

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA09-17

T.V., A MINOR

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered JUNE 24, 2009

APPEAL FROM THE SEVIER COUNTY
CIRCUIT COURT,
[NO. JV-08-56-2]

HONORABLE CHARLES A. YEARGAN,
JUDGE

AFFIRMED

M. MICHAEL KINARD, Judge

Appellant, T.V., who is a minor, appeals from the trial court's adjudication of him as delinquent for the offenses of second-degree sexual assault and kidnapping. On appeal, appellant argues that there was not sufficient evidence to support the decision of the trial court and that his trial counsel provided ineffective assistance. We affirm.

The victim, who is also a juvenile, testified that in late March or early April 2008, a friend of hers invited her to the friend's apartment. The friend took the victim to appellant's apartment instead. The victim testified that after she went into appellant's apartment, her friend told her to go into a room, and after she did, appellant pushed her back into a chair and tied her arms behind her around the back of the chair. Appellant then put duct tape over the victim's mouth. The friend tied appellant's feet. Appellant then unzipped the victim's pants and put his hand down in them. The victim further testified that appellant cut her arm with a knife and told her that if she told anyone, he would put a gun to her head. The victim was

later able to untie her arm, and when appellant turned around, she kicked him in the head and walked out of the apartment, according to her testimony.

Following the hearing, the trial court adjudicated appellant delinquent on charges of second-degree sexual assault and kidnapping. The trial court committed appellant to a term in the Division of Youth Services. This timely appeal followed.

Appellant's first argument on appeal is that the trial court's adjudication of him as delinquent on the charges is not supported by substantial evidence. The State argues in its brief that appellant's argument was not preserved for our review. We agree.

The Arkansas Rules of Criminal Procedure apply in juvenile proceedings. *See* Ark. Code Ann. § 9-27-325(f) (Repl. 2008). The procedure to be followed in order to preserve a challenge to the sufficiency of the evidence in a bench trial is set out in Arkansas Rule of Criminal Procedure 33.1(b). Rule 33.1(b) requires that a motion for dismissal, which states the specific grounds therefor, be made at the close of all the evidence. Arkansas Rule of Criminal Procedure 33.1(c) states that "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." The record reveals that counsel for appellant never made a motion to dismiss or for directed verdict. Appellant never challenged the sufficiency of the evidence before the trial court as required under Rule 33.1(b). We hold that the challenge to the sufficiency of the evidence was waived pursuant to Rule 33.1(c) and cannot be considered on appeal.

Although we have held that the issue of sufficiency of the evidence was waived, our review of the record reveals that we would have affirmed on this point even if the proper motion had been made. The victim testified that appellant committed acts that satisfy all of the elements for the offense of second-degree sexual assault. Arkansas courts have consistently held that the testimony of a victim alone constitutes substantial evidence to support a conviction for rape, so long as all of the necessary elements of the offense are satisfied. *Ellis v. State*, 364 Ark. 538, 222 S.W.3d 192 (2006). This principle applies to sexual offenses other than rape. *Brown v. State*, 374 Ark. 341, ___ S.W.3d ___ (2008). In addition, the victim testified to acts by appellant that satisfy the requirements for the offense of kidnapping. The trial court specifically credited the testimony of the victim when making its findings. The credibility of witnesses and the weight to be given to the evidence are matters for the factfinder, which in this case was the trial court, to decide. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002). Therefore, if a challenge to sufficiency of the evidence had been preserved in this case, it would have failed on appeal based upon the record before us.

Appellant's second point on appeal is that his counsel at trial provided ineffective assistance. The State argues that appellant failed to properly raise this issue before the trial court. We agree with the State on this point as well.

It is well settled that appellate courts will not consider ineffective-assistance-of-counsel arguments on direct appeal unless that issue has been considered by the trial court. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003). This requirement also applies in juvenile-delinquency proceedings. See *Walker v. State*, 330 Ark. 652, 955 S.W.2d 905 (1997).

Additionally, the facts surrounding the claim must be fully developed, either during the trial or during hearings conducted by the trial court. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004). The reason for this rule is that an evidentiary hearing as to the competency of appellant's counsel by the trial court better equips the appellate court on review to examine the sufficiency of the representation. *Id.* The trial court is in a better position to assess the quality of legal representation than an appellate court. *Id.*

In this case, appellant never raised the issue of ineffective assistance of counsel before the trial court. The record does not reveal that appellant has filed any post-trial motion raising the issue. The facts surrounding the claim of ineffective assistance of counsel have not been developed at all. Therefore, we hold that the issue was not properly raised before the trial court and cannot be considered on appeal.

Affirmed.

HENRY and BAKER, JJ., agree.