Stanley Nash (Nash) was indicted, tried, and convicted of grand larceny of a Troybilt "shredder" in the Newton County Circuit Court. He was sentenced to five years in the custody of the Mississippi Department of Corrections as a habitual offender. In relating to the jury his discovery of the theft, Ralph James (James), the owner of the shredder, made the unresponsive remark that the day before the shredder was stolen he discovered that two chainsaws and a weedeater had also been taken from his storage house. On appeal, Nash argues that James' unresponsive comments about the stolen chainsaws and weedeater amounted to inadmissible testimony about unindicted or uncharged criminal conduct of the accused. Finding no error, we affirm.

FACTS

In January 1992 James discovered his Troybilt shredder, a can of gasoline, and several athletic trophies had been stolen from his storage shed on his property in Newton County, Mississippi. James contacted Deputy Sheriff Ron Davis who came out to James' property. Together the two men followed two sets of footprints leading from James' storage house onto another piece of property where timber was cut. On that property, James and the deputy found the stolen shredder, the can of gas, and the trophies. All of the stolen objects were covered with brush and shrubs in an attempt to conceal it. The men left the stolen property in the same condition which they found it. Later that evening, Deputy Sheriff Davis and another officer sat and watched the area where the stolen property had been hidden. Around eight o'clock a car pulled off the road and attempted to get close to the stolen property, but was impeded by mud. The car turned off its lights, and Nash exited from the passenger side. He went immediately to the stolen shredder, uncovered it, and attempted to drag it to the car. He hollered at the driver of the car to assist him. At that point, the officers revealed themselves and ordered the two perpetrators to halt. The driver of the car, Nash's nephew, fled on foot into a pasture. Nash crouched by the car and was subsequently arrested for the theft of the shredder.

I. WHETHER THE VERDICT OF THE JURY SHOULD BE REVERSED BECAUSE THE COURT, OVER OBJECTION, ADMITTED EVIDENCE OF CRIMES WITH WHICH THE DEFENDANT WAS NOT CHARGED?

Following up James' answer that his shredder had been taken from his storage house, the prosecutor asked James whether anything else was taken at the same time as the shredder. James replied that the day before two chainsaws and a weedeater had been taken. Nash objected to the question about other items as being "immaterial." At no time did Nash object to James' answer as being evidence of uncharged crimes of the defendant. The trial judge overruled the objection, and there was no further mention of the two chainsaws or the weedeater during the trial.

Nash now argues that James' unresponsive comment is tantamount to impermissible testimony about uncharged criminal conduct of the accused, thereby denying him a fair trial and requiring reversal. Nash relies on the pre-evidence rules case of *Tucker v. State*, 403 So. 2d 1274, 1275 (Miss. 1981). In

Tucker, the prosecutor specifically questioned the detective about Tucker's activities. *Id.* In response, the detective stated that Tucker had been selling cocaine. *Id.* However, Tucker was only on trial for possession of cocaine. *Id.* Tucker objected at trial on the grounds of impermissible evidence of uncharged crimes. *Id.* The Mississippi Supreme Court held that it was error, and Tucker was denied the right to a fair trial. There are no similarities between *Tucker* and Nash's situation. The prosecutor in the case sub judice did not ask James anything about property taken from the storage house except that which Nash was arrested for stealing. Moreover, there is nothing whatsoever linking the stolen chainsaws and weedeater with Nash. Nash also failed to object to the testimony on the ground upon which he bases his appeal. "The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal." *Haddox v. State*, 636 So. 2d 1229, 1240 (Miss. 1994).

Under Rule 404(b) of the Mississippi Rules of Evidence, evidence of past crimes or acts of the accused are not admissible to prove character or to prove that the accused acted in conformity therewith. There are, however, exceptions to that rule to show such things as motive, absence of mistake or accident, and intent. Nonetheless, Nash has failed to prove that the situation of which he complains even falls within the ambit of this rule. There is simply no evidence of connection between Nash and James' testimony about the weedeater. The prosecutor did not elicit any information from Nash about items stolen on any other day than the day the shredder was taken. Nor did the prosecutor ask James about Nash taking anything other than the shredder. There was nothing in James' testimony that in any way indicates evidence of prior bad acts, crimes or uncharged conduct of Nash. Nash's argument is without merit.

THE JUDGMENT OF THE NEWTON COUNTY CIRCUIT COURT OF CONVICTION OF GRAND LARCENY AND HIS SENTENCE OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS A HABITUAL OFFENDER IS AFFIRMED. COSTS ARE TAXED TO NEWTON COUNTY.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.