Cite as 2023 Ark. App. 207

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-22-568

KIMBERLY ROGERS APPELLANT V. STATE OF ARKANSAS APPELLEE	OPINION DELIVERED APRIL 12, 2023 APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. 63CR-20-735] HONORABLE BRENT DILLON HOUSTON, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Kimberly Rogers appeals her convictions on charges of Class D felony first-degree endangering the welfare of a minor, in violation of Arkansas Code Annotated section 5-27-205(a)(1) (Supp. 2021); and misdemeanor driving while intoxicated (DWI), in violation of Arkansas Code Annotated section 5-65-103(a)(1) (Repl. 2016). She challenges the sufficiency of the evidence supporting the endangering-the-welfare-of-a-minor and DWI convictions.

I. *Facts and Procedural History*

Rogers was charged with first-degree endangering the welfare of a minor and DWI on October 26, 2020, after she had allegedly been intoxicated while driving her route as a school-bus driver to drop students off after school on August 27, 2020.

On March 14, 2022, Rogers filed a pretrial motion to dismiss the charge of endangering the welfare of a minor. She argued that convictions for that offense and DWI

would violate the intent of the legislature in enacting the DWI sentencing enhancement codified at Arkansas Code Annotated section 5-65-111(a)(1)(B) (Supp. 2021) under which the sentence for a DWI conviction pursuant to section 5-65-103 may be enhanced if a passenger under the age of sixteen is in the vehicle at the time of the offense. She stated that the offense of endangering the welfare of a minor generally prohibits such conduct and that the DWI sentencing enhancement prohibits a specific instance of that offense; accordingly, the former must yield to the sentencing enhancement in section 5-65-111(a)(1)(B). The circuit court found that Rogers was charged with two separate and distinct offenses and denied the motion to dismiss. A bench trial was held on March 15, and just before trial, the circuit court found that Rogers's motion for partial dismissal was premature unless or until she was convicted of both offenses.

The evidence at the bench trial established that on August 27, 2020, Rogers was employed as a school-bus driver by Bryant Public Schools and was assigned the bus route designed to transport special-needs children attending the elementary school and high school. On that day, Rogers had one adult aide and thirteen student passengers on the school bus when she drove off the road, hit a speed-limit sign, and landed in a ditch.

A one-and-a-half-hour audio and video recording taken by the camera mounted inside the front of the school bus indicates that Rogers's movements that day were slow, her speech was slurred and sometimes unintelligible, her head occasionally nodded, she seemed confused, and she drove twice in reverse gear after missing a turn. Rogers's supervisor, Scott

Curtis, testified that Rogers's speech in the video was different than the way she normally spoke.

The adult aide assigned to assist Rogers, Tiffani Newborn, testified that she was frightened by the way Rogers was driving on the day of the incident. She recalled that Rogers took a student to the wrong house and illegally drove the bus in reverse gear. Newborn explained that because of her unstable behavior, she suspected that Rogers was impaired by alcohol or drugs. Newborn recalled that when Bryant Police Officer Austin Kennedy arrived at the scene of the wreck, she told him that she thought Rogers was impaired.

Officer Kennedy described Rogers as being very defensive and agitated at the scene. He testified that her slurred speech and mannerisms led him to believe she was impaired, so he took her to the Bryant Police Department for further testing. Rogers's blood-alcohol test did not indicate that she was impaired by alcohol, which lead Officer Kennedy to suspect that she was impaired by a narcotic.

Bryant Police Officer Bill Hutto, a certified drug-recognition expert, administered a twelve-step drug-influence examination on Rogers. He explained the reason for the test, how he administered it, and the results of each of the twelve steps. Officer Hutto testified that Rogers told him that she was taking the following prescription medications: Adderall for her adult attention-deficit disorder; Lexapro and Klonopin for anxiety; Soma for her sleep disorder; and the anti-inflammatory medications Mobic and Armour. During examination, Officer Hutto noted that Rogers's speech was slurred, she had balance and memory issues, she was lightheaded, and she was suffering from a headache.

Officer Hutto opined that, on the basis of his examination, Rogers had ingested a high dose of Klonopin, which is the brand name for clonazepam—a long-acting benzodiazepine. He explained that clonazepam is a medication that slows brain activity, and it is administered with a label on the prescription bottle warning the patient that it will impair the ability to operate machinery or drive safely. He concluded that the amount of Klonopin Rogers had ingested exceeded the medical therapeutic dosage and prevented her from safely operating the school bus.

Rogers was placed under arrest, and prior to transporting her to the Saline County Jail, Officer Kennedy searched her belongings and discovered several loose prescription pills in her purse that were later determined to be Klonopin.

Mary Heffington with the Arkansas State Crime Laboratory testified that she analyzed the urine sample taken from Rogers on the day of the accident. The analysis showed that Rogers was positive for amphetamine, nicotine, meprobamate, caffeine, carisoprodol, fluconazole, citalopram/escitalopram, desmethylcitalopram/desmethylescitalopray, and methamphetamine. The toxicology tests did not confirm the presence of benzodiazepine; however, Heffington explained that this was common due to the chemistry of the drug. During her experience, she had never seen a toxicology test return positive for benzodiazepine.

Rogers testified on her own behalf at trial and explained that she had been prescribed several medications for various conditions and that she took those medications consistent with her prescriptions and her experience with them on the date in question. Rogers

specifically acknowledged that she took Klonopin and drove the school bus thirty minutes later. Rogers testified she had never previously used methamphetamine. She testified that she was drug tested regularly in her employment and had never failed a drug screen. Rogers also stated that her doctor never advised her to refrain from driving while using her prescription medications.

Regarding other factors that day, Rogers also noted that she had recently had a lap-band procedure and had vomited up her lunch earlier that day. She also had a brace on her leg that she had been using for at least two years prior to the accident.

During her testimony, Rogers attributed the accident to the weather, noting that the students were dismissed from school earlier than normal that day due to the threat of a tropical storm, which was expected to cause torrential rain and high winds in the area. Rogers explained that it was only the fourth day of school, making the situation very chaotic. Rogers testified that she could hear the tornado sirens going off.

Rogers explained that the bus's front tire had slipped off the road at a major drop off in the roadway, causing the accident at issue. The bus was too heavy to get out of the spot where it became stuck following the accident. Rogers emphasized that she did not try to do anything that would put the children on the bus at risk while she was driving.

At the close of the State's case and at the close of all of the evidence, Rogers moved for dismissal on the endangering-the-welfare-of-a-minor charge, challenging the State's proof that she had engaged in conduct that created a substantial risk of death or serious physical injury, which the circuit court denied. At the close of the State's evidence, Rogers challenged

the State's proof that she was intoxicated; however, at the close of all of the evidence, she challenged the State's proof of the culpable mental state for DWI. The circuit court also denied the motions for dismissal as to the DWI charge.

The circuit court then found Rogers guilty of both counts. A sentencing hearing was held on May 6, and Rogers was sentenced to one day in jail with credit for time served and a $1,000 fine for DWI; six years' probation with 120 days in the county jail as a condition of that probation and a $1,500 fine for the endangering-the-welfare-of-a-minor charge. The sentencing order was filed on May 10, and Rogers filed a timely notice of appeal on May 6, which is treated as being filed on May 11 pursuant to Ark. R. App. P.–Crim. 2(b)(1)) (2022).

II. *Discussion*

A. Endangering the Welfare of a Minor in the First Degree

Under section 5-27-205(a)(1), a person commits the offense of first-degree endangering the welfare of a minor if, "being a parent, guardian, person legally charged with care or custody of a minor, or a person charged with the supervision of a minor, he or she purposely: . . . [e]ngages in conduct creating a substantial risk of death or serious physical injury to a minor." Pursuant to Arkansas Code Annotated section 5-2-202(1) (Repl. 2013), "[a] person acts purposely with respect to his or her conduct or a result of his or her conduct when it is the person's conscious object to engage in conduct of that nature or to cause the result[.]" And Arkansas Code Annotated section 5-1-102(21) (Supp. 2021) defines "serious physical injury" as "physical injury that creates a substantial risk of death or that causes

protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ[.]"

Rogers challenges the sufficiency of the evidence supporting the finding that she purposely engaged in conduct that created a substantial risk of death or serious physical injury or that there was a substantial risk of death or physical injury to any minor. Rogers argues that her conduct in consuming prescription medication and then driving did not rise to this level of purposeful conduct. She cites *Cordero v. State*, 2019 Ark. App. 484, 588 S.W.3d 369, in support of the proposition that the use of prescription medication followed by driving while under its effects constitutes reckless rather than purposeful conduct.

Rogers's argument challenging the State's proof that she had the requisite purposeful mens rea to support the endangerment conviction is raised for the first time on appeal; accordingly, it is not preserved for appellate review, *see, e.g.*, *Hayes v. State*, 2020 Ark. 297, at 10. In order to preserve a challenge to the sufficiency of the evidence for appeal from a bench trial, the issue must be articulated clearly and specifically to the circuit court in a motion for dismissal so that the circuit court will have the opportunity to either grant the motion or, if justice requires, allow the State to reopen its case and supply the missing proof. *See Cribbs v. State*, 2020 Ark. App. 539, at 11, 612 S.W.3d 775, 781. A further reason that the motion must be specific is that the appellate court may not decide an issue for the first time on appeal and cannot afford relief that is not first sought in the circuit court. *Id.* A party may not change or expand his or her arguments on appeal; an appellant is limited to the scope and nature of the arguments made below. *Id.* at 11–12, 612 S.W.3d at 781. Because Rogers's

motions for dismissal on the endangerment charge were limited to a challenge to the evidence supporting the element that she engaged in conduct that created a substantial risk to the minors on the school bus, this issue is not preserved for appeal.

Rogers also argues that the State failed to present any evidence showing that any minor was either injured or ever at substantial risk of death or serious physical injury. She notes that the bus was not involved in a collision with another car; rather, it was a one-vehicle accident in which the bus slipped off of the side of a street. She points out that no one but her sustained any injury.

The endangerment statute only requires proof that the defendant engaged in conduct creating a substantial risk of death or serious physical injury, not actual injury. *See Williams v. State*, 2011 Ark. 432, at 7, 385 S.W.3d 157, 162 (rejecting a sufficiency challenge based on the lack of evidence that the child was harmed in any way). Consequently, the facts that Rogers did not collide with another car and no child was injured are of no moment.

The audio and video recording taken by the camera mounted inside the front of the school bus established that Rogers created a substantial risk of death or physical injury to the minor passengers—her movements that day were slow, her speech was slurred and sometimes unintelligible, her head occasionally nodded, she was confused, she drove twice in reverse gear after missing a turn, and she drove the school bus off the road into a ditch. The testimony of Rogers's supervisor, Scott Curtis, confirmed that her speech in the video was different from the way she normally spoke. Having observed Rogers's behavior at trial

compared to her behavior recorded on the audio and video recording, the circuit court found that the video showed that she was impaired when she drove the school bus.

Moreover, Ms. Newborn testified that she was scared by Rogers's behavior and that Rogers appeared to be impaired and was driving erratically. Officer Kennedy likewise testified that Rogers appeared to be impaired. Officer Hutto concluded that Rogers was impaired and that she could not have operated the school bus safely, which was supported by the medical testing that occurred subsequent to the accident. The video evidence and confirming testimony support that Rogers drove a school bus with thirteen minor passengers for an hour and a half while impaired or intoxicated. On the basis of that evidence, we hold that the circuit court reasonably concluded that Rogers's self-induced impairment created a substantial risk of death or serious physical injury to the minor passengers.

B. Evidence of DWI

It is unlawful for a person who is intoxicated to operate or be in actual physical control of a motor vehicle. Ark. Code Ann. § 5-65-103(a)(1). For a nonalcohol offense such as the one charged in this case, a culpable mental state of purposely, knowingly, or recklessly is required. *Rowton v. State*, 2020 Ark. App. 174, at 11, 598 S.W.3d 522, 529 (citing *Leeka v. State*, 2015 Ark. 183, 461 S.W.3d 331; Ark. Code Ann. § 5-2-203(b)). "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 or herself or another person. Ark. Code Ann. § 5-65-102(4) (Supp. 2021).

Rogers argues that the State failed to present sufficient proof that she was intoxicated. She notes that medical test results confirmed that she had no alcohol in her system. While methamphetamine was found to be "present" in her urine sample, there was no evidence as to the quantity or its source. Further, no evidence was presented that Rogers actually used methamphetamine on the date in question or at any previous time. The State presented evidence that other substances were present in Rogers's urine sample, but Rogers reiterates that she had valid prescriptions for each of those. Further, there was no proof as to the quantity of these substances in her system, and Rogers made clear she took all of her medications as prescribed and as she previously had done for years.

Instead, Rogers claims she was experiencing a medical issue because her blood sugar was dangerously low after she vomited up her lunch. Further, she urges that the accident was caused by the extreme weather in Saline County on the date in question rather than her manner of driving.

At the close of the State's evidence, Rogers unsuccessfully moved for dismissal on the DWI charge, arguing, "We don't believe there's been enough specific evidence there regarding intoxication of this particular individual while driving." The following renewal argument supporting the motion for dismissal was made at the close of all of the evidence:

> As to the DWI, Your Honor, we would have a motion for a directed verdict of acquittal in that the evidence that has been put forth and as what she has testified to that this is all items that she is prescribed for, not something that she was out there

> using with the intent to get intoxicated and with intent to drive this vehicle while intoxicated.

On appeal, Rogers asserts that there was insufficient proof that she was intoxicated.

In order to preserve a challenge to the sufficiency of the evidence in a bench trial, a criminal defendant must make a specific motion for dismissal or for directed verdict at the close of all the evidence. *Gadsden v. State*, 2019 Ark. App. 153, at 3, 570 S.W.3d 527, 529; Ark. R. Crim. P. 33.1(b)–(c) (2022). Rule 33.1 reads in pertinent part:

> (b) In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. . . . If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.
>
> (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.

It is well settled that Rule 33.1 is strictly construed. *Gadsden*, 2019 Ark. App. 153, at 4, 570 S.W.3d at 530. Failure to adhere to the requirements in Rule 33.1(b) "will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment." Ark. R. Crim. P. 33.1(c). Although Rogers did move to dismiss at the close of all of the evidence, she impermissibly changed the nature of her challenge to the sufficiency of the evidence in her brief before this court. We reiterate that a party may not change or expand his or her arguments on appeal and is limited to the scope and nature of the arguments made below. *Cribbs*, *supra*. Accordingly, this issue is not preserved for appeal.

C. DWI and Endangerment Statutory Coverage

Statutes that relate to the same subject matter should be read in a harmonious manner if possible. *City of Fort Smith v. Tate*, 311 Ark. 405, 409, 844 S.W.2d 356, 359 (1993). When two statutes relate to the same subject matter, this court presumes that the legislature was aware of the prior statute when it passed the later one. *Reed v. State*, 330 Ark. 645, 649, 942 S.W.2d 255, 258 (1997). A "general statute must yield when there is a specific statute involving the particular subject matter." *Bd. of Tr. for the City of Little Rock Police Dep't Pension & Relief Fund v. Stodola*, 328 Ark. 194, 201, 942 S.W.2d 255, 258 (1997).

Rogers argues that the two statutes at issue here involve the same subject matter. Endangering the welfare of a minor is a general statute that covers any conduct that places a minor at substantial risk, whereas section 5-65-111 is a specific statute targeting a particular type of substantial risk to children associated with DWI. Both have been criminal offenses under criminal law since at least 1947. *See* Ark. Stat. Ann. §§ 41-2407, 75-2503 & 75-2504 (1947). However, the legislature passed Act 1461 of 2003, "an act to enhance the penalty for [DWI] if a child is in the vehicle," which amended the DWI-penalty statute codified at Ark. Code Ann. § 5-65-111 to increase the minimum jail time from for a DWI offense if a passenger under sixteen years of age is in the vehicle.

Rogers urges that the legislature had full knowledge that the endangering statute at section 5-27-205 existed when it passed Act 1461 of 2003 and created a particular punishment for the act of DWI with a child in the vehicle. *See Reed*, 330 Ark. at 649. She argues that we must also presume that the General Assembly passed Act 1461 for a purpose—

namely, to create a specific punishment for a specific crime. *Id.* As stated above, a general statute must yield to a specific one.

Rogers urges that the two statutes can and do work harmoniously together. Section 5-27-205 creates a penalty for the general offense of endangering the welfare of a minor by classifying it as a Class D felony, whereas section 5-65-111 carves out a specific and particular type of endangering activity by setting a particular punishment for DWI with a child in the vehicle. Section 5-27-205 creates a general offense and penalty, whereas section 5-65-111 limits the penalty with respect to a particular activity. Rogers submits that the circuit court failed to follow the legislature's clear intent when it denied her motion for dismissal as to what she terms an extraneous charge for endangering the welfare of a minor.

We disagree. Contrary to Rogers's argument, she was neither convicted nor sentenced under section 5-65-111(a)(1)(B)'s sentencing enhancement for the presence of a minor passenger at the time of the offense. The circuit court pronounced from the bench—and Rogers's sentencing order reflects—that she was convicted of two separate offenses—first-degree endangering the welfare of a minor pursuant to section 5-27-205 and driving or boating while intoxicated under section 5-65-103. And as to the DWI conviction, she was sentenced under section 5-65-111(a)(1)(A) to one day in the county jail. Rogers was not convicted or sentenced under section 5-65-111(a)(1)(B)'s enhancement mandating a minimum sentence of seven day's imprisonment. Accordingly, the issue she raises is not presented by her case and we decline to address it. *See, e.g.*, *Romes v. State*, 356 Ark. 26, 46,

144 S.W.3d 750, 763 (2004) (holding that this court will not address an argument on appeal where the record is "barren of proof" as to the allegation made).

Affirmed.

ABRAMSON and THYER, JJ., agree.

Lassiter & Cassinelli, by: *Michael Kiel Kaiser*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Rebecca Kane*, Ass't Att'y Gen., for appellee.