

ARKANSAS COURT OF APPEALSDIVISION IV
No. CACR08-1515

DUSTIN RAY DAVIS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered SEPTEMBER 9, 2009APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT,
[NO. CR2007-462]HONORABLE GARY RAY
COTTRELL, JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Dustin Davis was convicted by a jury of three counts of battery in the second degree and one count of battery in the first degree. The jury sentenced Davis to one year's imprisonment for each of the three second-degree battery convictions and to five years' imprisonment for the first-degree battery conviction. The jury recommended to the court that none of the sentences run consecutively. The trial court entered an order of conviction and ordered the sentences to be served consecutively. Davis brings two points on appeal: (1) the trial court erred in denying his motion for directed verdict on the sufficiency of the evidence to prove first-degree battery; and (2) the trial court abused its discretion in rejecting the jury's recommendation and ordering the sentences to run consecutively. We find no error and affirm Davis's conviction.

This case began on September 29, 2007, when Davis and his wife brought their three-month-old son to the Sparks Medical Center emergency room in Fort Smith after waking to

find the infant's leg swollen and causing severe pain. Dr. Michelle Horan treated the infant, discovering that he had a broken femur—a twisting fracture that was, according to her, “textbook for child abuse.” An x-ray of the infant's entire body revealed that he also had fourteen broken rib bones in various stages of healing. The infant was transferred to Arkansas Children's Hospital in Little Rock for further treatment.

Mrs. Davis testified that her husband brought her son to her at bedtime screaming and crying and that he woke in the middle of the night screaming. In the morning, her son's leg was swollen and he could not move it. She testified that she did not know how his injuries happened. Davis told a doctor at Children's Hospital that, while he was changing the infant's diaper, the infant's leg got caught between a bed frame and a mattress. In one interview with the Van Buren Police Department, Davis said that the infant fell off the bed after he changed the infant's diaper. He also indicated that he picked his son up by his legs. In a later interview, Davis said that he was holding his son by his legs and he heard something and did not know if the leg was out of the socket. He also admitted that, because of significant stress, he sometimes would get mad and squeeze his son.

Davis was charged by amended information dated October 22, 2007, with five counts of domestic battering in the second degree, Ark. Code Ann. § 5-26-304, Class B felonies: “with the purpose of causing physical injury to a family or household member, he caused serious physical injury to [Z.D.], a family or household member[.]” In an amended information dated September 10, 2008, appellant was charged instead with five counts of first-degree battery under Ark. Code Ann. § 5-26-304, Class B felonies: “intentionally or

knowingly without legal justification causes serious physical injury to one he knows to be twelve (12) years of age or younger[.]”

The jury convicted Davis of one count of battery in the first degree and three counts of the lesser-included offense, battery in the second degree. The jury sentenced him to five years for the first-degree conviction and one year for each of the second-degree convictions and recommended to the court that none of the sentences run consecutively. Declining to follow the jury’s recommendation, the court ordered the sentences to run consecutively. Davis brought this appeal challenging the sufficiency of the evidence to support the first-degree battery conviction and challenging the court’s decision to have the sentences run consecutively.

Davis’s first point on appeal is that the trial court erred in denying his motion for directed verdict because the State failed to provide sufficient evidence to show that he committed battery in the first degree. Specifically, he cites Ark. Code Ann. § 5-13-201(a)(3), which states that a person commits first-degree battery if “[t]he person causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life[.]” He does not dispute that the victim sustained serious physical injury but contends that the State failed to prove that appellant caused this injury under circumstances manifesting extreme indifference to the value of human life.

A motion for directed verdict is a challenge to the sufficiency of the evidence. *Reed v. State*, 91 Ark. App. 267, 270, 209 S.W.3d 449, 451 (2005). In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial

evidence, direct or circumstantial. *Malone v. State*, 364 Ark. 256, 261, 217 S.W.3d 810, 813 (2005). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Tillman v. State*, 364 Ark. 143, 146, 217 S.W.3d 773, 775 (2005).

Davis's argument is not preserved for review because he did not raise this specific sufficiency argument below. *Greenwood v. Anderson*, 2009 Ark. 360 (appellant must raise issue with specificity and make argument to the circuit court for it to be preserved on appeal); *see also* Ark. R. Crim. P. 33.1 (requiring motion for directed verdict to state "the specific grounds therefor"). In his directed verdict motion in the trial court, Davis contended that no one saw him injure the infant and, therefore, that the evidence was insufficient and required the jury to speculate about how the injuries occurred. He did not contend that the State failed to prove that he caused the injury under circumstances manifesting extreme indifference to the value of human life.

We note that the probable reason Davis did not make this argument in the trial court is because the first-degree battery code provision cited by Davis is irrelevant to his conviction. He was charged and convicted of first-degree battery pursuant to Ark. Code Ann. § 5-13-201(a)(7) (Repl. 2006), not subsection 201(a)(3). Subsection 201(a)(7) states that a person commits battery in the first degree if "[t]he person intentionally or knowingly, without legal justification, causes serious physical injury to a person he or she knows to be twelve (12) years of age or younger[.]" Whether Davis committed serious physical injury under circumstances manifesting extreme indifference to the value of human life was not an issue in the State's case

against him.¹ Accordingly, we affirm his conviction.

Davis's second point on appeal is that the trial court abused its discretion when it sentenced him to consecutive sentences based solely on its distaste for the jury's verdict and not on aggravating circumstances. It is well established that the question whether sentences should run consecutively or concurrently lies solely within the province of the trial court. *Pyle v. State*, 340 Ark. 53, 61, 8 S.W.3d 491, 496 (2000) (citing *Brown v. State*, 326 Ark. 56, 931 S.W.2d 80 (1996), and *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996)). The appellant assumes a heavy burden of demonstrating that the trial judge failed to give due consideration to the exercise of his discretion in the matter of the consecutive sentences. *Id.* Further, the trial court is not required to explain its reason for running sentences consecutively. *Id.* Our review of the record indicates that the trial judge considered his experience with sentences for plea agreements and from other cases tried before him, the age of the victim in this case, and the severity of the wounds in ordering the sentences to run consecutively. We cannot say that the trial court abused its discretion.

Affirmed.

ROBBINS and BROWN, JJ., agree.

¹Appellant's addendum does not contain the amended information designating the charges against him and therefore his brief does not comply with the Rules of the Arkansas Supreme Court and Court of Appeals, Rule 4-2(a)(8) (2004). Under Rule 4-2(b)(3), "If the Court finds the abstract or Addendum to be deficient such that the Court cannot reach the merits of the case . . . the Court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies . . ." However, in light of our decision that he failed to preserve this argument, we find that the deficiency was not such that we could not reach the merits of the case. See Ark. Sup. Ct. R. 4-2(b)(3).