ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR08-1255

CHRISTOPHER LEE BURCHAM, APPELLANT	**Opinion Delivered** 3 JUNE 2009
V.	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT, [NO. CR-20068-73-A]
	THE HONORABLE GARY COTTRELL, JUDGE
STATE OF ARKANSAS, APPELLEE	AFFIRMED

D.P. MARSHALL JR., Judge

Dr. and Mrs. Ford's home was apparently particularly attractive to burglars. The fourth unsuccessful break-in is the subject of this appeal. Eighteen-year-old Christopher Burcham, along with another adult and several juveniles, planned to burgle the Fords' home. One person kicked open the door, but the group scattered when the alarm sounded. The police developed several suspects, including Burcham, who eventually confessed—twice at the police station and again at trial. A jury convicted Burcham of attempted residential burglary, and the circuit court sentenced him to two years' imprisonment with one year suspended. Burcham appeals, arguing that the circuit court erred by failing to suppress his police-station confessions, in refusing to instruct the jury on the lesser-included offenses, and by refusing to allow the jury to hear about his juvenile co-defendants' plea deals.

Burcham's Statements to Police. Burcham gave two taped interviews to police. He argues that he was in custody for *Miranda* purposes during his first interview. Because he was not read his rights before that interview, he contends that his initial statement was inadmissible and should have been suppressed. Though the officer read Burcham his rights before his second statement, Burcham argues that it was fruit of the poisonous tree and should have been suppressed too.

Isbell v. State is on point. There our supreme court held that, even though Isbell's confessions should have been suppressed, any error was harmless because of Isbell's decision to testify at trial. 326 Ark. 17, 22, 931 S.W.2d 74, 77 (1996). At trial, Isbell repeated the substance of his earlier confessions. Further, he made no argument, either at trial or on appeal, that he was forced to testify because the court had admitted his earlier confessions. *Ibid.*

Like Isbell, Burcham testified at trial; he did not argue below that the admission of his police-station confessions forced him to testify at trial; and he does not make that argument on appeal. We hold, following *Isbell*, that Burcham's confession in open court to all the essential facts of attempted residential burglary undermines his challenge to his police-station confessions.

At trial, Burcham testified that he and five others met in a pasture behind the Fords' home. They climbed over the Fords' back gate, stepped over an electronic trip wire, hopped another fence, and then took their lookout positions around the house.

One group member kicked in the door. The alarm sounded and the group fled the premises without anyone entering the house. Burcham said that he never intended to go into the house and that he was not trying to get into trouble. He admitted, however, that he knew the consequences of his actions and what he was doing was wrong. Later, the prosecutor asked him "the plan was break in, steal whatever property you guys could and then get out of there before anybody showed up or the police showed up?" Burcham responded "Yes, Sir." In sum, Burcham's trial testimony was essentially a repeat of his earlier confessions. Even if his earlier statements should have been suppressed, his confession in open court made any error here harmless. *Isbell*, 326 Ark. at 22, 931 S.W.2d at 77.

On the merits of admitting the statements, we see no error in any event. First, preservation is questionable because Burcham did not object to the first testimony about his police-station confessions. Second, *Miranda* warnings were necessary before the first interview only if Burcham was in custody. *Hall v. State*, 361 Ark. 379, 389, 206 S.W.3d 830, 837 (2005). A person is in custody if he is arrested or his freedom of movement is retrained to an extent typically associated with a formal arrest. *Ibid.* "In resolving the question of whether a suspect was in custody at a particular time, the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation." *Ibid.* Our review is *de novo*. *Bedsole v. State*, 104 Ark. App. 253, 255, ___ S.W.3d ___, ___ (2009).

After the fourth attempted robbery, Detective Christina Hall began investigating and canvassing the neighborhood. Burcham became one of several suspects. Burcham testified that Hall met him at a friend's house and "just asked for me to come down to the police station and answer a couple questions." Burcham said that Hall told him "that we wasn't under arrest," and that "[s]he just want[ed] to talk to us about the prior burglaries." Later that day, Burcham and another suspect drove to the police station to talk to Hall. Hall recorded the conversation. At the start of the interview, Hall told Burcham again that he was not under arrest. She did not give him *Miranda* warnings. Burcham confessed. Later, after providing the warnings, Hall interviewed him a second time. In light of these facts, and after viewing the taped interviews, we conclude that Burcham was not under arrest and his freedom of movement was not restrained to the degree typically associated with a formal arrest. We therefore hold that Burcham was not in custody for *Miranda* purposes during his first interview. Thus, the circuit court did not err in admitting both tapes.

The Lesser-Included Offenses. Burcham is right: breaking or entering and criminal trespass are lesser-included offenses of residential burglary. *Grays v. State*, 264 Ark. 564, 567, 572 S.W.2d 847, 849 (1978). The circuit court's refusal to instruct the jury on these lesser-included offenses was reversible error if either of those instructions was supported by the slightest evidence. *Atkinson v. State*, 347 Ark. 336, 349, 64 S.W.3d 259, 268 (2002). But if there was no rational basis for acquitting Burcham of

attempted residential burglary and convicting him of either criminal trespass or breaking or entering, then the circuit court's refusal to instruct on those offenses was not error. *Ibid.* Further, if the evidence clearly showed that Burcham was either guilty of attempted residential burglary or innocent, then the court's refusal to instruct on the lesser-included offenses was not error. *Ibid.*

"A person commits residential burglary if he . . . enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the . . . structure any offense punishable by imprisonment." Ark. Code Ann. § 5-39-201(a)(1) (Repl. 2006). Burcham's in-court confession established his attempt to burglarize the Fords' home with the group. Ark. Code Ann. § 5-3-201 (Repl. 2006). We see no rational basis for instructing the jury on the two lesser-included offenses. Thus, the circuit court did not commit reversible error in refusing to instruct the jury on those offenses.

Co-Defendants' Negotiated Pleas. Burcham next argues that, based on judicial estoppel, the jury should have been allowed to hear about Burcham's juvenile co-defendants' plea deals. In *Ross v. State*, however, our supreme court held that "the sentence another defendant received is not relevant to guilt, innocence, or punishment, but that the sentence could be offered to show bias or prejudice of a witness." 300 Ark. 369, 382, 779 S.W.2d 161, 167 (1989). Because none of Burcham's co-defendants were witnesses at his trial, the circuit court did not err in

refusing to admit evidence of the co-defendants' negotiated pleas.

Affirmed.

PITTMAN and HENRY, JJ., agree.