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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-494

JOE EDWARD BUTLER APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** November 16, 2011 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SECOND DIVISION [NO. CR10-2297, CR10-2468] HONORABLE CHRISTOPHER CHARLES PIAZZA, JUDGE AFFIRMED

RAYMOND R. ABRAMSON, Judge

This appeal involves two separate criminal cases from Pulaski County Circuit Court. In CR10-2297, Joe Edward Butler was charged with aggravated robbery and misdemeanor theft. These charges arose out of an incident in which Butler offered to sell a handgun to the victim, but when the transfer was taking place, Butler grabbed the money and the gun from the victim instead. Then, while holding the gun, Butler asked the victim if he had anything else in his pocket. In CR10-2468, Butler was charged with being a felon in possession of a firearm, filing a false police report, and misdemeanor fleeing. These charges arose from an incident in which Butler fled on foot from a police officer after an attempted traffic stop, dropped a handgun during the foot chase, and reported his car stolen after police impounded it. Butler was convicted of all charges and was sentenced to sixty months in the Arkansas Department of Correction.

On appeal, Butler argues that there was insufficient evidence to support his convictions for aggravated robbery, felon in possession of a firearm, filing a false police report, and fleeing.

When the sufficiency of the evidence is challenged, the test is whether substantial evidence supports the verdict. *Mosley v. State*, 87 Ark. App. 127, 130, 189 S.W.3d 456, 458 (2004). Substantial evidence is evidence of sufficient force and character to compel a conclusion beyond suspicion or conjecture. *Hutcheson v. State*, 92 Ark. App. 307, 313, 213 S.W.3d 25, 29 (2005). We review only evidence that supports the conviction and do not weigh it against other evidence that is favorable to the accused. *Turbyfill v. State*, 92 Ark. App. 145, 149, 211 S.W.3d 557, 559 (2005). The fact-finder is free to believe all or part of a witness's testimony. *Harmon v. State*, 340 Ark. 18, 24, 8 S.W.3d 472, 476 (2000). Inconsistent testimony does not render proof insufficient as a matter of law, and one eyewitness's testimony is sufficient to sustain a conviction. *Id.* at 24–25, 8 S.W.3d at 476. Further, we do not weigh credibility of witnesses on appeal; such matters are left for the fact-finder. *Turbyfill*, 92 Ark. App. at 149, 211 S.W.3d at 559.

I. *Aggravated Robbery*

Butler first argues that there was insufficient evidence to support his conviction for aggravated robbery. More specifically, he argues that there was insufficient evidence that he was armed with a deadly weapon at the time of the alleged robbery or that he used force or a threat of force during the taking of the money. He also argues that there was insufficient evidence identifying him as the perpetrator.

"A person commits robbery if, with the purpose of committing a felony or

misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person." Ark. Code Ann. § 5-12-102(a) (Repl. 2006). Aggravated robbery occurs if, while committing a robbery, the person "[i]s armed with a deadly weapon," "[r]epresents by word or conduct that he or she is armed with a deadly weapon," or "[i]nflicts or attempts to inflict death or serious physical injury upon another person." Ark. Code Ann. § 5-12-103(a)(1)-(3) (Repl. 2006).

Butler argues that the evidence shows that, at the time he allegedly took the money from the victim, he had handed the gun to the victim and the victim was in possession of the firearm. Thus, according to Butler, he was not armed with a deadly weapon at the time of the alleged robbery. The victim, however, testified that, after Butler grabbed the money and the gun and began to walk away, Butler turned back and asked him what else he had in his pocket. At that time, he had the gun in his hand and, although it was pointed at the ground, he was holding it where the victim could see it.

Our case law makes it clear that a person does not have to point a gun at a person in order to have committed aggravated robbery. *Robinson v. State*, 317 Ark. 17, 25–26, 875 S.W.2d 837, 842 (1994) ("There is no requirement in the robbery statute that the threat of physical harm to an individual be made directly or individually, only that physical force be immediately threatened, however that threat may be communicated.")

Here, there was sufficient evidence to find that Butler's brandishing of a weapon was a communicated threat and that it was done while Butler was essentially asking if the victim

had anything of value. The fact that Butler did not actually take anything else from the victim while in possession of the firearm is not fatal to his conviction. A conviction of aggravated robbery does not require that a theft actually occur; it requires only that the perpetrator act with the purpose of committing theft or resisting apprehension after committing theft. *Moore v. State*, 372 Ark. 579, 583–84, 279 S.W.3d 69, 73 (2008). The focus of aggravated robbery is on the physical force used or threatened, and if the defendant has the intent to commit a theft, no actual transfer of property needs to take place for the offense to be complete. *Id.*

Butler also argues that there was insufficient evidence to identify him as the perpetrator of the crime because he denied being present at the time of the robbery, the victim originally identified the robber as "Joe Marbley," and the State failed to present any of the other five witnesses allegedly present at the time of the robbery. We find this argument to be meritless.

"The testimony of one eyewitness alone is sufficient to sustain a conviction." *Lenoir v. State*, 77 Ark. App. 250, 257, 72 S.W.3d 899, 903 (2002). And in the absence of a constitutional challenge to the identification procedures, the reliability of a witness's identification is a question for the fact-finder. *Ewell v. State*, 375 Ark. 137, 138, 289 S.W.3d 101, 103 (2008). "[U]nequivocal testimony identifying the appellant as the culprit is sufficient to sustain a conviction." *Stipes v. State*, 315 Ark. 719, 721, 870 S.W.2d 388, 389 (1994).

Here, the victim unequivocally identified Butler as his assailant at trial. He explained that he originally told the police that he had been robbed by "Joe Marbley," because he knew Butler's father, whose last name was Marbley, and had assumed that they had the same last name. Thus, the identification issue was one of credibility, and we will not disturb a

credibility determination by the fact finder.

II. *Felon in Possession of a Firearm*

Butler next argues that there was insufficient evidence that he possessed a handgun. Arkansas Code Annotated section 5-73-103(a) (Supp. 2009) provides that, subject to certain exceptions not applicable here, it is unlawful for a convicted felon to possess or own a firearm. Here, it is undisputed that Butler was a convicted felon. Thus, the only issue is whether Butler possessed the firearm in question.

In support of his argument, Butler denies possessing the handgun and challenges the reliability of Officer Smith's identification. As stated above, the testimony of one eyewitness alone is sufficient to sustain a conviction. *Lenoir*, *supra*. And in the absence of a constitutional challenge to the identification procedures, the reliability of a witness's identification is a question for the fact-finder. *Ewell*, *supra*.

Here, Officer Smith identified Butler as the suspect he chased on foot and whom he saw with a handgun. Any challenge to the reliability of his identification is one of credibility. The judge made that credibility determination, and we will not disturb that determination on appeal.

Additionally, to the extent that Butler argues that the identification procedure was suspect because Officer Smith identified Butler after he found his photo identification in the vehicle, we note that Butler did not challenge the constitutionality of the identification below or seek to have it suppressed. It is well settled that an appellant must raise an argument below and obtain a ruling to preserve the issue for appellate review. *Flowers v. State*, 92 Ark. App.

337, 341, 213 S.W.3d 648, 651 (2005) (citing *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998)). Because Butler did not do so, his argument in this regard was not preserved for appeal.

III. *Filing a False Police Report*

Butler next challenges the sufficiency of the evidence to support his conviction for filing a false police report. Arkansas Code Annotated section 5-54-122(b) (Supp. 2009) provides that "[a] person commits the offense of filing a false report if he or she files a report with any law enforcement agency or prosecuting attorney's office of any alleged wrongdoing on the part of another person knowing that the report is false."

Butler claims that there was insufficient evidence because he denied at trial that he had abandoned his vehicle. He claimed that his car could be started without a key and that it had, in fact, been stolen. He argues that, because he believed that his car had been stolen at the time he placed the report, it did not matter whether it had actually been stolen.

However, taking the evidence in the light most favorable to the State, as we must do, Officer Smith testified that Butler abandoned his vehicle during an attempted traffic stop. The car was then impounded. Several days later Butler reported the vehicle stolen. Thus, because Butler abandoned the vehicle, he knew at the time of his report that it had not been stolen. Therefore, there was sufficient evidence to support the conviction.

IV. *Fleeing*

Finally, Butler argues that there was insufficient evidence to support his conviction for fleeing. Arkansas Code Annotated section 5-54-125 (Supp. 2009) provides that "[i]f a person knows that his or her immediate arrest or detention is being attempted by a duly authorized law enforcement officer, it is the lawful duty of the person to refrain from fleeing, either on foot or by means of any vehicle or conveyance."

Once again, Butler challenges the reliability of the officer's identification. As stated above, in the absence of a constitutional challenge to the identification procedures, the reliability of a witness's identification is a question for the fact-finder. *Ewell*, *supra*. Here, Officer Smith testified that he saw a man whom he later identified as Butler flee on foot after an attempted traffic stop and found Butler's identification card and cell phone in the abandoned vehicle. The officer's testimony is sufficient to support the conviction.

Affirmed.

WYNNE and BROWN, JJ., agree.