

Cite as 2009 Ark. App. 587

ARKANSAS COURT OF APPEALSDIVISION III
No. CACR08-1407MELVIN LEE LOCKHART, III
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE**Opinion Delivered** September 16, 2009APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR 08-490]HONORABLE CHRISTOPHER
CHARLES PIAZZA, JUDGE

AFFIRMED

JOSEPHINE LINKER HART, Judge

A jury found appellant, Melvin Lee Lockhart, III, guilty of first-degree felony murder and theft of property. Appellant first argues that the evidence was insufficient to establish that he, as required for proof of first-degree felony murder, caused the death of the victim, Ray Hart, in the course of and in furtherance of, or in immediate flight from, a felony, theft.¹ Second, appellant contends that the court erred in allowing the State to introduce a photograph into evidence that appellant describes as “too gruesome.” We conclude that appellant’s challenge to the sufficiency of the evidence was not preserved for appellate review

¹A person commits first-degree murder when the person “commits or attempts to commit a felony,” and “[i]n the course of and in the furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life.” Ark. Code Ann. § 5-10-102(a)(1) (Repl. 1996). Here, the underlying felony was theft. *See* Ark. Code Ann. § 5-36-103 (Supp. 2009).

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and that the court did not abuse its discretion in admitting the photograph into evidence. Accordingly, we affirm.

State's witness Toni Boggs described the circumstances surrounding Hart's death. Boggs testified that she and appellant drove to Hart's RV in order to rob Hart of his wallet and credit cards. Upon knocking at Hart's RV and Hart answering the door, both Boggs and appellant entered the residence. Appellant grabbed Hart's wallet, handed it to Boggs, and indicated that Boggs should leave. Boggs left the RV with the wallet and went to the car. Boggs yelled appellant's name and turned to go back, because appellant did not come out. After approximately a minute to one and one-half minutes, she heard "a pop sound." Boggs had entered the front seat of the car, started the car and begun to turn the car around in order to leave, when appellant exited the RV and entered the car. Appellant stated that they did not have to worry about Hart and showed that he had Hart's two cell phones. Boggs handed the wallet back to appellant. They then drove to a bank and attempted to use one of Hart's credit cards to withdraw money from an ATM. Boggs's husband testified that he had seen appellant with a handgun that day, that he believed appellant had a pistol in his waistband later that night, and that appellant told him he had "blowed [Hart's] noodles all over the pillow." Hart was found dead, lying face-down on his bed with a single gunshot wound to the back of his head.

On appeal, appellant asserts that the evidence was insufficient to support his conviction for first-degree felony murder because the State failed to prove that he caused Hart's death

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in the course of and in furtherance of, or in immediate flight from, the theft. His argument, however, is not preserved for appellate review. At the close of the State's presentation of its evidence to support a first-degree felony-murder conviction, appellant challenged the sufficiency of the evidence to support a theft conviction. Further, appellant challenged the sufficiency of the evidence to support a capital felony-murder conviction, with its underlying felony of aggravated robbery, and aggravated robbery—both of which appellant was acquitted. But at the close of the State's evidence, appellant did not move for a directed verdict on the offense of first-degree felony murder, with its underlying felony of theft. Because appellant failed to make, at the close of the State's case, a specific challenge to the sufficiency of the evidence to support his conviction for first-degree felony murder, we are precluded from reviewing the issue. *See Maxwell v. State*, 373 Ark. 553, 285 S.W.3d 195 (2008) (requiring a challenge to the sufficiency of the evidence to be preserved by making a specific motion for a directed verdict at both the conclusion of the State's case and at the conclusion of all of the evidence).

Next, we consider appellant's evidentiary claim. During the testimony of a police officer testifying for the State, appellant objected to a photograph offered into evidence by the State, State's Exhibit Five, asserting that because the photograph was gruesome, the probative value of the photograph was outweighed by the danger of prejudice. Further, he asserted in part that another photograph, State's Exhibit Four, showed Hart's body and the angle at which he lay. The State responded by noting that State's Exhibit Five would be used by the

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medical examiner to show where Hart was killed based on the blood spatters and pooling of blood. The court admitted State's Exhibit Five into evidence along with State's Exhibit Four. Following the officer's testimony, appellant objected to State's Exhibit Six, asserting that it was cumulative to State's Exhibit Five. The court excluded State's Exhibit Six, stating that it was "pretty much the same thing."

During the medical examiner's testimony, the State presented State's Exhibit Five to the witness. The medical examiner testified that the photograph showed Hart face down on a pillow and bed, with a broad blood-flow pattern on the upper back that came out of the wound and ran down the back, following gravity, with high velocity blood spatter farther down the back. The examiner opined that Hart's body was likely in this position when he was shot in the back of the head.

Appellant argues on appeal that the court erred in admitting State's Exhibit Five, given that it was inflammatory, gruesome, and cumulative, with its probative value substantially outweighed by the risk of unfair prejudice, and with another photograph showing the position of the body. We disagree.

A court's admission of even a gruesome photograph is not an abuse of discretion if the photograph sheds light on some issue, proves a necessary element of the case, enables a witness to testify more effectively, corroborates testimony, or enables jurors to better understand testimony. *Garcia v. State*, 363 Ark. 319, 214 S.W.3d 260 (2005). Further considerations include whether the photograph shows the condition of the victim's body, the

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probable type or location of the injuries, and the position in which the body was discovered. *Id.* A circuit court, however, must not apply a *carte blanche* approach to admission of a photograph and must consider whether the photograph creates a danger of unfair prejudice that substantially outweighs its probative value. *Id.*

Here, State's Exhibit Five, as explained by the medical examiner, showed both blood pooling and spattering that indicated to the medical examiner that Hart was shot in the back of the head while lying face down on the bed. Thus, the photograph was needed in the State's presentation of its case. The photograph that appellant asserts was similar was decidedly not; it did not show the pooling and spattering. Furthermore, the court excluded a photograph that the court considered cumulative, indicating that the court exercised its discretion when making decisions on admitting photographs. Thus, we conclude that the court did not abuse its discretion in admitting State's Exhibit Five into evidence.

VAUGHT, C.J., and GRUBER, J., agree.