

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR 09-1261

ANTHONY DETEL BEARE
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered June 30, 2010

APPEAL FROM THE MISSISSIPPI
COUNTY CIRCUIT COURT
[NO. CR 2008-315]

HONORABLE DAVID N. LASER,
JUDGE

AFFIRMED; MOTION GRANTED

M. MICHAEL KINARD, Judge

Anthony Beare appeals from his conviction for battery in the third degree. His attorney filed a no-merit brief and motion to withdraw, pursuant to *Anders v. California*, 386 U.S. 738, 744–45 (1967) and Arkansas Supreme Court Rule 4-3(k) (2010), and appellant did not file any pro se points for reversal. We affirm the conviction and grant counsel’s motion.

Appellant was originally charged with burglary, terroristic threatening, and third-degree battery based on an incident that occurred at the residence of Kassandra Woods on the night of October 22, 2008. At the jury trial on July 29, 2009, Woods testified that appellant kicked in the door to her home, demanded that she return a CD player belonging to him, hit her with a shirt, and threw a plastic bottle at her, which left a knot on her head. Yvonne Hill, Woods’s roommate at the time of the incident, testified that she heard the door

being kicked in and saw appellant hitting Woods with a shirt. She also testified that Woods had a knot on her head.

Lieutenant Eugene Kelly testified that he took Woods's statement after the incident and observed a knot that covered Woods's forehead. He stated that he attempted to take photographs of the injury, but the injury did not show up in pictures because it blended in with Woods's forehead. Lt. Kelly did not have the photographs he had taken. Appellant's counsel then moved to strike Lt. Kelly's testimony and to dismiss the battery charge because there were no photographs to back up Lt. Kelly's observations. The trial court denied both motions, allowing Lt. Kelly's testimony as to what he saw and reasoning that the jury could weigh the testimony to make their own determination.

Sergeant Michael Ephlin, the detective assigned to investigate the case, also testified at the trial. On cross-examination of Sgt. Ephlin, appellant's counsel pointed out that appellant had been in jail for several months while awaiting trial. The State objected to counsel's comment, and the trial court sustained the objection. After Sgt. Ephlin's testimony, the State rested, and appellant moved for directed verdict regarding all charges except the battery charge. Appellant conceded that there was a prima facie case for battery in the third degree.

During his case-in-chief, appellant testified in his own defense and admitted to hitting Woods because she would not return his CD player. However, appellant disputed that she had a bump on her head after he hit her. During cross-examination, the State questioned

appellant regarding his prior conviction for residential burglary, a Class B felony. Appellant testified that he pled guilty and, without prompting, stated that he had received five years' probation as a result. The State then questioned whether he had served time due to a probation revocation. Appellant's counsel objected to the revocation question, but appellant indicated a willingness to answer. The objection was overruled, and appellant testified that he had violated his previous probation and been sent to prison.

The jury found appellant guilty of battery in the third degree. During the sentencing phase, the State sought to introduce several prior convictions, including misdemeanors. Appellant objected, arguing that the non-felony convictions were inadmissible. The trial court overruled appellant's objection, and the jury sentenced appellant to 364 days' imprisonment and imposed a \$500 fine.

Appellant's counsel filed a timely notice of appeal, followed by a no-merit brief and motion to withdraw as counsel. When an appellant's attorney finds that an appeal would be wholly frivolous, we are bound to review the entire record to ensure the appellant is afforded his constitutional rights. *Campbell v. State*, 74 Ark. App. 277, 279, 47 S.W.3d 915, 917 (2001).

To avoid double-jeopardy implications, we address the sufficiency of the evidence before any other issues. *Stegall v. State*, 340 Ark. 184, 189, 8 S.W.3d 538, 542 (2000). In this case, a challenge to the sufficiency of the evidence leading to the battery conviction or the legality of the sentence would be frivolous. A person commits third-degree battery—a Class

A misdemeanor—if, with the purpose of causing physical injury to another person, the person causes physical injury to any person. Ark. Code Ann. § 5-13-203(a)(1) (Repl. 2006). The sentence for a Class A misdemeanor may include imprisonment of up to one year and a fine of up to \$2500. *Id.* §§ 5-4-104(d)(5)(Supp. 2009), 5-4-201(b)(1) (Supp. 2009), 5-4-401(b)(1) (Repl. 2006). When reviewing the sufficiency of evidence leading to a conviction, we consider only the evidence that tends to support the finding of guilt and view it in the light most favorable to the State. *Graham v. State*, 365 Ark. 274, 275, 229 S.W.3d 30, 32 (2006). We will affirm the trial court’s ruling if it is supported by substantial evidence. *Coggin v. State*, 356 Ark. 424, 431, 156 S.W.3d 712, 717 (2004). Substantial evidence is evidence that is of sufficient force and character to compel a conclusion one way or the other, without speculation or conjecture. *Stephenson v. State*, 373 Ark. 134, 136, 282 S.W.3d 772, 775 (2008). In considering the evidence presented below, we will not weigh the evidence or assess the credibility of witnesses, as those are questions for the finder of fact. *Woods v. State*, 363 Ark. 272, 275, 213 S.W.3d 627, 630 (2005).

Here, appellant admitted to purposely hitting Woods. Woods and two other witnesses testified that she had an injury to her forehead—a large knot—following the incident. Those three statements are of sufficient force and character to compel the conclusion that appellant’s admitted action caused injury to Woods. The resulting punishment was within the limits imposed by statute for a Class A misdemeanor.

Of the other issues raised during the trial that resulted in adverse rulings, only four

were relevant to the battery conviction. First, appellant's motion to strike Lt. Kelly's testimony regarding the injury he observed was properly denied, despite the lack of photographic proof, as was the contemporaneous motion to dismiss. A witness may testify as to his personal knowledge of a matter, and evidence proving personal knowledge may consist of the witness's own testimony. Ark. R. Evid. 602 (2010). Lt. Kelly's testimony as to the injury he observed on Woods's forehead was admissible because it was based on his personal knowledge. Furthermore, a photograph may be merely cumulative when it depicts an object that has already been described by witness testimony. *See Johnson v. State*, 2010 Ark. App. 153, at 16. In *Johnson*, the trial court admitted photographs of various items located in the front passenger seat of a vehicle after the officer who took the photographs testified as to what he had seen in the car. *Id.* at 13, 16. The defendant argued that there was not a proper foundation for the photographs, but we held that, even if the foundation was lacking, their admission was not prejudicial because the photographs were cumulative to what the officer had already described. *Id.* at 16. In the present case, the lack of photographs was of no consequence because any photographs of the injury would have been cumulative to Lt. Kelly's testimony. Additionally, the denial of appellant's motion to dismiss was proper because Lt. Kelly's observation of Woods's injury was but one piece of evidence supporting the State's case.

Second, the trial court properly sustained the State's objection to the statement regarding appellant being in jail while awaiting trial. Questions during cross-examination

should not be conjectural, speculative, or argumentative. *Maxwell v. State*, 284 Ark. 501, 505, 683 S.W.2d 908, 911 (1985). Counsel's statement was more of an argumentative comment than a question, and it appeared to be an attempt to draw sympathy for appellant, rather than a probative inquiry. There was no error in sustaining the State's objection to such commentary.

Third, the trial court did not err by allowing questioning regarding appellant's prior probation revocation. Evidence of previous convictions presented for the purpose of attacking a witness's credibility is admissible if the crime was punishable by death or imprisonment in excess of one year. Ark. R. Evid. 609(a). Class B felonies are punishable by a sentence of five to twenty years. Ark. Code Ann. § 5-4-401(a)(3) (Repl. 2006). The State's line of questioning was specifically geared toward the prior conviction for residential burglary, and such questioning was permissible under Rule 609(a) because residential burglary is punishable by more than one year. Because the probation was a result of that conviction, questions regarding the probation were also permissible. Furthermore, appellant opened the door to the issue of probation and indicated a willingness to answer questions about the revocation. Therefore, appellant's counsel's objection was properly overruled.

Finally, the introduction of appellant's prior misdemeanors during the sentencing phase was appropriate. Arkansas Code Annotated section 16-97-103(2) (Repl. 2006) provides that prior misdemeanors are admissible in the sentencing phase of a trial. *Davis v. State*, 330 Ark. 76, 87, 953 S.W.2d 559, 564-65 (1997). Therefore, there was no error in their admission.

Cite as 2010 Ark. App. 544

For the foregoing reasons, we affirm the conviction and grant counsel's motion to withdraw.

Affirmed; motion granted.

PITTMAN and BROWN, JJ., agree.