ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION II

CACR05-1348

JUNE 27, 2007

RODNEY DALE EDGIN APPELLANT	APPEAL FROM THE MONTGOMERY COUNTY CIRCUIT COURT [NO. CR-2002-45]
V.	HON. J.W. LOONEY, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED; MOTION TO WITHDRAW GRANTED

ROBERT J. GLADWIN, Judge.

This is a no-merit appeal from appellant's conviction in Montgomery County Circuit Court of driving while intoxicated (DWI), fourth offense. Appellant was sentenced to a term of five years in the Arkansas Department of Correction and fined $2000. Appellant's counsel filed his original no-merit brief based upon appellant's notice of appeal filed September 20, 2005. Appellant filed points for reversal and the State responded. Upon review, this court ordered appellant's counsel to fully brief the issue regarding the trial court's denial of appellant's motion for mistrial. [1] Appellant's counsel filed another no-merit brief on February

[1]This opinion was not designated for publication. *See Edgin v. State*, CACR 05-1348 (Ark. Jan. 17, 2007). While we envisioned that appellant's counsel would file an adversarial brief on the issue of the trial court's denial of appellant's motion for mistrial, appellant's counsel filed another no-merit brief that fully analyzes this issue.

6, 2007, and neither the appellant nor the State filed a response. We grant counsel's motion to withdraw and affirm appellant's conviction.

On October 24, 2002, at approximately 8:30 p.m., officers in Montgomery County were conducting a search of a residence in which suspected drug activity had been reported. The residence was located on Logan Gap Road in Montgomery County. As officers were searching the residence, one officer was stationed by the door for security. This officer, Deputy Naron, saw a vehicle turn from the road into the driveway, and alerted Mike May, Supervising Investigator for the drug task force. Naron and May approached the vehicle as it stopped in the yard and observed the driver and passenger as they stepped from the vehicle. May noticed immediately that the driver, appellant Rodney Dale Edgin, had an odor of alcohol about him, his eyes were bloodshot, watery and glassy, and he was having trouble keeping his balance.

Appellant was taken to the house, where the officers requested that he perform three field sobriety tests. May, who was trained and had experience in administering these tests, requested that appellant perform the Horizontal Gaze Nystagmus test, the walk-and-turn test, and the one-legged stand test. In May's opinion, appellant failed to complete the tests satisfactorily and was sufficiently intoxicated for him to believe that appellant would be a danger to himself or others if allowed to drive.

Appellant was transported to the Montgomery County Sheriff's office in Mount Ida, where he was advised of his right to a breath test, using the breath-alcohol-content-analyzer instrument. Appellant refused the breath test, stating that he would furnish a blood sample

instead. Because he had refused the breath test, he was not allowed to have a blood test, and was charged with DWI fourth offense. Appellant's first trial resulted in a mistrial after Investigator May referred to appellant's previous convictions. On August 25, 2005, appellant was again brought to trial. After testimony by Investigator May and appellant, appellant was found guilty of DWI. The jury sentenced him to five years, imprisonment and a fine of $2000 after evidence was presented that appellant had been previously convicted of DWI three times within the five years immediately preceding the arrest.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, appellant's counsel has filed a motion to withdraw on the grounds that this appeal is wholly without merit. This motion was accompanied by a brief discussing all matters in the record that might arguably support an appeal, including all adverse rulings and a statement as to why counsel considers each point raised as being incapable of supporting a meritorious appeal. Appellant was provided a copy of his counsel's brief and was notified of his right to file a list of points on appeal within thirty days. Appellant filed pro se arguments, to which the State responded. We held that appealing the trial court's denial of appellant's motion for mistrial was not wholly without merit and ordered appellant's counsel to fully brief the issue of whether the State should have been allowed to elicit testimony of appellant's prior arrests on cross-examination in the precise manner in which it was done.[2] This appeal followed.

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[2] *See* footnote one.

Counsel's brief covered two adverse rulings from the court. One was a denial of appellant's motion for directed verdict of not guilty, made at the end of the State's case and again at the end of all evidence. Appellant argued in the motion for directed verdict that the State had failed to prove a prima facie case that appellant was operating a motor vehicle while impaired due to the ingestion of alcohol. The second was a denial of appellant's motion for a mistrial, requested because the prosecutor, during cross-examination of appellant, elicited testimony that referred to previous occasions when the appellant had consumed too much alcohol and was incarcerated. Appellant's counsel claims that the trial court's denial of these motions was proper and does not constitute error.

Appellant originally filed pro se points attacking the trial court's denial of appellant's motions for directed verdict, alleging that the evidence was insufficient. The State responded that the appellant's conviction was supported by substantial evidence. After this court issued its opinion of January 17, 2007, appellant's counsel filed his second no-merit appeal, expanding his argument regarding appellant's motion for mistrial. Neither the appellant nor the State filed any further response.

Appellant's counsel first submits that the trial court's denial of appellant's motion for directed verdict was proper. On appeal, a motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). We view the evidence in the light most favorable to the State, consider only evidence that supports the verdict, and affirm if substantial evidence supports the conviction. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with a

reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id*.

Counsel argues that Investigator May testified that he saw a vehicle as it pulled into the yard and stopped at the residence police were searching. He walked out to the vehicle and observed appellant immediately after the vehicle stopped. He stated that appellant had bloodshot, glassy, watery eyes, and that when he observed appellant as he walked, appellant had trouble with his balance.

May administered three field sobriety tests. May stated that during the Horizontal Gaze Nystagmus test, appellant's eyes did not smoothly follow the pen that he focused on and which May moved across and back before appellant's face. He stated that appellant's eyes showed a jerking prior to maximum deviation and that these factors were indicative of impairment due to alcohol ingestion. On the one-legged-stand test, appellant was asked to hold either foot about six inches from the floor while counting. May testified that appellant had to "flail his arms" to keep his balance, and did not count out loud as requested. On the "walk and turn" test, appellant was asked to walk heel-to-toe for nine steps, pivot on one foot, and return while keeping his arms to his sides. May testified that appellant started out well, but then had to place his feet farther apart to keep his balance, and had to raise his arms for balance again.

Appellant argues that he testified that fifteen years ago he had an accident that tore his knee out of socket. He also testified to almost losing his eye and that everything now seemed blurry. He stated that he had had one beer on the date of the incident, which did

not intoxicate him. The beer can was in the back seat of his vehicle and there were no other beer cans there. He felt wrongly accused and was detained for over an hour at the residence, and the police charged him because he refused to take a breath test. Instead, appellant offered to take a blood test, but he was not allowed to do so. Therefore, appellant claims that the proof offered by the State was not sufficient for a jury to find every element of the crime charged beyond a reasonable doubt.

In *Gavin v. State*, 309 Ark. 158, 827 S.W.2d 161 (1992), the Arkansas Supreme Court found in circumstances similar to the instant case that an officer's observations are sufficient evidence to convict on the offense of DWI. The court held:

> Even if we were to agree with the appellant's argument that the trial judge erred in admitting his blood alcohol test results into evidence, we would not reverse because there is competent evidence sufficient to support the appellant's DWI conviction. *Butler v. Dowdy*, 304 Ark. 481, 803 S.W.2d 534 (1991). As noted in the beginning of the opinion, Officer Squires testified that the appellant smelled strongly of alcohol, and he had red eyes and poor balance when he exited his vehicle. In addition, the appellant admitted to having consumed "a couple of beers," and an empty beer can was found in his truck. In fact, the officer testified that he had no doubt in his mind that the appellant was intoxicated and was a danger to other persons.

Gavin, 309 Ark. at 162, 827 S.W.2d at 164.

The State argues, and we agree, that Investigator May's observation of appellant's appearance, actions, and performance on the three field-sobriety tests were sufficient to allow the jury to find that appellant was operating a vehicle while he was impaired due to the ingestion of alcohol. After the jury found appellant guilty of DWI, sufficient evidence of appellant's three prior convictions for DWI were introduced without objection in the form

of certified court records. This is competent evidence to show to the jury that appellant had committed a fourth offense within the meaning of Arkansas law.

Appellant's counsel also submits that the trial court's denial of appellant's motion for mistrial is proper. Appellant was testifying on cross-examination when the following colloquy occurred:

Q: Do you take a nap every time that you drink beer?

A: I don't drink beer anymore.

Q: Well, the times you were drinking prior to October 24, 2002, did you always go take a nap after you drank beer?

A: Sure.

Q: Did anything else ever happen to you during that period of time after you were through drinking before you took a nap?

A: No, sir.

Q; Never?

A: No.

Q: I want you to think about that last question and the last answer you gave me on that. You always took a nap after you'd drank several beers.

A: Sure.

Q: Well, where would you take those naps then every time you drank several beers?

A: You know, if I was at someone's house, I'd nap on their couch or I'd go out and -

BY MR. HENDERSON: Objection, Your Honor, relevance.

BY MR. WILLIAMSON: If we may approach, Your Honor.

BY THE COURT: You may.

BY MR. WILLIAMSON: It's cross-examination and he opened the door and I'm going to ask him - I have the right to ask him how he knows how alcohol affects him. He has three prior convictions for driving while intoxicated which means he's been arrested at least three times after drinking. I have the right to ask him if he's taken a nap every time or if something happened. The Defendant chose to take the stand in cross-examination and he's just testified as a result of what was covered in cross about him having drunk a beer. He's just now on cross-examination testified about what the effects of alcohol is on his person. He says after drinking several beers he takes a nap. I know that not to be true and that's what I'm getting at. He has three prior arrests and convictions for driving while intoxicated and he has opened the door now.

BY THE COURT: Mr. Henderson.

BY MR. HENDERSON: I don't think I've opened the door on the effects of alcohol. Mr. Williamson is on a fishing expedition and you're using the back door to get in otherwise inadmissible priors.

BY MR. WILLIAMSON: Your Honor, they are admissible if the Defendant takes the stand. I just can't get it in my case in chief. He's on the stand now and he's opened the door about what he does when he drinks. He answered the question. It's not a fishing expedition. Those fish are already caught and are in my tank.

BY THE COURT: You're going to pull them out I expect pretty quickly.

BY MR. WILLIAMSON: I'm going to go into specific times and dates.

BY THE COURT: I'm going to overrule your objection, go ahead.

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Q: So, where did you take that nap?

A: Saline County Jail.

BY MR. SIKES: Your Honor, may we approach?

BY THE COURT : Yes, you may.

BY MR. SIKES: He is going over evidence that was in the last trial that resulted in a mistrial and we'd move for a mistrial on that same basis.

BY THE COURT : Mr. Williamson.

BY MR. WILLIAMSON: I asked him where he was sleeping and if he was drinking, Judge, on those dates.

BY THE COURT : The difference here of course is that evidence came in through a State's witness in the last trial and this is coming in through him and he voluntarily took the stand. It's fair, a fair question, overruled.

Appellant's counsel argues that even though the prosecutor came perilously close, he did not ask the appellant whether he had been arrested or convicted for DWI on the dates he testified that he had to take a nap after he drank too much. After appellant asked for a mistrial, the State abandoned this line of questioning. Appellant did not ask for a cautionary instruction to the jury regarding previous incarcerations.

Our supreme court has made it clear that a mistrial is a drastic remedy and should be declared when there has been an error so prejudicial that justice cannot be served by continuing the trial, or when it cannot be cured by an instruction. *Holsombach v. State*, 368 Ark. 415, __ S.W.3d __ (2007). The trial court has wide discretion in granting or denying a motion for mistrial, and, absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. *Id.* It is the duty of the defendant to request a curative instruction.

Hall v. State, 314 Ark. 402, 862 S.W.2d 268 (1993). The State claims that after his motion for mistrial was denied, appellant failed to ask for a cautionary instruction to the jury.

Here, the State was aware that appellant had been arrested several times after having had too much to drink, rather than simply sleeping it off, as appellant's testimony implied. Therefore, the State was entitled to use appellant's testimony to impeach his credibility. The instant case may be distinguished from *Barker v. State*, 52 Ark. App. 248, 916 S.W.2d 775 (1996), where this court reversed the defendant's conviction because the prosecutor had cross-examined her regarding two previous DWI convictions. The court held that there was no relevant basis for directly questioning the defendant about the prior convictions other than to use them to show her bad character. Here, the prosecutor did not directly ask whether appellant had been previously convicted of DWI, but only used those occasions on which appellant had been incarcerated, without mentioning a conviction or a specific crime, to rebut appellant's testimony of a specific character trait that he claimed to possess, thereby also placing appellant's credibility into question.

Appellant's counsel also contends that appellant put a specific character trait into evidence by testifying that he always takes a nap after drinking several beers. Counsel claims that appellant "opened the door" to the State, giving it the right to rebut this testimony, either through rebuttal witnesses or further cross-examination of appellant. *See Ross v. State*, 96 Ark. App. 385, __ S.W.3d __ (2006) (where this court allowed the State's cross-examination of defendant regarding whether he habitually possessed a weapon after he testified that his wife requested the gun that he possessed and the pocket knife that he

"always" carried). The State was aware that appellant had experienced an arrest between the time he had drank enough beer to cause him to feel he needed to take a nap and the time he was able to take the nap. Under Arkansas Rules of Evidence 404(b), in order to find prior crimes admissible, the court must find the evidence is independently relevant. The fact that appellant had, on at least the occasions that he was incarcerated, not acted in conformity with what he described in his testimony as "always" being the case was independently relevant, both to show the jury that the personal characteristic that he claimed was not true and that his credibility was in question.

Accordingly, we grant counsel's motion to withdraw and affirm appellant's conviction.

Affirmed; motion to withdraw granted.

MARSHALL and MILLER, JJ., agree.