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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-206

TIMOTHY CLEMMONS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** December 8, 2010 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION [NO. CR-2007-1305] HONORABLE WILLARD PROCTOR, JR., JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant was convicted of multiple counts of unlawful discharge of a firearm from a vehicle for firing shots from his vehicle at the home of his ex-girlfriend, one of which severely injured a little girl. He argues on appeal that the evidence is insufficient to support his convictions, that the trial court erred in admitting evidence of prior bad acts to prove intent or motive, and that the trial court erred in denying his motion to suppress the fruits of a search on the grounds that his consent was improperly obtained. We affirm.

Double-jeopardy considerations require us to decide issues relating to the sufficiency of the evidence before arguments asserting trial error. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). This means that we review all of the evidence that supports the finding of guilt, even evidence that might have been improperly admitted, to determine sufficiency. *Davis v. State*, 318 Ark. 212, 885 S.W.2d 292 (1994). The evidence supporting a conviction

is sufficient if it is substantial. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* Circumstantial evidence may provide a basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Id.* Whether the evidence excludes every other hypothesis is left to the jury to decide. *Carmichael v. State*, 340 Ark. 598, 12 S.W.2d 225 (2000). Guilt may be proven in the absence of eyewitness testimony, and evidence of guilt is not less because it is circumstantial. *Id.*

Here, there was evidence that five shots were fired at the home of appellant's ex-girlfriend, that four of the shots hit the home, two of the shots entered the bedroom where his ex-girlfriend was on the bed playing with her children, and that one of these bullets severely injured one of the children. Just prior to the shooting, appellant had been engaged in an angry telephone conversation with his ex-girlfriend prompted by jealousy and had asked her where in the house she was located. The telephone call ended immediately upon the shots being fired, and appellant did not call back or answer his telephone when called. Police officers soon afterward found four shell casings in the street outside the home. An eyewitness testified that the shots were fired from a dark car with tinted windows, larger than a Honda Civic, that was parked at the side of the house and that sped off afterward. Acting on the ex-girlfriend's belief that appellant was the shooter, police officers went to appellant's home. They found that his car, a black Honda Accord, was still warm to the touch, and a shell casing

was found on the floorboard behind the driver's seat. A ballistics expert testified that the shell casing found in appellant's car was fired from the same gun as the casings found in the street. He also stated that live ammunition found in appellant's garage matched the shell casings found at the scene and in appellant's car. We hold that this proof is substantial evidence to support appellant's convictions.

Evidence of eight prior incidents was introduced over appellant's objection. These incidents all involved violence or threats of violence by appellant to his ex-girlfriend, mostly prompted by appellant's jealous suspicions. Appellant argues that evidence of these incidents should have been excluded because they were relevant only to show that he was of bad character and therefore more likely to have committed the crimes with which he was charged. We do not agree. Arkansas Rule of Evidence 404(b) prohibits introduction of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show that he acted in conformity therewith. However, the rule expressly permits introduction of such evidence if it is admissible for another purpose, including proof of intent, motive, or identity. Given the evidence that the shots were fired immediately upon the conclusion of a telephone call from appellant to his ex-girlfriend in which he expressed anger based on his jealousy over discovering another man's voice on her answering machine, we think that the evidence of prior acts of violence and expressions of jealousy were independently relevant to show appellant's motive, intent, and identity. The jury was instructed that it could consider the

disputed evidence only for such purposes and not as evidence of appellant's bad character, and we hold that the trial court did not abuse its discretion in allowing admission of this evidence.

Appellant next claims that conflicts in the evidence regarding when and how his consent to search was obtained render any consent invalid. A police officer may conduct searches without a warrant if consent is given to search. Ark. R. Crim. P. 11.1(a). Valid consent to search must be voluntary, and voluntariness is a question of fact to be determined from all the circumstances. *Jackson v. State*, 2010 Ark. App. 359. At the trial court, the State must show by clear and convincing evidence that consent to search was freely and voluntarily given without actual or implied coercion or duress. Ark. R. Crim. P. 11.1(b). The appellate court's role is to conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and giving due weight to inferences drawn by the trial court. *Welch v. State*, 364 Ark. 324, 219 S.W.3d 156 (2005). We will reverse only if the circuit court's ruling is clearly against the preponderance of the evidence. *Id.* We find no such error in this case. Although the police officers involved in appellant's arrest had different recollections regarding the incident approximately eighteen months after the fact, the differences in their testimony pertained to the time and place that consent was given rather than the voluntariness thereof. There was no dispute in their testimony that appellant did in fact consent and that no duress or coercion was exercised in obtaining either his verbal consent or his execution of the written consent form introduced at trial.

Despite the differences in the testimony of the police officers regarding the timing of the consent, they were all in agreement that appellant was not threatened or intimidated and that he consented to the search. A written consent form executed by appellant was introduced at trial. We do not think that the discrepancies in the testimony of the police officers rendered it inherently incredible or insufficient, as appellant suggests, and, after reviewing the totality of the circumstances, we cannot say that the trial court clearly erred in finding that appellant's consent to search was voluntarily given.

Affirmed.

GLADWIN and KINARD, JJ., agree.