Cite as 2010 Ark. App. 433

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA10-72

	Opinion Delivered MAY 19, 2010
D.B., a MINOR APPELLANT	APPEAL FROM THE INDEPENDENCE COUNTY CIRCUIT COURT [NO. JV-08-246]
V.	HONORABLE LEE WISDOM HARROD, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant D.B. appeals his adjudication of delinquency by an Independence County Circuit Court on one count of rape, a Class Y felony, pursuant to Arkansas Code Annotated section 5-14-103(a)(3)(A) (Supp. 2009). He was ordered to complete the sexual-offender program at the Division of Youth Services, after which he was placed on probation for one year. Appellant's sole issue on appeal is that the evidence was insufficient to support the adjudication of delinquency. We affirm.

On November 19, 2008, the State filed a petition against appellant alleging that he was delinquent, having committed the offense of rape against a person under the age of fourteen. Appellant's adjudication hearing was held on August 25, 2009.

The alleged victim, A.M., then eleven years old, testified regarding the alleged incidents involving his cousin, appellant. Included in his testimony was an explanation that he calls his "rear-end a butt," and allegations that he held appellant's "stuff" in his hand and that appellant "put his wiener in my butt." Lisa Earls, an investigator with the Crimes Against Children Department of the Arkansas State Police testified regarding her investigation in this case. Ms. Earls interviewed both A.M. and appellant. Appellant's mother, Nina Branscum, and A.M.'s great-aunt, Pat Ferguson, with whom both A.M. and appellant lived at the time, also testified at the hearing. But none of their testimony is abstracted in appellant's brief or discussed in the argument section. Next, appellant testified on his own behalf, at which time he denied all the allegations regarding A.M.

Counsel for both sides then moved directly into closing arguments, during which appellant's counsel stated, "Your Honor, I just don't believe the evidence presented today supports a conviction in this matter," and requested that the circuit court consider the lesser-included offense of sexual assault in the second degree, pursuant to Arkansas Code Annotated section 5-14-125(a)(5) (Supp. 2009). Counsel again stated that the prosecutor had charged his client with rape, and he did not think there was any evidence to support that charge.

The circuit court found the charge of rape to be true, and following the disposition hearing held on October 20, 2009, entered a delinquency adjudication order on October 21, 2009, adjudicating appellant delinquent and finding him guilty of rape beyond a reasonable doubt. Appellant filed a timely notice of appeal on November 18, 2009. This appeal

followed.

Arkansas Code Annotated section 5-14-103(a)(3)(A) provides that a person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen (14) years of age. "Deviate sexual activity" is defined, in pertinent part, to mean any act of sexual gratification involving the penetration, however slight, of the anus or mouth of a person by the penis of another person. Ark. Code Ann. § 5-14-101(1)(A) (Supp. 2009).

In reviewing a juvenile-delinquency case, we look at the record in the light most favorable to the State to determine whether there is substantial evidence to support the conviction. *J.R. v. State*, 73 Ark. App. 194, 40 S.W.3d 342 (2001). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without mere speculation or conjecture. *Id.* A rape victim's testimony may constitute substantial evidence to sustain a conviction for rape, even when the victim is a child. *Kelley v. State*, 375 Ark. 483, 292 S.W.3d 297 (2009). The rape victim's testimony need not be corroborated, nor is scientific evidence required. *Id.* In a bench trial, the trial judge is in a superior position to evaluate the witnesses and to weigh their credibility. *Carter v. State*, 360 Ark. 266, 200 S.W.3d 906 (2005). Moreover, when the defendant takes the stand in his defense and offers his own account of the events, as appellant did here, it is well settled in this state that the fact-finder may resolve questions of conflicting testimony and inconsistent evidence, and may choose to believe the State's account of the

facts, rather than the defendant's. *Id*.

We do not reach the merits of appellant's challenge to the sufficiency of the evidence because this issue was not properly preserved for our review. Appellant failed to make a motion to dismiss at the close of the evidence as required by Arkansas Rule of Criminal Procedure 33.1(b),(c) (2009). Rule 33.1 applies to juvenile delinquency proceedings, and appellant's failure to comply therewith constitutes a waiver of any challenge to the sufficiency of the evidence. *E.g.*, *Jones v. State*, 347 Ark. 409, 64 S.W.3d 728 (2002). Rule 33.1(b) provides that in a nonjury trial, a motion for dismissal must be made at the close of all of the evidence, and it must state the specific grounds therefore. Rule 33.1(c) provides that a defendant's failure to make a specific motion for dismissal constitutes a waiver of any question pertaining to the sufficiency of the evidence to support the judgment.

Moreover, even were we to view the comments by appellant's counsel during closing argument as a motion for dismissal, counsel failed to specify any basis for the motion or any deficiencies in the State's proof. Instead, the substance of the closing argument addressed the credibility of the victim concluding that the evidence presented did not support a conviction. A motion for dismissal must specify the element of the crime that the State failed to prove. *Brown v. State*, 368 Ark. 344, 246 S.W.3d 414 (2007). A general motion that merely asserts that the State failed to prove its case is inadequate to preserve the issue for appeal. *Wright v. State*, 92 Ark. App. 369, 214 S.W.3d 280 (2005).

Affirmed.

PITTMAN and GLOVER, JJ., agree.