

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CR-23-239

ANDRE LUTHER CAIN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 31, 2024

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT
[NO. 26CR-22-403]

HONORABLE RALPH C. OHM,
JUDGE

AFFIRMED; REMANDED TO
CORRECT SENTENCING ORDER

BRANDON J. HARRISON, Chief Judge

Andre Luther Cain was found guilty of arson and third-degree domestic battery, and he now appeals his arson conviction, arguing that the circuit court erred in denying his motion for directed verdict because the State failed to prove the requisite amount of damages. He also asserts that the court erred in allowing certain video evidence because it was irrelevant and more prejudicial than probative. We affirm Cain’s conviction but remand for the limited purpose of correcting the sentencing order.

In June 2022, the State charged Cain with arson, criminal impersonation, and third-degree domestic battery. In short, Cain was accused of physically assaulting his girlfriend, Jamie McBride, while at an apartment belonging to Jeffrey Abell; impersonating a police officer to make Abell open his apartment door; and setting fire to Abell’s apartment.¹ The criminal information was later amended to clarify that there was an estimated \$10,000 in

¹The criminal-impersonation charge was later nolle prossed.

damages caused by the fire. The information was also amended to charge Cain as a habitual offender.

A jury found Cain guilty of arson and third-degree domestic battery, and he received a sentence of twenty years' imprisonment.² Cain has timely appealed the sentencing order. Specific facts relevant to the points on appeal will be discussed below. Although Cain challenges the sufficiency of the evidence in his second point on appeal, we must address it first for purposes of double jeopardy. *Lewondowski v. State*, 2022 Ark. 46, 639 S.W.3d 850.

I. *Directed Verdict*

A person commits arson if he or she starts a fire with the purpose of destroying or otherwise damaging an occupiable structure that is the property of another person. Ark. Code Ann. § 5-38-301(a)(1)(A) (Supp. 2023). Arson is a Class D felony if the property sustains at least \$500 but less than \$2500 worth of damage, a Class C felony if the property sustains at least \$2500 but less than \$5000 worth of damage, and a Class B felony if the property sustains at least \$5000 but less than \$15,000 worth of damage. Ark. Code Ann. § 5-38-301(b).

After the State's case in chief, the defense moved for a directed verdict, in part arguing that the State had not proved that Cain caused over \$5000 in damages, which is required for a conviction on a Class B felony. The court denied the motion and decided

²Cain's sentencing order contains a clerical error; the box indicating he was sentenced as a habitual offender is not checked. We therefore remand for the circuit court to correct the sentencing order. *See Palmer v. State*, 2023 Ark. App. 178, 663 S.W.3d 436 (remanding the case to the circuit court for the limited purpose of entering an amended sentencing order that corrects a clerical error).

to “let that go to the jury and we’ll see what the jury comes back with as far as a number is concerned.” The defense rested and renewed its motion, which was denied.

The court instructed the jury that if it found Cain guilty of arson, it must also determine whether the property sustained (1) at least \$5000 but less than \$15,000 in damage, (2) at least \$2500 but less than \$5000 in damage, or (3) at least \$500 but less than \$2500 in damage. The verdict forms show that the jury found the property had sustained at least \$2500 but less than \$5000 in damage, and the sentencing order reflects that Cain was convicted of a Class C felony.

On appeal, Cain reiterates that arson is a Class B felony if the property sustains at least \$5000 but less than \$15,000 worth of damage, and he argues that the State failed to present substantial evidence that the present value of the damage in this case was at least \$5000. This argument fails to address Cain’s actual conviction, which was for a Class C felony, meaning the property had sustained at least \$2500 but less than \$5000 in damage. Therefore, we need not address the sufficiency argument presented on appeal.³

Within this argument, Cain also asserts that he objected to the jury instruction that allowed the jury to find damages of at least \$5000 but less than \$15,000, and he contends that the circuit court’s “denial of the directed verdict as well as the denial of the Appellant’s motion to amend Jury Instruction AMCI 2d 3802 – VF was in error and highly prejudicial to the Appellant.” This court will not consider an argument when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without

³We note that the owner of the damaged property, who is also a general contractor, estimated the cost of repairs as \$3000, which is sufficient evidence to support the jury’s conviction.

further research that the argument is well taken. *Britton v. State*, 2014 Ark. 192, 433 S.W.3d 856. Neither conclusory statements nor allegations without factual substantiation are sufficient. *Id.* We therefore decline to address any argument regarding the jury instruction.

II. *Admissibility of Video*

Cain was arrested near the scene of the arson, and the State introduced a video of Cain's police interview following his arrest, including the pre-interview period during which he made numerous vulgar statements to police officers. After several minutes (and seven transcript pages) of Cain speaking belligerently to officers either in the room or through the door, defense counsel objected on relevance grounds. The State responded that interspersed within Cain's rants were statements about McBride and the fire and that those statements were relevant. The court ruled that Cain's statements were admissions and allowed that portion of the recording to proceed.

On appeal, Cain asserts that while a few statements made after the defense's objection would be admissible, such as his insistence that he did not start the fire, the majority of his pre-interview statements should have been excluded on relevance grounds. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ark. R. Evid. 401 (2023). Though all relevant evidence is admissible, even relevant evidence can be excluded if its probative value is outweighed by the danger of unfair prejudice or confusion of the issues. Ark. R. Evid. 402, 403. The circuit court's evidentiary rulings will not be reversed absent an abuse of discretion and a showing of prejudice. *Stanton v. State*, 2020 Ark. 418, 613 S.W.3d 368.

Cain contends that the majority of his pre-interview statements did not relate to the charges against him but instead concerned his sexual prowess with white women, certain parts of his anatomy, and the racist motivations of the police. He claims the State played those statements to bias the jury against him. Cain also contends that even if relevancy was shown, the statements were not admissible under Rule 403 because they were more prejudicial than probative.

As a preliminary matter, Cain did not raise a Rule 403 argument below, and it is axiomatic that the appellate court will not address an argument that is raised for the first time on appeal. *Stansell v. State*, 2011 Ark. App. 670. As to Cain's relevance argument, the State counters that the challenged statements were relevant to show Cain's state of mind and that Cain has failed to prove any prejudice. The State notes that portions of the interview that were equally as profane and belligerent, including damning passages about McBride and profane statements he made on the dash-cam video, were played for the jury without objection.

We hold that the circuit court did not abuse its discretion in allowing the video. Cain failed to demonstrate any prejudice resulting from its admission because his inflammatory statements were cumulative to similar statements heard by the jury without objection.

Affirmed; remanded to correct sentencing order.

ABRAMSON and HIXSON, JJ., agree.

Jeremy D. Wann, for appellant.

Tim Griffin, Att'y Gen., by: *Christopher R. Warthen*, Ass't Att'y Gen., for appellee.