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

DIVISION III

CACR07-1272

September 17, 2008

DOUGLAS J. HOUSTON
APPELLANT

AN APPEAL FROM GRANT COUNTY CIRCUIT COURT
[CR2006-161-1]

V.

HON. CHRIS E WILLIAMS, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

On June 1, 2007, a Grant County jury found Douglas Houston guilty of DWI (Drugs), two counts of battery in the first degree, and battery in the third degree. The jury sentenced him to a ten-year term in the Arkansas Department of Correction. Appellant challenges the sufficiency of the evidence to support the convictions. He also asserts that the trial court erred in not allowing the jury to consider sending him to Drug Court. Neither of appellant's points has merit; accordingly, we affirm.

On the morning of September 27, 2006, appellant caused an automobile accident when he crossed the center line and crashed into a vehicle driven by Karen Jewett. Ellen Walters and toddler Braden Jewett were passengers in Ms. Jewett's vehicle. Ms. Jewett and Ms. Walters suffered serious injuries. A witness testified that she did not see appellant use his brakes or otherwise try to avoid the accident. Soon after the accident, appellant signed a statement saying that he had lost consciousness and later woke up in a ditch. When Officer Brent Cole arrived at the scene, appellant was sitting in the back of his truck. Appellant fell

when he tried to stand, and his speech was slurred. Officer Cole asked appellant if he had hit his head; appellant replied that he had not. Officer Cole opined that appellant was under the influence of some drug; therefore, he asked appellant to submit to a blood test. Appellant consented, and tested positive for benzodiazepines (a class of drugs that includes Xanax) and cocaine metabolites. No test was performed to determine whether appellant had marijuana in his system. When confronted with these results by police on the day of his arrest, appellant remarked that he was surprised the tests did not show the presence of marijuana in his system, as he had "smoked a shit-load the night before the accident."

The State also presented evidence of events prior to the day of the accident. Appellant was employed at the local Sonic Drive-In at that time. He arrived at Sonic that evening and was slurring his words. Assistant manager Tammy New asked him to leave, and he complied. Appellant and Ben White started "partying" at 9:00 or 10:00 that evening. When they arrived at the residence of Dustin Johnson at 12:30 a.m., appellant was not walking well. He told Johnson that he had taken Xanax, was drinking, and had smoked marijuana. While at Johnson's home, appellant sat in a chair in the kitchen and fell. Johnson took appellant's keys, drove White home, and returned to work.

Johnson's mother delivered food the next morning while appellant was still asleep in the chair. She noted that appellant was "out of it" because "there were a lot of people around and everything and he didn't look at me or anything." Johnson returned the keys to appellant the next morning. Appellant left around 11:00 a.m.; the accident occurred twenty minutes later. A few days after the accident, appellant went to the Sonic and talked to New about the accident. According to New, appellant bragged about how the police did not find the cocaine he had hidden, and he had no remorse over causing the accident.

After the State presented its case, appellant moved for directed verdict, arguing that if the jury believed all of the evidence presented by the State, it would be insufficient to

sustain a conviction on any of the charges. The trial court disagreed and denied the motion. Appellant then presented in his case and testified that the accident occurred when he was trying to retrieve CDs that had fallen in his floorboard. At the conclusion of his case, appellant renewed his directed-verdict motion, which the court denied. The jury later found appellant guilty of the aforementioned charges and sentenced him to ten years in the Arkansas Department of Correction.

First, appellant challenges the sufficiency of the evidence to support the convictions. He contends that the State presented insufficient evidence to sustain the DWI conviction and that, without the DWI conviction, the battery convictions must fail.

We affirm, as appellant failed to preserve this argument for appellate review. At trial, appellant merely asserted that the evidence was insufficient to support the convictions. Rule 33.1 of the Arkansas Rules of Criminal Procedure mandates that a directed-verdict motion specifically state how the State's evidence is deficient and that the failure to specifically advise how the evidence was deficient constitutes a waiver of the issue on appeal. Stating that the evidence is "insufficient to sustain a conviction" is too general to preserve a sufficiency challenge for appeal. *See also Smith v. State*, 367 Ark. 274, 239 S.W.3d 494 (2006); *Davis v. State*, 97 Ark. App. 6, 242 S.W.3d 630 (2006).

Had the point been preserved, we would still affirm. When a defendant makes a challenge to sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). Only evidence supporting the verdict will be considered. *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997). The conviction will be affirmed if there is substantial evidence to support it. *Id.* Circumstantial evidence may constitute sufficient evidence to support a conviction, but it must exclude every other reasonable hypothesis other than the guilt of the accused. *Whitt v. State*, 365 Ark. 580, 232 S.W.3d 459 (2006). The question of whether the circumstantial

evidence excludes every other reasonable hypothesis consistent with innocence is for the trier of fact to decide. *Id.*

It is unlawful for any 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). "Intoxicated" means:

> 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).

Appellant's primary argument was that the accident was caused by his failure to pay attention to the road, not the ingestion of illicit substances. However, evidence presented to the jury showed that appellant was using illegal drugs the night before the accident, that he was behaving consistently with someone under the influence of a narcotic shortly after the accident, that his blood tested positive for cocaine and Xanax, and that appellant bragged about hiding his cocaine stash from the police. This evidence is sufficient to support a finding that appellant was intoxicated at the time of the accident; thus, the evidence is sufficient to support the DWI conviction. Appellant makes no independent argument with respect to the battery convictions, but suffice it to say that evidence is sufficient to support these convictions as well.

Almost as an aside, appellant also asks us to reverse the trial court's decision not to instruct the jury to consider Drug Court. Though the trial judge indicated his desire for an appellate court to look at the issue, appellant does not present an argument or any citation supporting reversal on the issue. Accordingly, we could decline to reach the issue. *See Harrison v. State*, 371 Ark. 652, ___ S.W.3d ___ (2007) (stating that the appellate courts do not consider an issue when the appellant presents no citation to authority or convincing

argument in its support, and it is not apparent without further research that the argument is well taken). However, we hold that the trial court properly denied giving the instruction, as Drug Court would not have been available to appellant. Arkansas Code Annotated section 16-98-303(c)(1)(B) (Supp. 2007) states that Drug Court is not available for any person convicted of a violent felony offense. Here, appellant was convicted of two counts of battery in the first degree and one count of battery in the third degree. At minimum, the first-degree battery convictions would have made him ineligible for the program. *Cf.* Ark. Code Ann. § 5-4-501(d)(2)(vi) (Repl. 2006) (classifying first-degree battery as a "felony involving violence" for the purposes of sentencing enhancement).

Affirmed.

HART and HUNT, JJ., agree.