ARKANSAS COURT OF APPEALS

NOT DESIGNATED FOR PUBLICATION

DIVISION II

CACR05-925

MARCH 15, 2006

ROBERT W. FRANKLIN APPELLANT	APPEAL FROM THE LOGAN COUNTY CIRCUIT COURT, SOUTHERN DISTRICT, [NO. CR-2003-110], HON. PAUL E. DANIELSON, JUDGE
V.	
STATE OF ARKANSAS APPELLEE	AFFIRMED

SAM BIRD, Judge

Appellant Robert W. Franklin was convicted by a jury of possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and use of a communication facility. He was sentenced to a total of thirty years' imprisonment, including a ten-year sentence enhancement under Ark. Code Ann. § 5-64-411 with respect to his conviction for possession of methamphetamine with intent to deliver. On appeal, Franklin argues (1) that the trial court erred when it allowed the State to introduce testimony concerning controlled drug buys within his home, and (2) that the evidence was insufficient for the jury to find that Franklin possessed methamphetamine with the intent to deliver. We affirm.

At trial, Officer Larry Garner testified that he was involved in the execution of a search warrant at Franklin's residence on November 28, 2003. Garner said that the residence had been under surveillance and that police found the following items during the search of the residence: a mirror with a white line of powder substance that appeared to be methamphetamine; a square box containing baggies with a white substance and small empty

bags; a Ziploc bag containing "corner bags"; round tubes, baggies, and items of drug paraphernalia used to crush the powder substance; a set of digital scales; a "PVC cylinder taped on both ends"; two smoking devices with burned residue; two Ziploc baggies with a white powder residue left inside each bag; a night-vision scope; and $172 in U.S. currency. Garner also said that, among the $172, there were two five-dollar bills that he had "photographed two or three days earlier" and that had been used to buy drugs.

Garner explained that he had conducted a "controlled buy" at Franklin's residence with the photographed money. He said that he searched the confidential informant, observed the informant going "to and from the residence," and recovered drugs from him. He also said that he used the photographed bills in the buy and that the serial numbers on the bills matched those recovered during the search of Franklin's residence. Garner said that he had worked "between 150 and 200" drug cases and that he had conducted "probably 200 or 300 controlled buys."

Steve Reid of the Booneville Police Department testified that he also participated in the execution of the search warrant at Franklin's residence. He said that he "helped secure the residence and Mr. Franklin" and that he asked Franklin's wife, Doris Franklin, to "empty her pockets." According to Reid, Mrs. Franklin's pockets contained $172 in cash and two small packages of a "white powder substance," which tested positive for methamphetamine. Reid also said that police found "four [or] five cameras … outside the house." He explained that "the significance of the surveillance equipment would be [that] you could see who is coming and going from your residence while you're not at home" and that it could be "used to protect especially from law enforcement." Reid stated that Franklin's residence was located approximately seven hundred thirty-nine feet from a church.

Cindy Moran, a forensic chemist at the Arkansas State Crime Laboratory, also testified for the State. She said that she had analyzed suspected controlled substances in over four thousand cases and that the substances seized from Franklin's residence tested positive for "methamphetamine hydrochloride, nicotinamide" with a total weight of 6.6613 grams.

After the close of the State's case, Franklin's counsel moved for a directed verdict, stating in part as follows:

> At this time the Defense moves for a directed verdict of acquittal on possession of [methamphetamine with] intent to deliver. Looks to me like the evidence is indicative of possession with intent to use. And the jury would have to be guessing as to the evidence on intent to distribute or [deliver]. … So also just for purposes of protecting ourselves we move for a directed verdict on what is in essence a sentencing question on the house being within a thousand feet of the Assembly of God Church.

The trial court denied the motions. Franklin's counsel renewed the motions at the close of all of the evidence, and the court again denied them.

While Franklin raises it as his second point on appeal, preservation of Franklin's freedom from double jeopardy requires us to examine his sufficiency of the evidence argument before addressing trial errors. *Nelson v. State*, ___ Ark. ___, ___S.W.3d ___ (Feb. 16, 2006). A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Id*. When a defendant makes a challenge to sufficiency of the evidence on appeal, the appellate court views the evidence in the light most favorable to the State. *Id*. The test for determining sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial; substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id*. Only evidence supporting the verdict will be considered, and the conviction will be affirmed if there is substantial evidence to support it. *Id*.

Arkansas Code Annotated section 5-64-401(a) (Supp. 2003) provides that, with certain exceptions, it is unlawful to manufacture, deliver, or possess with intent to

manufacture or deliver a controlled substance. In this case, Franklin claims that the evidence was insufficient to support his conviction for possession of methamphetamine with intent to deliver because "the testimony of Larry Garner and Steve Reid showed that the drug paraphernalia found in Franklin's home was consistent with possession with intent to use, not intent to deliver." However, police seized 6.6613 grams of methamphetamine from Franklin's residence while Franklin was there. This is more than thirty times the presumptive amount for possession of methamphetamine with intent to deliver. *See Rabb v. State*, 72 Ark. App. 396, 39 S.W.3d 11 (2001) (stating that, under Ark. Code Ann. § 5-64-401(d), possession of more than two hundred milligrams of methamphetamine gives rise to a presumption of intent to deliver). Furthermore, the serial numbers on the photographed bills used in the controlled buy matched those on the bills recovered during the search of Franklin's residence. Viewing the evidence in the light most favorable to the State, as we are required to do, we find that substantial evidence supports Franklin's conviction for possession of methamphetamine with intent to deliver. Although Franklin additionally claims that the majority of the methamphetamine was recovered from his wife and was "not tied" to him, he failed to raise this argument in his directed-verdict motion below and is therefore precluded from raising it on appeal. *See Woolbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2003) (recognizing that an appellant is bound by the scope and nature of the arguments made at trial).

Franklin also contends that the trial court erred by allowing testimony concerning a controlled drug buy within his home before police executed the search warrant there. We review allegations of evidentiary errors under the abuse-of-discretion standard. *Threadgill v. State*, 347 Ark. 986, 69 S.W.3d 423 (2002). The trial court has broad discretion in its

evidentiary rulings; hence, the trial court's findings will not be disturbed on appeal unless there has been a manifest abuse of discretion. *Id*.

In this case, defense counsel made a motion in limine to exclude evidence of the controlled buy, which the trial court denied. Immediately after Officer Garner testified that he conducted a controlled buy, and as he was about to specifically discuss how he did so, the following colloquy occurred:[1]

DEFENSE COUNSEL: I don't know how many times we're going to have to do this. This is exactly what I moved in my motion in limine. We can't cross examine his confidential informant. But they get an opportunity to get all this stuff in. If that's not prejudicial.

THE COURT: This witness can testify about what he personally did. He can't testify about [what] anybody said or anything like that. But he can testify to the extent of what he did, what his personal knowledge.

DEFENSE COUNSEL: Your honor, here's the problem with that, it prejudices the Defendant's case because the State gets to hide the lying, cheating confidential informant that they used. We can't cross-examine the confidential informant. We don't know what Larry Garner did with the confidential informant. We have no way for us to ever know. And that's the [prejudice] is that he's going to - -

PROSECUTOR: Technically that's not correct. You can cross examine a confidential informant and the burden is on the Defense to request ... the disclosure of the confidential informant and that has not been done in this case. There's been no request for an informant and we're not obligated unless it's requested to disclose it.

DEFENSE COUNSEL: Your Honor - -

PROSECUTOR: I mean, it's the law.

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[1] We note that Franklin failed to abstract this colloquy in his brief on appeal. Although failure to abstract those portions of the record relevant to the points on appeal may preclude this court from considering those issues, we may go the record to affirm. *See Robinson v. State*, 49 Ark. App. 58, 896 S.W.2d 442 (1995).

DEFENSE COUNSEL: Judge, if that's the way the State's going to rest, if that's the way they're going to be that's fine. But he's not charged with possessing it and charged him delivery [sic] of a controlled substance and this is irrelevant. If he were charged with possession it would be relevant. It's irrelevant and it's prejudicial. There's no way for us to defeat it or even attempt to.

PROSECUTOR: I think the Court of Appeals has held that this is relevant evidence to be offered in regard to possession with intent to deliver.

THE COURT: He can testify about this own personal knowledge. He can't testify on anything the confidential informant said, obviously that would be hearsay and he couldn't be cross examined on it. But he can testify about what he personally did and that's subject to cross examination.

DEFENSE COUNSEL: Very well.

THE COURT: Objection overruled.

Franklin first claims that the trial court erred in allowing Garner's testimony as to the controlled drug buy because it was hearsay. Hearsay is a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ark. R. Evid. 801(c). According to Ark. R. Evid. 801(a), a "statement" is an "oral or written assertion" or "[n]onverbal conduct of a person, if it is intended by him as an assertion."

During his testimony about the controlled buy at Franklin's residence, Garner said that he searched the confidential informant, that he observed the informant going "to and from the residence," and that he recovered drugs from him. Garner also said that he used photographed bills in the buy and that the serial numbers on the bills matched those recovered during the search of Franklin's residence. Garner did not testify as to anything that the informant said or wrote, nor did he testify as to any nonverbal conduct by the informant that could be intended as an assertion. We fail to see how Garner's testimony about how he

conducted the controlled buy in this case concerned a "statement" as defined in Ark. R. Evid. 801; thus, we hold that the testimony is not hearsay.

In addition, citing Ark. R. Evid. 403, Franklin asserts that "[t]he State's allegation of controlled drug buys prior to [his] arrest prejudiced [him] unfairly because the allegation was factually insufficient to sustain a charge of delivery and because [he] had no way of rebutting the allegation." However, Franklin offers no convincing authority to support these claims, and he fails to explain how the cases he cites (*i.e*, *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991), and *Haynes v. State*, 309 Ark. 583, 832 S.W.2d 479 (1992)) support his assertions. As our supreme court has stated many times, arguments that are unsupported by convincing argument or authority will not be considered on appeal, unless it is apparent without further research that the arguments are well-taken. *Webb v. Bouton*, 350 Ark. 254, 85 S.W.3d 885 (2002).

For the reasons stated above, we hold that the trial court did not abuse its discretion in allowing Garner's testimony concerning the controlled drug buys at Franklin's residence; thus, we affirm.

Affirmed.

GLOVER and CRABTREE, JJ., agree.