DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ANDREE LAYTON ROAF, Judge

CACR05-968

September 13, 2006

BOBBY H. COX APPELLANT v. STATE OF ARKANSAS APPELLEE	APPEAL FROM LONOKE COUNTY CIRCUIT COURT [NO. CR04-369] HONORABLE JOHN LINEBURGER, SPECIAL JUDGE AFFIRMED

Appellant, Bobby Cox, was convicted by a jury of terroristic threatening in the first degree and assault in the third degree, and was sentenced to six years in the Arkansas Department of Correction and a $10,000 fine for terroristic threatening, and thirty days in jail and a $100 fine for the assault conviction. Cox appeals, alleging 1) that the case should have been dismissed because his speedy trial rights were violated; 2) that the trial court should have granted a mistrial because of certain witness statements; 3) that the trial court erred in denying the admission of relevant evidence; 4) that there was insufficient evidence to support the conviction for terroristic threatening in the first degree; and 5) that the convictions for both terroristic threatening and assault were inconsistent. We find no error and affirm.

On April 18, 2003, Christina Cox decided she would move out of the home that she shared with her husband, appellant Bobby Cox. Her mother, Ann White, and sister and brother-in-law, Carol

and Wesley Blankenship (Blankenship), were assisting her. While the four were removing boxes and furniture from the property, Cox arrived and an altercation ensued. White testified that at one point, Blankenship exited the house screaming, "he's got a gun"; that Cox then pointed the gun at her and told her to "get the f**k out"; and that Cox threatened to kill her entire family. Carol Blankenship testified that Cox pointed a gun at her husband's head and threatened to kill him when Blankenship began taking apart a bed. Carol also stated that before the police arrived, Cox told them that he would be out of jail in thirty minutes and that he knew where they lived and would be at their house to "finish this."

Blankenship testified that Cox told Christina that she was not taking the bed, but Christina responded that she was taking it and began pulling on the bed. Cox then shoved the mattress toward Blankenship, pulled out a gun, pointed it at his head and said, "you are not taking the f***ing bed." Blankenship stated that Cox then pointed the gun at Carol, Ann, and Christina. While Cox was pointing the gun at Blankenship, Cox said, "I will kill you, you f***ing a**hole. Get the f*** out of my house. . . . Do you know Jesus cause you're about to meet him." Blankenship testified that he was "scared to death" and that he told everybody that they needed to get out of the house. Blankenship also stated that Cox went to another house when he heard the police sirens and that he returned to the scene without the gun.

Cox testified that he and Christina had been having marital problems and that she decided to leave after he refused to give her money. He explained that he was angry when Christina's family arrived at the house to remove the furniture because the house had belonged to his parents and that Christina was taking items that did not belong to her, as she only had "two garbage bags full of clothes" when they got married. Cox stated that he called a policeman friend to report that Christina's family was trespassing and stealing his property and that he repeatedly asked the family to leave. He claimed that Blankenship grabbed a post of a Victorian bed, tore it off, and said that he (Blankenship)

was taking everything that Cox owned and that there was nothing Cox could do about it. Cox testified that Blankenship's statement forced him (Cox) to go get his revolver because a man's "home is his castle." Cox claimed that he unloaded the gun beforehand to prevent an accident and then brandished the gun and told Blankenship that the bed was not going anywhere. He stated that Blankenship ran, fell down, and began to scream. Cox claimed that he merely showed the gun to Blankenship and did not point it at his head. Cox also testified that he only asked Blankenship if he believed in Jesus because he kept screaming, "Oh God." In addition, Cox claimed that Christina and Blankenship had been drinking that day and both were belligerent.

The police arrived and Christina was allowed to take some things, but she left the bed. Cox told police that he was not carrying a gun; no weapon was found on him. Cox testified that he had taken the gun to his vehicle before the police arrived. No one was immediately arrested; however, Cox was arrested months later on January 6, 2004, and the case was not tried until May 18, 2005. On the trial date, Cox filed a motion to dismiss based upon a violation of his speedy trial rights. The trial court denied this motion. The jury found Cox guilty of terroristic threatening in the first degree and assault in the third degree. The trial court rejected Cox's post-trial motion to dismiss the terroristic threatening charge based on inconsistent verdicts and accepted the punishment proposed by the jury. Cox appeals.

Preservation of Cox's right against double jeopardy requires that we first consider his argument that the trial court should have granted his motion for directed verdict because there was insufficient evidence to sustain a conviction for terroristic threatening in the first degree. *Deshazo v. State*, ____ Ark. ____, ____ S.W.3d ____ (June 21, 2006). When reviewing a challenge to the sufficiency of the evidence, the appellate court will affirm a conviction if there is substantial evidence to support it, when viewed in the light most favorable to the state. *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999). Substantial evidence is that which is of a sufficient force and character that it will, with reasonable

certainty, compel a conclusion without mere speculation or conjecture. *Id*. Circumstantial evidence may be sufficient to provide the basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Id*. Whether circumstantial evidence excludes every other explanation except the guilt of the accused is a question for the jury. *Ridling v. State*, ---Ark. ---, ---S.W.3d--- (Jan. 27, 2005). Furthermore, the credibility of witnesses is an issue for the jury, and the jury may resolve questions of conflicting testimony and inconsistent evidence. *Id*.

A person commits the offense of terroristic threatening in the first degree if he or she purposely terrorizes another with the threat of death or serious physical injury or substantial property damage to another. Ark. Code Ann. § 5-13-301(a) (1) (A) (Repl. 1997). A terroristic threat need not be verbal, nor must the threat be communicated by the accused directly to the person threatened. *Lowry v. State*, ---Ark. ---, ---S.W.3d--- (Oct. 20, 2005). Moreover, it is not necessary that the recipient of the threat actually be terrorized, and there is no requirement that the State prove that the accused had the immediate ability to carry out the threats. *Id.* However, the accused must intend for the threat to fill the recipient with intense fright; in other words, it must have been the conscious object of the accused to cause fright. *Knight v. State*, 25 Ark. App. 353, 758 S.W.2d 12 (1988).

A person's intent or purpose cannot normally be shown by direct evidence, but may be inferred from the facts and circumstances shown in evidence; therefore, the jury is allowed to draw upon common knowledge and experience. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002). In addition, there is a presumption that the accused intends the natural and probable consequences of his actions. *Price v. State*, 347 Ark. 708, 66 S.W.3d 653 (2002).

Cox asserts that the State did not prove its case because Cox testified that he simply showed Blankenship the gun to prevent him from illegally removing the bed from the house. While there was varied testimony on what actually occurred during the altercation, the jury was free to believe the

testimony that Cox pointed the gun at Blankenship's head, threatened to send Blankenship to meet Jesus, and threatened to kill Blankenship's entire family. By Cox's own admission, he intended to frighten the victims so as to deter them from taking his property. Again, it is the province of the jury to weigh the evidence. Here, it is sufficient that Cox threatened to cause death with the intent to instill fright; it was not necessary for the State to prove that Blankenship was actually frightened, that Cox terrorized him over a long period of time, or that Cox was immediately able to carry out the threats.

Cox also argues that the 1988 Supplementary Commentary to Ark. Code Ann. § 5-13-301, states that the code provision was intended to reach repetitive conduct creating a prolonged state of terror, and that the court erred in not giving the proper weight to this provision. While commentary to the criminal code is a "highly persuasive aid to construction," it is not controlling over the clear language of the statute. *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977).

Cox's next argument on appeal is that he was not brought to trial within twelve months of his arrest, which is a violation of his speedy trial rights. The Arkansas Constitution guarantees the right to a speedy trial. Under Arkansas law, the State is required to try a defendant charged in circuit court and incarcerated pursuant to conviction for another offense within twelve months, excluding any periods of delay authorized by Rule 28.3 of the Arkansas Rules of Criminal Procedure. *See Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000); Ark. R. Crim. P. 28.1 (b). The time for trial commences running from the date the charges were filed, except that if prior to that time the defendant has been continuously held in custody, or has been lawfully at liberty, the time for trial commences running from the date of the arrest. *See Turner v. State*, 349 Ark. 715, 80 S.W.3d 382 (2002); Ark. R. Crim. P. 28.2 (a) (2005).

Once a defendant demonstrates that the speedy trial period has expired, the burden shifts to the State to show that the delay was the result of the defendant's conduct or was otherwise legally justified. *See Moody v. Ark. County Cir. Court, S. Distr.*, 350 Ark. 176, 85 S.W.3d 534 (2002); *Miles*

v. State, 348 Ark. 544, 75 S.W.3d 677 (2002). When a trial occurs within the time limits prescribed by the Arkansas Rules of Criminal Procedure, there is a strong presumption that the trial meets constitutional requirements, and this presumption can only be overcome by a strong showing of prejudice. *Halfacre v. State*, 292 Ark. 331, 731 S.W.2d 179 (1987).

Cox was arrested on January 9, 2004, and his trial did not begin until May 18, 2005. Because Cox was not brought to trial by January 9, 2005, Cox made a prima facie case for a speedy-trial challenge. Thus, the State had the burden of proving that the extra 130 days were legally justified and excludable.

The case was originally set for pre-trial on September 27, 2004, and jury trial on September 28 and 29, 2004. On September 16 and 17, 2004, Cox filed a motion for continuance and an amended motion for continuance, alleging that one of his three attorneys had a calendar conflict and would not be available for trial on September 28 and 29. On September 20, 2004, Cox filed another motion for continuance stating that another of his attorneys had a conflict due to a separate trial which had already previously been rescheduled two times. In all three motions, Cox waived his speedy trial rights should the motion be granted. On September 27, 2004, the trial court made an entry on the docket noting that pre-trial had been reset for January 18, 2005, and jury trial slated for February 2 and 3, 2005.

The period of delay from September 27, 2004, to February 3, 2005, a total of 130 days, is attributable to Cox. Delays that result from continuances given at the request of the defendant are excluded in calculating the time for speedy trial. *Ferguson*, *supra*. Rule 28.3 (c) of the Arkansas Rules of Criminal Procedure provides that "all continuances granted at the request of the defendant or his counsel shall be to a day certain, and the period of delay shall be from the date the continuance is granted until such subsequent date contained in the order or docket entry granting the continuance."

Cox argues that this period of time cannot be attributed to him because there were no

explanations made in the docket entry stating the reasons for the continuance, in literal compliance with the rule, which states that:

> Such periods shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to speedy trial pursuant to Rule 28 unless it is specifically provided to the contrary below.

Ark. R. Crim. P. 28.3 (2005).

Our supreme court has maintained that it will uphold excluded periods without a written order or docket entry where the record clearly demonstrates that the delays were either attributable to the defendant or legally justified and where the reasons for the delay were memorialized in the proceedings at the time of the occurrence. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004). Here, in a letter addressed to counsel and dated December 15, 2005, the trial court stated that the continuance granted on September 27, 2004, was done so at the request of the defendant. Cox made no contemporaneous objection to that determination, and the letter is a part of the record. A contemporaneous objection to the excluded period is necessary to preserve an argument in a subsequent speedy trial motion. *Ferguson*, *supra*.

Accordingly, the 130-day period between September 27, 2004, and February 3, 2005, is attributable to Cox. If this time period is subtracted from the 495 days, the State brought the case within the requisite twelve-month period, and there is no speedy trial violation. Thus, Cox's challenges to other excluded time periods need not be addressed.

Cox's third argument on appeal is that the court erred in denying his motion for a mistrial based upon the hearsay and prejudicial testimony of Ann White. The trial court has wide discretion in granting or denying a motion for a mistrial, and its decision will not be disturbed on appeal absent a showing of manifest abuse of discretion. *Taylor v. State*, 77 Ark. App. 144, 72 S.W.3d 882 (2002). A mistrial is an extreme remedy and is only proper where the error is beyond repair and cannot be

corrected by any curative relief and justice could not be served by continuing with the trial. *Id.* Among the factors that an appellate court considers when determining whether a trial court abused its discretion in denying a motion for mistrial are whether the prosecutor deliberately induced a prejudicial response and whether an admonition to the jury could have cured any resulting prejudice. *Moore v. State*, 355 Ark. 657, 144 S.W.3d 260 (2004). The trial court has a fundamental duty to insure that a defendant's rights are protected and that he receives a fair trial as guaranteed by the Constitution. *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002).

During her testimony, White stated that she did not, at first, tell the police about the gun because Christina was afraid Cox would kill her if she ever had to testify against him. At the time of the trial, Christina Cox was deceased, and defense counsel objected to the statement. The court sustained the objection and admonished the jury to disregard the comment because it was hearsay. When White responded that she did not believe the statement was hearsay, defense counsel moved for a mistrial; the court denied this motion. Cox now argues that White's statement that he would kill someone who testified against him was highly prejudicial and could not be cured with a simple admonition to the jury.

Hearsay evidence is generally inadmissible. *Hampton v. State*, 357 Ark. 473, 183 S.W.3d 148 (2004); Ark. R. Evid. 802. However, the availability of the declarant is immaterial and hearsay is admissible where the statement is of the "declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. . . ." Ark. R. Evid. 803(3) (2006). The trial court has great discretion in evidentiary hearings, and its ruling on hearsay questions will not be reversed absent an abuse of discretion. *Hampton*, *supra*.

In this case, no curative instruction was actually required because White's testimony fell into a hearsay exception under Rule 803(3). White simply responded to the question of why she waited to report that Cox had a gun. However, the court did consider her statement to be hearsay and issued

an admonition to the jury. In addition, the court admonished the witness and the attorneys. Even if the classification of the statement as hearsay is correct, there is no fundamental unfairness or prejudice in denying the motion for mistrial. Not every admission of inadmissible hearsay or other evidence can be considered reversible error "unavoidable though limiting instructions." *Bruton v. U.S.*, 391 U.S. 123, 135 (1968). Our constitution merely guarantees a fair trial, not a perfect one. *Id.* In addition, this court will not presume prejudice. *Hanlin v. State*, 356 Ark. 516, 157 S.W.3d 181 (2004).

Here, Cox cannot demonstrate that it was fundamentally unfair of the court to issue an admonition rather than declare a mistrial. White only testified as to what her daughter believed, and did not attest to the truth of the matter asserted. In addition, the jury was capable of determining how violent Cox could get, as Cox himself testified that he did, in fact, brandish a gun. The trial court did not abuse its discretion in denying the motion for mistrial.

Cox's fourth argument on appeal is that the trial court erred in denying the admission of evidence that a warrant was also issued for Wesley Blankenship, but was withdrawn by the State prior to the prosecution of Cox. During trial, defense counsel proffered the following question and anticipated response:

> Q. To show possible bias or prejudice, I'd like to ask him if any charges were filed against him and then dropped by the prosecuting attorney's office growing out of the same incident.
>
> AR. I would anticipate the answer would be that there was a warrant issued that later was recalled prior to the filing of the warrant in this case against Mr. Cox.

Cox also attempted to have Officer Steve Finch testify about the warrant issued on Wesley Blankenship, but the court would not allow the testimony. Cox proffered that Officer Finch would testify that he had a proper and valid arrest warrant for Blankenship and that the warrant was subsequently withdrawn at the direction of the prosecution. Cox argues that Blankenship was an extremely biased witness and that Blankenship only testified in return for the State recalling the

warrant against him.

Absent a manifest abuse of discretion, the trial court's decision regarding exclusion of evidence will not be reversed. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998). Also, the trial court has considerable discretion in determining the scope of cross-examination. *See Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993). In the absence of a conviction, specific instances of conduct by a witness may be exposed on cross-examination only as they relate to the witness's character for truthfulness. Ark. R. Evid. 608(b)(1).

Proof of bias is almost always relevant, and denial of cross-examination to show the possible bias or prejudice of a witness could possibly constitute constitutional error. *Swinford v. State*, 85 Ark. App. 326, 154 S.W.3d 262 (2004). The denial of a defendant's opportunity to impeach a witness is subject to harmless error review. *Id*. In order to find that the error was harmless, this court must conclude beyond a reasonable doubt that the error did not contribute to the verdict. *Id*.

In this case, there is no evidence in the record that Wesley Blankenship was ever arrested or that he exchanged his testimony for the dismissal of the warrant against him. In addition, Blankenship, as the alleged victim and the brother-in-law of Christina, was already bound to be inherently biased. Even if the court erred in denying Cox an opportunity to cross-examine Blankenship about the alleged warrant, the error was harmless, as there were other witnesses who testified about the events of the day, and Cox, himself, admitted to brandishing the gun.

Cox's fifth and final argument is that the court erred in accepting the jury's inconsistent jury verdicts. He asserts that because the jury convicted him of the lesser-included offense of assault in the third-degree, as opposed to aggravated assault, then the jury should not have convicted him of first-degree terroristic threatening. "Inconsistency" is generally understood to mean some logical impossibility or improbability implicit in the jury's findings as between jointly charged defendants.

Ray v. State, 342 Ark. 180, 27 S.W.3d 384 (2000). In the present case, the definition of inconsistent verdicts is not met.

Cox was originally charged with aggravated assault, which occurs if, "under circumstances manifesting extreme indifference to the value of human life, he or she purposely: (1) engages in conduct that creates a substantial danger of death or serious physical injury to another person." Ark. Code Ann. § 5-13-204(a)(1)(Repl. 2002). While the jury convicted Cox of terroristic threatening in the first degree, it convicted him of the reduced charge of assault in the third degree, which occurs if a person "purposely creates apprehension of imminent physical injury in another person." Ark. Code Ann. § 5-13-207 (a) (Repl. 2002).

In *Warren v. State*, 272 Ark. 231, 613 S.W.2d 97 (1981), our supreme court stated that the terroristic threatening statute does overlap with the assault statutes, and noted that the mere overlapping of statutory provisions did not render the statutes void or unconstitutional. In this case, three people testified that Cox pointed a gun at Blankenship's head and also threatened to kill Blankenship's entire family. The jury obviously believed that Cox purposely terrorized not only Blankenship but others not present with the threat of death as required under the terroristic threatening statute. The jury, however, did not need to also find Cox guilty of aggravated assault against Blankenship. The aggravated assault statutes require extreme indifference to the value of human life and engaging in conduct that creates a substantial danger of death or serious injury. During his testimony, Cox stated that he removed the bullets before he wielded the weapon; therefore, the jury was free to infer that no harm would have actually come to Blankenship. Still, even if the gun was unloaded, the jury could have believed that third-degree assault occurred because Cox created an imminent fear of apprehension in Blankenship. The trial court did not err in accepting the jury verdicts because they were, thus, not inconsistent.

Affirmed.

BIRD and BAKER, JJ., agree.