

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR 11-1258

ROBERT LEE HENDERSON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered September 12, 2012

APPEAL FROM THE MILLER
COUNTY CIRCUIT COURT,
NO. CR-2010-435-1

HONORABLE JOE E. GRIFFIN,
JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Robert Lee Henderson was charged with eight violations of Arkansas Code Annotated section 5-14-103 (rape of a child less than fourteen years of age) and seven violations of section 5-14-110 (sexual indecency with a child under fifteen years of age). The charges involved three girls: A.C. and L.C., appellant's stepdaughters, and H.S., their cousin. On August 21, 2011, following a two-day trial, he was found guilty on five counts of rape¹ and seven counts of indecency with a child,² and was sentenced to a total of 1440 months in the Arkansas Department of Correction.³ On appeal, Henderson argues that the trial court

¹Counts Two through Six, alleging the rape of A.C.

²Count Nine (L.C.), Counts Ten through Thirteen (A.C.), and Counts Fourteen and Fifteen (H.S.)

³Appellant had two prior felony convictions and was charged as a habitual offender.



erred by (1) denying his motion for a directed verdict on Count Four because there was insufficient evidence of penetration, and (2) overruling his objection to the introduction of two drawings created during interviews with the victims. We affirm.

Background

When the events giving rise to this case occurred, appellant was married to A.E., the mother of two of the victims, A.C. and L.C. The third victim, H.S., was the daughter of A.E.'s sister-in-law, C.K. The allegations of sexual abuse arose in June 2010 when C.K. found two letters, written by A.C. and H.S. and addressed to her, stating that appellant had been molesting them. C.K. told A.E. about the letters, and A.E. confronted appellant, removed him from the home, and reported the abuse to police. All three girls were given sexual-assault examinations and were interviewed at the Children's Advocacy Center (CAC). At trial, all three girls testified that they talked with a female staff member at CAC about the abuse, were shown drawings where the body parts involved in the abuse could be identified, and instructed the interviewer which body parts to circle and label.

During the testimony of H.S., appellant objected to the State's introduction of two drawings prepared during H.S.'s interview at CAC, arguing that the drawings had not been properly authenticated. The circuit court overruled the objection and admitted the drawings into evidence. At the close of evidence, appellant moved for a directed verdict on Count Four, which alleged the rape of A.C. The circuit court denied the motion.



Discussion

I. *Denial of Motion for Directed Verdict (Count Four)*

Count Four charged appellant with the rape of A.C. At trial, appellant moved for a directed verdict on Count Four, arguing that there was insufficient evidence of penetration as defined by the relevant rape statute. Although appellant raises his sufficiency challenge as his second point on appeal, double-jeopardy concerns require us to address it first.⁴

Arkansas Code Annotated section 5-14-103(a)(3)(A) (Supp. 2009) provides that a person commits rape if he engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen. “Deviate sexual activity” is defined in pertinent part as any act of sexual gratification involving the penetration, however slight, of the anus or mouth of a person by the penis of another person.⁵ In a challenge to the sufficiency of the evidence, this court reviews the evidence in the light most favorable to the State and considers only that evidence that supports the verdict.⁶ We affirm if the evidence supporting the verdict is substantial; that is, of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture.⁷ A rape victim’s uncorroborated

⁴*Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984) (citing *Burks v. United States*, 437 U.S. 1 (1978)).

⁵Ark. Code Ann. § 5-14-101(1)(A) (Supp. 2009).

⁶*Purdie v. State*, 2010 Ark. App. 658, 379 S.W.3d 541.

⁷*Id.*



testimony describing penetration may constitute substantial evidence to sustain a conviction of rape, even when the victim is a child.⁸

The victim, A.C., was eleven years old at the time of the trial, and the rape alleged in Count Four occurred between 2009 and 2010. At trial, A.C. testified that appellant used physical force to push her head down on his penis. She testified that his penis touched her lips and that he tried to push it further into her mouth, but could not do so because she kept her teeth clenched. Appellant argues that because of this, there was insufficient evidence of penetration, a required element of the rape statute, and his motion for directed verdict should have been granted.

We disagree. The lips are clearly a part of the mouth, and from A.C.'s testimony, a rational juror reasonably could have concluded that appellant pushed his penis past A.C.'s lips as far as her teeth, which satisfies the statute's requirement of penetration, however slight, of the victim's mouth.⁹ Our courts have long held that anytime a bodily member of the accused is within the labia of the pudendum, no matter how little, that is sufficient to constitute penetration.¹⁰ Likewise, the statute does not require a victim's oral cavity to be fully entered in order for penetration to occur; rather, slight penetration, such as that of the lips, can be sufficient to constitute rape. Because substantial evidence was adduced from the victim by

⁸*Vance v. State*, 2011 Ark. 392, 384 S.W.3d 515.

⁹*See, e.g., Chambers v. Lockhart*, 872 F.2d 274 (8th Cir. 1989).

¹⁰*Mongtomery v. State*, 2010 Ark. App. 501 (quoting *Poe v. State*, 95 Ark. 172, 129 S.W. 292 (1910)).



which the jury could, without speculation or conjecture, determine that appellant's conduct met the elements of rape set forth by the statute, we affirm.

II. *Admission of Drawings Depicting Areas of Abuse*

H.S. testified that during her interview at CAC, she was shown two drawings, one depicting the body of a male and one depicting a female, and was asked to identify where she was touched by appellant and which parts of his body were used to touch her. H.S. testified that a staff member named Missy labeled the drawings, that the areas circled and labeled by Missy were those that she, H.S., pointed out, and that aside from the evidence stickers, nothing appeared on the drawings that she had not identified during the interview. Appellant objected to the introduction of the drawings because the correct name of the person who interviewed H.S. was Kandace Kimmel. Appellant contends that as a result of this inaccuracy and the State not calling Kimmel to testify, the drawings were not properly authenticated. The court overruled the objection, finding that H.S.'s testimony about how the drawings were used during her interview, together with her use during testimony of the terms written on the drawings, was sufficient to authenticate the drawings, and that her failure to correctly name her interviewer did not overcome her identification or authentication of the drawings.

The standard of review for evidentiary rulings is that trial courts have broad discretion and that a court's ruling on the admissibility of evidence will not be reversed absent an abuse of that discretion.¹¹ Even when a trial court errs in admitting evidence, our supreme court has held that when the evidence of guilt is overwhelming and the error is slight, the reviewing

¹¹*Williams v. State*, 2011 Ark. App. 675, 386 S.W.3d 609.



court may declare that the error was harmless and affirm the conviction.¹² Rule 901(a) of the Arkansas Rules of Evidence provides that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Such evidence includes the testimony of a witness with knowledge that a matter is what it is claimed to be.¹³

In this case, H.S. testified that she actively participated in labeling the drawings, and the circuit court ultimately determined that whether she could give the correct name of her interviewer was irrelevant to her ability to authenticate the drawings themselves. As the court noted in making its ruling, H.S. identified the event during which she was shown the drawings (the interview at CAC) and testified that there was a discussion about the drawings; that the terms written on the drawings were terms that she gave her interviewer; and that the points circled on the drawings were the ones she instructed her interviewer to circle. The circuit court found that although H.S. might have misnamed the individual who interviewed her and marked on the drawings, all other factors relevant to authentication had been properly established. In light of the evidence adduced, we do not find that the circuit court abused its discretion in admitting the drawings, and therefore affirm.

Affirmed.

WYNNE and GLOVER, JJ., agree.

Phillip A. McGough, P.A., by: *Phillip A. McGough*, for appellant.

Dustin McDaniel, Att’y Gen., by: *Nicana C. Sherman*, Ass’t Att’y Gen., for appellee.

¹²*Buford v. State*, 368 Ark. 87, 243 S.W.3d 300 (2006).

¹³Ark. R. Evid. 901(b)(1) (2012).