

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 09-717

ROGER EUGENE ROSS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 11, 2010

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT
[NO. CR-2008-62-I]

HONORABLE JOHN HOMER
WRIGHT, JUDGE

AFFIRMED

M. MICHAEL KINARD, Judge

Appellant Roger Eugene Ross appeals from his conviction for second-degree sexual assault, for which he was sentenced to twenty years' imprisonment in the Arkansas Department of Correction. He argues that the trial court erred in denying his motion for directed verdict. We affirm.

At appellant's jury trial, the twelve-year-old victim testified that appellant, a family friend, slept in his bed on the night of January 13, 2008. The victim testified that he placed a pillow between appellant and himself, but when he awoke during the night, the pillow was gone and appellant's arm was lying across him. The victim moved appellant's arm and replaced the pillow. The victim woke up again, and this time appellant was rubbing his chest. The boy testified that he did not turn over or say anything to appellant, and appellant "grabbed [his] private parts and started to rub." Appellant rubbed the

victim's "private area," by which the victim explained he meant his penis and testicles, for two or three minutes. According to the victim, appellant then grabbed his hand and made him touch appellant's penis, which was beginning to become erect. Appellant got up from the bed, and when he came back and "started all over again," the victim jumped up, hit appellant in the side of the head, and ran to tell his grandfather what had happened.

At the close of the State's case, appellant's counsel made the following motion for directed verdict:

We'd move for a directed verdict. I believe the State has failed to prove sexual contact with [the victim]. I believe the evidence is insufficient. All we have is the evidence of [the victim]'s testimony alone.

The court denied the motion. After appellant's testimony, his counsel renewed the motion for directed verdict, "asserting that the State has failed to prove that Mr. Ross engaged in sexual contact with the sex organs of [the victim]." The court again denied the motion. The jury found appellant guilty of sexual assault in the second degree, and appellant was sentenced to twenty years' imprisonment.

Appellant argues on appeal that the State failed to offer proof that appellant touched the victim *for the purpose of obtaining sexual gratification*. However, his failure to raise this argument to the trial court in his motions for directed verdict precludes this court from addressing it on appeal. Ark. R. Crim. P. 33.1; *Pratt v. State*, 359 Ark. 16, 194 S.W.3d 183 (2004). Here, assuming the motion can be viewed as specific, the deficiency it was alleging was that the State failed to prove that the sexual contact occurred at all. That is an

entirely different argument than is now being asserted on appeal; therefore, appellant's conviction is affirmed.

If the argument were preserved for appellate review, we would still affirm. Appellant argues that because the victim testified that appellant did not say anything when the sexual contact occurred, nor did he (the victim) know whether appellant's eyes were open, the evidence was insufficient to show that the touching was for appellant's sexual gratification. Appellant contends that the evidence was insufficient because it did not rule out every other reasonable hypothesis but his guilt. We disagree.

This court treats a motion for directed verdict as a challenge to the sufficiency of the evidence. *Williams v. State*, 375 Ark. 132, 289 S.W.3d 97 (2008). In reviewing a challenge to the sufficiency of the evidence, this court determines whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* This court views the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *Id.*

A person commits the offense of sexual assault in the second degree if the person, being 18 years of age or older, engages in sexual contact with another person who is (1) less than 14 years of age and (2) not the actor's spouse. Ark. Code Ann. § 5-14-125(a)(3) (Supp. 2009). "Sexual contact" is defined as any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or

the breast of a female. Ark. Code Ann. § 5-14-101(10) (Supp. 2009). While “sexual gratification” is not defined by statute, our supreme court has construed the words in accordance with their reasonable and commonly accepted meaning. *McGalliard v. State*, 306 Ark. 181, 813 S.W.2d 768 (1991). Our case law makes clear that when sexual contact occurs, and there is no legitimate medical reason for it, it can be assumed that such contact was for sexual gratification and the State need not offer direct proof on that element. *See id.*; *Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993) (stating that it is not necessary for the State to provide direct proof that an act is done for sexual gratification if it can be assumed that the desire for sexual gratification is a plausible reason for the act).¹ Furthermore, it has long been held that a child victim’s uncorroborated testimony suffices to support a sexual-assault conviction. *E.g.*, *Johnson v. State*, 71 Ark. App. 58, 25 S.W.3d 445 (2000).

Affirmed.

HART and HENRY, JJ., agree.

¹To the extent that appellant argues that the “plausibility” rule regarding proof of sexual gratification is contrary to the State’s overall burden of proof, we point out that for us to so hold would be contrary to supreme court precedent.