

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-616

RICKY STRAIN & WALTER J. SIMS
APPELLANTS

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered FEBRUARY 18, 2009

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT,
[NO. CR-2005-937-2-5]

HONORABLE JODI RAINES
DENNIS, JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Appellants Ricky Strain and Walter Sims were convicted by a jury of first-degree murder and sentenced to imprisonment of twenty-five years and fifty years, respectively, for the shooting death of Wade Miller. Strain raises two points for reversal, and Sims raises one. We find no error and affirm.

In the early morning hours of September 6, 2005, Wade Miller was shot and killed near the 12th Street bridge in Pine Bluff. Testimony surrounding the event was provided by two witnesses: Jimmy Massey and Tommy Forrest, Jr. Massey testified that, at about 4:00 a.m. on September 6, 2005, he met Strain and Sims at a liquor store on Ohio Street to buy cocaine from Sims. Strain and Sims arrived in a car; Massey was on foot. According to Massey, after he bought the drugs, he started walking and Strain and Sims left in the car. About five or ten minutes later, as Massey approached 12th Street, he saw the same car that Sims and Strain had

been in at the liquor store parked by the curb, and he saw Sims in a fight with someone. He testified that he saw the person on the ground get up and try to run away. He then saw Sims fire a weapon and he heard a shot. Massey said that he saw Sims the next day at a convenience store and that Sims “kind of made a threat towards me” and told Massey not to tell anyone.

During cross-examination by Sims’s attorney, Massey was questioned about a statement he gave to the police before trial. In that statement, Massey said that he saw both Strain and Sims kicking, stomping, and punching the victim. Explaining this statement at trial, Massey testified that he “saw the same two people that [he] had met just prior to this kicking the crap out of someone and then I saw them shoot.” He indicated that he was probably a little more clear on what happened when he gave the statement, four months after the incident, than he was at trial, two years after the incident.

Forrest testified that he had known Sims all of his life because he grew up next door to him and still lived there and that he knew Strain because he was often at Sims’s house. At about 4:00 a.m. on September 6, 2005, Forrest and the victim, Wade Miller, were walking down 12th Street to go to the bait shop, where Forrest was meeting with a man who owed him money, when a car pulled up. Miller walked over to the car to talk, and Forrest continued walking down 12th Street toward the bait shop. When Forrest got to the end of the street, he turned around and saw Sims and Strain “beating up” Miller. Miller took off running and then Forrest heard gunshots. He testified that he did not see who was shooting because he ran across the street and hid in the ditch. He then saw the car that Sims and Strain were in leave the area.

Appellants were charged with capital murder in connection with the shooting death of Wade Miller. A jury convicted appellants of first-degree murder, a lesser included offense of capital murder. Both appellants appeal as error the admission of Massey's testimony regarding a drug transaction that took place between him and appellants before the murder. Strain also appeals the sufficiency of the evidence to support his conviction.

Sufficiency of the Evidence

For his first point on appeal, Strain contends that there was insufficient evidence to support his conviction for murder because there was no evidence that he participated in the murder of anyone. He claims that the only evidence presented relating to him was evidence that he "might have been" sitting in a car seen by two witnesses when the shooting took place. He argues further that no one testified that he had a weapon or that he acted with the purpose of killing Mr. Miller because there was no evidence that he acted at all.

We do not reach the merits of this issue because Strain's insufficiency argument was not preserved under Rule 33.1 of the Arkansas Rules of Criminal Procedure. In a jury trial, a defendant challenges the sufficiency of the evidence by making a motion for directed verdict at the close of the prosecution's evidence and again at the close of all of the evidence, which Strain did. Ark. R. Crim. P. 33.1(a). Rule 33.1(a) also requires the motion for directed verdict to "state the specific grounds therefor," which Strain did not do. The rule further provides that

[t]he 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.

Ark. R. Crim P. 33.1(c).

The supreme court has repeatedly stated that the motion must specifically advise the circuit court how the evidence was deficient. *Smith v. State*, 367 Ark. 274, 283, 239 S.W.3d 494, 501 (2006); *Pinell v. State*, 364 Ark. 353, 219 S.W.3d 168 (2005). The reason underlying this requirement is that it allows the circuit court the option of either granting the motion or, if justice requires, allowing the state to reopen its case to supply the missing proof. *Pinell*, 364 Ark. at 357, 219 S.W.3d at 171. Moreover, this court may not decide an issue for the first time on appeal. *Id.*

Strain's attorney made the following motion for directed verdict at the close of the State's case:

We too would ask for a motion to offer—we would raise a motion to dismiss on the grounds of sufficiency of evidence. I do not believe that there is any evidence that would—that could be used against these two defendants, in particular, with the conflicting evidence that was presented by the State's two witnesses, Forrest and Massey. Thank you.

At the close of all of the evidence, Strain's attorney renewed his motion "on the same grounds as previously stated." This motion does not specifically state how the evidence was insufficient or even mention what element of the crime was not proven. Therefore, Strain did not preserve his sufficiency argument for this court's review.

Exception to 404(b)

We now turn to the second point on appeal, which point was brought to this court by both Sims and Strain. They contend that the circuit court erred in allowing the State to elicit testimony from Massey that he purchased drugs from Sims shortly before the murder occurred. They argue that the trial court's admission of the testimony under the res gestae exception to Rule 404(b) of the Arkansas Rules of Evidence was an abuse of discretion.

Arkansas Rule of Evidence 404(b) states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Evidence offered under Rule 404(b) must be independently relevant, thus having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Cook v. State*, 345 Ark. 264, 270, 45 S.W.3d 820, 824 (2001). The list of exceptions to inadmissibility in Rule 404(b) is not an exclusive list; rather, it is representative of the types of circumstances under which evidence of other crimes, wrongs, or acts would be relevant and admissible. *Id.* As with other evidentiary determinations, the balancing of the probative value against the prejudicial effect is a matter left to the circuit court's sound discretion, and we will not reverse the circuit court absent a showing of a manifest abuse of discretion. *Morris v. State*, 367 Ark. 406, 412, 240 S.W.3d 593, 598 (2006).

Particularly relevant to this case, evidence of other crimes is admissible under the res

gestae exception to 404(b) to establish the facts and circumstances surrounding the alleged commission of the offense. *Gaines v. State*, 340 Ark. 99, 110, 8 S.W.3d 547, 554 (2000) (holding evidence of drug use on night of crime was admissible as res gestae, an exception to Rule 404(b)); *see also Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006) (holding defendant's post-murder drug use admissible under Rule 404(b) as evidence of res gestae). Under the res gestae exception, the State is entitled to introduce evidence showing all circumstances that explain the charged act, show a motive for acting, or illustrate the accused's state of mind if other criminal offenses are brought to light. *Gaines*, 340 Ark. at 110, 8 S.W.3d at 545. Specifically, all of the circumstances connected with a particular crime may be presented to the jury in order to put the jury in possession of the entire transaction. *Id.* Where separate incidents comprise one continuing criminal episode or an overall criminal transaction, or are intermingled with the crime actually charged, the evidence is admissible. *Id.*

In this case, the drug transaction and the murder occurred within five to fifteen minutes of each other only blocks apart. The purchaser of the drugs was an eye witness to the crime. There was testimony at trial that the victim, Miller, was a drug user; Massey's testimony that he had just purchased drugs minutes before the murder from appellants was relevant to a possible motive. Further, the testimony located the witness and appellants in the area at the time of the crime and was relevant to Massey's identification of appellants as the perpetrators of the crime. The circumstances of the drug transaction put the jury "in possession of the entire transaction." *See Gaines*, 340 Ark. at 110, 8 S.W.3d at 545. We hold that the admission of this evidence by the circuit court was not a manifest abuse of its discretion.

Affirmed.

PITTMAN and BAKER, JJ., agree.