NOT DESIGNATED FOR PUBLICATION
DIVISION III

CACR06-997

SEPTEMBER 26, 2007

SEAN MICHAUD APPELLANT	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. CR2004-88-III]
V.	HON. DAVID B. SWITZER, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Sean Michaud was convicted by a jury of manslaughter in connection with the death of Ashton Bass and sentenced to ten years in the Arkansas Department of Correction and fined ten thousand dollars. He raises four points for reversal on appeal. We reject them and affirm.

During the afternoon of February 5, 2005, Michaud was babysitting Ashton Bass, the fourteen-month-old son of his girlfriend, Michelle Breshears, while Michelle was doing errands. Later that evening, when Michelle returned, she noticed that something was wrong with the child. He was not moving or responding to her voice. She attempted to perform first aid, and Michaud called 911. Ashton was taken to the local hospital and then airlifted to Arkansas Children's Hospital and placed on life support. He never regained consciousness and died the next day.

Brandon Avant, a deputy sheriff with the Garland County Sheriff's Department, was the first officer on the scene. He testified that he arrived at the home at approximately 7:30 p.m. and immediately began helping the paramedics who were attempting to assist Ashton. After the ambulance took Ashton, Avant asked who had been with the child at the time of the accident. Michaud said that he was. Avant advised Michaud of his *Miranda* rights and told him that he was being held under investigative detention. Avant testified that Michaud told him: "I don't care what anybody says, I did not touch that child. I was lying on the couch, I got up, went to the bedroom where he was playing and found the child laying on the floor."

At the Sheriff's Department, Michaud met with Investigator Todd Sanders and Arkansas State Police Officer Dennis Morris in the Criminal Investigation Division. Sanders and Morris both testified that Michaud was advised of his *Miranda* rights and signed the form indicating that he had been so advised. Both officers also testified that Michaud had no questions about his rights and also signed a consent-to-search form for the search of his and Michelle's home. Michaud and Sanders then went to Michaud and Michelle's home where Sanders walked through the house and took some photos. They then went back to the Sheriff's Department where Sanders and Morris began questioning Michaud at 1:10 a.m.

Michaud was not in handcuffs when he went to the house or when he was being questioned. Morris said that he typed Michaud's statement, which Michaud signed at 2:05 a.m. In this statement, Michaud said that he tripped over the baby gate while he was holding Ashton and dropped him. He said that Ashton appeared to be fine so he took him back to

his room, set him on the floor, and went to the living room. After the statement was typed and signed, Morris left the conference room.

Sanders returned to the conference room and spoke with Michaud again. Sanders testified that Michaud said that he wanted to add to his statement. At 3:58 a.m., Morris returned to the conference room and typed another statement, which was also signed by Michaud. Michaud stated that his initial statement was true, but he added that, when he put Ashton in his room, Ashton kept crying. Michaud stated that he lost his temper and started shaking him. He stated further: "While I was shaking him, the back of his head hit the television. Then he went limp. I [laid] him down on the floor. He seemed to be breathing good at that point. I left the room and went and got on the couch and went to sleep." Michaud filed a motion to suppress this addition to his statement, which was denied by the trial court after a hearing.

I. Sufficiency of the Evidence

Michaud's first point on appeal is that the trial court erred in denying his motion for directed verdict. Specifically, he argues that the medical evidence was insufficient to support the conclusion that Ashton died from injuries caused by Michaud's reckless act. He claims that the conflicting testimony of the two doctors regarding the cause of death and whether the injuries were consistent with "shaken baby syndrome" did not rise to a level such that a reasonable jury could have concluded beyond a reasonable doubt that the crime of manslaughter was committed in this case.

We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id*. Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id*. On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id*. Credibility determinations are made by the trier of fact, which is free to believe the prosecution's version of events rather than the defendant's. *See, e.g.*, *Alexander v. State*, 78 Ark. App. 56, 77 S.W.3d 544 (2002).

Michaud was convicted of manslaughter pursuant to Ark. Code Ann. § 5-10-104 (Repl. 2006), which provides that a "person commits manslaughter if he recklessly causes the death of another person." A person acts "recklessly" if he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur, and the disregard of that risk is a gross deviation from the standard of care that a reasonable person would observe in the situation. *See Ellis v. State*, 345 Ark. 415, 418, 47 S.W.3d 259, 261 (2001); Ark. Code Ann. § 5-2-202 (Repl. 2006). We disagree with Michaud that the medical testimony was insufficient to establish that Ashton's death was caused by Michaud's reckless acts.

Dr. Stephen Schexnayder, Ashton's treating physician at Arkansas Children's Hospital, testified that Ashton had swelling around one eye and bruises on his neck that were unexplained by any routine medical care that he would have received. He said that Ashton

had a number of injuries, including retinal hemorrhages in both eyes, which is a "very uncommon injury with any type of accidental trauma" and "is primarily seen with shake injuries." Dr. Schexnayder also testified that Ashton had a skull fracture in an unusual place in the occipital area in a "branching pattern, which is something you don't see with just a child falling." Finally, he testified that the injuries were not consistent with a fall from a bed or simply dropping a child. He stated that Ashton's injuries would have had to have been caused by more than a simple fall and that the injuries could have been caused by blunt-force trauma.

Dr. Charles Kokes with the Arkansas State Crime Laboratory testified that the cause of Ashton's death was determined to be head and neck injuries. He stated that Ashton sustained a skull fracture involving the back right side of the skull and that the presence of subdural hematoma, or bleeding around the brain, and the fracture on the back of the skull were internal markers of blunt-force head trauma. He testified that the bruising to the back of the skull was an external marker of blunt force. He added that he would not expect to see this type of injury if the child was dropped on a carpeted surface. Finally, while Dr. Kokes agreed that falls as low as two meters may cause death or serious injury, he testified that at some point Ashton's head hit some surface hard enough, first, to fracture the skull and, second, to cause momentum such that the force hyperflexed his neck so when his head hit the surface his neck was bent suddenly and violently forward enough that it stressed the ligament on the back of the neck and tore it. He testified that a short term fall was not sufficient to explain the injuries and that the pattern of injury was more consistent with "a

deliberate striking of the child with the back of its head into an unyielding surface producing both the skull fracture and the hyperflexion injuries of the neck."

Viewing this evidence in the light most favorable to the State, we find that it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. We hold that the trial court did not err in denying Michaud's motion for directed verdict.

II. Motion to Suppress

Michaud's second point on appeal is that the trial court erred in denying his motion to suppress the addition he made to his statement. He argues that he repeatedly told Sanders that he wanted the questioning to end and that Sanders continued to talk to him, finally "wearing him down" until he gave a revised statement. The trial court denied Michaud's motion, finding that it was clear that Michaud was informed of his rights. The court then found that whether Michaud attempted to invoke his right to remain silent before he signed the amended statement was a credibility determination that the court found against Michaud, noting that Michaud signed the statement three times and initialed it eight times.

A statement made while in custody is presumed involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *Grillot v. State*, 353 Ark. 294, 310–11, 107 S.W.3d 136, 145 (2003). In order to determine whether a waiver of *Miranda* rights is voluntary, knowing, and intelligent we look to see if the confession was "the product of free and deliberate choice rather than intimidation, coercion, or deception." *Id.* When

reviewing the trial court's ruling, we make an independent determination based upon the totality of the circumstances. *Id.* The totality of the circumstances includes the age, experience, education, background, and intelligence of the defendant. *Conner v. State*, 334 Ark. 457, 466, 982 S.W.2d 655, 659 (1998). We will reverse a trial court's rulings on this issue only if it is clearly against the preponderance of the evidence. *Grillot*, 353 Ark. at 312, 107 S.W.3d at 146. Finally, the evaluation of the credibility of witnesses who testify at a suppression hearing is for the trial judge to determine, and we defer to the superior position of the trial judge on credibility issues. *See Flowers*, 362 Ark. 193, 206–07, 208 S.W.3d 113, 124 (2005). Conflicts in the testimony are for the trial judge to resolve, and the judge is not required to believe the testimony of any witness, especially that of the accused, since he or she is the person most interested in the outcome of the proceedings. *Id.*

During the suppression hearing, Michaud testified that he was read his rights at his home by Deputy Avant and that he understood those rights. He also testified that Investigator Sanders read him his rights at the Sheriff's Department and that he fully understood them. While he also testified that he made it clear that he was "done talking" and that he only signed the last statement to get away from Sanders and Morris, Sanders and Morris testified otherwise. Morris testified that Michaud made no request for the questioning to stop or indicated that he was "done talking." Sanders stated that Michaud did not say that he was "done talking" or that he would sign whatever they put on paper.

A defendant may stop questioning at any time by unequivocally invoking his right to remain silent. *See, e.g.*, *Whitaker v. State*, 348 Ark. 90, 95, 71 S.W.3d 567, 570 (2002).

However, the accused must be unambiguous and invoke his right with specificity. *Id.* at 97, 71 S.W.3d at 570. In this case, the trial court made a credibility determination that Michaud did not invoke his right to remain silent. We defer to the trial court's superior position to judge the credibility of the witnesses and hold that the trial court did not err in denying Michaud's motion to suppress his statement.

III. Spoliation

Michaud's third point on appeal is that the trial court erred in denying his motion to dismiss or in refusing to instruct the jury on the issue of spoliation of the evidence. Specifically, Michaud claims that, because the television— which allegedly caused Ashton's fatal injuries— was "not collected," his due-process right to examine exculpatory evidence was violated. The State responds, contending that Michaud's due-process argument is not preserved on appeal because it was not argued below. Moreover, it argues that an instruction on spoliation of evidence is designed to remedy litigation misconduct and requires proof of bad faith on the part of the police based on the destruction of evidence. In this case, the State asserts, Michaud has not alleged that the evidence was destroyed but merely "not collected." The State contends that Michaud has cited no authority for his proposition that "not collected" has the same legal significance as destroyed. Further, the State argues that neither defense counsel nor the court can require the State to take a particular investigative course in a criminal case. *See Landreth v. State*, 331 Ark. 12, 21, 960 S.W.2d 434, 438 (1998).

An instruction on spoliation is designed to remedy litigation misconduct. *Autrey v. State*, 90 Ark. App. 131, 141, 204 S.W.3d 84, 89 (2005). The State is only required to preserve evidence that is expected to play a significant role in a defendant's defense, and only if the evidence possesses both "(1) an exculpatory value that was apparent before it was destroyed, and (2) a nature such that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 142, 204 S.W.3d at 89. Further, in order to prove a due-process violation based on the destruction of potentially useful evidence, the defendant must also show bad faith on the part of the police. *Id.* at 142, 204 S.W.3d at 90.

First, Michaud has not even alleged that the television was destroyed, merely not collected. Further, Michaud does not argue that this evidence was not collected because of bad faith on the part of the police. Finally, it is well established that, in a criminal case, a witness may testify concerning tangible objects that are involved without producing the articles. *Johnson v. State*, 289 Ark. 589, 592, 715 S.W.2d 441, 443 (1986). The State was not obligated to take a particular investigative course or to examine every potential piece of evidence in case it might be exculpatory to the defense. *Landreth*, *supra*; *State v. Pulaski Cty. Circuit Court*, 316 Ark. 514, 516, 872 S.W.2d 414, 416 (1994). Defense counsel cannot simply rely on the State's investigation as a substitute for his or her own. *Landreth*, *supra*. We affirm the trial court's denial of Michaud's motion to dismiss.

IV. Rule 608 of the Arkansas Rules of Evidence

For his final point on appeal, Michaud contends that the trial court erred in not allowing him to cross-examine Sanders regarding allegations of misconduct that Michaud claims impacted Sanders's truthfulness. Rule 608(b) of the Arkansas Rules of Evidence provides that specific instances of conduct of a witness, other than conviction of a crime, may not be proved by extrinsic evidence. However, Rule 608(b) authorizes a court to permit such inquiry on cross-examination if it is probative of the witness's character for truthfulness. In order for cross-examination to be undertaken pursuant to this rule, this court has held that "(1) the question much be asked in good faith; (2) the probative value of the evidence must outweigh its prejudicial effect; and (3) the prior conduct must relate to the witness's truthfulness." *Farr v. Henson*, 79 Ark. App. 114, 122, 84 S.W.3d 871, 877 (2002).

During a hearing on a motion in limine filed by the State to limit Michaud's cross-examination of Sanders, Michaud argued that he should be permitted to inquire whether Sanders was involved in a theft of money, for which he was forced to resign or was fired. The trial court ruled that Michaud could not cross-examine Sanders about this because the prejudicial effect outweighed any probative value and the line of questioning would likely shift the focus from truthfulness to other bad acts of a witness.

The supreme court has held that whether a witness had previously stolen a gun was not probative of truthfulness. *Watkins v. State*, 320 Ark. 163, 168, 895 S.W.2d 532, 535 (1995). The court in *Watkins* relied upon its holding in *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982), that an absence of respect for the property rights of others, though an

undesirable trait, does not directly indicate an impairment of the trait of truthfulness. Trial courts have broad discretion in deciding evidentiary issues, and we will not reverse their decisions absent an abuse of discretion. *Shields v. State*, 357 Ark. 283, 166 S.W.3d 28 (2004). We see no abuse here.

Affirmed.

HART and GRIFFEN, JJ., agree.