Cite as 2018 Ark. App. 309

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CR-17-1074

RALPH A. KING	APPELLANT	OPINION DELIVERED: MAY 16, 2018 APPEAL FROM THE ASHLEY COUNTY CIRCUIT COURT [NO. 02CR-17-7]
V.		HONORABLE ROBERT BYNUM GIBSON, JR., JUDGE
STATE OF ARKANSAS	APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Ralph King appeals his conviction by an Ashley County jury on a lesser-included offense of sexual assault in the second degree (stemming from a rape charge) for which he was sentenced to twenty years' imprisonment in the Arkansas Department of Correction (ADC). Appellant challenges the sufficiency of the evidence, arguing that no evidence of the element of penetration was introduced and that the trial court abused its discretion when it allowed the victim's recorded testimony to be replayed to the jury during deliberations. We affirm.

Appellant was arrested and charged with one count of rape, a Class Y felony. At trial, the victim, J.D., stated that she is eight years old and in the second grade. She testified that appellant is her "Papaw." She explained that on November 12, 2016, she spent the night at the home of her uncle, Josh King, with his daughter, R.K.; his wife, Leslie Huff; Leslie's daughter, J.H.; and her Papaw. J.D. said that she was asleep in the living room when

appellant woke her up and took her into the room that J.H. and R.K. shared. J.D. testified that appellant put his private part in her mouth and put his finger in her private part.

R.K. testified that she is twelve years old and in the seventh grade. She explained that appellant is her grandfather. She corroborated J.D.'s testimony regarding the sleepover at her dad's, Josh King's, house to celebrate her stepsister's birthday. R.K. described how the next morning when she walked in a room, she saw appellant standing in front of J.D., who was sitting in a chair, guiding her hand toward his "private place." Appellant's zipper was down, and she saw "a couple inches of" his penis.

Kevin Sontag, a forensic serologist from the Arkansas State Crime Lab (ASCL), testified that he had analyzed several items submitted to him related to J.D., including the underwear J.D. had worn the morning of the incident. Sontag testified that as part of his examination, he had performed tape lifts from the inside of the underwear, which were then submitted to the DNA section for testing. Julie Butler, a forensic DNA analyst for the ASCL, also testified that she had examined the tape lifts from the inside of J.D.'s underwear and had found DNA matching both J.D. and appellant.

Defense counsel timely moved for a directed verdict at the end of the State's case-in-chief and at the end of the presentation of evidence. The trial court denied the motions, and the jury returned a verdict of guilty on the lesser-included offense of second-degree sexual assault, a Class B felony. He was sentenced by the jury to twenty years in the ADC. Appellant filed a timely notice of appeal on September 29, 2017.

I. *Sufficiency of the Evidence*

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *McPherson v. State*, 2017 Ark. App. 515, 532 S.W.3d 96. When reviewing a challenge to the sufficiency of the evidence, this court assesses the evidence in the light most favorable to the State and considers only the evidence that supports the verdict. *Id.* The sufficiency of the evidence is tested to determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence that is of sufficient force and character that will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* Finally, the credibility of witnesses is an issue for the jury and not the court. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

Appellant argues that, even viewed in the light most favorable to the State, the trial court erred in denying his timely motions for directed verdict on the count of rape and in finding that there was sufficient evidence to present the matter to the jury. In his directed-verdict motions, appellant argued that the State never elicited from J.D. her definition of "private part." He maintains that this vague terminology is insufficient to fulfill the statutory requirement that a conviction for rape requires proof of penetration of a victim's mouth or anus by a penis or of her labia majora or anus by a body member. *See* Ark. Code Ann. § 5-14-103(a)(3) (Repl. 2013); Ark. Code Ann. § 5-14-101(11) (Repl. 2013). He submits that the State failed to elaborate, by any form of evidence, to prove the necessary element of penetration.

We hold that appellant's sufficiency challenge is not preserved for appellate review. A directed-verdict motion is a challenge to the sufficiency of the evidence and requires the movant to apprise the circuit court of the specific basis on which the motion is made. *See, e.g.*, *Rounsaville v. State*, 372 Ark. 252, 256, 273 S.W.3d 486, 490 (2008). Arguments not raised at trial will not be addressed for the first time on appeal, and parties cannot change the grounds for an objection on appeal, but are bound by the scope and nature of the objections and arguments presented at trial. *See id*. In order to preserve a challenge to the sufficiency of the evidence supporting a conviction for a lesser-included offense, a defendant must address the lesser-included offense either by name or by apprising the trial court of the specific elements questioned by the motion for directed verdict. *E.g.*, *Davis v. State*, 362 Ark. 34, 38, 207 S.W.3d 474, 478 (2005).

After the State rested its case, appellant moved to dismiss the rape charge against him. The following colloquy occurred:

DEFENSE COUNSEL: Your Honor, I make a motion for directed verdict on the charge of rape in that the State has failed to make a prima facie case that my client engaged in deviate sexual activity with J.D. Basically, she said that he put his finger down in her private part down in her pants. And I cannot remember if she said anything more than that—

. . . .

THE COURT: The issue is that you say she did not testify that he penetrated her with his finger.

DEFENSE COUNSEL: She did not testify that he committed deviate sexual activity—

. . . .

DEFENSE COUNSEL: Well, it was never really defined by what she meant by "private part."

The trial court denied his motion. At the conclusion of all the evidence, appellant stated, "I do renew my motion for directed verdict." Ultimately, appellant was not convicted of rape, but rather of sexual assault in the second degree. Appellant failed to move for a directed verdict on sexual assault in the second degree either by name or by a specific element of the offense. *See* Ark. Code Ann. § 5-14-125 (Repl. 2013). Appellant's argument was based solely on whether the State proved "deviate sexual activity," an element of rape. Accordingly, his argument challenging the sufficiency of the evidence is not preserved for our review.

II. *Replay of Recorded Testimony of the Victim to the Jury During Deliberations*

During deliberations, the jury sent out the question, "What did [J.D.'s] testimony say about penetration?" Initially, the trial court responded that J.D.'s testimony could not be replayed and that the jurors would have to make their decision based on their own recollection of the testimony. The State objected, arguing that the trial court could replay J.D.'s testimony. The trial court sent the jury back to deliberate, and after a short recess, the jury was brought back into the courtroom. The trial court announced that it was going to replay J.D.'s entire testimony. Although appellant's counsel objected to allowing the jury to rehear J.D.'s testimony because the jury did not request to rehear it, the trial court replayed J.D.'s testimony in its entirety.

The trial court explained that the relevant statute provides that after the jurors have retired, they may rehear testimony if there is disagreement between them as to any part of the evidence or if they desired to be informed on a point of law. Arkansas Code Annotated section 16-64-115 (Repl. 2005) states that "after the jury has retired for deliberation, if there

is a disagreement between them as to any part of the testimony or of they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to the parties or their counsel."

Appellant argues that the trial court erred when it allowed the testimony to be replayed to the jury because the jurors neither exhibited disagreement among themselves nor sought the clarification of a point of law. He urges that the trial court went beyond the limits of the statute when it ordered the replaying of the victim's testimony in its entirety because that remedy went beyond the scope of the question submitted by the jury. Appellant submits that the trial court allowed the testimony of the State's most important witness to be refreshed in the minds of the jury and to be the last testimony they heard before returning to their deliberations. Accordingly, he maintains that the trial court failed to follow statutory law and that the denial of his counsel's objection was reversible error by the trial court.

We hold that this argument, likewise, is not preserved for our review because appellant failed to raise it before the trial court. Arguments not raised at trial will not be addressed for the first time on appeal, and parties cannot change the grounds for an objection on appeal, but are bound on appeal by the scope and nature of the objection and argument presented at trial. *Andruszczak v. State*, 2017 Ark. App. 183, 518 S.W.3d 114. During trial, appellant did not object to the replaying of J.D.'s testimony under section 16-64-115, rather he objected on the basis that the jury did not request to rehear J.D.'s testimony. Because appellant did not object on the grounds raised in his appeal, his argument is not preserved.

Affirmed.

GLOVER and WHITEAKER, JJ., agree.

Potts Law Office, by: *Gary W. Potts*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Ashley Argo Priest*, Ass't Att'y Gen., for appellee.