ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION I

CACR03-395

May 31, 2006

JEFF T. WALTON
APPELLANT

AN APPEAL FROM HOWARD COUNTY CIRCUIT COURT
[CR02-15]

V.

HON. CHARLES A. YEARGAN, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

A Howard County jury convicted appellant Jeff Walton of delivery of crack cocaine and sentenced him to 360 months in the Arkansas Department of Correction. After four attempts to submit a no-merit brief,[1] his attorney filed an adversarial brief arguing that the trial court erred in not suppressing appellant's statement to the police. Specifically, he contends that the statement should have been suppressed because the State failed to produce a material witness or explain said witness's absence. He also contends that the statement should have been suppressed because its prejudicial effect far outweighed its probative value. We affirm.

Factual and Procedural History

At a pre-trial hearing, appellant moved to suppress a statement that he made to the

[1]*See Walton v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (Feb. 15, 2006); *Walton v. State*, CACR 03-395 (Ark. App. June 29, 2005) (not designated for publication); *Walton v. State*, CACR 03-395 (Ark. App. Jan. 12, 2005) (not designated for publication); *Walton v. State*, CACR 03-395 (Ark. App. June 30, 2004) (not designated for publication).

police. Officer Sedric Reed of the Arkansas State Police testified that he, appellant, and Special Agent Joseph Beavers were sitting in a secured area in the Howard County Jail. Officer Reed stated that he attempted to record the interview; however, appellant did not want him to do so. He did not press the issue of recording the interview because appellant was being cooperative. Appellant did not want to write out the statement; so, Officer Reed wrote it for him. Officer Reed testified that he could not write down everything that appellant said and that the statement was a summation of the high points of the interview. The statement read:

> I know what I'm facing. Right now I want to find out about a deal. There is a guy in Texarkana who is dealing 70 or 80 ounces. I can probably set up a buy of about 15 or 20 ounces. His street name Pip and he drives a green Cadillac. This girl I'm seeing, her brother usually helps me find my dope when I'm over there. I am willing to do anything to help myself. I knew I was living wrong and that it was going to catch up to me. I'm not as big a dealer as people think. I have a family and don't want to do a lot of time.

Officer Reed testified that he told appellant the only thing he could promise was that he would talk to the prosecutor. He stated that appellant did most of the talking during the interview and that "[w]e were the ones trying to end the interview because we had been in there quite a while. I wanted to end it because he was asking me for things I couldn't promise."

On cross-examination, Officer Reed denied threatening appellant and stated that he did not need to threaten appellant because appellant was cooperating. He also denied threatening to revoke appellant's probation but testified that he informed appellant that his probation was probably going to be revoked. On further examination, Officer Reed noted that his paperwork erroneously stated that the transaction in question in this case occurred Tuesday, July 10, 2001. He was certain the actual date of the transaction that he witnessed was Thursday, July 12, 2001.

Appellant moved to exclude Officer Reed from testifying at trial, arguing that he did not know what date the transaction took place. The trial court denied the motion, stating that Officer Reed's knowledge of the date the transaction took place went to his credibility, not the admissibility of his testimony. Appellant also moved to exclude his written statement, arguing that it was a generalized statement and did not relate specifically to the charge. The trial court denied that motion, finding that appellant knowing, freely, and voluntarily gave the statement and that the statement was connected with the particular offense for with appellant was charged. Finally, because of the confusion of the dates on Officer Reed's reports, appellant moved to prevent the State from discussing any other charges against him. The trial court granted that motion and stated that evidence of other charges would be inadmissible unless appellant "opened the door."

Trial was held on September 20, 2002. Testimony at trial shows that on the evening of July 10, 2001, Officer Reed went to appellant's barber shop to determine if appellant knew him. Officer Reed did not recognize appellant, and appellant did not recognize him. On July 12, 2001, Reed picked up confidential informant Jerome Henry. Henry had forgery charges pending. Before leaving Henry's residence, Officer Reed made Henry empty his pockets to make sure he did not have any drugs or money on him. He then gave Henry $225. Henry went into appellant's barber shop to make sure appellant was present. Henry then left the barber shop to tell Officer Reed that appellant was there, and the two went back inside. After they went back in, Officer Reed witnessed both the money and a package being exchanged. After the exchange, Officer Reed and Henry left appellant's shop, and Henry set the drugs on the console of Officer Reed's car. On cross-examination, Officer Reed testified that he did not know where Henry was that day, but he understood that the pending charges were to be dropped because Henry had worked for Officer Reed.

Appellant denied selling drugs to Henry. He stated that Henry asked him about some drugs, but he told Henry that he did not sell drugs. Appellant also testified that Officer Reed wanted him to help him set up a bust of a dirty police officer and that, if he helped, Officer Reed "would make my problems go away." Appellant testified that "I needed to give him something or he would violate my probation." He denied saying, "I know what I'm facing," and testified that he probably signed the statement because he said that he would sign anything. Appellant claimed that Officer Reed told him, "I will tell the Judge, I'm a state trooper and you're a convicted felon. Who do you think they're gonna believe?"

The jury returned with a verdict of guilty of delivery of a controlled substance. The jury later sentenced appellant to thirty years in the Arkansas Department of Correction.

On October 9, 2002, the trial court held a hearing on appellant's motion for a new trial. At the hearing, appellant asked for a continuance to allow time to produce the witness who signed an affidavit alleging juror misconduct. Appellant thought the State would summon the jury panel and had not realized that the State did not do so until the morning of the hearing. The trial court denied appellant's motion, stating that appellant had nine days' notice of the hearing.

The basis for appellant's motion for new trial was an affidavit signed by juror Rebecca Hawkins, which stated in pertinent part:

> That she along with two (2) other individuals on the jury panel voted for a not guilty verdict in favor of Jeff Walton and against the state. That the foreman of the jury informed her along with the other jurors that unless they voted all together they could not leave that they either had to vote all for a guilty verdict or all against a guilty verdict. That at no point did anyone on the jury including the juror foreman advise her that she did not have to vote guilty, that she could have maintained her not guilty verdict and end the trial with a hung jury. She was told she could not leave the jury room without voting with the other jurors for conviction. That she at no time thought that under the evidence Jeff Walton was guilty of the crime charged and continues through this day to have the same feelings and belief.

The court denied the motion, stating that what goes on in the jury room is sacred, as

far as the deliberations among the jurors. He also stated that it was not the foreman's duty to advise individual jurors of their rights.

Counsel's Argument on Motion to Suppress

Appellant, through counsel, argues that the trial court should have suppressed the statement because the State failed to produce a material witness, specifically Agent Beavers, or explain his absence. He contends that, once he testified that he was coerced into giving the statement, the State was bound to call Agent Beavers to testify about the events leading up to the statement.

We review a motion to suppress a statement by making an independent determination based on the totality of the circumstances. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). The burden is on the State to prove by a preponderance of the evidence that a confession was given voluntarily and was knowingly and intelligently made. *Id.* In order to determine whether a waiver of *Miranda* rights was voluntary, we look to see if the confession was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Id.*

Where an accused has offered testimony that his confession was induced by violence, threats, coercion, or offers of reward, the State has the burden to produce all material witnesses who were connected with the controverted confession or give an adequate explanation of their absence. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004); *Smith v. State*, 254 Ark. 538, 494 S.W.2d 489 (1973); *Oliver v. State*, 77 Ark. App. 202, 72 S.W.3d 547 (2002). A defendant's failure to specifically raise the issue in the trial court or on appeal does not relieve the State of its burden to produce all material witnesses. *Fairchild v. State*, 349 Ark. 147, 76 S.W.3d 884 (2002) (overruled on other grounds); *Brown v. State*, 347 Ark. 44, 60 S.W.3d 422 (2001); *but see Johnson v. State*, 325 Ark. 197, 926 S.W.3d 837

(1996) (holding that the appellant's material-witness argument was barred when he failed to challenge the voluntariness of his statement at trial below).

As an initial matter, we conclude that Agent Beavers was a material witness. In *Oliver v. State*, *supra*, the State failed to call a detective who was present during an interrogation but took no significant part in the questioning. The appellant alleged that officers threatened to beat him during the interrogation. We held that the detective was in a position to observe the alleged coercion and should have been called as a witness. *But see Hayes v. State*, 269 Ark. 47, 51, 598 S.W.2d 91, 94 (1980) (holding that a lieutenant was not a material witness when the "only part" he played in the interrogation were the statements "You might as well tell us the truth because we are going to find out," and "What the son-of-a-bitch got, she deserved."). There was testimony that Agent Beavers was present, giving him an opportunity to observe any alleged coercion or false promises. Accordingly, he is a material witness.

However, when there is no specific evidence to refute, the State's burden to produce all material witnesses does not arise. *Anderson v. State*, *supra*; *Fairchild v. State*, *supra*. Here, Officer Reed was the only witness to testify at the suppression hearing. While appellant cross-examined Officer Reed on whether he had coerced appellant or made any promises, appellant gave no testimony or other specific evidence that he was coerced into giving an involuntary statement at the suppression hearing. When the statement was introduced at trial, appellant renewed his objection, but there had still been no specific evidence of coercion at that point.

It was not until appellant presented his case that he presented evidence that he was coerced. All of his objections to the statement were made prior to his testimony, and none of these motions were renewed after the testimony.

Our decision in *Profit v. State*, 6 Ark. App. 51, 637 S.W.2d 620 (1982), is helpful. There, appellant made no motion to suppress his statement until during trial. This court noted:

> Although not required to do so the trial court permitted the untimely motion and determined the issue of voluntariness. Under the circumstances the failure to make timely objection in no way weakened the State's burden of proving voluntariness. The failure to disclose the objection in a timely motion, however, can affect the State's obligation to produce all material witness to the confession at the hearing.
>
> We conclude from all of the circumstances surrounding the incident that absent a denial of a specific request that Officer Fulks be produced, the denial of the other officer present that such a statement was made, if believed, sufficiently rebutted the self-serving statement made by the appellant.

Id. at 56, 637 S.W.2d at 623.

Here, appellant presented no evidence relating to the involuntary nature of the confession until after the trial court ruled on the motion to suppress and on the renewed motion to suppress. Following *Profit*, we hold that appellant's failure to provide the State an opportunity to comply with the material-witness rule affected its obligation to produce all material witnesses to the confession. Had appellant presented evidence of a coerced confession at the suppression hearing (or renewed his objection at some point after evidence was presented), then our ruling may have been different; however, appellant should not be able to require the State to abide by the material-witness rule after he had been given many previous opportunities to present evidence of a coerced confession, yet failed to do so.

Appellant relies on *Smith v. State*, 256 Ark. 67, 505 S.W.2d 504 (1974), in support of his argument that the State still had the obligation to present all of the material witnesses to the confession. There, the appellant objected to the police officer reading the *Miranda* form signed by the appellant, but he asked that the circuit judge reserve his ruling until after he had an opportunity to testify on the subject. Another objection was made when the officer read

the actual statement, but again, the appellant asked the court to reserve its ruling. The court later denied the objection. In reversing the trial court, the supreme court noted that appellant's objection was general in nature, but that it was sufficient to put the burden of proving the voluntariness of the confession on the State. This burden included calling all material witnesses to testify. The instant case is distinguishable from *Smith*. Here, appellant challenged the motion to suppress in a pretrial hearing, received a ruling on the motion, and received a ruling on the renewed motion during trial. All of this occurred prior to appellant offering any evidence that the confession was coerced. Unlike the appellant in *Smith*, appellant never asked the trial court to reserve ruling on the motion at any later point in the trial.

The State did not have an obligation to produce all material witnesses to appellant's confession in this case due to appellant's failure to timely present evidence that his confession was coerced. We affirm on this point.

Next, appellant argues that the statement should have been suppressed because the prejudicial effect of the statement far outweighed its probative value. He contends that the statement was not a confession to the commission of any crime and that the only relevance the statement had regarding the charges was to appellant's knowledge about how and where to get drugs.[2] Appellant's argument is not a constitutional challenge but an evidentiary ruling

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[2]Contrary to the State's argument, appellant did argue this point below. Specifically, appellant argued at the suppression hearing:

> Your Honor, in addition, we're here regarding the statement that has been introduced. If the Court will analyze that statement, it appears to be a generalized statement and has nothing to do specifically with this specific charge.
>
> Based on that, it appears to me that the probative value of that evidence for the State would be must less than the prejudicial portion would be to the Defendant in front of a jury. And for that reason, we're asking that it be excluded.

based on Rule 403 of the Arkansas Rules of Evidence (2005). Accordingly, this court reviews the admissibility of such evidence under the abuse-of-discretion standard. *Moore v. State*, ___ Ark. ___, ___ S.W.3d ___ (Apr. 21, 2005); *Skiver v. State*, 336 Ark. 86, 983 S.W.2d 931 (1999). Rule 403 requires the exclusion of relevant evidence if its probative value is *substantially* outweighed by the danger of unfair prejudice. The mere fact that the evidence is prejudicial is insufficient to exclude evidence; the prejudice must be unfair, and it must substantially outweigh the probative value. *Marvel v. Parker*, 317 Ark. 232, 878 S.W.2d 364 (1994).

Appellant was charged with delivery of a controlled substance. While the sentence "I know what I'm facing" may be general in nature, the rest of appellant's written statement refers to another delivery of a controlled substance and appellant's desire to help himself. A reasonable jury could conclude that appellant would want to help himself if he were in trouble. Appellant also admits, "I'm not as big a dealer as people think." This statement is in direct contradiction to appellant's testimony that he did not deal drugs. The statement tends to show that appellant has experience dealing drugs and that he wanted to do something to reduce his punishment. The statement might be prejudicial, but that prejudice does not substantially outweigh the probative value of the statement. We affirm on this point as well.

Affirmed.

GLADWIN and NEAL, JJ., agree.