Cite as 2012 Ark. App. 219

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-350

Opinion Delivered MARCH 28, 2012

WILLIE MCDANIELS APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION [NO. CR2009-187]
V.	HONORABLE HERBERT WRIGHT, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBIN F. WYNNE, Judge

Willie McDaniels appeals from his conviction on two counts of rape. On appeal, appellant argues that the State failed to prove that he was the victim's guardian and that the trial court improperly submitted an instruction to the jury. Because none of appellant's arguments are preserved for appeal, the judgment of the trial court is affirmed.

On January 14, 2009, the State charged appellant with two counts of rape. Count One of the information alleged that appellant engaged in sexual intercourse or deviate sexual activity with QA, who was less than fourteen years of age. Count Two of the information alleged that appellant engaged in sexual intercourse with QA, who was less than eighteen years of age, and that appellant was the victim's "guardian to wit: STEP-GRAND PARENT."

At trial, QA testified that appellant is married to her grandmother. She also testified that appellant had sex with her. QA would sometimes spend the night with appellant and her

grandmother on school nights because her mother did not have a car and appellant would take her to school. QA testified that appellant would have sex with her after her grandmother left to go to work and before appellant took her to school. According to QA, appellant threatened to stop doing things for her like paying for her cell phone, buying her clothes, and buying her food.

Prior to the jury's deliberations regarding appellant's guilt on the offenses charged, the trial court gave an instruction to the jury that stated that, in order to prove that appellant committed the offense of rape, the State had to prove the following elements: first, that appellant engaged in sexual intercourse or deviate sexual activity with QA; second, that QA was less than eighteen years old at the time of the offense; and third, that appellant was QA's guardian or stepgrandparent. Before the instruction was given to the jury, appellant's attorney indicated that there was no objection to the instruction being given.

The jury found appellant guilty on both counts of rape. In a judgment and commitment order entered on September 15, 2010, the trial court sentenced appellant to two concurrent terms of 480 months' imprisonment. This appeal followed.

Appellant's first point on appeal is that the evidence submitted by the State was insufficient to show that he was QA's guardian. Appellant admits in his brief that this issue was not raised in his motions for directed verdict. Arguments made in support of a sufficiency-of-the-evidence challenge that were not made in support of a motion for directed verdict at trial are not preserved for appeal. *Ingle v. State*, 2010 Ark. App. 410, 379 S.W.3d

32. It is well settled that arguments not raised at trial will not be addressed for the first time on appeal. *Id.*

Appellant states in his brief that our supreme court enumerated four exceptions to the contemporaneous-objection rule in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), and he lists the four exceptions. However, appellant does not indicate which of the *Wicks* exceptions would apply in this case, nor does he argue how any of the exceptions would apply in this case. It is not the duty of this court to make appellants' arguments for them. *See, e.g.*, *Childs v. State*, 95 Ark. App. 343, 237 S.W.3d 116 (2006). In any event, none of the *Wicks* exceptions apply to this argument, as our supreme court has stated that the application of the exceptions listed in *Wicks* has been limited to specific constitutional and statutory-error arguments that are distinct from sufficiency-of-the-evidence arguments. *Smith v. State*, 343 Ark. 552, 573, 39 S.W.3d 739, 752 (2001). Also, this court and our supreme court have noted the fact that a challenge to the sufficiency of the evidence is not included among the *Wicks* exceptions to the contemporaneous-objection rule. *Hughes v. State*, 295 Ark. 121, 122, 746 S.W.2d 557, 557 (1988); *Ballew v. State*, 21 Ark. App. 215, 217, 731 S.W.2d 222, 223 (1987).

Appellant's second argument on appeal is that the trial court committed a constitutional violation by improperly submitting a jury instruction involving a "step-grandparent" under the rape statute when appellant was charged under the "guardian" section of the statute. This argument is likewise not preserved for review. Appellant never raised an objection to the instruction before the trial court, nor did appellant proffer another instruction. We will not

address objections concerning jury instructions that were not first presented to the trial court and where no proffer of another instruction was made. *See Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998). Although appellant again admits that no objection on this issue was raised before the trial court and again cites *Wicks*, *supra*, the error alleged does not fall under any of the *Wicks* exceptions. This court has held that the failure to timely object to a jury instruction cannot be the basis for an exception to that rule under *Wicks*. *See Halliday v. State*, 2011 Ark. App. 544, 386 S.W.3d 51; *see also Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). Further, the State is correct in its assertion that, to the extent appellant is arguing a denial of due process, he never raised that argument before the trial court, precluding consideration of the argument on appeal. *See Arrigo v. State*, 2009 Ark. App. 568, 337 S.W.3d 560.

Affirmed.

PITTMAN and HOOFMAN, JJ., agree.

Mark Alan Jesse, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.