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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-14-239

	OPINION DELIVERED APRIL 22, 2015
MICHAEL WOOLE APPELLANT	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT, THIRD DIVISION [NO. CR-2012-922]
V.	HONORABLE CHARLES E. CLAWSON, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Chief Judge

Appellant Michael Woole was convicted in the Faulkner County Circuit Court of two counts of aggravated cruelty to a dog, a Class D felony. He was sentenced to forty-eight months' probation. On appeal, he claims that there was insufficient evidence to find that he "tortured two dogs" and that the trial court erred in denying his motion to suppress.[1] We affirm.

Appellant was charged by felony information filed September 4, 2014, with two counts of aggravated cruelty to a dog under Arkansas Code Annotated section 5-62-104 (Supp. 2012). At the bench trial, Richard Green testified that, on August 30, 2012, he was running in his Conway neighborhood and heard the squeal of a dog. He stated,

[1]This appeal is presented to us a second time following rebriefing and settlement of the record. *Woole v. State*, 2014 Ark. App. 610.

> As I was going to the back, his truck was parked up there by the pen, and I saw him inside the cage hitting the dog. When I saw that, I asked him, "What are you doing?" He replied, "I'm putting him down. I've got to put him down." So, I went back to the front. That's when I made the 911 call. I was telling the 911 representative what was going on and then I heard one more "ork" and the final shot to one of the dogs.

Green explained that a reddish dog with a white stripe on its nose barked at appellant while appellant hit a solid-black dog with a t-ball sized baseball bat. Green believed that the reddish dog was a mixed breed that was part pit bull and the black dog was a Labrador. Green said that he saw one dog being beaten and heard the second dog being beaten while trying to report the incident to 911. Green had not seen either dog biting or lunging at appellant. Once Green heard no beating sounds or any dogs barking, he walked to the back and saw that the two dogs were gone and that appellant was driving away in his truck. He reported to 911 that the dogs were gone, but that "the only thing you'll notice is the blood." When he went to the pen with authorities once they arrived, Green saw "blood matter" in the empty pen. Green saw where it looked like appellant had washed off blood by the house.

Brian Edwards, a training supervisor for the Conway Police Department Emergency Operations Center, provided the recording of Green's 911 call to the center. Green's recorded statements to the dispatcher were played at trial.

Conway Animal Welfare Officer David Mitchell testified that he responded to Green's call and drove onto the driveway of the house. Officer Mitchell testified, without objection, as to what he saw in the eight photographs that he had taken that day and produced in court. He said that he saw the dog pen from the driveway. He also saw blood

in the dog pen, splattered on a tree, and on nearby concrete blocks and a railing. He claimed that he knocked on the front door of the house several times with no response.

During cross-examination of Officer Mitchell, appellant moved to strike the photographs, arguing that the officers had no exigent circumstances to justify entering the property without a search warrant. He argued that there had been time to secure the property and obtain a warrant. The State responded that this argument should have been raised before the introduction of the photographs. Also, the State claimed that exigent circumstances existed to secure the evidence in the dog pen, which was in plain view from the road. There was testimony that an effort had been made by appellant to wash away evidence before officers arrived. The State argued that nothing had been taken from the scene and officers did not go inside a residence. Further, the State claimed that appellant did not prove that he owned the home and questioned appellant's standing to have the evidence suppressed without proving ownership of the land. The trial court took appellant's suppression motion under advisement.

Conway Police Department Investigator David Short testified that he telephoned appellant as part of his investigation. A recording of the conversation was played for the court. During the conversation, appellant told Officer Short that he knew why he was called and that he had been trying to catch one dog in a pen. Appellant said that a guy walking nearby thought he was hitting the dogs and abusing them. Appellant stated that he had a friend that left puppies with him, but one of the dogs was running out of food and water. Appellant explained that he was trying to catch the dog by herding it with a shovel to get a

collar on it. Appellant denied hitting any dogs with a baseball bat and said that he had told Green that he just could not catch them. Appellant stated that one of the two dogs was taken to another pen, and his friend picked up the other dog. Appellant told Officer Short that the blood may have come from a dog scratching itself on a feeder that was in the pen, but he did not see any major scratches on the dog. Appellant agreed that Officer Short could meet him at the scene.

Officer Short stated that, when he spoke with appellant at the scene, there was no blood at the scene because it had rained the night before. Appellant showed him a cream-colored, medium-sized dog, told him that it was the dog referred to by Green, and that he had moved it from the pen.

Officer Short also talked with Green and noted that Green and appellant gave differing descriptions of the two dogs. Officer Short also testified as an expert in blood-stain spatter with regard to the photographs of the pen area. He stated that the pool of a significant amount of blood resulted from profuse bleeding in a sedentary victim because the thickness of the blood showed that the victim was not moving, and it would not have come from a scratch. The blood on the side of a basin tub was castoff from an object that was moving from an impact or strike to a body after a wound is opened. Blood on the base of a tree eighteen-to-twenty-four inches outside the pen showed several areas of spatter castoff from an object used to strike the victim. Blood droplets were found on concrete blocks in a corner of the pen. Blood droplets coming from the inside of the pen landed on the pen's wire fence. In Officer Short's opinion, the blood evidence was consistent with Green's version of the

incident in the pen and not consistent with appellant's story. He stated that it was his opinion that the animals were severely beaten with a blunt object. Officer Short testified that he interviewed appellant in person at the police station, and the interview was recorded. That interview was introduced into evidence and played for the court.[2]

Appellant moved for a directed verdict stating, "And, also I'll at this time move for a directed verdict." The trial court denied it.

During the defense's case, appellant's father-in-law, Larry Mash, testified that appellant had two pit bull mixes in the pen. He also testified that his daughter and appellant bought the property from his father-in-law's estate. Appellant testified that he put down only one dog, a reddish brindle, by striking it with a shovel after it was aggressive. He admitted to lying when he was called on the telephone to explain the situation. He denied having killed the second dog. He claims that he killed the first dog because it became aggressive with another dog and with him. He admitted that he could have turned around and left the pen when the dog first began snarling at him.

At the end of defense's case, the directed-verdict motion was renewed, generally, and denied. The trial court asked the attorneys to submit letter briefs on appellant's motion to suppress the photographic evidence, and the court later denied appellant's motion by order filed November 13, 2013. As reflected in the order, the trial court held that "the area searched was clearly visible from the road and that since [appellant] did not live in the house

[2]The police-station interview is included on disc in the record, but it was not included in appellant's abstract or addendum.

by the dog pen, it was not his curtilage. As such he did not have a reasonable expectation of privacy to the dog pen that was clearly visible from the street." Appellant was convicted on both counts and sentenced to four years' probation. This appeal timely followed.

I. *Sufficiency of the Evidence*

Dividing his sufficiency argument into two parts, appellant contends that the trial court erred in denying his dismissal motion because there was insufficient evidence that (1) he utilized torture and (2) two dogs were involved. A motion to dismiss at a bench trial, like a motion for directed verdict at a jury trial, is considered a challenge to the sufficiency of the evidence. *Vance v. State*, 2011 Ark. App. 413. Arkansas Rule of Criminal Procedure 33.1 (2013) governs motions to dismiss in bench trials and provides in relevant part as follows:

> (b) In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of 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 of the evidence.
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> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required . . . 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 of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal.

(Emphasis added.)

Both of appellant's motions for dismissal failed to specify the respect in which the evidence was alleged to be deficient. Because appellant's sufficiency argument was not

properly presented in the manner prescribed by Rule 33.1, it is not preserved for appellate review. Accordingly, we affirm.

II. *Motion to Suppress*

Appellant contends that the pictures of the dog pen that were introduced through Officer David Mitchell should have been suppressed because they were taken as a result of an intrusion on his private property. He contends that the trial court's ruling—that the pen was in the curtilage, but appellant did not have standing—was in error. Also, he maintains that the pen was not visible from the street; thus, he had an expectation of privacy.

The State contends that appellant's claim was raised after the photographs were introduced and admitted without objection. We note that, even though both parties and the trial court proceeded as if the photographs had been formally admitted, there is no record of a formal admittance of the photographs. Nevertheless, an objection must be made at the first opportunity to preserve an issue for appeal. *Vance v. State*, 2011 Ark. 243, 383 S.W.3d 325. Here, appellant did not object as Officer Mitchell identified and described each of the eight pictures depicting the scene. It was not until Officer Mitchell's cross-examination that appellant objected to the evidence already presented during his direct testimony. Because appellant failed to object at the first opportunity, we hold that the issue is not properly preserved for appellate review.

Affirmed.

ABRAMSON and HARRISON, JJ., agree.

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

Dustin McDaniel, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.