Not designated for publication

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 08-971

CHARLES ALVIN WINBERRY APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** April 15, 2009 APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT, [NO. CR-2007-367] HONORABLE GARY R. COTTRELL, JUDGE AFFIRMED

COURTNEY HUDSON HENRY, Judge

A jury in Crawford County found appellant Charles Alvin Winberry guilty of nonsupport, a class C felony. As a consequence, he received a sentence of ten years in prison and was required to pay restitution in the amount of $3,200. Appellant's sole argument for reversal is that the evidence is not sufficient to support the jury's verdict. We affirm.

The State presented evidence at trial that appellant and his former wife, Sheryl, married in June 1997 and that Sheryl gave birth to a son in August 1998. Appellant and Sheryl separated in December 1998, and soon thereafter, Sheryl instituted divorce proceedings against appellant. The trial court in the divorce case issued a temporary order in February 1999 requiring appellant to pay child support in the amount of $65 per week. In the decree of January 2000, the divorce court awarded Sheryl custody of the child and directed appellant

to pay $85 per week in child support. In 2000, the divorce court increased appellant's child-support obligation to $368.39 per month.

Since the divorce, both Sheryl and the Office of Child Support Enforcement filed numerous motions for contempt against appellant for unpaid child support. The orders from the divorce court reflect that appellant accumulated arrearages of $3,302 in September 2000, $3,256.73 in March 2001, $3,684.51 in November 2002, $2,576.90 in July 2003, and $7,403.80 in April 2005. At each juncture, the court ordered appellant to continue paying support at $368.39 per month with additional sums pledged to retire the outstanding arrearages. At trial, the State produced the child-support ledger showing that appellant made no child-support payments since April 2005 and that appellant owed over $20,000 in unpaid child support.

Appellant testified that he was a self-employed carpenter by trade but that he was no longer able to engage in that occupation after breaking his wrist in 2003 or 2004. He said that for a period of time he worked as a driver for a businessman until his driver's license was suspended. He began working at a convenience store four months prior to trial but had made no payments of child support. Appellant testified that he stood ready to pay $1,800 on the day of trial and said that he was willing to tender as child support the $1,400 he posted for bond upon his arrest.

Appellant further testified that he incurred expenses associated with harassment charges that Sheryl lodged against him in two counties. He said that he successfully defended one such charge in Crawford County but that he was convicted of the other charge in Sebastian

County where, in lieu of going to jail, he paid $2,600 for an ankle bracelet so that he could serve his sentence in home detention. Appellant could not recall the last time he had seen his son, but he acknowledged that the divorce court restricted him to telephone visitation and that the judge in Sebastian County ordered him not to have telephone contact with Sheryl. Appellant also testified that the divorce court issued body attachments on several occasions and that, to avoid being jailed, he paid lump sums of unpaid support in the amounts of $3,000 in May 2001, $2,500 in July 2003, and $1,000 in July 2005.

Appellant moved for a directed verdict both at the close of the State's case and at the conclusion of all the evidence. The trial court denied those motions, and the jury found appellant guilty of nonsupport in an amount greater than $10,000 but less than $25,000.

Appellant argues on appeal that the testimony showed that he had made periodic payments of child support, particularly when he was threatened with jail time. He further contends that he had just cause for not paying child support because he could not work as a carpenter after he fractured his wrist.

Arkansas Code Annotated section 5-26-401(a)(2) (Supp. 2007) provides that a person commits the offense of nonsupport if he or she fails to provide support to the person's legitimate child who is less than eighteen years of age. Nonsupport is a class C felony if the person owes more than $10,000 but less than $25,000 in past-due support. The statute further provides that it is an affirmative defense to a prosecution for nonsupport that the defendant had just cause to fail to provide the support. Ark. Code Ann. § 5-26-401(g).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Jester v. State*, 367 Ark. 249, 239 S.W.3d 484 (2006). We will affirm a conviction if substantial evidence exists to support it. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond speculation and conjecture. *Loar v. State*, 368 Ark. 143, 243 S.W.3d 923 (2006).

Pursuant to Rule 33.1(a) of the Arkansas Rules of Criminal Procedure, a criminal defendant in a jury trial must challenge the sufficiency of the evidence by making motions for a directed verdict at the close of the evidence offered by the prosecution and at the close of all of the evidence. Rule 33.1(a) also requires the defendant to specifically advise the trial court as to the particular deficiencies in the State's proof. *Smith v. State*, 367 Ark. 274, 239 S.W.3d 494 (2006). When a motion for a directed verdict does not identify particular or specific elements of proof that are missing from the State's case, the motion fails to properly apprise the trial court of the asserted error. *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007). A general motion that merely asserts that the State has failed to prove its case is not adequate to preserve the issue for appeal. *Davis v. State*, 97 Ark. App. 6, 242 S.W.3d 630 (2006). The reason underlying this requirement for specific grounds to be stated and for the absent proof to be pinpointed is that it allows the trial court the option of either granting the motion or, if justice requires, allowing the State to reopen its case to supply the missing proof. *Gillard v. State*, 373 Ark. 98, 270 S.W.3d 836 (2008). A further reason that the motion must

be specific is that the appellate court may not decide an issue for the first time on appeal and cannot afford relief that is not first sought in the trial court. *Lamb v. State*, 372 Ark. 277, 275 S.W.3d 144 (2008).

In this case, appellant moved for a directed verdict at the close of the State's case on the following basis:

> Your Honor, based upon the evidence that's been presented by the State, the defendant moves for a directed verdict of acquittal, based upon the evidence — the sufficiency of the evidence, that the State has presented in this case as to whether or not there has been enough evidence to permit the case to go to the jury at this point.

At the close of all of the evidence, appellant moved for a directed verdict by saying, "Based on the sufficiency of the evidence, that's been presented in the entire trial, the defendant would renew his motion to — to dismiss on the basis of the sufficiency of the evidence, that's been presented." As is evident, appellant's motions for a directed verdict were general in nature and did not inform the trial court of any particular deficiency in the State's proof. Consequently, the argument appellant now makes on appeal is not preserved for our review.

Even if the issue was preserved, we could not conclude that the evidence was insufficient. The State presented testimony and evidence detailing appellant's abysmal history of failing to make his child-support payments and showing that he currently owed over $20,000 in unpaid support. In his own testimony, appellant admitted that he was able to make large lump-sum payments when the prospect of jail was looming. Also, instead of paying support, appellant chose to spend $2,600 to avoid being jailed on the harassment conviction. Moreover, appellant's testimony demonstrates that he is capable of working in

some capacity. The jury was simply not required to believe his testimony that he suffered a disabling injury to his wrist. *See Turbyfill v. State*, 92 Ark. App. 145, 211 S.W.3d 557 (2005) (stating that jury is not required to accept the testimony of the accused as he is the person most interested in the outcome of the trial). In light of the foregoing proof, substantial evidence supports the guilty verdict.

Affirmed.

PITTMAN and GLADWIN, JJ., agree.