Not designated for publication.

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-498

	Opinion Delivered OCTOBER 29, 2008
ISSAC LAZELL HUDSON APPELLANT	APPEAL FROM THE HOT SPRING COUNTY CIRCUIT COURT, [NO. CR-2007-120-2]
V.	HONORABLE PHILLIP SHIRRON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Issac Hudson appeals his February 6, 2008 conviction by a Hot Spring County jury on one count each of commercial burglary and theft of property, for which he was sentenced as an habitual offender to a cumulative sentence of eighteen years in the Arkansas Department of Correction. On appeal, he challenges the sufficiency of the evidence, and also claims that the circuit court erred by (1) not allowing a jury instruction for breaking or entering — a lesser included offense of commercial burglary, and (2) questioning appellant and his mother during the sentencing phase of the trial. We affirm.

The State filed an information on May 7, 2007, alleging that appellant committed the offenses of commercial burglary and theft of property on or about April 30, 2007, by unlawfully entering a commercially occupiable structure of another, specifically Furniture for Less in Hot Spring County, with the purpose of stealing a television set having a value less

than $500. An amended information was filed on December 7, 2007, to add habitual criminal status because appellant had four or more prior felony convictions.

A jury trial was held on January 31, 2008. Officers Kevin Yagle and Bernie Moseley testified that at approximately 4:30 a.m. on April 30, 2007, they were conducting surveillance in an unrelated case at a restaurant. They noticed a light being turned on at the furniture store located across the street. This raised their suspicions, and the officers used their binoculars and video surveillance equipment to watch and film the scene. Next they saw appellant leave the store carrying a large television set. The officers observed appellant carry the television set to a nearby apartment complex, go into an apartment for a few minutes, come back out of the apartment, and proceed to walk back toward the furniture store.

Because Officers Yagle and Moseley had arrived at their surveillance post on foot, they contacted Officer Scott Parish and asked him to investigate. Upon arriving at the furniture store, he noticed that the front door was slightly ajar from an extension cord running from the interior to the exterior of the store. Officer Parish drove down the street, parked his car, and arrested appellant upon his return approach to the furniture store. Subsequently, at the station, Officers Yagle and Moseley identified appellant as the individual they saw taking the television set from the furniture store.

Monte Ledbetter, the owner of the store, testified for the State. He explained that, upon arriving at the store, he immediately noticed that the front door was unlocked and that the screen to a small window near the door had been bent and knocked onto the floor. Mr. Ledbetter testified that when he left his business the day before, the door had been locked, the window and screen were intact, and the lights had been turned off. He also noted that the

only item missing from the store was a television set, and he identified the one returned to him by the police as the one that had been stolen.

At the close of the State's case in chief, appellant moved for a directed verdict on all charges based upon insufficient evidence that he purposefully entered the building. The circuit court denied the motion, and appellant rested without testifying on his own behalf. Appellant's counsel renewed the motion for directed verdict, and it was also denied by the circuit court. The jury returned a guilty verdict, and appellant was sentenced as previously set forth. A judgment and commitment order was entered on February 6, 2008, and appellant filed a timely notice of appeal on February 15, 2008. This appeal followed.

(A) Sufficiency of the evidence

Standard of review

In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Dunn v. Stat*e, 371 Ark. 140, __ S.W.3d __ (2007). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* In determining whether the evidence was substantial we consider only the evidence that supports the conviction without weighing it against other evidence favorable to the accused. *Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997). Circumstantial evidence alone may constitute substantial evidence when every other reasonable hypothesis consistent with innocence is excluded. *Id.* Once the evidence is determined to be sufficient to go to the jury, the question of whether the circumstantial evidence excludes any other hypothesis consistent with innocence is for the jury to decide.

Id. This court does not pass upon the credibility of witnesses who testify at trial, nor does it resolve conflicts in the testimony, as those are matters solely for the jury's determination. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

Discussion

Arkansas Code Annotated section 5-39-201 provides that a person commits commercial burglary if he or she enters or remains unlawfully in a commercially occupiable structure of another person with the purpose of committing in the commercially occupiable structure any offense punishable by imprisonment. Additionally, Arkansas Code Annotated section 5-36-103 states that a person commits theft of property if he knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner of the property.

Appellant argues that the only substantial evidence presented was the testimony of Officers Yagle and Moseley regarding their observations while on surveillance on another case. He points out that they were looking through a video camera and binoculars, at night, through a window that reflected light, and that they indicated that the suspect was a black male. Appellant asserts that the videotape itself, with comments from the officers on it, is actually the best evidence of the event, and it is out of focus making it difficult to identify anyone. Additionally, he notes that there is a gap on the tape that is approximately ten minutes long. Appellant contends that there was no physical evidence that he broke into the building or stole the television. Based upon the insufficiency of the evidence, appellant argues that the motion for directed verdict should have been granted.

We disagree. Officers Yagle and Moseley personally observed appellant walking out of the furniture store carrying a large television set. They also observed him carry it to a nearby apartment complex, go into a room for a couple of minutes, come out without the television set, and begin walking back toward the furniture store. The jury was allowed to view the videotape that Officer Moseley made of the incident with his surveillance equipment, and it corroborated the testimony of the officers. Additionally, back at the police station, both officers identified appellant as the individual they saw taking the television set. Officer Parish, who responded to a call from Officers Yagle and Moseley, explained that upon his investigation of the area, appellant was the only person he saw on the street at the time.

Finally, the furniture-store owner, Mr. Ledbetter, testified that upon his arrival at the store he immediately noticed that the front door was unlocked. Additionally, he noted that the screen to a small window near the door had been bent and knocked onto the floor. Mr. Ledbetter testified that when he left his business the day before, the door was locked, the window and screen were intact, and the lights had been turned off. He also noted that after surveying the store, the only item missing was a television set, and he identified the one returned to him by the police as the one that had been stolen.

The jury determines not only the credibility of the testimony presented by Officers Yagle and Moseley, as well as the other two witnesses, but also the weight and value to be afforded their testimony. *See Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). Arkansas appellate courts have made it patently clear that the jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005). The trier of fact is free to believe all or part of

any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004). Indeed, after a jury has given credence to a witness's testimony, this court does not disregard it unless it was "so inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon." *Id.* One eyewitness's testimony, moreover, is sufficient to sustain a conviction, and his testimony is not "clearly unbelievable" simply because it is uncorroborated or because it has been impeached. *Id.* Substantial evidence exists to support appellant's convictions; accordingly, we affirm.

(B) Denial of jury instruction on lesser-included breaking or entering

Standard of review

With regard to our standard of review, we have stated that a party is entitled to a jury instruction when it is a correct statement of the law and when there is some basis in the evidence to support giving the instruction. *Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006). We will not reverse a circuit court's decision to give an instruction unless the court abused its discretion. *Id.*

If there is no rational basis for giving an instruction, a circuit court's decision to refuse an instruction on a lesser-included offense will be affirmed. *See Ellis v. State*, 345 Ark. 415, 47 S.W.3d 259 (2001). Once an offense is determined to be a lesser-included offense, the circuit court is not obligated to instruct the jury on that offense, unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser-included offense. *See* Ark. Code Ann. § 5-1-110(c).

Discussion

At the conclusion of the presentation of evidence, appellant's counsel offered an instruction of the lesser-included offense for breaking or entering, and the State simply responded that, "there can't be breaking and entering, can only be a burglary." The circuit court stated that, "the court has heard the evidence, the evidence is unequivocal that the structure entered was an ongoing business even to this day, which makes it an occupiable structure, a business structure and the television set was, in fact, removed from there and reasonable minds could not possiblly differ. Therefore, the court rejects the offered lesser included." Appellant then proffered the instruction into the record.

The original charges against appellant were commercial burglary, a Class C felony, and theft of property, a Class A misdemeanor. Arkansas Code Annotated section 5-39-201(b)(1) sets out that "a person commits commercial burglary if he or she enters or remains unlawfully in a commercial occupiable structure of another person with the purpose of committing in the commercial occupiable structure any offense punishable by imprisonment." Additionally, Arkansas Code Annotated section 5-39-202(a)(1) states that a person commits the offense of breaking or entering "if for the purpose of committing a theft or felony he or she breaks or enters into any (1) [b]uilding, structure, or vehicle." Appellant cites Arkansas Code Annotated section 5-1-110 regarding conduct that constitutes more than one offense, specifically:

> (b) A defendant may be convicted of one (1) offense included in another offense with which he or she is charged. An offense is included in an offense charged if the offense:
>
> (1) Is established by proof of the same or less than all of the elements required to establish the commission of the offense charged;

(2) Consists of an attempt to commit the offense charged or to commit an offense otherwise included within the offense charged; or

(3) Differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish the offense's commission.

(c) The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him or her of the included offense.

Appellant correctly points out that breaking or entering is a lesser-included offense for burglary. *See Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993); *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978). He cites *Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004), for the proposition that a circuit court's decision to exclude an instruction on a lesser-included offense will be affirmed only if there is no rational basis for giving the instruction. He argues that in the instant case there was absolutely no rational basis for the circuit court's *refusal* to give the instruction on breaking or entering, and it was error to refuse to do so.

The State counters that, while appellant argues that he was entitled to an instruction on the lesser-included offense of breaking or entering, he offers no rational basis for the circuit court to have done so, which appears to be the focus of the cited case. Simply because it is a lesser-included offense of burglary does not create a rational basis for giving the instruction. In *Robinson v. State*, 7 Ark. App. 209, 646 S.W.2d 714 (1983), this court held that the trial court properly refused to give just such an instruction because there was no question that the building broken into was a commericial structure. The same analysis applies to the instant case. It is undisputed that the furniture store was a commercially occupiable structure, and on those facts, the jury had no rational basis to acquit the defendant of commercial burglary while convicting him of breaking or entering. *See* Ark. Code Ann. § 5-1-110(c). The

Arkansas General Assembly's sound policy distinction between these two crimes is based upon the additional danger posed to individuals from theft in a commercial setting where people are likely to be present. *See* Original Commentary to Ark. Code Ann. § 5-39-201 (Repl. 1995). We affirm on this issue.

(C) Circuit court's questioning witnesses during sentencing phase

The State maintains that this issue was not properly preserved for our review because appellant failed to object to the circuit judge's questioning at trial. We agree. The contemporaneous-objection rule requires parties to object to a matter and bring it to the circuit judge's attention in some manner in order to later argue that matter as a basis for reversal on appeal. *See Kelley v. State*, __ Ark. App. __, __ S.W.3d __ (Sept. 3, 2008). Arguments may not be raised on appeal, even constitutional ones, that were not first brought to the attention of the trial court. *See Buford v. State*, 368 Ark. 87, 243 S.W.3d 300 (2006). Based upon our review of the record, the State is correct in its contention that appellant failed to object to the questions put forth by the circuit judge, either to his mother, Ms. Johnson, or to appellant, himself. Accordingly, we do not reach the merits on this particular issue.

Affirmed.

HEFFLEY, J., agrees.

HART, J., concurs.