

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION III

CACR06-1385

December 19, 2007

ERIC M. DAVIS

APPELLANT

APPEAL FROM THE BRADLEY
COUNTY CIRCUIT COURT
[NO. CR-2005-11-1]

V.

HONORABLE SAMUEL B. POPE,
CIRCUIT JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

JOSEPHINE LINKER HART, Judge

Appellant, Eric M. Davis, was convicted of second-degree murder and sentenced to twenty years' imprisonment and fined \$10,000. On appeal, he argues that the evidence was insufficient to support his conviction, that the circuit court erred in admitting testimony in contravention of Rules 403 and 404(b) of the Arkansas Rules of Evidence, and that the circuit court erred in refusing to grant a mistrial for juror misconduct. We affirm.

Preservation of appellant's right against double jeopardy requires that we consider his challenge to the sufficiency of the evidence first even though it was not listed as his first point on appeal. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). Appellant argues on appeal that the evidence was insufficient to support his conviction for second-degree

murder. We note, however, that in his directed-verdict motions, he argued that the evidence was insufficient to support first-degree murder, without addressing second-degree murder either by name or by apprising the court of the elements of second-degree murder. In order to preserve a challenge to the sufficiency of the evidence supporting a conviction for a lesser-included offense, a defendant must in his directed-verdict motions address the lesser-included offense either by name or by apprising the court of the elements of the lesser-included offense. *Id.* Given appellant's failure to do so, his argument was not preserved for appellate review.

Next, citing Rule 404(b) of the Arkansas Rules of Evidence, appellant argues that the court erred in permitting seven witnesses to testify, as their testimony had no bearing on whether he committed the crime and was admitted solely to show his bad character. Appellant also cites Rule 403 of the Arkansas Rules of Evidence and argues that the probative value of the testimony was substantially outweighed by its prejudicial effect.

Rule 404(b) provides 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,” but 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.” Rule 403 provides that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice....” Circuit courts are afforded wide discretion in making evidentiary rulings, and we will not reverse a ruling on the admissibility of evidence absent an abuse of discretion. *Brunson v. State*, 368 Ark. 313, ___

S.W.3d ___ (2006).

Here, appellant was charged with first-degree murder, and the State alleged that with the purpose of causing the death of the victim, Burgandy Duncan, he caused her death. *See* Ark. Code Ann. § 5-10-102(a)(2) (Repl. 2006). According to appellant, Burgandy was sixteen and in the eleventh grade at the time of her death, and that, at the time of the trial, he was twenty-two. On February 17, 2005, he went to Burgandy's residence. He had a poultry knife with him because he had "snatched" a dog by cutting its rope tether. Burgandy went through his pockets, found the knife, and playfully poked at him with it. He grabbed her hand, and she turned her back to him. He noticed that she had blood on her hand, though it was not a lot of blood, and he did not know that it was serious. He testified that it was as much her fault as his. He admitted on cross-examination that he told police that he went over to her house to pick up a Valentine's Day gift he had sent to her.

Appellant challenges the admissibility of the testimony of seven witnesses: Frederica Marshall, Akilah Swift, Shamonica Hampton, Chance Davis, Shaquonda York, Terrence York, and Faneshia Duncan. In allowing these witnesses to testify, the circuit court limited their testimony to incidents occurring from 2004 to Burgandy's death on February 17, 2005, and informed appellant that he would be entitled to a limiting instruction. The instruction apprised the jury to consider the testimony only as evidence of appellant's motive and intent.

Frederica Marshall testified that appellant and Burgandy Duncan would argue and fight, and a few months before her death, appellant asked Marshall whether Burgandy spoke to other males. Even though Marshall told him that Burgandy had not, appellant stated that

he was going to kill Burgandy.

Akilah Swift testified that during the school year Burgandy would come to school with cuts on her chest and burns on her arms. According to Swift, appellant told her he had caused those injuries. Swift also testified that three to four weeks before Burgandy's death, appellant called Swift and asked what other guys Burgandy was speaking to, and he stated that he would kill Burgandy.

Shamonica Hampton testified that appellant would call and speak to her about his relationship with Burgandy. He would ask Hampton whether Burgandy was involved with certain men. She testified that, sometime in 2004, he stated that he wanted to stab Burgandy and her family. Also, she testified about a June 2004 altercation at a McDonald's in which appellant pulled Burgandy from a car Hampton was driving, and after Hampton and Burgandy left the restaurant, he followed them to a residence where he demanded to speak to Burgandy.

Chance Davis testified that he observed burns on Burgandy's arm and had also observed that she had a bloodshot eye. He further testified that while at McDonald's, he was in a vehicle with Burgandy, Hampton, and another man and woman. Appellant tried to speak to Burgandy, but she refused. Appellant asked where they were going, and they gave him incorrect information. Appellant told them that he "should shoot holes in your car right now," but that he was not going to do so.

Shaquonda York testified that appellant followed her and Burgandy to a Pizza Hut. According to York, appellant and Burgandy "got into it," and appellant pulled Burgandy out

of the car by her arm. When York tried to stop the argument, appellant pushed her.

Terrence York testified that around the time Burgandy was killed, he observed appellant walking down the street. He testified that appellant was carrying a knife up his sleeve, had a “mean look on his face,” and walked like he was “kind of upset.”

Faneshia Duncan, Burgandy’s mother, testified that when she learned that appellant had a son by another woman, she told appellant that she did not want him involved with her daughter. Duncan testified that windows had been broken at her residence. She described how six or seven months before her death, Burgandy called after appellant had slapped her, and when Duncan arrived, he cursed them and stated that he would get his gun. She also testified that on the day of Burgandy’s death, Burgandy called her and told her that appellant had stabbed her in the chest.

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. *Brunson, supra*. Any evidence that is relevant to explain the act, show a motive, or illustrate the accused’s state of mind, may be independently relevant and admissible. *Id.* Further, a defendant’s previous threats regarding a homicide victim are admissible to show intent. *Id.*

Through the testimony of these witnesses, the State showed appellant’s aggressive behavior against the victim leading up to the murder, describing his threats and the violent and controlling nature of appellant’s relationship with the victim. This testimony was independently relevant and admissible to show appellant’s intent and motive in her death and counter appellant’s assertion that her stabbing death was accidental. Thus, we conclude that

the testimony was properly admitted. Moreover, given the import of this testimony, we cannot say that the circuit court erred weighing probative value of the testimony against its prejudicial effect.

In a third point, appellant notes that, following a recess, appellant's counsel approached the bench and stated that appellant and his father had observed one of the jurors having a conversation with family members of the victim, including the deceased's mother, who later testified at trial. In addressing the court alongside his attorney, appellant stated that "[i]t was like when we went out, they was all gathered up, and then they just, they scattered...." He further stated that "[i]t occurred out there in the hallway when - - By the time you said fifteen minute recess, we were all outside, and everybody was gathered up together. And when they seen me walk out the door, they scattered." Appellant's counsel stated that appellant would be open to an alternate juror or a mistrial, but would ask for an alternate juror first. Ultimately, however, appellant and his counsel concluded that they did not want the court to speak to the juror and asked only for an admonition.

On appeal, appellant argues that even though appellant declined to have the court question the juror, the court nevertheless should have declared a mistrial, *sua sponte*, or alternatively replaced the juror. He asserts that "[j]uror contact with a victim's family members is presumptively prejudicial to the substantial rights of the defendant and a trial court has a duty to intervene to correct a serious error like improper juror contact with a witness."

Following an allegation of juror misconduct, the moving party bears the burden of

proving both the misconduct and that a reasonable possibility of prejudice resulted from it. *Holsombach v. State*, 368 Ark. 415, ___ S.W.3d ___ (2007). Here, while there were allegations that a juror spoke to the victim's family members, there was no testimony submitted showing that any contact occurred. Because appellant failed to go forward with proof of misconduct, he did not meet his initial burden of proving misconduct stemming from contact by a juror with the victim's family. His failure to do so waived any objection to the alleged misconduct.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.