ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION I

CACR06-1149

KALIN LEASHAWN SPENCER — JUNE 13, 2007

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[CR 00-3291, CR 03-1289, CR 05-4511]

HONORABLE TIMOTHY DAVID FOX, JUDGE

AFFIRMED

A Pulaski County jury convicted appellant Kalin Leashawn Spencer of residential burglary and theft of property. The jury sentenced him, as a habitual offender, to eighteen years in the Department of Correction. The trial judge also revoked appellant's probation sentences for two prior criminal offenses. On appeal, appellant asserts two points of error. First, he asserts that the circuit court erred in denying his directed-verdict motions regarding his burglary and theft-of-property convictions alleging that the State failed to introduce substantial evidence of appellant's identity as the perpetrator. Second, he argues that the trial court erred in granting the State's probation-revocation petitions. We find no error and affirm.

A review of the record indicates that at no time during the trial did appellant raise the issue of an identification insufficiency. Defense counsel's arguments at the close of the State's case, and again at the close of all the evidence, were based upon the insufficiency of the evidence to establish

the value of the stolen property. A motion for a directed verdict based on insufficiency of the evidence must specify the respect in which the evidence is deficient. Ark. R. Crim. P. 33.1 (c). The requirement of specificity is to advise the trial court of exactly how the evidence is deficient. *Pratt v. State*, 359 Ark. 16, 194 S.W.3d 183 (2004). Arguments not raised at trial will not be addressed for the first time on appeal, and parties cannot change the grounds for an objection on appeal, but are bound on appeal by the scope and nature of the objections and arguments presented at trial. *Hutcherson v. State*, 74 Ark. App. 72, 47 S.W.3d 267 (2001). Therefore, appellant's first argument is not preserved.

For his second argument, appellant alleges that the trial court erred in granting the State's probation-revocation petitions. This argument is based upon his contention that insufficient evidence supports the identification of him as the perpetrator of the residential burglary and theft.

We will uphold a trial court's probation-revocation determination unless the decision is clearly against the preponderance of the evidence. *See Bradly v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). Because the determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the trial judge's superior position in credibility determinations. *Id*. To revoke probation, the trial court must find by a preponderance of the evidence that the probationer inexcusably violated a condition of that probation. Id.

On review, we hold that a preponderance of the evidence supports the trial court's revocation of appellant's probation. On October 23, 2000, appellant pled guilty to theft of property and received five years' probation. Five months later, the State filed a petition to revoke that probation because appellant tested positive for drug use and failed to report. The appellant pled guilty to the probation violation and was returned to his original sentence, plus additional community service and time in jail. In June 2002, the State filed a petition to revoke appellant's probation because he twice

tested positive for marijuana use, failed to perform any community service, and failed to pay supervision fees. Again, appellant pled guilty to the probation violation; and again, he was returned to his original probation sentence plus additional community service and random drug screens.

Approximately eight months later, a third petition for probation revocation was filed because appellant committed the offense of battery among other probation violations. The appellant pled guilty to the probation violations and was continued on probation. In July 2003, the appellant pled guilty to second-degree battery and was placed on three years' probation.

In November of 2005, the State petitioned to revoke appellant's probation on the ground that he committed the offenses of residential burglary and theft of property in the present case. This revocation hearing was consolidated with the burglary and theft trial. At the close of all the evidence and while the jury was deliberating in appellant's burglary and theft trial, the trial court conducted a hearing addressing the probation revocation. In addition to the evidence presented in the jury trial, the trial court heard testimony from appellant's probation officer. Acting as the fact-finder, the trial court reviewed the credibility of the witnesses and the weight of all the evidence that appellant violated his probation conditions and revoked his probation in both cases.

The evidence presented at trial established that on August 5, 2005, the home of Jessica and Robert Watson was broken into while they were away on a camping trip. That same night, not knowing that the Watsons were away, the Watsons' friend, Dewayne Taylor, stopped by their home to visit them. As he opened the Watsons' front door, Taylor surprised a man coming from a back room of the house. The man was carrying some items including a shotgun and a paintball gun. Taylor asked the man who he was and where the Watsons were. The man told him that the Watsons were camping and that he was "Robert's homeboy." Taylor thought the situation was strange, so as he left he took a close look at the old pick-up truck in the driveway. He knew that the truck did

not belong to the Watsons, but he recognized it from the neighborhood. In the back of the truck he saw a speaker box and another smaller black box that looked like a radio or stereo. Taylor immediately attempted to call the Watsons on his cell phone, but when he failed to reach them and after waiting a few minutes in hopes of a call-back, he went home.

The Watsons returned the next day to find a window in the front of their house broken and the interior in disarray. They noticed immediately that their stereo and Play Station video game system were missing from the living room entertainment center. Further investigation revealed that a TV/DVD player, a shotgun and paintball gun were missing.

The day after the burglary, Taylor realized that the man he had seen at the Watsons' was someone he had known a couple of years earlier. Later, at the police station, Taylor was presented with a photo lineup. He unequivocally identified appellant as the man he had seen removing items from the Watsons' home. At trial Taylor again identified appellant in open court as the man he had seen in the Watsons' home.

Appellant's identity argument is based on a factual determination that falls squarely within the province of the fact finder. Appellant relies on dicta in *Synoground v. State*, 260 Ark. 756, 543 S.W. 2d 935 (1976), for the proposition that eyewitness testimony is unreliable. However, that did was not the holding of the case. *See Synoground*, 260 Ark. at 760, 543 S.W. 2d at 936. Rather, the case "held that patently unreliable identification testimony should be excluded." *Stewart v. State*, 88 Ark. App. 110, 112, 195 S.W.3d 385, 387 (2004). In *Synoground*, the pretrial photo-identification was held to be impermissibly suggestive where a photograph differed from the others in the lineup, and the witness later used the pretrial identification to assist him with the in-court identification. *Synoground*, 260 Ark. at 761-62, 543 S.W. 2d at 937. Unlike the witness in *Synoground*, here Taylor was acquainted with appellant prior to their encounter in the Watsons'

residence, and made an unequivocal pretrial identification of appellant in a photo-lineup followed by an in-court identification. He testified that he observed appellant with certain stolen items in his arms inside the home and saw other items in appellant's truck parked outside the Watsons' residence.

Given this evidence, we find no error in the trial court's revocation of appellant's probation.

Affirmed.

BIRD and VAUGHT, JJ., agree.