ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-658

	Opinion Delivered JANUARY 28, 2009
RODNEY MAXWELL APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CR2007-3021]
V.	HONORABLE WILLARD PROCTOR, JUDGE
STATE OF ARKANSAS APPELLEES	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Rodney Maxwell appeals his conviction from the Pulaski County Circuit Court on a charge of residential burglary, under Arkansas Code Annotated section 5-39-201(a)(1)(Repl. 2006), for which he was sentenced as a habitual offender to seven years' imprisonment in the Arkansas Department of Correction. On appeal, he challenges the sufficiency of the evidence to support the conviction, specifically, that the State failed to introduce substantial evidence that he entered the residence in question on June 10, 2007, with the requisite intent to commit theft of property. We affirm.

On July 27, 2007, the State filed a single count felony information against appellant, alleging that on June 10, 2007, he unlawfully entered the residence of David Westbrook with the purpose of committing theft of property therein. Mr. Westbrook and appellant first became acquainted in mid-2006, when appellant came by Mr. Westbrook's home asking to

do yard work. While appellant was working for Mr. Westbrook, Mr. Westbrook would sometimes provide rides to appellant to various places, including to his home, or to do errands. On occasion, the two men drank beer together when appellant was working on the property, but they did not appear to have a personal relationship apart from the time appellant was there to do yard work.

Mr. Westbrook had a garage that he had renovated into a temperature controlled room for the purpose of breeding snakes, which also contained a refrigerator in which he kept beer. Although appellant had been inside the garage with Mr. Westbrook from time to time, Mr. Westbrook made it clear that no one was allowed in the garage unless accompanied by him.

Although appellant provided yard services until he was arrested in the summer of 2007, Mr. Westbrook stopped allowing appellant inside his residence during the spring of 2007. Mr. Westbrook had suspicions that appellant had been breaking into the residence and stealing various items. Specifically, in April 2007, the residence was burgled, and on several other dates during that time frame, items such as beer, tools, and even guns were stolen from the residence or garage. It should be noted, however, that appellant was not charged with the commission of any of those thefts.

Appellant continued to come around the property through May 2007, but he was only allowed there for the purpose of completing yard jobs for which he had been hired. On at least two occasions, the Westbrooks called the police to come remove appellant from the property after he had refused to leave.

On the evening of June 10, 2007, Mr. Westbrook was sitting on his porch at approximately 11:00 p.m., keeping watch on the garage because someone had broken into it the past three or four consecutive nights and stolen beer out of the refrigerator. At that time, he saw appellant come up the driveway, squat between Mr. Westbrook's vehicle and the garage door, and force the garage door open. It would not open all the way because Mr. Westbrook had wound a double set of wire rods through the hasp in an attempt to prevent additional break-ins. Mr. Westbrook watched appellant leave the garage area and subsequently return with a pair of cutting pliers that had been stolen from the property some two weeks earlier. Upon returning to the garage, appellant reached up, cut the wires with the pliers, opened the door, and went into the garage.

Mr. Westbrook immediately phoned 911, and police officers arrived within mere minutes. Officer Byron Harper apprehended appellant inside the garage, sitting near the refrigerator by the door that lead from the garage up to the house. Appellant was arrested without incident. Officer Hasin Almein also responded to the burglary, and arrived as Officer Harper was placing appellant under arrest. Officer Almein was one of the officers that had been called to the residence on two prior occasions to assist in removing appellant from the property.

Appellant was arraigned on August 28, 2007, and he was advised to have no contact with Mr. Westbrook. An omnibus hearing was held on October 16, 2007, and a pre-trial hearing was held on November 6, 2007. At that time, appellant waived his right to a jury trial, and appellant was again advised to have no contact with Mr. Westbrook. A bench trial

was held on February 26, 2008, at which time Mr. Westbrook, Officer Harper, and Officer Almein testified on behalf of the State.

After the State rested, appellant testified on his own behalf. He testified that he had been working at Mr. Westbrook's house on June 10, 2007, and that he and Mr. Westbrook had drunk beer together while he was there. He explained that he told Mr. Westbrook that he would be back after he went home to take a shower. He explained that he went into the garage, as he had on previous occasions, and was sitting on a bag of sawdust smoking a cigarette when the officers arrived. Upon completion of appellant's testimony, his attorney rested and asked the circuit court to consider finding appellant guilty of criminal trespass because there was no evidence presented that appellant stole anything or intended to steal anything while he was in Mr. Westbrook's residence. The State responded that as to evidence of "the theft": (1) appellant previously has been in possession of Mr. Westbrook's stolen property; (2) Mr. Westbrook has experienced repeated thefts of his property; (3) appellant was not allowed to be in the garage; (4) appellant previously has been told numerous times by officers not to be in the garage. The circuit court found that there was sufficient evidence to find appellant guilty of the burglary charge. A judgment and commitment order was entered on March 6, 2008, and appellant filed a timely notice of appeal on March 10, 2008.

A motion to dismiss at a bench trial and a motion for a directed verdict at a jury trial are challenges to the sufficiency of the evidence. *Russell v. State*, 367 Ark. 557, 242 S.W.3d 265 (2006). In order to preserve for appeal the issue of the sufficiency of the evidence, a defendant must first raise the issue to the circuit court in the manner provided in Arkansas

Rule of Criminal Procedure 33.1. Rule 33.1(b) provides that, in a non-jury trial, a defendant must challenge sufficiency by a specific motion to dismiss at the close of all of the evidence. If the defendant moves for dismissal at the close of the State's proof and the trial court denies the motion, then the motion must be renewed at the close of all of the evidence. *Id.* A defendant's failure to raise the issue at the time and in the manner required by the rule will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the judgment. Ark. R. Crim. P. 33.1(c).

Appellant's counsel's timing was proper, although his motion was not specifically presented as a typical motion to dismiss. Specifically, appellant's attorney stated:

> Your Honor, I would ask the Court to consider finding him guilty of criminal trespass in these cases. Really and truly[,] there is no evidence that he actually stole anything or intended to steal anything while he was there. Definitely they were all well acquainted with each other and knew the circumstances of the situations, and in this particular case [he] cooperated with the police and didn't cause any trouble while he was there. On this offense we are talking about here today, nothing was missing nor did it appear anything was attempted to be stolen. And even Mr. Westbrook said he let him drink beer when he was there. So, we would ask the Court to consider all of that before reaching a verdict and maybe find him guilty of criminal trespass.

However, in substance if not in perfect form, it does appear that he was challenging the sufficiency of the evidence with respect to appellant's intent to commit a theft while in the residence.

When a defendant challenges the sufficiency of the evidence that led to a conviction, the evidence is viewed in the light most favorable to the State. *White v. State*, 98 Ark. App. 366, 255 S.W.3d 881 (2007). Only evidence supporting the verdict will be considered. *Id.* The test for determining the sufficiency of the evidence is whether the verdict is supported

by substantial evidence, direct or circumstantial. *Graham v. State*, 365 Ark. 274, 229 S.W.3d 30 (2006). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* Circumstantial evidence may constitute substantial evidence to support a conviction. *See Sales v. State*, 374 Ark. 222, __ S.W.3d __ (2008). The longstanding rule in the use of circumstantial evidence is that, to be substantial, the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused. *Id.* The question of whether the circumstantial evidence excludes every other reasonable hypothesis consistent with innocence is for the trier of fact to decide. *Id.* Upon review, this court must determine whether the trier of fact resorted to speculation and conjecture in reaching its verdict. *Id.* Credibility determinations are made by the trier of fact, which is free to believe the prosecution's version of events rather than the defendant's. *See Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001).

Residential burglary requires both an unlawful entry into a residence and the purpose, or intent, to commit any offense punishable by imprisonment. *See* Ark. Code Ann. § 5-39-201(a)(1) (Repl. 2006). A person acts purposely when it is his conscious object to engage in action of that nature or to cause such a result. Ark. Code Ann. § 5-2-202(1) (Repl. 2006). A person's state of mind at the time of a crime is seldom apparent. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003) (citing *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002)). Intent or purpose, being a state of mind, can seldom be positively known to others, so it ordinarily cannot be shown by direct evidence, but may be inferred from the facts and circumstances shown in evidence. *Id.* Since intent cannot be proven by direct evidence,

members of the jury are allowed to draw upon their common knowledge and experience to infer it from the circumstances. *Id.*

Appellant concedes in his brief that he illegally entered Mr. Westbrook's garage and remained there, but he argues that no evidence was presented that he actually stole anything or was on the premises for the purpose of committing a theft. Appellant reiterates that he was merely sitting in the garage when the police arrived. The State alleges that he entered Mr. Westbrook's residence to commit theft of property, which occurs when a person exercises unauthorized control over the property of another person. Ark. Code Ann. § 5-36-103(a)(1) (Repl. 2006). Appellant acknowledges that the intent to commit theft of property, once inside a residence, can be inferred from the defendant's conduct inside the residence, *see Forgy v. State*, 302 Ark. 435, 790 S.W.2d 173 (1990) (evidence presented that defendant started to remove a portable television set from the residence), and *Atkins v. State*, 63 Ark. App. 203, 979 S.W.2d 903 (1998) (defendant observed walking toward stereo equipment inside residence), but he contends there was no such evidence of intent presented in this particular case.

As controlling authority, appellant cites *Norton v. State*, 271 Ark. 451, 609 S.W.2d 1 (1980), a case in which our supreme court held that proof that a defendant illegally entered a building at night did not, of itself, support the inference that the defendant intended to commit an offense punishable by imprisonment once inside the building. Likewise in the instant case, he maintains that the State failed to prove that he engaged in conduct that would support the inference that he intended to exercise unauthorized control over any of the

property that Mr. Westbrook kept in the garage. No evidence was introduced either that he handled the snakes for any reason or that he even opened the refrigerator that held Mr. Westbrook's beer. Officer Harper testified that appellant "was sitting in front of the refrigerator" when Officer Harper first entered the garage.

Appellant maintains that his passive conduct of sitting down once inside the garage simply does not suggest that he intended to commit theft of property while there. He asserts that "thieves do not just sit around." Appellant argues that, given the absence of any circumstantial evidence of specific intent to commit theft of property once inside the garage, the trier of fact could only guess or speculate about whether he was guilty of residential burglary, and that is insufficient to support the conviction.

Although it is true that specific intent cannot be inferred solely from proof of an illegal entry, *see Forgy*, *supra*, intent may be inferred from circumstantial evidence so long as such evidence is consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion. *Atkins v. State*, *supra*. Here, appellant was present in the garage late in the evening, rather than at a time he would have been there to perform yard work. Mr. Westbrook testified that he began to have "a lot of things disappear in [his] home" after hiring appellant as a yard worker, and that he suspected appellant because appellant was spending a lot of time in and around the residence. Mr. Westbrook testified that, despite telling appellant not to go into the garage unaccompanied and subsequently informing him that he was no longer welcome on the property at all, he witnessed appellant come to the residence on the night of June 10, 2007, squat between Mr. Westbrook's van and the garage, force the door

open, then leave and return with cutting pliers that had been stolen from the garage two weeks earlier, and cut the set of wires that had been securing the hasp. Mr. Westbrook immediately called emergency services, and shortly thereafter, appellant was found in the garage sitting in front of the refrigerator that contained Mr. Westbrook's beer.

After the incident and resulting arrest, appellant attempted to pressure Mr. Westbrook into dropping the charges, and violated a no-contact order by repeatedly harassing Mr. Westbrook. We agree with the State that it is difficult to conceive of a rational explanation for these circumstances other than appellant's guilt. *See Tiller v. State*, 42 Ark. App. 64, 854 S.W.2d 730 (1993); *Jimenez v. State*, 12 Ark. App. 315, 675 S.W.2d 853 (1984).

The State also correctly points out that a showing of unauthorized control is not required to establish residential burglary. *See* Ark. Code Ann. § 5-39-201(a)(1). Because appellant was charged with burglary, the State need only establish his intent to commit theft. *Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001)(affirming conviction of breaking and entering because he had the intent to commit a theft). Mr. Westbrook witnessed appellant cut the double wire to gain access to a place where he was not allowed and immediately called the police. Based on the circumstances, and viewed in the light most favorable to the State, the circuit court could have inferred that officers arrived so quickly that appellant was apprehended before he had an opportunity to take any property. *See Scates v. State*, 244 Ark. 333, 424 S.W.2d 876 (1968).

Appellant contends in his reply brief that, to the extent *Scates* held that a defendant's mere presence in an occupiable structure constitutes proof of him having specific intent

necessary to prove burglary, it was overruled on that point *sub silentio* by our supreme court's decision in *Norton*, *supra*. *See Golden v. State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984), *overruled on other grounds by Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001). We hold that there was additional evidence presented as to appellant's intent to commit theft of property above and beyond his mere presence in the garage.

The trier of fact may consider and give weight to any false, improbable, and contradictory statements made by an accused explaining suspicious circumstances. *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999); *Walker v. State*, 313 Ark. 478, 855 S.W.2d 932 (1993). Additionally, our supreme court held in *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000), that criminal intent can be inferred from a defendant's behavior under the circumstances and that a presumption exists that a person intends the natural and probable consequences of his acts.

The evidence regarding appellant's break-in on June 10, 2007, although far from the most definitive evidence of intent to commit theft we have seen, is sufficient to infer criminal intent on the part of appellant. The evidence is especially compelling when viewed in light of testimony from Mr. Westbrook and Officer Almein regarding appellant's continued attempts to come around Mr. Westbrook's residence despite multiple warnings to stay off the property. We hold that is was not speculation for the circuit court to determine that the officers simply arrived before appellant had the opportunity to steal beer or other items from the garage. Although we do not have evidence of him actually removing beer from the refrigerator or running at the sight of the officers entering the garage, there was sufficient

evidence from which the circuit court could infer that appellant had the requisite criminal intent and was more than "merely present" in Mr. Westbrook's garage.

Affirmed.

HENRY and BAKER, JJ., agree.