Cite as 2011 Ark. App. 71

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR10-618

RICHARD WAYNE KEISTER APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 2, 2011 APPEAL FROM THE MILLER COUNTY CIRCUIT COURT [NO. CR-09-115-2] HONORABLE WALTER KELVIN WYRICK, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

Richard Wayne Keister was convicted in a Miller County jury trial of aggravated robbery. He received a ten-year sentence to be served in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in admitting into evidence 1) a statement the victim made to another person and 2) a statement the victim made to police regarding the identification of the perpetrator where the purpose of the statements was to improperly "bolster" her credibility. He also argues that the trial court erred in allowing the State to discuss punishment during its closing argument in the guilt phase of the trial. We affirm.

Because Keister does not challenge the sufficiency of the evidence, we will recite only the testimony necessary to illuminate the arguments that Keister makes on appeal. The aggravated-robbery victim, Brenda Anthony, testified that in the early morning hours of

October 12, 2008, she was attempting to clean up the Games and Gifts arcade in Texarkana. She heard someone trying to gain access to the arcade. Anthony attempted to call the police, but the phone had no dial tone. She later learned that the phone line had been cut. A man wearing a plastic mask entered the business. When he stumbled, the mask "flew up off his face," allowing her to recognize Keister. According to Anthony, Keister had been a patron of the Games and Gifts. Keister chased her, caught her, and held her at knife point. She was unable to elude Keister because she recently had surgery to mend a broken ankle. Keister ordered her to "get down." With his hand on her neck, he forced her to crawl to the bathroom. Anthony stated that she heard someone else in the office attempting to gain access to the desk. Once in the bathroom, she surrendered the office keys to Keister. He then secured her in the bathroom by bracing a chair against the door. Anthony was able to escape from the bathroom after repeatedly pushing against the door. Once out, she saw that the cash drawer had been ransacked. She left through the front door, still unsure of the whereabouts of her assailant. Anthony ran to her car and drove to an E-Z Mart where she encountered Candice Scott. She asked Scott to call the police. Anthony stated that she tried to speak to the 911 operator, but could not hear her clearly. The 911 tape, with Anthony's voice on the recording, was played for the jury. Anthony then asked to call her boss.

Scott testified that, on the morning in question, Anthony entered her store. Scott described Anthony as "frantic," which she defined as "really . . . nervous" and "out of breath." Over Keister's hearsay objection, she recalled that Anthony told her she had just been

robbed and instructed her to call 911. Anthony then requested to use the convenience store phone to call her boss.

Detective Paul Nall of the Texarkana Police Department testified that he was called to investigate the robbery the same morning at approximately 7:30. His supervisor informed him that Keister was a suspect. He prepared a six-person photo array to show to Anthony, who viewed it in his office. Over Keister's hearsay objection, Detective Nall stated that Anthony identified Keister as the robber.

We first consider Keister's arguments that he preserved by making hearsay objections at trial. Evidentiary rulings are reviewed on appeal under an abuse-of-discretion standard. *Williams v. State*, 2010 Ark. 89, 377 S.W.3d 168. Hearsay is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Ark. R. Evid. 801(c). Under Rule 802 of the Arkansas Rules of Evidence, hearsay evidence is generally inadmissible. However, hearsay may be admissible if it falls within an exception to the hearsay rule. *See Wright v. State*, 368 Ark. 629, 249 S.W.3d 133 (2007).

Regarding Scott's testimony, Keister argues that it did not qualify as an excited utterance because there was insufficient evidence that Anthony's statement involved her reaction to the "alleged event." Furthermore, he asserts that her statement that she needed to call her manager, rather than police, is evidence that her response does not meet the criteria for an excited utterance. He concludes that Scott's testimony was merely used to "bolster"

Anthony's allegation that she had been robbed. We disagree.

The "excited-utterance" exception to the hearsay rule is found in Arkansas Rule of Evidence 803(2), which states, "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Ark. R. Evid. 803(2) (2010). Our supreme court has prescribed a five-factor test to evaluate whether a statement qualifies as an excited utterance: (1) the lapse in time between the event and the statement; (2) the age of the declarant; (3) the declarant's physical and mental condition; (4) the characteristics of the event; and (5) the subject matter of the statement. *Talley v. State*, 2010 Ark. 357, 377 S.W.3d 222. Additionally, to be an excited utterance, the statement must appear to be spontaneous, excited, or impulsive, rather than the product of reflection and deliberation. *Id.*

The trial court correctly applied the excited-utterance exception in this instance. While the fact that Anthony was an adult would weigh against a finding that the statement was an excited utterance, the other factors support the trial court's ruling. The statement was made mere minutes after Anthony escaped from the bathroom at a time when she was still unsure about whether her assailant and his confederates were still in the area. Scott described Anthony as "frantic." The event was armed robbery in which Anthony was physically assaulted, and the subject matter of the statement was that Anthony had been robbed and needed assistance in contacting police. Furthermore, contrary to Keister's assertions, Anthony

did not merely seek to call her boss, but actually made an emergency call to police. Finally, we decline to accept Keister's assertion that the statement was merely introduced to bolster Anthony's testimony. Keister did not make this argument to the trial court, and it is axiomatic that, with few exceptions not germane to this issue, we will not address arguments that are not first raised to the trial court. *Talley v. State*, 2010 Ark. 357, 377 S.W.3d 222. Under these circumstances, we cannot say that the trial court abused its discretion in admitting the statement.

We next consider Detective Nall's testimony regarding Anthony's identification of Keister in the photo array. He contends that because Anthony testified at trial and made an in-court identification, Detective Nall's hearsay testimony was offered "merely to bolster Ms. Anthony's testimony." We disagree. As noted above, a statement is hearsay only if it is offered for the truth of the matter asserted—here that Keister was the person who robbed Anthony. At trial, the State argued that it was offered not for the truth of the matter asserted, but as proof of the reason for the police furthering the investigation of Keister. A statement is not inadmissible as being hearsay if it is not offered to prove the truth of the matter asserted. Ark. R. Evid. 801(c). As with Keister's first point, the portion of his argument concerning bolstering was not made to the trial court, so we likewise decline to address it on appeal. *Talley*, *supra*.

We finally turn to Keister's argument that the trial court erred in allowing the State to discuss punishment during its closing argument in the guilt phase of the trial. Keister objected

to the prosecutor mentioning punishment when the prosecutor made the following statements:

> People will go and do some bad things and that's why this is an extremely important case. And the state legislature has established that armed robbery–aggravated robbery and the way we say it, but armed robbery, you know, is a Class Y felony in the State of Arkansas. A person can get not less than ten years nor more than 40 years or life as we stated it to you.

We find no error.

The trial court has a wide latitude of discretion in controlling the arguments of counsel, and its rulings in this regard are not overturned in the absence of clear abuse. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). The test on appellate review is whether there was a manifest abuse of discretion by the judge in failing to properly act on an objection to improper remarks. *Id.*

First and foremost, the class of the felony and the punishment range was placed before the entire venire when the trial judge read the information. Accordingly, Keister has failed to show prejudice. It is axiomatic that we will not reverse a trial court's rulings on the propriety of a closing argument absent a showing of prejudice. *Robertson v. State*, 304 Ark. 332, 802 S.W.2d 920 (1991).

Affirmed.

PITTMAN and MARTIN, JJ., agree.