DIVISION III

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

CACR06-17

August 30, 2006

APPEAL FROM THE SCOTT COUNTY CIRCUIT COURT
[CR-04-58]

LARRY E. NIBLETT
APPELLANT

V.

HONORABLE PAUL E. DANIELSON, CIRCUIT JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant, Larry Niblett, was tried by a jury and found guilty of the offenses of manufacturing methamphetamine and possession of drug paraphernalia. He was sentenced to forty years in the Arkansas Department of Correction on the manufacturing charge and ten years on the possession charge. In this appeal, he challenges the sufficiency of the evidence to support his conviction for manufacturing methamphetamine, and he contends that the trial court erred in denying his motions to suppress. We do not reach the merits of his arguments because they are not preserved for our review. We, therefore, affirm.

Sufficiency of the evidence

Appellant contends that the trial court erred in denying his motion for a directed verdict because there was insufficient evidence to support his conviction for manufacturing methamphetamine. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Barnes v. State*, ____ Ark. App. ____, ____ S.W.3d ____ (March 1, 2006). 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 of appeal. *Id*. As mentioned previously, however, appellant's challenge to the sufficiency of the evidence supporting his conviction for manufacturing methamphetamine is not properly preserved for our review.

Rule 33.1 of the Arkansas Rules of Criminal Procedure provides in pertinent part:

> (a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. *A motion for directed verdict shall state the specific grounds therefor*.
>
> . . . .
>
> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above *will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal 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*. A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

(Emphasis added.)

At the close of the State's case the following colloquy occurred:

DEFENSE COUNSEL:	I'd make a motion based on insufficiency first of the affidavit for the search warrant. Had a chemist testify what he was told was at the residence. He said there was no way he could draw a conclusion that there was manufacturing process going forth there. *Also, there's been nothing testified to, to connect Mr. Niblett to any of this activity*.
PROSECUTOR:	*I assume he's renewing his suppression is what he's going* [sic].

DEFENSE COUNSEL: *Yes, yes*.

PROSECUTOR: I don't think he's correctly quoted the chemist. Again, it's — I believe the question that was asked was what was muriatic acid used for and he said to clean bricks and he goes, do you have some of this at your residence and he said. He didn't say there's no — there's no evidence to connect the items listed in the affidavit to manufacture of meth. I think his testimony was directly opposite of that. He went how to cook it and what was used.

DEFENSE COUNSEL: No I was talking about when I asked the chemist and I named off —

TRIAL COURT: But the items specifically listed in the affidavit was sufficient in itself. But it's within the affidavit also to indicate there's some other things that if you found you could arrest me for.

PROSECUTOR: That statement is contained in the affidavit.

DEFENSE COUNSEL: That's not correct. To know with this items you would arrest me — with these items that he listed.

TRIAL COURT: I thought he said there's some things there that — we can look at it. *But of course we're talking about a directed verdict now*.

DEFENSE COUNSEL: *Yes*.

TRIAL COURT: The record was made on suppression, but the affidavit is going to say whatever it says. Of course it seems to me it says something more than just that these items were there. There's some language in there to the effective if —

PROSECUTOR: The search warrant should have been — the affidavit I think was admitted as an exhibit in the suppression hearing.

DEFENSE COUNSEL: Yes.

PROSECUTOR: The last line is that, which I read before we started the trial today, said whenever Chief Helms asked for permission to conduct a search of his home Mr. Niblett

told me, "no, cause there's stuff there, like I said, you guys can charge me with."

DEFENSE COUNSEL: An that's the items that were listed. I mean, you've heard —

TRIAL COURT: *Your motion for directed verdict would be denied.*

(Emphasis added.)

After careful review of the above colloquy, we cannot discern where appellant made a motion for directed verdict, even though at the close of the discussion, the trial court stated, "your motion for directed verdict would be denied." We do recognize that the State seems to accept that appellant moved for a directed verdict, but our review of the above quoted colloquy that occurred at the conclusion of the State's case simply does not convince us that such a motion was made, and certainly not with the specificity required by Rule 33.1. We conclude, therefore, that the issue is not preserved for our review.

Motion to suppress

For his remaining point of appeal, appellant contends that the trial court erred in denying his motion to suppress due to the false statements of the affiants in the sole affidavit supporting the warrant. Appellant is barred from raising this argument on appeal because he did not make it below. It is true that he challenged the search warrant several times during the proceedings below, but he never at any time argued that the affiants made false statements in support of the warrant. Yet, that is the sole basis for his point on appeal.

Below, appellant challenged the search warrant in the following ways:

1) Written motion — Appellant's written motion, filed in November 2004, contains no arguments about the affiants making false statements.

2) May 3, 2005 hearing — Appellant argued, "I am alleging that the stop and interview was improper as a basis."

3) July 5, 2005 hearing — Appellant argued, "The only suppression after what I've learned today relayed to the prosecutor about the stop out in Oklahoma we were challenging whether the search warrant was valid. Judge, I'd ask that you review the search warrant one more time and make a ruling to that affect."

4) July 5, 2005 hearing — Appellant also argued, "The search warrant is self explanatory. I'll just say what the officer said. Larry Niblett told him that he had muriatic acid, maybe some Coleman fuel and jars. The officer put in the affidavit for search warrant he knew that was used in the manufacture. I'd like you to review that affidavit."

5) August 12, 2005 *in camera* hearing before trial — Appellant argued:

> I am renewing my motion to suppress based on the insufficiency for the affidavit for the search warrant. It was signed by Allan Marx and Eric Helms. I don't know where Marx is from but it said he participated in the arrest in Oklahoma. Chief Helms of the Pocola Police Department read through the affidavit said there were several items he admitted were used in the clandestine manufacture of methamphetamine. But, if you look at what he actually admitted having, he said he had Coleman fuel, drain cleaner, glassware, muriatic acid, and there's nothing else to connect this affidavit that Mr. Niblett was manufacturing methamphetamine. Those are common items in a lot of people's houses. There is not a CI that indicates that there was any manufacturing there. There's no admission, if you read through the whole case, by Mr. Niblett, no writings, nothing that would indicate that there was manufacturing going on there. There was nothing that the police knew other than these four things. We all know from being involved in this that those items are used for methamphetamine, but without something else, I think the affidavit for search warrant is deficient.

6) At close of State's case — The colloquy concerning the renewal of appellant's motion to suppress appears earlier in this opinion in its entirety. Therefore, it is not necessary to repeat it again. The colloquy contains no mention of false statements by the affiants.

Consequently, we also conclude that appellant's challenge of the trial court's denial of his motion to suppress on these grounds is not preserved for our review.

Affirmed.

PITTMAN, C.J., and GLADWIN, J., agree.