Cite as 2010 Ark. App. 82

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-869

	Opinion Delivered JANUARY 27, 2010
TERRY WAYNE PACK APPELLANT	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. CR-08-751-1]
V.	HONORABLE ROBIN F. GREEN, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

M. MICHAEL KINARD, Judge

Appellant, Terry Wayne Pack, appeals from his conviction by a Benton County jury of one count of rape and one count of sexual assault in the second degree. Appellant argues that the trial court erred in denying his motion for a directed verdict and that the trial court erred in refusing to allow counsel for appellant to ask witnesses certain questions. We affirm.

On April 17, 2009, the State filed a felony information charging appellant with one count of rape and one count of sexual assault in the second degree against a fifteen-year-old female. The victim's mother testified that she began dating appellant in February 2007. The mother became pregnant, and appellant came to live with her, the victim, and the victim's siblings in November 2007 when the mother was placed on bed rest. Appellant kept his own residence during the time he stayed in the victim's home, keeping only clothes and a gun at the victim's residence. The victim's mother testified that she would leave appellant alone

with her children. After the pregnancy, appellant continued to stay in the victim's home. The victim's mother would leave for work at 4:00 a.m., and appellant would stay at the home until the children left for school.

The victim testified that, on the night of the incident in question, she was drinking with her mother and appellant. After her mother went to bed, appellant and the victim stayed up and continued to drink. Appellant and the victim went into the victim's bedroom, where appellant performed oral sex on the victim. The victim placed appellant's penis in her mouth and attempted to perform oral sex on him, but was unable to do so due to her inebriation. The victim's mother then came into the room and began arguing with appellant.

Following the State's case, appellant moved for a directed verdict, arguing that the State failed to prove that appellant was the victim's guardian. The trial court denied the motion. The jury returned verdicts of guilty on both the count of rape and the count of sexual assault in the second degree. In a judgment and commitment order entered May 6, 2009, the trial court sentenced appellant to 300 months' imprisonment in the Arkansas Department of Correction. This appeal followed.

Appellant's first point on appeal is that the trial court erred in denying his motion for a directed verdict. We treat a motion for directed verdict or a motion to dismiss as a challenge to the sufficiency of the evidence. *Wertz v. State*, 374 Ark. 256, 287 S.W.3d 528 (2008). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass

beyond suspicion and conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.*

Appellant was convicted of both the offense of rape and the offense of sexual assault in the second degree. A person commits rape if a person engages in sexual intercourse or deviate sexual activity with another person who is a minor and the actor is the victim's guardian. Ark. Code Ann. § 5-14-103(a)(4)(A)(i) (Supp. 2009). A person commits sexual assault in the second degree if the person engages in sexual contact with a minor and the actor is the minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor. Ark. Code Ann. § 5-14-125(a)(4)(A)(iii) (Supp. 2009). "Guardian" is defined as a parent, stepparent, legal guardian, legal custodian, foster parent, or any person who by virtue of a living arrangement is placed in an apparent position of power or authority over a minor. Ark. Code Ann. § 5-14-101(3) (Supp. 2009).

Appellant moved for a directed verdict on the ground that the State failed to prove that appellant was the victim's guardian under the applicable statutes. The evidence presented by the State shows that appellant moved into the victim's home while the victim's mother was on bed rest during her pregnancy. This left appellant as the only adult in the home capable of caring for the minor children, including the victim, for the duration of the pregnancy. Even after the victim's mother was no longer pregnant, appellant continued to reside in the home, and was the one in charge of getting the children ready for school after the mother left for work. In addition, the victim testified that, prior to this incident, she asked appellant for

help around the home if she needed it and that she placed a great deal of trust in appellant. In defining "guardian" as it did for the purposes of the statute, the legislature clearly intended to regulate the conduct of adults living in a home with children and to protect minors from being preyed upon by those adults. The evidence produced by the State at trial was sufficient for the jury to reasonably conclude that, by virtue of the living arrangement, appellant was placed in an apparent position of power or authority over the minor victim and that appellant was thus the victim's guardian for the purposes of the applicable statutes. We hold that the jury verdict is supported by substantial evidence.

Appellant's second point on appeal is that the trial court erred in denying him the opportunity to effectively cross-examine two witnesses against him. Appellant argues that the trial court's rulings violated his right under the Confrontation Clause of the Sixth Amendment to the United States Constitution to confront the witnesses against him. The State argues that appellant's argument is not preserved for our review because it was not raised before the trial court. We agree. A review of appellant's abstract shows that, while counsel for appellant argued that the testimony he sought to elicit was relevant, counsel never argued that refusing to allow the testimony violated appellant's rights under the Confrontation Clause. A constitutional argument, such as a Confrontation Clause argument, is waived if it is not presented to the trial court. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), *cert. denied*, 520 U.S. 1244 (1997). Because the Confrontation Clause argument made on appeal was not made below, we will not consider the argument for the first time on appeal.

Affirmed.

HART and HENRY, JJ., agree.