

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR12-144

TORRANCE CAERY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

OPINION DELIVERED OCTOBER 24, 2012

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SECOND DIVISION
[NO. CR2010-2573]

HONORABLE CHRISTOPHER
CHARLES PIAZZA, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Torrance Caery appeals his convictions on charges of aggravated-residential burglary and two counts of first-degree battery. Appellant does not challenge the sufficiency of the evidence supporting the convictions. Rather, he contends that the trial court erred by allowing evidence about his behavior before and at the time of his arrest over his objection based on Arkansas Rule of Evidence 403 (2011). We affirm.

On June 26, 2010, Little Rock police officers were summoned to 1205 West 24th Street in Little Rock around 10:00 p.m. after receiving a report of a shooting. Sergeant Roger Snook was the first officer to arrive, and he saw two women lying on the sidewalk in front of the house. One of them had a gunshot wound to her head, and the other a gunshot wound to her upper right back.

Johnny Green, the victims' husband and father, respectively, had been standing in front of his home when Alden Hill's car pulled up. Appellant got out of the car, pointed a gun at Green's head, and said, "Spook, I'm going to kill you." Green's wife, Shirley, came off of the porch telling appellant that he was not going to shoot her husband. The Greens retreated into their house, and, as Green was getting his gun, appellant kicked in the front door. Green heard gunshots, and, when he ran out the door with his gun, he saw his wife and their daughter, Shimberly, both lying on the ground.

On October 18, 2011, the State filed an amended felony information against appellant. The three counts involved in this appeal are one count of the Class Y felony of aggravated-residential burglary and two counts of the Class B felony first-degree battery. At the trial on October 19, 2011, the jury found appellant guilty of having committed the three felonies at issue, as well as two counts of first-degree battery in the presence of a child and having employed a firearm to commit aggravated-residential burglary. The jury sentenced appellant as a habitual offender with four prior felony convictions, and the trial judge ran the sentences consecutively for an aggregate sentence of 110 years.

The standard of review that this court applies when reviewing a trial court's application of Rule 403 is whether the trial court manifestly abused its discretion in determining whether the probative value of the evidence substantially outweighed the danger of unfair prejudice from the evidence presented. *Morris v. State*, 358 Ark. 455, 193 S.W.3d 243 (2004). This court does not reverse a trial court's ruling on a Rule 403-based objection absent an abuse of discretion. *Laswell v. State*, 2012 Ark. 201, ___ S.W.3d ___. A trial court

abuses its discretion when making an evidentiary ruling if the judge rules improvidently, thoughtlessly, or without due consideration. *Grant v. State*, 357 Ark. 91, 161 S.W.3d 785 (2004).

Appellant asserts that a trial judge may conclude that relevant evidence is inadmissible pursuant to Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. Our supreme court has noted that evidence offered by the State is often likely to be prejudicial to the accused, but the evidence should not be excluded unless the accused can show that it lacks probative value in view of the risk of unfair prejudice. *Croy v. State*, 2011 Ark. 284, ___ S.W.3d ___. Evidence is unfairly prejudicial to the defendant in a criminal case if the hostility it arouses in the jury would lead the jurors to find the defendant guilty because their emotions were aroused against him. *See Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986). The danger posed by jurors whose emotions are aroused against the defendant is that they might find the defendant guilty on some ground other than proof specific to the offense charged. *Old Chief v. United States*, 519 U.S. 172 (1997).

Appellant argues that the trial judge abused his discretion in denying appellant's Rule 403 objection to the admissibility of testimony from Hill and Officer Steve Dodge concerning the circumstances of appellant's arrest by Little Rock police officers. Before trial began, the prosecutor announced that the State would introduce evidence from Hill and Dodge that would show that appellant was, in fact, the shooter and was nearby at a witness's house the next day. Appellant objected on the basis that the evidence would have no probative value and that the prejudicial effect would outweigh any probative value that the

evidence may have. The court overruled the objection, saying that “running away and the circumstances around the arrest are, have always been allowed.”

At trial, Hill testified that he and appellant both smoked sherm—cigarettes laced with PCP—as Hill drove the two of them around on the night of the shooting. At the Greens’ house, Hill testified that he ran after appellant to try to stop him, and they struggled for the gun at one point. Hill talked to the police later that night and showed them where appellant’s mother and girlfriend lived. When the prosecutor asked Hill about what happened the next morning, appellant again objected on the basis that the testimony would not be relevant. The trial court again overruled the objection. Hill testified that appellant came to his house the next morning and banged on the door. Hill took his children to the back of the house, and his girlfriend’s mother called the police.

Dodge testified that, when officers confronted appellant that morning, appellant failed to comply with orders that he show his hands and get on the ground. As set out above, appellant “was making moves like he was fixing to run from the scene.” Based on that, Dodge tackled appellant from behind and took him to the ground. As Dodge told him to stop resisting, appellant kept fighting and trying to get away. At one point, Dodge’s grasp had slipped so much that he was holding only appellant’s head. It took three officers to subdue appellant before he could be handcuffed. Appellant did not object during Dodge’s testimony.

Appellant acknowledges that the police arrested him near Hill’s residence. It is undisputed that Hill had accompanied appellant the day before when appellant entered the

Greens' house and began shooting and that he had attempted to stop appellant. Just prior to being arrested, appellant went to Hill's residence and began banging on the back door. Appellant points out that his visit to Hill's residence took place the day *after* appellant had entered the home of the Green family and shot Shirley and Shimberly Green. Hill testified that he did not know why appellant came by his residence. Appellant maintains that because the State could not establish why appellant came by Hill's residence and beat on the back door, the fact that he did so had no probative value.

Appellant also claims that the fact that the police arrested appellant for shooting Shimberly and Shirley Green has no probative value because the police can make warrantless felony arrests on the basis of mere probable cause. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004). Appellant notes that probable cause is less than proof beyond a reasonable doubt, which is the degree of proof required to sustain a conviction.

We disagree and hold that the evidence in question was relevant and more probative than prejudicial. Arkansas Rule of Evidence 401 (2011) defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." To be relevant, it is not required that the evidence prove the entire case or even a single issue. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996). Rule 403 provides that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" The balancing of unfair prejudice versus probative

value required by Rule 403 is left to the trial court's discretion. *Bryant v. State*, 2010 Ark. 7, __ S.W.3d __.

The evidence in question was admissible to show when and how appellant was taken into custody after the shooting in order to fully inform the jury of the circumstances surrounding appellant's crimes. Hill was with appellant the night of the shooting, struggling with appellant at one point to try to get the gun away from him. Afterward, Hill spoke to the police and showed them where appellant's mother and girlfriend lived. The next morning, appellant appeared at Hill's house and began banging on the door. Although Hill said that appellant did not have an "angry demeanor," Hill took his children to the back of his house while his girlfriend's mother called the police—actions that likely would not have occurred if a mere social guest had come to the door. Dodge then described the struggle that occurred when the officers arrived and confronted appellant and appellant's attempts to flee.

In *Gaines v. State*, 340 Ark. 99, 110, 8 S.W.3d 547, 554 (2000), our supreme court held:

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. Specifically, all of the circumstances connected with a particular crime may be shown to put the jury in possession of the entire transaction *Res gestae* evidence is presumptively admissible.

(Internal citations omitted.) Evidence of postcrime conduct is relevant and admissible in a variety of contexts. *Morris v. State*, 53 Ark. App. 183, 920 S.W.2d 508 (1996). For example, appellant appeared as if he were about to run away, and evidence of an attempt to flee is admissible even though it did not occur immediately after the crime. *Hill v. State*, 325 Ark.

419, 931 S.W.2d 64 (1996). Similarly, resisting arrest is relevant to show consciousness of guilt. *Kidd v. State*, 24 Ark. App. 55, 748 S.W.2d 38 (1988).

We hold that the trial court was within its discretion to overrule appellant's Rule 403 objection and to allow Hill and Dodge to testify about what occurred before and after appellant's arrest on the morning after the shooting when appellant went to Hill's house and then resisted arrest. The evidence was relevant to inform the jury of all the facts surrounding the crimes, including how appellant came to be in custody, and also to show his consciousness of guilt.

Affirmed.

GRUBER and GLOVER, JJ., agree.

Timothy A. Boozer Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender,
for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.