

Cite as 2010 Ark. App. 442

ARKANSAS COURT OF APPEALSDIVISION IV
No. CACR09-1345TASHIKA SADE HIGGINS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE**Opinion Delivered** May 19, 2010APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CR-08-3885]HONORABLE WILLARD
PROCTOR, JR., JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Tashika Higgins was found guilty of misdemeanor battery in the third degree and misdemeanor theft of property. She was sentenced to one year in the Pulaski County Jail, suspended, and was given twelve days' jail credit. Higgins argues on appeal that the evidence was insufficient to support her theft-of-property conviction. We affirm Higgins's conviction because she did not preserve this issue for our review.¹

Higgins was charged with robbery and misdemeanor theft of property on September 19, 2008. She waived her right to a trial by jury, and on July 6, 2009, a bench trial was held.

¹See *Grube v. State*, 2010 Ark. 171, ___ S.W.3d ___ (sufficiency issue not preserved for review where defense counsel's statement was in the nature of a closing argument and where defense counsel never moved for a dismissal of the charges).

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The victim, Shardria Bogard, testified that she and Higgins are second cousins. According to Bogard, on July 2, 2008, she was attacked by Higgins and “a girl named Briana.”² Bogard stated that at the time of the attack, she was on her way to visit a friend. Bogard testified that a vehicle pulled on the side of her and “a very tall young lady approached [her] and asked [her] about [her] deceased cousin.” She stated that before she knew it, Briana had “swung” at her. Bogard said that Higgins then exited the vehicle and began hitting her. Bogard testified that Higgins caused her to fall to the ground; however, she did not recall how many times Higgins hit her. Bogard stated, “I got back up and we kept fighting.” After the fight, Bogard testified that she picked up her cell phone, but that when she went to reach for her purse, Higgins instructed Briana to “grab” it.³ According to Bogard, Briana handed Higgins her purse and they drove off.⁴ Bogard testified that she called the police and told them what had happened. She also stated that she went to the emergency room after the fight. According to Bogard, she had a concussion and her knee was injured.

On cross-examination, Bogard stated that although she and Higgins are cousins, they have never been close. According to Bogard, Higgins’s deceased mother “was lying on [her]” so she “never fooled with them at all.” Bogard also stated that she and Higgins had fallen out

²At the time of the attack, Bogard did not know Briana; however, she later learned that her other attacker was Briana Peoples.

³The purse had some cash, an ID, a pack of cigarettes, and a lighter in it.

⁴Both Higgins and Briana were passengers in a vehicle driven by a third young lady named Kendra.

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about a month before this incident because Higgins owed her money. Bogard testified that she was beating on the car window asking for her purse before the vehicle pulled off.

Higgins testified that she “never had a real relationship” with Bogard. According to Higgins, her mother never “lied on” Bogard; however, she acknowledged that Bogard did get a “whooping” after her mother told Bogard’s mother “about the boys and the grown men situation.” Higgins said that she never knew that Bogard had a problem with her.⁵ Higgins stated that she was present at the time Briana jumped on Bogard. According to Higgins, Briana wanted to fight Bogard because Bogard kept calling her about a boy. Higgins testified that the only thing she did was “try to break up a fight between a big girl, a girl bigger than her because she was beating Sha[r]dria to death.” Higgins stated, “I never put my hands on her and I never touched her eight dollars, or her ID card, or her purse.” Higgins testified that Briana was living with her in July 2008.

On cross-examination, Higgins testified that she already knew that Briana wanted to fight Bogard before the incident took place. She stated that Briana got out of the car when she saw Bogard and hit her. According to Higgins, she got out of the car but she did not strike Bogard. Higgins testified that she told Briana to give Bogard back her purse when she asked for it.

At the end of the evidence, the following colloquy took place:

THE COURT: Okay. Do you want to come to the lectern any – you don’t have to come to the lecture. Any statements you want to make before –

⁵Higgins said that Bogard even came to her house in 2007 when her mother passed away.

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PROSECUTOR: Judge, the State would just like to ask the Court, if the Court does not believe the State met its burden on the offense of Robbery and Theft of [Property], we would ask the Court to consider the lesser offense of Battery in the Third Degree and Misdemeanor Theft.

DEFENSE: Your Honor, we would ask the Court to find her not guilty. I think in this particular case here, the only issue is who do you believe, and you have got two people who have told their relative, have told us what they thought was going on.

...

We just ask the Court to find her not guilty.

THE COURT: Okay. Well, I don't think that she's guilty of the Robbery. I do have a problem with the Battery and the Theft of Property because she took the girl back, or she got in the car with her and then went back to her house. And I know she's explained how she had the eight dollars, she knew she had eight dollars, I guess – she said something about the eight dollars in her testimony. Maybe she did read the statement and that's how she found it out, but it just seems like she knew that there was that money in the purse, and maybe she found that out because she read the statement.

DEFENSE: I've gone over discovery with her in great detail.

THE COURT: Oh, you did. You talked to her about it. Okay. All right, then. That's where she found that out then. But just the – I mean she – to me if, it's just-if you're involved in a -- something like that, she would kick her out of the car or not get in the car, or something, but at least not take her back to your house and hang out with her.

I don't believe everything that the victim said either, because I do think there was a little bit more going on than what she talked about as well, so I'm not going to find her guilty of the Robbery.

I will find her guilty of the Battery 3[rd] and the Theft of Property. I really – my main thing is, I want no contact. That's the biggest thing I want out of this.

Higgins was sentenced to one year in the Pulaski County Jail, suspended. She received twelve days' jail credit conditioned upon her having no contact with the victim. The

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judgment and commitment order was entered on August 17, 2009. Higgins filed a timely notice of appeal on September 14, 2009. This appeal followed.

Higgins argues that the evidence was insufficient to support her theft-of-property conviction. The State contends that the issue is not preserved for our review. We agree with the State.

Rule 33.1 of the Arkansas Rules of Criminal Procedure states in pertinent 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.

(c) The failure of a defendant to challenge the sufficiency of the evidence at the time 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 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 (2009).

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It is well settled that this court strictly construes Rule 33.1.⁶ In order to preserve a sufficiency-of-the-evidence challenge, a party must move for a directed verdict or for dismissal at the conclusion of the evidence and not during a closing argument.⁷

Here, Higgins's argument is not preserved for our review for two reasons: (1) because it is apparent that Higgins's attorney's statement asking the court to find Higgins not guilty was in the nature of a closing argument, and (2) because Higgins's attorney never moved for a dismissal as required under Rule 33.1. Therefore, we affirm.

Affirmed.

KINARD and BAKER, JJ., agree.

⁶*Grube, supra.*

⁷*Id.*