

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR12-305

LESLIE JOHN HARRIS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 28 , 2012

APPEAL FROM THE CLARK
COUNTY CIRCUIT COURT
[NO. CR2011-54]

HONORABLE ROBERT
McCALLUM, JUDGE

AFFIRMED

RAYMOND R. ABRAMSON, Judge

Leslie Harris was convicted by a Clark County jury of criminal use of a prohibited weapon; two counts of possession of a controlled substance with intent to deliver; possession of a firearm by certain persons; and simultaneous possession of drugs and firearms. As a habitual offender, he was sentenced to a total of forty years' imprisonment. Harris argues on appeal that the circuit court erred when it denied his two separate motions to suppress evidence. Additionally, he argues that there was juror impropriety and that the court should have granted his motion for a continuance, made on the day of trial, in order to obtain new counsel. We affirm Harris's convictions for the reasons explained below.

This case began when Jasmine Owens alerted a 911 dispatcher that Harris had attempted to sexually assault her at his home. Renee Jones, a deputy sheriff, was notified that Harris was driving a black pickup truck and that Owens's purse, shoes, and jacket were in

Harris's vehicle. Deputy Jones, while on patrol, saw a black pickup pass her on the highway; she reversed, followed, and pulled the truck over for driving left of center. Harris was the driver, and Deputy Jones ran his driver's license number and discovered that Harris had outstanding felony warrants. Two other officers arrived at the scene and arrested Harris on the warrants.

After Harris was in custody, officers searched his vehicle and found brass knuckles and Owens's purse and shoes. Officers later found drugs in the backseat of the patrol car in which Harris was transported. Based on this discovery and Owens's allegations that the assault had taken place at Harris's residence, the police obtained a search warrant for the home. In the house, officers found a .22 caliber rifle in a bedroom; a 9mm handgun in an air vent in the living room; ecstasy pills in the pocket of a jacket lying on a bed; digital scales; and a red jacket that Owens later identified as hers.

In an amended felony information, Harris was charged with the following: (1) criminal use of a prohibited weapon; (2) two counts of possession of a controlled substance with intent to deliver; (3) criminal attempt to commit sexual assault; (4) possession of a firearm by certain persons; and (5) simultaneous possession of drugs and firearms. Before trial, Harris made two separate motions to suppress. First, he argued that the warrant issued for the search of his residence lacked probable cause. The circuit court denied that motion. Second, he argued that the warrantless search of his vehicle after he had been arrested violated *Arizona v. Gant*, 556 U.S. 332 (2009). The circuit court denied that motion as well.

At trial, before the jury was impaneled, Harris moved for a continuance in order to

obtain new counsel. According to Harris, he was unaware that he could have a bench trial instead of a jury trial. The court denied the motion. At the conclusion of the case, the jury found Harris guilty of the drug and weapons charges, but acquitted him of the attempted sexual assault charge.¹ Harris, a habitual offender, was sentenced by the jury to the following: six years for use of a prohibited weapon; forty years for simultaneous possession of drugs and firearms; and forty years each on both counts of possession with intent to deliver.

At a later hearing, the court ruled that the sentences would run concurrently. Additionally, at that hearing, Harris alleged to the court that a juror who was having an intimate relationship with his ex-wife failed to disclose that relationship to the court and, after trial, bragged to Harris's ex-wife about giving Harris a lengthy prison term. The trial judge indicated he could file a motion, but Harris never made a motion for a new trial or for any other relief at that hearing or after the sentencing order had been entered.

The first issue is whether the court erred when it denied Harris's motion to suppress the evidence found at his residence. Harris argues that the affidavit supporting the search warrant lacked any facts upon which the magistrate could conclude that drugs or contraband would be found in the home. Here, the affidavit supporting the search warrant included the following facts: Owens alleged that Harris had tried to rape her at his residence, but Owens was able to escape; law-enforcement officers then stopped Harris in his vehicle and found Owens's purse and high-heeled shoes in the interior of the cab; and they also found forty

¹Harris's motion to sever the felon-in-possession charge was granted; he later pleaded no contest to that charge and received a six-year sentence.

ecstasy pills in the backseat of the patrol car where Harris had been detained after being arrested on felony warrants.

In reviewing a trial court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court and proper deference to the trial court's findings. *Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50 (2007). We reverse only if the trial court's ruling is clearly against the preponderance of the evidence. *Id.* Arkansas Rule of Criminal Procedure 13.1 lays out the procedure for the issuance of a warrant:

(b) The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

See also Yancey v. State, 345 Ark. 103, 44 S.W.3d 315 (2001). Harris does not challenge the reliability of the hearsay statements in the affidavit; instead, he argues that the officers used Owens's allegations of sexual assault as a pretext to search Harris's residence for drugs. However, the officers had more than Owens's allegations to support an inference that a crime

had taken place at Harris’s home—they also found Owens’s shoes and purse in Harris’s pickup truck. This discovery, along with Owens’s allegations, provided the circuit court with direct evidence and gave it a substantial basis for finding reasonable cause that additional evidence of sexual assault would be found in Harris’s home. Therefore, the court’s denial of this motion to suppress was not clearly against the preponderance of the evidence.

Second, Harris argues that his motion to suppress the evidence found in his truck should have been granted. Under *Arizona v. Gant*, when an “arrestee has been secured and cannot access the interior of the vehicle . . . circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.” 556 U.S. at 335. Harris argues that after the traffic stop, when he was arrested on outstanding felony warrants, the police were precluded from searching his vehicle without a warrant because there was no reason for them to believe evidence of that offense would be found in the vehicle.

Here, officers had probable cause to believe Harris had outstanding felony warrants—his arrest, therefore, was justified on those grounds. If this was the whole story, the officers would likely have been precluded from using the search incident to arrest exception to search his vehicle. But before the officers conducted the search, they had received information from Owens that her purse and shoes were in Harris’s truck. *Gant* states the following: “If there is probable cause to believe a vehicle contains evidence of criminal activity . . . a search of any area of the vehicle in which the evidence might be found [is authorized].” 556 U.S. at 347 (citing *United States v. Ross*, 456 U.S. 798 (1982)). “[O]fficers

may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search." *Id.* The information from Owens about the whereabouts of her personal items gave the officers a reason to believe Harris's truck contained evidence of a sexual assault. In other words, the police had probable cause to believe the truck contained evidence of criminal activity, and the circuit court's denial of Harris's second motion to suppress was not clearly against the preponderance of the evidence.

Harris also argues that the court should have granted his motion for a continuance in order to obtain new counsel. A motion for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reversed on appeal in the absence of a clear abuse of that discretion. *Jackson v. State*, 2009 Ark. 336, 321 S.W.3d 260. The burden of establishing an abuse of discretion falls squarely on the shoulders of the appellant. *Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008). An appellant must not only demonstrate that the trial court abused its discretion by denying a motion for a continuance, but he must also show prejudice that amounts to a denial of justice. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). Here, Harris made a motion for continuance on the day of trial because he wanted to dismiss his counsel, but had not yet contacted or hired another attorney. We note that he was ably represented at trial—his attorney obtained an acquittal on the charge of attempted sexual assault. Harris has failed to show that the court abused its discretion or that he suffered any prejudice from the denial of his motion for a continuance. *See Wormley v. State*, 2010 Ark. App. 474, 375 S.W.3d 726.

Finally, Harris argues he is entitled to a new trial because he made uncorroborated

statements at a sentencing hearing that one of the jurors, who was having an affair with Harris's ex-wife, had bragged about giving Harris an extended prison sentence. This argument, however, is not preserved. Harris never filed a post-trial motion for a new trial and never obtained a ruling from the circuit court. As this argument is raised for the first time on appeal, it is not preserved for our review. *See Middleton v. State*, 311 Ark. 307, 842 S.W.2d 434 (1992). We are unable to decide issues not ruled on by the lower court. *Smith v. State*, 363 Ark. 456, 215 S.W.3d 626 (2005).

Affirmed.

PITTMAN and MARTIN, JJ., agree.

Scholl Law Firm, PLLC, by: *Scott A. Scholl*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.