ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION II

CACR08-858

February 11, 2009

	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT,
CAESAR CLAY	SEVENTH DIVISION [CR-2007-2598]
APPELLANT	
V.	HONORABLE BARRY SIMS, JUDGE
STATE OF ARKANSAS	
APPELLEE	AFFIRMED

Appellant, Caesar Clay, was convicted by a Pulaski County jury of driving while intoxicated, fourth offense; misdemeanor fleeing; and resisting arrest. He was sentenced to a total of six years' imprisonment. On appeal, Clay only challenges his conviction for driving while intoxicated, arguing that the evidence was insufficient to support the conviction. We affirm.

At trial, Sherwood Police Officer Jamie Michaels testified that on May 6, 2007, a teal Chrysler ran a stop sign onto Kiehl Avenue, almost striking two vehicles and forcing a third to an outer lane; the vehicle then made an improper lane change and headed toward Jacksonville, going sixty-five to seventy miles per hour in a fifty-five mile-per-hour zone. Michaels stated that she followed the vehicle with lights and siren activated, but the driver

did not stop, even though he looked at her in his rear-view mirror. Officers from the Jacksonville Police Department and another Sherwood unit joined in the chase, which ended at a roadblock. Although asked several times to exit the vehicle, the driver, later identified as appellant, refused to do so and instead grasped the steering wheel. Officers removed appellant from the vehicle by force and at gunpoint; he resisted, causing one of the Jacksonville officers to "pepper spray" him. Michaels testified that she initially thought that the spray was for two or three seconds; that she stated this in her report; but that she was incorrect, it only lasted a second.

Appellant was cursing and yelling obscenities, but did not complain of any injuries. No cans or bottles of alcoholic beverages were found in the vehicle; but Michaels said that she could smell the odor of intoxicants on appellant both before he was pepper sprayed and when she later transported him in her cruiser. Michaels explained that Sherwood officers use tasers, not pepper spray; that she did not have a Sudecon wipe to remove the pepper spray; that Sudecon is better than soap and water in deactivating pepper spray more quickly; that she did not ask the Jacksonville officers if they had a wipe; that appellant was decontaminated with Sudecon at the Sherwood Police Department, which was a five-minute drive away; and that she used one wipe and attempted to use a second but appellant refused it.

Michaels, who was admitted as an expert witness in the administration of field-sobriety tests and as a drug-recognition expert, administered three field-sobriety tests: the horizontal-gaze nystagmus (HGN), walk-and-turn, and one-leg stand sobriety tests to

appellant. She stated that appellant exhibited six of six clues on the HGN test, indicating, in her experience, about an eighty-two percent likelihood of impairment; six indicators on the walk-and-turn test; and three of four clues on the one-leg stand test. She acknowledged that appellant's eyes were bloodshot once they arrived at the station, and that the pepper spray was a possibility as to why his eyes were red; however, she testified that in her training and experience, pepper spray never caused nystagmus. Michaels testified that before she began the sobriety tests, appellant became more jovial and told her how attractive she was. Michaels testified that she believed appellant was impaired both before and after the tests, based upon his driving, his behavior, the smell of intoxicants, and his erratic mood changes. After the field-sobriety tests, Michaels took appellant to the booking room and attempted to advise him regarding his implied-consent rights. Appellant refused to sign the implied-consent form or to take any tests, which she duly noted.

Jacksonville Police Officer Ryan Temple testified that he followed Michaels in the pursuit; that they were traveling about forty-five miles per hour in a twenty-five mile-per-hour zone in a residential neighborhood; and that Jacksonville Officer Boutnick eventually stopped appellant at gunpoint. He stated that he and Michaels asked appellant to exit the vehicle, but he refused to do so, instead lighting a cigarette and placing his hands on the steering wheel. Temple said that he and Michaels physically removed appellant from the car; that appellant continued to resist; and that he delivered a one-second burst of pepper spray into appellant's face area and then placed him in Michaels's police unit. Temple

stated that he smelled intoxicants on appellant, although he did not place that information in his report.

Appellant only challenges the sufficiency of the evidence to support his conviction for driving while intoxicated, fourth offense. In his directed-verdict motion, he argues that the State did not prove that any of the tests administered after the pepper spray were reliable to determine whether he was intoxicated. On appeal, appellant again makes this argument; he also argues that the fact that the jury found him guilty of misdemeanor fleeing instead of felony fleeing demonstrated that the jury did not believe he was driving erratically.

A motion for directed verdict is a challenge to the sufficiency of the evidence. *Simmons v. State*, 89 Ark. App. 34, 199 S.W.3d 711 (2004). To determine if evidence is sufficient, there must be substantial evidence, direct or circumstantial, to support the verdict. *Id.* Substantial evidence is that which is of sufficient force and character to compel a conclusion one way or the other with reasonable certainty, without speculation or conjecture. *Mayo v. State*, 70 Ark. App. 453, 20 S.W.3d 419 (2000). In reviewing a challenge to the sufficiency of the evidence, this court views the evidence in the light most favorable to the State and considers only the evidence that supports the conviction. *Simmons*, *supra*.

We first point out that appellant's argument that the jury convicted him of misdemeanor fleeing instead of felony fleeing evidences the jury's disbelief that he was driving erratically was not made to the trial court. A party cannot change his arguments

on appeal and instead is bound by the scope and nature of the arguments and objections made to the trial court. *Abshure v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002). Because this argument was not made below, we do not now consider it on appeal.

The argument appellant made below was that the pepper spray caused the field-sobriety tests to be unreliable. He argues that there is no other evidence, other than those tests administered by Officer Michaels, to show that he was intoxicated – there were no alcohol bottles or cans found in the car, and there were no BAC test results.

It is unlawful for a person who is intoxicated to operate or be in actual physical control of a motor vehicle. Ark. Code Ann. § 5-65-103(a) (Repl. 2005). A driver is "intoxicated" if he is "influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians." Ark. Code Ann. § 5-65-102(2) (Repl. 2005). Proof of a motorist's blood-alcohol content, while admissible as evidence tending to prove intoxication, is not necessary for a conviction of DWI on the ground of intoxication. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004). Opinion testimony regarding intoxication is admissible, and it is then the jury's province to determine the weight and credibility of that evidence. *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

In the present case, appellant fled when Officer Michaels tried to pull him over, requiring officers from another city holding him at gunpoint to make him stop. Then, when he would still not get out of the vehicle and was combative, he had to be pepper sprayed. Both officers who testified at trial stated that they smelled intoxicants, and that appellant had erratic mood changes. Appellant refused to take the breathalyzer test, which is admissible as an indication of a fear of results. *See Johnson v. State*, 337 Ark. 196, 987 S.W.2d 698 (1999). Furthermore, Officer Michaels, testifying as an expert, stated that appellant failed all three field-sobriety tests, and based upon her training and experience, that pepper spray did not cause nystagmus, the involuntary jerking of the eyeball, which may be aggravated by the effect of depressants, such as alcohol, on a person's central nervous system. *See Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993) (quoting *State v. Superior Court of County of Cochise*, 718 P.2d 171 (Ariz. 1986)). It is apparent that the jury found Officer Michaels's testimony to be credible, and convicted appellant accordingly. We hold that there is substantial evidence to support the DWI conviction.

Affirmed.

KINARD and MARSHALL, JJ., agree.