

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION IV

CACR06-1246

GREGORY HARRIS

May 16, 2007

APPELLANT

V.

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR2005-2016]

STATE OF ARKANSAS

HON. CHRISTOPHER CHARLES
PIAZZA
CIRCUIT JUDGE

APPELLEE

AFFIRMED

A jury found Gregory Harris guilty of residential burglary, and he was sentenced as an habitual offender to forty years in the Arkansas Department of Correction. On appeal, Harris argues that there was insufficient evidence to support his conviction and that the trial court erred in failing to grant his motion for a continuance. We affirm.

At trial, Charlotte Wherry testified that on March 1, 2004, she arrived home at approximately 4:30 p.m. and discovered that her house had been burglarized sometime after she had left that morning for work. Wherry, who lives alone, found her front screen door open and the window to her living room broken. Her TV, DVD player, and several DVDs were missing, and her bedroom had been ransacked. While surveying the condition of her bedroom, she noticed a *Pirates of the Carribean* DVD on her desk. She recalled that the DVD

was in the living room when she left for work that morning, and she informed the police of that fact while the officer was present and dusting for fingerprints. Wherry further testified that she had borrowed the DVD from her son Chris Wherry. She also stated that she was not acquainted with Harris, had never loaned him the DVD, and had never given him permission to enter her home.

Chris Wherry testified that he responded to a request from his mother and had gone to her house immediately following her discovery of the burglary. He recognized the *Pirates of the Caribbean* DVD as one he had bought at a Best Buy in Fort Worth, Texas. When he purchased the DVD, it was wrapped in plastic, which he removed to view the movie at his residence. He asserted that only he and his wife had handled the DVD before he loaned it to his mother. Chris denied knowing Harris and insisted that Harris had neither been a guest in his home nor had any other reason for handling the DVD.

Officer Tracey Richie of the Little Rock Police Department testified that she was directed to the DVD by Wherry and was able to lift a fingerprint print from the DVD case. Little Rock Police Department fingerprint expert Mickey Holloway testified that there was “no doubt” that the fingerprint that Officer Richie lifted matched Harris’s left-thumb print.

After the conclusion of the State’s case, the trial court denied Harris’s directed-verdict motion in which he argued that the State presented insufficient evidence that he entered the Wherry home or exercised unauthorized control over her property. Harris then called Ponderosa Pawn Shop employee Anthony Sean Holmes. Homes testified that Harris was a regular customer and that store records showed that on January 28, 2004, Harris pawned a

Pirates of the Caribbean DVD, which he did not redeem. That DVD was sold on May 10, 2004.

For his first point on appeal, Harris argues that there was insufficient evidence to sustain his conviction. He asserts that the “only evidence” in this case that placed him in the Wherry home was a thumb print on a DVD case. Citing *Holloway v. State*, 11 Ark. App. 69, 666 S.W.2d 410 (1984), he contends that the existence of a fingerprint alone at the scene is not sufficient to sustain a conviction for burglary. Further, he argues that, even assuming he was in the home, there is no evidence of when he was actually there or that he was involved or intended to be involved in the theft of Wherry’s property. We disagree.

Although circumstantial, the evidence may constitute substantial evidence to support a conviction. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). For us to hold that circumstantial evidence is substantial, the evidence must exclude every other reasonable hypothesis that is inconsistent with the guilt of the accused. *Id.* Overwhelming evidence of guilt is not required in cases based on circumstantial evidence; the test is one of substantiality. *Id.* We hold that, although circumstantial, there was sufficient evidence to support appellant's conviction of residential burglary in this case.

First, contrary to Harris’s characterization of the holding in *Holloway*, we have held that the State puts before the jury substantial evidence when it proves that the defendant's fingerprints were found at the scene of the crime. *Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357(2002). While we are mindful that this court did reverse a conviction based on fingerprint evidence in *Holloway v. State*, *supra*, *Holloway* is easily distinguishable. In *Holloway*,

fingerprints were found on a piece of glass located *outside* the house where a burglary had occurred; in the instant case, the fingerprint was found on a DVD *inside* the Wherry residence. Further, the evidence established that the DVD was moved from one room to another by someone other than a member of the household during a relatively short span of time that encompassed when the burglary took place.

Regarding the balance of Harris's argument, his contention that there was no evidence of when he was in the home is unavailing. Wherry and her son Chris reported no other incident of unlawful entry into their homes and specifically disavowed granting Harris authorized access to the DVD upon which his fingerprint was found. Finally, given the relatively short period of time of Wherry's absence from her residence, no other incidents of unauthorized entry into her home, the movement of the DVD by someone other than a household member, and the finding of Harris's fingerprint on the DVD case, we can conceive of no hypothesis consistent with Harris's innocence that would render the fingerprint evidence insubstantial.

For his second point, Harris argues that he was denied due process by the trial court's refusal to grant his motion for a continuance on the day of the trial. Harris's trial counsel had requested a continuance when, three days before trial, she learned that the fingerprint was lifted not from what she "assumed" was a DVD disc, but rather from a DVD case found at the crime scene. She had arranged to have Pawnderosa Pawn Shop employee Anthony Sean Holmes testify concerning Harris's documented handling of a *Pirates of the Caribbean* DVD.

Harris now contends that his trial counsel's misconception was based on a failure of the State to disclose material evidence. We disagree.

The appellate courts of this state review the grant or denial of a motion for continuance under an abuse-of-discretion standard. *See, e.g., Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). An appellant must not only demonstrate that the trial court abused its discretion by denying the motion for a continuance but also must show prejudice that amounts to a denial of justice. *See Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002). We hold that the trial court did not abuse its discretion in denying Harris's motion for a continuance.

We note first that Harris never disputed that his fingerprint was the fingerprint in question or that he had access to the fingerprint card. Accordingly, we find no merit to his contention that the State failed in its discovery obligations. Second, although Harris argued to the trial court that there was a difference between finding a latent print on a DVD disc and on a DVD case, we are unable to see a meaningful distinction. Harris failed to explain the significance of this alleged distinction to the trial court or to this court on appeal, and it is not apparent to us that such a distinction is meaningful in this case. Whether it was on the disc or the case, the print was nevertheless found inside the Wherry residence. Furthermore, the item upon which the fingerprint was discovered had been moved from the living room to the bedroom during the time frame in which the house was burglarized. Finally, the State proved that the print was found on an item to which Harris had not been granted lawful access. Accordingly, we hold that Harris failed to prove that he was prejudiced by the denial of his continuance motion.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.