ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-802

FRED JONES APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** FEBRUARY 25, 2009 APPEAL FROM THE POINSETT COUNTY CIRCUIT COURT, [NO. CR2007-227] HONORABLE VICTOR HILL, JUDGE AFFIRMED

KAREN R. BAKER, Judge

A jury in Poinsett County Circuit Court convicted appellant Fred Jones of attempted first-degree murder of his ex-wife, Elizabeth Ann Jones. He was sentenced to twenty-eight years' imprisonment in the Arkansas Department of Correction. Appellant presents three arguments for reversal. First, he challenges the sufficiency of the evidence to support his conviction. Second, he asserts that the trial court erred in denying his motion for a mistrial. Third, he asserts that the trial court erred in allowing the State to comment during closing argument that the evidence was "uncontroverted." Finding no error, we affirm.

I. Sufficiency of the Evidence

In his first point on appeal, appellant challenges the trial court's denial of his motion for a directed verdict. A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Gikonyo v. State*, 102 Ark. App. 223, ___ S.W.3d ___ (2008). The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial

evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict. *Id.* The credibility of witnesses is an issue for the fact finder and not for the appellate court. *Id.* The fact finder may resolve questions of conflicting testimony and inconsistent evidence and may choose to believe the State's account of the facts rather than the defendant's. *Id.*

A person commits first degree murder if, "[w]ith the purpose of causing death of another person, he causes the death of another person." Ark. Code Ann. § 5-10-102(a)(2) (Repl. 2006). A person attempts to commit an offense if he "purposely engages in conduct that [c]onstitutes a substantial step in a course of conduct intended to culminate in the commission of an offense[.]" Ark. Code Ann. § 5-3-201(a)(2) (Repl. 2006). Arkansas Code Annotated section 5-2-202(1) (Repl. 2006), states that a person acts purposely with respect to his conduct when it is the person's "conscious object to engage in conduct of that nature or to cause the result."

Appellant sought dismissal below, arguing that the State failed to prove, either by direct or circumstantial evidence, that he acted with the requisite intent to commit attempted first-degree murder. Appellant pointed out that all or some of Elizabeth's injuries could have been sustained when she fell into the water. A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *DeShazer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006). Because intent cannot be proven by direct evidence, the fact finder is allowed to draw upon common knowledge and experience to infer it from the circumstances. *Id.* Due to the difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.*

A review of all the evidence reveals that on April 19, 2007, appellant brought lunch to his ex-

wife, Elizabeth, at her place of work. Elizabeth had previously explained to appellant that she had only twenty minutes for lunch that day and that they would have to eat in the parking lot. However, after Elizabeth climbed into appellant's truck, appellant drove off. While driving, appellant asked for Elizabeth's cellular phone. Elizabeth testified that he put the phone between his legs and would not give it back to her. Appellant drove Elizabeth to a secluded, gravel road. Elizabeth testified that while traveling down the road, appellant began saying things such as, "I am not good enough to sleep at your house or on your floor." She explained that appellant had asked to stay at her house the night before, but she did not allow him to do so. Appellant then pulled to the middle of a bridge and told Elizabeth to get out of the truck. Appellant exited the truck and threw her cellular phone into the bed of the truck. Elizabeth testified that at this point appellant's demeanor changed. He became angry. He walked around to the passenger side of the truck where Elizabeth was sitting. As he approached her side of the vehicle, she saw a knife in appellant's hand. At that point, she began to run from appellant.

Elizabeth made it only to the end of the bridge. It was there that appellant caught her and threw her to the ground, breaking her hip and injuring her knee. Elizabeth tried to get up, but appellant dragged her back to the middle of the bridge, telling her that she now knew what it was like to beg. Once the two were back to appellant's truck, Elizabeth could feel blood running down her face. She testified that "the next thing [she] knew he was stabbing [her]." Elizabeth passed out momentarily. However, when she was regaining consciousness, she felt appellant push her over the edge of the bridge into the water below. Although she was unable to swim, when she hit the water, she was able to secure herself on a stump. She testified that appellant threw her a rope, but she would not take the rope, as she did not want to give him "a second chance to do the job he was trying to do."

It was at this point that Charles Strange and David Holder heard Elizabeth's cry for help. Strange and Holder were driving nearby when they heard her cries, and they stopped to help. Both men saw appellant attempting to throw Elizabeth the rope. Holder also noticed fresh blood on the bridge. When appellant learned that Strange and Holder had called the police, however, he threw the rope at Elizabeth, told her to "get herself out of the water," and left the scene. Holder testified that Elizabeth told him that appellant had stabbed her.

Upon their arrival at the scene, EMTs pulled Elizabeth from the water. Cordel Laden testified he could see approximately ten puncture wounds around her neck and shoulder area and several wounds to her right arm and hand. He testified Elizabeth had lost an extensive amount of blood and was suffering from the effects of submersion in the very cold water. He attempted to apply pressure to her wounds in order to stop the bleeding, while his partner, Hunter Wright, tended to the injuries to her leg. Laden testified that her "wounds and lacerations were consistent with knife wounds." Elizabeth told Laden that "he stabbed [her]" and that she had been thrown off the bridge. After preparation and treatment by the EMTs, Elizabeth was flown to a Memphis hospital trauma center.

Poinsett County Sheriff's Detective Mark Robinson testified that he photographed the wounds on Elizabeth's neck and shoulder area. He stated that she had approximately fourteen puncture wounds. He stated that the wounds appeared to be from a thin-bladed instrument. He also photographed the blood stains on the bridge and blood splatters that were found from the area around the hood of appellant's truck to the front bumper. Hope Burdette, a dispatcher with the Marked Tree Police Department, testified that on April 19, 2007, appellant came into the department and told Burdette that he and Elizabeth had gotten into a fight and that she had fallen off a bridge. Sergeant Brad Kirby testified that appellant also told him about the fight and that Elizabeth had fallen off the

bridge.

From these facts, the jury could have reasonably found that appellant had the requisite intent to commit attempted first-degree murder. Appellant took Elizabeth from her workplace to a remote location. He tricked her into giving him her cell phone. While on the secluded bridge, appellant's demeanor changed; he became angry and produced a knife. He stabbed Elizabeth approximately fourteen times in the back of the neck and shoulders and pushed her off the bridge into the river. When he discovered that a passerby had heard Elizabeth's cries for help and notified police, appellant left the scene while Elizabeth was injured and remained in the water unable to swim. Elizabeth testified unequivocally that appellant broke her hip, injured her knee, stabbed her numerous times, and threw her off the bridge. She told Strange and Holder that appellant stabbed her. Blood was found on appellant's truck and on the bridge. Appellant went to the police department and informed officers that he and his ex-wife got into an argument and that she fell off a bridge. This evidence, when viewed in the light most favorable to the State, is sufficient to prove that appellant possessed the requisite state of mind for attempted first-degree murder of his ex-wife, Elizabeth.

II. Prosecutor's Questioning of Appellant's Character Witness During Sentencing

For his second argument, appellant contends that the trial court erred in refusing to grant a mistrial based on remarks made by the prosecutor during the sentencing phase of the trial. During the sentencing phase, the prosecutor was questioning appellant's brother, Joe, one of appellant's character witnesses. The prosecutor asked Joe whether he had seen the blood stains on the bridge. The following colloquy took place:

PROSECUTOR: And again, you weren't there when all that went on.

JOE JONES: No.

PROSECUTOR: Didn't hear her screaming for help did you?

JOE JONES: No.

PROSECUTOR: Did you see the blood stains on the bridge?

DEFENSE COUNSEL: Your Honor, note my objection again. May we approach, Your Honor?

THE COURT: All right. Sustained. Mr. [Prosecutor], you made your point.

Appellant objected and moved for a mistrial, arguing to the trial court that the prosecutor was asking the questions solely to "inflame and prejudice this jury." The circuit court denied the motion. Appellant did not request that a cautionary instruction be read to the jury.

It is well settled that a mistrial is an extreme remedy that should be granted only when the error is beyond repair and cannot be corrected by curative relief. *Brown v. State*, 74 Ark. App. 281, 47 S.W.3d 314 (2001). A trial court has wide discretion in granting or denying a motion for a mistrial, and the appellate court will not disturb the court's decision absent an abuse of discretion or manifest prejudice to the movant. *Id.* However, among the factors we consider on appeal is whether the defendant requested a cautionary instruction or admonition to the jury, and the failure of the defense to request an admonition may negate the mistrial motion. *Rohrbach v. State*, 374 Ark. 271, ___ S.W.3d ___ (2008).

Appellant asserts that he was prejudiced by the prosecutor's comments as they were made solely to "inflame" the jury. Here, however, appellant would not necessarily be entitled to the relief he requests on appeal because appellant failed to request that the jury be admonished to disregard the prosecutor's comment. *See Weaver v. State*, 324 Ark. 290, 920 S.W.2d 491 (1996) (when there is doubt as to whether the trial court abused its discretion, a failure to request an admonition will negate a mistrial motion); *see Moore v. State*, 87 Ark. App. 385, 192 S.W.3d 271 (2004) (stating that it is the defendant's obligation to request a curing instruction, and a failure to request one will not inure to

the defendant's benefit on appeal). Moreover, appellant failed to demonstrate that he was prejudiced by the prosecutor's comments. As the State points out, appellant's twenty-eight-year sentence was within the statutory range and was less than the maximum sentence within the statutory range for a Class A felony. *See* Ark. Code Ann. § 5-4-401(a)(2) (Repl. 2006) (stating that the statutory range for a Class A felony is not less than six years nor more than thirty years). A defendant who has received a sentence within the statutory range short of the maximum sentence cannot show prejudice from the sentence itself. *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002) (citing *Young v. State*, 287 Ark. 361, 699 S.W.2d 398 (1985)). We hold that the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

III. Prosecutor's Comments During Closing Argument

For appellant's final argument on appeal, he contends that the trial court erred in allowing the prosecutor to comment that the evidence was uncontroverted, a comment that was an improper reference to the fact that appellant did not testify on his own behalf. We do not address the merits of this argument because appellant failed to make a contemporaneous objection below.

This court was presented with a similar issue in *Kelley v. State*, 103 Ark. App. 110, ___ S.W.3d ___ (2008). There this court stated:

> In *Smith v. State*, 330 Ark. 50, 53-54, 953 S.W.2d 870, 871-72 (1997), our supreme court held:
>
> > In order to be timely, an objection must be contemporaneous, or nearly so, with the alleged error. *Jones v. State*, 326 Ark. 61, 931 S.W.2d 83 (1996). To preserve a point for appeal, a proper objection must be asserted at the first opportunity after the matter to which objection has been made occurs. *Asher v. State*, 303 Ark. 202, 795 S.W.2d 350 (1990), *cert. denied*, 498 U.S. 1048 (1991). Where the allegation of error concerns a statement made by the prosecutor during argument, the defendant must make an immediate objection to the statement at issue in order to preserve the allegation for appeal. *Wallace v. State*, 53 Ark. App. 199, 920 S.W.2d 864 (1996) (citing *Butler Mfg. Co. v. Hughes*, 292 Ark. 198, 729 S.W.2d 142 (1987)).

. . . .

> Likewise, motions for a mistrial must be made at the first opportunity. *Smith*, 330 Ark. at 54, 953 S.W.2d at 872 (citing *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996); *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996); *Johnson v. State*, 325 Ark. 197, 926 S.W.2d 837 (1996)). In *Ronning v. State*, 295 Ark. 228, 748 S.W.2d 633 (1988), the defendant argued on appeal that the prosecutor's closing argument commented on the defendant's failure to testify as evidence of guilt; however, our supreme court held that because the defendant failed to make a contemporaneous objection at trial, the argument was not preserved for our review. In *Ronning*, the court stated: "In hundreds of cases we have repeated the fundamental rule that an argument for reversal will not be considered in the absence of an appropriate objection in the trial court." *Id.* at 235, 748 S.W.2d at 637.

Kelley, 103 Ark. App. at 119-20, ___ S.W.3d at ___ (2008).

Here, the prosecutor's allegedly improper comment was made during his closing argument. Appellant failed to make any objection to the comment or move for a mistrial. Accordingly, this issue was not preserved for our review, and we do not address it.

Based on the foregoing, we affirm appellant's conviction.

GRUBER, J., agrees.

PITTMAN, J., concurs.