

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR08-225

WENDELL LEE ROGERS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered MAY 20, 2009

APPEAL FROM THE UNION
COUNTY CIRCUIT COURT,
[NO. CR-2005-531]

HONORABLE HAMILTON H.
SINGLETON, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Wendell Lee Rogers was convicted by a Union County jury of aggravated robbery with a firearm enhancement and sentenced to forty-five years' imprisonment. On appeal, he contends that the circuit court abused its discretion in not allowing him to testify in support of his duress defense as to the history and background of the individual who threatened to kill him. He also asserts that the circuit court abused its discretion in allowing a witness to testify about what a reasonable person in Rogers's position would have done. We affirm.

At his trial on the charge of aggravated robbery, Rogers testified that he owed George Thrower money for drugs. He said Thrower took him to a store in Strong, Arkansas, pointed a gun at him, and ordered him to rob the store to get money to satisfy his debt. Rogers stated that he went into the store, asked to use the bathroom, came out, and asked the clerk for

money. The clerk refused, and Rogers left. Rogers claimed that Thrower “threw a gun in my face and told me to go back in that store and get his money.” Rogers went back in, brandished his weapon, and asked the clerk for money. The clerk complied, giving Rogers thirty dollars, and Rogers again left and gave the money to Thrower.

When Rogers was asked at trial to tell what he knew about Thrower’s background, the circuit court sustained the State’s objection. Rogers then testified that he was related to Thrower and had known him a long time. He claimed that he believed Thrower when Thrower made threats because he knew him and knew what he would do. He further testified that during the two months after the robbery and before he was arrested, he did not go to a law-enforcement officer and explain what happened. He stated that he had owed Thrower \$200, and that Thrower committed a murder before Rogers could pay him the rest of the money. Rogers also testified that he was afraid to ask Wayne West, the store clerk, for help when he went in the store. He also admitted that he told police after his arrest that “they were going to give me dope to rob the store. I said on the tape they gave me some, I went in and robbed the store, and they were going to give me some more when I got through robbing the store.”

Wayne West testified that Rogers did not ask for help when he came in the first time. West was asked if any person were under duress, would it have been reasonable for them to ask for help. Defense counsel objected, and the trial court responded, “That’s what you asked.” Defense counsel responded, “Yes, and he objected to it as speculation.” The trial judge said, “He let you talk about it.” West continued to testify that if he were in trouble,

he would have asked for assistance. He said it had happened before, and it had been on the news where “someone comes in and says they are in trouble and asks for help. Yes, that would have been a reasonable request.”

The jury found Rogers guilty of aggravated robbery with a firearm enhancement. He was sentenced to forty-five years’ imprisonment. Our supreme court granted Rogers’s motion for belated appeal.¹ This appeal followed.

Standard of Review

It is well settled that trial courts have broad discretion in evidentiary rulings and a trial court’s ruling on the admissibility of evidence will not be reversed absent an abuse of that discretion. *See Owens v. State*, 363 Ark. 413, 214 S.W.3d 849 (2005). Additionally, this court will not reverse an evidentiary ruling absent a showing of prejudice. *Sauerwin v. State*, 363 Ark. 324, 214 S.W.3d 266 (2005).

I. Duress Defense

Rogers first claims that the circuit court abused its discretion in not allowing him, in support of his duress defense, to testify as to the history and background of George Thrower, the man who threatened him. Rogers claims that Thrower demanded money from him and drove him to Strong, Arkansas, to rob a store to get some money. He claims Thrower

¹In an unpublished opinion dated May 22, 2008, our supreme court granted Rogers’s motion for belated appeal and to proceed in forma pauperis. *See Rogers v. State*, ___ Ark. ___, ___ S.W.3d ___ (May 22, 2008). The court ruled that Rogers was not at fault and his attorney erred by failing to file the notice of appeal as requested by Rogers. The court appointed an attorney to represent Rogers in this appeal.

pointed a gun at him and that he was afraid. He claims that in light of the imminent threat to his life, he robbed the store at gunpoint for thirty dollars.

Rogers contends that central to his duress defense was his understanding of Thrower's history and reputation and the fear it caused him. When Rogers's counsel asked him about that understanding, the trial court sustained the State's objection. He argues that by prohibiting him from testifying about Thrower's history and reputation, the circuit court kept the jury from considering all the facts and circumstances supporting Rogers's reasonable belief that Thrower would carry out his threat.

Arkansas Code Annotated section 5-2-208(a) provides in pertinent part:

It is an affirmative defense to a prosecution that the actor engaged in the conduct charged to constitute an offense because the actor reasonably believed he or she was compelled to engage in the conduct by the threat or use of unlawful force against the actor's person or the person of another that a person of ordinary firmness in the actor's situation would not have resisted.

Rogers claims that even though Arkansas appellate courts have not addressed the determination of "reasonable belief" in the context of duress, it is hornbook law that whether a belief is reasonable is determined by the totality of the circumstances. *See, e.g., U.S. v. Rugh*, 968 F.2d 750 (8th Cir. 1992) (where the court stated that when assessing the good faith of officers in conducting a search, the court must look at the totality of the circumstances, including information known by officers but not presented to the issuing judge).

Rogers maintains that to support his reasonable belief that he was being compelled to rob the store because his life was in imminent jeopardy, he would have testified about Thrower's history as a drug dealer and his notorious reputation. He contends that when the

circuit court foreclosed that opportunity, it precluded the jury from fully considering the totality of the circumstances that supported his reasonable belief that his life was in danger. He claims that to deny him that opportunity was an abuse of discretion.

The State points out that after the circuit court sustained its objection to the question regarding Thrower's background and reputation, Rogers's lawyer moved on without proffering the testimony he sought to admit. The State contends that Rogers's claim that this was an abuse of discretion fails for three reasons. First, Rogers did not object on the basis that, without the testimony, the jury was unable to review the totality of the facts supporting Rogers's belief that Thrower would carry out his threat, and it is therefore not preserved for appeal. *See Fields v. State*, 81 Ark. App. 351, 101 S.W.3d 849 (2003). In trying to refute this argument, Rogers argues that *Fields* is inapplicable because, there, the defendant stated an objection to the State's closing argument, but the appellate court held that because the defendant changed his argument on appeal, he did not preserve the argument as he had not made it below.

Rogers claims that, here, the State made the objection and the trial court sustained it; therefore, *Fields* does not apply. Further, the State contends that *Rugh, supra*, which was cited by Rogers in support of his argument, relates to the analysis of a police officer's good-faith belief that a search warrant is valid. It does not address the "reasonableness" analysis in a duress defense.

Second, the State asserts that Rogers's failure to proffer the testimony he sought to admit precludes this court from determining error. The State claims that error may not be

based on a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the excluded evidence was made known to the court or was apparent from the context within which the questions were asked. *See* Ark. R. Evid. 103(a)(2). The State contends that the substance of Rogers's proposed testimony about Thrower was not apparent from the context of the questions posed to Rogers during direct examination. Further, Rogers did not attempt to inform the trial court about that which he would testify. Therefore, with no indication of what the testimony would have been, this court cannot determine whether Rogers suffered prejudice from the circuit court's exclusion of it. *See Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999).

Rogers argues that the question was what Rogers knew about Thrower's reputation and background. After the objection was sustained, Rogers testified that he had known Thrower for a long time and knew what Thrower would do to him. Rogers's counsel had explained to the jury that the testimony would show that Thrower was a notoriously bad person, a very bad man, and a cocaine dealer. Rogers contends that viewing the question his counsel asked him in this context, the substance of the evidence to which Rogers would have testified is apparent.

Accordingly, the State's third basis for arguing that the trial court did not abuse its discretion is that Rogers presented ample evidence that Thrower had a drug-related background and that Rogers feared Thrower would kill him if he did not rob the store. Rogers did testify that he had known Thrower for a long time, that he owed him \$200 for drugs, and he knew that Thrower would carry out any threats he made. Rogers described

how Thrower forced him to go to Strong and threatened him with a gun if he failed to get money from the store. Therefore, the State argues that any more evidence about Thrower's background would have been cumulative and irrelevant, providing no more support for a finding of duress than the evidence already presented by Rogers. *See, e.g., Pugh v. State*, 351 Ark. 5, 89 S.W.3d 909 (2002).

We hold that the trial court did not abuse its discretion in not allowing Rogers to testify as to the history and background of George Thrower based upon Rogers's failure to proffer the evidence. If the evidence Rogers wished to submit was something different from the evidence Rogers testified about, we have no way of knowing whether Rogers's case was prejudiced without it. If the evidence was that outlined by Rogers above, which was allowed, the State's argument that the evidence would have been cumulative would be applicable. Based upon the foregoing, we hold that no abuse of discretion was made and affirm the trial court on this point.

II. "Reasonable Person" Testimony

Rogers contends that the trial court abused its discretion when it allowed Wayne West, the store clerk, to testify as to what a reasonable person in Rogers's position would have done. The State asked West on re-direct examination whether a reasonable person under duress would have asked him for help. The trial court rejected Rogers's objection that such testimony was speculative. West answered that a reasonable person in Rogers's position would have asked for his assistance.

Rogers argues that West's opinion testimony about what a reasonable person would have done was mere speculation and not admissible under Arkansas Rule of Evidence 701.

Rule 701 states:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are

- (1) Rationally based on the perception of the witness; and
- (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rogers claims that West offered no personal knowledge to support his opinion about individuals in Rogers's position. See Ark. R. Evid. 602 (which requires a foundation to be established that a witness has personal knowledge of a matter). Also, Rogers argues that, under *Moore v. State*, 362 Ark. 70, 207 S.W.3d 493 (2005), meaningless assertions that amount to little more than choosing up sides are inadmissible. He contends that West's assertion of what a reasonable person would have done here calls for nothing more than a meaningless assertion that amounts to little more than choosing up sides.

The State points out that Rogers's counsel asked of West on cross-examination, "Would it be unusual for somebody who was robbing you to ask you to call the police? Would that be a normal occurrence?" West answered, "No, sir." The State contends that after Rogers's counsel continued this line of questioning, the State objected when defense counsel asked West to speculate as to what an observer would think about a delay in police arrival. The trial court sustained that objection.

During its re-direct examination, the State asked West, "[I]f any person were under duress would it have been reasonable for them to [tell] you to get help?" Rogers's counsel

objected based upon speculation. The trial court overruled the objection, pointing out that it was essentially the same question that the State had allowed Rogers to ask West on cross-examination.

The State asserts that the trial court considered the substance of the State's question and determined that it was proper considering Rogers's cross-examination of the same witness. Further, even though Rogers contends that West's answer required him to speculate, he does not explain how he was prejudiced by that speculation. *See Leaks, supra*. Moreover, any error was invited by Rogers, and he cannot seek reversal on an error for which he is responsible. *See McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997). Accordingly, the trial court's ruling is hereby affirmed.

Affirmed.

GRUBER and GLOVER, JJ., agree.