

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-519

STEVEN RAY BAKER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered DECEMBER 15, 2010

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DISTRICT
[NO. CR-2009-237]

HONORABLE JAMES O. COX,
JUDGE

AFFIRMED

JOSEPHINE LINKER HART, Judge

A jury found appellant, Steven Ray Baker, guilty of the second-degree sexual assault of his stepdaughter, who was eight years old at the time she testified at trial. Appellant appeals and challenges the sufficiency of the evidence, arguing that his stepdaughter was an incompetent witness. His argument, however, is not preserved for appellate review, and accordingly, we affirm.

Appellant was convicted of second-degree sexual assault, primarily on the testimony of his stepdaughter. At trial, she testified that during the summer after her kindergarten year, appellant touched her “inside” her pajamas in her “bad spot,” which was demonstrated at trial on a doll, and told her he would “whip” her “butt” if she told anyone. Appellant did not object to the testimony or competency of his stepdaughter as a witness at any time during the

trial.

At the close of the State's case, appellant moved for a directed verdict, asserting that the evidence presented was "insufficient to establish a prima facie case of sexual assault in the second degree." The circuit court denied appellant's motion. Appellant rested without presenting any evidence and then renewed his motion for a directed verdict, further arguing that there had not been "evidence or testimony of an actual sexual act or sexual gratification" or "sufficient evidence to establish a prima facie case or establish that there was actually sexual contact that occurred." The court again denied the motion.

In reviewing a challenge to the sufficiency of the evidence, we review all evidence introduced at trial, whether correctly or erroneously admitted. *Eichelberger v. State*, 323 Ark. 551, 916 S.W.2d 109 (1996). We affirm if there is substantial evidence to support the conviction when viewing the evidence in the light most favorable to the State. *Morris v. State*, 86 Ark. App. 78, 161 S.W.3d 314 (2004). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond speculation or conjecture. *Id.*

A person commits sexual assault in the second degree if, being eighteen years of age or older, he engages in sexual contact with another person who is less than fourteen years of age and is not the person'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).

In his brief, appellant challenges the sufficiency of the evidence to support his conviction, arguing that his stepdaughter was an incompetent witness and thus the evidence was insufficient to show that a crime occurred. Review of sufficiency challenges, however, require appellate courts to consider all evidence, whether correctly or erroneously admitted, and if the evidence is determined to be insufficient, there is no need to consider other arguments because the case will be reversed and dismissed. *Eichelberger, supra*. Only if the evidence is determined to be sufficient, will we then consider other potential trial errors. *Id.* Thus, appellant's argument—that the evidence is insufficient to support his conviction because the victim was an incompetent witness—is based on a false premise about appellate review. We must still consider the stepdaughter's testimony in our review of the sufficiency of the evidence. Moreover, appellant did not challenge the competency of the victim to testify. His failure to do so precludes this issue from being reviewed on appeal. *Stevenson v. State*, 2009 Ark. App. 582.

Furthermore, parties cannot change the grounds for their objection on appeal. *Morris, supra*. A party is limited by the scope and nature of the objections and arguments made at trial. *Id.* In a sufficiency challenge, a party must state the specific basis for the challenge, and arguments not raised at trial will not be addressed for the first time on appeal. *Id.* At trial, appellant made a directed-verdict motion in which he challenged the sufficiency of the evidence, specifically stating that there was no evidence that sexual gratification or contact had actually occurred. Appellant's brief then argues, under his sufficiency challenge, that his

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stepdaughter was an incompetent witness. As appellant has changed the grounds of his objection on appeal, the argument he makes on appeal is not preserved. And he does not raise on appeal his challenge to the sufficiency of the evidence to support proof of sexual contact or gratification. Arguments not raised on appeal are deemed waived. *King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996).

Affirmed.

VAUGHT, C.J., and GLOVER, J., agree.