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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-17-165

Opinion Delivered: January 24, 2018

BRAD L. HILL APPELLANT	APPEAL FROM THE POPE COUNTY CIRCUIT COURT [NO. 58CR-15-390]
V.	HONORABLE BILL PEARSON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED; MOTION TO WITHDRAW GRANTED

KENNETH S. HIXSON, Judge

Appellant Brad L. Hill appeals after he was convicted by a Pope County jury of possession of a controlled substance and delivery of a schedule I or schedule II controlled substance not methamphetamine or cocaine and sentenced as a habitual offender to serve a total of 240 months in the Arkansas Department of Correction. Appellant's attorney has filed a no-merit brief and a motion to withdraw as counsel pursuant to Arkansas Supreme Court Rule 4-3(k) (2017) and *Anders v. California*, 386 U.S. 738 (1967), asserting that this appeal is wholly without merit. The motion is accompanied by an abstract and addendum of the proceedings below, alleged to include all objections and motions decided adversely to appellant, and a brief in which counsel explains why there is nothing in the record that would support an appeal. The clerk of this court mailed a copy of counsel's motion and brief to appellant's last-known address informing him of

his right to file pro se points for reversal; however, he has not done so.[1] Consequently, the attorney general has not filed a brief in response. We grant counsel's motion to withdraw and affirm the convictions.

Appellant was charged by felony information with two counts of delivery of a schedule I or schedule II controlled substance not methamphetamine or cocaine. A jury trial was held on June 8, 2016.

At trial, Narcotics Investigator Tony Haley testified that he used a confidential informant, Shannon Scissom, in order to set up two controlled buys of heroin from appellant. The first controlled buy occurred on July 8, 2015. Investigator Haley testified that he had searched Scissom immediately before and after the controlled buy. Agent Michael Owen Evans testified that he is employed by the Russellville Police Department and that he had searched Scissom's vehicle immediately before the buy to verify that there was not any money or controlled substances contained in the vehicle. Investigator Haley testified that he then equipped Scissom with two electronic-monitoring devices and gave her $240 to purchase heroin from appellant. Investigator Haley and Agent Evans observed appellant enter and exit Scissom's vehicle, and Scissom gave the heroin she purchased with the $240 to Agent Evans. Because the electronic recordings were unusable because Scissom's radio was playing too loudly during the transaction, Investigator Haley asked Scissom to set a second controlled buy.

The second controlled buy took place the next day, July 9, 2015. Scissom was searched immediately before and after by Investigator Haley, and Agent Evans searched

[1]The packet was mailed to appellant by certified mail, and a return receipt indicates that delivery was accepted.

her vehicle. Scissom was equipped with two electronic-monitoring devices and given $100 to buy heroin from appellant. Investigator Haley and Agent Evans observed appellant enter and exit Scissom's vehicle, and Scissom gave the heroin she purchased and the two electronic monitoring devices to Agent Evans. Scissom was compensated by law enforcement for her assistance.

The electronic recordings from both transactions were admitted into evidence at trial. Scissom testified and confirmed that she had, in fact, purchased heroin from appellant on July 8 and 9, 2015. Lauren McDonald, a forensic chemist at the Arkansas State Crime Laboratory, testified that the substances obtained tested positive for heroin and that heroin was a schedule I controlled substance. The first substance obtained weighed 1.9676 grams, and the second substance obtained weighed 0.8754 grams.

Appellant moved for a directed verdict arguing that the State failed to meet its burden to prove that he delivered a controlled substance and that he knowingly or willfully did so as defined in the statute on either count, without any further specific argument. The trial court denied his motion, and appellant testified on his own behalf. Appellant refuted the testimony presented by the State and contended that Scissom was actually selling him heroin despite her testimony. He contended that Scissom was framing him and had hidden the heroin in her bra so that law enforcement would not discover it during the searches before the controlled buys. After his testimony, he renewed his motion for a directed verdict, and the trial court denied his motion.

After all evidence was presented, the jury found appellant guilty of one count of possession of a controlled substance and one count of delivery of a schedule I or schedule

II controlled substance not methamphetamine or cocaine, and appellant was sentenced as a habitual offender to serve a total of 240 months in the Arkansas Department of Correction. This appeal followed.

Appellant's counsel explains that any challenge to the sufficiency of the evidence based on appellant's motion for a directed verdict or renewed motion for a directed verdict would be wholly without merit. Arkansas Rule of Criminal Procedure 33.1 (2017) provides,

> (a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor.
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> . . . .
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> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. *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.* A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

(Emphasis added.)

This court treats a motion for directed verdict as a challenge to the sufficiency of the evidence. *Gillard v. State*, 372 Ark. 98, 270 S.W.3d 836 (2008). However, the Arkansas Supreme Court has held that Rule 33.1 is to be strictly construed. *Rayfield v. State*, 2014 Ark. App. 123 (citing *Carey v. State*, 365 Ark. 379, 230 S.W.3d 553 (2006)).

In order to preserve a challenge to the sufficiency of the evidence, an appellant must make a specific motion for a directed verdict, both at the close of the State's case and at the end of all the evidence, that advises the trial court of the exact element of the crime that the State has failed to prove. *Rayfield*, *supra*. The reason underlying the requirement that specific grounds be stated and that the absent proof be pinpointed is that it allows the trial court the option of either granting the motion or, if justice requires, allowing the State to reopen its case and supply the missing proof. *Id.* A general motion that merely asserts that the State has failed to prove its case is inadequate to preserve the issue for appeal. *Id.* Therefore, the motion must specifically advise the trial court as to how the evidence was deficient. *Gillard*, *supra*. Here, as in *Gillard* and in *Rayfield*, appellant made only a general motion for directed verdict and failed to specifically identify how the evidence was deficient. Therefore, any arguments challenging the sufficiency of the evidence are not preserved for appeal.

Additionally, counsel abstracts and discusses three other adverse rulings.[2] First, during voir dire, appellant sought to dismiss a potential juror for cause arguing that she had testified that she would give greater weight to the testimony of a police officer. The juror had stated that she "would hope [she] could believe [police officers] more than a normal person." The trial court denied the motion, stating that "[s]he said she hoped she could, you know, and I think she's probably highlighting the fact that police officers should have a role in society, you know. I didn't hear nothing that would get her for

[2]Counsel discusses two additional objections in her brief in which appellant conceded error before the trial court made a ruling. Because those objections did not result in an adverse ruling, we need not address them in this opinion.

cause." Regardless of whether the trial court's decision was error, we cannot address this issue because it pertains to a potential juror that appellant excused through the use of his peremptory challenges. *Jackson v. State*, 375 Ark. 321, 290 S.W.3d 574. It is well settled that the loss of peremptory challenges cannot be reviewed on appeal. *Id.* The focus should not be on a venire person who was peremptorily challenged, but on the person who actually sat on the jury. *Id.*; *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996).

Next, the trial court sustained a relevancy objection. Appellant had stated that he was in the Arkansas Department of Correction at the time of trial because he had violated his parole. Appellant's trial counsel subsequently asked whether he took those cases to trial or whether he had pleaded guilty in those cases. The State objected on the basis of relevancy, and the trial court sustained the objection. Arkansas Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Arkansas Rule of Evidence 402 further provides that "[e]vidence which is not relevant is not admissible." The decision to admit or exclude evidence is within the sound discretion of the trial court, and we will not reverse that decision absent a manifest abuse of discretion or absent a showing of prejudice. *Starling v. State*, 2016 Ark. 20, 480 S.W.3d 158. Because appellant's parole-violation cases do not have any relation to the charges brought against him at trial, the trial court did not abuse its discretion is sustaining the State's objection.

Finally, the trial court sustained the State's objection to appellant's trial counsel leading appellant on direct examination.

> [COUNSEL]: Okay. Well, now let's try to walk through this so we can try to explain this for the jury and try to see. How do you explain the part where she says that's a hundred in the tape that you heard?
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> [APPELLANT]: Obviously that was her trying to make it sound like I was selling her something, but when she handed me the bag of heroin, that's what she said – here's that hundred – that's why she didn't say hundred dollars or nothing like that. She just said here's that hundred, talking about the bag of dope –
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> [COUNSEL]: Just like somebody putting down a package of cigarettes at the grocery store and saying –
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> [STATE]: Objection, Your Honor. It's leading.
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> THE COURT: I'll sustain that. It is leading.

Arkansas Rule of Evidence 611(c) states,

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

It is always in the sound discretion of the trial court to permit a witness to be asked leading questions on direct examination. *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980). Because the question was asked during appellant's direct examination and not used to develop his testimony, the trial court did not abuse its discretion. Therefore, an appeal from the adverse rulings in this case would be wholly without merit. Thus, from our review of the record and the brief presented, we find that counsel has complied with the requirements of Rule 4-3(k) and hold that there is no merit to this appeal.

Accordingly, counsel's motion to withdraw is granted, and appellant's convictions are affirmed.

Affirmed; motion to withdraw granted.

HARRISON and WHITEAKER, JJ., agree.

King Law Group PLLC, by: *Natalie S. King*, for appellant.

One brief only.