ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

DIVISION IV

CACR05-180

MARCH 22, 2006

ALFONZO HENDRIX
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

AN APPEAL FROM THE NEVADA COUNTY CIRCUIT COURT [CR-2004-35-1]

HONORABLE JIM GUNTER, JUDGE

AFFIRMED

OLLY NEAL, Judge

Appellant Alfonzo Hendrix appeals from a ten-year sentence for his aggravated-robbery conviction by a Nevada County jury. For reversal, appellant advances seven points: (1) there was insufficient evidence to convict him; (2) the evidence presented to the jury was a case of robbery; (3) the show-up identification was unconstitutionally tainted and should have been suppressed; (4) the in-court identification should have been suppressed; (5) he was improperly denied his rights under Ark. R. Evid. 804 to impeach Shekitha Bryant with her confession to James Walker that she committed the crime in question; (6) the clothes found in his home should have been suppressed as a violation of the United States and Arkansas Constitutions; and (7) the out-of-court identification by the victim was fruit of the poisonous tree of the illegal search of appellant's house. Finding no error, we affirm.

At trial, Carl Vaughn testified that, at a few minutes after 1:00 a.m. on March 6, 2004, he had just arrived at his Prescott home from his job at Petit Jean Poultry in Gum Springs

Industrial Park and was reaching under the front seat of his car to get a pack of cigarettes when he felt someone's hand in his pocket. As Vaughn turned around, the perpetrator "fell" on Vaughn and pushed him into the car. Vaughn called out to his wife to contact the police, and as Vaughn tried to get out of the car, the perpetrator, a man Vaughn recognized from the neighborhood, swung a long stick at him. The stick hit the car, but not before shattering and hitting Vaughn under his eye. Vaughn recalled that his perpetrator wore a pair of black jeans, an old, dark-looking jacket, and an old cap pulled down around his head. The perpetrator took Vaughn's billfold that contained about six dollars, his license, and medical cards. As the perpetrator ran off, Vaughn threw the stick at him. Vaughn further testified that, although he knew where his perpetrator used to live, he could not remember his name. According to Vaughn, Officer Chris Fincher asked him if the man's name was "Alfonzo," to which Vaughn responded in the affirmative.

Officer Chris Fincher was dispatched to Vaughn's home. He testified that Vaughn had told him that he knew his assailant because he walked by his home often and had worked with him, and that, although he did not know his last name, the man's name was "Alfonzo." Officer Fincher testified that he knew Vaughn was talking about appellant; therefore, he and Officer Scott Sundberg left the scene and went to appellant's home. Fincher testified that they went to the door, and appellant answered. The officers told appellant what had just happened and asked if he knew Vaughn. Officer Fincher testified that appellant told them that he had not committed the crime and that he had just returned from the Shell gas station where he purchased himself a sandwich, chips, and a coke. Officer Fincher further stated that appellant invited them into his home to show them his recent purchase. Once inside, the officers noticed a pile of clothes on the floor beside appellant's bed. The items resembled those that Vaughn described his perpetrator as wearing during the incident. When asked

about the clothes, appellant stated that he had worn those clothes to work and had subsequently changed. Officer Fincher noted that he and Officer Sundberg looked in the clothing to see if a weapon or billfold was present. They found neither. However, Officer Sundberg found a red lined hat, which the officer believed resembled the one described to them by Vaughn.

Officer Fincher went back to Vaughn's home and brought him back to appellant's home. Officer Sundberg testified that he waited outside with appellant until Officer Fincher arrived with Vaughn. Once Vaughn identified appellant as his perpetrator, appellant was placed under arrest. At trial, appellant testified that he did not commit this crime. Also, James Walker, a man who claimed to be with appellant on the night in question, testified on appellant's behalf. He testified that a neighbor named Shekitha Bryant, who he testified was similar in build to the appellant, admitted to him that she had committed this crime. Bryant denied making such an admission to Walker. In response, appellant's counsel sought to impeach her based on the admission to Walker. The State objected, and the trial court sustained that objection. Subsequently, appellant was convicted of the charges against him, and it is from that conviction that he now brings this appeal.

Double jeopardy considerations mandate that we address the sufficiency of the evidence prior to any other assignments of trial error. *See Williams v. State*, ___ Ark. ___, ___ S.W.3d __ (Oct. 6, 2005). We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Bowker v. State*, ___ Ark. ___, ___ S.W.3d ___ (Sept. 29, 2005). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Williams v. State*, *supra*. Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or the other and pass beyond mere suspicion or conjecture. *Bowker v. State*, *supra*. On appeal, we

view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.* Additionally, when reviewing a challenge to the sufficiency of the evidence, we consider all the evidence, including that which may have been inadmissible, in the light most favorable to the State. *Williams v. State*, *supra.* Witness credibility is an issue for the fact-finder, who is free to believe all or a portion of any witness's testimony and whose duty it is to resolve questions of conflicting testimony and inconsistent evidence. *Lefever v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (May 18, 2005).

Although appellant does not properly abstract his motion for directed verdict, a review of the record reveals that appellant's motion was made and properly renewed. As he argued below, appellant asserts that there was insufficient evidence to convict him of aggravated robbery because there was no evidence to establish that he inflicted or intended to inflict death or serious physical injury to Mr. Vaughn. We find no merit in this argument.

A person commits aggravated robbery if he commits a robbery and (1) is armed with a deadly weapon or represents by word or conduct that he is so armed or (2) inflicts or attempts to inflict death or serious physical injury upon another person. Ark. Code Ann. § 5-12-103 (Repl. 1997). A person acts purposefully with respect to his conduct when it is his conscious object to engage in conduct of that nature or cause such a result. *See* Ark. Code Ann. § 5-2-202(1) (Repl. 1997). Intent or purpose to commit a crime is seldom proven by direct evidence and often is inferred from the circumstances. *Jones v. State*, 72 Ark. App. 271, 35 S.W.3d 345 (2000). Thus, a presumption exists that a person intends the natural and probable consequences of his acts because of the difficulty in ascertaining a person's intent. *Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1990). Also, the jury is allowed to draw upon its common knowledge and experience to infer intent in reaching a verdict from the facts directly proved. *Robinson v. State*, 293 Ark. 243, 737 S.W.2d 153 (1987).

In the instant matter, Vaughn testified that appellant pushed him into the car and then tried to hit him with a long stick. The code does not require Vaughn to have sustained serious physical injury. The statute clearly requires just that a person who commits a robbery is either armed with a deadly weapon or represents by words that he is so armed, or that he inflicts or attempts to inflict death or serious physical injury to another. Germane to this case is the fact that Vaughn noted that his perpetrator swung a long stick at him, and obviously, the perpetrator attempted to inflict serious physical injury to Vaughn by doing so. When the stick retracted from hitting the car, pieces of the stick hit Vaughn under his eye, causing him to bleed. The jury was allowed to draw upon its common knowledge and experience, and it was presumable that the natural and probable consequence of swinging a stick at someone is that it would cause serious physical injury. Accordingly, as substantial evidence supports the verdict, we affirm on this point.

Appellant argues second that the evidence, although insufficient to prove aggravated robbery, could support a finding of robbery. He asks this court to reduce the charge and sentence him or remand the case to the trial court for sentencing. The State charged appellant, by felony information, with aggravated robbery. Whether the evidence was sufficient to support such a charge was a question for the jury to decide, *see Barnes v. State*, 346 Ark. 91, 65 S.W.3d 389 (2001), and we will not attempt to second guess its determinations. *See Price v. State*, 347 Ark. 708, 66 S.W.3d 653 (2002).

As his third, fourth, and seventh points on appeal, appellant argues that the "show up" or out-of-court identification, as well as the in-court identification of him, was unconstitutionally tainted and should have been suppressed. The State argues that these arguments are procedurally barred because appellant failed to raise a contemporaneous objection to the identification at trial. We agree with the State. In *Edwards v. State*, ___ Ark.

___, ___ S.W.3d ___ (Jan. 27, 2005), our supreme court held that, when an appellant files a motion prior to trial requesting that the out-of-court identifications made by the witnesses be suppressed and the appellant does not object to the in-court identifications, his failure to object to the in-court identifications bars our review. Accordingly, we do not address these points.

However, had these arguments been preserved for our review, we would nevertheless have affirmed. It is the trial court's responsibility to determine if there are sufficient aspects of reliability in an identification to allow its introduction as evidence. *Millholland v. State*, 319 Ark. 604, 893 S.W.2d 327 (1995). We do not reverse a trial court's ruling on the admissibility of an identification unless it is clearly erroneous. *Id.* It is appellant's burden to prove that a pretrial identification was suspect. *Fields v. State*, 349 Ark. 122, 76 S.W.3d 868 (2002).

A pretrial identification violates due process when there are suggestive elements in the identification procedure that make it all but inevitable that the victim will identify one person as the perpetrator. *See Fields v. State*, *supra*. Nevertheless, even when the process is suggestive, the circuit court may determine that, under the totality of the circumstances, the identification was sufficiently reliable for the matter to be decided by the jury. *Id.* However, when the identification is followed by an in-court identification, we will not set aside the conviction unless the identification was so suggestive as to create a substantial possibility of misidentification. *See id.* (citing *Goins v. State*, 318 Ark. 689, 890 S.W.2d 602 (1995)). In determining reliability, the following factors are considered: (1) the prior opportunity of the witness to observe the alleged act; (2) the accuracy of the prior description of the accused; (3) any identification of another person prior to the pretrial identification procedure; (4) the level of certainty demonstrated at the confrontation; (5) the failure of the witness to identify the

defendant on a prior occasion; and (6) the lapse of time between the alleged act and the pretrial identification procedure. *Fields v. State*, *supra*; *see also United States v. Martin*, 391 F.3d 949 (8th Cir. 2004).

In the instant case, the identification process employed by the officers was unnecessarily suggestive and conducive to irreparable mistaken identification. In *Stovall v. Denno*, 388 U.S. 293 (1967), the Supreme Court reviewed the practice of showing a suspect singly for purposes of identification and the claim that the practice was so unnecessarily suggestive and conducive to irreparable mistaken identification that it constituted a denial of due process of law. The Court noted that the practice "has been widely condemned," but concluded that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." 388 U.S. at 302; *see also Neil v. Biggers*, 409 U.S. 188 (1972) (there was no due-process violation based on the totality of the circumstances because there was no substantial likelihood of misidentification where the victim had been in her assailant's presence for some time and had directly observed him, described her assailant, and made no identification of others presented at previous showups, lineups, or through photographs).

Here, under the totality of the circumstances and applying the reliability factors, there was no substantial likelihood of misidentification because Vaughn had a significant opportunity to view appellant. Indeed, Vaughn testified that he saw appellant's face when he (appellant) spun Vaughn around and pushed him into the car after trying to lift Vaughn's wallet from his pocket. Although Vaughn did not identify appellant by name, he told the officers that he knew his assailant from the neighborhood and had worked with him at one time. Vaughn described in detail what his assailant was wearing, and when presented with a suspect, Vaughn immediately identified appellant as the perpetrator. The time between the

identification and the crime was minimal. For these reasons, although the identification was suggestive, it did not create a substantial likelihood of irreparable misidentification when viewed from the totality of the circumstances.

This brings us to appellant's sixth argument that the clothes found in his home should have been suppressed as a violation of the United States and Arkansas Constitutions because the officer's use of the knock-and-talk procedure to gain entry into the home and the officers did not inform him of his right to refuse consent to a warrantless search. When we review a denial of a motion to suppress the evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the circuit court. *Simmons v. State*, 83 Ark. App. 87, 118 S.W.3d 136 (2003). Here, we conclude that the circuit court did not err in denying appellant's motion to suppress because the police's action of going to the appellant's home in order to request his assistance in a criminal investigation did not amount to a "seizure" under the Fourth Amendment. *See Scott v. State*, 347 Ark. 767, 67 S.W.3d 567 (2002).

In *Jackson v. State*, 86 Ark. App. 39, 158 S.W.3d 715 (2004) and *Jennings v. State*, 69 Ark. App. 50, 10 S.W.3d 105 (2000), we held that, pursuant to Ark. R. Crim. P. 2.2, an officer may seek cooperation from an individual while investigating a crime. In the present case, Officer Fincher was investigating a robbery when he made contact with appellant. He and Officer Sundberg went to appellant's home and knocked. When appellant answered the door, Officer Fincher informed appellant of his reason for being there and asked appellant if he knew Vaughn. Appellant informed the officers that he was not in the area at the time of the crime and that he had went to the Shell gas station to buy himself something to eat. Thereafter, appellant invited the officers inside to show them his food; while inside, the

officers noticed in plain view items of clothing that matched the description given by Vaughn. Police officers legitimately at a location and acting without a search warrant may seize an object in plain view if they have probable cause to believe that the object is either evidence of a crime, fruit of the crime, or an instrumentality of a crime. *Love v. State*, 355 Ark. 334, 137 S.W.3d 383 (2003). Because the officers were able to see the robbery-related items in plain view, there was probable cause to seize those items. Accordingly, we affirm the circuit court's denial of the motion to suppress.

Appellant's final argument on appeal is that the trial court erred in denying his right under Ark. R. Evid. 804 to impeach Shekitha Bryant with her confession to James Walker that she committed the crime in question. He claims that her out-of-court statement was an exception to the hearsay rule as a statement against interest under Rule 804(b)(3) or as residual hearsay under Rule 803(24). Trial courts have broad discretion in deciding evidentiary issues, and their decisions are not reversed absent an abuse of discretion. *Mendiola v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (Sept. 28, 2005).

Rule 804(b)(3) provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> . . . .
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> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offering to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Rule 803(24) reads as follows:

> (24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the

> court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Reading the first rule—804(b)(3)—we note that Bryant was clearly available. According to the Arkansas Rules of Evidence, a witness is "unavailable" only if she is absent from the hearing and the proponent of her statement has been unable to procure her attendance or testimony by process or other reasonable means. Ark. R. Evid. 804(a)(5). Here, Bryant was subpoenaed and ultimately called as a witness by defense counsel. Once on the stand, Bryant denied making a statement to Walker about robbing Vaughn. Walker's statement, which tended to expose Bryant to criminal liability and was offered to exculpate appellant, was inadmissible because it lacked corroborating circumstances that clearly indicated the trustworthiness of the statement.

Reading the second rule—803(24), also known as the residual hearsay exception,—the circuit court has considerable latitude under Ark. R. Evid. 803(24) to admit evidence that the court feels meets the spirit of the rule. *Hunt v. Perry*, 357 Ark. 224, 162 S.W.3d 891 (2004). This exception was intended to be used very rarely, and only in exceptional circumstances. *Flores v. State*, 348 Ark. 28, 69 S.W.3d 864 (2002). The rule is inapplicable because the requirements of the rule were not met. First, appellant failed to give the State advance notice that Rule 803(24) would be used at trial. The rule clearly requires this. Nor did the trial court make the necessary findings that the hearsay statement (1) is material, (2) is more probative than other evidence, and (3) serves the interests of justice, as required by the rule. Because these criteria were not met, we decline to hold that the trial court abused

its discretion by not admitting the statement under Rule 803(24). *See Flores v. State*, *supra*.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.