Cite as 2012 Ark. App. 243

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-711

	Opinion Delivered April 11, 2012
STEVEN ROSS, JR. APPELLANT	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. CR-2010-14]
V.	HONORABLE MICHAEL MEDLOCK, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED IN PART; REVERSED AND DISMISSED IN PART

JOHN MAUZY PITTMAN, Judge

The appellant was charged with negligent homicide, first-degree criminal mischief, and second-degree battery arising out of his involvement in a multi-vehicle traffic accident on October 21, 2009. After a jury trial, he was found guilty of those offenses and sentenced to consecutive terms of imprisonment of twenty years for negligent homicide, eight years for first-degree criminal mischief, and six years for second-degree battery. On appeal, he argues that there is no substantial evidence to support his convictions. We affirm in part and reverse and dismiss in part.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. On appeal, we will affirm the circuit court's denial of a motion for directed verdict if there is substantial evidence to support the jury's verdict. *Rollins v. State*, 2009 Ark. 484, 347 S.W.3d 20. Substantial evidence is evidence forceful enough to compel a conclusion one way or the

other beyond suspicion or conjecture. *Id.* In reviewing the sufficiency of the evidence, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the State, *i.e.*, without weighing it against conflicting evidence that may be favorable to the appellant. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994). We will affirm the verdict if the finding of guilt is supported by substantial evidence. *Id.*

Arkansas Code Annotated section 5-10-105(a)(1)(a) (Supp. 2011) provides, in pertinent part, that a person commits negligent homicide if he negligently causes the death of another person as a result of operating a vehicle while intoxicated. Appellant argues that there is no substantial evidence that he was intoxicated at the time of the accident. We do not agree. There was evidence that appellant awoke at 11:30 a.m. on the morning of the accident. Appellant admitted at trial that he and his passenger, Jacob, smoked "a couple of bowls" of marijuana after arising and ingested "a pill and a half" of Xanax shortly before the accident occurred at approximately 4:00 p.m. Appellant had no prescription for Xanax; he obtained the drug from a friend and had never taken it before. Appellant testified that he felt "really, really calm" after taking the Xanax, and that Jacob was falling asleep immediately before the SUV driven by appellant crossed into the lane of oncoming traffic, narrowly missing a tractor-trailer rig, striking a glancing blow to a Jeep driven by Jennifer Berger, and colliding squarely head-on with a pickup truck driven by Richard Kalesh. Ms. Berger was injured, and Mr. Kalesh was killed. Road conditions were clear and dry.

The driver of the tractor-trailer rig, Wayne Hays, testified he was driving southbound when appellant's vehicle veered into his lane, forcing him to the shoulder and narrowly

missing his vehicle. Mr. Hays said that, after avoiding appellant, he watched appellant's vehicle in his side mirror, and saw appellant continue on the wrong side of the road for approximately three-fourths of a mile, without correcting, before striking the victims' vehicles. Mr. Hays estimated that appellant was in the wrong lane for forty-five seconds to one minute before impact. Driving behind Hays's semi was a vehicle driven by Gary Moore. Mr. Moore testified that he drove off the shoulder of the road to avoid appellant's vehicle and that, when appellant passed him, appellant was leaning against the driver-side door of his vehicle and appeared to be asleep. We hold that this constitutes substantial evidence that appellant was intoxicated at the time of the accident. *See Hatley v. State*, 68 Ark. App. 209, 5 S.W.3d 86 (1999).

Appellant next argues that there is no substantial evidence to support his conviction of first-degree criminal mischief. We agree. That offense is committed when a person purposely and without legal justification destroys or causes damage to any property belonging to another. Ark. Code Ann. § 5-38-203(a)(1) (Supp. 2011). Here, the charge was premised on the theory that appellant purposely caused damage to the Jeep driven by Jennifer Berger. However, in a prosecution for criminal mischief in the first degree, it is necessary to show that the damage was willfully caused and not accidental. *Bray v. State*, 12 Ark. App. 53, 670 S.W.2d 822 (1984). Although there is abundant evidence in the present case to show that appellant was acting recklessly, there is nothing to show that he acted with the purpose of damaging Ms. Berger's Jeep. *See McGill v. State*, 60 Ark. App. 246, 962 S.W.2d 382 (1998). We therefore reverse appellant's conviction of first-degree criminal mischief.

Arkansas Code Annotated section 5-13-202(a)(3) (Supp. 2011) provides that a person commits second-degree battery if he recklessly causes serious physical injury to another person by means of a deadly weapon. Appellant finally asserts that there was no substantial evidence that he was intoxicated and argues that there was therefore no substantial evidence to support a finding that he acted recklessly. We do not address this argument because it was not raised below. In his directed-verdict motion, appellant argued that there was insufficient proof to support a second-degree battery conviction because an automobile cannot constitute a deadly weapon for purposes of section 5-13-202(a)(3). However, appellant now concedes that an automobile may in fact constitute a deadly weapon for purposes of that statute, and instead argues that the evidence was insufficient to prove he acted recklessly. An appellant cannot change his argument on appeal, *Owens v. State*, 313 Ark. 520, 856 S.W.2d 288 (1993), and the present argument therefore is not properly before us. *See Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990).

Affirmed in part; reversed and dismissed in part.

WYNNE and HOOFMAN, JJ., agree.