

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-934

BRIAN KEITH WALKER
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered OCTOBER 20, 2010

APPEAL FROM THE PULASKI COUNTY
CIRCUIT COURT, FIRST DIVISION
[NO. CR-2007-796]

HONORABLE MARION A. HUMPHREY,
JUDGE

AFFIRMED

M. MICHAEL KINARD, Judge

Brian Keith Walker appeals from his conviction on one count of rape. On appeal, appellant argues that the trial court erred by denying his pre-trial motion to dismiss because his prosecution was barred by the running of the statute of limitations on a charge of rape. Appellant also argues that the trial court erred by denying his motion for a directed verdict because the evidence presented at trial is insufficient to support his conviction. We affirm.

On February 27, 2007, the State charged appellant with one count of rape. The offense with which appellant was charged occurred on May 23, 1998, nine years and three months before appellant was charged. The delay in charging appellant is attributable to the fact that appellant was not matched to DNA evidence recovered from the victim until 2006. On June 22, 2007, appellant filed a motion to dismiss in which he alleged that the State failed to

comply with the statute of limitations. The trial court denied appellant's motion in an order entered on March 24, 2008.

At the trial, Pam Kitsmiller, a nurse at St. Vincent's Doctors Hospital, testified that she treated the victim on the night of the incident. She testified that the victim had tears, abrasions, and bruising to her genital area. She further testified that the victim gave her a history of a forced sexual encounter with a man who held her at knife point and raped her. According to Kitsmiller, the injuries to the victim were consistent with the history of a forced sexual encounter. Angelo Bakalekos testified that he responded to the report of a rape on May 23, 1998. He took custody of the rape kit that was performed by the hospital staff, which was taken to the police department and stored in the evidence facility. Larisa Ivy testified that she processed the crime scene for evidence. She identified a photograph of a window with the screen removed from the outside. She also identified a photograph of the bedroom area that showed a phone that had been disconnected from the wall. A fingerprint was collected from one of the phones. Ivy transported all of the physical evidence, including the rape kit, to the Arkansas State Crime Lab.

Mickey Holloway, a latent print examiner with the Little Rock Police Department, testified that there was one usable print that was recovered from the crime scene. The print was not of sufficient quality for a database, but was sufficient for a human to compare. Holloway identified the print as being the left thumb print of appellant. Mary Robnett, the Arkansas CODIS Administrator, testified that the state crime lab obtained a match to the

DNA collected in the rape kit in 2006. Robnett testified that the DNA sample collected from appellant matched the DNA taken from the rape kit in 1998.

The victim testified that she was spending the night with her friend when the incident occurred. She testified that a man who had his face covered up and was carrying a knife woke her up and told her to move to the other bed in the room. The man attempted to rape the other woman, then stopped and raped the victim, both digitally and with his penis.

At the close of the State's evidence, appellant moved for a directed verdict, which was denied. At the end of appellant's case, appellant again moved for a directed verdict and the motion was denied. The jury found appellant guilty on the charge of rape. In a judgment and commitment order entered on February 23, 2009, the trial court sentenced appellant to 480 months' imprisonment in the Arkansas Department of Correction. Appellant filed a notice of appeal on February 19, 2009.

Although it is appellant's second point on appeal, we must, due to double jeopardy concerns, address appellant's sufficiency argument first. *Stegall v. State*, 340 Ark. 184, 8 S.W.3d 538 (2000). An appeal from a denial of a directed-verdict motion is a challenge to the sufficiency of the evidence. *Flowers v. State*, 373 Ark. 127, 282 S.W.3d 767 (2008). A challenge to the sufficiency of the evidence asserts that the verdict was not supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence that is forceful enough to compel a conclusion one way or the other beyond speculation or conjecture. *Id.* We review the evidence in a light most favorable to the State and consider

only the evidence that supports the verdict. *Ingle v. State*, 2010 Ark. App. 410, 379 S.W.3d

32. We affirm where the record reveals that substantial evidence sustains the verdict. *Brown v.*

State, 2010 Ark. App. 154, 377 S.W.3d 354.

Appellant's argument is without merit. Appellant was tried for and convicted of the offense of rape. A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person by forcible compulsion. Ark. Code Ann. § 5-14-103(a)(1) (Supp. 2009). Appellant argues on appeal that, because the State failed to prove forced entry into the apartment where the victim was sleeping, there was no evidence of "forcible compulsion." However, the victim testified that the man who had intercourse with her on the night in question, who was identified by the forensic evidence as appellant, did so by forcible compulsion. The testimony of the victim is, by itself, substantial evidence to support a conviction on a charge of rape. *Rounsaville v. State*, 2009 Ark. 479, 346 S.W.3d 289. The jury's verdict was supported by substantial evidence. The trial court did not err by denying appellant's motions for a directed verdict.

Appellant's other argument on appeal is that the trial court erred by denying his motion to dismiss based on failure to comply with the statute of limitations. This argument raises a point of statutory interpretation. We review questions of statutory interpretation de novo and construe criminal statutes strictly, resolving all doubts in favor of the defendant. *Lampkin v. State*, 2009 Ark. App. 382, 309 S.W.3d 223.

Cite as 2010 Ark. App. 688

At the time the offense was committed in 1998, the statute of limitations for a charge of rape was six years. Ark. Code Ann. § 5-1-109(b)(1). In 2001, however, the legislature added subsection 5-1-109(b)(1)(B), which stated as follows:

However, for rape, § 5-14-103, the period of limitation may be extended to fifteen (15) years during which extended time a prosecution for rape may be commenced if based upon forensic deoxyribonucleic acid (DNA) testing or another test that may become available through an advance in technology.¹

On appeal, appellant argues that subsection (b)(1)(B) should not apply to his case because the State failed to show an advance in technology in DNA testing. Appellant's argument is based upon a faulty reading of the statute. The 2001 amendment clearly applies to prosecutions based upon DNA evidence *or* another test that may become available through an advance in technology. The use of the disjunctive "or" means that the phrase "through an advance of technology" applies to a new test and not to DNA testing. Appellant does not challenge that his conviction was based upon DNA evidence. The wording of the 2001 amendment that added section 5-1-109(b)(1)(B) makes it clear that the legislature intended for the extension of the statute of limitations to apply to a situation such as the one presented here in which the State had a DNA profile of the offender and it took longer than the original six-year statute of limitations for the profile to be matched to an individual. Therefore, appellant's

¹In 2009, the legislature redrafted subsection (b)(1)(B), which currently reads as follows:

However, for rape, § 5-14-103, the period of limitation is eliminated if biological evidence of the alleged perpetrator is identified that is capable of producing a deoxyribonucleic acid (DNA) profile.

argument that the 2001 amendment does not apply because there was no showing of an advancement in DNA testing fails.

As part of his argument, appellant also asserts that the State was required under Arkansas Code Annotated section 5-1-109(i) to file an information containing the genetic information to toll the statute of limitations. Section 5-1-109(i) is not applicable in this case because that section provides a mechanism for the State to toll the statute of limitations when it has the genetic profile of an unidentified defendant. In the case at bar, charges were brought against appellant prior to the running of the statute, rendering it unnecessary for the State to file an information containing the genetic information of the DNA recovered from the victim. The trial court did not err by denying appellant's pre-trial motion to dismiss. The judgment of the trial court is affirmed.

Affirmed.

PITTMAN and GLADWIN, JJ., agree.