

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR09-1384

DERRICK WHITE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 15, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR09-2112]

HONORABLE CHRISTOPHER
CHARLES PIAZZA, JUDGE

AFFIRMED

JOSEPHINE LINKER HART, Judge

Derrick White (White) was convicted in a Pulaski County jury trial of first-degree battery. He received a ten-year sentence to be served in the Arkansas Department of Correction. On appeal, he challenges the sufficiency of the evidence and the trial court's admission of testimony about an unsworn prior statement that a recanting witness made to police. We affirm.

White was charged with first-degree battery for shooting Renekia White (Renekia) in the face. The incident occurred at the home of Carey Walton, with whom Derrick White had resided until Walton ordered him out of the apartment after an argument the night before. On the day of the shooting, White had returned to Walton's residence to pick up some of his personal property. He again argued with Walton and punched her in the face. Renekia, a friend of Walton, was outside on the porch and was shot by White when he was

leaving the apartment.

There was ample testimony, including that of White himself, that White pulled a handgun from his pocket, the gun discharged, and a bullet struck Renekia in the face. However, White claimed at trial that the shooting was accidental. None of the witnesses at trial testified that they heard White make any threats to use the weapon. Walton did, however, admit at trial that she made a statement to police shortly after the shooting in which she said that she heard White say, “I’m going to kill all of y’all.” When confronted by the statement, Walton attempted to explain the inconsistency by claiming that she was “hysterical” and that she was angry with White at the time.

We first address White’s challenge to the sufficiency of the evidence and summarily affirm the trial court on this point because the argument is procedurally barred. Although on appeal White challenges the intent element of first-degree battery, he made only a general directed-verdict motion to the trial court, to wit, “I don’t think they met their burden.” It is axiomatic that a criminal defendant in a jury trial must make a directed-verdict motion that specifies which portion of the evidence presented is inadequate to prove an element of the charged offense. Ark. R. Crim. P. 33.1(a). Arkansas Criminal Procedure Rule 33.1(c) states in pertinent part that a “motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense.” Because White’s directed-verdict motion was not specific, we conclude that his argument on appeal is not preserved for appellate review.

We next consider White’s evidentiary issue. His argument involves a portion of the

testimony elicited by the State from White's self-proclaimed fiancée, Carey Walton. Walton testified that the night before the shooting she argued with White and ordered him to leave her apartment. Renekia assisted her in packing White's clothes, and a third party took them from the residence. On the day of the shooting, she and Renekia were sitting on the porch when White drove up with his brother, Eric Branscum. White stated that he had come to retrieve his clippers. Walton gave him his watch and ring, which he placed in his car. He then returned to the apartment, asserting that he was going to pick up his mail. White and Walton began "tussling" in the hallway of the apartment. White punched her in the face, bloodying her lip. Walton retreated to the bathroom, locked the door, and called the police. According to Walton, Renekia subsequently entered the residence and told her that White had shot her. Although she admitted that she saw White "reaching for his pants," she denied seeing a gun. She claimed that she was surprised when Renekia told her that White had a gun.

Walton initially claimed she did not remember what she told police that night, but after having her recollection refreshed by her written statement, she recalled the interview. She was directed to read a portion of the statement in which she told police that White had stated that "I'm going to kill all of y'all," and then "raised the gun up." Walton admitted that she remembered telling police that she saw the gun and fled because she thought that White was going to shoot her. Walton nonetheless denied hearing White make his threat, and claimed she was only repeating what Renekia had told her. She further claimed that her

memory was impaired because she was “hysterical,” although she conceded that she “probably remembered the incident better back when it happened” than at the time of trial.

On cross-examination, Walton stated that she “stretched” the truth because she was mad at White. She unequivocally stated that she neither saw a gun nor heard White make the previously described threat. On re-direct, Walton confirmed that she lied to police when she stated that she saw a gun and heard White make his threat.

The State then called Little Rock Police Officer Rian Heck. When Officer Heck attempted to testify about Walton’s statement, White’s counsel made a hearsay objection and responded to the State’s argument that it would be a prior inconsistent statement with the assertion that it was inadmissible because Walton had “already admitted that she’s lied in her earlier statements to the police. This is an unsworn [statement], and she’s got sworn testimony today.” The trial court admitted the testimony to “impeach Walton.” The State also called Little Rock Police Officer Rodney Blocker who, over White’s objection, also testified about the statement that Walton made to the police. During closing arguments, the State used Walton’s unsworn statement that, prior to the shooting, she claimed that White said “I’m going to kill all of y[’all].”

White argues that the trial court erred in admitting Walton’s statement to police. He asserts that a prior, unsworn statement cannot be introduced as substantive evidence in a criminal case and that a prior, inconsistent statement is not admissible for impeachment purposes because Walton admitted that she made the statement. White contends that the

State was “attempting to use the unsworn testimony of [Walton] for the truth of the matter asserted.” We believe this argument is well taken.

Evidentiary rulings are reviewed on appeal under an abuse-of-discretion standard. *Williams v. State*, 2010 Ark. 89, 377 S.W.3d 168. We agree that the trial court abused its discretion in admitting extrinsic proof of Walton’s prior, unsworn statement in this case. First, White is correct that Walton’s prior, unsworn statement, as testified to by Officers Heck and Blocker, was inadmissible as substantive evidence. *Smith v. State*, 279 Ark. 68, 648 S.W.2d 490 (1983). Likewise, it is well-settled law that Walton’s prior statement was not admissible for impeachment purposes under Rule 613(b)¹ of the Arkansas Rules of Evidence because she admitted that she made a prior, inconsistent statement. *Kennedy v. State*, 344 Ark. 433, 42 S.W.3d 407 (2001); *Ford v. State*, 296 Ark. 8, 753 S.W.2d 258 (1988); *Roberts v. State*, 278 Ark. 550, 648 S.W.2d 44 (1983). However, the obvious evidentiary error made by the trial court does not end our inquiry.

As with any evidentiary error, we will not reverse absent a showing of prejudice. *McFerrin v. State*, 344 Ark. 671, 42 S.W.3d 529 (2001). If the error is slight and the proof of guilt overwhelming, the error will be deemed harmless. *Rodriguez v. State*, 372 Ark. 335, 276

¹Rule 613(b), provides in pertinent part:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon.

S.W.3d 208 (2008). We hold that the error in this case was harmless.

Three witnesses who were on the scene at the time of the shooting testified at trial for the State: Walton, Renekia, and neighbor Michael Funches. There were no substantial differences in their testimony. The one key detail, White's threat, was brought before the jury only when the State sought to impeach Walton with her prior, inconsistent statement. White neither made any objection of any kind during her testimony, nor sought an instruction limiting the use of the statement to impeachment purposes. While White did object to the testimony of Officers Heck and Blocker, both officers merely recounted that Walton saw White pull out a gun and shoot Renekia. Importantly, neither officer testified about White's threat. Accordingly, the officers' testimony merely echoed the testimony concerning the facts that White and Walton argued and that White pulled out a gun and shot Renekia. There was overwhelming evidence of these facts. Indeed, White's own testimony did not contradict these facts, although he did assert that the gun accidentally discharged while he was pointing it at the victim. The most damaging statement, White's alleged threat, which was the only direct evidence of his purposeful intent to cause serious physical injury, was put before the jury without objection. Likewise, White did not object to the State's use of that statement as substantive evidence during closing argument. Accordingly, we affirm.

Affirmed.

VAUGHT, C.J., and PITTMAN, J., agree.