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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR09-324

	Opinion Delivered March 17, 2010
JEWEL EUGENE JOHNSON AND MICHAEL RYAN WEBB APPELLANTS	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CR-2008-1589]
V.	HONORABLE WILLARD PROCTOR, JR., JUDGE
STATE OF ARKANSAS APPELLEE	REVERSED AND REMANDED

JOHN MAUZY PITTMAN, Judge

A jury found appellants Jewel Eugene Johnson and Michael Ryan Webb guilty of second-degree battery. Their sentences were enhanced because of their habitual-offender status and, pertinent to this appeal, under the Arkansas Criminal Gang, Organization, or Enterprise Act for committing the crime "in concert" with two or more other persons. Appellants argue on appeal that it was error to enhance their sentences under the Arkansas Criminal Gang, Organization, or Enterprise Act because the evidence is insufficient to support the finding that they acted in concert with two other persons while committing the battery. We reverse and remand for resentencing.

The Arkansas Criminal Gang, Organization, or Enterprise Act is codified at Ark. Code Ann. § 5-74-101 (Repl. 2005) *et seq.* The provision that is the subject of this appeal is section 5-74-108, which prohibits engagement in violent group activity:

> (a) Any person who violates any provision of Arkansas law that is a crime of violence while acting in concert with two (2) or more other persons is subject to enhanced penalties.
>
> (b) Upon conviction of a crime of violence committed while acting in concert with two (2) or more other persons, the classification and penalty range is increased by one (1) classification.
>
> (c) The fact that the group was not a criminal gang, organization, or enterprise is not a defense to prosecution under this section.

The phrase "in concert" is defined as acting in mutual agreement in a common plan or enterprise. *Jones v. State*, 333 Ark. 208, 969 S.W.2d 618 (1998); *Taylor v. State*, 94 Ark. App. 21, 120 S.W.3d 545 (2006). The precise question, then, is whether there was sufficient evidence to support a finding that appellants acted in mutual agreement with at least one additional person in a common plan or enterprise to commit battery. We hold that there was not.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Jimenez v. State*, 83 Ark. App. 377, 128 S.W.3d 483 (2003). We will affirm a conviction if it is supported by substantial evidence, *i.e.*, evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resort to speculation or conjecture. *Id.*

Viewed in light of this standard, there was evidence that appellant Johnson was having a party at his house to watch a televised prizefight. Appellant Webb was one of perhaps a score of invited guests. Simultaneously, another group of four people had gathered to watch

the prizefight at another location: the victim, Josh Neal; his friend, Chris; and two women, Rickey and Ashley. This second group met at Chris's house and intended to watch the prizefight there, but the women became bored. Ashley knew about the larger party at appellant Johnson's house, and telephoned her friend Liz (one of Johnson's guests) for directions to Johnson's house. This second group then went to Johnson's house uninvited and mingled with the crowd.

Trouble began when Josh and appellant Webb accidentally bumped into each other on the stairs in Johnson's house. Harsh words were exchanged between the two. Appellant Webb remained disturbed over the incident. Seeing this and sensing trouble, Chris suggested that the members of the second group should all leave, and he urged Josh to go sit in the car while he went to find Rickey and Ashley. Josh refused to go any farther than the interior garage door. Chris returned in time to see an altercation between Josh and the two appellants. It is undisputed that appellant Johnson incapacitated Josh with pepper spray and that appellant Webb then punched Josh repeatedly in the face. Josh and Chris both testified that they thought that there might have been another person besides the appellants hitting Josh, but they were not certain of this. Chris testified that, when the fight broke out, he tried to get over to Josh but was restrained by several unidentified people. That is the extent of the evidence to support a finding of concerted action.

Even assuming that this evidence is sufficient to support a finding that three people were involved in a melee directed at Josh, we conclude that it is insufficient to demonstrate

that the third person acted "in concert" with appellants. Evidence of mutual agreement in a common plan or enterprise is lacking. There is testimony to show that a third person might have struck Josh. The problem is not simply that we do not know the identity of this third person; it is that we know nothing whatsoever about the third person's actions prior to the fight or about his relationship to the appellants. Likewise, there is evidence that Chris was restrained from going to aid Josh during the fight, but again we know nothing about the actors' identities, appearance, or relationship to the parties. We think that, on these facts, a finding of concerted action is purely speculative.

Appellants argue that, as a consequence of this error, the entire case should be retried on the merits. We do not agree with their argument that the enhancement tainted the entire process. Instead, as was the case in *Griffin v. State*, 2 Ark. App. 145, 617 S.W.2d 21 (1981), the trial court's error in this instance had no bearing upon the jury's determination of guilt or innocence but instead affected only the extent of the punishment to be imposed. Consequently, we reverse and remand for a sentencing proceeding comporting with our decision herein.

Reversed and remanded.

VAUGHT, C.J., and ROBBINS, J., agree.