

ARKANSAS COURT OF APPEALSDIVISION I
No. CACR12-377

TERRY ANTONIO LEE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 27, 2013APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SEVENTH DIVISION
[NO. CR-10-48]

HONORABLE BARRY SIMS, JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Terry Lee appeals an order of the Pulaski County Circuit Court convicting him of a terroristic act, criminal attempt to commit first-degree battery, and four counts of aggravated assault. He also received a firearm enhancement. He was sentenced as a habitual offender to an aggregate term of eighty-five years' imprisonment. Lee argues on appeal that the trial court erred by denying his directed-verdict motions; that the trial court abused its discretion by refusing to instruct the jury on concurrent and consecutive sentences; and that he cannot be convicted of a terroristic act, attempted first-degree battery, and aggravated assault without being subjected to double jeopardy. We affirm.¹

¹This is the second time this case is before us. We originally remanded the case for supplementation of the addendum. See *Lee v. State*, 2012 Ark. App. 706.

On November 2, 2009, Lee and an unidentified man got into a physical altercation with Robert Brown and Archie Roberson outside of Brown's home. Lee threatened to return and "kill everybody in the house." The police were called and a report was made. Less than an hour later, Brown went outside to move his vehicles. Lee, who was standing in the middle of the road, fired approximately eight shots in Brown's direction. One bullet hit the windowsill of Brown's house. At the time, Brown's wife and their three minor children were inside the house. Lee was identified as the perpetrator and formally charged with the crimes for which he was convicted. This appeal followed.

Lee first argues that the trial court erred by denying his directed-verdict motions. According to Lee, the State failed to prove that he was the perpetrator and that he had the requisite intent for the crimes for which he was charged. A motion for a directed verdict is a challenge to the sufficiency of the evidence.² The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial.³ Substantial evidence is evidence forceful enough to compel a conclusion one way or the other, without resorting to speculation or conjecture.⁴ With regard to circumstantial evidence, such evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion.⁵ When we

²*Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

³*Id.*

⁴*Id.*

⁵*Saul v. State*, 365 Ark. 77, 225 S.W.3d 373 (2006).

review a challenge to the sufficiency of the evidence, this court views the evidence in the light most favorable to the State, and only evidence supporting the verdict will be considered.⁶

A directed-verdict motion requires that the movant inform the trial court of the specific basis on which the motion is made.⁷ “A motion for directed verdict . . . based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense.”⁸ The reason for the specificity requirement for directed-verdict motions is that “when specific grounds are stated and the absent proof is pinpointed, the circuit court can either grant the motion, or, if justice requires, allow the State to reopen its case and supply the missing proof.”⁹

Here, Lee’s directed-verdict motions were only recitations of the elements of each charged crime. He did not identify the specific elements that he now claims the State failed to prove. Because Lee’s motions did not inform the trial court of the specific issues in the

⁶*Walley, supra.*

⁷*Campbell v. State*, 319 Ark. 332, 891 S.W.2d 55 (1995); Ark. R. Crim. P. 33.1(a) (2012).

⁸Ark. R. Crim. P. 33.1(c) (2012).

⁹*Williamson v. State*, 2009 Ark. 568, 350 S.W.3d 787 (citing *Pinell v. State*, 364 Ark. 353, 357, 219 S.W.3d 168, 171 (2005)).

State's case that are now being challenged, the question of the sufficiency of evidence to support his convictions is not preserved for appeal.¹⁰

Next, Lee argues that the trial court abused its discretion by refusing to instruct the jury on concurrent and consecutive sentences. Arkansas Code Annotated section 5-4-403¹¹ provides in relevant part:

(a) When multiple sentences of imprisonment are imposed on a defendant convicted of more than one (1) offense, including an offense for which a previous suspension or probation has been revoked, the sentences shall run concurrently unless, upon recommendation of the jury or the court's own motion, the court orders the sentences to run consecutively.

....

(d) The court is not bound by a recommendation of the jury concerning a sentencing option under this section.

During deliberations, Lee's jury sent a letter to the judge asking were they to "make the decision of concurrent or consecutive, and where is that paperwork?" The court responded that "the ultimate decision lies with the court." Lee was subsequently sentenced to forty years' imprisonment for committing a terroristic act, thirty years' imprisonment for criminal attempt to commit first-degree battery, fifteen years' imprisonment for each of the counts of aggravated assault, and fifteen years' imprisonment for employing a firearm in the commission of his crimes. The trial court ran Lee's aggravated-assault convictions concurrently to the other convictions, which were run consecutively to each other.

¹⁰See *Malone v. State*, 2012 Ark. App. 280.

¹¹(Repl. 2006).

We have stated that in making a decision between concurrent and consecutive sentences, the trial judge should make it clear that it is his or her discretion being exercised when entering the sentences and not the jury's.¹² Additionally, there must be an exercise of judgment by the trial judge, and not a mechanical imposition of the same sentence in every case.¹³ Here, the trial court exercised its discretion by running the aggravated-assault convictions concurrently to Lee's other convictions. Lee has been unable to show that the trial court abused its discretion. Therefore, we affirm the court's decision not to instruct the jury on concurrent and consecutive sentences.

Finally, Lee argues that his convictions subject him to double jeopardy. Lee concedes that no objection was made to the trial court on double-jeopardy grounds; however, he urges this court to address the issue as one involving substantial rights under the fourth *Wicks* exception.¹⁴ Lee acknowledges that our supreme court refused to find the third *Wicks* exception for double jeopardy in *State v. Montague*.¹⁵ He even admits that his case is similar to *Montague*. We decline Lee's invitation to "first determine the merits of the issue and then turn to waiver to determine whether Rule 103(d) 'substantial rights' under the fourth exception are present." *Wicks* exceptions are rarely applied.¹⁶ Furthermore, our supreme

¹²*Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985).

¹³*Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980).

¹⁴*See Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

¹⁵341 Ark. 144, 14 S.W.3d 867 (2000).

¹⁶*Strickland v. State*, 2010 Ark. App. 599, 378 S.W.3d 157.

court has made it clear that when a double jeopardy–argument is not raised below, we cannot consider it on direct appeal.¹⁷ Accordingly, the judgment of the trial court is affirmed.

Affirmed.

WALMSLEY and WYNNE, JJ., agree.

John Wesley Hall, for appellant.

Dustin McDaniel, Att’y Gen., by: *Valerie Glover Fortner*, Ass’t Att’y Gen., for appellee.

¹⁷*Montague, supra.*