ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION II

CACR08-37

June 18, 2008

	APPEAL FROM THE OUACHITA COUNTY CIRCUIT COURT
TAIMAK ANTWAN GASTON APPELLANT	[CR2006-213-3]
V.	HONORABLE EDWIN A. KEATON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant, Taimak Gaston, was tried by a jury and found guilty of the offenses of aggravated robbery and first-degree murder. He was sentenced to 540 months in the Arkansas Department of Correction. For his two points of appeal, appellant contends: 1) the trial court erred by denying his motion for directed verdict, and 2) the trial court erred by allowing the State to call witnesses for the sole purpose of impeaching them with prior inconsistent statements as a subterfuge to introduce inadmissible hearsay. We affirm.

I. Denial of Motion for Directed Verdict

A defendant's right to be free from double jeopardy requires a review of the sufficiency of the evidence prior to a review of any asserted trial errors. *Brown v. State*, 100 Ark. App. 172, ____ S.W.3d ____ (2007). Consequently, we first examine the trial court's denial of appellant's motion for a directed verdict. We treat a motion for directed verdict as a challenge

to the sufficiency of the evidence, view the evidence in the light most favorable to the State and consider only evidence that supports the verdict, and affirm if substantial evidence supports the verdict. *Id*. Substantial evidence is evidence that is forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id*.

The first three subpoints of appellant's first argument merely set out applicable statutory and case law. The first subpoint explains the overall standard of review. The second subpoint focuses on appellant's first-degree murder conviction; he merely makes a conclusory statement that the State failed to provide sufficient evidence to show that he committed the offense, and he then sets out the statutory definitions of the offense and statutory and case-law explanations of the requisite intent for first-degree murder. But there is no development of how those concepts were insufficiently proven by the State. Similarly, for his third subpoint with respect to his aggravated-robbery conviction, appellant makes a conclusory assertion that the State failed to provide sufficient evidence to prove that he committed the offense, quoting the statutory definition of aggravated robbery and the requisite intent. Therefore, to the extent that appellant is even asserting these comments as bases for reversal, the first three subpoints can be quickly disposed of as having no merit.

The crux of appellant's first argument lies in his fourth subpoint where he contends that the only evidence supporting his conviction is the uncorroborated testimony of accomplices. On this subpoint, we disagree and find no basis for reversal.

In *Martin v. State*, 346 Ark. 198, 202-03, 57 S.W.3d 136, 139-40 (2001), our supreme court explained:

> Ark. Code Ann. § 16-89-111(e)(1) (1987) provides that a person cannot be convicted of a felony based upon the testimony of an accomplice, unless that testimony is "corroborated by other evidence tending to connect the defendant with the commission of the offense." Corroboration is not sufficient if it merely establishes that the offense was committed and the circumstances thereof. *Id.* It must be evidence of a substantive nature since it must be directed toward proving the connection of the accused with the crime and not directed toward corroborating the accomplice's testimony. *Meeks v. State*, 317 Ark. 411, 878 S.W.2d 403 (1994). The test for determining the sufficiency of the corroborating evidence is whether, if the testimony of the accomplice were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *McGehee*, 338 Ark. at 159, 992 S.W.2d at 110; *Marta*, 336 Ark. at 73, 983 S.W.2d at 924.
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> Circumstantial evidence may be used to support accomplice testimony, but it, too, must be substantial. *Marta,* 336 Ark. at 73, 983 S.W.2d at 924 (citing *Peeler v. State*, 326 Ark. 423, 932 S.W.2d 312 (1996)). Corroborating evidence need not, however, be so substantial in and of itself to sustain a conviction. *Flowers v. State*, 342 Ark. 45, 25 S.W.3d 422 (2000). Where circumstantial evidence is used to support accomplice testimony, all facts of evidence can be considered to constitute a chain sufficient to present a question for resolution by the jury as to the adequacy of the corroboration, and the court will not look to see whether every other reasonable hypothesis but that of guilt has been excluded. *Johnson v. State*, 303 Ark. 12, 792 S.W.2d 863 (1990).

Here, it is not necessary to recount the lengthy testimony of the many witnesses. It is sufficient, however, for purposes of this opinion to explain that the evidence, after the accomplice testimony is excluded, consists of the following: 1) the testimony of two women, Angela Snyder and Meisha Flannigan, that appellant was in a car with three other persons who had admittedly taken part in the robbery and murder of the victim during the same time frame as those events occurred; 2) the presence of appellant's DNA on a red bandana and testimony that the perpetrators wore red bandanas; 3) the discovery of a gun box and ammunition in appellant's closet that were of the same type as the weapons used in the

incident; and 4) the testimony from Akeem Avery, appellant's cousin, that on August 22, he was at Corby Roger's house and that appellant was there, along with others who had admittedly taken part in the robbery and murder.

As explained in the above-quoted passage, the test for determining the sufficiency of the corroborating evidence is whether, if the testimony of the accomplices were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. There is no question that there was evidence independently establishing the crime. The issue, therefore, is whether the independent evidence "tends to connect the accused with its commission." We hold that it does.

II. The trial court erred by allowing the State to call witnesses for the sole purpose of impeaching them with prior inconsistent statements as a subterfuge to introduce inadmissible hearsay.

In making his second argument, appellant relies upon *Roberts v. State*, 278 Ark. 550, 551-52, 648 S.W.2d 44, 45-46 (1983), in which our supreme court explained:

> Prior to trial appellant filed a motion in limine seeking to prohibit references to the December 23 statement. At the pretrial hearing it was disclosed that Richard had made two statements subsequent to the December 23 statement in which he stated that parts of the December 23 statement were untrue. The two subsequent statements about the incident were consistent with his eventual testimony at trial. The trial court ruled that the statement of December 23 would be admissible for the purpose of impeaching Richard's testimony.
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> We first note that although Richard fully admitted making the prior inconsistent statements, the trial court subsequently allowed the prosecution to introduce the complete text of the statement through a deputy sheriff. To do so was error. Once a witness has fully and unequivocally admitted making the prior inconsistent statement, then it cannot be proven again through another witness. McCormick, Evidence, § 37 at 72-73 (2d ed. 1972). We also note that in this particular case, the prior inconsistent statements could not be a part of the proof in the

case because they are expressly excluded as substantive evidence under Rule 801 (d) (1) (i), Uniform Rules of Evidence, Ark. Stat. Ann. 28-1001 (Repl. 1979) which maintains as hearsay unsworn out-of-court statements in criminal cases.

We still must decide whether the trial court erred in allowing the State to impeach Richard, its own witness, with his December 23 hearsay statement by asking him if he had in fact made the prior inconsistent statements. Under the circumstances of this case we believe the trial court erred by allowing the impeachment because the probative value of such testimony was far outweighed by the danger of unfair prejudice. Therefore, this evidence should have been excluded under Rule 403, Ark. Stat. Ann. 28-1001 (Repl. 1979).

The State argues that asking Richard about his prior inconsistent statements was for impeachment purposes, but it really was a mere subterfuge. The only conceivable reason that the State could have for impeaching its own witness was to bring before the jury hearsay information not admissible as substantive evidence, hoping that the jury would accord it substantive value although it was clearly inadmissible as such under Rule 801 (d) (1) (i). In this instance the danger of convicting the defendant on unsworn testimony is too great; the limiting instruction to the jury directing them to consider the prior inconsistent statement for impeachment only was not a sufficient safeguard.

In *Lewis v. State*, 288 Ark. 595, 600-02, 709 S.W.2d 56, 59 (1986), however, our supreme court further explained:

In *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981), *rehearing denied*, this court held that statements made by a witness to the sheriff during his investigation were admissible for impeachment purposes as inconsistent, out-of-court statements under Rule 613 when the witness professed at the trial not to remember what she told the sheriff. We explained in *Chisum* that it was formerly the rule that inconsistent statements were admissible only for impeachment and not as substantive evidence. That limitation has been abolished in civil cases and modified in criminal cases to the extent that prior statements given under oath and subject to the penalty of perjury are admissible as substantive evidence. The common law rule still prevails in criminal cases that prior inconsistent statements not made under oath, as in the case before us, are admissible only for impeachment purposes.

We considered the question of unsworn prior statements again in *Roberts v. State*, 278 Ark. 550, 648 S.W.2d 44 (1983), *rehearing denied*, where we held it was permissible for a party to impeach his own witness by the use of a prior inconsistent

> hearsay statement if the probative value on the issue of impeachment outweighs the prejudicial effect arising from the danger that the jury will give substantive effect to the prior inconsistent statement.
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> Applying these rules to the case at bar, we find that the trial judge complied with the provisions of Rule 613. Both Ms. Tolliver and the appellant were afforded an opportunity to explain or deny Ms. Tolliver's statement, and the appellant was able to interrogate the witness. The trial judge correctly ruled that the statement was admissible solely for impeachment purposes and in turn admonished the jury to only consider the evidence in that light. Also, the trial judge weighed the prejudicial effect versus the probative value of the statement in making his decision, as required by *Roberts*.
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> It is a general rule that relevancy of evidence is within the trial court's discretion and, absent a showing of abuse of that discretion, its decision will be affirmed. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3 (1982), *rehearing denied*. We have held that the similar problem of weighing the prejudicial effect of cumulative evidence against its probative value is a matter of balancing which is primarily the function of the trial judge in the exercise of his discretion. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980). The exercise of that discretion should not be interfered with on appeal in the absence of manifest abuse. *Id*. Here, no such manifest abuse has been demonstrated. The admissibility of evidence must necessarily be decided on a case-by-case basis. The trial court properly limited the testimony and correctly instructed the jury. In addition, the appellant has failed to show that he suffered any prejudice as a result of the court's ruling. Unif. R. Evid. 103(a).

See also Kennedy v. State, 344 Ark. 433, 42 S.W.3d 407 (2001).

Here, when responding to appellant's objection to the introduction of the challenged testimony, the prosecutor explained that Tony Gaston, appellant's brother, had told him, when they reviewed the videotaped statement together, that he could not specify which parts of the statement he was recanting and which parts he was not. The trial court concluded that the prosecutor could not know what, if anything, Tony was recanting and allowed him to be called as a witness. Then, with respect to Akeem Avery, the prosecutor told the judge that Avery's account of events had been consistent every time he had talked to Avery, including

the Friday before the trial started. The trial court determined that under those circumstances *Roberts* did not apply and allowed the State to call Avery, also.

On the stand, Avery was asked if he had heard Ronnie Gaston or anyone else talk about "hitting a lick." Avery denied having heard any such thing and stated that he was lying to the police when he had earlier told them that he had. In responding to appellant's objection, the trial court reasoned that appellant had not presented any evidence in his earlier objection to show that the prosecutor knew Avery's trial testimony would differ from his prior statements.

Following the court's ruling, appellant sought a mistrial in connection with this testimony, which was denied. Appellant alternatively sought and was granted the following admonition to the jury: "Evidence that a witness previously made a statement which is inconsistent with his testimony at trial may be considered by you for the purpose of judging the credibility of the witness but may not be considered by you as evidence of the truth of the matter set forth in that statement."

The facts of this case are sufficiently distinguishable from the *Roberts* case to make it inapplicable. In *Roberts*, the child witness (son of the victim and the defendant) made subsequent statements that were consistent with his trial testimony and inconsistent in significant respects from the first statement that he gave the police. Thus, the police *knew* which parts of the original statement that the witness gave were inconsistent with his subsequent statements. In addition, the son fully admitted making the prior inconsistent statement in which he said that his dad shot his mom, but the court nevertheless allowed the

State to introduce the complete text of the statement through a deputy sheriff. The supreme court concluded that allowing such an impeachment under the facts of *Roberts* was error because the probative value of the testimony was far outweighed by the danger of unfair prejudice, and that the only conceivable reason the State could have for impeaching its own witness was to bring before the jury hearsay information not admissible as substantive evidence, hoping that the jury would accord it such under Rule 801 (d)(1)(i).

Here, as the trial court explained, Tony Gaston would not pinpoint for the prosecutor which parts of his original statement were untrue, and Akeem Avery's account to the prosecutor remained consistent even through the Friday night prior to trial.

Affirmed.

GRIFFEN and HEFFLEY, JJ., agree.