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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 11-643

ROBERT PRESTON CLAYTON APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered March 7, 2012 APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT, NORTHERN DISTRICT [NO. CR-09-11] HONORABLE DAVID G. HENRY, JUDGE AFFIRMED

DOUG MARTIN, Judge

An Arkansas County jury found appellant Robert Preston Clayton guilty of rape and second-degree sexual assault involving his then-fourteen-year-old daughter S.C. Clayton was sentenced as a habitual offender to fifty years' imprisonment for rape and thirty years for sexual assault, with those sentences running consecutively. Clayton argues that there is no substantial evidence to support his convictions and that the sentence he received is unconstitutional. We affirm.

S.C.'s parents separated when she was six years old, and Clayton was awarded custody of S.C. S.C. described her relationship with Clayton as "close" until she reached puberty, at which time Clayton began touching her breasts and buttocks and "making perverted comments." Clayton's convictions stem from an incident recounted by S.C. that occurred in the summer when S.C. was fourteen years old.

According to S.C., she was lying down on her side in her bedroom when Clayton came into her room and laid down behind her on the bed. He began rubbing her leg, and then he put his hands into S.C.'s pants and stuck his finger inside her vagina. S.C. asked Clayton to stop, but he told her "not to worry about it" and it "would be okay." Clayton also touched S.C.'s breasts. S.C. felt Clayton fumbling around behind her, and she "felt something bigger try and go inside of [her.]" Clayton pulled her pants down and attempted to force his penis inside her vagina. A knock on S.C.'s bedroom door interrupted and ended the attack. According to S.C., Clayton warned her the following day that, if she told anyone what had happened, Clayton would go to jail and S.C. would have nowhere to live.

In addition to second-degree sexual assault, the State charged Clayton with two separate counts of rape. Count one of the information involved penetration with a penis, while count two involved digital penetration. Clayton moved for directed verdicts at the close of the State's case in chief and at the close of all of the evidence. The trial court denied Clayton's motions, and the matter was submitted to the jury for deliberation. The jury found Clayton guilty as to the rape charge involving digital penetration and of second-degree sexual assault. With respect to the rape charge involving penetration with a penis, the jury was unable to reach a verdict, and the trial court thus declared a mistrial.[1]

On appeal, Clayton argues that the trial court erred in denying his directed-verdict motions. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Cowan v. State*, 2010 Ark. App. 715. In reviewing a challenge to the sufficiency of

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[1]This was not an acquittal, as asserted by appellate counsel.

the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.*

Specifically, with respect to both convictions, Clayton attacks the credibility of the victim and points to the lack of corroborating evidence to support S.C.'s allegations. A person commits rape if he engages in deviate sexual activity with another person who is under eighteen years old when the actor is the victim's parent. Ark. Code Ann. § 5-14-103(a)(4)(A)(i) (Repl. 2006). Deviate sexual activity is defined as "any act of sexual gratification involving the penetration, however slight, of the labia majora . . . of a person by any body member or foreign instrument manipulated by another person." Ark. Code Ann. § 5-14-101(1)(B) (Repl. 2006). A person commits second-degree sexual assault if the person engages in sexual contact with another person who is less than eighteen years of age and the actor is the minor's guardian. Ark. Code Ann. § 5-14-125(a)(4)(A)(iii) (Repl. 2006). Sexual contact is defined as "any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female." Ark. Code Ann. § 5-14-101(9).

The State asserts that Clayton's challenge to the sufficiency of the evidence supporting his rape conviction is not preserved for appellate review. We agree. Where a motion for directed verdict is made, Arkansas Rule of Criminal Procedure 33.1 requires that the motion specifically state how the evidence is deficient. Rule 33.1 also provides that the failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required

by the rule will constitute a waiver of any question pertaining to sufficiency of the evidence. Ark. R. Crim. P. 33.1(c) (2010).

At the close of the State's case, defense counsel moved for directed verdict as to one of the rape charges:

> I would agree that there has been some evidence presented that might at least raise a question of digital penetration as to one count, but the State has alleged two separate counts of rape. There has been no testimony with regard to any other type of penetration actually occurring. I don't believe—based on those facts[,] I don't believe the evidence is sufficient to go forward on two counts of rape. And would ask that the—I suppose it would be the second count of rape be dismissed—or directed verdict issued as to the second count of rape, since there has only been allegations of one type of penetration.

At the close of all of the evidence, defense counsel renewed his directed-verdict motion on the rape charge:

> I also would again move for a directed verdict as to one of the counts of rape. I would agree that the evidence was sufficient to raise a question of fact for the jury as to one count. . . . There was some evidence of digital penetration. There was no evidence of penis penetration. And would, therefore, move for a directed verdict of acquittal as to the second count of rape.

Clayton's motion pertained to rape by penetration with a penis. In other words, Clayton did not challenge the rape count of which he was ultimately convicted, which involved digital penetration. Accordingly, his argument is not preserved for review. *See, e.g.*, *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000) (holding that, where the appellant failed to raise count four involving kidnapping in his initial directed-verdict motion, any challenge to the sufficiency of the evidence as to that charge was not preserved).

In any event, Clayton's argument is not persuasive. Arkansas appellate courts have "continually held that a rape victim's testimony alone is sufficient and is substantial evidence

to support a rape conviction." *Williams v. State*, 2011 Ark. App. 675, at 7, 386 S.W.3d 609, 614 (quoting *Hickey v. State*, 2010 Ark. 109, at 2). Moreover, the uncorroborated testimony of a rape victim is sufficient evidence to support a conviction. *Id*. Inconsistencies in a rape victim's testimony are matters of credibility that are solely for the jury to decide, and the jury may accept or reject testimony as it sees fit. *Id*. Even if Clayton had preserved his challenge to the sufficiency of the evidence, we would affirm his rape conviction.

Clayton's argument with respect to his conviction for second-degree sexual assault is also not preserved because, while Clayton challenges S.C.'s credibility on appeal, he argued at trial that the sexual-assault charge was a lesser-included offense of rape and that the State did not prove the element of sexual gratification. A party cannot change the grounds for directed-verdict motion on appeal but is bound by the scope and nature of the argument presented at trial. *Avery v. State*, 93 Ark. App. 112, 217 S.W.3d 162 (2005). Clayton abandoned the arguments he raised at the trial-court level, and we do not reach the merits of his argument regarding credibility because it is made for the first time on appeal. It is well settled that arguments not raised at trial will not be addressed for the first time on appeal. *Fuson v. State*, 2011 Ark. 374, at 6, 383 S.W.3d 848, 852.

Clayton, who is thirty-nine years old and suffers from cancer, asserts that his eighty-year prison sentence is equivalent to a life sentence. Clayton further contends, without citation to authority, that the sentence is unconstitutional in that it is extreme and amounts to cruel and unusual punishment. Clayton's argument is not preserved for appellate review. A constitutional due-process argument must be raised before the circuit court to be preserved

for appellate review. *Rogers v. State*, 2011 Ark. App. 2; *see Wright v. State*, 327 Ark. 455, 939 S.W.2d 835 (1997) (declining to address appellant's argument that his sentence under the habitual-offender statute of fifty years' imprisonment for delivery of 967 milligrams of cocaine constituted cruel and unusual punishment where appellant raised the point for the first time on appeal). Moreover, this court may affirm for failure to cite supporting authority for an argument. *See Smith v. State*, 326 Ark. 520, 932 S.W.2d 753 (1996).

Affirmed.

PITTMAN and GLADWIN, JJ., agree.