ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION II

CACR 07-196

June 4, 2008

BRANDON D. SANDERS
APPELLANT

APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY
[NO. CR-05-2402-1]

V.

HONORABLE WILLIAM A. STOREY, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

A jury in Washington County found appellant Brandon Dwayne Sanders guilty of first-degree murder in the death of April Love and fixed his sentence at a term of twenty-five years in prison. Raising five issues on appeal, appellant argues that the trial court erred by denying his motion to suppress evidence because the reliability of the informants was not established; that the trial court erred by denying his motion to suppress evidence found within in a duffel bag because opening the bag required a separate warrant; that the trial court erred by denying his motion to suppress a statement he gave to the police because he was not advised of his Miranda rights; that the trial court erred by refusing to transfer the case to another venue; and that the trial court erred in denying his motions for a directed verdict. Finding no error, we affirm.

April Love was from Hope, Arkansas, and was a junior majoring in political science at the University of Arkansas in Fayetteville. On Thursday, September 16, 2005, Ms. Love's roommates

noticed a foul odor coming from Love's bedroom in their apartment. They had not seen Ms. Love in several days, and they alerted the apartment manager and maintenance man, who unlocked the door to Ms. Love's bedroom and saw what appeared to be a body under a comforter on the bed. The police were summoned, and they confirmed that there was a decomposing body under the comforter that was tightly wrapped in two bed sheets "like a mummy," as described by the officers. The body was clad only in a pair of underwear, and a garbage bag, that had been slit and had the bottom cut out, encircled the body's mid-section and genital area. Over twenty cotton balls were found between the underwear and the garbage bag. More cotton balls and a folded feminine napkin were discovered inside the underwear. The left arm was dripping a greasy, yellow substance that was later determined to be vegetable oil. Also, one earring was missing. The only visible injuries to the body were abrasions on both knees and feet. All indications were that the body was that of Ms. Love, but positive identification would come later through a comparison of dental records. Foul play was suspected, given the way the body was arranged. There were, however, no signs of a struggle in the bedroom.

The police discovered a purse in Ms. Love's bedroom, but her wallet, keys, driver's license, credit cards, and cell phone were not in it. Ms. Love's vehicle was located near the apartment, and blood stains were found on both the driver and passenger seats in the front. The rearview mirror was in the back seat area, and a palm print was lifted from it. A single flip-flop sandal was found, as well as an earring stud. A month later, an earring matching the one on the body was found inside the vehicle when it was being cleaned.

From speaking with Ms. Love's friends, the officers ascertained that Love had last been seen on Sunday, September 11. They also learned that appellant and Ms. Love had dated off and on since high school and that appellant, who lived in Nashville (Howard County) had spent the weekend of

September 9 to 11 with Ms. Love in Fayetteville. Reportedly, appellant had carried a blue duffel bag bearing the insignia of the United States Air Force during the visit.

Fayetteville detectives Tim Franklin and Sean Chandler drove to Hope to inform Ms. Love's parents, Ira and Magigor Love. From them, the detectives obtained descriptions of Ms. Love's possessions that were missing and confirmed her relationship with appellant. The detectives then drove to Nashville and asked the Howard County Sheriff's Office for assistance in locating appellant. When they arrived at appellant's home, his mother answered the door, and she became hysterical when told that they were inquiring about the disappearance of Ms. Love. The detectives had not released to the general public the information that Ms. Love was dead but instead were advising that she was a missing person. Appellant agreed to speak with them at the sheriff's office in Howard County, and he rode there with the detectives.

Appellant told the detectives that he had traveled to Fayetteville by bus the previous weekend and that Ms. Love had picked him up at the bus station. He said that they socialized with her friends and attended the Razorback football game against Vanderbilt on Saturday. Appellant stated that he felt uncomfortable and like a "tag-along" all weekend because Ms. Love was busy with her studies and other activities that he felt she should have cancelled to spend more time with him. He said that he last saw her at around two o'clock on Sunday afternoon when she dropped him off for a visit with his friends, Dejuan White and Brandon Johnson. Appellant went with these men to a bar and played pool. He said that he called Ms. Love but was not able to reach her, adding that it was not unusual for her not to talk to him for weeks at a time when she was mad at him. Appellant stated that he walked to the bus station and left Fayetteville in the early hours of Monday morning. Scratches were noticed on appellant's forearms that appellant said he had gotten while wrestling with a friend, Ryan Morbley.

Detective Franklin testified that appellant seemed cold, stoic, and unemotional during the interview and unconcerned about the well-being of Ms. Love. Franklin left the room and telephoned officers in Fayetteville for an update and learned that appellant may have been in Fayetteville longer than appellant had indicated. Also, he received information that Ms. Love's friends had been sending and receiving text messages to and from Ms. Love's cell phone. In particular, Ms. Love's cell phone records had been subpoenaed and revealed that her cell phone had been used at 1:45 a.m. on Friday, September 16, in the Howard County area. Appellant was confronted with this information and told that Ms. Love was dead. The detectives then asked appellant for permission to search his home, but appellant refused. The detectives also attempted to advise appellant of his rights, but appellant did not want to hear them because he believed that rights are given only when an arrest is imminent. According to the detectives, they assured appellant that he was not under arrest, at which time appellant asked to leave, and he did leave with members of his family who were waiting for him.

Detective Franklin applied for and obtained a warrant from a judge in Howard County to search appellant's residence. In appellant's bedroom, the officers found a blue duffel bag with an Air Force emblem, and inside it they located Ms. Love's cell phone, her wallet, driver's license, credit cards, and keys. The officers also seized a pair of men's shorts that were blood stained. Appellant was placed under arrest and taken to the Howard County jail where he gave a brief exculpatory statement after being advised of his Miranda rights. Appellant maintained that he had last seen Ms. Love on Sunday, September 11, at 2:00 p.m. He did not know how Ms. Love's possessions had gotten into his duffel bag, and he had no idea how her cell phone could have been used in Howard County.

Further testimony at trial revealed that Ms. Love was the president of an organization called the Diversity Alliance and that she had not attended a meeting that was held on Monday, September

12. Shonda Brown sent her a text message inquiring about her absence, and Ms. Brown later received a reply to that text message from Ms. Love's phone. Mr. Ira Love had also sent a text message to Ms. Love that was answered. Another student, Leslie Yocum, always met Ms. Love after classes on Tuesdays and Thursdays behind Ole Main, but she did not see Love either day that week.

Zeneta Brown was Ms. Love's best friend. Ms. Brown testified that appellant and Ms. Love broke up every few months and that appellant's visit to Fayetteville that weekend was sudden and unexpected. She had been with Ms. Love on Sunday afternoon at an ice cream social, and she had Ms. Love over for dinner that night. Ms. Love told her that she was going to break up with appellant, and Ms. Brown said that something was bothering Ms. Love that evening. Ms. Love told her that she needed to discuss something with her but that she would tell her later. Ms. Brown sent a text message to Ms. Love inquiring about her whereabouts late on Thursday, September 15. She said she received a response from Ms. Love's phone.

Dejuan White testified that he had not seen appellant in quite some time but that appellant appeared at his apartment on the afternoon of Sunday, September 11. They, along with Brandon Johnson, watched football and went to a pool hall where they drank beer. The three returned to White's apartment sometime around 9:30 p.m. White testified that appellant borrowed a cell phone from a neighbor and repeatedly called Ms. Love. He said that they were arguing and that appellant was not pleased with their conversations. Finally, appellant said that Ms. Love was coming to pick him up, and he grabbed his duffel bag and went outside to wait for her shortly after 10:00 p.m. White saw a vehicle drive up and back into a dead end. Appellant stood outside the car talking for a long time, and White once saw appellant leave the car and pace back and forth in front of the apartment. White said that the vehicle left after Mr. Johnson went outside at approximately 10:45 p.m.

Brandon Johnson testified that appellant repeatedly asked Ms. Love to come get him in the phone conversations he overheard that Sunday night. He said he went outside to ask for a ride and that, when he approached the vehicle, he saw a flip flop on the ground. He placed the sandal on top of the car and knocked on the passenger-side window. In the passenger seat, he saw a body slumped over which did not move or react to his knocking. Johnson said that appellant was in the driver's seat and that appellant waved him off and then drove away. He guessed that this occurred at 11:00 p.m.

Rachel Hawkins, a friend of appellant and a student at Fayetteville, testified that appellant called her at 1:00 p.m. on Saturday wanting a ride to the bus station because he and Ms. Love had an argument. She could not take him because she was home for the weekend and not in Fayetteville. She testified that appellant called her late Sunday night and told her that he was on his way home on a bus. Appellant called her again on Monday night and asked her to pick him up, saying that he would meet her at a Fayetteville grocery store after he retrieved his things from Ms. Love's apartment. Ms. Hawkins testified that appellant told her that he and Ms. Love had fought all weekend and he thought she was pregnant. Appellant planned for Ms. Hawkins to take him to the bus station to meet a bus that left at 1:45 a.m., but fell asleep and did not wake until morning. She also could not drive him to the bus which left that morning because she had an eight o'clock class. Ms. Hawkins informed appellant about the campus bus routes that would take him closer to the bus station, and while they were waiting for a campus bus, a police car pulled into the nearby E-Z Mart. Ms. Hawkins encouraged appellant to ask the officer for a ride, and appellant approached the officer but returned because the officer could not take him.

The prosecution introduced a CD made from the security camera at the E-Z Mart in Fayetteville. It verified appellant's presence there on Tuesday, September 13. Confirmation also came from the police officer who spoke with appellant about a ride to the bus station.

Ryan Morbley testified that appellant called him on Saturday, September 10, and told him that Ms. Love was pregnant. He said appellant called him many times after that wanting to talk and that appellant sounded as if he did not have good news. In one conversation, appellant told Morbley, "I f***ed up." Morbley picked appellant up at the bus station on Tuesday in Texarkana, and they went to a lake to talk. Appellant told Morbley that Ms. Love was dead. Appellant said that she had tried to hit him with her car and choke him, and that he had choked her back and squeezed too hard. Appellant also told Morbley how he wrapped her body and had used cotton balls, for reasons that appellant did not explain. Appellant further said that he cleaned under Ms. Love's fingernails with alcohol. Morbley also saw a wound on appellant's arm, and he denied wrestling with appellant. He testified that appellant had Ms. Love's cell phone and that appellant admitted he had responded to text messages sent to Ms. Love on the phone.

Ms. Love's cell phone was broken when it was recovered from appellant's duffel bag, so it was sent to the Federal Bureau of Investigation to see if any information could be retrieved. Jason Abromowitz, a forensic examiner with the FBI, retrieved text messages exchanged between Zeneta Brown and Ms. Love's phone on September 16, and one exchanged between Ira Love and his daughter's phone on September 14. He also found evidence of a single 911 call placed from Ms. Love's phone on Sunday, September 11, at 11:42 p.m. that lasted fourteen seconds but did not make a connection.

Dr. Adam Craig, the medical examiner, testified that the manner of death was homicide and that the cause of death was asphyxiation by undetermined means. He testified that asphyxiation can

be achieved by either smothering, strangulation, or compression of the chest, but he could not determine which mechanism was employed because of the degree of decomposition. Dr. Craig said that when any of the three methods are applied, the victim would lose consciousness after a minute and would recover if the pressure is released. However, if the pressure is continued, then death will result in three to four minutes. Dr. Craig was familiar with the practice of sexual asphyxiation or autoerotica, and he could not rule that out as a possible scenario that led to Ms. Love's death, but he said that death from participating in that activity was extremely rare, and even more rare in women. He found no evidence of pregnancy and said that the level of decomposition was consistent with her last being seen alive on Sunday, September 11.

Forensically, it was appellant's palm print that was found on the broken rear-view mirror in Ms. Love's vehicle. DNA testing proved that the blood recovered from the vehicle belonged to her. The blood found on the shorts seized from the duffel bag came from appellant. DNA was also extracted from the nail clippings taken from Ms. Love's right hand. The DNA was contributed by more than one individual, and neither Ms. Love nor appellant could be excluded as contributors of the DNA. Terry Rolf from the crime lab explained that eighty-nine percent of the African American population would be excluded as contributors of the DNA. He further explained that it is expected that a person's own DNA would be found under the nails and that for another person's DNA to be left there, it would have to come from scratching or rubbing, rather than casual contact.

When the prosecution rested, appellant moved for a directed verdict, which was denied by the trial court, and then appellant took the witness stand. He testified that he and Ms. Love had dated for years and that their relationship became more serious in 2003. They saw one another almost every other weekend, but he said that they also saw other people. He testified that he had never been in trouble with the law.

Appellant recounted the events of that weekend and said he had not felt like a "tag-along" and that he and Ms. Love did not argue. He testified that she dropped him off at Mr. White's apartment on Sunday afternoon while she went to the library to study and that he was supposed to call her later. Appellant said that Ms. Love picked him up that night and that they went to Taco Bell to eat, and that she drove him back to White's apartment. He said they started kissing and then began having consensual sex in the back seat of the car. Appellant testified that he and Ms. Love had twice engaged in a practice whereby they would cut off each other's air supply with a belt or a necktie in order to heighten the sexual experience. On this occasion, he had a belt around his neck for that purpose, and he said that he placed a trash bag over Ms. Love's head. Appellant testified that her body became limp not long after he had put the bag over her head. He said he called her name and screamed at her and then ripped the bag off of her head. He stated that he slapped and shook her but got no response. He called 911 twice but did not make a connection. Appellant said that he panicked and did not try to get further help.

Appellant continued his testimony by saying that he fell on Ms. Love when he was carrying her to her apartment, which he said accounted for the scrapes on her knees and feet. He laid her on the bed, sprinkled water on her face, and shook her some more without any response. He said he fell asleep next to her on the bed.

Appellant testified that he had no intention of hurting Ms. Love and denied that he killed her in a rage. He stated he did not call the police out of fear that he would be blamed. Appellant also denied that he tried to clean her body, that he placed the cotton balls in and around her underwear, or that he rubbed vegetable oil on her. He admitted that he hurriedly wrapped her body in the sheets but said that he did that because he did not want anyone to see her. Appellant testified that she did not scratch his arms and did not know how the scratches got there. He said he did not break the

rear-view mirror and that his palm print was on it because he had tried to repair it. He acknowledged that he returned text messages from Ms. Love's phone and said he did that so no one would stumble upon her body. Appellant said that he wanted more time so that he could speak to his brother.

Appellant also presented the testimony of Dr. Stephen Hucker, a forensic psychiatrist from Ontario, Canada, who was declared an expert in the subject of sexual asphyxiation. Dr. Hucker testified that sexual asphyxiation is the practice of enhancing sexual arousal by diminishing the flow of oxygen to the brain. He spoke with appellant for several hours, read the autopsy report, and heard Dr. Craig's testimony, and he concluded that Ms. Love's death was consistent with sexual asphyxiation. He said that the practice was rare in women and that he knew of only three deaths, including this one, that had occurred where the practice was being engaged in with a partner.

At the conclusion of this testimony, appellant renewed his motion for a directed verdict. As his fifth point on appeal, appellant contends that the trial court erred in denying that motion. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Coggin v. State,* 356 Ark. 424, 156 S.W.3d 712 (2004). Although designated as his last issue, double jeopardy concerns require us to address this argument first. *McDuffy v. State,* 359 Ark. 180, 196 S.W.3d 12 (2004).

In reviewing a challenge to the sufficiency of the evidence, this court views the evidence in a light most favorable to the State and considers only the evidence that supports the verdict. *Boldin v. State,* ___ Ark. ___, ___ S.W.3d ___ (Apr. 24, 2008). The test for determining sufficiency of the evidence is whether substantial evidence supports it. *Jenkins v. State,* 350 Ark. 219, 85 S.W.3d 878 (2002). 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.*

Circumstantial evidence may provide the basis to support a conviction, but it must be consistent with any other reasonable conclusion. *Bolding v. State, supra.* Overwhelming evidence of guilt is not required in cases based on circumstantial evidence; rather, the test is one of substantiality. *Id.*

A person commits first-degree murder if, with a purpose of causing the death of another person, he causes the death of another person. Ark. Code Ann. § 5-10-102(a)(2) (Repl. 2006). A person acts purposely with respect to his conduct or a result of his 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(1) (Repl. 2006).

In this case, the jury heard testimony that appellant and Ms. Love had fought all weekend and were arguing up to the point in time when Ms. Love met appellant at Mr. White's apartment. There was evidence that appellant concealed the body in a locked room, that he attempted to destroy evidence, and that he took steps to lead others to believe that Ms. Love was still alive after his departure from Fayetteville. There was testimony that appellant's arms were scratched and that his own blood was on his shorts, and there was evidence demonstrating the likelihood that appellant contributed the DNA found under Ms. Love's fingernails, which could not have been found there as a result of casual contact. Although appellant claimed that the Ms. Love's death occurred while they were being intimate and engaging in sexual asphyxiation, the jury was free to discount his version of events and choose instead to believe Mr. Morbley's account that appellant confessed to strangling Ms. Love — without mentioning that it was part of a sexual encounter. We hold that there is substantial evidence to support the jury's finding that appellant was guilty of first-degree murder.

We now turn back to appellant's first argument concerning the denial of his motion to suppress the evidence found in the search of his bedroom. Appellant contends that the search warrant was invalid because the supporting affidavit did not contain any facts establishing the reliability of the informants. In reviewing a trial court's denial of a motion to suppress, we make an independent examination of the issue based on the totality of the circumstances and reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Benson v. State,* 342 Ark. 684, 30 S.W.3d 731 (2000).

When an affidavit for a search warrant is based, in whole or in part, on hearsay, the affiant must set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. *Stanton v. State,* 344 Ark. 589, 42 S.W.3d 474 (2001); Ark. R. Crim. P. 13.1(b). The "informants" that appellant is referring to were the friends of Ms. Love who cooperated with the police in the investigation surrounding the circumstances of her death. An affidavit for a search warrant need not contain facts establishing the veracity of non-confidential informants, such as police officers, public employees, victims, and other witnesses whose identity is known. *Id.* Thus, no additional support for the reliability of witnesses is required when the witness volunteered the information as a good citizen and not as a confidential informant whose identity is to be protected. *Id.* The informants here fall into the class of persons whose reliability need not be established. Consequently, appellant's argument is without merit.

Appellant also argues that the trial court erred by not suppressing the evidence found in his duffel bag during the search, namely his shorts and Ms. Love's cell phone, keys, wallet, driver's license, and credit cards. Appellant's contention is that a separate warrant was required before the officers could legally open the duffel bag.

The search warrant specifically authorized a search for a duffel bag, Ms. Love's belongings, and forensic evidence including blood, hair, fibers and clothing. The only authority appellant cites is Ark. R. Crim. P. 13.5, which provides a mechanism for judicial scrutiny when documents authorized to be seized under a warrant cannot be searched for or identified without examining the contents of other documents not covered by the warrant. On its face, this rule applies only to documents but not any other objects subject to seizure. Otherwise, appellant has provided no citation to authority, and we can conceive of none, that requires officers to obtain an additional warrant before searching a container that is listed in the warrant as an object subject to seizure. We will not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Strong v. State,* ___ Ark. ___, ___ S.W.3d ___ (Feb. 21, 2008).

Appellant also moved to suppress the statement that he gave to the detectives prior to his arrest.[1] Appellant argues that the statement should be suppressed because the officers did not advise him of his Miranda rights. The trial court found that appellant was not in custody when the statement was made and declined to suppress the statement. We conduct a de novo review of this issue based on a totality of the circumstances. *Young v. State,* 370 Ark. 147, ___ S.W.3d ___ (2007). We also give deference to the trial court's findings and the inferences drawn by the court, and we reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Dondanville v. State,* 85 Ark. App. 532, 157 S.W.3d 571 (2004).

Detective Franklin testified that appellant's mother was yelling and screaming after being told about Ms. Love's disappearance and was so overwrought that she fell to the ground in the yard.

[1] Appellant also sought to suppress the brief statement he made following his arrest, but he withdrew his motion as to that statement.

Because of the commotion, he asked appellant to come to the sheriff's office and explained to him that he did not have to go. Appellant agreed to talk with the detectives, and Franklin gave him the choice to drive his own vehicle or ride with them, and he said that appellant chose to go with them. Franklin testified that appellant's decision to speak with them was completely voluntary, that he was not in custody, and that appellant was advised several times that he was free to leave at any time. The interview took place at a desk at the station and not a formal interview room. Detective Chandler testified that he explained to appellant that he could leave at any time and that he was not under arrest. Chandler said that when appellant asked to leave, he opened the door for appellant and that appellant left with his family.

Appellant testified that he was not given the Miranda warnings before speaking with the detectives and that he would have refused to speak with them had the warnings been given. He also testified that he was not handcuffed or placed under arrest.

Miranda warnings are required only in the context of custodial interrogation. *Wofford v. State,* 330 Ark. 8, 952 S.W.2d 646 (1997). The question is whether appellant was "in custody" when he made the statement. A person is "in custody" for purposes of the Miranda warnings when he or she is deprived of his freedom by formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Hall v. State,* 361 Ark. 379, 206 S.W.3d 830 (2005). In resolving the question of whether a suspect was in custody at a particular time, the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation. *Id.* The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being interrogated. *Id.*

In this case, appellant was asked to discuss Ms. Love's disappearance at the sheriff's office and was told that he was not required to accompany the detectives there. Appellant agreed to answer

questions and chose to ride with the officers instead of taking his own vehicle. Appellant was also informed that he could leave at any time, and in fact, appellant did exercise that prerogative by leaving. We hold that a reasonable person in appellant's situation would not have felt that he was being restrained at the time he made his statement. Therefore, we cannot say that the trial court's ruling that appellant was not in custody is clearly against the preponderance of the evidence.

The last issue for us to review is the argument that venue for the trial should have been moved because of pretrial publicity. Appellant filed a motion to that effect before trial, attaching the affidavit of two voters in the county who stated that appellant could not receive a fair trial due to pretrial publicity. Appellant brought the motion to the attention of the trial court at a pretrial hearing, at which time a number of newspaper articles were introduced into evidence that covered Ms. Love's death, the investigation, and appellant's involvement. The trial court took the motion under advisement and ruled that he would reconsider the motion during the jury selection process if it appeared that twelve jurors could not be found who had not formed an opinion on appellant's guilt or innocence.

At voir dire, the court asked the forty-eight person jury panel if any of them had read newspaper articles or heard television news stories about the case. Twelve persons responded affirmatively, and of those twelve, eight persons responded that they had not formed an opinion about appellant's guilt or innocence and could set aside what they had heard in the news and decide the case based on the testimony and evidence presented in court. Four persons responded that they had already formed an opinion about the case, and the trial court excused them.

A change of venue should be granted only when it is clearly shown that a fair trial is not likely to be had in the county. *Ferguson v. State,* 343 Ark. 159, 33 S.W.3d 115 (2000). This requires a movant to show that there is a county-wide prejudice against him. *Id.* A defendant is not entitled

to jurors who are totally ignorant of the facts surrounding the case, as long as they can set aside any impression they have formed and render a verdict solely on the evidence adduced at trial. *Id.* The standard of reviewing a change of venue is whether there was an abuse of discretion by the trial court. *Id.*

In the present case, only one-quarter of the jury panel had heard about the case in advance of trial. Moreover, the trial court excused the four venire persons who stated that they had formed an opinion about appellant's guilt or innocence, and the remaining eight persons who also had previous knowledge about the case said that they could put aside what they knew and decide the case based on the evidence at trial. We also observe that none of those eight persons were seated on the jury. The record before us does not demonstrate a county-wide bias against appellant, and we cannot say that the trial court abused its discretion by denying the motion for a change of venue.

Affirmed.

GRIFFEN and GLOVER, JJ., agree.