ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CACR06-1357

September 5, 2007

KENNETH GREGORY STEPHENS
APPELLANT

AN APPEAL FROM PULASKI COUNTY CIRCUIT COURT
[CR2005-3440]

V.

HON. BARRY SIMS, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

At a bench trial held May 19, 2006, the Pulaski County Circuit Court found Kenneth Gregory Stephens guilty of driving while intoxicated, careless and prohibited driving, and misdemeanor possession of a controlled substance. He was sentenced to one day in jail, fined a total of $1350 plus costs, and had his driver's license suspended. He challenges the evidence to support the convictions. He also argues that the court should have dismissed the DWI charge based on the doctrine of res judicata and the prohibition against double jeopardy. Finally, he contends that the court erred in excluding evidence of his sleep disorder and of the arresting officer's bias. We hold (1) that his challenges to the sufficiency of the evidence are not preserved for appellate review, (2) that neither double jeopardy nor res judicata precluded the State from pursuing the DWI charges, and (3) that the trial court did not commit either of the alleged evidentiary errors. Accordingly, we affirm.

Background Facts

On December 22, 2003, Mike Dawson of the Arkansas State Police was called to the 147-mile marker of eastbound Interstate 40, near its intersection with Interstate 430. When he arrived, he saw the front of appellant's vehicle against a steel cable in the median. Appellant was in the driver's seat, and his vehicle was still in drive. Deputies were banging on the glass and shaking appellant's vehicle trying to awaken him. Dawson eventually broke the back glass to the right rear door with a police baton, reached inside the vehicle, and unlocked the doors. Appellant then momentarily regained consciousness. Dawson asked appellant if he knew his name. Dawson asked three times before appellant replied, "Greg." Appellant collapsed again, and emergency responders put appellant on a stretcher. Dawson searched appellant and found four prescription bottles in his left front pocket. All were in appellant's name except for a bottle of Diazepam, which had the name Hugh Chalmers on the bottle. Dawson opined that on December 22, 2003, appellant was a danger to himself and other drivers.

The following evening, Dawson received a telephone call from appellant. Appellant confirmed that Dawson had charged appellant with DWI and possession of a controlled substance. When appellant questioned Dawson about the charges, Dawson replied that appellant appeared impaired and had a prescription belonging to another person. Appellant told Dawson that the Diazepam was in his ex-father-in-law's name, whom he had not seen in two or three years. Appellant also told Dawson that he was a doctor of psychiatry and a former prosecutor and that Dawson had filed the wrong charges.

Appellant provided a urine sample while in the emergency room, which tested positive for opiates. Don Riddle, a forensic toxicologist for the Arkansas State Crime Lab, noted that he did not determine the level of opiates in the urine, despite the ability to do so, because he was merely screening for the presence of narcotics. He testified that people in response to

opiates tend to be sluggish, sleepy, drowsy, and unable to make quick decisions. Based on Dawson's testimony, Riddle concluded that appellant's actions were consistent with someone having opiates in his system.

On cross-examination, Riddle acknowledged that a blood test would be more accurate than a urine test if someone wanted to quantify the amount of a drug in a person's system. He stated that the test he ran produces positive returns if a person has at least 300 nanograms per milliliter of a drug. Going along with a hypothetical proposed by appellant, Riddle agreed that if a person took two 60-milligram tablets twelve hours before he was arrested, and the arrest was three half-lives of the drug later, one would expect to see a blood level of approximately one-eighth of 2000 to 2500 nanograms per milliliter. A blood test showing 298 nanograms per milliliter would be within that range. Riddle stated that if a blood test showed that appellant had 298 nanograms per milliliter of a drug, it would technically be a negative test; however, it would be consistent with his urine test.

Appellant called Hugh Chalmers, appellant's former father-in-law. Chalmers testified that he possessed the bottle of Diazepam at one time. He noted that he was a heart patient and that appellant insisted that he take the pills with him on his vacation. He testified that he took several pills while on the trip, but that he lost the pills at some point. Chalmers testified that Dr. Wanda Stephens, appellant's mother, prescribed the medication on December 24, 2002, just before he left for the trip.

Dr. Richard Peek, a spinal surgeon, testified that appellant was one of his patients and had been since 1992. He stated that appellant had a severe lower back problem and several herniated disks. Appellant had emergency surgery in May 2003, and since that date, he had been prescribed MS Contin, 30 milligrams three times a day. Dr. Peek testified that appellant was a "very compliant patient."

Dr. Peek testified that appellant had a sleep disorder. The State objected, and the court allowed appellant to lay a foundation. Dr. Peek then testified that he often made referrals to other physicians for what he may suspect are other problems a particular patient may have. He stated that he referred appellant to a sleep-study clinic because he did not have expertise in that area. During the State's voir dire of Dr. Peek, the following colloquy occurred:

> MR. HILBURN: Your Honor, I think we have gone beyond the voir dire as to a cross-examination, and he's going to be entitled to cross-examine Dr. Peek at the proper time, but this is not voir dire. This is cross-examination.
>
> MR. LEVERETT: I'm trying to get to the issue, Your Honor, of this sleep disorder, whether or not he can render an opinion in an area where he does not have expertise.
>
> THE COURT: Well, in an effort to speed this along, I'm just trying to get things testified to that he can testify about, an I don't see where in the law – okay.
>
> Let me just tell you, Mr. Hilburn, all I'm having a problem with is: I don't care what he was prescribed. It doesn't really matter. He was asleep on the freeway. Let's get back to that. Give me some reason or something. We've been here a whole day, and you still haven't told me why he was passed out on the freeway. Maybe you could do that.
>
> I don't know if this witness – I don't – I'm going to take a break for a minute. I've got a – I have lost my ink pen, and we'll come back and talk about this some more, okay?

After the recess, the court suspended the proceedings until August 9. At the beginning of the proceedings on that day, appellant noted that Dr. Peek had been on the witness stand and that he had intended to continue with his testimony; however, Dr. Peek was involved in emergency surgery and doubted that he would arrive in time to continue his testimony.

Therefore, appellant presented his testimony at that time.[1]

Appellant stated that he suffered a severe back injury on May 2003 and that Dr. Peek operated on him. After the operation, he was prescribed high dose morphine, but by December 2003, his prescription had been titrated down to sixty milligrams a day. Appellant testified that he kept a bottle of thirty-milligram pills on his person and took two pills a day, including the day of the accident. He stated that on December 22, 2003, he had also taken Drixoral, which he described as similar to an antihistamine but without the sedating effect. He opined that the Drixoral had worn off before his accident. Appellant testified that when Dawson took the pills from him on the night of the accident, the prescriptions were four days old.

To explain why he had not slept for three days leading up to the accident, appellant testified that the Friday before the accident, he caught his then-wife communicating with an old boyfriend over the Internet. Appellant and his wife argued that night, and she later left the residence in Conway and drove to Little Rock to meet the man. Appellant stated that he was unable to sleep all day Saturday or Sunday as a result. He testified it was not unusual for him to be unable to sleep, as he has experienced previous episodes of insomnia; however, he opined that the situation with his wife made things worse.

Monday evening, the night appellant was arrested, his wife explained that she was again going to Little Rock to be with her former boyfriend. He followed her to her car and pulled out three prescription bottles (and claimed that he did not have the bottle of Diazepam on his person). He told his wife that he would not have to take medication for the rest of his life if it were not for her. She then left for Little Rock. Appellant claimed that it was 10:10

[1]When the hearing reconvened, the court granted appellant's motion to allow his counsel to withdraw and proceed pro se.

p.m. when she left. At that time, the news program he was watching announced a tornado warning. Worried about his wife being caught in the tornado, he jumped in this car and went after her. Appellant stated that he caught his wife in Mayflower. He was able to talk to his wife over the phone, and he told her about the tornado and asked her to come back home. His wife told him that she was going to continue to Little Rock. Appellant then decided to give up and return home.[2] He stated that between the Morgan and I-430 exits, he had a narcoleptic attack, which had never happened to him before that day. Appellant next remembered waking up in an ambulance. After that, he remembered doctors putting a tube down his throat. The doctors told him that they thought he had a drug overdose. Appellant stated that he tried to convince the doctors that he had not had an overdose, but that he could not do so.

Appellant stated that the doctors performed a urine test, which showed positive for opiates. The doctors then ran a blood test, which showed that he only had 298 nanograms per milliliter of opiates in his system. He claimed that this would be the same result as someone who had taken sixty milligrams of the drug twelve hours earlier. He stated that at the time the test was run, he had the equivalent of one-third of one of his tablets in his system, which he claimed would not be enough to intoxicate anyone. Many of appellant's medical records were entered into evidence. Included in the records was a diagnosis of a sleeping disorder from 2001. As appellant attempted to give more testimony regarding his sleep disorder, the following colloquy occurred:

APPELLANT: Finally, after this incident, I had six accidents in 2004.

MR. LEVERETT: Judge, I'm going to object to this as being relevant.

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[2]From the 147-mile marker, one would travel west to get to Conway. Appellant's car was in the eastbound lane.

APPELLANT: Where I fell asleep at the wheel just like I did on this night and -

THE COURT: That's sustained.

MR. LEVERETT: Thank you.

APPELLANT: Okay. Well, Your Honor, I was also- -I won't go any further with this. I'm going in the wrong direction. I was going to testify and the witnesses that I had out in the hall were going to testify as to the times that they have seen me sleepwalk.

MR. LEVERETT: Judge, I'm going to object to that. He's testifying now as to what these witnesses will testify to, who I'm going to object to being called.

APPELLANT: I'm trying to clarify if I'm going to be ask- -call them as witnesses or whether I'm going to be able to go into this line all the times that I've been sleepwalking.

THE COURT: Have you listed them as witnesses?

APPELLANT: My father may have been. The other two, my son and babysitter, were not because they're testifying about an incident that happened a month ago. And so I didn't know- - they had never seen me sleepwalk before until a month ago.

THE COURT: Okay, I'm not going to let them testify.

APPELLANT: Okay.

After this colloquy, appellant reiterated that he had a real sleep disorder, which has caused him to quit driving. The State continued to object to the testimony; however, the court stated that it would allow the testimony and give the testimony the weight it deserves.

Appellant stated that he found the contact information for the arresting officer the day after his arrest. He stated that on the night of the arrest, Dawson never told him that he was under arrest and never gave him a ticket. He stated that after he discovered the charges, he sent Dawson a memo explaining the legal reasons why he (Dawson) made a mistake in arresting him. Again, the State objected:

MR. LEVERETT: I object to this as being relevant.

THE COURT: If this is argument, save it for later.

APPELLANT: Okay.

THE COURT: If it's testimony- -

APPELLANT: All right, I did want to point out that I'd talked to him about the difference.

The other thing is when I talked to him on that evening, as the Court knows the new law in DWI cases is if you get a DWI you're supposed to get a receipt for your driver's license and you have seven days- -

MR. LEVERETT: Again, I'm going to object to this as being relevant to anything at all in this case. As to whether or not he was handed a receipt or given a ticket, it's just irrelevant.

APPELLANT: Your Honor, after- -what I wanted- -this points to the bias of the witness of the trooper in this case. Maybe I- -

MR. LEVERETT: And Judge, that's argument; that's not testimony.

THE COURT: That is argument. Let's do testimony at this time and then you can argue later.

APPELLANT: Okay. The document that I was supposed to have received so I could appeal with seven days, I got eight days later.

THE COURT: Okay, well, not that's not before the court. It's my understanding you've already taken all that up with Judge Proctor.

APPELLANT: Yeah, and- -yes, except it's in the- -in the Court's record is a record. There's a file stamped copy in the record showing that the trooper sent me the receipt a day too late for me to use it to get my license back. It was file stamped on the 30th of January and you have to get it within seven days in order to keep your driver's license. So the reason I'm testifying to that is that I'm saying that I apparently upset the officer enough to where he did not send me the receipt.

MR. LEVERETT: Objection, speculating.

THE COURT: Okay.

MR. LEVERETT: And objection as to relevance.

THE COURT: I'm going to sustain it.

APPELLANT: Okay.

After cross-examination, appellant rested his case. Both sides gave closing arguments. The court then found appellant guilty of DWI, careless driving, and possession of a controlled substance. He received a total of $1350 in fines plus court costs, was sentenced to one day in jail, and had his driver's license suspended.

Analysis of Contentions

Appellant challenges the sufficiency of the evidence to support his convictions. On the DWI and careless-driving charges, he argues that the scientific evidence showed that he was not intoxicated at the time of the accident; therefore, the court had no substantial evidence upon which to find that he was intoxicated. On the drug-possession charge, he argues that there was no evidence that he possessed the Diazepam and that, even if there were evidence to show that he possessed the bottle, he legally possessed the bottle.

However, as argued by the State—and contrary to the argument appellant makes in his reply brief—none of appellant's sufficiency challenges are preserved for appellate review. Rule 33.1(b) of the Arkansas Rules of Criminal Procedure provides that in a bench trial, a motion for dismissal must be made at the close of the evidence and that, if a defendant moves for dismissal at the close of the prosecution's case, that motion must be renewed at the close of the evidence. The failure to challenge the sufficiency of the evidence as prescribed by the rule constitutes a waiver of any question pertaining to the sufficiency of the evidence. Ark. R. Crim. P. 33.1(c).

Appellant moved for directed verdict at the close of the State's case. Then appellant presented his case. At the conclusion of appellant's case, the State proceeded with a brief closing argument; then appellant presented his closing argument. Appellant presented an argument challenging the sufficiency of the evidence in his closing. Even if we were to

regard his argument as a renewal of his directed-verdict motion, as appellant urges this court to do, his failure to renew his motion immediately after the close of the evidence constitutes a waiver of his sufficiency challenge. *See*, *e.g.*, *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998) (holding that sufficiency challenge was not preserved when the challenge was made after the jury instructions but before the closing arguments). Accordingly, we hold that appellant's sufficiency challenges are not preserved for appellate review and affirm on this point.

Next, appellant argues that the circuit court should have dismissed the DWI charge based on the doctrine of res judicata and the prohibition against double jeopardy. He notes that the Department of Finance and Administration previously suspended his driver's license and that the circuit court reversed that finding because it was unable to reach the conclusion that appellant was intoxicated. He contends that both the claim-preclusion and issue-preclusion prongs of res judicata bar relitigation of the issue of whether he was intoxicated.

However, as argued by the State, the previous administrative proceeding had no res judicata effect on the criminal charges. Arkansas Code Annotated section 5-65-402(d) (Repl. 2005) provides, "Any decision rendered at an administrative hearing held under this section *shall have no effect on any criminal case* arising from any violation of . . . § 5-65-103[.]" (Emphasis added.) In addition, our supreme court has held that the suspension of driving privileges is a civil sanction and does not rise to the level of "punishment" under the Double Jeopardy Clause. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997). Accordingly, no jeopardy attached at the administrative proceeding, and the criminal trial did not violate appellant's right to protection from double jeopardy.

Finally, appellant challenges two evidentiary rulings. We review evidentiary objections under the abuse-of-discretion standard. *McKeever v. State*, 367 Ark. 374, ___

S.W.3d ____ (2006). Further, we will not reverse on an evidentiary ruling absent a showing of prejudice. *Id.*

First, appellant argues that we should reverse because the court did not allow him to admit evidence of his sleep disorder. While the court excluded evidence that he had six similar incidents after the December 2003 accident, the record shows that he testified that the accident was the result of a narcoleptic attack and that he presented medical records showing a history of sleep disorders before the accident. The trial court committed no reversible error with respect to the evidence of appellant's sleep disorder.

Next, appellant argues that the trial court erroneously excluded evidence of bias of the arresting officer. Regarding the bias of the arresting officer, appellant proffered that he would have testified that Dawson became very angry with him after being informed that he could not charge appellant with a felony. He stated that Dawson hung up on him when he attempted to call again and that Dawson had the dispatch officer threaten to arrest him for interference with governmental operations if he called again. Appellant also proffered that he called prosecutor Bill Brown to point out the mistake regarding the felony drug charge and that Brown told him that Dawson was "out to get [appellant]." However, Brown recused from the case because of the disagreement with the police officer. He also was going to testify about Dawson's failure to get him the receipt for a temporary driver's license in time and Dawson's failure to inform him about his arrest as additional evidence of bias.

In *Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999), our supreme court noted that, generally, a witness may not be impeached on a collateral matter. However, if a witness denies the facts claimed to show bias, the attacker has a right to prove those facts by extrinsic evidence. *Id.* The witnesses must first deny the bias before he or she can be impeached by extrinsic evidence. *Id.*

Here, Dawson never gave any testimony denying any bias. Appellant could not bring in extrinsic evidence to show bias. Therefore, the court properly excluded such evidence. Finding no error on appellant's evidentiary arguments, we affirm on this point as well.

Affirmed.

GLADWIN and VAUGHT, JJ., agree.