

DIVISION II

NOT DESIGNATED FOR  
PUBLICATION

CACR05-1262

APRIL 19, 2006

MIKE C. LOBBS

APPEAL FROM THE GRANT COUNTY  
CIRCUIT COURT  
[CR-05-67-2]

APPELLANT

v.

HONORABLE PHILLIP H. SHIRRON,  
CIRCUIT JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

After a bench trial, appellant Mike C. Lobbs was convicted of hunting turkey out of season. On appeal, he challenges the sufficiency of the evidence. We hold that the issue is not preserved for our review.

Arkansas Rule of Criminal Procedure 33.1 provides, in pertinent part:

(b) In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all the evidence.

(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. A renewal at the close of all the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

Ark. R.Crim. P. 33.1 (2005).

Our supreme court interpreted Rule 33.1 in the context of a bench trial in *State v. Holmes*, 347 Ark. 689, 66 S.W.3d 640 (2002). In *Holmes*, the appellant moved for a directed verdict

following the close of the State's case during his bench trial but failed to renew the motion at the close of all the evidence.<sup>1</sup> The trial court convicted Holmes on two of the three charges but later set aside his convictions. The State appealed, arguing that the trial court erred in granting Holmes's motion to set aside the verdicts as he had waived any question pertaining to sufficiency of the evidence by failing to make the appropriate motion at the close of all the evidence. The supreme court agreed and said:

In the present case, Holmes's motion for directed verdict was not made at the close of all the evidence. Rather, it was included during Mr. Kearney's closing argument, as quoted above. Under *Etoch, supra*, [343 Ark. 361, 37 S.W.3d 186 (2001)] we adhere to a strict interpretation of our rules, and we hold that Holmes did not comply with Ark. R.Crim. P. 33.1(b) and (c). In order to preserve the question of the sufficiency of the evidence, Holmes should have made his motion for directed verdict at the close of all the evidence before closing arguments. Because of his failure to do so, we hold that the trial court erred in considering his motion to set aside the verdict for insufficient evidence, and we reverse and remand with instructions to reinstate Holmes's convictions and sentence.

*Holmes*, 347 Ark. at 693, 66 S.W.3d at 643, *see also Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003).

Appellant in this case included an argument that the evidence was insufficient during his closing argument. A motion to dismiss at the close of the State's evidence and again at the close of all the evidence is mandatory to preserve a challenge to the sufficiency of the evidence. Accordingly, we find that the argument is not preserved for our review and affirm.

Affirm.

BIRD and NEAL, JJ., agree.

---

<sup>1</sup>The supreme court amended Rule 33.1 to refer to motions to dismiss rather than motions for directed verdicts in connection with bench trials by *per curiam* order dated April 8, 1999. *See In Re: Rule 33.1, Rules of Criminal Procedure*, 337 Ark. Appx. 621 (1999).