

Not designated for publication
ARKANSAS COURT OF APPEALS
JUDGE KAREN R. BAKER

DIVISION III

CACR05-1109

SEPTEMBER13, 2006

GEORGE H. SORRELLS

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE BOONE COUNTY
CIRCUIT COURT
[CR-04-408-4]

HONORABLE GORDON WEBB, CIRCUIT
JUDGE

AFFIRMED

Appellant George Sorrells appeals his conviction of aggravated robbery and theft for which he was sentenced to fourteen years in the Arkansas Department of Correction. His sole point on appeal is that the trial court erred in permitting the State to introduce evidence of several weapons and ammunition that were not used in the crime with which appellant was charged. We find no error and affirm.

Evidentiary matters regarding the admissibility of evidence are left to the sound discretion of the trial court, and rulings in this regard will not be reversed absent an abuse of discretion. *Grant v. State*, 357 Ark. 91, 161 S.W.3d 785 (2004). Abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but requires that the trial court act improvidently, thoughtlessly, or without due consideration. *Id.* Evidence is relevant if it tends to make the existence of any consequential fact more or less probable than it would be without the evidence. Ark. R. Evid. 401. However, even relevant evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice. Ark. R. Evid. 403. If unfair prejudice is alleged, the appellant must show the prejudice, as prejudice is not presumed. *See Hanlin v. State*, 356 Ark. 516, 526, 157 S.W.3d 181, 187 (2004). *See also Dye v. State*, 70 Ark. App. 329, 17 S.W.3d 505 (2000)(finding no abuse of discretion in admitting evidence of ammunition found in appellant's car and the assault rifle found at his residence when charge was stalking).

In this case, Daisy Mitchell testified that she was closing the Country Mart in Harrison at about 9:45 p.m., on November 10, 2005, when a man approached her and demanded the store's money. After refusing his demand, Mitchell called Tyler Brasel, the store's night manager, to the front. Brasel testified that, as he was walking to the front area, appellant turned toward him and raised up the fleece shirt he was wearing to reveal an opened fanny pack around his waist. Brasel stated that he could see the top of what appeared to be a gun inside the fanny pack. While showing this to Brasel, appellant said, "Give me all the money. Do you really want to die over somebody else's money?" After Brasel handed appellant the store's cash drawer and two bank bags, appellant turned and walked out the door.

Officer Sean Rader testified that, six days prior to the robbery, at about 10:00 p.m., he saw appellant walking out of the bushes behind the Country Mart and getting into the passenger side of a suspicious vehicle. Officer Rader stopped the car and asked appellant for permission to search the vehicle. After obtaining permission, Officer Rader found a loaded .40 caliber handgun underneath appellant's seat. Officer Rader seized the gun and cited appellant for carrying a prohibited weapon. The gun was put into police evidence, where it remained until trial, and, therefore, was clearly not the weapon used during the robbery.

Two days after the robbery, on November 12, 2005, appellant was arrested in Arlington, Texas. He had a loaded .40 caliber semi-automatic handgun in his jacket pocket and a loaded .45

caliber pistol in his luggage. Appellant also had a black fanny pack. The arresting officer, Danny Nutt, testified that he believed that there were magazines for a handgun in the fanny pack at the time of the arrest. It was stipulated at trial that both of those guns were purchased after November 10 and, therefore, neither of these guns were the weapon used during the robbery.

Arkansas Code Annotated section 5-12-103(a)(1)(Repl. 2006) provides that a person commits the offense of aggravated robbery if the person commits robbery as defined in section 5-12-102, and is armed with a deadly weapon or represents by word or conduct that the person is so armed. When a defendant verbally represents that he is armed with a deadly weapon, this is sufficient to convict for an aggravated robbery, regardless of whether, in fact, he did have such a weapon. *See Clemmons v. State*, 303 Ark. 354, 796 S.W.2d 583 (1990). Where no verbal representation is made and only conduct is in evidence, the focus is on what the victim perceived concerning a deadly weapon. *Id.* This is because even the display of a gun instills fear in the average citizen. *See Robinson v. State*, 317 Ark. 17, 875 S.W.2d 837 (1994).

Brasel testified that appellant raised up his jacket to reveal an open fanny pack containing a metallic object. In conjunction with revealing this object, appellant said, "Do you really want to die over someone else's money?" Brasel testified that he believed the object in the fanny pack to be a gun and described what he saw as the "top of the gun, the bolt part where you cock it." He explained that based upon his experience with guns, what he saw appeared to be a semi-automatic handgun.

Appellant made a verbal representation that he was armed with a deadly weapon and exposed an object that appeared to be to the victim a semi-automatic handgun. Under these circumstances, appellant's conduct was sufficient to convict him of the crime of aggravated robbery.

Appellant argues that because the weapons confiscated from appellant before and after the

robbery could not have been in appellant's possession at the time of the robbery, the only purpose served by the reference to, and admission of, the guns and ammunition, was to allow the jury to make inferences regarding Mr. Sorrell's propensity to behave violently and threateningly, and to improperly infer that he possessed a gun—and likely a loaded gun—while robbing the Country Mart. *See Long v. State*, 240 Ark. 687, 410 S.W.2d 578 (1966)(finding weapon erroneously introduced to show accused had propensity for violence); *Rush v. State*, 238 Ark. 149, 379 S.W.2d 29 (1964)(finding introduction of weapon not used in crime was error because of tendency to confuse the jury); *Everett v. State*, 231 Ark. 880, 333 S.W.2d 233 (1960)(finding knife found by body of victim inadmissible because not identified as used by victim or accused). He further claims that the only remedy here is to reverse and remand the case for trial.

We agree that the evidence and stipulations are quite sufficient to prove that none of these particular weapons could have been the gun seen by Brasel during the robbery for which appellant was convicted. One gun was in police custody at the time of the robbery and the other two, as stipulated, were purchased by appellant after the robbery. We disagree that the only purpose for the admission of the evidence was to improperly create inferences of a propensity for violence. The trial court allowed the items to be admitted, stating that appellant's possession of the items was close enough in time and proximity to the crime to be relevant and admissible. As the court acknowledged, the fact that those particular weapons were conclusively not in appellant's possession at the time of the robbery was, at least to some extent, exculpatory. Additionally, appellant admitted in his testimony that he warned the store employees that they didn't want to die over someone else's money, although he claimed it was made after he received the money from his demand. He also testified that he had with him at the time of the robbery a lighter that looked like a Derringer.

Under these facts, we cannot find that the trial court acted improvidently, thoughtlessly, or without due consideration when it admitted the testimony regarding appellant's possession of weapons and ammunition that were not used in the crime. Nor can we find any prejudice to appellant even if the admission had been an abuse of discretion. Accordingly, we affirm.

BIRD and ROAF, JJ, agree.