

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR09-683

NATHANIEL MOSEBY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered JANUARY 6, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CR 2008-2628]

HONORABLE HERBERT THOMAS
WRIGHT, JR., JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Nathaniel Moseby appeals his conviction from the Pulaski County Circuit Court on a charge of maintaining a drug premises under Arkansas Code Annotated section 5-64-402 (Supp. 2007), for which he was sentenced to ten years' imprisonment in the Arkansas Department of Correction, with seven of those years suspended. On appeal, he challenges the sufficiency of the evidence to support the conviction. We affirm.

On May 2, 2008, Officer Seth Corben of the Jacksonville Police Department observed a confidential informant enter and leave a specific address—106 Wilson—going in with twenty dollars in “buy funds” and coming out with “some substance” and no money. Evidence was presented that the substance was an off-white, rock-like substance that field tested positive as cocaine. Essentially the same event took place again on May 6, 2008, when the same confidential informant encountered appellant at the same address and asked for

twenty-dollars' worth of crack, and appellant went to the bathroom and broke off what field tested positive as cocaine. That substance was returned inside a plastic wrapper by the confidential informant to Officer Corben.

Officer Corben participated in serving a search warrant on May 10, 2008, at which time he discovered appellant, appellant's wife, and an eight-year-old child in the residence located at 106 Wilson. Appellant was taken into custody at that time, after officers found four or five baggies with a white residue in them scattered around the house in areas such as the hall closet and main bedroom. No measurable amount of drugs was found as a result of the search.

After being read his rights, appellant told Officer Corben that his address was 106 Wilson and that he sold crack cocaine to help pay bills for the house. It is undisputed that officers did not establish whose name was on the lease of the residence or whether any other individuals were also living at the two-bedroom residence.

An information was filed on July 2, 2008, charging appellant with four crimes—two felony counts of delivery of a controlled substance, cocaine, for the controlled buys on May 2 and May 6, 2008, pursuant to Arkansas Code Annotated section 5-64-401 (Supp. 2007), one felony count of maintaining a drug premises, pursuant to Arkansas Code Annotated

section 5-64-402 (Supp. 2007), and one misdemeanor count of possession of drug paraphernalia, pursuant to Arkansas Code Annotated section 5-64-403 (Supp. 2007).¹

A bench trial was held on February 25, 2009, during which Officer Corben testified for the State. He testified to the previously stated facts and explained that appellant specifically said, “You’re not going to find any crack here. There’s – – And I sell crack to pay bills.” After his testimony, the State rested and requested the circuit court to *nol-pros* Count IV for possession of drug paraphernalia. The circuit court granted that request.

At that point, appellant’s counsel moved to dismiss, stating that she didn’t “believe the State’s met its prima facie burden of this case.” Specifically, she argued that:

There was no direct evidence of any baggies or anything located in the house that had any drugs on them whatsoever. In addition to that, the officer did testify that there were other people that were, had access to the house.

There is no direct evidence as to a [confidential informant] that was provided to say that this was actually the person that sold the drugs. The detective himself said that he did observe the [confidential informant] go into the house and leave the house, but didn’t observe anything of which person in the house, whether it was a brother, or the wife or anyone else who actually sold the drugs.

In addition to that, we also make a motion that at best this would be reduced to a [Class] D felony. There is no direct evidence that this was in 1000 feet of a recreation center.

The State responded that there was evidence that two controlled buys were made from the house and that the search and seizure warrants stated that the buys were made from appellant.

¹Both counts of delivery of a controlled substance, cocaine, as well as the count of possession of drug paraphernalia were *nol-prossed*, without explanation.

Additionally, when the officers accessed the house, they recovered the baggies with the white-powder substance. Finally, after being Mirandized, appellant stated that officers would not find drugs there and that he sold drugs to make money to pay bills. The circuit court agreed with the State and granted appellant's motion only with respect to the class level of the felony.

The defense rested without putting on any evidence, and the circuit judge stated that he showed the motions renewed. The motion was again denied. Appellant was found guilty of maintaining a drug premises and sentenced as previously set forth. A judgment and commitment order was entered on March 4, 2009, and appellant filed a timely notice of appeal on March 26, 2009. This appeal followed.

A motion to dismiss at a bench trial and a motion for a directed verdict at a jury trial are challenges to the sufficiency of the evidence. *Russell v. State*, 367 Ark. 557, 242 S.W.3d 265 (2006). In order to preserve for appeal the issue of the sufficiency of the evidence, a defendant must first raise the issue to the circuit court in the manner provided in Ark. R. Crim. P. 33.1 (2009). Rule 33.1(b) provides that, in a nonjury trial, a defendant must challenge sufficiency by a specific motion to dismiss at the close of all of the evidence. If the defendant moves for dismissal at the close of the State's proof and the trial court denies the motion, then the motion must be renewed at the close of all of the evidence. *Id.* Because appellant did not put on a defense, his initial motion would have sufficed, but it appears a

renewal was made, even if at the prompting of the circuit court. Accordingly, we reach the merits of appellant's argument with respect to the sufficiency of the evidence.

When a defendant challenges the sufficiency of the evidence that led to a conviction, the evidence is viewed in the light most favorable to the State. *White v. State*, 98 Ark. App. 366, 255 S.W.3d 881 (2007). Only evidence supporting the verdict will be considered. *Id.* The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Graham v. State*, 365 Ark. 274, 229 S.W.3d 30 (2006). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* Credibility determinations are made by the trier of fact, which is free to believe the prosecution's version of events rather than the defendant's. *See Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001).

Arkansas Code Annotated section 5-64-402(a)(2) (Supp. 2007) provides that it is unlawful for any person to knowingly keep or maintain any store, shop, warehouse, dwelling, building or other structure or place or premise that is resorted to by a person for the purpose of using or obtaining a controlled substance in violation of [Arkansas Code Annotated Chapter 62] or that is used for keeping a controlled substance in violation of [Arkansas Code Annotated Chapter 62]. "Knowingly" is described as a person's conduct or the attendant circumstances when he or she is aware that his or her conduct is of that nature or that the attendant circumstances exist, or a result of the person's conduct when he or she is aware that

it is practically certain that his or her conduct will cause the result. *See* Ark. Code Ann. § 5-2-202(2) (Supp. 2007).

Appellant argues that the State's case appears to "rest squarely" on the unsworn account of an unknown witness, the confidential informant, whose words subsequently were used by Officer Corben to secure a search warrant for the 106 Wilson address. Appellant maintains that all that was proven at trial was that "some substance" was received by a confidential informant at 106 Wilson and that appellant admitted to selling cocaine. He urges that no direct or circumstantial evidence supports the finding that he distributed crack cocaine, or other illegal substance, *from the house*, allowed others to use illegal substances *at the house*, or that he stored illegal substances *at the house*.

In *Franklin v. State*, 60 Ark. App. 198, 962 S.W.2d 370 (1998), this court found insufficient evidence of maintaining a drug premises where there was no testimony that the defendant knew that drugs were being kept in the house, used there, or sold there. In *Franklin*, drugs were discovered on the premises that was shared by two adults. Here, appellant claims that the residence was shared by "untold numbers" of adults and no drugs were found during the search.

He also notes that his admission to selling drugs in no way suggested where or how he sold crack cocaine, and he argues that to jump to the conclusion that he did so from the 106 Wilson address where he lived is pure speculation based on the limited evidence presented by the State at trial. Appellant submits that, when viewed in the light most

favorable to the State, the circumstantial evidence presented by the State does not amount to substantial evidence that he maintained a drug premises.

We disagree. Appellant moved to dismiss the charges against him based on the grounds that there were no drugs found on the premises, other people had access to the house, there was no direct evidence of what the confidential informant saw, and that appellant's wife or brother could have sold the drugs. The circuit court specifically found that the offense of maintaining a drug premises "does [not] require ownership" but "[to] knowingly keep or maintain." The circuit court determined that the evidence presented showed that "[appellant] was identified as making two sales from the residence" and that "when he was arrested, [appellant] gave the residence as his address and indicated that he sold crack cocaine."

The State correctly notes that while the confidential informant's information was in the search-warrant affidavit, it was admitted into evidence without objection. Hearsay evidence admitted without objection may constitute substantial evidence to support a conviction. See *Darrough v. State*, 330 Ark. 808, 957 S.W.2d 707 (1997) (noting that there was no hearsay objection at trial after the defendant asserted on appeal that the appellate court should not consider an officer's testimony about an informant's description because it was hearsay); *Clemmons v. State*, 303 Ark. 265, 795 S.W.2d 927 (1990) (considering a burglary victim's testimony, admitted without objection, about what the insurance company paid him to support the value of stolen items); see also *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315

(1996) (considering facts in arrest-warrant affidavits, admitted without objection in a juvenile-transfer hearing, even though they may have constituted inadmissible hearsay).

Contrary to appellant's conclusions about the evidence presented, when viewed in the light most favorable to the State, the evidence indicates that appellant lived at the house at 106 Wilson and knew that drugs were being sold there. See *Holt v. State*, 2009 Ark. 482 (finding substantial evidence to show that the defendant lived on the premises and was involved in methamphetamine manufacturing). To the extent that appellant asserts that someone else—his wife or brother—may have had access to the house, the evidence shows that he not only admitted to selling cocaine, but also that the confidential informant bought cocaine from him on two occasions at the residence. Appellant informed Officer Corben on May 10, 2008, that he would not find any drugs there, which was supported by the allegations that appellant had been selling off-white substances in plastic baggies that field-tested positive for cocaine from the house in the days leading up to the search of the residence, as well as the fact that baggies with off-white residue were found in the master bedroom and hall closet during the search of the residence.

We hold that substantial evidence supports the conviction. At the very least, there was sufficient evidence to show that appellant knew drugs were being sold from the residence and he allowed it to occur. Accordingly, we affirm.

Affirmed.

PITTMAN and HART, JJ., agree.