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ARKANSAS COURT OF APPEALS

DIVISION III

No. CR-23-48

TRISTEN WALLER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 14, 2024

APPEAL FROM THE UNION COUNTY
CIRCUIT COURT
[NO. 70CR-19-275]

HONORABLE GRISHAM PHILLIPS, JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

On June 3, 2022, a Union County Circuit Court jury found appellant Tristen Waller guilty of first-degree murder and attempted first-degree murder. Waller was sentenced to serve twenty-five years' incarceration with a two-year firearm enhancement on the first-degree-murder offense. He was also sentenced to a term of six years' imprisonment with a two-year firearm enhancement on the offense of attempted first-degree murder, with the sentences to run concurrently. On appeal, Waller argues the circuit court erred by (1) violating his right to speedy trial; (2) denying his motion for a new trial; (3) admitting hearsay evidence; (4) prohibiting him from impeaching a witness; and (5) allowing the State to commit a golden-rule infraction. We affirm.

On June 5, 2019, following an ambush at a prearranged drug deal to purchase Xanax, two men suffered gunshot wounds. Brandon Parker succumbed to his injuries; Randy Miller received treatment and was later released. During the investigation, Waller's name was provided to law

enforcement as being involved in the incident. Through a photo lineup, Miller identified Waller as one of the two men involved in the shooting. When investigators made contact with Waller, he took them to the location of the shooting, described what took place at the scene, provided the location of the white truck he used during the incident, and named the other male with him at the time of the shooting as seventeen-year-old Chancin Hooks. As a result of Waller's and Hooks's own admissions, investigators recovered a firearm used in the shooting. Waller was arrested on June 5. Following a multiday trial that began on May 31, 2022, Waller was convicted of first-degree murder and attempted first-degree murder. He now appeals.

For his first point on appeal, Waller asserts that the circuit court erred in denying his motion to dismiss the charges for lack of a speedy trial.

Under Arkansas Rule of Criminal Procedure 28.1, a defendant must be brought to trial within twelve months unless there are periods of delay that are excluded under Arkansas Rule of Criminal Procedure 28.3. If the defendant is not brought to trial within the requisite time, the defendant is entitled to have the charges dismissed with an absolute bar to prosecution pursuant to Arkansas Rule of Criminal Procedure 30.1. We conduct a *de novo* review to determine whether specific periods of time are excludable under our speedy-trial rules.¹

The time for speedy-trial calculation commences on the date of arrest or service of summons.² Waller was arrested on June 5, 2019. He was brought to trial on May 31, 2022, or 1091 days after

¹*McCray v. State*, 2020 Ark. 172, 598 S.W.3d 509.

²Ark. R. Crim. P. 28.2(a).

his arrest.³ Waller takes issue with sixteen continuances that were purportedly “on his motion.” Waller argues that many of the continuance orders tolling time allegedly made at his request were not signed by his counsel. He maintains that the orders are invalid because they lack his attorney’s signature, and there were no written motions by Waller that preceded them, nor were there verbal motions on the record. Below, Waller conceded that his trial was timely held if the challenged form continuance orders are valid. Waller fails to cite any authority for his argument that the continuance orders are per se invalid to toll speedy-trial time because they were not signed by his counsel. By his own admission, his trial was timely if the form continuance orders are valid.

Next, Waller asserts that the circuit court erred by denying his new-trial motions. The decision whether to grant or deny a motion for new trial lies within the sound discretion of the circuit court, and this court will reverse only if there is a manifest abuse of discretion.⁴ A circuit court’s factual determinations on a motion for new trial will not be reversed unless clearly erroneous, and the circuit court determines issues of credibility.⁵

Pursuant to Arkansas Rule of Criminal Procedure 33.3, a convicted felon may file a motion for new trial within thirty days after the date of entry of judgment, and if a hearing is requested or found to be necessary, the circuit court shall designate a hearing date.⁶ If the circuit court neither

³Waller’s appellate brief claims that he was incarcerated for 1056 days in pretrial incarceration.

⁴*Taffner v. State*, 2018 Ark. 99, 541 S.W.3d 430.

⁵*Id.*

⁶Ark. R. Crim. P. 33.3(a) & (b).

grants nor denies the posttrial motion within thirty days of its filing, the motion shall be deemed denied.⁷

The sentencing order was filed on June 17. Waller filed a motion for new trial on July 14. An amended motion for new trial was filed on July 15. No request for a hearing was made in either of the posttrial motions. Without holding a hearing, the circuit court denied Waller's motion for new trial in an order entered on August 12. Waller directs this court's attention to a letter dated July 23, in which he requested a hearing on his posttrial motions. In that letter, Waller acknowledged that pursuant to Arkansas Rule of Criminal Procedure 33.3, any hearing would need to be held within ten days of the filing of the motion. Nonetheless, "Waller seeks leave to waive the ten-day requirement due to his need to obtain additional evidence. However, he requests that a hearing occur no later than August 5, 2022."

Rule 33.3(a) does not contain a mandate for the circuit court to hold a hearing on a posttrial motion if the motion does not request a hearing.⁸ Here, neither of Waller's new-trial motions contained a request for a hearing. We decline to hold that Waller's letter to the court requesting a hearing outside of the ten-day window in order to gather evidence falls within the hearing mandate of Rule 33.3. We fail to find error in the circuit court's decision to not hold a hearing on Waller's new-trial motions when no hearing request was made in the time and manner contemplated under the rules.

⁷Ark. R. Crim. P. 33.3(c).

⁸*Neff v. State*, 2021 Ark. App. 123, 618 S.W.3d 479.

Waller argues that the circuit court erred in failing to grant a new trial after multiple *Doyle* violations. A *Doyle* violation arises from *Doyle v. Ohio*,⁹ in which the defendants were cross-examined by the prosecutors about their post-*Miranda* silence and asked why they told an exculpatory story for the first time at trial. The Supreme Court held this amounted to reversible error, stating:

[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.^{10]}

Where a comment on the defendant's postarrest silence is not an attempt to impeach the defendant, it is not the type of comment prohibited by the *Doyle* court.¹¹

Waller first takes issue with detective Josh Luman's statement at trial that, following Waller's arrest, he attempted to interview Waller "but [he] asked for an attorney." Waller concedes that he did not object to this statement "because the mention did not seem to violate *Doyle*"; therefore, it presents no issue for appeal. On cross, Waller's counsel then questioned Luman, "And so, I just want to clarify something for the record. You said that Mr. Waller exercised his right to an attorney, did you not?" Luman responded, "Yes, sir."

A recording of separate defendant Chancin Hooks's interview with detective Luman was played in court. In the recording, the following exchange takes place:

LUMAN: Because what it boils down to is that day out there, there was four people. Okay? One of them, he's given us his account of it.

⁹426 U.S. 610 (1976).

¹⁰*Doyle*, 426 U.S. at 618.

¹¹*Robinson v. State*, 348 Ark. 280, 72 S.W.3d 827 (2002).

HOOKS: Yes, sir.

LUMAN: One of them hasn't. You're one of them. And the other one can't give us an account of it.

At that point, Waller's counsel moved for a mistrial arguing, "Mr. Luman just illuminated the fact that Mr. Waller exercised his right to counsel by not giving a statement. And I'm concerned that's unduly prejudicial to exercise his rights and is grounds for a mistrial."

The circuit court's refusal to grant a mistrial does not rise to reversible error. First, the jury already heard that Waller exercised his right to counsel. Such testimony was brought forth by the defense itself. Waller suffered no prejudicial error because he opened the door to this line of questioning and because the same or similar evidence was introduced at trial without objection.¹²

Last, Luman was called to testify as a witness for Waller. On cross, the State asked the following:

STATE: Who were the four people that were there on the scene?

LUMAN: Brandon Parker, Randy Miller, Dakota Waller, and Chancin Hooks.

STATE: All right. And you interviewed all of those persons?

LUMAN: Yeah—well, no, sir. I did not interview Brandon Parker. He was deceased. And in my role—I did speak with Chancin Hooks, I did speak with Dakota Waller, but both requested to have an attorney.

Again, Waller asserted that Luman's comment on his right to remain silent is grounds for mistrial. The circuit court declined to grant a mistrial but instead instructed the jury to ignore the statement. There is no *Doyle* violation when there was no comment or question by the prosecutor about

¹²See *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998).

appellant's postarrest silence but instead was an inadvertent reference to the defendant's silence by a witness.¹³ We find no merit in Waller's argument that his right to due process was violated and his right to a fair trial was severely prejudiced by the "accumulation of three *Doyle* violations."

For his next challenge on appeal, Waller argues that the circuit court erred by failing to grant his motion for new trial based on a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The victims in this case, Brandon Parker and Randy Miller, were shot in a 2003 Ford Taurus. The incident that led to Parker's death occurred on June 5, 2019. The vehicle was released to Parker's family nine days later, on June 14, and ultimately destroyed. The State is required to preserve only evidence that is expected to play a significant role in the defense, and then only if the evidence possesses both an exculpatory value that was apparent before it was destroyed and possesses a nature such that the defendant would be unable to obtain comparable evidence by other reasonably available means.¹⁴ The defendant must also show bad faith on the part of the State.¹⁵

Waller's argument with regard to the vehicle is pure speculation. He makes only vague assertions that the vehicle contained or was itself exculpatory evidence. Waller further asserts that he was entitled to the opportunity to evaluate the vehicle for himself and to have the vehicle evaluated by his own expert. He contends that because he was deprived of such opportunity, a *Brady* violation occurred. Further, the sheriff's office collected and documented all of the exculpatory evidence from the vehicle—projectile bullets were recovered, a firearm was located, there were swabs for blood

¹³*Tarkington v. State*, 313 Ark. 399, 855 S.W.2d 306 (1993).

¹⁴*See Lewis v. State*, 2012 Ark. App. 184, 396 S.W.3d 775.

¹⁵*Id.*

and DNA, .45-caliber shell casings were collected, and photographs of the evidence were taken as well as photographs of the inside and outside of the vehicle. These steps were taken for the purpose of preserving the crime scene. Waller's speculation that there could have been additional exculpatory evidence was not a sufficient reason to grant a new trial. Furthermore, there is no evidence of bad faith where the police follow their procedures.¹⁶ Detective Luman testified that standard procedure was followed in collecting and preserving evidence from the car and releasing the vehicle due to capacity issues at the sheriff's office.

Next, prior to trial, Waller sought discovery of any cooperation agreements the State had with Hooks and Miller. The State provided none. Less than thirty days after testifying against Waller, Hooks pleaded guilty to theft by receiving and received a suspended imposition of sentence; Miller pleaded guilty to possession of a counterfeit substance and received a one-year suspended sentence. Waller asserts that the "record makes it obvious that Hooks and Miller at the very least had tacit, if not actual agreements with the State for leniency in exchange for their testimony." He argues that the failure to disclose these agreements constitutes a *Brady* violation and a new trial should be granted. However, both Hooks and Miller testified that they had no agreement with the prosecutor. Waller's contention to the contrary is speculation, at best.

Waller next argues that the circuit court erroneously allowed "several instances" of testimony over his hearsay objections.

¹⁶*Golden v. State*, 2009 Ark. App. 632.

A circuit court has broad discretion in deciding evidentiary issues.¹⁷ We will not reverse a circuit court's ruling on the admission of evidence absent an abuse of discretion and a showing of prejudice.¹⁸ Abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires that the circuit court act improvidently, thoughtlessly, or without due consideration.¹⁹ Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted.²⁰ Hearsay is not admissible unless it meets an exception provided by law or by the Arkansas Rules of Evidence.²¹

Waller challenges statements made by Hooks as inadmissible hearsay. Waller argues that at trial, Hooks was erroneously permitted to testify that Waller's father, Rudy, concocted a self-defense story and tried to hide evidence. Hooks was asked what everyone was doing at the kitchen table. He responded, "We was trying to put together a self-defense story." Hooks's response was a description of what was happening and does not contain an out-of-court statement; therefore, it is not inadmissible hearsay.

Hooks was further permitted to testify, over another hearsay objection, that regarding his phone, "They told me to take out the SIMS card." There is no identification of who "they" was. However, Hooks had just testified that those involved in putting together a self-defense story were

¹⁷*Washington v. State*, 2019 Ark. App. 224, 575 S.W.3d 626.

¹⁸*Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999).

¹⁹*Washington, supra*.

²⁰Ark. R. Evid. 801(c).

²¹Ark. R. Evid. 802.

Waller, Kesa, and Rudy. It is logical to surmise that Waller was the “they” or at least a portion of it. If Waller was the declarant, the statement was an admission by a party opponent, not hearsay. A statement made by a defendant and offered against him at trial constitutes an admission of a party opponent.²² The circuit court did not abuse its discretion in overruling the objection.

The circuit court additionally allowed the State to play the recording of Hooks’s interview with the Union County Sheriff’s Office. Waller contends this was an abuse of the court’s discretion because the recording contained “several hearsay statements.” Specifically, Waller argues that the recording included Hooks’s statement that Rudy crafted a self-defense story and directed Waller and Hooks to dispose of the SIM cards from their phones. Statements regarding hiding evidence and fabricating a justification defense are statements of the declarant’s intent and plan to cover up the crimes. We conclude that Rudy’s statements fall under the Rule 803(3) exception as a statement of the declarant’s then existing state of mind, such as intent, plan, and motive.²³

For his next point on appeal, Waller contends the circuit court erred in prohibiting him from impeaching a witness’s propensity for truthfulness and his bias for the State. On cross, Miller was asked if he is dangerous. He denied that he is a dangerous man. The State objected to Waller’s subsequent line of questioning regarding Miller’s involvement in a separate shooting, for which he was uncharged. The State objected, arguing that Waller can inquire only about convictions, not incidents in which he was only a suspect. After hearing counsels’ argument at sidebar, the circuit court stated, “I think I’m going to allow him to do so, [] over the State’s objection.” The court ruled

²²Ark. R. Evid. 801(d)(2)(i).

²³Ark. R. Evid. 803(3).

in favor of Waller and allowed his continued questioning of Miller about an unrelated shooting incident. Therefore, this issue can present no reversible error.

Waller also argues that the court erred by denying his proffer of testimony from El Dorado Police Captain Scott Harwell. The proffered testimony included that Harwell investigated Miller for a gas-station shooting and that he was certain Miller was involved in the shooting, that Miller pulled the trigger in that shooting, and that Harwell saw video footage of Miller committing the shooting. He further stated that Miller was arrested in connection with that shooting but had not been charged. Waller moved to admit Harwell's proffered testimony, arguing that it was evidence of Miller's bias in favor of the State with regard to his testimony because "there is hard evidence that he committed this crime [the gas station shooting], yet he has not been charged." The court ruled that the connection was not close enough to admit the proffered testimony. We find no error in the circuit court's evidentiary ruling. Waller failed to establish that Miller had a deal with the State and that his testimony was offered in exchange for leniency in other crimes.

Last, Waller argues that the circuit court erred by failing to declare a mistrial after the State made impermissible statements in closing argument. Waller contends that in closing, the State urged jurors to put themselves in Waller's shoes and implored them to consider whether Waller's actions following the shooting were those of an innocent man. Waller asserts that these statements amounted to a violation of the golden rule and constitute reversible error. A golden-rule argument is one that implores the members of the jury to put themselves in the position of a party or victim.²⁴ We need

²⁴*Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000).

not recite verbatim the comments that Waller challenges here because his failure to timely object to the comments precludes our review of this issue on appeal.

To preserve an issue for appeal, a defendant must object at the first opportunity, and a motion for mistrial must likewise be made at the first opportunity.²⁵ The reason behind the rule is that a circuit court should be given an opportunity to correct any error, perhaps before any prejudice occurs.²⁶ The contemporaneous-objection rule applies to claims that a prosecutor has made an improper golden-rule argument.²⁷ Here, Waller's golden-rule argument is not preserved for review. Waller's mistrial motion was not raised until closing argument concluded, the jury had been instructed, and court resumed after a recess. Hence, Waller failed to object and move for mistrial at the first opportunity.

Affirmed.

GRUBER and THYER, JJ., agree.

The Firm, PLLC, by: *S.L. Smith*, for appellant.

Tim Griffin, Att'y Gen., by: *David L. Eanes, Jr.*, Ass't Att'y Gen., for appellee.

²⁵*Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000).

²⁶*Id.*

²⁷*Vance v. State*, 2011 Ark. 243, 383 S.W.3d 325.