ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE K. BAKER DIVISION IV

CACR06-995

WILSON J. MCCRACKIN, JR.

NOVEMBER 28, 2007

APPELLANT

v.

APPEAL FROM THE ASHLEY COUNTY CIRCUIT COURT
[NO. CR2005-156-4A]

STATE OF ARKANSAS

APPELLEE

HONORABLE DON EDWARD GLOVER, CIRCUIT JUDGE

AFFIRMED

An Ashley County jury convicted appellant Wilson J. McCrackin, Jr. of aggravated robbery and theft of property and sentenced him to a term of 324 months in the Arkansas Department of Correction. It is undisputed that on August 19, 2005, Myran Mitchell and Robert Sherrer, who pleaded guilty, robbed the Delta Trust and Bank in Wilmot at gunpoint while appellant waited outside in a car and that appellant drove them away after the robbery. On appeal appellant challenges the sufficiency of the evidence for the jury to find that he was a willing participant in the scheme to rob the bank, rather than acting under duress, and the trial court's refusal to include robbery as a lesser included offense of the aggravated robbery. We find no error and affirm.

Appellant preserved the issue of the sufficiency of the evidence for appeal by making and renewing specific directed-verdict motions at trial. A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most

favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Furthermore, circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Id.* Whether the evidence excludes every other hypothesis is left to the jury to decide. *Id.* The credibility of witnesses is an issue for the jury and not the court. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person. Ark. Code Ann. § 5-12-102 (Repl. 2006 & Supp. 2007). A robbery becomes aggravated if the person is armed with a deadly weapon, represents by word or conduct that he is armed with a deadly weapon, or inflicts or attempts to inflict death or serious physical injury upon another person. Ark. Code Ann. § 5-12-103 (Repl. 2006 & Supp. 2007).

Our statute defining an accomplice reads as follows:

> (a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person:
>
> (1) Solicits, advises, encourages, or coerces the other person to commit the offense;
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> (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or
>
> (3) Having a legal duty to prevent the commission of the offense, fails to make a proper

effort to prevent the commission of the offense.

(b) When causing a particular result is an element of an offense, a person is an accomplice of another person in the commission of that offense if, acting with respect to that particular result with the kind of culpable mental state sufficient for the commission of the offense, the person:

(1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the particular result;

(2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the particular result; or

(3) Having a legal duty to prevent the conduct causing the particular result, fails to make a proper effort to prevent the conduct causing the particular result.

Ark. Code Ann. § 5-2-403 (Repl. 2006 & Supp. 2007). "A person acts purposely with respect to this or her conduct or a result of his or her conduct when it is the person's conscious object to engage in conduct of that nature or to cause the result." Ark. Code Ann. § 5-2-202 (Repl. 2006 & Supp. 2007). One cannot disclaim accomplice liability simply because he did not personally take part in every act that went to make up the crime as a whole. *Wilson v. State*, 365 Ark. 664, 232 S.W.3d 455 (2006). Defendant's mere presence at the crime scene does not make him an accomplice as a matter of law. *Id*. Factors relevant in determining whether person is an "accomplice" include presence of accused near the crime, accused's opportunity to commit the crime, and association with a person involved in the crime in a manner suggestive of joint participation. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002); *Davis v. State*, 77 Ark. App. 130, 72 S.W.3d 121 (2002).

In the case before us, it is undisputed that Mitchell and Sherrer committed the aggravated robbery and that appellant drove the car used to flee the scene of the crime. Appellant, however, asserts that he was under duress to participate in the bank robbery. He stated that he was in fear of his life or that of his family if he did not assist. Appellant testified that he knew Mitchell as a violent felon and that he feared him, but that he met Sherrer for the first time on the day of the

robbery. According to Mitchell's testimony, appellant, Mitchell, and Sherrer decided to drive from Little Rock to Wilmot to visit some of Sherrer's relatives who lived there. Mitchell stated that the men first discussed robbing the bank shortly before they got to Wilmot. Appellant then moved to the driver's seat when Mitchell got out of the car and removed the license plate. Mitchell and Sherrer had guns when Mitchell got back into the car. Mitchell further testified that appellant said that he wanted nothing to do with robbing the bank, but Mitchell replied that there was "no backing out" and that, if anything happened, "there could be consequences." He never specified what those consequences might be, adding that he never threatened to kill or hurt appellant if he did not participate. Mitchell also confirmed that he never told either the FBI agents or police officers that he had forced appellant to participate.

Sherrer's testimony was contradictory with Mitchell's stating that "everybody just kind of fell in" when Mitchell brought up the idea of robbing the bank, but he also asserted that appellant was not "for it" until they got to the bank. Sherrer stated that he never heard Mitchell mention that there would be consequences for not participating.

The question of whether appellant was under duress was a fact question for the jury to resolve. It is undisputed that appellant remained in the car while Mitchell and Sherrer were in the bank and then drove them away after the robbery. The defendant has the burden of proving an affirmative defense by a preponderance of the evidence, and the jury is the sole arbiter of whether or not he has sustained that burden. *Davis v. State*, 365 Ark. 401, ___ S.W.3d ___ (2007). Thus, a circuit court may enter a directed verdict on an affirmative defense only if there are no factual issues to be resolved by the jury. *Id*. Arkansas Code Annotated section 5-2-208 (Repl. 2006) defines duress as follows:

> (a) It is an affirmative defense to a prosecution that the actor engaged in the conduct charged to constitute an offense because the actor reasonably believed he or she was compelled to engage in the conduct by the threat or use of unlawful force against the actor's person or the person of another that a person of ordinary firmness in the actor's situation would not have resisted.
>
> (b) The affirmative defense provided by this section is unavailable if the actor recklessly placed himself or herself in a situation in which it was reasonably foreseeable that the actor would be subjected to the force or threatened force described in subsection (a) of this section.

Ark. Code Ann. § 5-2-208 (Repl. 2006).

We hold that substantial evidence supports the accomplice to aggravated-robbery conviction. It was for the jury to determine appellant's state of mind from the circumstances of the crime. *Jefferson v. State*, 359 Ark. 454, 198 S.W.3d 527 (2004). Under the facts of this case, it was also for the jury to determine, based on the evidence as a whole, if appellant had recklessly placed himself in the situation. Ark. Code Ann. § 5-2-208. Appellant testified that he knew Mitchell to be a violent felon prior to accompanying him in the vehicle. Furthermore, appellant's testimony confirms his actions of moving into the driver's seat, waiting for the two to return from robbing the bank, and then driving away from the scene of the crime. Accordingly, we find no error in the trial court's refusal to direct a verdict.

Neither do we find error in the trial court's refusal to instruct the jury on robbery as a lesser-included offense. While a trial court must instruct on a lesser-included offense when there is the slightest evidence to support giving the instruction, there must be a rational basis for doing so. *E.g., Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005). Both Mitchell and Sherrer testified that they had pleaded guilty to aggravated robbery. Although robbery is ordinarily a lesser-included offense of aggravated robbery, when the evidence is conclusive as to show that only aggravated robbery was committed, the judge need not instruct the jury on mere robbery. *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004). In the case before us, appellant admitted in redirect examination

by his own counsel that he knew Mitchell's history, that Mitchell had a gun, and that Mitchell "had the guts to go to a bank with a loaded gun." Accordingly, there was no rational basis for the trial court to instruct the jury on robbery as a lesser-included offense, and the trial court did not err by refusing to give the instruction.

Accordingly, we affirm.

ROBBINS and VAUGHT, JJ., agree.