ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISION III

CACR07-178

November 28, 2007

RAMON DEWEY BEAL
APPELLANT

APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT [NO. CR-2005-818]

V.

HON. RALPH WILSON, JR., JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

The appellant, Ramon Beal, was tried in the Circuit Court of Crittenden County on charges of aggravated robbery and burglary arising out of acts that occurred on June 18, 2005. He was found guilty of these offenses by a jury and sentenced to terms of imprisonment in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in denying his motion to dismiss on the ground of former prosecution. We affirm.

Appellant based his argument at trial on the assertion that he previously was charged in district court with the felony offenses of aggravated robbery and residential burglary arising out of the same incident and pled guilty to reduced misdemeanor charges of carrying a weapon and theft by receiving. Appellant relied below expressly and exclusively on Ark.

Code Ann. §§ 5-1-110 and 114 (Repl. 2006). Pursuant to section 5-1-110(a)(1), a defendant may not be convicted of an offense if he has previously been convicted of a lesser-included offense. The trial judge denied appellant's motion on the ground that neither of the offenses of which appellant was convicted in district court were lesser-included offenses of aggravated robbery and residential burglary. He was correct.

An appeal from a denial of a motion to dismiss for violation of the prohibition against double jeopardy is typically a question of law requiring de novo review. *Winkle v. State*, 366 Ark. 318, ___ S.W.3d ___ (2006). Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

> [A] single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Craig v. State, 314 Ark. 585, 588, 863 S.W.2d 825, 826 (1993) (quoting *Blockburger v. United States*, 284 U.S. 299 (1932)).

The misdemeanor offense of carrying a weapon is committed when a person has a handgun, knife, or club on or about his person or vehicle with the intent to use it as a weapon. Ark. Code Ann. § 5-73-120(a) (Repl. 2005). The felony offense of aggravated robbery is committed if a person with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, employs or threatens to immediately

employ physical force upon another and is armed with a deadly weapon or represents by word or conduct that he is so armed. Ark. Code Ann. §§ 5-12-102 and 103 (Repl. 2006). Because no actual weapon is required to commit aggravated robbery, *see, e.g., Edwards v. State*, 360 Ark. 413, 201 S.W.3d 909 (2005), carrying a weapon is not a lesser-included offense of aggravated robbery.

Likewise, theft by receiving is not a lesser-included offense of residential burglary. Theft by receiving is committed by receiving, retaining, or disposing of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen. Ark. Code Ann. § 5-36-106(a) (Repl. 2006). Residential burglary, on the other hand, is committed when a person enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment; the intended additional crime need not be completed and need not be theft. Ark. Code Ann. § 5-39-201(a)(1)(Repl. 2006).

Appellant's argument on appeal is also based on the doctrine of *res judicata*. This is outside the scope of the objection at trial, and we will not address it on appeal. *See State v. Banks*, 322 Ark. 344, 909 S.W.2d 634 (1995). However, even were we to do so, appellant's argument would be unavailing. The State's dismissal of a case before the trial has begun does not prevent a subsequent prosecution, and misdemeanor convictions in district court do not bar a subsequent felony prosecution for separate crimes in circuit court, even if the misdemeanor and felony charges arose out of the same criminal episode. *Branning v. State*, ___ Ark. ___, ___ S.W.3d ___ (Nov. 8, 2007).

Affirmed.

GRIFFEN and MARSHALL, JJ., agree.