ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CACR07-535

December 19, 2007

DEMARCO BLACKMON
APPELLANT

AN APPEAL FROM GARLAND COUNTY CIRCUIT COURT
[CR2006-425 I]

V.

HON. JOHN HOMER WRIGHT, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Demarco Blackmon appeals from his conviction for first-degree battery. He argues that his conviction should be reversed because the State failed to prove that he acted purposely. He also argues that the trial court failed to give "due consideration" to his imperfect justification defense, which he claims would have entitled him to a lesser charge of second-degree battery. We hold that appellant's argument that the State failed to prove he acted purposely is procedurally barred. We further hold that the trial court properly rejected appellant's justification defense. Accordingly, we affirm appellant's conviction.

I. Facts

Appellant was charged with the first-degree battery of Corey Webb pursuant to Ark. Code Ann. § 5-13-201(a)(8) (Supp. 2007), which defines the offense as purposely causing physical injury to another person by means of a firearm. The incident took place on July 9, 2006, in Hot Springs. The basic facts are undisputed: an argument involving racial comments preceded the shooting. Appellant admits that he shot Webb but asserts that he did

so in self-defense and did not act purposely to harm Webb.

The State's case-in-chief was presented through the testimony of Webb, Neva Webb (Webb's mother), Kristen Webb (his sister), and Carmen Owen (his girlfriend), who each lived in Apartment 8 at 2314 Lakeshore Drive. On the day of the incident, Webb, Owen, Kristen, Webb's brother, Kevin, and a friend, Jordan (referred to herein as "the Webbs"), returned to the apartment complex from Lake Ouachita. Webb's witnesses said that they pulled into the apartment complex with their windows down, listening to loud music, singing, and laughing.

Jonese Richie, appellant's girlfriend, had driven appellant and Phyllis Blackmon (appellant's mother) to the apartment complex to drop off appellant's son to the boy's mother. Appellant got out of the car and walked his son to the apartment. Appellant was still standing outside of that apartment when the Webbs arrived. Appellant's witnesses testified that the people inside of the Webb vehicle were using profanity, including the word "nigger." Appellant approached the Webb vehicle and asked if they were talking about him. Kevin got out of the car and he and appellant engaged in a "heated argument" that involved Kevin and appellant yelling and pushing each other. Kristen admitted that during the argument, she heard her brothers use the word, "nigger."

Conflicting testimony was adduced regarding whether the incident defused at that point and whether the Webbs thereafter went into the Webb apartment. Appellant and Richie said that the fight never broke up and that the Webbs never went inside of the apartment. Webb's mother said that one person (Webb) ran inside the apartment and came "right back" outside.

The Webb witnesses testified that the fight broke up and that they all went inside the apartment. They then heard a sound at the front door. Kristen said she opened the door and saw foam running down the door where someone had apparently hit the door with a beer can.

According to the Webb witnesses, appellant was standing outside of the apartment and called Kristen a "bitch"; Webb called appellant a "nigger" and further argument ensued. Webb admittedly ran toward appellant with the intent to fight him. While backing away from Webb, appellant shot Webb in the stomach, using Richie's 380 semi-automatic pistol that he pulled from his pocket. Appellant and his companions then fled in Richie's vehicle.

Appellant denied that he ever stood in front of the Webb apartment. Yet, LeeAnn Clem, the responding officer, testified that there was a trail of blood in the kitchen area, which was the apartment's entry point. She further said that a beverage had been spilled in the very front of the kitchen area and that the bullet casing was found in the parking space in front of the apartment.

Whether Webb had a weapon was also disputed. Webb's witnesses testified that he had no weapon; Richie and appellant testified that Richie called to appellant that Webb had a knife. She inconsistently testified that *after* the shot was fired, they ran back to her car and that appellant shot *as* they were all "scrambling" back to the car. Richie said that appellant shot at the ground. She also said that they were only "a few steps away" from her car, and that appellant "didn't have to run far at all."

Appellant testified that Webb was approximately fifteen-to-twenty feet from him when Webb ran at him; that he "shot low" to scare Webb; and that he never intended to shoot anyone. Appellant's witnesses said that three or four people rushed toward them; appellant said that he did not think they could get back to the car and leave. He further said that his family was outnumbered, that they did not know the Webbs, that the Webbs were "real drunk," and that he did not know what they were going to do to his family.

Appellant's mother and Richie testified that they were concerned for their safety; however, appellant's mother said that "a minute or two" passed between the time Webb went into the house and when he came out. She said this was not enough time to allow her to get

into Richie's two-door Honda because she was tall and the front seat had to be pushed forward.

None of appellant's witnesses telephoned the police. Although appellant and Richie testified that as they left someone called "Shoot me, nigger," each of appellant's witnesses claimed that they were not certain whether appellant had shot anyone. Appellant admitted that he called local hospitals but did not call the police. He also admitted that he initially told the police he did not know anything about the shooting and denied to the police that he shot anyone.

During the bench trial, appellant requested that the trial court dismiss the first-degree battery charge, but failed to challenge the proof of any specific elements of that charge. He also argued that he acted in self-defense. Additionally, he asserted that his conduct would conform with second-degree battery in recklessly causing serious physical injury by means of a deadly weapon.[1] The trial court denied appellant's directed verdict motion and the renewal thereof; rejected appellant's justification defense; and determined that he was not entitled to the lesser charge. It found appellant guilty of first-degree battery and sentenced him to serve eight years in the Arkansas Department of Correction.

II. Motion for a Directed Verdict

Appellant first challenges the trial court's denial of his motion for a directed verdict. We treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *See Coggin v. State,* 356 Ark. 424, 156 S.W.3d 712 (2004). We affirm a conviction if substantial evidence exists to support it. *Id*. Substantial evidence is that which is of sufficient force and

[1] *See* Ark. Code Ann. § 5-13-202(a)(3) (Supp. 2007).

character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id*.

Appellant was convicted of first-degree battery under § 5-13-201(a)(8), which defines battery as purposely causing physical injury to another person by means of a firearm. Appellant argues that the trial court erred in denying his motion for a directed verdict because the State failed to make a *prima facie* case that he acted purposely. We summarily affirm appellant's conviction without reaching the merits of his argument because he failed to assert below that the State failed to prove that he acted purposely.

A directed-verdict motion shall state the specific grounds therefor, and must specify the respect in which the evidence is deficient. *See* Ark. R. Crim. P. 33.1(a),(c). A general motion merely stating that the evidence is insufficient does not preserve for appeal a challenge to a specific deficiency in the evidence. *See* Ark. R. Crim. P. 33.1(c). A defendant's failure to state the specific grounds for his directed-verdict motion or to state the manner in which the evidence is deficient waives any question pertaining to the sufficiency of the evidence to support the verdict. *See* Ark. R. Crim. P. 33.1(c).

Here, appellant requested that the court dismiss the first-degree battery charge but he failed to specifically challenge the proof of any elements of that charge. He further asserted that if he committed first-degree battery, then he was justified because he acted in self-defense. He also asserted that the charge should be reduced to second-degree battery. Clearly, appellant did not argue below, as he does now, that the State failed to prove he acted purposely. Accordingly, we affirm because appellant failed to preserve his challenge to the sufficiency of the evidence.

IV. Justification Defense

We further affirm because the trial court did not err in rejecting appellant's justification defense. Appellant argues that the trial court erred in failing to give "due

consideration" to his justification theory.[2] Appellant cites no authority for his apparent proposition that "due consideration" is a legal standard that a trial court must meet when ruling on the applicability of a justification defense. In any event, that is not the proper legal standard. Rather, we examine whether substantial evidence supports the trier-of-fact's conclusion that the justification defense was inapplicable. *See Gilliam v. State*, 294 Ark. 115, 741 S.W.2d 631 (1987); *Graham v. State*, 2 Ark. App. 266, 621 S.W.2d 4 (1981).

In short, simply because the court ruled against appellant does not mean that it did not give his argument "due consideration" or that it erred in rejecting appellant's justification defense. No justification defense was available to appellant, either because he failed to show that he could not have safely retreated or because he provoked the situation in which he purposely used deadly force.

Appellant does not deny that, in shooting Webb, he used deadly physical force. *See* Ark. Code Ann. § 5-2-601(2)(Repl. 2006) (defining "deadly physical force" as physical force that under the circumstances in which is it used is readily capable of causing death or serious physical injury). A person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is committing or is about to commit a felony involving force or is using or about to use unlawful deadly physical force. *See* Ark. Code Ann. § 5-2-607(a)(1)-(2) (Supp. 2007). However, a person is not permitted to use deadly physical force in self-defense if he knows that he can avoid the necessity of using deadly force with complete safety by retreating. *See* Ark. Code Ann. § 5-2-607(b)(1)(A); *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992).

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[2]Appellant also asserts that because he may have been reckless in forming his belief that his use of deadly physical force was reasonable, he could be found guilty of no more than second-degree battery based upon a reckless mental state. *See* Ark. Code Ann. § 5-2-614(a). In essence, he purports to challenge the trial court's refusal to reduce the charge to second-degree battery. However, while he cites to the relevant statutory provisions, he provides no real argument on this issue. Thus, we do not address it.

Moreover, a person is not justified in using even mere physical force on another person if, with the purpose to cause physical injury or death to the other person, the person provokes the use of unlawful physical force by the other person. *See* Ark. Code Ann. § 5-2-606(b) (Supp. 2007). A condition precedent to a plea of self-defense is an assault upon the defendant of such a character that it is with murderous intent, or places the defendant in fear of his life, or great bodily harm; thus, a mere assault is not sufficient to justify the plea of self-defense. *See Girtman v. State*, 285 Ark. 13, 684 S.W.2d 806 (1985). Finally, if the victim was the original aggressor, and withdraws from an altercation so that the danger has passed, a person is not justified in pursuing him to continue the fight or to use deadly physical force upon him. *See Thomas v. State*, 266 Ark. 162, 583 S.W.2d 32 (1979).

Appellant here was not entitled to a justification defense, first, because the evidence supports that he could have safely retreated to Richie's vehicle and left the scene. Appellant's mother said that "a minute or two passed" between the time Webb entered the apartment and when he came back out. Appellant fails to explain why that was not enough time to retreat to Richie's car and leave, especially in light of the fact that appellant, his mother, and Richie were certainly able to run to the car and safely flee after the shooting.

Moreover, Webb was no closer than fifteen feet from appellant when he came out of the apartment. Appellant was only a few feet from Richie's car. Even if appellant backed away as Webb approached him, appellant testified that he did not believe he could retreat to Richie's vehicle – thus, he cannot argue that he attempted to retreat. To the contrary, appellant's conduct in taking two steps back as Webb approached him allowed the permissible inference that appellant anticipated the counter-attack and was simply buying the time needed to produce the gun from his pocket and fire it. *See Burton v. State*, 254 Ark. 673, 495 S.W.2d 841 (1973) (rejecting the defendant's justification defense where the defendant armed himself and went to a bar in anticipation that the decedent would be there

and would attack him). Second, appellant was not entitled to a justification defense because he, being armed, provoked the use of unlawful physical force by Webb. The evidence demonstrated that the original altercation ended when the fight between appellant and Kevin broke up and the Webbs went into their apartment. By thereafter throwing the beer can at the apartment door and insulting Kristen and Webb, appellant provoked the subsequent attack by Webb. Webb admitted that he intended to "fight" appellant; however, mere assault does not warrant a justification defense. *See Girtman*, *supra*.

Affirmed.

HART and GLADWIN, JJ., agree.