

## ARKANSAS COURT OF APPEALS

DIVISION III  
No. CACR12-93

JEREMY McCLARD

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 10, 2012

APPEAL FROM THE HOT SPRING  
COUNTY CIRCUIT COURT,  
[NO. 30CR-10-149-2]HONORABLE PHILLIP H.  
SHIRRON, JUDGE

AFFIRMED

**RAYMOND R. ABRAMSON, Judge**

A Hot Spring County jury convicted appellant Jeremy McClard of first-degree murder and sentenced him to forty years in the Arkansas Department of Correction. McClard appeals that conviction, arguing that there was insufficient evidence of the requisite intent to support a first-degree murder conviction and that the trial court erred in denying his motion for a mistrial during the sentencing phase of the trial. We affirm.

On the evening of June 24, 2010, Allen Cummins drove to the home of Jeremy McClard. McClard approached Cummins's vehicle and spoke with him through the driver's side window. During the interaction, McClard shot Cummins with a .22 rifle. McClard then opened the door, pushed Cummins over into the passenger seat, and drove his vehicle to the Prairie Bayou Cemetery down the road. He parked the vehicle and walked home.

On the way home, McClard encountered two men. When one of the men, Matthew

Weatherford, asked McClard what he was doing, McClard explained that he was looking for muscadine grapes. Because Weatherford did not believe his explanation and thought he was suspicious, Weatherford called the police to report him.

The next morning, former police officer Jim Elliott was driving past the cemetery and saw Cummins's car. Believing from his training that it might be a suicide, he approached the vehicle to investigate. He called the police when he saw Cummins's body slumped over in the front passenger's seat.

An autopsy of the body revealed that Cummins had been shot in the head with a bullet trajectory of left to right and slightly downward. There was no stippling around the wound. Based on this information, the lack of a weapon at the scene, the position of the body, and other factors, the police determined that the death was a homicide.

McClard was eventually developed as a suspect in the death. He gave three statements to the police. In the first two statements, McClard admitted that Cummins had driven to his house that morning, but he denied shooting him. McClard also gave the officers detailed descriptions of two unknown men in a red Nissan Pathfinder who parked behind Cummins at his house and who followed Cummins when he left.

On June 28, 2010, while at the Hot Spring County jail, Officer Courtney Henry overheard McClard telling a trustee that he had accidentally shot Cummins. When McClard realized that Henry had overheard the conversation, he asked to speak with detectives. At that time, McClard gave a third statement, admitting that he shot Cummins, but claiming that the shooting was an accident. He then described for the police the location of the gun. The

police later located the gun near where McClard had indicated, but, rather than leaning against a tree as he described, it was on the ground under leaves and pine straw.

The aforementioned facts were developed at trial. Additionally, Lindsey Ensley, a friend of McClard's, testified that McClard owed Cummins money and that Cummins had refused to sell him any more drugs. She testified that a few days before the shooting, McClard told her that he wanted to bash Cummins's head in and rob him and asked if she would drive him there. She declined. She then testified that on the day of the shooting, they were at Brett Hughes's<sup>1</sup> house and that McClard asked if she and Hughes would drive him to Cummins's house. She stated that she believed from his question and his previous comments that he was wanting to go to Cummins's house to rob him. They declined. Lieutenant Aaron Collier and Lieutenant Blake Zavadil testified that the gun in question would be very difficult to fire accidentally.

Several witnesses testified on McClard's behalf. They indicated that McClard had a drug problem, but that he was not a violent person. Jessica Looper, Hughes's fiancée, testified that she was present when McClard stopped by Hughes's house on the night of the shooting. She denied hearing McClard ask Ensley to take him to see Cummins. She further stated that McClard was calm and did not appear to be under the influence of drugs or alcohol.

McClard testified regarding the night of the shooting and again claimed that the shooting was an accident. He admitted that Cummins was his main supplier of drugs and that

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<sup>1</sup>Hughes is McClard's cousin. Hughes testified that, although McClard came to his house that day, he did not see McClard because he was outside working in his garden.

Cummins had cut him off due to his debt. He further admitted that he would go into withdrawal if he did not take the drugs. But he insisted that, before the date of the shooting, he had simply stopped requesting drugs from Cummins until he could pay for more. He testified that Cummins had come to his house that day to sell him some pain pills. McClard stated that he had been working in his garden and that he had his rifle with him because he might want to shoot a squirrel or a snake. He walked up to Cummins's vehicle carrying the rifle, and, when he pulled out his wallet to show Cummins that he did not have any money, the gun accidentally went off. He explained that the gun must have bumped the car, or it caught on his shirt, because he denied pulling the trigger. He stated that he panicked because he did not want to go back to prison. He then hid the gun and drove Cummins and the car to the cemetery.

The jury convicted McClard of first-degree murder. At sentencing, Cindy Redden, Cummins's sister, testified that the family was initially willing to accept a plea of twenty-five years, but McClard turned the offer down and subjected them to a trial. Defense counsel objected, stating that the statement was incorrect and that no plea offer had been made. The court sustained the objection and instructed the witness not to talk about what might or might not have been offered. Redden asked that McClard be sentenced to the maximum. On cross-examination, defense counsel elicited the fact that no offer had actually been made. When the jury retired for sentencing, defense counsel moved for a mistrial, which the trial court denied. The jury sentenced McClard to forty years in the Arkansas Department of Correction. McClard now appeals.

McClard first argues that that there was insufficient evidence to support his conviction for first-degree murder because the State failed to prove that he acted purposefully. He contends that the State relied heavily, if not solely, on the testimony of Lindsey Ensley to prove purposeful intent. Ensley testified at trial that, a few days prior to the shooting, McClard had taken her to lunch and told her that he was going to bash Cummins over the head and steal his pills. She then testified that, on the night of the shooting, McClard asked her and Brett Hughes if they would take him to rob Cummins. McClard contends that this is the only evidence presented by the State that would suggest that the shooting was not an accident.

A person commits first-degree murder if “with a purpose of causing the death of another person, the person causes the death of another person.” Ark. Code Ann. § 5-10-102(a)(2) (Repl. 2006). In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Dunn v. State*, 371 Ark. 140, 264 S.W.3d 504 (2007). 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.* Circumstantial evidence may constitute substantial evidence to support a conviction; guilt can be established without direct evidence, and evidence of guilt is not less because it is circumstantial. *Id.* For circumstantial evidence to be substantial, the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused. *Id.* The question of whether the circumstantial evidence excludes every hypothesis consistent with innocence is for the jury

to decide, and the jury's determination will not be disturbed unless the jury reached its verdict using speculation and conjecture. *Id.* The weighing of evidence and witness credibility are matters left solely to the discretion of the jury. *Id.*

McClard contends that there was insufficient evidence that he acted with the requisite intent. 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. *Leaks v. State*, 345 Ark. 182, 45 S.W.3d 363 (2001). The existence of criminal intent or purpose is a matter for the jury when criminal intent may be reasonably inferred from the evidence. *Kendrick v. State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992).

Here, there was evidence that McClard had previously discussed robbing Cummins by bashing in his head. There was evidence that he owed Cummins money and had been cut off from his supply of drugs. Therefore, there was evidence of some motive for the shooting. In addition, McClard initially denied shooting Cummins and concocted a detailed story to deflect suspicion onto some other persons. He then drove the car away from the crime scene and hid the weapon under leaves and pine straw. There was also evidence that it would be very difficult for that particular type of gun to go off accidentally. Thus, there was sufficient evidence upon which the jury could infer that McClard purposefully shot Cummins.

McClard next argues that the trial court erred in denying his motion for a mistrial during sentencing. A mistrial is a drastic remedy and should be declared only when there has been an error so prejudicial that justice cannot be served by continuing the trial and when it cannot be cured by an instruction to the jury. *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475

(2007). An admonition to the jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial. *Zachary v. State*, 358 Ark. 174, 188 S.W.3d 917 (2004). The circuit court has broad discretion in granting or denying a motion for a mistrial, and this court will not reverse the circuit court's decision absent an abuse of discretion. *Williams v. State*, 371 Ark. 550, 268 S.W.3d 868 (2007).

Here, we need not reach the merits of McClard's argument because he did not move for a mistrial at the first opportunity. This court has consistently held that a motion for mistrial must be made at the first opportunity. *See, e.g., Ellis v. State*, 366 Ark. 46, 233 S.W.3d 606 (2006); *King v. State*, 361 Ark. 402, 206 S.W.3d 883 (2005); *Rodgers v. State*, 360 Ark. 24, 199 S.W.3d 625 (2004). The reason for this is that a circuit court should be given an opportunity to correct any perceived error before prejudice occurs. *Ellis, supra*. In *Ellis*, defense counsel did not make his motion for mistrial until the prosecutor had already asked three additional, unrelated questions. *Id.* Our supreme court held that the motion was untimely as it was not made at the first opportunity. Here, even though counsel objected to the testimony at the first opportunity, counsel did not request a mistrial until after he questioned the witness and after the jury had begun deliberations. This court has previously held that it was proper to deny a motion for mistrial when the request was not made at the first opportunity, even though the motion had been preceded by defense objections sustained by the trial court. *Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992); *Dumond v. State*, 290 Ark. 595, 721 S.W.2d 663 (1986). Because McClard failed to request a mistrial at the first opportunity, no error occurred.

Affirmed.

HOOFFMAN AND BROWN, JJ., agree.

*Louis L. Loyd*, for appellant.

*Dustin McDaniel*, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.