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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR 10-232

	Opinion Delivered OCTOBER 20, 2010
BOBBY FORREST APPELLANT	APPEAL FROM THE HOT SPRING COUNTY CIRCUIT COURT [NO. CR-09-81]
V.	HONORABLE CHRIS E WILLIAMS, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Bobby Forrest appeals his conviction for attempt to commit rape against his thirteen-year-old stepdaughter SW. Forrest was tried before a jury in Hot Spring County Circuit Court, and he was sentenced to sixteen years of imprisonment. Forrest argues on appeal that (1) there is insufficient evidence upon which to sustain a conviction, (2) the trial court abused its discretion in excluding the lay-opinion testimony of Forrest's wife, and (3) the trial court abused its discretion in allowing a witness to testify that she had been qualified as an expert in other trials. After reviewing these points on appeal, we hold that none of them present any basis upon which to reverse the conviction. We, therefore, affirm.

The means to challenge the sufficiency of the evidence is by a motion for directed verdict. *Sales v. State*, 374 Ark. 222, 289 S.W.3d 423 (2008). To affirm, the conviction must be supported by substantial evidence, which is evidence of sufficient force and character that

it will with reasonable certainty, compel a conclusion one way or another; it must force the mind to pass beyond speculation or conjecture. *Jones v. State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984). In our review, we consider the evidence in the light most favorable to the State and only consider the evidence that supports the jury's verdict. *Sales*, *supra*.

Credibility determinations are for the finder of fact, not this court on appeal. *Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005). The finder of fact may believe all or part of any witness's testimony and may resolve issues of conflicting or inconsistent evidence. *Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008); *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001). A victim's uncorroborated testimony can alone constitute substantial evidence of guilt if it meets all the statutory elements; this applies to rape and other sexual offenses, and it applies if the victim is a child. *Brown*, *supra*; *Gatlin v. State*, 320 Ark. 120, 895 S.W.2d 526 (1995). After a jury has given a witness's testimony full credence, we will not disregard it unless the testimony is inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon. *Wyles v. State*, 368 Ark. 646, 249 S.W.3d 782 (2007).

Considering the evidence at trial under these standards, we hold that there was substantial evidence to support the conviction for criminal attempt to commit rape. The statutory definition of "rape" includes engaging in intercourse or deviate sexual activity with another person who is less than fourteen years old. Ark. Code Ann. § 5-14-103(a)(3)(A) (Supp. 2009). The statutory definition of "deviate sexual activity" includes the penetration,

however slight, of the anus or mouth of one person by the penis of another person, or penetration, however slight, of the labia majora or anus of one person by any body member or foreign instrument manipulated by another person. Ark. Code Ann. § 5-14-101(1) (Supp. 2009). Criminal attempt is defined in part as purposefully engaging in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense. Ark. Code Ann. § 5-3-201(b) (Repl. 2006). A substantial step means that the overt acts must be beyond mere preparation and must reach far enough toward accomplishment, toward the desired result, to amount to the commencement of consummation. *Mitchem v. State*, 96 Ark. App. 78, 238 S.W.3d 623 (2008). The step must be strongly corroborative of a criminal purpose. Ark. Code Ann. § 5-3-201(c) (Repl. 2006).

Forrest contends that SW's testimony was inconsistent, and her allegations did not demonstrate acts strongly corroborative of a criminal purpose. We disagree. At trial, SW testified that on one morning in June 2008, Forrest came into the bathroom where she was showering, pulled back the curtain, stood before her in boxer shorts with an apparent erection that he exposed to her, and did not leave when she asked. SW said that instead he said, "We haven't done this in so long. Just do it again. Do it again." SW said Forrest thrust himself upon her until her grandmother, who lived next door, appeared at the front door. When asked what doing "it" again meant, SW stated that Forrest wanted oral sex from her because he had made her perform it "lots of times" when her mother was not at home. Although this testimony was inconsistent with a prior interview SW gave, any inconsistencies were for the

jury to resolve. SW's testimony was sufficient evidence of a substantial step that would support the jury's finding of guilt. *See Kirwan v. State*, 351 Ark. 603 96 S.W.3d 724 (2003).

We next consider Forrest's two evidentiary challenges, which are reviewed for an abuse of discretion. *Marks v. State*, 375 Ark. 265, 289 S.W.3d 923 (2008). We will not reverse an evidentiary ruling unless the appellant can demonstrate prejudice. *McFerrin v. State*, 344 Ark. 671, 42 S.W.3d 529 (2001).

Forrest contends first that the trial court abused its discretion in disallowing his wife's relevant lay opinion under Ark. R. Evid. 701. Rule 701 limits lay-opinion testimony to opinions or inferences that are rationally based on the perception of the witness and are helpful to a clear understanding of the testimony or the determination of a fact in issue. We hold that no abuse of discretion, and no prejudice, has been shown by Forrest.

To explain further, Forrest's wife is the mother of SW. SW asserted that her mother did not believe any of her accusations against Forrest, and Mrs. Forrest testified to the same effect. Mrs. Forrest said she and Forrest had been married for thirteen years and that SW never liked Forrest or his family. The mother stated that SW had made other unbelievable accusations against Forrest in the past. Mrs. Forrest testified, without objection, that SW had told her she wanted to live with her maternal grandmother, with whom Mrs. Forrest did not get along. When asked whether she had formed an opinion about "what's really happening here," the State objected. The trial judge disallowed her opinion on the basis that it was speculation.

As Mrs. Forrest continued her testimony, she explained that the grandmother had purchased a cell phone for SW, had arranged for SW to have a horse, and had allowed SW to do as she pleased without supervision. Mrs. Forrest claimed that her mother had been trying to remove SW from her "since before she [SW] was born."

Forrest did not at trial, nor does he on appeal, proffer what opinion Mrs. Forrest held that was disallowed. We can only presume he intended to elicit from Mrs. Forrest that she believed SW's motive to lie about this incident was so she could be permanently moved to her grandmother's house. If so, our presumption demonstrates that this point was clearly brought to the jury's attention. There was no resulting prejudice from excluding Mrs. Forrest's opinion. *Schmidt v. State*, 98 Ark. App. 167, 253 S.W.3d 35 (2007).

Lastly, Forrest argues that the trial court "erred in allowing the State's witness to testify that she had been qualified as an expert." A nurse, board-certified in sexual assault examinations, testified for the State. The prosecutor was laying a foundation of her years of training and experience, which the nurse detailed without objection. Then, the prosecutor asked if she had previously been qualified in court as an expert in the field. Defense counsel objected, "It's hearsay if she's been qualified in court. And not only, in asking that question about being qualified in court because there's a comment on the evidence by the Court." The judge responded that this was a proper question subject to the defense's cross-examination. The nurse's testimony proceeded, wherein she explained that her physical examination of SW was consistent with, but not definitive of, sexual contact.

On appeal, Forrest cites cases reflecting a trial judge's duty to preside with impartiality, to be cautious with language used in court, and to avoid prejudicing one side over the other. Forrest also cites the rule that generally hearsay is not permitted unless fitting into an exception. He does not, however, amplify or argue how those citations mandate reversal.

We see neither the nurse's answer about a factual event to be hearsay, nor the judge's plain ruling to be a comment upon the evidence. It is a judge's function to rule on objections, so judicial commentary reflecting a ruling is not inappropriate. *Green v. State*, 343 Ark. 244, 33 S.W.3d 485 (2000); *Miller v. State*, 239 Ark. 836, 394 S.W.2d 601 (1965). Assignments of error presented by counsel in the appellate brief, unsupported by convincing argument or authority, will not be considered on appeal unless it is apparent without further research that they are well taken. *Dixon v. State*, 260 Ark. 857, 545 S.W.2d 606 (1977). Moreover, Forrest does not demonstrate prejudice. Regardless of whether the nurse had previously been qualified as an expert at trial, there was ample evidence of her qualifications to render an expert opinion in this case. *Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d 30 (1999).

For the foregoing reasons, we affirm the conviction.

HART and GRUBER, JJ., agree.