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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-22-215

SHAWN MCLEMORE APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered December 14, 2022 APPEAL FROM THE GRANT COUNTY CIRCUIT COURT [NO. 27CR-20-99] HONORABLE CHRIS E WILLIAMS, JUDGE AFFIRMED

STEPHANIE POTTER BARRETT, Judge

Shawn McLemore was convicted by a Grant County Circuit Court jury of one count of rape and one count of sexual assault in the second degree. The victim was his nine-year-old stepdaughter. He was sentenced to twenty-five years' imprisonment for the rape conviction and twenty years' imprisonment for the second-degree sexual-assault conviction, with the sentences ordered to be served concurrently. On appeal, McLemore argues (1) that the circuit court abused its discretion by allowing hearsay statements into evidence during Officer Everett Wilkerson's testimony, and (2) there was insufficient evidence to find him guilty of rape and sexual assault in the second degree. We affirm the convictions.

Although it is McLemore's second argument on appeal, we must address the sufficiency of the evidence first for purposes of double jeopardy. *Lewondowski v. State*, 2022 Ark. 46, 639 S.W.3d 850. A motion for directed verdict at a jury trial is considered a challenge to the sufficiency of the evidence. *Marbley v. State*, 2019 Ark. App. 583, 590 S.W.3d 793. In reviewing

a challenge to the sufficiency of the evidence, this court views the evidence in the light most favorable to the State and considers only the evidence that supports the verdict. *Barfield v. State*, 2019 Ark. App. 501, 588 S.W.3d 412. We will affirm a circuit court's denial of the directed-verdict motion if there is substantial evidence, either direct or circumstantial, to support the verdict. *Marbley*, *supra*. 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 resorting to speculation and conjecture. *Barfield*, *supra*.

"A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age." Ark. Code Ann. § 5-14-103(a)(3)(A) (Supp. 2021). Deviate sexual activity means "any act of sexual gratification involving [t]he penetration, however, slight, of the anus or mouth of a person by the penis of another person; or [t]he penetration, however, slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person." Ark. Code. Ann. § 5-14-101(1)(A) & (B) (Supp. 2021).

"A person commits sexual assault in the second degree if the person, being eighteen years of age or older, engages in sexual contact with another person who is less than fourteen years of age and not the person's spouse." Ark. Code Ann. § 5-14-125(a)(3) (Supp. 2021). "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(11).

On October 26, 2020, Julie McLemore could not find her husband or her nine-year-old daughter, Child 1, inside their home, so she began looking for them outside. As she opened

the door of a backyard shed where McLemore and Child 1 frequently worked on projects, she found McLemore standing in the shed, naked from the waist down, with Child 1 kneeling in front of him. McLemore responded by pulling up his pants and walking into the house, where Julie confronted him and told him to leave. Julie called 911, and McLemore was arrested.

At the close of the State's case, McLemore's counsel made the following motion for directed verdict:

> I'm not sure if the evidence is clear about whether—whether the child—as far as the touching goes, that's—that's—it would be—the testimony was very vague. I'm not sure that—that it meets the burden of proof beyond a reasonable, just touched—it's—you know, not a lot of detail at all, nothing about how far Mr. McLemore's hand might have—or fingers or whatever would've gone into the private area. So based upon the—the vagueness of the testimony in that regard and I think it is a little hard to believe that—that this was happening just any time of the day or night in a household without anyone else seeing it. I think that calls into question more—so based on that, I'll make a motion for directed verdict.

The circuit court denied the motion. Counsel renewed the motion at the close of all the evidence on the same grounds—that the testimony was "very vague"—and the circuit court again denied the motion.

McLemore now argues on appeal that there is insufficient evidence to support his convictions because Julie McLemore did not testify that she actually saw McLemore and Child 1 touching each other's private areas, and there was no testimony that Child 1 touched his private area. This argument is not preserved for appellate review.

In a jury trial, a motion for directed verdict must be made at the close of the State's evidence and again at the close of all the evidence, and it must state the specific grounds for the motion and why the evidence is deficient; failure to challenge the sufficiency of the evidence in this manner constitutes a waiver of any question regarding the sufficiency of the evidence. Ark.

R. Crim. P. 33.1(a) & (c) (2021). Here, McLemore's counsel argued that the testimony regarding the touching was "very vague" and that there was "not a lot of detail at all." This motion failed to specify which allegation the motion was addressing or if it was addressing both allegations, and it failed to apprise the circuit court which elements of the charges the State had failed to prove. Because McLemore's motions for directed verdict fall short of the requirements set forth in Rule 33.1 of the Arkansas Rules of Criminal Procedure, his sufficiency arguments are waived on appeal.

Nevertheless, had McLemore's sufficiency arguments been preserved, his convictions would be affirmed. He argues that Julie McLemore did not see him and Child 1 touching each other; he further asserts that while Child 1 testified that he touched her "upper chest" (the terminology she used for her breasts) and her "private area" (the terminology she used for either sex's genital area), she did not testify that she had touched his private area.

Child 1 testified that McLemore touched her upper chest with his hand, and he touched her private area with his hand and his private area on both the inside and outside. She said that it had happened more than ten times over the past year, sometimes in McLemore's truck and sometimes in the shed. She had not told anyone because McLemore told her that he would be in big trouble, and she was afraid that he would hurt her siblings.

There is no requirement that Child 1 touch McLemore in order for him to be convicted of rape and sexual assault in the second degree. A rape or sexual-assault victim's testimony alone is sufficient and constitutes substantial evidence to support those types of convictions when the acts described fall within the definitions of sexual contact and deviate sexual activity. *Kirkland v. State*, 2021 Ark. App. 56, 618 S.W.3d 167. We do not weigh the evidence presented at trial

or assess witness credibility. *Turner v. State*, 2018 Ark. App. 5, 538 S.W.3d 227. It is the jury's role as the finder of fact to resolve questions of inconsistent evidence and conflicting testimony, and the jury is free to believe the State's version of the facts over the defendant's account. *Robinson v. State*, 2017 Ark. App. 689, 537 S.W.3d 765. The jury is not required to abandon common sense, and it may draw reasonable inferences from the evidence. *Id.* There is no requirement that there be scientific evidence of rape, as the victim's testimony, if believed, constitutes sufficient evidence to establish guilt. *Hillman v. State*, 2019 Ark. App. 89, 569 S.W.3d 372. Child 1's testimony that McLemore touched her upper chest with his hand and that he touched her private area, both inside and outside, with his hand and his private area is sufficient evidence to support the rape and second-degree sexual-assault convictions.

McLemore next argues that the circuit court abused its discretion by allowing hearsay statements into evidence. A pretrial hearing was held to determine whether McLemore's statement made to Officer Everett Wilkerson of the Sheridan Police Department would be admissible at trial. Officer Wilkerson testified he was dispatched to a possible sexual assault of a minor, and he was looking for the address when he saw a person later identified as McLemore sitting on the tailgate of a pickup truck. He said that McLemore waved him down and said, "Hey, right here." Officer Wilkerson testified that when he stopped, McLemore ducked his head and said, "Man, I'm—I'm guilty. I did it. Take me to jail." Officer Wilkerson stated that McLemore held his hands out in front of him; he placed McLemore in handcuffs and read him his rights; he asked McLemore if he wanted to answer any questions; McLemore responded, "Not right now"; and Officer Wilkerson placed McLemore in the patrol car and took him to the jail.

The State argued McLemore's statement was admissible. McLemore admitted he had made a statement, but he asserted that Officer Wilkerson's testimony was not accurate, and what he had actually said was far less incriminating. The circuit court stated that it was not its job to determine if Officer Wilkerson's statement was "in fact, true or factual or a correct restatement or not. My job is to determine whether or not the statement is admissible." The State argued the statement was voluntary and spontaneous, and McLemore was not in custody or being questioned at the time he made it. The circuit court found that the statement was a "spontaneous utterance" made by McLemore when he was approached by Officer Wilkerson before McLemore was in custody or had invoked his right to remain silent and that it was admissible.

On appeal, McLemore argues that his statement was inadmissible hearsay because it did not fall under the excited-utterance exception to the hearsay rule. This argument is not preserved for appellate review. McLemore never argued to the circuit court that his statement was hearsay. This court will not consider arguments raised for the first time on appeal; a party cannot change his or her grounds for an objection or motion on appeal but is bound by the scope of arguments made at trial. *Parret v. State*, 2022 Ark. App. 234, 644 S.W.3d 472.

Nevertheless, even if the argument had been preserved, there was no error. Matters regarding the admissibility of evidence are left to the sound discretion of the circuit court, and evidentiary rulings will not be reversed absent an abuse of discretion. *Montgomery v. State*, 2022 Ark. App. 329, 653 S.W.3d 21. Abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires that the circuit court act improvidently, thoughtlessly, or without due consideration. *Id.* Furthermore, an evidentiary ruling will not be

reversed unless the appellant can demonstrate that he was prejudiced by the ruling, as prejudice is not presumed. *Tilmon v. State*, 2022 Ark. App. 291, 646 S.W.3d 286.

McLemore contends the circuit court erred in allowing hearsay statements into evidence during Officer Wilkerson's testimony. The statement of which he complains is his own statement to Officer Wilkerson. A statement is not hearsay if it is offered against a party and is his own statement. Ark. R. Evid. 801(d)(2)(i). A statement made by a defendant and offered against him at trial constitutes an admission of a party opponent. *Crockett v. State*, 2021 Ark. App. 422, 634 S.W.3d 821. Because McLemore made the statement freely and of his own volition as Officer Wilkerson approached him, his statement is not hearsay, and the circuit court did not abuse its discretion in admitting it.

Affirmed.

VIRDEN and HIXSON, JJ., agree.

James Law Firm, by: *William O. "Bill" James, Jr.*, and *Jacqueline Mangandi*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Jason Michael Johnson*, Ass't Att'y Gen., for appellee.