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

DIVISION IV

CACR 08-80

August 27, 2008

BOBBY D. RODGERS	APPELLANT	APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT [NO. CR-2007-423]
V.		HONORABLE LEE FERGUS, CIRCUIT JUDGE
STATE OF ARKANSAS	APPELLEE	AFFIRMED

Appellant was convicted of aggravated robbery, attempted kidnapping, fleeing on foot, carrying a weapon, and first-degree terroristic threatening. On appeal, appellant argues that the trial court erred in denying his motions for directed verdict as to all five charges, and he also argues that the trial court erred in denying his motion to suppress the victim's identification of him on the night the crimes took place and at trial. We find no error and affirm.

On the night of April 16, 2007, Christy Owen was studying in a café at Barnes & Noble when she noticed appellant, an older white gentleman wearing blue coveralls, enter the store. She observed him looking around as he stood at the register and watched him sit down. After ten or fifteen minutes, appellant got up and went outside. Approximately twenty minutes later, Owen collected her things and left the café. As she walked out the door, she

saw appellant sitting at one of the bistro tables outside. As she walked past, he stood up and began to follow her.

As she approached her vehicle, she hit the panic button on her keychain, hoping to attract the attention of other people in the parking lot or scare appellant. She opened the back door of her car and was preparing to put her things in the backseat, when appellant said something to her. She did not hear him and said, "What?" He repeated "Put your things in the car" several times, and each time Owen responded by asking, "What?" Then he said to her, "Get in the car. If I have to tell you again, I will blow your head off." According to Owen, appellant had his hand in the pocket of his coveralls, as if he had a gun, and was holding a styrofoam coffee cup in the other hand. Owen responded that she would give him the keys to her car, but she was not getting in the car. When she hesitated in giving him the keys, however, appellant ran away. Owen quickly called 911 and spoke to the dispatcher as she watched appellant run across the parking lot.

Officers quickly responded and apprehended appellant within ten minutes of receiving the 911 call. Once appellant was in custody, the officers recovered a toy gun, a steak knife, and .22 caliber ammunition from appellant's person. Officers took Owen to the location where appellant had been apprehended, told appellant to stand up straight, placed a spotlight on appellant, and asked Owen if she recognized him. Owen positively identified appellant as the man who had approached her.

Prior to trial, appellant filed a motion to suppress any identification testimony offered by Owen, arguing that the procedure used by the Jonesboro Police Department was suggestive and improper and that any subsequent identification of appellant was tainted. At

the suppression hearing, Owen testified that when the police had her look at the suspect, she did not know if he was handcuffed and could not tell if he was bleeding.[1] She stated that she knew immediately it was him.

Officer John Hughes testified that when Owen arrived at the scene, he removed appellant from the back of a patrol vehicle and stood him up straight so that Owen could see him. Officer Mark Hosier testified that once Owen had arrived at the scene, he knelt down beside her and asked her if she recognized the man (appellant) who was standing beside the police car. Hosier admitted that appellant was handcuffed at the time, that he was bleeding, and that there were approximately six officers at the scene. He also read aloud the policy for this type of field identification:

> In the field when a person is arrested in close proximity in time and place to the commission of an offense, that individual may be taken to be viewed by the victim of or witness to the offense for purposes of identification. This type of confrontation is a proper exercise of investigatory powers and will result in avoiding the incarceration or further detention of innocent suspects, in making positive identifications at a time when identifying factors are fresh in the witness' memories, and in avoiding the necessity of subsequent identification procedures. . . . The suspect shall be brought to be viewed by the witness in a neutral manner. . . . The suspect will not be presented in an obviously custodial manner, as in handcuffs or other physical restraints unless necessary.

Appellant argued that the officers did not follow the above policy because appellant was taken out of a police car, while handcuffed, in order for Owen to observe him. Appellant urged that the procedure used by the police in this case made it inevitable that Owen would identify him as the culprit and requested that the court suppress the identification and any in-court identification. The court denied the motion, citing the opportunity that Owen had to

[1] Appellant had apparently fallen while running from the police and sustained a cut on his forehead.

observe appellant, both in the café and outside as he approached and spoke to her; the accuracy of her description; and her level of certainty. The court also noted Owen's testimony that she did not notice whether appellant had handcuffs on and the short length of time between the crime and the confrontation.

At trial, Owen and the responding officers again testified as to events on the night in question. Appellant objected to Owen's and the officers' in-court identification of him, but the objections were overruled. At the close of the State's case, appellant made motions for directed verdict as to each charge, which were overruled. Appellant then rested and renewed his motions, which were again overruled. The jury returned verdicts of guilty on all counts, and appellant was given the following sentences to run concurrently: twenty-five years' imprisonment for aggravated robbery; six years' imprisonment for criminal attempt to commit kidnapping; six years' imprisonment for terroristic threatening; thirty days' imprisonment for fleeing on foot; one year of imprisonment for carrying a weapon. Appellant then filed a timely notice of appeal to this court.

Sufficiency of the Evidence

For his first point on appeal, appellant argues that the trial court erred in denying his motions for directed verdict. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Smith v. State*, 367 Ark. 274, 239 S.W.3d 494 (2006). We have repeatedly held that, 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. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with

reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

In reviewing a challenge to the sufficiency of the evidence, we will not second-guess credibility determinations made by the fact-finder. *Epps v. State*, 100 Ark. App. 344, ___ S.W.3d ___ (2007). The credibility of witnesses is an issue for the jury and not the court. *Bell v. State*, 371 Ark. 375, ___ S.W.3d ___ (2007). The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

1. Aggravated Robbery

Arkansas Code Annotated section 5-12-103(a) (Repl. 2006) states that 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; [or] (2) Represents by word or conduct that he or she is armed with a deadly weapon." A person commits robbery "if, with the purpose of committing a felony or misdemeanor theft[,] . . . the person employs or threatens to immediately employ physical force upon another person." Ark. Code Ann. § 5-12-102(a) (Repl. 2006).

Appellant first contends that the State failed to prove the necessary elements of a robbery because there was no evidence that appellant ever took anything from the victim as to constitute felony or misdemeanor theft. Appellant misunderstands the nature of the crime; the crime is committed when, with the *purpose* of committing a felony or misdemeanor theft, the person employs or threatens to employ physical force upon another person. A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must

usually be inferred from the circumstances of the crime. *Young v. State*, 371 Ark. 393, ___ S.W.3d ___ (2007). In this case, the victim's testimony established that appellant approached her with the intent of at least stealing her car, if not also abducting her, and he threatened to employ physical force to do so. As stated previously, the credibility of witnesses is a matter for the jury and not this court, therefore we hold that, based upon Owen's testimony, the State did provide substantial evidence of the commission of a robbery.

Appellant also asserts that the State never proved appellant was armed with a deadly weapon or represented that he was so armed. Again, Owen's testimony established that appellant acted in such a way as to suggest that he had a gun in his pocket and threatened to "blow [her] head off," and the officers' testimony established that appellant was armed with a knife, along with ammunition and a toy gun. Accordingly, we hold there is substantial evidence to support the conviction for aggravated robbery.

2. Attempted Kidnapping

A person commits the offense of kidnapping if, without consent, the person restrains another person so as to interfere substantially with the other person's liberty with the purpose of facilitating the commission of any felony or flight after the felony; inflicting physical injury upon the other person; engaging in sexual intercourse, deviate sexual activity, or sexual contact with the other person; or terrorizing the other person or another person. Ark. Code Ann. § 5-11-102(a)(3)(4)(5) & (6) (Repl. 2006). Criminal attempt to commit kidnapping occurs when a person purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of the offense of kidnapping. *See* Ark. Code Ann. § 5-3-201(a)(2) (Repl. 2006).

Appellant argues that the State failed to prove the elements of attempted kidnapping because there was no proof of any physical restraint of the victim. Again, appellant misunderstands the elements of the crime. Criminal attempt to commit kidnapping only requires that a substantial step in the commission of kidnapping take place; it does not require there be actual physical restraint of the victim. Owen's testimony established that appellant attempted to interfere substantially with her liberty by approaching her and threatening to employ physical violence in order to force her into her car. We hold that this constitutes substantial evidence of a criminal attempt to commit kidnapping.

3. Fleeing on Foot

If a person knows that his or her immediate arrest or detention is being attempted by a duly authorized law enforcement officer, it is the lawful duty of the person to refrain from fleeing, either on foot or by means of any vehicle or conveyance. Ark. Code Ann. § 5-54-125(a) (Repl. 2005). Appellant asserts that, in this case, there was no evidence that appellant knew his arrest was being attempted because "there is no testimony whatsoever of the Appellant's state of mind." However, Officer John Hughes testified that while searching for the suspect on foot immediately after the 911 call, appellant came around the side of a house, looked at the officer, and immediately turned and ran. Hughes testified that he yelled at appellant several times to stop and get on the ground, but appellant did not stop until he fell and the officers were able to restrain him. As noted previously, a criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Young*, *supra*. We hold there was substantial evidence

presented from which the jury could infer that appellant knew his arrest or detention was being attempted and fled on foot, thus committing the offense of fleeing.

4. Carrying a Weapon

A person commits the offense of carrying a weapon if he or she possesses a handgun, knife, or club on or about his or her person with a purpose to employ the handgun, knife, or club as a weapon against a person. Ark. Code Ann. § 5-73-120(a) (Repl. 2005). Appellant contends that there was no evidence that the steak knife found on his person was possessed with the purpose to employ it as a weapon. Again, a criminal defendant's intent or state of mind must usually be inferred from the circumstances of the crime. *Young*, *supra*. Considering the circumstances of this case, we hold there is substantial evidence to support the inference that appellant possessed the knife with the purpose to employ it as a weapon.

5. Terroristic Threatening

First-degree terroristic threatening occurs when a person, with the purpose of terrorizing another person, threatens to cause death or serious physical injury or substantial property damage to another person. Ark. Code Ann. § 5-13-301(a)(1)(A) (Repl. 2006). Appellant argues that there is no evidence of the purpose of his "confrontation" with Owen, and that, other than Owen's own testimony, there is no evidence that appellant committed the offense of terroristic threatening. Even assuming this is true, Owen's testimony, which the jury clearly found credible, is enough to constitute substantial evidence that appellant committed the act of terroristic threatening.

Motion to Suppress

For his second point on appeal, appellant contends that the trial court erred in denying his motion to suppress the victim's identification of him as her assailant, both on the night in question and at trial. Appellant asserts that her identification of him on the night in question was unduly suggestive and unconstitutional in nature and tainted any and all subsequent identifications of him. Appellant also argues that Owen's identification of him was not reliable due to inconsistencies in her description of appellant.

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 making this determination, we look first at whether the pretrial identification procedure was unnecessarily suggestive or otherwise constitutionally suspect. *Id*. A pretrial identification violates the Due Process Clause when there are suggestive elements in the identification procedure that make it all but inevitable that the victim will identify one person as the culprit. *Id*. But even when the process is suggestive, the circuit court may determine that under the totality of the circumstances the identification was sufficiently reliable for the matter to be decided by the jury. *Fields v. State*, 349 Ark. 122, 76 S.W.3d 868 (2002). 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; and (6) the lapse of time between the alleged act and the pretrial identification procedure. *Mezquita*, *supra*.

Considering the above factors, we find no error in the trial court's ruling allowing the field identification and the subsequent in-court identification into evidence. While appellant was handcuffed and surrounded by several officers at the time Owen viewed him on the scene, Owen testified that she could not tell if he was handcuffed, and considering the very short lapse of time between the confrontation and the field identification, and Owen's opportunity to observe appellant in a non-threatening environment prior to the confrontation, it was not error to determine that the identification was sufficiently reliable to be decided by the jury. And any inconsistencies in the evidence were for the jury to resolve. *Bell*, *supra*. Under the totality of the circumstances, the trial court's decision was not clearly erroneous; therefore, we affirm.

Affirmed.

HART and BAKER, JJ., agree.