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ARKANSAS COURT OF APPEALS

DIVISION II

No. CACR09-360

REGINALD DUNAHUE, APPELLANT V. STATE OF ARKANSAS, APPELLEE	**Opinion Delivered** 2 DECEMBER 2009 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CR08-2430] THE HONORABLE BARRY SIMS, JUDGE AFFIRMED

D.P. MARSHALL JR., Judge

Reginald Dunahue appeals his conviction for the armed robbery of a convenience store. He was found guilty of aggravated robbery and sentenced to fifty years' incarceration. He does not challenge the sufficiency of the evidence supporting his conviction; his appeal addresses only the admission of certain testimony under Arkansas Rule of Evidence 701.

Early one morning at the Lones BP gas station, Delana Head was making biscuits when a man she later identified in both a photo lineup and at trial as Dunahue pointed a gun at her and said "[g]ive me all your money, [expletive]." The robber was wearing a bandana over his nose and mouth, some type of cap, and glasses. Head identified the

getaway car as a red or maroonish Ford. A usual customer at the BP witnessed the robbery from outside, noted the getaway vehicle as a Ford Contour or Escort, and provided the police with the car's license plate number. The vehicle bearing that license plate was registered to Dunahue. The police arrested him a few days later in his 1998 Ford Contour, which bore that same license plate. Officer J. P. Massiet found a bandana, silk cap, head cap, and a box of nine millimeter bullets in Dunahue's car. Officer Massiet also interrogated Dunahue.

At trial, Officer Massiet characterized Dunahue's behavior in custody as a "fishing expedition." Dunahue objected to this characterization.

> [Prosecution]: And at this point in time in your investigations, would you normally have taken a recorded statement?
>
> [Massiet]: Yes.
>
> [Prosecution]: And was that done?
>
> [Massiet]: No, sir.
>
> [Prosecution]: And why was that not done?
>
> [Massiet]: Well, we began to talk and Mr. Dunahue is a very intelligent person. And during our conversation it was like he was more on a fishing expedition trying to figure out what we knew more than what he wanted—
>
> [Defense]: Judge, I think the defendant, excuse me, the witness is speculating here. We're not giving what was in the contents of his statement.

[The Court]: What's your objection?

[Defense]: Speculation.

[The Court]: Overruled.

"Speculation" is a sufficient ground to preserve a Rule 701 objection. *Diffee v. State*, 319 Ark. 669, 681–82, 894 S.W.2d 564, 570–71 (1995).

After further testimony by Officer Massiet about the interrogation, the prosecutor used the phrase "fishing expedition" twice.

> [Massiet]: I saw that the interview wasn't going anywhere so I discontinued the interview myself.
>
> [Prosecution]: And you said that he was in a fishing expedition. Can you explain a little more?
>
> [Massiet]: He was trying to take over the interview himself.
>
> [Defense]: Judge, his opinion is irrelevant about this; what's important here is the responses to questions that were asked.
>
> [Prosecution]: And Judge, a negative response to a question or a manipulative response to a question is very indicative of—
>
> [Defense]: That's for the jury to decide, Judge.
>
> [The Court]: I'll allow it.
>
> [Prosecution]: And so they should be able to hear that. Continue, please.
>
> [Massiet]: I'm sorry, can you ask the question again?
>
> [Prosecution]: I guess the question was, exactly how was he on the fishing

expedition with you?

Defense counsel did not object to this third invocation of "fishing expedition." The State argues that, even though Dunahue objected twice, because he did not object at this third instance, he failed to preserve his Rule 701 argument for appellate review. We disagree.

To preserve an alleged evidentiary error, a party must object at the first opportunity and continue to object when the disputed issue arises again. *Hardman v. State*, 356 Ark. 7, 11–12, 144 S.W.3d 744, 746–47 (2004); *Vaughn v. State*, 338 Ark. 220, 224–25, 992 S.W.2d 785, 787–88 (1999). Dunahue did so. His first objection was contemporaneous with Officer Massiet's first "fishing expedition" opinion. When the prosecutor later used Officer Massiet's opinion in a question, Dunahue objected again. The circuit court overruled his objection again. This exchange preserved the issue for appeal by discharging Dunahue's obligation to keep objecting if a challenged question is re-asked. *Hardman*, *supra*; *Stephens v. State*, 328 Ark. 81, 89, 941 S.W.2d 411, 415 (1997).

"Fishing expedition" was said a third time only because Officer Massiet could not remember the prosecutor's question. And this exchange immediately followed the court's denial of Dunahue's second objection. If the court had sustained Dunahue's second objection, failed to rule on it, or the third reference had come after some

intervening testimony, then Dunahue would have waived the issue by not objecting a third time. *Compare Vaughn*, *supra*, *with Walker v. State*, 301 Ark. 218, 220, 783 S.W.2d 44, 45–46 (1990). But none of these things happened. On this record, Dunahue preserved his objection. *Vaughn*, *supra*.

On the merits of his evidentiary argument, this is a close issue. Arkansas Rule of Evidence 701 limits the "opinio[n] or inferenc[e]" testimony of non-expert witnesses to statements that are both "[r]ationally based on the perception of the witnesses; and [h]elpful to a clear understanding of his testimony or the determination of a fact in issue." It is not clear that Dunahue's evasiveness in custody was a fact in issue at trial. The fishing-expedition testimony, however, may have been helpful to a clear understanding of Officer Massiet's testimony.

But we affirm for two reasons. First, close calls on evidentiary matters rest within the circuit court's sound discretion. We see no abuse of that discretion here. *Ibid.* Second, the case against Dunahue was overwhelming. The Lones BP clerk who was robbed identified him and his vehicle without equivocation. And one of the gas station's customers saw the robbery and the get-away in Dunahue's car. Any error in the "fishing expedition" testimony was harmless. *Eastin v. State*, 370 Ark. 10, 21–22, 257 S.W.3d 58, 67 (2007).

Affirmed.

VAUGHT, C.J., and GLADWIN, J., agree.