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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-529

RONALD EARL ROBINSON APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** November 17, 2010 APPEAL FROM THE HOT SPRING COUNTY CIRCUIT COURT [NO. CR-2008-131-2] HONORABLE PHILLIP H. SHIRRON, JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

After a jury trial, appellant was convicted of two counts of attempted first-degree murder and two counts of first-degree battery. His sentence was enhanced for committing a felony with a firearm, and he was sentenced to serve a consecutive total of 135 years' imprisonment. On appeal, he argues that the evidence was insufficient to support his convictions; that the trial court erred in refusing to grant his requested continuance; that the trial court erred in denying his request for a lesser-included-offense instruction; and that the trial court failed to exercise its discretion in ordering that appellant's sentences be served consecutively. We affirm.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, considering only the evidence that supports the verdict, and will affirm a conviction if substantial evidence exists to support it. *Cluck v. State*, 365 Ark.

166, 226 S.W.3d 780 (2006). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* A brief recitation of the facts will suffice. The victims, Michael Walker and Eric Washington, testified that they stopped at a club near Malvern on June 29, 2008, and waited in their parked car for some friends to join them. They stated that, shortly afterward, appellant and Jeff Traylor arrived in another car and began shooting at them. Neither victim was armed, and both testified that they saw appellant shooting at them. Both victims sustained gunshot wounds.

Rule 33.1(a) of the Arkansas Rules of Criminal Procedure requires a motion for directed verdict to state the specific grounds therefor. *See also Williams v. State*, 375 Ark. 132, 289 S.W.3d 98 (2008). A party is bound by the scope of the arguments made at trial and may not enlarge or change those grounds on appeal. *Id.* Here, appellant's directed-verdict motion was based on the credibility of the witnesses, and he named no particular elements of the offenses for which he claimed evidence to be lacking. Consequently, the only issue before us on appeal is the credibility of the witnesses to the shooting. However, it is the sole province of the jury to determine the credibility of a witness, as well as the weight and value of his testimony. The appellate court will not pass upon the credibility of a witness and has no right to disregard the testimony of any witness after the jury has given it credence, unless the testimony is inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon. *Wyles v. State*, 368 Ark. 646, 249 S.W.3d 782

(2007). We hold that the eyewitness identification of appellant and testimony of the two victims that appellant shot at them is sufficient evidence to support his convictions.

Appellant also asserts that the trial court erred in denying his motion for a continuance based on the State's failure to timely notify appellant of a witness (Mr. Harris) that the prosecution intended to call. Appellant's objection was that he had no opportunity to investigate the witness's criminal history. On appeal from such a ruling, an appellant must not only demonstrate that the trial court abused its discretion by denying the motion for a continuance but also must show prejudice that amounts to a denial of justice. *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002). No such prejudice is shown in this case. The trial court permitted appellant's attorney to examine the witness and determine that the failure of the NCIC check to reveal a suspected criminal conviction in California was because the witness was a juvenile when the offense was committed. More importantly, the trial court indicated that it was inclined to grant the appellant's motion to exclude Harris as a witness, but appellant declined and decided to call Harris as a witness for the defense; when he did so, Harris testified that he did not see appellant shoot but did see Traylor shooting at the victims. Here, where appellant himself decided to call this witness, and the witness's testimony was sufficiently exculpatory that appellant relied on it in his closing argument, we cannot say that appellant suffered a denial of justice by not being afforded a continuance to allow him time to impeach that witness's credibility.

Appellant was denied a requested instruction on second-degree battery as a lesser-included offense of first-degree battery, and argues on appeal that this was error. It is reversible error to refuse to instruct on a lesser-included offense when there is the slightest evidence to support the instruction; however, a trial court's decision not to give an instruction on a lesser-included offense will be affirmed if there is no rational basis for giving the instruction. *Flowers v. State*, 362 Ark. 193, 208 S.W.3d 113 (2005). Here, appellant's theory of the case, as shown by the closing argument, was that the accomplice did all the shooting and that appellant was simply innocent. It is also undisputed that both victims were shot and seriously injured. Under these circumstances, we hold that there was no rational basis for the requested second-degree battery instruction.

Finally, appellant argues that the trial court stated that it was bound by the jury's recommendation of consecutive sentences and that the court thereby erred in failing to exercise its discretion to consider imposing concurrent sentences. This argument lacks merit for two reasons. First, the point was waived because there was no objection made to the consecutive sentencing. *See Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). Second, appellant takes the judge's statement completely out of context. The judge did say that he believed it was "incumbent on this Court to attempt to put into effect what it believes is their intentions and what is best for the protection of the community," but this was in reference to trial counsel's request to allow appellant to go home on an electronic monitor pending appeal and had nothing to do with the consecutive sentencing.

Affirmed.

GLADWIN and KINARD, JJ., agree.