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ARKANSAS COURT OF APPEALS
DIVISION II
No. CR-22-734

ROBERT CORINTH WILSON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered May 31, 2023

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SEVENTH DIVISION
[NO. 60CR-20-3581]

HONORABLE KAREN D. WHATLEY,
JUDGE

AFFIRMED

STEPHANIE POTTER BARRETT, Judge

Robert Corinth Wilson (Cory) was convicted in a bench trial by the Pulaski County Circuit Court of false imprisonment in the second degree (Class A misdemeanor), battery in the second degree (Class D felony), and assault in the second degree (Class B misdemeanor).¹ He was placed on twelve months' probation for the false-imprisonment conviction and twenty-four months' probation for the battery conviction, and he was ordered to serve one day in the county jail for the assault conviction. Cory only appeals his second-degree-battery conviction, arguing that it should be reduced from second-degree battery to third-degree battery because the evidence adduced at trial supports only a conviction for third-degree

¹Cory's father, Robert Allen Wilson, was convicted of false imprisonment in the second degree for his conduct in the events that resulted in the filing of the charges, but he is not a party to this appeal.

battery and that a conviction for felony battery is inconsistent with his conviction for misdemeanor assault. Cory's arguments are not preserved, and we affirm his conviction for battery in the second degree.

The Wilsons farm land is located in England, Arkansas. On the evening of September 7, 2020, a farm truck was stolen from their shop on the Jefferson/Pulaski County line. When they discovered the theft on the morning of September 8, the Wilsons were able to locate the truck by using the GPS tracker installed on it, and they began to drive toward the truck's location. They tracked the truck's path through Jefferson, Lonoke, White, and Pulaski Counties; as they tracked the truck through the various counties, they were in communication with the appropriate law enforcement agencies reporting the theft. The Wilsons were ultimately able to locate the truck at Michael Harmon's residence, located outside of Cabot, Arkansas. When they arrived at Harmon's residence, the Wilsons saw Harmon standing by the driver's side of their farm truck. Believing Harmon was the person who had stolen their farm truck, the Wilsons pulled into the driveway; got out of their truck with guns drawn (Cory's gun was not loaded); the men began yelling at each other; the Wilsons claimed Harmon began acting aggressively, and they told Harmon to get on the ground; and when Harmon did not immediately comply and reached toward his pocket, Cory hit Harmon across the face with the butt of his gun. Harmon then complied with the directive to get on the ground, where he remained with his head bleeding, until authorities arrived approximately forty minutes later. When asked, Cory told the officer he had hit

Harmon. Harmon allowed paramedics responding to the incident to treat the two-and-a-half-centimeter gash on his head, but he refused further treatment.

Harmon testified that when he returned home on the morning of September 8 from running errands, he discovered the stolen truck in his driveway; while he was attempting to determine why the truck was in his driveway, two men, whom he identified as the Wilsons, pulled into his driveway, jumped out of their truck with guns pulled on him, and ordered him to get on the ground. He said Cory “pistol whipped” him a couple of times in the face before he went to the ground, and he has a permanent scar on his forehead from the blows. Harmon said he remained on the ground, with his head bleeding profusely, until law enforcement arrived. Harmon testified that he felt lucky to be alive.

Harmon denied stealing the truck or knowing anything about it being stolen. It was eventually determined that Harmon had not stolen the Wilsons’ truck after an investigation revealed convenience-store surveillance video showing another person driving the stolen truck. Harmon was not arrested, but the Wilsons were arrested in connection with their interaction with Harmon.

At the close of the State’s case, Cory moved for a directed verdict. With respect to the battery charge, Cory made the following argument:

DEFENSE ATTORNEY: As to Cory then we have, what, battery in the second?

THE COURT: Uh-huh.

DEFENSE ATTORNEY: With the purpose of causing physical injury causes physical injury by means of a deadly weapon other than a firearm. Physical injury means impairment of physical

condition or infliction of substantial pain or infliction of substantial bruising, swelling or visible marks associated with physical trauma.

Again, our attack is the guy got a two-and-a-half-centimeter laceration. As he testified, his pain scale was five out of ten localized to that area.

Lesser included of that, you know, would be battery in the third degree. Purpose to cause physical injury causes physical injury or recklessly does it.

The circuit court denied the motion, finding that the State had made a prima facie case.

Cory testified in his own defense, claiming he was justified in using physical force against Harmon under three different statutes—Arkansas Code Annotated section 5-2-606 (Supp. 2021) (use of physical force in defense of a person); section 5-2-609 (Repl. 2013) (use of physical force in defense of property); and section 5-2-611 (Repl. 2013) (use of physical force by a private person aiding law enforcement). Cory testified that when he and his father confronted Harmon on Harmon’s property, his gun was not loaded, and he only used it to subdue Harmon and keep him there until the police arrived. Cory said Harmon reached into his pocket during the altercation, and when that happened, his adrenaline “kicked in”; he hit Harmon with his gun because Harmon was “screaming and hollering and being kind of crazy,” and he thought Harmon had a gun and was going to shoot both of them. He said that he believed he was assisting law enforcement by keeping Harmon at the scene until law enforcement arrived, and he hit Harmon only because he “was scared to death.” Cory admitted on cross-examination that he was not a certified law enforcement officer, and he

did not have training in recovering a stolen vehicle or developing a suspect. Cory also admitted that Harmon never threatened physical harm to him or his father.

Robert's testimony about Harmon's putting his hand in his pocket and Cory hitting him was substantially the same as Cory's testimony. Robert said he was scared because Harmon was being aggressive, and when Harmon put his hand in his pocket, he felt threatened because he believed that Harmon was going to pull a gun and shoot someone; Robert believed Cory's reaction in striking Harmon was reasonable under the circumstances. Robert admitted that after Harmon complied with their demand that he get on the ground, he told Harmon that he had called the police and that Harmon was going to be arrested. Robert testified that it was reasonable to believe that Harmon was the person who had stolen the truck. On cross-examination, Robert admitted that he was not a certified law enforcement officer, he did not have training in recovering stolen vehicles or in the takedown of felony suspect, and he had pointed a gun at a man and ordered him to the ground until law enforcement arrived, even though Harmon was not armed.

At the close of all the evidence, the following colloquy occurred:

DEFENSE ATTORNEY: I'm thinking jury trial and prosecution goes first. But I guess I'm renewing my motion for directed verdict. And however, you guys want me to go first? I wasn't going to do a traditional close. I was just going to hit now that we got the record go back and hit the elements of the justification defenses.

THE COURT: Okay. Here's what we'll do. I'm going to go ahead and deny your motion for directed verdict. And then we will go through the normal way we would do it for closing. And I will let the State go first.

DEFENSE ATTORNEY: Understood.

There was a short break in the proceedings; when court reconvened, the State made its closing argument. Cory's attorney then made the following argument regarding the battery charge:

Cory, the second step is hitting Harmon in the head with the pistol, separate act. Was that act justified. In 5-2-606 also comes into play with that, justified in using physical force to defend yourself or a third person from what you reasonably believe to be the use or imminent use of unlawful physical force. And you can use the degree of force reasonably necessary to defend yourself or the third person.

Cory was very—listen, Harmon admitted, yeah, before I got on the ground, I reached into my pocket. We know that later when Harmon is in custody as a suspect for theft that he tries to reach into his pocket and [the law-enforcement officer] goes, Don't—don't go there. People get concerned when you start putting your hands in your pocket. That's exactly the reasonable belief Cory had. This guy is reaching into his pocket. That testimony is undisputed. That guy reached into his pocket and it scared them to death. Was their reaction appropriate under these circumstances? I suggest to you that it was exactly appropriate under the circumstances.

As Cory testified, I was scared. I was scared that guy was going to shoot my dad and me. That was compelling testimony without contradiction. So self-defense comes into play with Cory, as well.

I suggest to you that those three justification defenses, Your Honor, apply to the single charge against Robert and all three charges against Cory.

Cory frames his argument on appeal as “whether the court erred in its consideration of the defense of justification, specifically whether there was sufficient evidence to support negation of this defense,” in arguing that his battery conviction should be reduced from battery in the second degree to battery in the third degree because the evidence adduced at trial, considering the defense of justification and the prosecutor's concession, support only

the offense of battery in the third degree. He acknowledges that the trier of fact “has significant leeway in determining credibility of witnesses,” but he contends that the evidence “does not support a finding that the prosecution fully negated the defense of justification as it pertains to Battery in the Second Degree.” We hold that this argument is not preserved for appeal.

In a bench trial, the denial of a motion to dismiss is affirmed if there is substantial evidence, direct or circumstantial, to support the conviction. *Porter v. State*, 2023 Ark. App. 64, 660 S.W.3d 875. Substantial evidence is evidence that is sufficient to compel a conclusion one way or the other beyond suspicion and conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the verdict, considering only evidence supporting the verdict. *Id.* We do not weigh the evidence presented at trial, as that is a matter for the fact-finder, nor do we assess the credibility of the witnesses. *Id.* The fact-finder is not required to believe any witness’s testimony, especially the self-serving testimony of the accused, because the accused is the person most interested in the outcome of the trial. *Id.*

Rule 33.1(b) of the Arkansas Rules of Criminal Procedure (2022), provides:

In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution’s evidence, then the motion must be renewed at the close of all of the evidence.

A motion for dismissal on the basis of insufficiency of the evidence must specify how the evidence is deficient; the failure to challenge the sufficiency of the evidence in a nonjury trial

as set in subsection (b) of Rule 33.1 constitutes a waiver of any question relating to the sufficiency of the evidence to support the judgment. Ark. R. Crim. P. 33.1(c).

Cory asserts that he should not be penalized because his attorney complied with the explicit direction of the circuit court in handling the dismissal motion, as the circuit court “clearly did not want to hear the same arguments twice in a nonjury setting.” That is a mischaracterization of what occurred. Cory’s counsel stated that he renewed his motion for directed verdict and then stated that he was not going to do a traditional closing argument. The circuit court then denied the renewal of the motion, and the attorneys moved on to closing arguments.

Rule 33.1 is strictly construed, and our supreme court has held that to preserve a sufficiency-of-the-evidence challenge, a party must move for a directed verdict or for dismissal at the conclusion of the evidence and not during a closing argument. *Grube v. State*, 2010 Ark. 171, 368 S.W.3d 58. Cory’s argument on appeal—that it was undisputed that he believed he was acting justifiably—was never made in a motion to dismiss, and it therefore is not preserved for appeal. Here, as in *Grube*, counsel never asked for a dismissal of the battery charge, and he never raised any issue regarding justification until his closing argument. Arguments made during closing arguments do not preserve a sufficiency claim for appellate review. *N.L. v. State*, 2017 Ark. App. 227, 519 S.W.3d 360.

Cory also argues that the felony battery conviction is inconsistent with the court’s misdemeanor assault conviction because the actions were contemporaneous, and the assault conviction only required reckless conduct. This argument is not preserved because it was

not made to the circuit court and is being raised for the first time on appeal. Arguments not raised at trial will not be addressed for the first time on appeal. *McLemore v. State*, 2022 Ark. App. 512, 657 S.W.3d 190.

Affirmed.

THYER and WOOD, JJ., agree.

Jeff Rosenzweig, for appellant.

Tim Griffin, Att’y Gen., by: *Christopher R. Warthen*, Ass’t Att’y Gen., for appellee.