Not designated for publication.

DIVISION I

CACR07-246

NOVEMBER 7, 2007

FREDERICK A. NORRIS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT
[NO. CR-2006-273]

HON. JAMES ROBERT MARSCHEWSKI,
JUDGE

AFFIRMED

Appellant Frederick Norris appeals his conviction from the Sebastian County Circuit Court on two charges of aggravated robbery, for which he was sentenced as a habitual offender to thirty years' incarceration in the Arkansas Department of Correction on each conviction, with the sentences to run concurrently, and ten additional years of suspended imposition of sentences on each conviction. On appeal, appellant argues that the circuit court erred in admitting the in-court identification of Sheila Smith and in denying the motion to suppress his confession, and he challenges the sufficiency of the evidence with respect to the conviction related to the first bank teller he encountered. We affirm.

On or about March 9, 2006, appellant entered a Chambers Bank branch location in Fort Smith, Arkansas, and committed aggravated robbery using a twelve-inch knife against two separate bank tellers, Monta Wakefield and Jamie Payne. As he ran into the bank, loan

assistant Sheila Smith noticed appellant from where she was sitting at her desk and observed the robbery take place in the approximately twenty seconds that followed. Although he initially held a towel around his head and over his face, Ms. Smith identified appellant from a photographic line-up conducted by Detective David Joplin the day after the incident. Additionally, bank surveillance equipment captured images of the robbery on videotape.

Appellant was arrested the following day at a Little Rock motel by Fort Smith police officers, Detective Greg Smithson and Detective Ronald Scamardo, Jr. The officers attempted to interview appellant and advised him of his rights, at which time he asked to speak to an attorney. The officers ceased questioning appellant and the three men left to return to Fort Smith. Near the beginning of the return trip, Detective Scamardo made a comment to the effect that he could not understand why someone that owes $40,000 in back child support, which he had not made payments on, with a family in Van Buren struggling to survive, robs a bank to compound the problems he already has and then makes his problems worse by possibly buying crack with the money or going to a motel to pay for prostitution. When they stopped to eat in Conway, appellant asked to speak privately with Detective Scamardo. At that time, appellant admitted his involvement in the robbery; however, he also explained that he did not rob the bank to obtain money for drugs or a prostitute, but rather to support his family. Detective Scamardo did not question appellant further at that point in time, and the three completed their trip without further incident.

Three days later on March 13, 2006, Detectives Smithson and Scamardo received word that appellant wanted to speak to them. They went to see him, advised him of his rights

again, reminded him that he had previously asked for an attorney, and then asked why he had sent for them. Appellant signed a second rights form and then proceeded to give the officers a full statement, which was taped and subsequently typed into an approximately forty-page statement that was admitted at trial. Appellant implicated himself and even took the officers back to an area on Interstate 40 where he stated he had discarded a knife, shirt, and glove used in the robbery, although none of the items were located or recovered from under the bridge. Appellant then took the officers back to Little Rock and revealed to them where he had buried the $1610 that was stolen in the robbery.

A hearing was held on August 3, 2006, and continued on August 7, 2006, on appellant's motion to suppress the in-court identification of Ms. Smith, the loan assistant, as well as appellant's motion to suppress the statements he made to officers on March 10, 2006, and March 13, 2006, as well as the ones he made in the car when he subsequently took the officers back to Little Rock regarding the evidence related to the robbery. The prosecutor assured the circuit court that he had no intention of utilizing the initial comment appellant made to Detective Scamardo in the car. Both motions were denied, and the jury trial proceeded on August 7, 2006.

At the close of the State's evidence, appellant moved for a directed verdict on the aggravated robbery count involving the first bank teller, Ms. Payne, on the basis that the entire incident lasted less than one minute and consisted of the same conduct under the law. Appellant's attorney argued that he felt as though it would subject appellant to double jeopardy to be tried twice in one count for the same conduct and cited Ark. Code Ann. § 5-1-

110 in support of his argument. Additionally, he mentioned that Ms. Payne turned around and ran before appellant reached her station and did not recognize that he had a knife until after she ran away. Accordingly, he argued that appellant could not have made the required representation at that point of possessing a deadly weapon. The prosecutor responded that appellant entered the bank yelling for the tellers to put money in a bag and then chased Ms. Payne as she fled, brandishing a knife in front of him and telling her not to run from him. The motion was denied, and appellant presented no witnesses on his behalf. His attorney rested without renewing his previous motion. The jury found appellant guilty of the above-described charges. The judgment and commitment order was filed on August 8, 2006, and appellant filed a timely notice of appeal on August 11, 2006.

I. Sufficiency of the Evidence on the Conviction Related to Ms. Payne

Although appellant raises this issue as his third point on appeal, this court must consider his sufficiency argument before addressing any asserted evidentiary errors to preserve appellant's freedom from being placed in double jeopardy. *See Eastin v. State*, 370 Ark. 10, __ S.W.3d __ (2007). We first consider whether this issue is preserved for appeal. Rule 33.1(a) of the Arkansas Rules of Criminal Procedure provides that "[i]n a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence." Subsection (c) states in relevant part that "[t]he failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required . . . constitute waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment." Appellant moved for a

directed verdict on this particular count of aggravated robbery at the close of the State's case-in-chief, did not present evidence on his behalf, and rested without renewing his motion. While a renewal of his motion for a directed verdict is generally required by Rule 33.1(a) of the Arkansas Rules of Criminal Procedure, it is not required where, as here, a defendant rests without presenting a case. *Diggs v. State,* 93 Ark. App. 332, 219 S.W.3d 654 (2005) (citing *Robinson v. State*, 317 Ark. 17, 875 S.W.2d 837 (1994); *Chrobak v. State*, 75 Ark. App. 281, 58 S.W.3d 387 (2001)). Accordingly, we hold that appellant's challenge to the sufficiency of the evidence with respect to that particular aggravated robbery conviction is preserved for our review.

Although appellant argues that he should not have been convicted of two counts of aggravated robbery because it was a continuing course of conduct, our case law has held otherwise. *See Rhodes v. State*, 293 Ark. 211, 736 S.W. 2d 284 (1987) (aggravated robbery is not a continuing offense). Furthermore, we hold that there is sufficient evidence to support the conviction on the separate count of aggravated robbery involving Ms. Payne. Arkansas Code Annotated section 5-12-103 sets forth the elements of aggravated robbery, as follows:

> (a) A person commits aggravated robbery if he or she commits robbery as defined in § 5-12-102, and the person:
> (1) Is armed with a deadly weapon;
> (2) Represents by word or conduct that he or she is armed with a deadly weapon; or
> (3) Inflicts or attempts to inflict death or serious physical injury upon another person.
>
> (b) Aggravated robbery is a Class Y felony.

As appellant entered the bank and approached her area, he repeatedly shouted at the tellers to put the money in the bag. The bank surveillance video shows appellant running and

brandishing a knife in front of him. While Ms. Payne did turn to run from her station, appellant ran after her yelling for her not to run from him and to "get back here." He approached her, demanded money, and threatened her while armed with a twelve-inch knife. Ms. Payne testified that she saw appellant with "an object in his hand" and that she did not know "if it was a gun or a knife" until she went down the stairs and saw that it was a "knife and not a gun." The evidence supports that she saw that appellant was armed and perceived that it was some type of deadly weapon, either a knife or a gun. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *White v. State*, __ Ark. __, __ S.W.3d __ (June 21, 2007). Substantial evidence is evidence forceful enough to compel the fact-finder to make a conclusion one way or the other beyond suspicion or conjecture. *Id.* When determining the sufficiency of the evidence, we view the evidence in the light most favorable to the State, and we will only consider the evidence that supports the verdict. *Id.* Additionally, the credibility of witnesses is an issue for the jury and not this court. *See id.* We affirm on this point.

II. In-Court Identification by Sheila Smith

We will not reverse a trial court's ruling on the admissibility of an in-court identification unless the ruling is clearly erroneous under the totality of the circumstances. *Mezquita v. State*, 354 Ark. 433, 125 S.W.3d 161 (2003). In determining whether an in-court identification is admissible, the court looks first at whether the pretrial identification procedure was unnecessarily suggestive or otherwise constitutionally suspect; and it is the

appellant's burden to show that the pretrial identification is suspect. *Id.* Reliability is the linchpin in determining the admissibility of identification testimony. *Id.*

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; (6) the lapse of time between the alleged act and the pretrial identification procedure. *Mezquita*, *supra*. Our supreme court has held that, even when the identification procedure is impermissibly suggestive, the trial court may determine that under the totality of the circumstances the identification was sufficiently reliable for the matter to be submitted to the factfinder, and then it is for the factfinder to decide the weight the identification testimony should be given. *Id.*

Ms. Smith testified that she noticed appellant run into the bank from where she was sitting at her desk and observed the robbery take place in the approximately twenty seconds that followed. Appellant initially held a towel around his head and over his face, and Ms. Smith testified that she did not see his face when he first entered the bank and approached the tellers. She testified that, after the first teller ran, and appellant moved to another teller, she was able to see parts of his face. She asserted that she caught more than a glimpse of his face and that he partially faced her office as he was leaving the bank. Additionally, she identified appellant from a photographic line-up conducted by Detective David Joplin subsequent to the incident, and she stated that no one indicated to her whom she should

choose. Finally, she also positively identified appellant in the courtroom as the person she witnessed robbing the bank.

Appellant's sole argument is that Ms. Smith simply did not have enough time to make an adequate identification. At trial, he urged the circuit court to examine her degree of attention and her opportunity to observe what happened. Because she had a limited opportunity to view the robber, including only partial views of his face, appellant now contends that the circuit court's denial of his motion to suppress was clearly erroneous.

Based upon the evidence presented at the suppression hearing, Ms. Smith had ample opportunity to observe the aggravated robbery. She was not provided a prior description of appellant, nor did she identify any other individual prior to the pretrial identification. She positively identified appellant, and she was certain of her choice of photograph in the lineup. Additionally, there was no significant time lapse between the aggravated robbery and her pre-trial identification. We hold that, under the totality of the circumstances, the circuit court was not clearly erroneous in admitting Ms. Smith's identification and affirm on this point as well.

III. Denial of Motion to Suppress Statements

At the hearing on appellant's motions to suppress various statements made to Detectives Smithson and Scamardo, the prosecutor informed the circuit court that the State had no intention of using the initial statement made in Conway by appellant to Detective Scamardo during the trial. As for the subsequent statements, appellant independently initiated the contact, the officers advised him of his rights, reminded him that he had

previously asked for an attorney, and then asked why he had sent for them. Appellant signed a second rights form and then proceeded to give the officers a full statement.

At trial, appellant argued that the initial comment by Detective Scamardo was the functional equivalent to questioning, even though appellant had already asked to speak to an attorney. A "functional equivalent to questioning" occurs when the words or actions of police are such that the police should know are reasonably likely to elicit an incriminating response from a suspect. *See State v. Pittman*, 360 Ark. 273, 200 S.W.3d 893 (2005). Appellant maintained that once the original exchange between Detective Scamardo and appellant occurred, the "cat had been let out of the bag" and that it was still weighing on appellant's mind when he made the lengthy statement to officers some three days later. His attorney also asserted that all statements made thereafter were fruits of the original violation and should have been suppressed. While the circuit court indicated that even the State seemed to be conceding that the comment in the car was improper, the circuit court did not go so far as to find that all of the other subsequent statements should be suppressed.

Appellant now argues that not enough time elapsed between the statements to break the chain and no sufficient act of intervening free will occurred. He maintains that Detective Scamardo deliberately elicited an admission of guilt after he had invoked his Miranda rights, and that accordingly, all the fruits of that constitutional violation should have been suppressed.

Detective Smithson testified that the comment by Detective Scamardo "was just a comment . . . [i]t wasn't a question. It was just a comment he made." Detective Scamardo

also testified that he was simply making a comment and was not attempting to elicit a response from appellant. Detective Scamardo stated that he did so after learning that a known prostitute had been seen leaving appellant's motel room and that appellant had been to the child-support office in Little Rock without making any payments against his back-child support obligation. Subsequently, when appellant spoke to him about the comment in Conway, Detective Scamardo explained that he only listened and did not attempt to question appellant on the issue.

The State maintains that even if this court were to determine that the initial comment was violative of appellant's rights, the fact remains that neither Detective Scamardo's comment nor appellant's response in Conway were ever admitted at trial. The State contends that the three-day gap between those comments and appellant's transcribed statement serves to avoid the effects of a Miranda violation. *See Davis v. State*, 330 Ark. 76, 953 S.W.2d 559 (1997).

Additionally, if an accused initiates further communication or conversation with police officers, after initially requesting an attorney before speaking, any resulting statements may be admissible. *See Edwards v. Arizona*, 451 U.S. 477 (1981). It is clear that on March 13, 2006, appellant independently initiated the contact when he asked to speak with the two officers. Detective Smithson advised appellant of his rights, which he waived. Appellant then signed the rights form and gave his lengthy statement admitting the aggravated robbery. It appears that, at that time, appellant not only initiated the contact but also provided the information without significant questioning by the officers.

The State argues, and we agree, that at each point of interrogation, appellant was advised of his rights and his request to speak to an attorney was respected. Simply because he initially invoked that right does not preclude him from subsequently initiating contact with the police, and upon doing so, his admissions were properly admitted into evidence by the circuit court. We affirm on this point as well.

Affirmed.

BIRD and HEFFLEY, JJ., agree.