Not Designated for Publication.

DIVISION II

CACR 06-1201

May 23, 2007

ANTHONY BANISTER

APPELLANT

APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT
[CR-2001-0311-1]

V.

HONORABLE BERLIN C. JONES, JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant, Anthony Banister, was convicted of possession of a controlled substance, crack cocaine, in violation of Ark. Code Ann. § 5-64-401 (Supp. 1999). Appellant argues on appeal that there was insufficient evidence to support his conviction. We find no error and affirm.

On April 11, 2001, a search warrant was executed on a home located at 1404 West 17th Street in Pine Bluff, Arkansas, due to suspected drug activity. During the execution of the warrant, appellant was observed by police officers exiting the back door of the house and was detained. During a search of appellant, police officers found a package containing crack cocaine in the front pocket of appellant's pants. In a criminal information filed April 16, 2001, appellant was charged with (1) possession of a controlled substance, crack cocaine,

with intent to deliver; and (2) possession of a controlled substance, marijuana, with intent to deliver. The marijuana charge was based on drugs found inside the home; appellant was found not guilty of the marijuana charge at trial, and it is not at issue on appeal.

After numerous motions, including seven motions for continuance filed by appellant and four motions for continuance filed by the State, the trial on this matter was held on April 4, 2006. Sergeant Joe Harrell of the Pine Bluff Police Department testified that he participated in the execution of the search warrant on April 11, 2001, and he was part of the team entering the house from the front. Harrell testified that as he came through the kitchen, he saw appellant going out of the back door at a fast pace. Harrell followed appellant outside and saw that another officer, Officer Charles Harrison, had detained appellant and had him on the ground. Harrell testified that Harrison searched appellant and removed some white rock substance from his left, front pants pocket.

Officer Harrison testified that his responsibility during the execution of the search warrant was to cover the back of the house while the other officers made entry in the front. He testified that he and Sergeant John Zuber went to the back of the house, and when Harrison reached the rear of the house, he placed himself in a position to observe the rear door. Harrison testified that he heard a commotion and observed appellant come out of the back door. Harrison identified himself as a police officer and ordered appellant to get on the ground, lying on his stomach. Harrison testified that he handcuffed appellant, then searched appellant and found in his front, left pocket a bag of what Harrison thought was crack

cocaine with several rocks. Harrison also testified that he did not recall appellant saying anything to him at that point, and he did not recall anyone being in the backyard at the time except himself, Sergeant Zuber, Sergeant Harrell, and appellant.

Sergeant Zuber testified that when he and Officer Harrison got to the rear of the residence, they encountered appellant coming off the back porch area. Zuber testified that Harrison stopped appellant, ordered him to the ground, and handcuffed him. He also testified that Harrison searched appellant, although Zuber did not observe the search. Zuber testified that the lab report in this case reported that 1.6 grams of cocaine were seized from appellant, and at least eight sales could be made from that quantity.

At the close of the State's evidence, appellant made a motion for directed verdict on the charge of possession of crack cocaine with intent to deliver, arguing that there had been testimony to show that appellant had possessed the cocaine, if the testimony of the officers was believed, but there had been no evidence to show any intent on the part of appellant to deliver. The State responded by arguing that the amount appellant had in his possession, 1.6 grams, was above the one-gram limit that creates the presumption of intent to deliver. On this basis, the court denied the motion for directed verdict.

The defense then presented the testimony of Jerry Howell, a friend of appellant's. Howell testified that on April 11, 2001, he was at the house in question, which was the residence of Pam Brown, appellant's ex-girlfriend. Howell testified that he was sitting on the back porch when the police arrived. Howell testified that he saw the police coming around

to the back of the house, and he stood in the doorway of the back door. He testified that the police pulled their guns on him, told him to get down on the ground, and handcuffed him. Howell testified that he did not see appellant come past him, and he thought appellant "walked around the house or something." Howell stated that the police told appellant to freeze and had appellant on the ground as well. Howell testified that he heard appellant say, "Don't do me like that. Don't do me like that. Why y'all do me like that?" Howell then heard appellant say, "Why you put that in my pocket? Why you do me like that?"

Appellant testified that on April 11, 2001, he had picked up his daughter at the airport and had taken her to his ex-girlfriend's house to see his other daughter and grandson. Appellant stated that he had been at the house only ten or fifteen minutes, he had not entered the house, and he was in the back yard when he heard somebody say, "Police." Appellant testified that he was standing in the backyard as the police came around the house. He testified that the police told him to get on the ground, and he saw Jerry Howell when the police brought him out of the house and put him on the ground as well. Appellant stated that the police handcuffed him while he was on the ground and then searched his pockets. Appellant testified:

> The one that was on my right-hand side, he reached his hand in my pocket, and he came out with—matter of fact, I know it was two twenties and a five-dollar bill. He said, "Here's the marked money." I said, "What!" you know, just like that. I said, "Man." And by that time the other one was all digging in my pocket and whatever. I tried to turn around. And he said, "Oh, yeah, look here what we've got here." I said, "What's that?" And he said: "It's crack cocaine. You know what it is." I said, "Why you do me like that?" That's how it went. I said, "Why you do me like that?" And,

you know, it went like that right there, because one was in one pocket and the other was in my other pocket, you know.

Appellant testified that he did not have any crack cocaine in his possession before the police handcuffed him and put him on the ground.

After appellant's testimony, the defense rested and renewed its motion for directed verdict on the charge of possession of crack cocaine with intent to deliver. Appellant argued that based on his testimony, he did not possess crack cocaine. Appellant asserted there was contradictory testimony by the State, and the State had not established that he was in possession of cocaine. Appellant also renewed his earlier argument that there was nothing to indicate any intention to deliver the cocaine based on the way it was packaged. The State rebutted appellant's contentions by arguing again that the amount of cocaine recovered was over the one-gram limit allowing a presumption of intent to deliver, and the testimony of the appellant was self-serving. The court denied the motion.

The jury found appellant guilty of the lesser-included charge of possession of a controlled substance. In an order filed April 6, 2006, the court sentenced appellant to ten years' probation and a fine of $7500. Appellant filed his timely appeal to this court on May 1, 2006.

On appeal, appellant renews his argument that there was insufficient evidence to establish his possession of crack cocaine. However, we cannot reach the merits of this argument because appellant has failed to preserve the argument for our review. Appellant's motion for directed verdict made at the close of the State's case failed to challenge the

sufficiency of the evidence with regard to possession, and appellant's attorney even conceded that the State had presented evidence of possession. A defendant is required to address the lesser-included offenses in his motion for directed verdict to preserve a challenge to the sufficiency of the evidence necessary to support a conviction for a lesser-included offense. *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996). In *Jordan*, the appellant was charged with capital murder but ultimately convicted of the lesser-included offense of second-degree murder. Our supreme court held that the appellant's failure to question the sufficiency of the evidence for lesser-included offenses at the close of the State's case constituted a waiver of the argument. Similarly, in this case, appellant's failure to question the sufficiency of the evidence with regard to possession at the close of the State's case constitutes a waiver of the argument for purposes of appeal.

Affirmed.

MARSHALL and VAUGHT, JJ., agree.