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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR12-753

WILLIAM J. SELLERS APPELLANT	**Opinion Delivered** April 3, 2013 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. 23 CR-11-727]
V.	HONORABLE CHARLES E. CLAWSON, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Chief Judge

William J. Sellers appeals his sexual-assault conviction and the thirty-six-month probationary sentence that resulted from a bench trial in Faulkner County Circuit Court. On appeal, he argues that the State failed to prove that the victim was under the age of sixteen. We affirm.

Appellant was charged in Faulkner County Circuit Court with four felony counts of sexual assault in the fourth degree, in violation of Arkansas Code Annotated section 5-14-127 (Supp. 2011). The felony information was filed on June 10, 2011, alleging that appellant, being thirty-one years of age, had sexual intercourse with a minor female under the age of sixteen. At the March 8, 2012 bench trial, the victim's mother testified that her daughter was born on October 13, 1994. Appellant admitted that the intercourse took place, but testified that it did not occur until after the victim had turned sixteen, which was October 13, 2010.

On cross-examination, appellant admitted to telling the police detective during his interview that the relationship began "just a little bit prior to" the victim's sixteenth birthday. However, he testified at the hearing that he did not know whether the detective had been asking him about when the victim began making advances toward him or when their sexual relationship began.

Melissa Hillary Smith, a Conway police detective, testified that when she interviewed appellant during the investigation of the case, he told her that he began having sex with the victim about a month before she and her mother moved to the Salem Park Apartments. The victim's mother testified that she and her daughter moved to the Salem Park Apartments, I-6, in February 2010, and later moved to a second apartment, E-7, in that complex in January or February 2011.

The victim testified that she was a high school freshman in 2009 and that, on the date of the hearing, she was a junior and would graduate in 2013. She stated that her sexual relationship with appellant began "a little close into my freshman year and it continued on through my sophomore year." She claimed that the relationship lasted for a year. She testified that she lived in Salem Park Apartments, I-6, when her first sexual encounter with appellant happened.

At the close of the State's evidence, appellant moved for a dismissal, arguing that the State failed to establish the age of the victim at the time of the alleged assault. The trial court denied the motion, stating that there was circumstantial evidence to support the age of the

victim. After appellant testified and at the conclusion of all the evidence, the trial court announced as follows:

> Gentlemen, the Court wants to take a little time to review my notes and the testimony in this case and satisfy myself that I have properly understood the time lines. The defense counsel makes an argument regarding the age of the victim. I want to be sure that I understand what he's trying to prove or to show here today. And—

The trial court was interrupted by the prosecutor who sought to argue the point. With the trial court's permission, the prosecutor reviewed the evidence regarding the age of the victim and the testimony from appellant, Detective Smith, and the victim. Defense counsel responded, arguing that the evidence showed that there was no sexual contact before the victim's sixteenth birthday. The trial court responded that it wanted time to sort out the evidence.

By letter opinion dated March 22, 2012, the trial court found appellant guilty of one count of sexual assault in the fourth degree and dismissed the remaining three counts. At the sentencing hearing, defense counsel stated that he wanted to "make sure that my record is clear on this," because he did not recall moving to dismiss the case at the close of all the evidence. He did so for the record, and the trial court noted the motion and that it had been denied. Appellant was sentenced to thirty-six months' probation, ordered to pay court costs and a sheriff's fee, to provide a DNA sample, to pay a booking fee and fine of $1,000, and to register as a sex offender. A sentencing order was filed on April 31, 2012, and a notice of appeal followed.

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 evidence. *Colgan v. State*, 2011 Ark. App. 77, at 1, (citing Ark. R. Crim. P. 33.1(b)–(c) (2010)). 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. The motion for dismissal shall state the specific grounds therefor. 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. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. . . .

Ark. R. Crim. P. 33.1(b)–(c) (2011).

It is well settled that Rule 33.1 is strictly construed. *See, e.g.*, *Elkins v. State*, 374 Ark. 399, 288 S.W.3d 570 (2008). The Arkansas Supreme Court has also made it clear that to preserve a sufficiency-of-the-evidence challenge, a party must move for a directed verdict or for dismissal at the conclusion of the evidence and not during a closing argument. *See, e.g.*, *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003) (sufficiency-of-the-evidence argument not preserved because the motion for directed verdict was not made prior to closing argument); *see also State v. Holmes*, 347 Ark. 689, 66 S.W.3d 640 (2002). 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). Arguing that the State has failed to prove its case, without asking for a dismissal, will not suffice. *Grube v. State*, 2010 Ark. 171, 368 S.W.3d 58.

The State contends that appellant's argument is not preserved for appeal because he failed to renew it at the close of all the evidence, citing *Higgins v. State*, 2010 Ark. App. 442. In *Higgins*, this court held that the issue of sufficiency was not preserved because defense counsel made a closing argument seeking a not-guilty verdict, and he never moved for a dismissal under the rule. Further, in *Simmons v. State*, 2012 Ark. App. 165, counsel's renewal at the sentencing phase was made too late to preserve the issue.

Here, although he moved for dismissal at the close of the State's case, defense counsel did not renew his motion at the close of all the evidence. He made an argument regarding the lack of evidence on the issue of the victim's age, but did so in response to the prosecutor's argument. He did not move to dismiss until the sentencing phase. Under Rule 33.1, he did not have to move to dismiss at the close of the State's case, but if he did, he had to renew it at the end. Ark. R. Crim. P. 33.1(b). Accordingly, appellant's sufficiency argument is not preserved.

Even if we were to consider the merits, we would affirm. When an appellant challenges the sufficiency of the evidence to support a conviction on appeal, this court's test is whether there is substantial evidence to support the verdict. *Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id.* In determining whether the evidence is substantial, evidence is viewed in the light most favorable to the State, considering only the evidence that supports the verdict. *Id.*

The State was required to prove that appellant was guilty of fourth-degree sexual assault, which is sexual intercourse or deviate sexual activity by a defendant over the age of twenty with a victim under the age of sixteen. Ark. Code Ann. § 5-14-127(a)(1)(A) (Supp. 2011). The evidence was that the victim's sixteenth birthday was October 13, 2010. The bench trial took place on March 8, 2012, and on that date, the victim testified that she was a junior in high school. Therefore, beginning in the fall of 2011, she was a junior; in the fall of 2010, she was a sophomore; and in the fall of 2009, she was a freshman. The victim also testified that she had a consensual-sexual relationship consisting of ten or more sexual encounters with appellant. This relationship started when she was a high school freshman, "a little close into my freshman year and it continued on through my sophomore year." This would have been from the fall of 2009 until the fall of 2010 and into the spring of 2011. Also, appellant admitted that the relationship started a little bit before the victim's sixteenth birthday. This was direct evidence of what those witnesses experienced. Thus, substantial evidence supports appellant's conviction.

Affirmed.

HARRISON and WHITEAKER, JJ., agree.

Andrew L. Clark, Sr., for appellant.

Dustin McDaniel, Att'y Gen., by: *Christian Harris*, Ass't Att'y Gen., for appellee.