ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CACR 07-244

OCTOBER 31, 2007

ROBERT WASHINGTON APPELLANT	APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. CR-06-130-3]
V.	HONORABLE GRISHAM A. PHILLIPS, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant Robert Washington was convicted by a jury in Saline County Circuit Court of aggravated robbery. Washington was accused of forcibly taking $412 cash from the register of Bullock's convenience store in Benton, Arkansas, at approximately 2:30 a.m. on December 23, 2005. The robber threatened the store clerk, Patricia Serrato, with a knife, had a slight scuffle with her, and demanded that she open the register. Serrato positively identified appellant as the perpetrator, even though the robber wore a stocking cap to hide his identity. She was certain of his identity because he had been in the store on previous occasions, he had talked to her, and he had identifiable physical mannerisms. Police were summoned, and they arrested appellant nearby and mere minutes later. After the jury found him guilty, this appeal followed. Appellant argues three points for reversal: (1) that the

State failed to present sufficient evidence to support his guilt; (2) that the trial court abused its discretion by not granting a mistrial after a witness testified to inappropriate character evidence; and (3) that the trial court abused its discretion in not granting a mistrial on the basis that the prosecutor made an improper comment. We affirm.

We first address the sufficiency of the evidence to support the conviction. Our courts treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *See Tubbs v. State*, __ Ark. __ , __ S.W.3d __ (May 10, 2007). In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence, direct or circumstantial. *See id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *See id.* This court views the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *See id.* A directed verdict motion in a criminal case must state the specific ground of the motion. *See Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997). Arkansas Rule of Criminal Procedure 33.1 provides "[a] motion for directed verdict . . . based on insufficiency of the evidence must specify the respect in which the evidence is deficient." A party cannot change the grounds for a motion on appeal and is bound by the scope and nature of the arguments made at trial. *Abshure v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002).

After the State rested, defense counsel moved for directed verdict "based on the lack of sufficient evidence to convict my client based on each element. I would question that they

have proved that it was actually my client who robbed Bullock's. That he had a knife, that the skull cap belongs to him." Appellant expands this argument on appeal to challenge not only whether it was appellant who committed this crime, but also whether the State set forth sufficient proof of attempt to inflict injury or of purpose to commit a theft. We do not address anything other than what was preserved at the trial court level. *Abshure v. State*, *supra*. Appellant's argument properly before us is limited to identifying appellant as the person who robbed the store.

The evidence before the jury, in the light most favorable to the State, showed that Serrato worked the night shift at Bullock's and was held at knife-point on the night in question. Serrato testified that she knew who the robber was because he had been in the store the night before the robbery, hanging out for two or three hours, and he had also been in the store that morning and later that evening, prior to the robbery. He had talked to her. She said she knew it was appellant because of his voice and the way he moved, plus she could still see his face well enough despite the nylon cap.

The police responded to Serrato's pushing of the panic button under the counter, and officers were informed that they should look for a black male wearing blue pants and a white or gray sweatshirt. Appellant was seen walking across a grassy field behind the convenience store and toward a particular residence on West Sevier Street. Officers drove to the residence, exited their patrol car, and ordered the suspect to the ground. The suspect did not comply and had to be forcibly taken. Appellant repeatedly told officers that, "I didn't do

anything." A search of appellant's clothing revealed exactly $412 in currency in his pants pocket, the exact amount missing from Bullock's cash register. Appellant did not ask why he was being arrested.

A search was conducted around the house in the light of day the next morning. The house belonged to a Mr. Crouch. A kitchen knife was found inside Mr. Crouch's toolbox in the carport, and a nylon cap was found on the ground next to Mr. Crouch's boat. Mr. Crouch denied ownership of either item, and he recalled hearing the commotion outside the night before. Serrrato identified the knife and the cap as being used in the robbery.

The jury had before it sufficient evidence to support a finding of guilt. Appellant was found near the crime scene just minutes after the crime occurred, and he would not respond to officers' commands to surrender. He fled the scene trying to get away from the officers, which is indicative of guilt. *Jones v. State*, 314 Ark. 289, 862 S.W.2d 242 (1993). More importantly, the store clerk positively identified appellant as the man who robbed her that night. This alone is sufficient to support the jury's determination that appellant was the person who committed the crime that night. *See Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003). We affirm this point on appeal.

We next consider the two motions for mistrial, which were denied by the trial court. Mistrial is an extreme remedy and is only necessary where it appears that, if the trial is continued, the defendant cannot receive a fair trial. *See Wilkins v. State*, 324 Ark. 60, 918 S.W.2d 702 (1996). The trial court has wide discretion in granting or denying a motion for

mistrial, and the trial court's decision will not be reversed on appeal absent an abuse of that discretion. *Cook v. State*, 316 Ark. 384, 872 S.W.2d 72 (1994). We defer to the trial court, as it is in a superior position to determine the effect of the allegedly prejudicial remark on the jury. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000); *Ward v. State*, 338 Ark. 619, 1 S.W.3d 1 (1999). A curative instruction or admonition is generally deemed sufficient to eliminate prejudice generated by most trial error. *Wilkins v. State*, *supra*. It is the appellant's obligation to ask for a curative instruction, and the failure to do so will not inure to his benefit on appeal. *Vick v. State*, 314 Ark. 618, 863 S.W.2d 820 (1993).

There were two motions for mistrial. The first came during the testimony offered by Serrato. Her testimony had been the subject of a motion in limine to prevent her from discussing certain topics, including that she believed appellant to be intoxicated during a visit to the store. The trial court ruled that this would not be allowed, but that her general familiarity with him was permissible. However, during her testimony, she said she recalled appellant telling her that he liked her because she was white and he did not date black women. This drew an objection, urging that this was improper bad-character evidence impermissible under Ark. R. Evid. 404(b) and that this had been ruled inadmissible. The State countered that this testimony established her familiarity with appellant and why she had reason to remember him among all the patrons of the store. The trial judge denied the mistrial but told the prosecution to move on to something else. Appellant argues that his is reversible error because introducing this "prior bad act" was highly prejudicial,

inflammatory, and could not be cured by an instruction to the jury to disregard it. We disagree and hold that the trial court did not manifestly abuse its discretion.

Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998). Testimony is admissible pursuant to Rule 404(b) if it is independently relevant to the main issue, relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal or a bad person. *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996).

Here, the prosecution made clear that it had to demonstrate why Serrato was certain in her identity of appellant as the person who committed this crime, and this comment lent credence to why Serrato would remember appellant. Moreover, appellant did not ask for a curative instruction, which cannot inure to his benefit on appeal. For the foregoing reasons, we affirm this point.

The other motion for a mistrial came during the State's closing argument. The prosecutor summed up the evidence presented to the jury and noted that when appellant was apprehended by the police, he did not ask why he was being arrested. Defense counsel

objected on the basis that this was an improper comment on the defendant's right not to testify. The defense asked for a limiting instruction, which was not given. Appellant argues that this was reversible error because it was an improper comment that influenced the jury's verdict.

Some leeway is given to counsel in closing argument, and counsel are free to argue every plausible inference that can be drawn from the testimony. *Newman v. State*, 353 Ark. 258, 290, 106 S.W.3d 438, 459 (2003). Therefore, a trial court is given broad discretion in controlling the arguments of counsel, such that, absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. *See*, *e.g.*, *Cox v. State*, 345 Ark. 391, 47 S.W.3d 244 (2001); *Cook v. State*, 283 Ark. 246, 675 S.W.2d 366 (1984).

An allegedly improper comment on the defendant's failure to testify usually occurs during the prosecutor's closing argument, when the evidence is closed and the defendant's opportunity to testify has passed. *Adams v. State*, 263 Ark. 536, 566 S.W.2d 387 (1978). Under those circumstances, a comment that draws attention to the defendant's failure to testify is improper because it creates the risk that the jury will surmise that the defendant's failure was an admission of guilt. *See id.* Consequently, the comment has the effect of making the defendant testify against himself in violation of the Fifth Amendment. *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002). Under the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, a defendant has the privilege of deciding whether to testify. *See id.*

In this case, appellant chose not to testify, and his counsel moved for a mistrial and asked for an admonition to the jury. However, the comment did not refer to appellant's failure to testify. Rather, it referred to what appellant did and did not say to the officers who were trying to arrest him, not to the fact that he did not speak or testify before the jury. *Compare Howard v. State*, *supra* (holding that the comment did not refer to appellant Howard's failure to testify but, instead, to Howard never having expressed remorse to the witnesses that testified). Under those circumstances, there is no error committed.

For the foregoing reasons, we affirm appellant's conviction for aggravated robbery.

VAUGHT and BAKER, JJ., agree.