

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR10-837

JOHNNY LYNN BOVEE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 2, 2011

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT
[NO. CR-2006-551-3]

HONORABLE GRISHAM PHILLIPS,
JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant pled guilty in March 2007 to domestic battery in the third degree and was sentenced to fifteen months in the Arkansas Department of Correction followed by suspended imposition of sentence for fifty-seven months. The State filed a petition to revoke his suspended sentence in December 2009, asserting that he violated the conditions thereof by committing third-degree domestic battery and first-degree terroristic threatening on October 23, 2009. The State also asserted that appellant violated the conditions of his suspended sentence by consuming alcohol on October 23, 2009. The trial judge found the petition to be true, revoked appellant's suspension, and sentenced him to three years' imprisonment. On appeal, appellant asserts that the evidence is insufficient to establish that he committed domestic battery because, after he took the stand and testified that he had sex with the victim, he was not permitted to testify that the victim had so many other lovers that it was reasonable

for him to believe that he was not in a “dating relationship” with her. *See* Ark. Code Ann. §§ 5-26-302 (Repl. 2006); 5-26-305 (Supp. 2009). We affirm.

We note that appellant’s argument, although couched in terms of sufficiency, is actually addressed to the trial court’s ruling on the evidentiary point mentioned above. Fifth Amendment considerations require the sufficiency of the evidence to be addressed before consideration of other assertions of error, and that sufficiency be determined on the basis of the record as it stands, considering all the evidence heard at trial, whether properly or erroneously admitted. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). The reason for distinguishing between evidentiary insufficiency and trial error was explained in *Burks v. United States*, 437 U.S. 1 (1974):

[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Id. at 15.

Because the error that appellant asserts was incorrect rejection of evidence, it is not a matter of evidentiary insufficiency but instead is one of trial error. The decision to admit or exclude evidence is within the sound discretion of the trial court, and we will not reverse a trial court’s decision regarding exclusion of evidence absent a manifest abuse of discretion and

a showing of prejudice by the appellant. *Hill v. State*, 2010 Ark. App. 488. Here, appellant was not allowed to testify that the victim was so promiscuous that his sexual relationship with her did not constitute a “dating relationship,” and he argues that this evidence was relevant to show that, even if he had beaten the victim, his crime did not constitute the offense of domestic battery that the State asserted as one of the grounds for revocation of his suspension. However, even assuming *arguendo* that the trial court did manifestly abuse its considerable discretion in this matter, appellant could not make the requisite showing of prejudice because he does not contest the sufficiency of the evidence relating to the other violations with which he was charged, *i.e.*, terroristic threatening and consumption of alcohol. Here, the trial court found the petition to be true, and, although the State bears the burden of proving a violation of the conditions, it need only prove that the defendant committed one violation of the conditions. *Josenberger v. State*, 2010 Ark. App. 243. When a party appealing from a ruling leaves an alternate, independent ground unchallenged, the circuit court’s ruling must be affirmed. See *Pugh v. State*, 351 Ark. 5, 89 S.W.3d 909 (2002); *Pearrow v. Feagin*, 300 Ark. 274, 778 S.W.2d 941 (1989). Here, appellant was also found to have drunk alcohol and to have committed terroristic threatening in violation of his conditions of suspension. Because appellant failed to challenge the trial court’s alternative grounds for revoking his suspension, we must affirm. See *Murry v. State*, 2010 Ark. App. 782; *Josenberger v. State*, *supra*; *Watlington v. State*, 2010 Ark. App. 37.

Affirmed.

ROBBINS and GRUBER, JJ., agree.