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ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR09-444

JIMMY LEE FROST, APPELLANT V. STATE OF ARKANSAS, APPELLEE	**Opinion Delivered** 17 FEBRUARY 2010 APPEAL FROM THE DREW COUNTY CIRCUIT COURT [NO. CR-2007-219-1] THE HONORABLE SAM POPE, JUDGE AFFIRMED

D.P. MARSHALL JR., Judge

About a month after his wife, Venessa, filed for divorce, Jimmy Frost invited her to their home to talk. She went. Frost asked her to come back and live with him, but she said no. He responded "I'm going to do what I told you I'd always do if you left me. I'm going to kill you." Frost then pulled out a .22 caliber pistol and shot Venessa four times as she sat alone in her car. Venessa survived. And a jury convicted Frost of attempted first-degree murder, committing a terroristic act, and possessing a firearm even though he was a felon on probation. On appeal, Frost argues various trial errors and the sufficiency of the evidence showing a terroristic act.

1. We consider Frost's sufficiency point first to avoid a double-jeopardy

problem. *King v. State*, 338 Ark. 591, 595, 999 S.W.2d 183, 185 (1999). He argues that the record contains no evidence he intended to shoot at a vehicle because he was shooting at Venessa. But the governing statute, Ark. Code Ann. § 5-13-310 (Supp. 2009), only requires proof that Frost shot at a "conveyance" occupied by Venessa with the purpose of injuring her. The precedents construing the statute have rejected the argument Frost makes and held that the statute applies in circumstances like these. *Stephenson v. State*, 373 Ark. 134, 137, 282 S.W.3d 772, 776 (2008); *Warren v. State*, 103 Ark. App. 124, 128–30, 286 S.W.3d 768, 772–73 (2008). Viewing the record in the light must favorable to the State, and applying the precedential gloss on the statute, we hold that substantial evidence supports the terroristic-act conviction.

2. During voir dire, the State mischaracterized Arkansas law about manslaughter three times. Frost objected each time. The circuit court, however, overruled the objections and declined to correct the prosecutor. The court stumbled here, but there was no reversible error. The State also recited the law correctly before its misstatements during voir dire. Moreover, the court eventually instructed the jury with the model instructions, AMI Crim. 2d 1004, which defined manslaughter correctly, and AMI Crim. 2d 101, which told the jurors to follow the law as the court gave it to them in the instructions. The law presumes that the jury followed the court's instructions, not the State's comments during voir dire, in deciding the case.

Hall v. State, 315 Ark. 385, 391–92, 868 S.W.2d 453, 456–57 (1993).

3. Next Frost argues that the circuit court abused its discretion by admitting other-crimes evidence. When he shot Venessa, Frost was on probation for aggravated assault and terroristic threatening against her. His probation had been revoked—based partly on Venessa's testimony that she had been cut when he broke out a window at their daughter's apartment. No abuse of discretion occurred here. The other-crimes evidence was independently relevant on Frost's motive for attempted murder and his intent. *Brunson v. State*, 368 Ark. 313, 323–24, 245 S.W.3d 132, 140–41 (2006). Nor do we agree with Frost that the prejudicial impact of this proof outweighed its probative value under Rule 403. In any event, the circuit court instructed the jury to consider this proof as evidence only of motive or intent. *Barrett v. State*, 354 Ark. 187, 205–06, 119 S.W.3d 485, 497 (2003).

4. Frost also asserts an abuse of discretion in the court's decision not to instruct the jury on mental disease or defect. Ark. Code Ann. § 5-2-312 (Repl. 2006). The slightest supporting evidence requires submission of an instruction. *Gilcrease v. State*, 2009 Ark. 298, at 14, 318 S.W.3d 70, 80. But Frost did not put on evidence suggesting that he could not appreciate the criminality of his actions or their consequences because of a mental disease or defect. *Teater v. State*, 89 Ark. App. 215, 201 S.W.3d 442 (2005). Frost testified that he could not remember shooting Venessa;

he said that, after the shooting he "felt like somebody touched" him and heard a voice say "no, not the one you love." The forensic psychologist who evaluated him concluded that Frost did not have a mental disease or defect at the time of the shooting. The rest of Frost's proof here concerned his distress about the divorce and Venessa's actions, not a mental disease or defect. The circuit court, moreover, instructed the jury that an extreme emotional disturbance, could, in certain circumstances, diminish Frost's crime from attempted murder to attempted manslaughter. AMI Crim. 2d 1004. Unlike in the *Teater* case, we discern no abuse of discretion on this issue on this record.

5. Last, Frost argues another abuse of discretion in the circuit court's handling of a jury question during the sentencing deliberations. The jury sent a note out asking the court to define consecutive and concurrent "in English." The court read the lawyers this note; read them the written response that the court planned to make (which we copy in the margin[*]); noted that the jury was making only a recommendation on consecutive versus concurrent; and then invited the lawyers to make any record they wanted. No one invoked the governing statute, Ark. Code

[*] "Consecutive - means one after the other or stacked, e.g., 10 years + 20 years = a 30 year sentence. Concurrent means together, e.g., 10 years + 20 years = a 20 year sentence."

Ann. § 16-89-125(e) (Repl. 2005), which required the circuit court to bring the jury back and answer the question in open court.

Frost's lawyer made two objections "to the form of the answer to the jury's question." First, he doubted whether the jury would understand the abbreviation "e.g." and suggested "that is" instead. Second, he argued that "to put twenty in as an example is unnecessarily suggestive that he shouldn't get a ten and a ten, and I would request the Judge amend that to ten plus ten equals twenty." The court responded that "[t]he example is correct. It doesn't mean to suggest that it, is what the sentence should be, and I[ ] don't think it does that." The court wrote "example" by each e.g., overruled Frost's objection, and sent the note back to the jury with the written response on the bottom.

Frost now argues that the circuit court's definitions were adequate but its example went too far by mentioning a twenty-year sentence. This number, Frost contends, suggested that he should receive a twenty-year sentence on one of the charges. According to Frost, a later note shows that the jury took the court's hint to his prejudice. The jury asked: "Using 30 yrs as a guideline, what is the minimum time Def could spend in prison." (The circuit court's handling of this note is not asserted as error.)

The question for this court is whether the circuit court abused its discretion in

responding to the jury's note requesting the definitions. *Brown v. State*, 288 Ark. 517, 521–22, 707 S.W.2d 313, 315 (1986). As Frost acknowledges, he had and has no quarrel with the court using examples cast in terms of years' imprisonment. The suggestibility problem now argued by Frost, however, inheres in any example put in these terms. And Frost waived that argument. Once the court put its foot on this road without objection, the court acted within its discretion in not using the statutory minimum term in the examples.

Even if the court abused its discretion, this record does not show prejudice in Frost's sentence. As the State argues, Frost faced ten to fifty years' imprisonment for attempted murder, ten to sixty years for the terroristic act, and ten to thirty years for being a felon in possession of a handgun. The jury fixed his sentences at twenty-three years, ten years, and ten years. The circuit court could have imposed these sentences consecutively. Therefore Frost's exposure was imprisonment for as many as one hundred forty years. The jury recommended that none of the sentences be consecutive and the court imposed concurrent sentences. Frost's twenty-three-year sentence was within the statutory ranges and well short of the maximums. He thus cannot demonstrate prejudice in his sentence from the circuit court's response to the note. *Buckley v. State*, 349 Ark. 53, 64–65, 76 S.W.3d 825, 832 (2002).

Affirmed.

GLADWIN and BAKER, JJ., agree.