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ARKANSAS COURT OF APPEALS
DIVISION II
No. CR-22-196

DENNIS DAVIS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered December 14, 2022

APPEAL FROM THE MISSISSIPPI
COUNTY CIRCUIT COURT,
OSCEOLA DISTRICT
[NO. 47OCR-20-222]

HONORABLE TONYA M.
ALEXANDER, JUDGE

AFFIRMED; REMANDED TO
CORRECT SENTENCING ORDER

RITA W. GRUBER, Judge

Dennis Davis appeals an order of the Mississippi County Circuit Court entered after a jury convicted him of first-degree murder, breaking or entering, and a sentencing enhancement for using a firearm in the commission of the first-degree murder. He was sentenced to twenty-five years for the murder conviction, six years for breaking or entering, and fifteen years for employing a firearm during the murder, all to be served consecutively in the Arkansas Department of Correction. Davis brings five points on appeal. We affirm.

Testimony at trial established that on the evening of August 10, 2020, Douglas Freeman picked up Davis, Roderick Hale, and Deanthony Poole and drove them to a residence on Main Street in Osceola, Arkansas, to participate in a dice game. After they

arrived and parked, around 11:45 p.m., Davis and Freeman went inside to gamble. Shortly thereafter, they returned to the car because the house was too crowded. Davis and Poole then put masks on their faces, got out of the car, got in the victim Demetrius Crawley's unoccupied car, searched the car, and then returned to Freeman's vehicle. Freeman started to drive away when Crawley and another person came out of the house and started walking toward Crawley's car. Freeman put the car in reverse and backed up parallel to Crawley's car. Hale and Davis got out of the car, pointed guns in Crawley's direction, and opened fire. Crawley was shot in the head and died later at a local hospital. Hale and Davis quickly got back in Freeman's car, and he drove away. All the events were captured on a nearby SkyCop video camera and played for the jury.

Shell casings from a 40mm and a 45mm handgun were found at the scene, and an additional 45mm shell casing was found during a search of Davis's girlfriend's house. Testimony from the Arkansas State Crime Laboratory established that the 40mm casings had been fired from the same gun and that the 45mm casings had been fired from the same gun. The medical examiner testified that the gunshot wound caused Crawley's death and that the wound was consistent with either type of ammunition.

I. Sufficiency—No In-Court Identification

For his first point on appeal, Davis contends that the circuit court erred in denying his motion for directed verdict because none of the witnesses made an in-court identification of him as the offender. On appeal, we treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Armstrong v. State*, 2020 Ark. 309, at 5, 607 S.W.3d 491, 496.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Collins v. State*, 2021 Ark. 35, at 4, 617 S.W.3d 701, 704. We affirm a conviction if substantial evidence exists to support it. *Price v. State*, 2019 Ark. 323, at 4, 588 S.W.3d 1, 4. Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion without resorting to speculation or conjecture. *Id.*, 588 S.W.3d at 4.

The State must prove that “the person who stands before the court in the position of the defendant is the one whom the indictment or information accuses and to whom the evidence is supposed to relate.” *Womack v. State*, 301 Ark. 193, 198, 783 S.W.2d 33, 36 (1990) (quoting *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988)). However, this identification can be inferred from all the facts and circumstances that are in evidence. *Id.* In *Becker v. State*, 298 Ark. 438, 441, 768 S.W.2d 527, 529 (1989), we held that there was sufficient proof of identity where the defendant was tried alone and was specifically identified as both “Mr. Becker” and “the defendant” throughout the trial. The witnesses were eyewitnesses to the robbery, and “the fact that none of them pointed out that the wrong man had been brought to trial was eloquent and sufficient proof of identity.”

Here, Davis was tried alone and was repeatedly referred to throughout the trial as Dennis, the defendant, Mr. Davis, Dennis Davis, and DJ. Poole and Freeman testified at trial, both were eyewitnesses to the crime, and neither pointed out that the wrong man had been brought to trial. Poole also stated that he knows Dennis Davis and that he was in the

courtroom. Finally, the jury watched a video of Davis's interview with the Osceola Police Department and could compare the appearance of Davis with the defendant at trial. We hold that substantial evidence supports the proof of Davis's identity as the offender.

II. *Sufficiency–Accomplice Liability for First-Degree Murder*

For his second point on appeal, Davis argues that the circuit court erred by denying his directed-verdict motion on the first-degree-murder charge, arguing the State failed to prove he was Hale's accomplice in the murder. He contends that the State failed to prove that he had the intent or "purpose" to promote or facilitate the murder. He argues that even if the State demonstrated that he assisted Hale when he opened fire in the direction of Crawley, this was not proof that he provided this assistance for the purpose of promoting or facilitating the murder of Crawley. We hold that this argument is not preserved for appeal.

Rule 33.1(a) of the Arkansas Rules of Criminal Procedure provides that "a motion for directed verdict shall state the specific grounds therefor." Our case law is settled that failing to state specific grounds for a directed-verdict motion results in a failure to preserve those grounds for purposes of appeal. *Meadows v. State*, 358 Ark. 396, 402, 191 S.W.3d 527, 531 (2004). The reason underlying the requirement that specific grounds be stated and that the absent proof be pinpointed is that it allows the circuit court the option of either granting the motion or, if justice requires, allowing the State to reopen its case and supply the missing proof. *Mullins v. State*, 2009 Ark. App. 359.

The State charged Davis with first-degree murder on two theories. The first theory was felony-murder: that in the course of and in the furtherance of breaking or entering, Davis

or an accomplice caused Crawley's death under circumstances manifesting extreme indifference to the value of human life. The second theory was that with the purpose of causing Crawley's death, Davis or an accomplice caused Crawley's death. *See* Ark. Code Ann. § 5-10-102(a) (Supp. 2021). At trial, Davis moved for a directed verdict on the first-degree-murder charge, arguing that the State had not proved causation because the medical testimony did not establish whether the gunshot wound that killed Crawley was caused by a .45-caliber weapon or a .40-caliber weapon. This was not a challenge to accomplice liability. Davis also argued that the State failed to prove that "Davis was acting alone or with someone and committed a Breaking or Entering or any other felony that would be able to connect him with Felony Murder." This was not a challenge to the State's proof regarding Davis's or an accomplice's requisite intent of purpose for first-degree murder. Rather, this was a challenge to the State's felony-murder theory. Because neither of these motions includes the argument Davis is now making on appeal, Davis's argument is not preserved. A party cannot change the grounds for a directed-verdict motion on appeal but is bound by the scope and nature of the argument presented at trial. *Magness v. State*, 2012 Ark. App. 609, at 8, 424 S.W.3d 395, 401.

III. *Sufficiency—Breaking or Entering*

For his third point on appeal, Davis argues that the circuit court should have granted his motion for a directed verdict on the breaking-or-entering charge because the State failed to prove that he entered Crawley's car for the purpose of committing a theft or that he was an accomplice of someone who did. Again, we hold that Davis did not preserve this argument

for appeal. Davis’s motion for a directed verdict in the circuit court regarding the charge of breaking or entering provided that “there’s no information that Mr. Davis had no permission to go in Mr. Crawley’s car.”¹ This is not the same argument that Davis is making on appeal; accordingly, it is not preserved.

IV. *Violence-in-Concert-with-Others Charge*

Davis also argues that the circuit court erred in denying his directed-verdict motion on the charge of violence in concert with others because the State failed to prove he was an accomplice in the killing of Mr. Crawley. The State initially charged Davis with the sentencing enhancement of engaging in violent group activity under Ark. Code Ann. § 5-74-108 (Repl. 2016), which authorizes an enhanced penalty range of a one-classification increase when a person is convicted of a “crime of violence” while acting in concert with two or more persons. In this case, however, the State conceded during the discussion of jury instructions that this sentencing enhancement did not apply. The circuit court omitted the jury instruction on the enhancement, and it was not applied. Therefore, any error by the circuit court in denying a motion for directed verdict on this enhancement is harmless because Davis cannot demonstrate prejudice. *Nickelson v. State*, 2012 Ark. App. 363, at 11–12, 417 S.W.3d 214, 220. We do point out, however, that the sentencing order needs to be corrected.

¹There is no requirement that the State prove Davis did not have permission to enter to prove the offense of breaking or entering. Ark. Code Ann. § 5-39-202 (Repl. 2013); see also *Smith v. State*, 346 Ark. 48, 53, 55 S.W.3d 251, 254 (2001) (defendant convicted of breaking or entering where he lawfully entered K-Mart with the purpose of committing a theft).

The sentencing order appears to treat this enhancement as a substantive offense, although no conviction or sentence was imposed. We therefore remand and instruct the circuit court to enter an amended sentencing order removing this count.

V. Evidence of Rap Videos in Sentencing Hearing

Finally, Davis contends that the circuit court erred when it admitted rap videos during the sentencing hearing showing him with firearms and using coarse language. He claims the videos constituted improper character evidence entered solely to inflame the jury's passion against him. We hold that the circuit court did not abuse its discretion in allowing this evidence.

During the guilt phase of the trial, Davis's objection to the introduction of the rap videos on the basis of improper character evidence was overruled, and the circuit court said that it would allow the State to introduce the videos for impeachment purposes if Davis testified. He did not, and the videos were not introduced during the guilt phase of the trial. Before the sentencing phase began, the State again indicated that it planned to introduce the videos to show Davis's lack of remorse for the murder. Davis objected that the evidence was improper character evidence. The court overruled Davis's objection. The videos show Davis making statements about guns and violating the law, mentioning the victim in this case, and portraying someone saying that Crawley "got what he deserved" and that he "should have ducked." On the video, Davis appears to agree with the statements.

We review the circuit court's decision to admit evidence during the penalty phase of a trial for abuse of discretion. *Brown v. State*, 2010 Ark. 420, at 12, 378 S.W.3d 66, 73.

Further, although the rules of evidence apply to evidence introduced at the sentencing phase, certain evidence is admissible at sentencing that would not have been admissible at the guilt phase of the trial. This includes “relevant character evidence.” Ark. Code Ann. § 16-97-103(5) (Repl. 2016). Here, the video shows Davis holding guns and agreeing that Crawley deserved to be shot. We simply cannot say that the circuit court acted improvidently, thoughtlessly, or without due consideration in admitting this evidence to show Davis’s lack of remorse.

In addition, we will not reverse unless an appellant demonstrates that he was prejudiced by the evidentiary ruling. *Smith v. State*, 2022 Ark. 95, at 14. Davis cannot demonstrate prejudice. In general, a defendant who is sentenced within the statutory range and short of the maximum sentence cannot establish prejudice from the admission of evidence at the penalty phase. *Shreck v. State*, 2016 Ark. App. 374, 499 S.W.3d 677. First-degree murder is punishable by imprisonment of ten to forty years or life. Ark. Code Ann. § 5-10-102(c)(1) (Supp. 2021); Ark. Code Ann. § 5-4-401(a)(1) (Repl. 2013). Davis received a twenty-five-year sentence for the murder, so he cannot show prejudice from admission of the evidence.² Accordingly, we affirm his convictions.

Affirmed; remanded to correct sentencing order.

²We decline to address the constitutional argument raised in Davis’s reply brief. He admits the argument was not raised in the circuit court, and we do not consider issues raised for the first time on appeal, even constitutional ones. *See, e.g., A.J.A. v. State*, 2019 Ark. App. 464, at 5, 588 S.W.3d 92, 95. Moreover, we have long held that we will not address an argument raised for the first time in a reply brief. *Longeway v. State*, 2018 Ark. App. 356, at 4, 553 S.W.3d 180, 182.

BARRETT and MURPHY, JJ., agree.

Terrence Cain, for appellant.

Leslie Rutledge, Att’y Gen., by: *Walker K. Hawkins*, Ass’t Att’y Gen., for appellee.