

Curtis Jean WHITE v. STATE of Arkansas

CR 90-52

790 S.W.2d 896

Supreme Court of Arkansas
Opinion delivered June 25, 1990

APPEAL & ERROR — PRESERVING QUESTION OF SUFFICIENCY OF THE EVIDENCE FOR APPEAL. — In order to preserve the question of sufficiency of the evidence for appeal, a motion for directed verdict must be made at the conclusion of all the evidence.

Appeal from Drew Circuit Court; *Stark Ligon*, Judge; affirmed.

Clifton Bond, for appellant.

Steve Clark, Att'y Gen., by: *Paul L. Cherry*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, Curtis Jean White, appeals from a conviction of burglary, robbery, second degree battery, and two counts of rape. He states two points of appeal. The first questions the trial court's denial of his directed verdict motion which he made at the conclusion of the state's evidence. The second contends the circumstantial evidence against him was insufficient. We treat the points together and

conclude the evidence was sufficient to support the conviction; even if it were not, White waived his right to question sufficiency of the evidence on appeal by failure to move for a directed verdict at the conclusion of all the evidence. We affirm the conviction.

The victims were an elderly married couple. Billy Carpenter testified he lived in the same apartment building as the victims and was in his apartment in the early morning August 28, 1988. White came to Carpenter's apartment at 4:00 a.m. and asked Carpenter to lend him \$2.00 and engage in fellatio. Carpenter refused both requests. Carpenter testified that White "said he was going around to the other apartment, in front" meaning that of the victims. Carpenter then heard knocking and banging coming from "in the front part of the building." Carpenter said White was wearing a straw hat and had it on as he left Carpenter's apartment headed for the victims' apartment.

The brief for the state argues that the victim's husband "testified that the appellant had used a flashlight and hit his wife with it over the head," and "the appellant had sex with" the wife. That simply is not so. Neither of the victims identified White as the assailant. The victim wife testified she had seen White earlier cutting grass around their apartment building, but she and her husband both specifically stated they could not identify him as the assailant. The victims testified that their assailant beat the wife, raped her twice, and took \$15.00 after breaking in to their apartment. The husband testified that the assailant had a hat and "looked like a colored man." Curtis Jean White is black.

The victims both testified that their assailant was wearing a hat when he entered their apartment. White's sister, with whom he lived, testified she had seen White earlier in the evening of the night and morning in question at a disco wearing his straw hat. Similar testimony was given by Jimmy Clary who had seen White at the disco and again around midnight, wearing a straw hat.

[1] The evidence was sufficient to sustain the conviction, but that does not matter because no motion for directed verdict was made by White at the conclusion of all the evidence. The question of sufficiency of the evidence was not preserved for appeal. Ark. R. Crim. P. 36.21(b); *Remeta v. State*, 300 Ark. 92, 777 S.W.2d 833 (1989); *Houston v. State*, 299 Ark. 7, 771 S.W.2d 16 (1989).

Affirmed.