

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR10-310

JAMIE FOWLER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 4, 2011

APPEAL FROM THE YELL COUNTY
CIRCUIT COURT
[NO. CR-2008-33]

HONORABLE JERRY D. RAMEY,
JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

After a jury trial, appellant was convicted of manufacturing methamphetamine and possession of drug paraphernalia. He was sentenced as a habitual offender to sixty-five years' imprisonment. On appeal, he argues that the evidence was insufficient to support his convictions; that the trial court erroneously denied his motion to suppress evidence found during a nighttime search of his house; that the trial court erred in allowing evidence of his prior conviction; and that the trial court erred in denying his motion for mistrial. We affirm.

Where the sufficiency of the evidence is challenged on appeal of a criminal conviction, we consider that issue before considering reversal on other grounds. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In order for us to do so, however, the issue of evidentiary sufficiency must have been preserved for appeal by a directed-verdict motion at trial made at the close of the evidence offered by the prosecution and again at the close of all of the

evidence. Ark. R. Crim. P. 33.1(a). A motion for a directed verdict must state the specific grounds therefor, *id.*, and a failure to challenge the sufficiency of the evidence at the times and in the manner prescribed by Rule 33.1(a) constitutes a waiver of any question pertaining to the sufficiency of the evidence to support the finding of guilt. Ark. R. Crim. P. 33.1(c).

At the close of the State's case-in-chief, appellant's counsel renewed a prior motion for mistrial based on an asserted discovery violation. After that was denied, appellant's counsel said, "And then, Your Honor, the motion for directed verdict based on insufficiency of the evidence." Appellant's counsel did not elaborate, and the motion was denied. At the close of all the evidence, appellant's counsel stated, "I'm going to renew my previous motions that I made at the end of the State's [case], for mistrial and insufficiency of the evidence." These, too, were denied.

The reason for the requirement that particular grounds must be stated in a directed-verdict motion, specifying the elements for which proof is absent, is to allow the State an opportunity to reopen its case and present the missing proof. *Eastin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007). To this effect, Rule 33.1(c) expressly requires that a directed-verdict motion must specify the respect in which the evidence is insufficient, and provides that a motion merely stating that the evidence is insufficient does not preserve for appeal any issues relating to insufficient proof on the elements of the offense. The Arkansas Supreme Court has strictly construed Rule 33.1 and held that it will not address the merits of an appellant's insufficiency argument where the directed-verdict motion is not specific. *Eastin v. State, supra*.

Because appellant's directed-verdict motion did not specify the manner in which the evidence was insufficient, his sufficiency argument is not preserved for appeal, and we therefore cannot address it.

Appellant next argues that the trial court erred in denying his motion to suppress evidence seized following the search of his home, asserting that the warrant was invalid because it failed to establish the reliability of the confidential informant or to meet the requirements for a nighttime search. In reviewing a trial court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court and proper deference to the trial court's findings. *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004).

Arkansas Rule of Criminal Procedure 13.1(d) provides that a judicial officer may issue a search warrant if he finds that the application for a warrant meets the requirements of Rule 13.1(b) and, based on the proceedings before him, there is reasonable cause to believe that the search will discover things specified in the application and subject to seizure. The requirements of Rule 13.1(b) are as follows:

The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based

in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

Here, the affidavit of Detective Sergeant Gary Morrison stated that he had reason to believe that methamphetamine, and paraphernalia and precursors used in the manufacture of methamphetamine, were then being possessed at appellant's residence. The residence was described by address and physical appearance. With regard to the reasons supporting the affiant's belief, the affidavit stated that Detective Morrison had received information from a confidential informant who within the last six hours had been at the described residence, where she saw articles used in the manufacture of methamphetamine. In a safe under the sink, she had seen iodine crystals, lye, toluene, and bi-layered liquids. Iodide crystals were being made on top of the refrigerator, and she saw muriatic acid in the laundry-room closet. The affidavit declared that the informant had also told the detective that appellant had that morning purchased pills at Walgreen's to be used in the manufacturing process, that appellant had methamphetamine on his person, and that the detective had independently confirmed the information about appellant's activity at Walgreen's by checking the purchase records. The informant's reliability was also established by confirmation of past information given by the informant regarding methamphetamine possession that was verified as true and correct.

Although there is no fixed formula in determining an informant's reliability, factors to be considered in making such a determination include whether the informant's statements are (1) incriminating; (2) based on personal observations of recent criminal activity; and (3) corroborated by other information. *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001). Additionally, facts showing that the informant has provided reliable information to law enforcement in the past may be considered in determining the informant's reliability in a present case. *Id.* Here, while the informant's statements were not incriminating, they were based on personal observations of recent criminal activity and corroborated by other information independently obtained by Detective Morrison. Furthermore, the affidavit stated that the informant had previously given reliable information and recited the details of that incident in some detail. Based on our review of the totality of the circumstances, we cannot say that the trial court erred in denying appellant's motion to suppress based on informant reliability.

Nor do we agree that the trial court erred in denying appellant's motion to suppress because of the affidavit's asserted failure to establish grounds for a nighttime search. The informant told Detective Morrison that appellant was attempting to clean up the crime scene by destroying evidence, specifically stating that appellant was tending a burn barrel into which he placed items such as matches. At the suppression hearing, Detective Morrison testified that the striker plates from match boxes were used in the methamphetamine-manufacturing process as a source of red phosphorus, and that the late-night burning of the remaining

matches was evidence of ongoing destruction of evidence. The affidavit also stated that the detective had learned from independent sources that persons would bring appellant ingredients in return for the finished methamphetamine, so there was a danger that the methamphetamine would be quickly distributed upon completion of the manufacturing process.

Arkansas Rule of Criminal Procedure 13.2(c)(ii) permits authorization of a nighttime search where there is reasonable cause to believe that the objects to be seized are in danger of imminent removal. Here, in light of a reliable informant's statement that she saw appellant attempting to clean up the scene by destroying evidence, we think that there was reasonable cause to believe that items enumerated in the warrant would be disposed of or destroyed, and we hold that the trial court did not err in refusing to suppress evidence obtained in the search on this ground. *See Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003).

We next address appellant's argument that the trial court erred in allowing admission of evidence of appellant's prior drug conviction for possession of methamphetamine. Appellant asserts that introduction of this evidence was improper under Ark. R. Evid. 403 and 404. We do not agree. Rule 404(b) generally provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. However, the rule permits such evidence when offered for other purposes, including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Here, appellant testified on his own behalf and stated that the informant was the person making the methamphetamine and that appellant did

not know the significance of the chemicals found in his house. In light of appellant's testimony, evidence of his prior methamphetamine conviction was probative of his motive, knowledge, and absence of mistake, and introduction of this evidence was not unfairly prejudicial under Rule 403 in light of the State's need to refute appellant's testimony that he was unfamiliar with methamphetamine.

Finally, we cannot address appellant's argument that the trial court erred in denying his motion for mistrial based on an asserted discovery violation revealed in Detective Morrison's testimony. This issue is not preserved for appeal because appellant did not make a timely objection, but instead waited until the witness had finished his testimony before making the motion for mistrial. *Taylor v. State*, 94 Ark. App. 21, 223 S.W.3d 80 (2006).

Affirmed.

ROBBINS and GLOVER, JJ., agree.