ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION II

CA CR 06-1043

June 13, 2007

ARMON HOUSTON AND WARDELL NEWSOME II

APPELLANTS

V.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY
[NO. CR 05-2702]

HONORABLE JOHN W. LANGSTON, JUDGE

AFFIRMED

A Pulaski County jury found appellants, Armon Houston and Wardell Newsome II, guilty of first-degree murder in the shooting death of Melvin Lunnie. As a result of the jury's verdicts, Houston was sentenced to forty years in prison, and Newsome was sentenced to thirty-five years in prison. In this joint appeal, appellants raise four issues for the reversal of their convictions. They contend that the trial court erred: (1) by denying their motions for directed verdict; (2) by prohibiting them from offering evidence that another person may have committed the murder; (3) by denying their motion to prohibit the State from introducing evidence of an alleged past drug deal as the motive for the murder; and (4) by not allowing them to introduce evidence of the eyewitness's drug addiction. We find no error and affirm.

On the night of May 20, 2005, the body of Melvin Lunnie was found lying on Fletcher Street,

near the corner of Sixth Street, located in the area known as the "east end" of Little Rock. Lunnie had been shot in the back and also in the back of his left thigh. The shot to the thigh broke his femur, but it was the shot in the back that proved fatal. Six .40 caliber shell casings were found at the scene. These shell casings had been fired from the same weapon, which was believed to be a .40 caliber, semi-automatic firearm, such as a Glock, H & K, or IMI. A bullet fragment was recovered from Lunnie's body, but it was not known for certain whether it was .40 caliber, although it had polygonal rifling that was consistent with a Glock, H & K., or IMI weapon. There was testimony that revolvers do not eject spent shells and thus leave no evidence behind when they are fired.

The shooting was witnessed by Irma Moragne. It was said that she reluctantly provided information to the police, behavior that was not unusual for that area, where cooperation with the police was uncommon. When first approached, she gave the police a false name, but she did give a statement that night implicating appellants in the murder. She also identified appellants from separate photo spreads she was shown. As of the time of trial, Moragne was serving a two-year sentence in prison with one year suspended for theft of property.

Moragne testified that she was well-acquainted with the appellants as well as Lunnie prior to the incident. She had seen Newsome at a park that afternoon and had been over at Houston's house. She recalled that there was a party that afternoon at Royce Bean's house, which was across the street from Houston's. It was her testimony that she "smoked a 20" of crack cocaine at around three o'clock that afternoon at a friend's house, where she then took a nap. She woke up at around 10:00 p.m. and decided to walk to another friend's house.

As she was walking down Sixth Street toward Fletcher Street, she heard Houston and Newsome arguing with Lunnie over a past drug deal. Moragne explained that the three had been engaged in an ongoing dispute over a drug deal that had occurred two years ago. The dispute

concerned Lunnie's accusation that appellants had sold him bad drugs. Moragne said the three had been involved in a heated argument about this same drug deal at a club just the previous month.

Moragne hid under a tree across the street from the argument on Fletcher Street. She saw Shawn Mayweather standing near Lunnie, while Houston and Newsome were standing on the passenger side of Newsome's vehicle. Both Houston and Newsome were armed with handguns. Moragne testified:

> Well, they were arguing back and forth, and [Lunnie] was really, he was really just disrespecting 'em really bad, and then [Lunnie] finally just said, 'Man, F★★★ y'all,' and [Lunnie] got ready to turn and walk up the hill towards his mom's house. And then that's when I heard Newsome say, 'I'll smoke yo' a★★.' And [Lunnie] turned, and he said, 'F★★★ you, you wh★★★ a★★ n★★★★★." And then [Lunnie] walked and turned back around and walked back up, and then that's when I heard the shots.

Moragne saw a flash from one of the guns, which one she could not tell, and she closed her eyes while the remaining shots were fired. She said that Shawn Mayweather immediately got into his vehicle and drove away and that Houston got into Newsome's vehicle, a light-colored Cutlass. Before driving away, Newsome walked over to the body and said, "Who's the wh★★★ a★★ n★★★★★ now?" Moragne said that she approached the body and stayed about fifteen seconds after the others left.

Bonnie Fuller testified that she was Newsome's girlfriend at the time. She estimated that her home on German Road was an eight to twenty-minute drive from the location of the murder, depending on speed and traffic. On the night of the murder, she said that Newsome arrived at her house unexpectedly sometime between 11:15 and 11:30 p.m. He was not upset, but seemed unusually quiet, and when she asked him what was wrong, he told her that someone had been killed. She said that Newsome made telephone calls to Houston and to his cousin. She did not know the content of their conversations because Newsome used street slang that she did not understand. Prior to trial,

Newsome wrote Fuller a letter asking her to ignore the subpoena commanding her presence at trial.

Appellants defended the charge primarily with an alibi defense. Royce Bean testified that both Houston and Newsome were at his house for a gathering that night and that the two were still at his house when word spread through the neighborhood that Lunnie had been killed. He said that around midnight Houston and Newsome walked over to the Club 25, which was caddy-corner to his house, and that he saw them come out of the club at 2:30 a.m. Diane Bowen, Royce Bean's sister, also testified that Houston and Newsome were at their house that evening. Ed Jordan and Thomas Robinson, who also attended the party, gave similar testimony.

Rhonda St. John worked with Newsome at the Flight Deck Restaurant. She testified that appellant worked on May 20 and helped her close the restaurant at 5:00 p.m.

Ms. Lawanda Campbell placed the 911 call that alerted the police to the shooting. She had been watching television in her bedroom, which has a view of Fletcher Street, when she heard the shots. She looked out of her bedroom window and saw a lone figure walking toward a dark-colored vehicle that was possibly a Cutlass. She said that this person was not Houston, her husband's nephew. She did not notice a woman walk up to the body.

Shaheed Armon Campbell, Ms. Campbell's son who was named after Houston, also saw a dark-colored vehicle. He did not see anyone walk up to the body, either.

Sufficiency of the Evidence

Appellants both argue that the trial court erred in denying their motions for a directed verdict. A motion for a directed verdict is treated as a challenge to the sufficiency of the evidence. *Wright v. State,* ___ Ark. ___, ___ S.W.3d ___ (Feb. 1, 2007). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence. *Id.* Substantial evidence is that evidence forceful enough to compel the fact-finder to make a conclusion one way or the other beyond

suspicion or conjecture. *Id.* When determining the sufficiency of the evidence, we view the evidence in the light most favorable to the State, and we will only consider evidence that supports the verdict. *Id.*

Citing *Kitchen v. State,* 271 Ark. 1, 19, 607 S.W.2d 345, 356 (1980), and *Barnes v. State,* 258 Ark. 565, 574, 528 S.W.2d 370, 376 (1975), appellants contend that the testimony of Ms. Moragne should be disregarded because it was "inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon." Appellants argue further that her testimony was so laden with inconsistencies and contradicted by their own witnesses that the jury's verdict necessarily rested upon speculation and conjecture. However, it is the jury's duty to weigh the evidence, and the jury may believe all or only a part of any witness's testimony. *Mosley v. State,* 97 Ark. App. 127, 189 S.W.3d 456 (2004). Furthermore, this court has held that the issue of a witness's inconsistent statements is a matter of credibility that is left for the jury to decide. *Wyles v. State,* ___ Ark. ___, ___ S.W.3d ___ (Feb. 8, 2007). As the appellate court, we are bound by the jury's determination regarding the credibility of the witnesses. *Mosley v. State, supra.* One eyewitness's testimony is sufficient to sustain a conviction, and such testimony is not clearly unbelievable based only on the fact that it is uncorroborated or because it has been impeached. *Id.*

Here, appellants exposed through cross-examination what can be considered inconsistencies in Ms. Moragne's testimony, and they introduced evidence that contradicted her testimony in certain respects. However, it was within the province of the jury to resolve any conflicts and inconsistencies in the testimony. *Phillips v. State,* 344 Ark. 453, 40 S.W.3d 778 (2001). We are not convinced that these inconsistencies and contradictions rendered her testimony so utterly unbelievable that the guilty verdicts are not supported by substantial evidence. We affirm on this point.

Third-Party Culpability

Prior to trial, the State moved in limine to prohibit appellants from introducing testimony that a man named Corey Bealer might have committed the murder. In opposition to the motion, appellants urged that Tyrone Lunnie, the brother of victim Melvin Lunnie, was prepared to testify that he dropped Lunnie off at the corner of Fletcher and Sixth Streets ten minutes before the murder; that Bealer was in the vicinity of the intersection standing on his car, but that Houston was not there; and that Lunnie and Bealer were engaged in an ongoing disagreement because Bealer was living with Lunnie's ex-girlfriend and their children. Appellants also proffered that Bealer had been arrested six months after the murder and that he had in his possession a Glock semi-automatic .40 caliber weapon, similar to the kind of weapon that was said to have been used in the shooting. The trial court granted the State's motion in limine, but ruled that appellants would be permitted to offer testimony that Bealer and others were present, but not Houston, when Tyrone Lunnie dropped Melvin Lunnie off. Appellants argue on appeal that the granting of the motion in limine was in error.

The admission or rejection of evidence is within the discretion of the trial court, which this court will not reverse in the absence of a manifest abuse of that discretion. *Pugh v. State,* 351 Ark. 5, 89 S.W.3d 909 (2002). In *Zinger v. State,* 313 Ark. 70, 852 S.W.2d 320 (1993), the supreme court considered under what circumstances evidence incriminating others is relevant to prove that a defendant did not commit the crime charged. The court held that:

> A defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible.

Id. at 75, 852 S.W.2d at 323 (quoting *State v. Wilson,* 367 S.E.2d 589 (N.C. 1988)). The court also quoted with approval from the decision in *People v. Kaurish,* 802 P.2d 278 (Cal. 1990):

> The rule does not require that any evidence, however remote, must be

> admitted to show a third party's possible culpability . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

Zinger at 76, 852 S.W.2d at 323.

Based on the holding in *Zinger,* the court in *Johnson v. State,* 342 Ark. 186, 27 S.W.3d 405 (2000), affirmed the trial court's decision to exclude third-party evidence where the evidence created only an inference but did not point directly to the third-party's guilt. We thus can find no abuse of discretion here. The proffered evidence regarding the alleged ongoing dispute between Lunnie and Bealer would have shown a motive for Bealer to have committed the murder, but no direct evidence linking him to the shooting. And, as noted by the trial court, Glock semi-automatic weapons are common, and the fact that Bealer was found with a similar weapon six months removed in time was too remote to have any relevance. The circuit court did not prevent the appellants from presenting evidence of Bealer's presence and strange behavior just before the shooting. Appellants chose not to offer this evidence and thus, cannot now complain about a bar that the trial court did not impose.

Appellants' reliance on the Supreme Court's decision in *Holmes v. South Carolina,* 547 U.S. 319 (2006), is unfounded. In that case, the Court was considering the South Carolina Supreme Court's holding that excluded evidence of a third-party's guilt where there was strong forensic evidence of the defendant's guilt. The Court held that this rule violated a criminal defendant's right to have a meaningful opportunity to present a complete defense because it focused only on the strength of the prosecution's evidence rather than the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. In its decision, however, the Court recognized that third-party evidence may and has been traditionally excluded where it does not sufficiently connect the other person to the crimes, as for example, where the evidence is speculative or remote, or does not tend to

prove or disprove a material fact in issue. Our rule of law governing the admissibility of third-party evidence falls within this category and thus does not offend the holding in *Holmes*.

Evidence of Past Drug Deal

Also in a preliminary ruling, the trial court granted the State's request to allow Ms. Moragne to testify that appellants and Lunnie were arguing about a past drug deal at the time of the murder. Appellants contend that the evidence was inadmissible under Ark. R. Civ. P. 404(b) because it served only to cast them in a poor light as drug dealers and was unfairly prejudicial. The State contends that the evidence was properly admitted as evidence of motive under the *res gestae* exception to Rule 404(b). The State's assertion is correct.

With regard to Rule 404(b), the general rule is that evidence of other crimes by the accused, not charged in the indictment or information and not a part of the same transaction, is not admissible at the trial of the accused; however, evidence of other crimes is admissible under the *res gestae* exception to the general rule to establish the facts and circumstances surrounding the alleged commission of the offense. *Gaines v. State,* 340 Ark. 99, 8 S.W.3d 547 (2000). Under the *res gestae* exception, the State is entitled to introduce evidence showing all circumstances which 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. *Id*. Specifically, all of the circumstances connected with a particular crime may be shown to put the jury in possession of the entire transaction. *Id*. When the purpose of evidence is to show motive, anything and everything that might have influenced the commission of the act may, as a rule, be shown. *Thessing v. State,* 365 Ark. 384, ___ S.W.3d ___ (2006) (quoting *Barrett v. State,* 354 Ark. 187, 201, 119 S.W.3d 485, 494 (2003)).

Here, the testimony was that appellants and Lunnie had been involved in a running dispute about a past drug transaction which they were arguing about at the time of the murder. Clearly, this

evidence falls within the *res gestae* exception to explain the act and as proof of motive, and the trial court did not abuse its discretion by allowing its admission into evidence.

Evidence of Drug Addiction

The record reflects that this was the second trial of this matter, as appellants' first one ended in a mistrial. At the first trial, Ms. Moragne was said to have admitted that she had been addicted to crack cocaine for twenty years. Prior to this trial, the trial court granted the State's motion in limine to preclude appellants from questioning Ms. Moragne in such as way as to expose her long-term addiction. Appellants argue that her drug addiction was admissible because it was relevant to the issue of the "believability of her testimony." We cannot agree.

Rule 608(b) of the Arkansas Rules of Evidence provides:

> *Specific Instances of Conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

In *Echols v. State,* 326 Ark. 917, 973-74, 936 S.W.2d 509, 538 (1996), the supreme court determined under this rule that a witness's history of substance abuse was not probative of the witness's veracity because there was no showing that substance abuse had affected the witness's perception of reality or his ability to tell the truth. As in *Echols,* no such showing was made here, and we cannot conclude that the trial court abused its discretion by not allowing cross-examination on this issue. Even had it been admissible, we also discern no prejudice from the trial court's ruling. The jury did hear testimony that Moragne had smoked crack cocaine earlier that afternoon. Thus, the jury was made

fully aware of her usage of drugs. We will not reverse an evidentiary ruling in the absence of prejudice. *See Gaines v. State, supra.*

Affirmed.

MARSHALL and VAUGHT, JJ., agree.