NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-10

BRANDON J. JOHNSON, APPELLANT V. STATE OF ARKANSAS, APPELLEE	**Opinion Delivered** SEPTEMBER 24, 2008 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, [NO. CR-07-1474-1] HONORABLE WILLIAM A. STOREY, JUDGE, AFFIRMED

KAREN R. BAKER, Judge

A Washington County jury convicted appellant Brandon Johnson of first-degree battery and the trial court sentenced him to serve ten years' imprisonment and a $5000 fine. On appeal, appellant asserts two points of error: (1) That the trial court should have granted a directed verdict on the charge of battery in the first degree because there was insufficient evidence to support a jury's finding that the appellant acted with "extreme indifference to the value of human life" in accordance with Ark. Code Ann. § 5-13-201(a)(3); (2) That the trial court erred when it failed to exclude an opinion on an ultimate issue when the court admitted Dr. Sam Turner's statement that the victim's injuries were "serious physical injuries" and his opinion mandated a legal conclusion not permitted by Arkansas Rule of Evidence 704. For the reasons stated herein, we affirm.

This case arises from appellant beating one of his fellow inmates at the Washington County Jail. The beating occurred after the victim, Donnie Stewart, removed two dominoes from the table where appellant was playing a game of dominoes, stating that he would return them when appellant

put the mat on the table. In response to the victim's request, appellant struck him in the back of the head, knocking him to the ground, and continually beating Stewart by stomping and kicking his head and back until an officer came to Stewart's aid.

The victim testified that he blacked out shortly after the initial attack, but when he regained consciousness, he could not see or hear anything. He tried to feel around and crawl, but was hit again. He remembered feeling a table, being jumped on his back and beaten, and an officer eventually coming who stopped the beating. Stewart explained that he had no way to defend himself because he was unconscious, and when he was conscious, he could not see. The victim was taken to the hospital and later kept in medical isolation for two weeks where he had difficulty moving, seeing, and eating.

Washington County Sheriff's Lieutenant C.J. Mitchell testified that he made a DVD, of the beating, out of the jail's surveillance footage. Mitchell described how appellant came up behind Stewart to begin the attack, and that, when Stewart hit the floor, appellant started beating him. Detective Scott MacAfee testified about the DVD of the beating and estimated that it was around two minutes and forty-some seconds from the time when appellant first starting beating Stewart until the deputies came in and the beating stopped. The jury watched the DVD. The footage shows appellant repeatedly beating Stewart on the concrete floor, dragging Stewart back towards him, putting his foot on Stewart and taking his shirt off, continuing to beat Stewart while he was down and repeatedly stomping Stewart's head with his foot, only stopping the attack when the deputy arrived. Matthew Stever, a former Washington County jailer, testified that he saw appellant stomp on Stewart's head four times before he could get to him.

In statements to Detective MacAfee, appellant admitted that he hit Stewart and kept on

hitting him. At trial, he explained that he was scared when he was jumping up and down, over and over again, on Stewart's face. He testified that his intent was to keep Stewart from getting up from the floor, and that he was also scared of Stewart when he pulled Stewart back out from under a table where he had crawled seeking shelter. His fear, he claimed, was based upon earlier statements by Stewart that he had killed his own brother, would not mind killing again, and that he was in a mood to fight. He felt that he would be forced to fight Stewart sooner or later.

Dr. Sam Turner, a Washington Regional Hospital emergency room physician, testified that "substantial blunt trauma" was required to cause the victim's orbital-fracture injury because "it's not intended to break easily." Dr. Turner also testified that he thought that Stewart had suffered from a "catastrophic, abusive beating to his face with the fractures to the left eye orbit which are not easily induced on somebody without hurting them pretty hard." He stated that Stewart's face was so swollen from the beating that a person could not determine what his face looked liked in a normal state.

The sufficient evidence supports the jury's verdict. 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. *Taylor v. State,* 77 Ark. App. 144, 72 S.W.3d 882 (2002). We affirm a conviction if substantial evidence exists to support it, which is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id.* Furthermore, a criminal defendant's intent can seldom be proven by direct evidence and must usually be inferred from the circumstances surrounding the crime. *Id.* Because intent can seldom be proven by direct evidence, the jurors are allowed to draw upon their common knowledge and experience to infer it from the circumstances. *Id.* And because of the obvious difficulty in

ascertaining a defendant's intent, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.* Moreover, the jury was under no obligation to believe appellant's evidence. *See, e.g., Smith v. State,* 337 Ark. 239, 988 S.W.2d 492 (1999).

Appellant was charged with violating Ark. Code Ann. § 5-13-201(a)(3) (Repl. 2006), which provides that a person commits battery in the first degree if: "He or she causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life." According to appellant, there was simply not sufficient evidence for the jury to conclude that Stewart sustained any life-threatening injuries or conduct that was life-endangering. Appellant's argument ignores the fact that the focus in determining the applicable degree of the offense is on the accused's state of mind.

In *Tarentino v. State,* 302 Ark. 55, 786 S.W.2d 584 (1990), our supreme court explained that the primary way in which first-degree battery differs from second- and third-degree battery is the state of mind of the actor. The court went on to explain that in order to be convicted of first-degree battery, a defendant must act with the purpose of causing serious physical injury to another person. Moreover, the circumstances of the first-degree battery must by necessity be more dire and formidable in terms of affecting human life. *See Tigue v. State,* 319 Ark. 147, 889 S.W.2d 760 (1994). The attendant circumstances must be such as to demonstrate the culpable mental state of the accused. *Id.* The *Tigue* court further elaborated that first-degree battery involves actions which create at least some risk of death and which, therefore, evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim. *Id. See also Hoyle v. State*, 371 Ark. 495, ___ S.W.3d ___ (2007).

Here, the evidence showed that appellant acted recklessly under circumstances manifesting extreme indifference to human life. Specifically, the evidence demonstrated that appellant repeatedly stomped and beat the victim on the head for over two and a half minutes ending his attack only when jailers arrived. The photographic evidence depicted a bloody scene supporting victim's attempt to seek shelter only to be pulled back by appellant who continued to beat and stomp the victim made more vulnerable by loss of consciousness and impaired vision and hearing. While appellant excused his attack to the jury by claiming he was scared, it is the jury's province to determine his credibility. *See Smith*, *supra*. Accordingly, substantial evidence supports the jury's conviction on the first-degree battery charge, and the trial court did not err in refusing to grant the directed verdict motions.

Neither did the trial court err by allowing Dr. Turner's descriptions of the victim's injuries, which included the statement that the victim's injuries were "serious physical injuries." The decision to admit relevant evidence, opinion testimony or otherwise, rests in the sound discretion of the trial court, and the standard of review of such a decision is abuse of discretion. *E.g. Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998). Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Ark. R. Evid. 704.

Such opinion testimony is admissible provided that it does not mandate a legal conclusion. *Marts*, *supra*. When appellant objected to the doctor's description of the injuries as serious, the trial court found that the question called for a medical conclusion. The trial court did not abuse its discretion in allowing this testimony. While the doctor's opinion about the extent of the injuries may have embraced the ultimate issue as to whether appellant caused serious physical injury under

the requisite circumstances, the doctor's factual basis for his opinion was explored in cross-examination and went to his credibility. A jury is not bound to accept opinion testimony of experts as conclusive and is not compelled to believe an expert's testimony any more than the testimony of any other witness. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995) *writ of cert. denied* 517 U.S. 1226 (1996). The jury was specifically instructed that it was not bound to accept an expert opinion as conclusive, but should give the opinion whatever weight it thought the opinion should have, and that it could disregard any opinion testimony if it found it to be unreasonable.

Accordingly, the trial court did not err in refusing to exclude the medical expert's description and observations of the victim's injury.

Affirmed.

GLOVER and VAUGHT, JJ., agree.