

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CACR 08-1062

LEVONIA GRAY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered MAY 6, 2009

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTH DIVISION, [NO. CR 07-4122]

HONORABLE WILLARD PROCTOR,
JR., JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Levonia Gray was tried before a jury in Pulaski County Circuit Court and found guilty of first-degree battery and terroristic threatening. On appeal, appellant challenges only the battery conviction, asserting that while there was sufficient proof that he attacked the victim with a gun, it was used as a striking device and not as a “firearm.” Thus, he contends that there lacks sufficient proof of physical injury “by means of a firearm.” We 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 means to challenge the sufficiency of the evidence is by a motion for directed verdict. Ark. R. Crim. P. 33.1(a) (2008). That Rule reads in pertinent part:

(a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor. . . .

(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.

In this trial, the State called the victim of appellant's attack, Anthony Tate, Little Rock police officers, and appellant's girlfriend to testify about the incident. After the State rested, the public defender declined to posit any motions on his client's behalf. Upon query by the prosecutor about a motion for directed verdict and the concern of automatically presenting an ineffective-assistance-of-counsel claim, the public defender did not respond. Rather, the public defender said that if the State did not think it had enough evidence, then he would agree to dropping the charges. However, no defense motion was made.

Thereafter, the public defender made an opening statement and called one witness. At the conclusion of the defense presentation, the public defender rested, making no motion to the trial court. The prosecutor again raised concern about defense counsel's failure to make any motion on his client's behalf. Defense counsel asked the State to explain what motion it wanted defense counsel to make, considering that defense counsel heard the State's

witnesses testify that appellant shot and threatened to kill the victim. Defense counsel then stated if he had misunderstood the testimony, then he would make an appropriate motion for directed verdict. The trial judge sua sponte ruled that there was sufficient evidence to go to the jury, “so there is no problem.”

Even if we were to construe the preceding as somehow constituting a motion for directed verdict, it failed to specify what element was missing, and it certainly failed to address whether the victim was battered “by means of a firearm” as contemplated by our Criminal Code. Rule 33.1 is strictly construed, and a clear and specific motion for a directed verdict must be made to the trial court to preserve the sufficiency issue for review. *See Pinell v. State*, 364 Ark. 353, 219 S.W.3d 168 (2005). This comports with our appellate rule that we may not address issues for the first time on appeal. *See id.* *See also Elkins v. State*, 374 Ark. 399, ___ S.W.3d ___ (2008).

For these reasons, we affirm without reaching the merits of appellant’s argument.

Affirmed.

PITTMAN and GRUBER, JJ., agree.