

**ARKANSAS COURT OF APPEALS**

DIVISION III  
No. CACR 09-750

PHILLIP COLEY ELLIOTT  
APPELLANT  
  
V.  
  
STATE OF ARKANSAS  
APPELLEE

Opinion Delivered February 24, 2010

APPEAL FROM THE GARLAND COUNTY  
CIRCUIT COURT,  
[NO. CR 2007-602-I]

HONORABLE JOHN HOMER WRIGHT,  
JUDGE

AFFIRMED

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**M. MICHAEL KINARD, Judge**

A Garland County jury found Phillip Coley Elliott guilty of sexual assault in the second degree, and he was sentenced to five years' probation, with certain special conditions imposed. Elliott argues on appeal that the trial court erred in denying his motion for a directed verdict because the evidence was insufficient to support a guilty verdict. We disagree and affirm.

Appellant was charged with sexual assault in the second degree for violating Arkansas Code Annotated section 5-14-125(a)(3) on August 5, 2007. At the trial, which took place on March 10 and 11, 2009, the victim testified that she was currently eleven years old. She stated that on August 5, 2007, appellant and his daughter were over at her house. Her father and appellant had been drinking together. Late that afternoon,

everybody at the house decided to take a nap, and she and appellant's daughter went to her room. The victim was watching television when appellant came in her room and lay down on her bed, at which point she moved to the floor. She stated that appellant put his foot over the bed and touched her "private spot" for about ten minutes. He then got up to leave the room and told her not to tell anyone. The victim went to her parents' room and told them what had happened. The victim's mother testified that her daughter—in tears—woke her up from a nap that day to tell her that appellant had touched her in her "bad spot." Also testifying were Sergeant Joel Ware, who investigated the sexual-assault report for the sheriff's office; Doug Shuffield, a child-abuse investigator with the Arkansas State Police Crime Against Children Division; and Tracey Sanchez, a forensic interviewer with the Cooper-Anthony Mercy Advocacy Center. A letter of apology that appellant wrote to the victim during his interview with police was introduced into evidence. In the letter, appellant apologizes to the victim "for any hurt" he has caused her and says, "My actions were not even in my right mind. If they were, I would not even have been in your room in the first place."

A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Phavixay v. State*, 2009 Ark. 452, 352 S.W.3d 311. In reviewing a challenge to the sufficiency of the evidence, the appellate 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.*

In this case, appellant challenges the sufficiency of the State's evidence with regard to the proof of sexual gratification. Appellant's argument was properly preserved with a specific motion for directed verdict at the close of the State's evidence and renewal at the close of all evidence.

A person commits sexual assault in the second degree if he, being eighteen years of age or older, engages in sexual contact with someone who is less than fourteen years of age and not the person's spouse. Ark. Code Ann. § 5-14-125(a)(3) (Supp. 2009). Sexual contact includes any act of sexual gratification involving the touching, directly or through clothing, of the sex organs. Ark. Code Ann. § 5-14-101(10) (Supp. 2009). "Sexual gratification" is not defined in the statute, but our supreme court has construed the words in accordance with their reasonable and commonly accepted meanings. *Farmer v. State*, 341 Ark. 220, 223, 15 S.W.3d 674, 676–77 (2000) (citing *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995); *Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993); *McGalliard v. State*, 306 Ark. 181, 813 S.W.2d 768 (1991)). The supreme court has consistently held 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. *Farmer, supra* (citing *Strickland*, 322 Ark. 312, 909 S.W.2d 318; *Warren*, 314 Ark. 192, 862 S.W.2d 222; *McGalliard*, 306 Ark. 181, 813 S.W.2d 768; *Williams v. State*, 298 Ark. 317, 766 S.W.2d 931 (1989) (per curiam)).

Acknowledging the above law, appellant argues that the circumstantial evidence that the touching was for sexual gratification failed to rule out every other reasonable hypothesis than that of his guilt. *See Stivers v. State*, 64 Ark. App. 113, 978 S.W.2d 749 (1998). He argues that the requirement that every other reasonable hypothesis be ruled out for circumstantial evidence to be sufficient is contrary to the “plausibility” rule set out in supreme court case law regarding proof of sexual gratification. However, the law as it stands is that the State need not provide direct evidence of the touching being for the purpose of sexual gratification if it can be assumed that the desire for sexual gratification is a plausible reason for the act. Here, it is at least plausible that appellant’s act of touching the victim’s vaginal area with his foot, after which he ordered her not to tell anyone and later wrote a letter of apology, was done for the purpose of sexual gratification.

Despite his arguments to the contrary, appellant’s testimony that he did not recall touching the victim or saying anything to her (and later testimony that he *did not* touch the victim) is of no consequence on appeal. The jury is not required to believe the testimony of any witness—certainly not the self-serving testimony of the accused. *E.g.*,

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*Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008). Thus, appellant's argument that "it is certainly reasonable to conclude that Appellant's conduct was not for sexual gratification, but rather, incidental contact that Appellant was not aware of until after the occurrence" fails. The victim testified that the contact occurred, and appellant's desire for sexual gratification is certainly a plausible reason for his action.

Affirmed.

VAUGHT, C.J., and GRUBER, J., agree.