ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION I

CACR 06-650

EMIL ROLAND RATH — February 21, 2007

APPELLANT — APPEAL FROM THE CIRCUIT COURT OF POLK COUNTY

V. — [NO. CR-2005-150]

STATE OF ARKANSAS — HONORABLE JERRY WAYNE LOONEY, JUDGE

APPELLEE

AFFIRMED

Sarah J. Heffley, Judge

Appellant Emil Roland Rath was found guilty by a jury of committing sexual assault in the fourth degree and was sentenced to a term of six years' imprisonment. He contends on appeal that the trial court erred in denying his motion for a directed verdict and by allowing the State to inquire about convictions that had been expunged. We find no error and affirm.

Considering appellant's first argument, directed-verdict motions are treated as challenges to the sufficiency of the evidence. *Vergara-Soto v. State,* 77 Ark. App. 280, 74

S.W.3d 683 (2002). When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State. *Saulsberry v. State,* 81 Ark. App. 419, 102 S.W.3d 907 (2003). Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Miles v. State,* 350 Ark. 243, 85 S.W.3d 907 (2002). Only evidence supporting the verdict is considered. *Carmichael v. State,* 340 Ark. 598, 12 S.W.3d 225 (2000).

Sexual assault in the fourth degree is a violation of Ark. Code Ann. § 5-14-127 (Repl. 2006). Subsection (a)(1) of the statute provides that a person commits this offense if he or she, being twenty years of age or older, engages in sexual intercourse or deviate sexual activity with another person who is less than sixteen years of age and is not his or her spouse. The term "sexual intercourse" means penetration, however slight, of the labia majora by a penis. Ark. Code Ann. § 5-14-101(10) (Repl. 2006). The phrase "deviate sexual activity" is defined as any act of sexual gratification involving the penetration, however slight, of the labia majora or anus of a person by any body member of another person. Ark. Code Ann. § 5-14-101(1).

Janice Turcott lives in Mena and has a daughter, C.T. Ms. Turcott testified that appellant's wife and sister-in-law used to babysit C.T. and that C.T. became acquainted with appellant at that time, when she was approximately eleven years old. In June and July of 2005, Ms. Turcott noticed changes in C.T., and it seemed to her that C.T. and appellant had

become more than just good friends. She observed that they hugged in a way that was a "little too personal." During outings in the park, C.T. and appellant would run the trails ahead of Ms. Turcott, and they would return in an hour, even though Ms. Turcott had told them to come back sooner. These things concerned Ms. Turcott, since C.T. was fourteen and appellant was thirty years old. With her suspicions aroused, she began monitoring C.T. and appellant's emails and instant messages and also recording their phone calls. Based on the content of these communications, Ms. Turcott forbid appellant from seeing her daughter. Ms. Turcott turned the communications over to the police.

C.T. testified that she had known appellant for five years and that appellant and his wife began to socialize more often with her and her mother during the summer of 2005. She said she was being harassed by a man named Russell, and she asked appellant to protect her from this man. She said appellant did so by standing watch over her house at night a couple of times a week.

C.T. recalled that she sneaked out of her house to meet appellant sometime around midnight on August 1, 2005. After talking for a while, they began kissing. She said she tried to back off, but that appellant would not stop. Appellant asked her twice to have sex with him. She said that, although it was not something she wanted to do, she agreed to have sex with him following his second request. C.T. testified that appellant penetrated her vagina with his penis while they lay on his jacket. According to C.T., appellant used a condom that he removed from a pocket in his pants. She was not sure if appellant ejaculated, but she said

that afterwards appellant tied a knot in the condom and placed it in his pocket.

C.T. further revealed in her testimony that she and appellant developed a code with which to communicate over the internet. They used symbols for such phrases as "I love you," and "hugs and kisses." To circumvent the parental controls Ms. Turcott had placed on C.T.'s computer, appellant and his wife set up an email account for C.T. to use without her mother's knowledge.

The State played for the jury tapes of two telephone conversations between appellant and C.T. In them, appellant encouraged C.T. to disobey her mother by meeting with him; appellant advised C.T. that she was not required to respond to police questioning other than to give her name, address, and date of birth; they discussed the possibility that she might be pregnant; they talked about how much they wanted to see each other; and they spoke of "the strength of the ties between us."

Steven Hubbard, an officer with the Mena Police Department, interviewed appellant on September 11, 2005. Officer Hubbard testified that appellant admitted he had sexual intercourse with C.T.

In his testimony, appellant said that he agreed to protect C.T. from Russell Powell and that his being at her house was for that purpose. He denied having sexual intercourse with C.T. He testified that he hurt his back when he was in the military and that he was bedridden the night C.T. claimed they had sexual relations. He also said the statement he gave to Officer Hubbard was made under pressure and that he had made something up so he could

leave. He further maintained that his back was hurting during the interview because he was sitting in a plastic chair and had not taken his evening medication.

Tina Rath, appellant's wife, testified that C.T. asked appellant to watch her house to make sure that Russell was not around. She said that on August 1 appellant had a cold and was also experiencing terrible back pain. She said she had to help him go to the bathroom several times and that he did not leave the house the entire evening.

As his challenge to the sufficiency of the evidence, appellant contends that the only evidence supporting the verdict was the uncorroborated testimony of C.T., and he argues that the jury's finding of guilt rested on speculation and conjecture in light of his and his wife's testimony. Contrary to appellant's arguments, the weighing of evidence lies within the province of the jury, and we are bound by its determination regarding the credibility of witnesses. *Williams v. State,* 351 Ark. 215, 91 S.W.3d 54 (2003). Moreover, it is well settled that the testimony of a child victim alone constitutes substantial evidence to support the verdict. *Pickens v. State,* 347 Ark. 904, 69 S.W.3d 10 (2002). Here, the child testified that she and appellant engaged in sexual intercourse, which is testimony that the jury was entitled to believe. We cannot say there is no substantial evidence to support the guilty verdict.

Appellant next argues that the trial court erred by allowing the State to impeach his testimony by inquiring about two previous convictions of sexual assault in the first degree,

identified as class C felonies, that had been expunged. We disagree.

Rule 609(a) of the Arkansas Rules of Evidence provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or witness, or (2) involved dishonesty or false statement regardless of the punishment.

Rule 609(c) provides in pertinent part that:

> Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted.

Although appellant's prior convictions had been expunged, the trial court allowed the State's inquiry because there had been no finding of rehabilitation when the convictions were expunged. The trial court referenced the supreme court's decision in *Wal-Mart Stores, Inc. v. Regions Bank Trust Dep't,* 347 Ark. 826, 69 S.W.3d 20 (2002), where it held that Rule 609(c) prohibits the admission of expunged convictions only where there is a finding of rehabilitation at the time of expungement.

Appellant contends that *Wal-Mart Stores, Inc.* is distinguishable because the prior convictions in that case involved dishonesty or false statement. We fail to perceive any meaningful distinction because the supreme court's holding in *Wal-Mart Stores, Inc.* concerning the admissibility of expunged convictions did not hinge on the nature of the crime

involved.

Appellant also argues that use of the prior convictions was not proper under Rule 609(a) because sexual assault in the first degree does not involve dishonesty or false statement and because the prejudicial effect outweighed the probative value. However, these issues were not brought to the trial court's attention, and we do not consider arguments raised for the first time on appeal. *Simmons v. State,* 95 Ark. App. 114, ___ S.W.3d ___ (2006). Appellant also contends that the trial court erred when it stated that the prior convictions were not subject to expungement. We can find no error because the trial court's comment was not the basis for its ruling and because this issue is also being raised for the first time on appeal.

Affirmed.

MARSHALL, J., agrees.

Hart, J., concurs.