

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION I

CACR07-894

April 30, 2008

DAVID WOODY

APPELLANT

APPEAL FROM THE POPE
COUNTY CIRCUIT COURT
[CR2006-192]

V.

STATE OF ARKANSAS

APPELLEE

HON. DENNIS CHARLES
SUTTERFIELD, JUDGE

AFFIRMED

Appellant David Woody appeals from his first-degree murder and retaliation against a witness convictions. On appeal, he makes four claims of error 1) the trial court erred in not granting a mistrial; 2) the trial court erred in its failure to grant Woody's motion for directed verdict; 3) the trial court erred in allowing certain evidence to be introduced; and 4) the trial court erred in its refusal to submit the "lesser included jury instruction." We see no error and affirm.

The facts that led up to Woody's conviction are as follows. On March 19, 2006, Woody and Jack Christen were arrested for possession of illegal substances. While in custody, Christen offered information relating to a potential methamphetamine lab in exchange for his release. In response to Christen's cooperation with authorities, Woody and several members of his Aryan Brotherhood became interested in identifying the "snitch" because "[v]iolent

repercussions come to informants.” Woody and an accomplice picked up Christen and took him to a remote location, where they began questioning him about what he had told the police. During the course of questioning, one of Woody’s accomplices, Kevin Erdelyi, killed Christen.

Following his conviction, Woody received a six-year sentence and a \$10,000 fine for retaliation against a witness and a forty-year sentence for murder in the first degree. It is from these two convictions that Woody appeals on four separate grounds. However, it is his second ground, insufficient evidence to support his conviction, that we must consider first. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002). He claims that the trial court erred in its failure to direct verdicts in his favor because the prosecution did not sufficiently corroborate the testimony of one of his alleged accomplices, Justin Jackson. Unfortunately, we cannot consider the merits of this claim because Woody’s argument is barred. The record does not contain a motion for directed verdict at the close of the State’s case (which was the close of evidence) as required by Arkansas Rule of Criminal Procedure 33.1 (a) (2007). The failure to make such a motion *on the record* bars a challenge to the sufficiency of the evidence on appeal. *Id.* at 33.1 (c).

Woody also argues on appeal that the trial court erred in its refusal to grant a mistrial when a witness for the State, Justin Jackson, volunteered during cross-examination that he had taken a polygraph examination. Indeed, Jackson was pushed by Woody’s counsel, through several questions, on how “we” could know that his testimony concerning the crimes was true. When Jackson thrice attempted to provide verification of his veracity via similar

statements given by others, Woody posed the following question through counsel: “No, I’m asking you, sir, how can you say, not from statements, how can you say that?” Jackson then replied, “I took a polygraph test.” After this reply, Woody moved “for a mistrial based on the statement of the witness [that] he took a polygraph test.” The trial court did not specifically deny the motion, but pointed out that Woody had asked the question and “got his answer.” After additional discussion, the court instructed the jury: “Ladies and gentleman of the jury, the Court would admonish you that any reference to a polygraph test should not be considered by you in your decision in this matter.”

As noted by the trial court, Woody invited any error that may have occurred as a result of Jackson’s mention of taking a polygraph test. Woody repeatedly asked how “we” could know Jackson was being truthful and refused to allow him to make references to an obvious source of verification—the corroborating statements of other witnesses to the murder. As such, Jackson turned to what he viewed to be another source of verification, his having taken a polygraph examination. Further, the record does not show that Woody was ignorant of the fact that Jackson had submitted to the polygraph examination. Because Woody invited any error caused by Jackson’s mention of the polygraph, the mistrial motion was rightly denied.¹

Next, Woody argues that the trial court committed reversible error by overruling his objections to each of the four photographs of the victim that the prosecution presented at trial

¹Furthermore, a mistrial is a drastic remedy, available only when the alleged error is so prejudicial that justice cannot be served by continuing the trial, and it cannot be cured by an admonition to the jury. *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003). Here, the trial court’s jury admonition more than cured any resulting error from Jackson’s polygraph reference and serves as an alternative basis for affirmance.

on the ground that their purpose was to “inflamm[e] the jury.” A trial court’s decision to admit photographs will not be reversed on appeal absent a showing of abuse. *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999). That photographs are cumulative, gruesome, or inflammatory does not warrant their exclusion if they serve some evidentiary purpose, such as shedding light on an issue, proving a necessary element of the case, enabling a witness to testify more effectively, corroborating testimony, or enabling a juror to better understand testimony. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006). Other acceptable purposes are to show the condition of the victim’s body, the probable type or location of the injuries, and the position in which the body was found. *Branscum v. State*, 345 Ark. 21, 43 S.W.3d 148 (2001).

Here, State’s Exhibit 1 showed the victim’s body from a distance. The photograph was admitted during the testimony of Terry Wood, who, along with his granddaughter, discovered the body. According to Wood, the photograph accurately revealed the location of the body when he and his granddaughter happened upon it, particularly the body’s relation to the road. Because this photograph was used to establish the location where the body was found and identified a potential crime scene (a recognized ground for admission) the trial court did not abuse its discretion by admitting State’s Exhibit 1.

State’s Exhibit 2 was also admitted during Wood’s testimony and showed a closer view of the body from a different perspective. This photograph was also used during the testimony of Investigator Aaron Duvall to show pliers that were found near the body—pliers that Woody later told police were his—which proved to be circumstantial evidence of Woody’s presence at the scene. Thus, State’s Exhibit 2 was properly introduced because it showed both

the position of the body and Woody's pliers that were discovered at the crime scene (and their location relative to the body).

State's Exhibit 3, the final photograph admitted during Wood's testimony, showed a closer view of the victim, including a view of his upper body and head. Wood explained that he and his granddaughter went to check on Christen's condition—whether he was still alive—and noticed the blood visible on his head. This bloody area is depicted in the photograph. Wood also verified, via this photograph, the clothing that was on the body when it was found—a dark hooded sweatshirt with the words "Orange County" on the front. The prosecution later relied on the photograph during the testimony of Janet Crum, who verified that Christen was wearing the "Orange County" sweatshirt when Woody picked him up from her house on the night of March 24, 2006. Because State's Exhibit 3 corroborated the testimonies of Wood and Crum, the trial court did not abuse its discretion by admitting it.

The final photograph challenged by Woody is State's Exhibit 4, which was also taken at the scene. It shows a side view of the entry wound on Christen's head, admitted during the testimony of Duvall. It was used to show the wound that Duvall observed on the body when he arrived at the scene. The photograph was also used during the testimony of Dr. Frank Peritti, the medical examiner who autopsied Christen's body. Dr. Peritti used the photograph to show stippling (the burnt and unburnt grains of gunpowder on the skin) on the victim's head. Because State's Exhibit 4 showed the location of Christen's injury and enabled jurors to better understand Peritti's testimony, the trial court did not abuse its discretion by admitting it. In sum, the four photographs admitted at trial were not cumulative and each

served a legitimate evidentiary purpose. Thus, the trial court did not error in permitting their introduction.

Woody's final argument is that the trial court erred by refusing to instruct the jury on felony manslaughter as a lesser-included offense of first-degree felony murder. This argument is meritless because felony manslaughter is not a lesser-included offense of first-degree felony murder. *Jester v. State*, 367 Ark. 249, 239 S.W.3d 484 (2006). Woody concedes that more than six years ago, in *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001), the Arkansas Supreme Court explicitly held that felony manslaughter, as defined by Arkansas Code Annotated section 5-10-104 (a)(4) (A) & (B)(i) (Repl. 2006), is not a lesser-included offense of felony murder. He simply argues that *Hill* was wrongly decided. Not only are we bound by *Hill*, with no power to overrule it, the supreme court recently reaffirmed *Hill*, rejecting the very mens-rea argument that Woody makes in this appeal. *Perry v. State*, 371 Ark. 170, ___ S.W.3d ___ (2007) (concluding that "under circumstances manifesting extreme indifference to the value of human life," as set forth in the felony-murder statutes, is not a culpable mental state).

Because the trial court committed no reversible error, Woody's convictions are affirmed in all respects.

Affirmed.

HART and HEFFLEY, JJ., agree.