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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 09-1029

	Opinion Delivered APRIL 21, 2010
ODELL LARON HINTON APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION,
V.	[NO. CR 08-5026]
	HONORABLE HERBERT THOMAS WRIGHT JR., JUDGE,
STATE OF ARKANSAS APPELLEE	
	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Odell Hinton was tried before the bench in Pulaski County Circuit Court and found guilty of two counts of aggravated robbery and two counts of aggravated burglary. These charges were filed after a break-in at the apartment of Zhivago Walker and Tyrone Taylor wherein Walker's wallet and cash were stolen. Hinton was charged with a co-defendant for each count, but they were tried separately. Hinton was sentenced to a twenty-year term in prison. He challenges the sufficiency of the evidence to convict him, asserting primarily that there was insufficient proof that he possessed or used a weapon, or that he threatened to use force in the commission of the crimes. After reviewing the evidence under the proper standard, we affirm.

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. Ark. R. Crim. P. 33.1 (2009); *Graham v. State*, 365 Ark. 274, 229 S.W.3d 30 (2006); *Beasley v. State*, 2009 Ark. App. 625. 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. *Gamble v. State*, 351 Ark. 541, 95 S.W.3d 755 (2003). Only evidence supporting the verdict will be considered. *Sales v. State*, 374 Ark. 222, 289 S.W.3d 423 (2008). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008). Circumstantial evidence may constitute sufficient evidence to support a conviction, but it must exclude every other reasonable hypothesis other than the guilt of the accused. *Whitt v. State*, 365 Ark. 580, 232 S.W.3d 459 (2006). The question of whether the circumstantial evidence excludes every other reasonable hypothesis consistent with innocence is for the trier of fact to decide. *Id.*

Here, appellant and his co-defendant were charged in the same felony information with the same crimes against the same victims. In cases where the theory of accomplice liability is implicated, we affirm a sufficiency-of-the-evidence challenge if substantial evidence exists that the defendant acted as an accomplice in the commission of the alleged offense. *Cook v. State*, 350 Ark. 398, 86 S.W.3d 916 (2002); *Purifoy v. State*, 307 Ark. 482, 822 S.W.2d 374 (1991).

A person is criminally liable for the conduct of another person when he is an accomplice of another person in the commission of an offense. Ark. Code Ann. § 5-2-402(2). When two or more persons assist one another in the commission of a crime, *each is an accomplice* and criminally liable for the conduct of both. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996) (emphasis added). There is no distinction between principals and accomplices where criminal liability is concerned. *Id.* There is no requirement in our law that one's partner in crime must be convicted first to create an issue of accomplice liability.[1]

Appellant contends that a finding of guilt from a criminal bench trial is reviewed for clear error. That standard applies to typical civil bench trials, and in the case of *Sharp v. State*, 350 Ark. 529, 88 S.W.3d 848 (2002), to quasi-criminal proceedings to determine by fact-finding whether certain machines constitute illegal gaming devices under the criminal code. What we consider in the present appeal is criminal liability, and we apply the proper standard we have recited.

Moving to the merits, Hinton argues that the evidence was perhaps sufficient to sustain a mere burglary charge but not aggravated robbery or aggravated burglary charges. The thrust of Hinton's contention is that because the two victims did not testify, and no one else could

[1]Hinton attempts to assert in his reply brief that his trial being conducted before his co-defendant somehow limited the State to proving only principal liability, but we reject that because he has failed to present convincing authority. *Perroni v. State*, 358 Ark. 17, 186 S.W.3d 206 (2004). Both men were charged, and in that case, both could be found accomplices to the other. *Passley v. State*, *supra.* And, in any event, we do not consider arguments made for the first time in a reply brief. *Ayala v. State*, 365 Ark. 192, 226 S.W.3d 766 (2006); *Maddox v. City of Ft. Smith*, 346 Ark. 209, 56 S.W.3d 375 (2001).

verify that Hinton himself possessed a firearm in the commission of the crimes, nor could anyone verify that the threat of force was used, then the State's case failed. The State responds that the circumstantial evidence is compelling that either Hinton or an accomplice possessed a firearm in the perpetration of this robbery. We agree with the State.

The evidence, viewed most favorably to the State, revealed that on the night of October 28, 2008, a 911 call was made to the North Little Rock police department. The dispatcher, Mary Denton, took the frantic call from a person who identified himself as Zhivago. He whispered his pleas for help, telling her that people were kicking in the door to his garage apartment on North Magnolia Street.

The intruders came in, and Denton listened as the telephone line remained open. She heard repeated demands by one person seeking money from one of the tenants. A tenant was heard to deny having much money because he had paid rent, swearing on his child's life. A tenant told the man that what money he had, the man could take. There were no fewer than twenty demands for "the money." On the 911 recording, no one ever specifically mentioned a gun, nor was there any explicit verbal threat of harm. Denton stayed on the line through the time that police responded to the scene and secured the persons and premises. The 911 call was preserved on a compact disc and was admitted into evidence without objection.

An eyewitness, a neighbor named Scottie McClina, told police that he saw two dark-skinned black males wearing hooded jackets at the garage-apartment door. McClina said he observed at least one of the men holding a handgun while the other kicked the door to get

inside. McClina saw the men go in, the police arrive, and the police remove the same two men. McClina confirmed that the men who were removed were the men he saw break in, not the new apartment tenants.

Several officers testified to their actions on the scene. Their collective testimonies demonstrated that they responded to the 911 call to secure the scene; that two men attempted to leave with something bulging in their pockets; that the two returned inside but were taken out shortly thereafter; and that two very upset tenants were discovered in the apartment. Zhivago Walker was found in a back bedroom, terrified and on the floor. Walker immediately told the police that he was "a victim" and that the two intruders hid their guns in the closet. Two guns were found there — a Ruger .45 caliber and a Para Ordinance. One gun was on the closet shelf; the other was found shoved under the loose carpeting of the closet.

Officers found Walker's wallet, Walker's driver's license, and $112 cash in Hinton's pants pocket. Hinton also had Walker's cell phone. Hinton told officers he was only there "to buy weed." Walker and Taylor did not appear to testify at trial. The owner of the apartment, Bobby Sykes, testified that he rented the apartment to Walker and Taylor, accepting the first month's rent ($350) and a deposit that day. Sykes's 911 call, also on the compact disc, recorded Sykes saying he was informed by his tenant that there were men with a gun breaking into the apartment.

On this evidence, the trial judge announced that he found Hinton guilty of these four counts. After the judgment was filed, appellant filed a timely notice of appeal. We now examine the sufficiency-of-the-evidence argument.

Arkansas Code Annotated section 5-12-103(a) defines aggravated robbery as committing robbery while armed with a deadly weapon or representing by word or conduct that he is armed with a deadly weapon. As relevant here, robbery required proof of the use of, or the threat to use, physical force to commit a theft. Ark. Code Ann. § 5-12-102(a). The argument here is that sufficient proof was lacking that Hinton had a gun, threatened to use one, or threatened to use physical force of any kind. Appellant's attorney points out that the State failed to fingerprint the guns, to determine to whom they were registered, or to present the testimony of the victims to verify any threats or possession of firearms. The State responds that the neighbor verified that one of the intruders had a gun, Walker told officers that the intruders hid their guns in the closet, where two guns were found, and both intruders were charged in the same instrument, implicating accomplice liability. This provides substantial evidence to support the finding that the intruders at minimum represented by word or conduct that they were armed as a threat in order to commit the theft.

Aggravated burglary, in this case, required the State to prove the commission of a residential burglary while armed with a deadly weapon or while representing by word or conduct that he was armed with a deadly weapon. Ark. Code Ann. § 5-39-204(a). To prove burglary in this case, the State had to prove entrance into the residence with the purpose to

commit any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(a). This argument focuses on the same issue that Hinton deems the fatal flaw in the State's case — that there was no direct proof on the record of Hinton holding a gun. For the same reasons explained in the previous paragraph, we hold that substantial circumstantial evidence is in the record to support a finding of guilt, either as a principal or an accomplice.

We affirm.

KINARD and MARSHALL, JJ., agree.