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ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-21-363

ZACHARY STILL APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** April 6, 2022 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. 66FCR-20-40] HONORABLE STEPHEN TABOR, JUDGE AFFIRMED

KENNETH S. HIXSON, Judge

Appellant Zachary Still was convicted in a jury trial of simultaneous possession of drugs and firearms, possession of more than fourteen grams of marijuana with intent to deliver, and possession of drug paraphernalia.[1] For these offenses, Still was sentenced to concurrent prison terms of ten, three, and three years. Still now appeals, and his appeal concerns only his conviction for simultaneous possession of drugs and firearms.

Still raises two arguments on appeal. First, he argues that there was insufficient evidence to support his conviction for simultaneous possession of drugs and firearms. Still next contends that the trial court erred in disallowing the statutory defense provided by Ark. Code Ann. § 5-74-106(d) (Repl. 2016). We affirm.

[1]The jury acquitted Still of maintaining a drug premises.

A person commits the offense of simultaneous possession of drugs and firearms if he commits a felony drug violation while in possession of a firearm. Ark. Code Ann. § 5-74-106(a)(1) (Repl. 2016). Arkansas Code Annotated section 5-74-106(d) provides, "It is a defense to this section that the defendant was in his or her home and the firearm . . . was not readily accessible for use."

On the evening of January 8, 2020, Still was in his house playing cards with three other men. An intruder entered the house through a side door and fired a gun.[2] Two of the men were able to exit the house, and the police were called. As the police were arriving at the house, Still and the fourth man were exiting the house through a side window. The police briefly placed Still in handcuffs until they patted him down and found no weapons on his person. Still gave the police written and verbal consent to search his house. During the search of the house, the police found—in various locations—marijuana, drug paraphernalia, a handgun, and a loaded magazine clip.

Prior to trial, Still's counsel advised the State of his intent to raise, as a defense to the charge of simultaneous possession of drugs and firearms, that Still was in his home, and the firearm was not readily accessible for use pursuant to Ark. Code Ann. § 5-74-106(d). The State then filed a motion in limine, requesting that Still be prohibited from raising the defense. After a hearing on the motion, the trial court granted the State's motion, finding that the defense was unavailable because Still had voluntarily exited the house through a

[2]Evidently, the intruder was shot during the episode and later died from his injuries. No charges were filed in connection with this shooting.

window and was not in the house when it was searched or when the contraband was discovered. The case proceeded to a jury trial.

The testimony of the police officers can be summarized as follows. When the police arrived at Still's house that night to investigate the shooting, they saw Still and another man crawling out a side window of the house. Upon searching Still's person, the police found no weapons but discovered that he was carrying $485 in cash. Still gave the officers consent to search his house. Before the search began, Still was told to remove his dogs from his house, which he did. After that, Still remained either in his front yard or on the porch as the police searched the house. The only other time Still was permitted inside the house was when, after the search was complete and the contraband discovered, he was allowed to get a change of clothes before being transported to the police station.

During the search of Still's house, the police found a handgun in a closed box in the laundry room on top of either the washer or dryer. The handgun was not loaded, but a loaded magazine clip that went to the gun was on a table between the living room and kitchen area. The police searched Still's bedroom closet and found drug paraphernalia, including a smoking pipe, plastic baggies, and a marijuana grinder. The closet also contained a backpack and a locked safe. The police found two jars of suspected marijuana in the backpack, which the crime lab later confirmed to be more than one hundred grams of marijuana.

After Still was arrested, he gave a statement to the police. In the statement, Still admitted that he possessed and sold marijuana. Still also admitted he owned the seized handgun, stating that he typically kept the gun in one pocket and the loaded magazine clip

in the other to keep from accidentally shooting himself. Still stated that he had the handgun on him when the police arrived that night and that he threw the gun in the laundry room because "[he had] weed." Still also admitted that the safe in his closet belonged to him, and he gave the police the key to the safe. When the police opened the safe, they found $100 in cash and a waxy substance that tested positive for THC.

Still's roommate, Matthew Hurt, also testified for the State. Hurt stated that he rented a room from Still, and he was one of the men playing cards on the night of the shooting incident. Hurt testified that Still was his marijuana dealer, and that he had seen Still selling marijuana to others at the residence. According to Hurt, Still usually kept the marijuana in a safe in his room. Hurt also testified that Still had a handgun, which he either carried or kept in the safe. On the night of the incident, Still had the handgun with him and was showing it to the others at the residence.

Still testified on his own behalf. In his testimony, Still admitted that he sold marijuana to friends and stated that he kept the marijuana and money in his safe. Still also admitted that he was in possession of drug paraphernalia found in his closet. Still testified that the handgun found by the police belonged to him and that on the night the police arrived, he had the gun on his person before tossing it into the laundry room.

In this appeal, Still first argues that there was insufficient evidence to support his conviction for simultaneous possession of drugs and firearms. In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Boswell v. State*, 2021 Ark. App. 456, 636 S.W.3d 827. Substantial evidence is evidence forceful enough to compel a conclusion one way or the

other beyond suspicion or conjecture. *Id.* We view the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *Id.*

Still does not deny that he possessed the marijuana, nor does he deny that he possessed the handgun. However, Still relies on *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000), where the supreme court held that to be convicted of simultaneous possession, a connection must exist between the firearm and the controlled substance. *See also Manning v. State*, 330 Ark. 699, 956 S.W.2d 184 (1997) (holding that there must be some link between the firearms and drugs and that mere possession of a firearm is not enough). Still contends that the State failed to prove a connection between the firearm and the drugs because the handgun was not found in proximity to the marijuana or drug money.

We hold that Still's challenge to the sufficiency of the evidence is not preserved for review. Arkansas Rule of Criminal Procedure 33.1 requires a motion for directed verdict to specify how the evidence is deficient. Ark. R. Crim. P. 33.1(c). The motion must be specific enough to apprise the trial court of the particular basis on which the motion is made. *Wallace v. State*, 53 Ark. App. 199, 920 S.W.2d 864 (1996). Our law is clear that a party is bound by the scope and nature of his directed-verdict motion and cannot change the grounds on appeal. *Plessy v. State*, 2012 Ark. App. 74, 388 S.W.3d 509.

At the close of the State's case, Still moved for a directed verdict, and with respect to the simultaneous-possession charge, he argued, "I don't believe they met their burden on maintaining or simultaneous." At the close of the case, Still renewed the directed-verdict motion with respect to all four charges "based on the State not meeting its burden on each of the charges, each and every element."

In a challenge to the sufficiency of the evidence, a defendant must inform the trial court of the specific basis for the challenge, and arguments not raised at trial will not be addressed for the first time on appeal. *Morris v. State*, 86 Ark. App. 78, 161 S.W.3d 314 (2004) (holding that appellant's failure to argue below the absence of a link between her possession of drugs and the firearm barred her from raising the issue on appeal). Because Still did not specify the deficiency in the State's proof when making his directed-verdict motions, he did not preserve his sufficiency challenge for appellate review.

Still's remaining argument is that the trial court erred in not allowing him to raise the statutory defense provided by Ark. Code Ann. § 5-74-106(d), which provides, "It is a defense to this section that the defendant was in his or her home and the firearm . . . was not readily accessible for use." Still concedes that he was not in his house during the search or when the handgun was discovered, and he acknowledges that our court has interpreted the statute to mean that, for this defense to apply, the defendant must be present in the home when the firearm is found. *See, e.g.*, *House v. State*, 2020 Ark. App. 240, 600 S.W.3d 106 (holding that the defense was unavailable when appellant was in a detached garage or immediately outside the garage when the firearm was discovered); *Dotson v. State*, 2013 Ark. App. 550 (holding that the defense was unavailable when appellant was removed from his house by the police on a domestic-abuse call, and during a subsequent search the police found drugs and firearms); *Vergara-Soto v. State*, 77 Ark. App. 280, 74 S.W.3d 683 (2002) (stating that this defense is a very narrow exception to the crime of simultaneous possession and holding that it was unavailable where appellant was not in his home when the handgun was discovered). Still, however, contends that our court has wrongly interpreted this statute.

Still contends that the issue should not be whether the defendant was in his home when the police found the firearm; rather, the issue should be whether the defendant was in his home when the felony drug offense and firearm possession were alleged to be simultaneous. Still urges our court to reconsider our interpretation of this statute and to conclude, under these circumstances, that the defense was available to him.

We find no merit in Still's argument. As conceded by Still, we have consistently interpreted this affirmative defense to mean that it is available only when the defendant is inside his or her home when the firearm is discovered. *See House*, *supra*. Here, Still had exited his house through a window and was not in the house when it was searched or when the contraband was discovered. Therefore, the trial court correctly ruled that the defense was not available to him.

Twenty years ago, this court delivered *Vergara-Soto*, *supra*. In that case, Vergara-Soto agreed for police officers to search his residence in a trailer park, and the police followed him three or four miles to get there. When they arrived, the police searched the trailer while Vergara-Soto remained outside. The police found drugs and a firearm inside the trailer, and Vergara-Soto was convicted of simultaneous possession of drugs and firearms. On appeal, Vergara-Soto argued that sufficient evidence did not support his conviction based on his affirmative defense that he was in his home and the gun was not readily accessible. We disagreed, and wrote:

> While we recognize that criminal statutes are strictly construed and any doubts are resolved in favor of the defendant, we are first and foremost concerned with ascertaining the intent of the General Assembly. *Sansevero v. State*, 345 Ark. 307, 45 S.W.3d 840 (2001). In statutory interpretation matters, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Langley v. State*, 343 Ark. 324, 34 S.W.3d 364 (2001). In adopting section

> 5-74-106(d), the General Assembly obviously intended to create a *very narrow exception* to the crime of simultaneous possession of drugs and firearms where "the defendant was in his home and the firearm was not readily accessible for use." We see nothing in this clear and unambiguous language that permits an interpretation other than, first, that the defendant must be in his home and, second, that the firearm is not readily accessible for use in order for a defendant to avail himself of the defense. . . .
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> . . . Here, it is not disputed that the handgun was found in Vergara-Soto's home and it is not disputed that Vergara-Soto was *not* in his home when the handgun was discovered. Under these circumstances, clearly Vergara-Soto has failed to establish that he was "in his home," as the statutory defense requires.

Vergara-Soto, 77 Ark. App. at 284–85, 74 S.W.3d at 685−86 (emphasis added).

We recently applied the *Vergara-Soto* precedent in *House*, *supra*. In *House*, we held that the defense was unavailable when the appellant was in a detached garage or immediately outside the garage when the police searched his house and discovered the firearm. We explained:

> In adopting section 5-74-106(d), the General Assembly obviously intended to create a *very narrow exception* to the crime of simultaneous possession of drugs and firearms where the defendant was in his home and the firearm was not readily accessible for use. *Vergara-Soto*, *supra*. We have interpreted this very narrow exception to mean that for the affirmative defense to apply, the defendant must be inside his or her residence when the firearms are discovered. Because Mr. House was not inside his residence but was either in a detached garage or immediately outside the garage, there was no basis to conclude that Mr. House was in his home when the firearms were found.

House, 2020 Ark. App. 240, at 6, 600 S.W.3d at 109.

While Still argues that we have misinterpreted the statute, we disagree. It is well settled that an interpretation of a statute by the appellate court subsequently becomes a part of the statute itself. *State v. Griffin*, 2017 Ark. 67, 513 S.W.3d 828. The legislature is presumed to be familiar with the appellate court's interpretation of a statute, and if it disagrees with that interpretation, it can amend the statute. *Id.* Without such an

amendment, however, our interpretation remains the law. *Id.* We have interpreted the statute to create a narrow exception that is available only when the defendant is inside his or her residence when the firearms are discovered, and the statute has not since been amended. Consistent with our prior holdings, we conclude that the defense was not available to Still because he was not in his house when the police discovered the firearm.

Affirmed.

GRUBER and VAUGHT, JJ., agree.

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