ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION III

CACR07-1242

MAY 14, 2008

JAMES LEE KING

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. CR 06-4910)

HONORABLE BARRY SIMS, JUDGE

AFFIRMED

A jury in Pulaski County Circuit Court convicted James Lee King of simultaneous possession of drugs and firearms, possession of a controlled substance, and possession of drug paraphernalia. The jury sentenced him to terms of seventy years, twenty years, and ten years respectively. The trial court imposed the sentences recommended by the jury and ordered that the sentences run consecutively. On appeal, appellant asserts that the trial court erred in failing to inform the jury of the law regarding the concurrent or consecutive serving of multiple sentences. Because appellant's argument is not preserved, we affirm.

Appellant does not challenge the sufficiency of the evidence; therefore, we will provide only a brief summation of the facts of this case. On July 10, 2006, Sergeant Ameling and Sergeant Lett discovered a vehicle parked along King Road in an area commonly known for break-ins. The sergeants approached the vehicle and found no one inside; however, they saw a screwdriver and

drug paraphernalia in the seat. The sergeants returned to their patrol car, called for back-up units, and continued to observe the vehicle. Approximately fifteen to twenty minutes later, after the back-up units had arrived, the sergeants watched appellant walk from a wooded area, enter the vehicle, and attempt to drive away. The sergeants and other units surrounded appellant's vehicle. At the time the sergeants made contact with appellant, he was "sweating profusely" and was wearing a brown glove. Meanwhile, the officers conducted a search of the wooded area and found footprints leading to a nearby business, which had been burglarized. The officers searched appellant's vehicle and found drug paraphernalia, drugs, common tools used to break into homes and vehicles, and a .22 revolver. A search of appellant's person revealed a rusted wrench in his waistband and a clear, plastic bag containing an off-white substance in his right sock. The officers arrested appellant. The state filed a felony information on December 13, 2006, and a trial was held on July 31, 2007.

While the jury was engaged in sentencing deliberations, the jury had a note delivered to the trial judge. The note read, "Are the sentences served concurrently?" The trial judge asked both the prosecutor and defense counsel how they wanted to handle the question posed by the jury. The following dialogue took place:

DEFENSE COUNSEL:	They need to address the instructions to [sic] Court provided.
THE COURT:	Do you want me to write that in the note or do you want me to bring the jury back into the box and tell them that?
DEFENSE COUNSEL:	I don't have a particular opinion about that.
THE COURT:	Okay, do you Ms. Ewenike?
PROSECUTOR:	No, Your Honor. I think if Defense doesn't object, writing it is fine.

THE COURT:	Okay, so what do you want me to write? I'll write exactly what you say.
DEFENSE COUNSEL:	Well, you're essentially referring the jury back to the instructions.
THE COURT:	"Refer to the jury instructions?"
DEFENSE COUNSEL:	Yeah.
THE COURT:	Is that okay?
PROSECUTOR:	Fine.
THE COURT:	"Refer to the jury instructions." I've written on this here. Beth is going to go copy it and will hand at the copy or the original back to the –
COURT REPORTER:	Copy.
THE COURT:	A copy back to the jury. Okay, thank you.

The jury returned with sentences to terms of seventy years, twenty years, and ten years respectively. The trial court imposed the sentences recommended by the jury and ordered that the sentences run consecutively. This appeal followed.

Appellant contends that the trial court erred in failing to inform the jury of the law regarding the concurrent or consecutive serving of multiple sentences. Arkansas Code Annotated section 16-89-125(e) (Repl. 2005) states:

> After the jury retires for deliberation, if there is a disagreement between them as to any part of the evidence or if they desire to be informed on a point of law, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of or after notice to the counsel of the parties.

The requirement of section 16-89-125(e) that the judge call the jury into open court to answer any question the jury might have is mandatory. *See Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986); *Houston v. State*, 41 Ark. App. 67, 848 S.W.2d 430 (1993). Noncompliance with this statutory provision gives rise to a presumption of prejudice, and the State bears the burden of overcoming that presumption. *Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001).

In the case at hand, the trial judge informed defense counsel and the prosecutor of the jury's note and asked how the parties wished for him to proceed. Defense counsel responded, requesting that the judge simply refer the jurors to the jury instructions provided to them. The prosecutor responded that she thought it was appropriate to respond to the jury's question in writing, as long as defense counsel had no objection. The trial judge confirmed that both parties agreed that the judge should respond in writing, stating "Refer to the jury instructions." Then, the note was delivered to the jury without objection.

It is well settled that we will not consider an argument raised for the first time on appeal. *Aydelotte v. State*, 85 Ark. App. 67, 146 S.W.3d 392 (2004) (citing *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000)). Here, appellant clearly failed to object to the trial court's response in writing to the jury question. In fact, appellant consented to the manner in which the trial court responded by providing the trial judge with an appropriate response to the jury's question. Hence, appellant is barred from now arguing that the trial court erred in failing to inform the jury of the law regarding the concurrent or consecutive serving of multiple sentences. *See Smith v. State*, 278 Ark. 462, 648 S.W.2d 792 (1983) (finding that counsel cannot consent that the trial judge take some action and then seek a reversal on the basis of that action where, in response to the jury's inquiry, defense

counsel agreed in response to a question by the trial judge that information about "the parole situation" could be given to the jury). Because appellant's argument is barred, we affirm.

Affirmed.

ROBBINS and VAUGHT, JJ., agree.