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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-23-456

JESSIE ALEXANDER EVANS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** June 5, 2024 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. 23CR-20-451] HONORABLE TROY B. BRASWELL, JR., JUDGE AFFIRMED

BART F. VIRDEN, Judge

Jessie Alexander Evans was tried by a jury and convicted of rape in the Faulkner County Circuit Court, and he appealed. Evans challenges the sufficiency of the evidence supporting his conviction, the circuit court's admission of the text messages between the victim and her friend, and the circuit court's denial of his request to impeach the victim with a prior inconsistent statement. We affirm.

I. *Relevant Facts*

On May 15, 2020, Evans was charged with one count of rape and second-degree sexual assault.[1] On February 23, 2023, Evans filed a motion in limine seeking to suppress hearsay statements made via text message by the victim to her friend, Reagan McCombs.

[1]The sexual-assault charge was dropped, and an amended criminal information was entered on March 7, 2023.

At the March 2, 2023, suppression hearing, the circuit court took the matter under advisement. It found that at trial, before the text messages were to be introduced, counsel should approach the bench, and the court would rule on the motion at that time. The court stated that the decision "is very dependent on the facts of the case and the timeline. And so I just need to hear that testimony first."

Before the trial, the State requested that any testimony or evidence regarding the civil suit against Evans be deemed inadmissible as irrelevant. Defense counsel responded that such testimony or evidence "could become relevant if anything goes to credibility regarding inconsistent statement." The court found that the evidence was excluded, but "if something comes up that you believe opens that door, just approach, and we will address it at that time." After some discussion, it was discovered that the statement was not verified, and defense counsel stated that "we won't bring it up." The statement in the civil suit was not proffered.

At the trial, the victim testified that she knew Evans as the bouncer at Bear's Den Pizza, a college bar across the street from the University of Central Arkansas. They exchanged phone numbers and texted occasionally. On September 20, 2019, Evans and the victim texted about getting her underage friend into the bar that evening. When the victim arrived at Bear's Den Pizza, Evans chatted with the victim at the bar for a little while, and at 10:39 p.m., Evans texted her and proposed that they "disappear for a sec." They met outside in the parking lot at 10:41, and he asked if she wanted to talk in his car. They got into the car, and "he immediately asked if I wanted to have sex. I had told him that I did not want to have sex." They agreed to oral sex, and she performed oral sex on him first.

After that, as she was getting into the back seat, he "gave me a two-handed shove." She took her pants off, and he initiated oral sex. She testified that at some point Evans became unclothed, and after five minutes, "[she] no longer wanted to be in that situation" and became "kind of frantic." She began to wiggle around, and she "felt his penis touch [her] vaginal area," and she told him that she did not want to have sex. He asked her "why not? Why no sex? Just 30 seconds." She testified, "I kept telling him no. He kept asking for it. I kept telling him no." The victim testified that Evans penetrated her anus with his penis. She pulled it out of her, and he repeated saying "three seconds" and "I just need three seconds." He penetrated her anus again, and she pulled it out of her again. She tried to open the door and get out of the car, but he grabbed her arm and then "tried to put it in again." In this attempt, he slightly penetrated her vagina. He inserted his penis inside her anus again. Once she was able to work her way out from under him, he held her head down, and inserted his penis into her mouth. The victim testified that Evans bruised her during the rape. Eventually, Evans released her head, and she was able to put her pants back on and leave the vehicle. He asked her, "What am I supposed to do with this?" and pointed to his erect penis. She responded that it was not her problem and closed the door. She immediately went to her car, which was parked at a gas station nearby. While she waited for Evans to go back inside the bar, she texted her friend Reagan, who was traveling back to Conway from a soccer game "that that had just happened, that I didn't want it to happen, that I told him to stop." The victim sent the first two texts at 11:11 p.m., immediately after the rape, but Reagan did not respond until 12:23 a.m. Once the victim saw Evans go back inside the bar, she reentered the bar and to get her friends and tell them they needed to leave. Her friends

were paying their bill as she walked in, and she "grabbed them" and left. She did not tell anyone at that time that she had been raped, and she drove her friends to their residences.[2] The victim stated that she did not immediately report the rape to the police because she was afraid her family would be disappointed in her, but she decided to report it to the police four days later. Photographs were taken of her bruises, and a rape kit was administered. The tape lift of the victim's underwear produced a partial male DNA profile consistent with the DNA profile obtained from Evans.

The State called Reagan McCombs, the victim's best friend at the time of the rape, to testify. She testified that she was not with the victim the evening of the rape, but she received text messages from the victim from 11:11 p.m. to 12:31 a.m. Counsel objected that the text messages were hearsay, and the present-sense-impression and excited-utterance exceptions did not apply except for the first two texts time stamped at 11:11 p.m. Counsel argued that after the initial texts, the victim reentered the bar and had further conversations with other people, drove home, and "went about her business." These intervening events precluded the excited-utterance exceptions because she was no longer under the stress of excitement, and there was no testimony that she was "continually upset or excited." Counsel contended that "there's questions being asked, and information being pulled out," and that also precludes the excited-utterance exception because the texts were "not spontaneous." The court ruled that the initial texts were admissible under the present-sense-impression exception and that all the texts from 11:11 p.m. to 12:31 a.m. were both present sense impressions and excited utterances because two hours after the rape, she was still under

[2]The victim was the designated driver that evening.

the stress of being forcibly raped and processing what had happened. Reagan resumed her testimony, stating that at 11:23 p.m., she responded, [W]hat the fuck happened? From 11:24 to 12:31, the victim told her that Evans had raped her. Reagan gave the text messages to the police on September 24.

Evans moved for a directed verdict, and it was denied. Defense counsel called Evans to the stand, and he testified that on September 20, 2019, he was working security at Bear's Den Pizza, and he and the victim had been texting during the day about getting her underaged friend in the bar. That night, they saw each other at the bar, and then they met up outside in the parking lot. They entered his car and agreed to have oral sex. Evans testified that she performed oral sex on him first, then she got into the back seat and undressed, and he performed oral sex on her. He asked her if she wanted to have intercourse and she said no. He testified that he respected her wishes, and she got dressed and went to her car for a while, then reentered the bar. Evans renewed his directed-verdict motion, which again was denied.

The jury found Evans guilty of rape and sentenced him to fifteen years' imprisonment in the Arkansas Division of Correction. He timely filed his notice of appeal, and this appeal followed.

II. *Discussion*

Evans challenges the sufficiency of the evidence supporting his conviction for rape; however, he is procedurally barred from mounting the challenge on appeal. Arkansas Rule of Criminal Procedure 33.1 requires that the grounds for a directed-verdict motion shall state specific grounds and provides, in pertinent part:

> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense.

See Phillips v. State, 361 Ark. 1, 203 S.W.3d 630 (2005). The reasoning underlying the specificity requirement is that when specific grounds are stated and the absent proof is pinpointed, the circuit court can either grant the motion or, if justice requires, allow the State to reopen its case and supply the missing proof. *Id.* A further reason that the motion must be specific is that this court may not decide an issue for the first time on appeal. *Id.* This court has held that Rule 33.1 is to be strictly construed. *See McGaugh v. State*, 2023 Ark. App. 457, 678 S.W.3d 410.

Here, Evans made the following directed-verdict motion after the State rested its case, which the circuit court denied:

> Judge, at this time, the defense would move for a motion for directed verdict. The state has charged Mr. Evans under 5-14-103, Rape. The elements of that charge are that he did unlawfully and feloniously on or about September 20, 2019, engage in sexual intercourse or deviant sexual activity with another person by forcible compulsion. Judge, we don't think that the State has provided any evidence to prove that he did that.

He then made the following renewal of his motion at the close of his defense: "I would ask that our entire argument at the end of the State's case be taken from the record and put in right here." Because Evans's directed-verdict motion was nonspecific, no argument regarding sufficiency is preserved for this court's review, and we are unable to address his argument.

B. Admission of Text Messages

Evans argues that the circuit court abused its discretion by admitting text messages between the victim and her friend on the night of the rape because they are inadmissible hearsay under Ark. R. Evid. 802 and do not fall under either the present-sense-impression or excited-utterance exceptions to hearsay. He contends that there was no evidence that the victim was experiencing continued excitement one hour after the alleged rape and relies on the victim's testimony that after she saw Evans go back inside the bar, she reentered the bar, spoke with her friends, and drove them home; thus, she was no longer in an excited state, and she had time to reflect and deliberate. We disagree.

Though the circuit court found that the text messages were admissible pursuant to both the present-sense-impression and excited-utterance exceptions, we focus our analysis on the excited-utterance exception because it clearly applies to the entirety of the text messages. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ark. R. Evid. 801(c). Arkansas Rule of Evidence 803(2) provides that an excited utterance is not excluded by the hearsay rule, even though the declarant is available as a witness, and an excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. This court has observed that sexual abuse is a startling event within the meaning of Rule 803(2). *See Frye v. State*, 2009 Ark. 110, at 4, 313 S.W.3d 10, 13; *Killcrease v. State*, 310 Ark. 392, 836 S.W.2d 380 (1992).

This court will not reverse a circuit court's decision regarding the admission of evidence absent a manifest abuse of discretion. *Beard v. State*, 2020 Ark. 62, at 6, 594 S.W.3d 29, 32. An abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires that the court acted improvidently, thoughtlessly, or without due consideration. *Id.* Moreover, an appellate court will not reverse a circuit court's evidentiary ruling absent a showing of prejudice. *Id.*

The relevant inquiry is whether the statement was made under the stress of excitement or was made after the declarant calmed down and had an opportunity to reflect, which is a matter within the circuit court's sound discretion. *Lester v. State*, 2024 Ark. App. 206, at 18, 687 S.W.3d 344, 357. Admissibility is not to be measured by any precise number of minutes, hours, or days but requires that the declarant is still under the stress and excitement caused by the event. *Ludwick v. State*, 2021 Ark. App. 347, 635 S.W.3d 330. Continuing emotional or physical shock, unabated fear, and other factors may also prolong the time, making it proper to resort to Rule 803(2); *Peterson v. State*, 349 Ark. 195, 199, 76 S.W.3d 845, 847 (2002). The trend in the law is toward relaxing the time element. *Jones v. Currens*, 104 Ark. App. 187, 192, 289 S.W.3d 506, 511 (2008).

The record contains sufficient evidence from which the circuit court could have concluded that the victim was still under the stress and excitement caused by the event when she sent the admitted text messages. In finding that the text messages that occurred between 11:11 p.m. and 12:31 a.m. constituted excited utterances, the court found that "based on the situation she was in, in her testimony that she was scared and tried to get away and couldn't get away. That is a traumatic experience." The texts support the court's conclusion:

VICTIM:	Reagan I told him no and he did it anyways	11:11 p.m.
VICTIM:	I said no and tried to push him off	11:11 p.m.
VICTIM:	I was literal just raped please	11:13 p.m.
VICTIM:	Reagan please	11:16 p.m.
VICTIM:	Idk what to do	11:16 p.m.
VICTIM:	Please	11:25 p.m.
VICTIM:	Reagan in need you so bad I'm literally sober I drove. Please.	12:04 p.m.
VICTIM:	I tried to shove him off of me I tired so hard. He wouldn't get off of me.	12:04 p.m.
REAGAN:	hold up what the fuck happened?	12:23 a.m.
VICTIM:	Reagan he wouldn't get off	12:24 a.m.
VICTIM:	I tried to shove him off I told him no	12:24 a.m.
REAGAN:	where were you?	12:23 a.m.
VICTIM:	The Den	12:24 a.m.
VICTIM:	I said n indie	12:25 a.m.
VICTIM:	No more	12:25 a.m.
REAGAN:	Okay, this is weird and award question but like what exactly did he do?	12:26 a.m.
VICTIM:	He literally put his Dick in my fucking butt twice. I told him no and I ripped it out and he put it back on me. I think we had sex too because my vagina is burning. He was so mix bigger than me and I tried so hard. I was pushing him off it was in a car. He said he wanted to talk so I did it to myself.	

	But please help me	12:27 a.m.
REAGAN:	holy fuck [victim]. were you w lauren? who was it?	12:29 a.m.
VICTIM:	She was inside it was his 15 he said he wanted to talk to me so I said okay. The black bouncer at bears den	12:29 a.m.
VICTIM:	Reagan please	12:30 a.m.
VICTIM:	I can't	12:30 a.m.
REAGAN:	Wait it was the bouncer at the bears den?	12:31 a.m.

In the initial round of contested text messages (from 11:11 p.m. to 12:04 a.m., when Reagan did not respond), the victim pleads for help three times. In the next round of text messages during her conversation with Reagan (the eight minutes from 12:23 a.m. to 12:31 a.m.), the victim begs for help twice and tells Reagan she does not know what to do. Clearly, the circuit court did not err in determining that she was under the stress and excitement caused by the event as she was texting Reagan. Additionally, before Reagan responded to her texts, Evans was texting the victim (from 11:22 p.m. to 12:11 a.m.), telling her "U r amazing" and repeatedly asking her where she was; thus, the circuit court could have concluded that being contacted by her rapist who wanted to know her location caused the victim to experience continuing emotional shock and unabated fear, prolonging the time in which an excited utterance could occur.

Moreover, it is clear from the record of the transcript that the circuit court carefully exercised its discretion by admitting only a part of the text-message exchange between the victim and Reagan. The court considered the circumstances surrounding the texts, then

declined to admit a third page of texts that occurred the day after the rape, finding that there had been time for the victim to reflect before sending those texts. *See Bates v. State*, 2017 Ark. App. 123, at 7, 516 S.W.3d 275, 279. The record firmly establishes that the text messages at issue fall squarely within the excited-utterance exception to the hearsay rule; therefore, we hold that the circuit court did not manifestly abuse its discretion in admitting the text messages.

C. Prior Inconsistent Statement

Evans contends that the circuit court erred in denying his request to impeach the victim with a prior inconsistent statement she made in the context of the civil suit against Evans and Bear's Den Pizza. Evans's argument fails because he did not proffer the complaint from the civil suit; thus, the issue of the statement's admissibility is not preserved for review. An appellant who seeks relief in this court has the burden of bringing up a sufficient record upon which to grant relief. *Penix v. State*, 2022 Ark. App. 407, at 12, 654 S.W.3d 828, 835. It is well settled that an appellant bears the burden of producing a record demonstrating error. *Id*. Accordingly, we affirm.

Affirmed.

GLADWIN and HIXSON, JJ., agree.

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

Tim Griffin, Att'y Gen., by: *Jacob H. Jones*, Ass't Att'y Gen., for appellee.