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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR11-327

BRIAN K. JOHNSON APPELLANT	**Opinion Delivered** November 30, 2011 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NOS. CR-2005-1485; CR-2009-217(A)]
V.	HONORABLE JAMES O. COX, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant pled guilty to possession of a controlled substance (hydrocodone) in June 2006, and imposition of sentence was suspended for five years. In a separate case, appellant pled guilty to possession of drug paraphernalia in April 2009, and imposition of sentence for that offense was suspended for three years. In July 2010, the State filed a petition to revoke both suspensions, alleging that appellant violated the conditions thereof by committing theft by receiving. After a hearing, the trial court found that appellant did violate the conditions of his suspensions by committing theft by receiving, and he was sentenced to five years' imprisonment with imposition of an additional period of imprisonment suspended for fifteen years. Appellant argues on appeal that the trial court erred in revoking his suspensions because the evidence was insufficient to show that he knew or should have known that the property in question was stolen. We affirm.

Appellant's suspended impositions of sentence were conditioned upon his leading a law-abiding life and refraining from violating any federal, state, or municipal law. To revoke a probation or suspension, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. *Foster v. State*, 104 Ark. App. 108, 289 S.W.3d 476 (2008). The trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Costes v. State*, 103 Ark. App. 171, 289 S.W.3d 476 (2008). Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Foster v. State*, *supra*. Since the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial court's superior position. *Id*.

A person commits the offense of theft by receiving if he or she receives, retains, or disposes of stolen property of another person, knowing that the property was stolen or having good reason to believe that the property was stolen. Ark. Code Ann. § 5-36-106(a) (Repl. 2006). Unexplained possession or control of recently stolen property gives rise to a presumption that a person knows or believes that property was stolen. Ark. Code Ann. § 5-36-106(b)(1) (Repl. 2006).

The allegation of theft by receiving in this case was based on appellant's possession of a white porch swing, weed eater, and patio furniture that had been reported stolen from a nearby neighbor's home the previous day. Although the porch swing had been partially painted black, the neighbor recognized it on appellant's porch, and reported the location of the swing to the police. Officers Rowe and Omara were dispatched, knocked on appellant's front door, and received no answer. When the officers went to the rear of the house to knock

on the back door, they noticed several other items that the neighbor had reported stolen. Appellant then appeared from the direction of the front of the house and asked the officers why they were there. The officers replied that they were investigating a nearby burglary, and they asked appellant about various items that were reported as stolen. Appellant, visibly shaking, nervously told the officers that he purchased the porch swing and a battery from Raymel Cunningham, stating that he had been standing in the front yard when Raymel drove by in a truck and asked him if he needed anything. He also stated that Raymel installed the swing on appellant's front porch and began, of his own volition, to paint the swing black but did not finish because his partner was in a hurry. When asked about the patio furniture on his back porch, appellant said that he had forgotten that he also purchased the patio furniture and a weed eater from Raymel, paying a total of $35 for all of the items. When asked why he had not answered the officers' knock on his front door, appellant said that he had not been in the house, but was instead down the block, and that the only people in the house were his young children. When the officers suggested that they should go in to check on the welfare of the children since they had been left alone, appellant told them that his cousin was inside watching the children. Faced with a further contradiction, appellant told them that it was not his cousin but instead the children's mother who was inside watching them.

Appellant denied the contradictory statements at trial, testifying that the police officers must have misunderstood him, that he had not been nervous when the police appeared, that he did not ask Raymel where he had acquired the items he bought, and that he did not know that Raymel, who habitually dealt in used items, was a convicted felon. The trial court

expressly found appellant's testimony to be unbelievable. Appellant argues that the State failed to prove that he knew or had good reason to know that the property was stolen.

Intent can seldom be proved by direct evidence and must be inferred from facts and circumstances. The fact that evidence is circumstantial does not render it insubstantial, and the fact-finder may consider possession, along with any other pertinent fact, in determining whether an appellant possessed specific criminal intent. *See Thomason v. State*, 91 Ark. App. 128, 208 S.W.3d 830 (2005). The fact-finder need not lay aside its common sense in evaluating the ordinary affairs of life and may infer a defendant's guilt from improbable explanations of incriminating conduct. *Terrell v. State*, 342 Ark. 208, 27 S.W.3d 423 (2000). Evidence of concealment of property (*e.g.*, by painting it a different color) may, depending upon the surrounding circumstances, constitute evidence of a felonious intent. *Smith v. State*, 264 Ark. 874, 575 S.W.2d 677 (1979). The finder of fact may consider and give weight to any false, improbable, and contradictory statements made by the defendant to explain suspicious circumstances when determining criminal knowledge and intent, *Atkins v. State*, 63 Ark. App. 203, 979 S.W.2d 903 (1998), and evidence of intent has been found in testimony that a defendant was so nervous during a traffic stop that he was "shaking uncontrollably." *Malone v. State*, 89 Ark. App. 281, 202 S.W.3d 540 (2005). On this record, we cannot say that the trial court clearly erred in finding that appellant knew or had good reason to know that the property was stolen.

Affirmed.

VAUGHT, C.J., and GRUBER, J., agree.