

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 11-68

ULISES ARROYO, JR.

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered SEPTEMBER 14,
2011

APPEAL FROM THE LONOKE
COUNTY CIRCUIT COURT
[NO. CR-10-276-2]

HONORABLE PHILLIP T.
WHITEAKER, JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Ulises Arroyo was convicted by a jury of possession of methamphetamine, possession of drug paraphernalia, maintaining a drug premises, and simultaneous possession of drugs and firearms. Mr. Arroyo was sentenced to consecutive prison terms totaling twenty-nine years. On appeal, Mr. Arroyo challenges only his convictions for possession of methamphetamine and simultaneous possession of drugs and firearms. He argues that there was insufficient evidence to support either of those convictions. We affirm.

The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the verdict. *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000). 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.* In reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the State



and consider only the evidence that supports the verdict. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). In considering the evidence, we will not weigh the evidence or assess credibility, as those are questions for the finder of fact. *Woods v. State*, 363 Ark. 272, 213 S.W.3d 627 (2005).

The State elicited testimony that the Cabot Police Department received numerous reports of suspected drug activity at Mr. Arroyo's home, and they began surveillance of the property. As a result of that surveillance, appellant's trash was pulled on June 24, 2010, and again several days later. Upon searching Mr. Arroyo's trash, the police found a tupperware container containing 0.0328 grams of methamphetamine. The police also found gun oil and packaging for a pipe commonly used to smoke methamphetamine. The police observed several surveillance cameras mounted around Mr. Arroyo's home. Based on this evidence, the police obtained a warrant to search appellant's house.

The search was conducted on July 2, 2010. Officer Tommy Thompson was the first to enter the home, and he detained Mr. Arroyo as Mr. Arroyo came out of the bathroom. At first Mr. Arroyo was cooperative, but he soon became convulsive and had to be taken to the hospital. Dr. George Gray, appellant's treating physician, testified that Mr. Arroyo's symptoms upon arrival were consistent with his having ingested a large amount of drugs. A toxicology screen was positive for methamphetamine in an amount higher than the lab was capable of measuring.

During the search of Mr. Arroyo's home, the police found an empty piece of cellophane in the bathroom sink that subsequently tested positive for methamphetamine



residue. The police also found a glass pipe in the toilet. The police searched the master bedroom, which was five or six feet down the hall from the bathroom. The police found an unloaded semiautomatic handgun on the night stand, as well as a loaded clip near the bed. Also in the bedroom was a video monitor, a safe containing \$4759 in cash, bulletproof vests, ammunition, and a speed-loader for a revolver.

Mr. Arroyo's first argument on appeal is that there was insufficient evidence to support his conviction for possession of methamphetamine. Mr. Arroyo notes that there were no quantifiable drugs found in his residence, and he submits that there was insufficient proof to link him to the 0.0328 grams of methamphetamine found in the trash outside of his home. Mr. Arroyo argues that there was insufficient proof that it was his trash and that there was no evidence of when it had been put there or whether it had been tampered with. Mr. Arroyo further argues that evidence of methamphetamine in his bloodstream on the day of his arrest does not equate to knowingly possessing the drug.

We hold that appellant's sufficiency arguments pertaining to his conviction for possession of methamphetamine are not preserved for review. Rule 33.1(a) of the Arkansas Rules of Criminal Procedure provides that, in a jury trial, a motion for directed verdict shall be made at the close of the State's case and at the close of the evidence, and shall state the specific grounds therefor. The failure of a defendant to make a specific directed-verdict motion constitutes a waiver of any question pertaining to the sufficiency of the evidence. *See* Ark. R. Crim. P. 33.1(c). Rule 33.1 is to be strictly construed, and the reason underlying the requirement for specific grounds is to give the State the opportunity to reopen its case to



supply the missing proof, if justice so requires. *Davis v. State*, 365 Ark. 634, 232 S.W.3d 476 (2006).

When Mr. Arroyo made his directed-verdict motion before the trial court, he argued only that there was an insufficient quantity of methamphetamine to support the charge. That argument has been abandoned on appeal, and at any rate the 0.0328 grams of methamphetamine recovered from the trash-pull constituted a useable amount to sustain the charge. *See Sinks v. State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993). Mr. Arroyo did not argue below that there was insufficient evidence to link him to the contents of the trash outside his house, nor did he argue that evidence of methamphetamine in his system was insufficient. Arguments not raised at trial will not be addressed for the first time on appeal, and parties are bound on appeal by the scope and nature of the arguments presented at trial. *Abshure v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002). Because Mr. Arroyo's arguments challenging the sufficiency of the evidence supporting his possession-of-methamphetamine conviction were not specifically raised to the trial court, they need not be addressed on appeal.

Mr. Arroyo's remaining argument is that there was insufficient evidence to support his conviction of simultaneous possession of drugs and firearms.¹ Arkansas Code Annotated section 5-74-106(a)(1) (Supp. 2009) provides that no person shall commit a felony violation of § 5-64-401 while in possession of a firearm. Arkansas Code Annotated section 5-64-401

¹Although appellant's second point heading alleges evidentiary error in admitting testimony about methamphetamine in appellant's bloodstream, his supporting argument and standard of review make it clear that he is actually challenging the sufficiency of the evidence. Moreover, Mr. Arroyo did not object at trial to evidence of the positive methamphetamine toxicology screen.



(Supp. 2009) makes it unlawful to possess methamphetamine. Arkansas Code Annotated section 5-74-106(d) provides that “[i]t is a defense to this section that the defendant was in his or her home and the firearm or other implement or weapon was not readily accessible for use.”

In challenging his conviction for simultaneous possession of drugs and firearms, Mr. Arroyo contends that the handgun found in the master bedroom was not readily accessible for use. He further contends that although the State provided evidence of methamphetamine in his bloodstream, they could not prove when the drugs were ingested. Therefore, Mr. Arroyo maintains that the State failed to prove that his possession of the gun and drugs was simultaneous.

We conclude that Mr. Arroyo’s directed-verdict motion was of sufficient specificity to preserve his challenge to the sufficiency of the evidence regarding his conviction for simultaneous possession of drugs and firearms. We further hold that there is substantial circumstantial evidence to support that conviction. The supreme court has held that circumstantial evidence may provide the basis to support a conviction, but it must be consistent with the defendant’s guilt and inconsistent with any other reasonable conclusion. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004).

Contrary to Mr. Arroyo’s argument, there was evidence that the handgun found on the night stand in his master bedroom was readily accessible for purposes of the relevant statute. In *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000), the gun found in the appellant’s home was unloaded, but the supreme court rejected the appellant’s argument that



the gun was not accessible, noting that the gun was in an open case with ammunition close at hand. Similarly, in the present case the gun was in plain sight on a night stand with an ammunition clip nearby. Mr. Arroyo was found in the bathroom, which was just steps away from the bedroom, and the gun could have easily been loaded. While Mr. Arroyo posits that the gun was inaccessible to him after his arrest by the police, this fails to account for its accessibility immediately prior to the search. Examining the evidence in the light most favorable to the State, there was substantial evidence that the gun was accessible for use, and Mr. Arroyo cannot avail himself of the defense in § 5-74-106(d).

Moreover, we hold that there was substantial circumstantial evidence that, along with the gun, Mr. Arroyo simultaneously possessed methamphetamine in close temporal proximity to the search of his house. Upon gaining entrance to his home, the police found Mr. Arroyo exiting the bathroom, and he soon began convulsing and exhibiting signs of drug ingestion, later confirmed by a toxicology screen. In the bathroom sink was a piece of cellophane with methamphetamine residue, and it was evident that Mr. Arroyo unsuccessfully tried to flush a pipe down the toilet. From this evidence, the only reasonable conclusion to be inferred by the jury was that Mr. Arroyo had been in possession of methamphetamine simultaneous with his possession of the gun.

Affirmed.

GRUBER and ABRAMSON, JJ., agree.

Edward G. Adcock, for appellant.

Dustin McDaniel, Att’y Gen., by: *Valerie Glover Fortner*, Ass’t Att’y Gen., for appellee.