NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA08-913

W.K. APPELLANT	**Opinion Delivered** April 29, 2009
V.	APPEAL FROM THE GRANT COUNTY CIRCUIT COURT, [NO. JV 2006-117-1]
STATE OF ARKANSAS APPELLEE	HONORABLE CHRIS E WILLIAMS, JUDGE
	AFFIRMED

JOSEPHINE LINKER HART, Judge

W.K. was adjudicated a juvenile delinquent upon the Grant County Circuit Court's finding that he had committed three counts of rape. He appeals, arguing that the evidence was insufficient to support his adjudication. We affirm.

On November 15, 2007, the State filed an information alleging that W.K. committed five counts of rape on June 8, 2007. It specifically alleged that W.K. violated the subdivision of the Arkansas rape statute, Arkansas Code Annotated section 5-14-103(a)(3)(A) (Repl. 2006), by engaging in sexual intercourse or deviate sexual activity with another person who was less than fourteen years of age. At W.K.'s delinquency hearing, the State presented evidence from the alleged victim, H.K., an eleven-year-old female, and her brother, J.K., an eight-year-old male, both of whom are W.K.'s cousins. H.K. testified that while she was changing her clothes in a bathroom in the home of her grandmother, Frenda Sample, W.K. entered, bent her over the sink, and penetrated her "privates" with his penis. Later, while she

was playing in a shed behind the house, W.K. forced her into a closet, pulled down her pants and again penetrated her with his penis. H.K. also testified that on that same day, W.K. forced her to perform oral sex on him in her grandmother's living room. On cross-examination, H.K. recounted that she had "some bleeding" the day after the alleged incident. However, when she went to the doctor a week later, the doctor did not find any tearing, but instead found that she had a urinary-tract infection. J.K. testified that he was also visiting his grandmother on the date in question and that he observed the incident in the shed and the incident in the living room.

In W.K.'s case-in-chief, Frenda Sample testified that the children were never out of her sight long enough for the acts to have occurred. W.K. also testified and denied the allegations. At the close of the evidence, W.K. moved for a directed verdict, first arguing that there was no evidence of penetration by forcible compulsion. The trial court denied that motion, pointing out that the State was proceeding under the subdivision of the rape statute that proscribed engaging in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. W.K. then argued that the State failed to prove that there was a three-year age difference between him and the alleged victim.[1]

W.K. argues on appeal that the evidence was insufficient to sustain his adjudication because the case "hinges" upon the testimony of two small children and there was

[1] We note that the three-year age difference is not an element of the offense of rape where the victim is less than fourteen years old, but rather there is a statutory affirmative defense available under that subdivision which requires that the defendant prove that he or she was not more than three years older than the victim. Ark. Code Ann. § 5-14-103(a)(3)(B). However, W.K. has apparently abandoned this argument on appeal.

"inconclusive" medical evidence. Regarding the children's testimony, he asserts that H.K.'s testimony was inconsistent with her recorded forensic interview and that J.K.'s testimony "may have been influenced by his mother." Finally, he contends that Ms. Sample's testimony directly contradicted the children's evidence.

Although a delinquency adjudication is not a criminal conviction, it is based on an allegation by the State that the juvenile has committed a crime. *Rogers v. State*, 78 Ark. App. 103, 78 S.W.3d 743 (2002). The standard of review for sufficiency of the evidence in a juvenile proceeding is the same as in a criminal case. *Pack v. State*, 73 Ark. App. 123, 41 S.W.3d 409 (2001). The record is reviewed in the light most favorable to the State to determine whether there is substantial evidence to support the conviction. *J.R. v. State*, 73 Ark. App. 194, 40 S.W.3d 342 (2001). Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another, without requiring the fact-finder to resort to speculation or conjecture. *Id.* On appeal, neither the credibility of the witnesses nor the evidence presented at trial will be re-weighed, because those matters are left to the trier of fact. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002).

We note first that the Arkansas Rules of Criminal Procedure apply to juvenile-delinquency proceedings. Ark. Code Ann. § 9-27-325(f) (Repl. 2008). Rule 33.1(b) of the Arkansas Rules of Criminal Procedure requires a defendant in a bench trial to challenge the sufficiency of the evidence at the close of all of the evidence, or such a challenge is waived. Further, it is so well-settled as to be axiomatic that a party cannot change the

grounds for a directed verdict on appeal, but is bound by the scope and nature of the argument presented at trial. *Avery v. State*, 93 Ark. App. 112, 217 S.W.3d 162 (2005). Accordingly, much of what W.K. argues on appeal varies significantly from the argument that he preserved below. However, to the extent that he argues that there was insufficient evidence that he engaged in sexual intercourse or deviate sexual activity, we reach the merits, but nonetheless disagree.

As noted previously, the victim, H.K., testified about all three acts, and J.K. corroborated her testimony as to two of the incidents. Under our standard of review, this evidence is sufficient to sustain the adjudication of delinquency. A victim's testimony, even if the victim is a child, is, in and of itself, substantial evidence to support a conviction in rape cases. *Clem*, *supra*. The weighing of evidence lies within the province of the fact finder, and this court is bound by its determination regarding the credibility of witnesses. *See*, *e.g.*, *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000). The finder of fact is free to believe all or part of a witness's testimony, and inconsistent testimony does not render proof insufficient as a matter of law. *Id.* Accordingly, we affirm.

Affirmed.

GLADWIN and KINARD, JJ., agree.