

Cite as 2010 Ark. App. 501

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CACR09-1259

JAMES E. MONTGOMERY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered JUNE 16, 2010APPEAL FROM THE GREENE
COUNTY CIRCUIT COURT
[NO. CR-08-129]HONORABLE BARBARA HALSEY,
JUDGE

AFFIRMED

KAREN R. BAKER, Judge

A Greene County Circuit Court jury convicted appellant James E. Montgomery of rape of a person who is less than eighteen (18) years of age by a grandparent. He was sentenced to twenty-five (25) years in prison. Following the denial of his motion for a new trial, appellant filed this timely appeal. Appellant has one argument on appeal: that the trial court erred in denying his motions for directed verdict when the State failed to provide sufficient evidence to prove he committed rape. We conclude that there was sufficient evidence to support appellant's conviction and affirm.

Appellant was convicted of raping his granddaughter, K.M. The evidence at the time of trial established the following facts. K.M. first reported the charges to her mother, Vonda

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Montgomery, on February 13, 2008, when K.M. was six years old. K.M. was the adopted daughter of Vonda and Chris Montgomery, who had fostered her from the age of three. Appellant is Chris's father. Although he resided out of state, appellant had been spending considerable time in Vonda and Chris's home while helping them with repairs. Regular members of the Montgomery household included Vonda's nineteen-year-old son from a previous relationship whom Chris had adopted; Chris's fourteen-year-old son; Chris's twelve-year-old daughter; K.M.; Vonda and Chris's four-year-old adopted daughter; and Mary DeMaris, Chris's mother (who was divorced from appellant).

At the time the allegations were made, Vonda and Chris had been having some marital problems and were living separately. On February 12, 2008, K.M. had gone to church with Chris and spent the remainder of the day at his residence. The following day, Chris contacted Vonda at work to tell her that a condom had been found in K.M.'s bed. Vonda worried that it could have belonged to "one of the boys." Vonda testified that she questioned K.M. after school that day. K.M. told her mother that appellant had been in her bed. Vonda asked K.M. if appellant had touched her anywhere that made her feel uncomfortable, and K.M. responded that he had touched her "privates." K.M. told her mother that he touched her under her panties with his fingers and his knuckles. The incident was reported to the child-abuse hotline. In a recorded interview, K.M. told Trish Smith, a social worker from Arkansas Children's Hospital who was the evaluator on the investigation, essentially the same information that she described to Vonda. Smith testified that K.M. said that appellant would

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touch her “privates” indicating the front genital area, including penetration into the area between the labia majora. K.M. said that it had been going on for a number of months; appellant would allow her to stay up late to watch movies and would put a blanket over the two of them, and he then would touch her with his fingers and knuckles. She also described the touching taking place while waiting in the drive-through line at McDonald’s or in the restaurant under the table, and one time taking place in her bed. She stated that he touched her front and back genital areas. The last date of contact was the weekend before February 13, when Vonda was gone. Nothing she said referenced the use of a condom. K.M. told Smith and testified at trial that her grandmother was often present when the touching was taking place.¹ K.M. was examined at Arkansas Children’s Hospital by Dr. Brian Hardin, who stated that the labia majora exhibited signs of redness that could be consistent with sexual abuse; however, Dr. Hardin also stated that such redness was not necessarily symptomatic of sexual abuse. At the conclusion of the State’s case, appellant moved for a directed verdict on the basis that there was insufficient evidence to convict him of the charged crime; appellant particularly argued that there was no evidence of sexual intercourse or sexual gratification, as required to prove deviant sexual activity. At the conclusion of the case, appellant renewed his motion, which was again denied.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Kelley v. State*, 103 Ark. App. 110, 286 S.W.3d 746 (2008). In reviewing a challenge to the

¹Appellant spends much time in the brief attempting to discredit Vonda, and that is not of particular import, as issues of credibility are for the trial court to discern.

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sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* 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. *Id.* We defer to the jury's determination on the matter of witness credibility. *Id.* Jurors do not and need not view each fact in isolation, but rather may consider the evidence as a whole. *Id.* The jury is entitled to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. *Id.*

Appellant was convicted of rape pursuant to Arkansas Code Annotated section 5-14-103 (Repl. 2006), which provides in pertinent part as follows:

(a) A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person: . . .

(4)(A) Who is a minor and the actor is the victim's:

(ii) Uncle, aunt, grandparent, step-grandparent, or grandparent by adoption;

The terms "deviate sexual activity" include any act of sexual gratification involving penetration, however slight, of the labia majora or anus of a person by a body member. Ark. Code Ann. § 5-14-101(1)(B) (Repl. 2006).

Appellant asserts that the trial court erred in denying his motions for a directed verdict because the victim testified at trial that he touched her from the *outside of her clothing*; he contends that penetration was not, therefore, sufficiently established. Penetration can be

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shown by circumstantial evidence, and if the evidence gives rise to more than a mere suspicion, and the inference that might reasonably have been deduced from it would leave little room for doubt, that is sufficient. The courts have long held that anytime a bodily member of the accused is “within the labia of the pudendum . . . , no matter how little, that will be sufficient to constitute penetration.” *Poe v. State*, 95 Ark. 172, 129 S.W. 292 (1910).²

The jury in this case clearly believed the testimony that appellant touched K.M. in a manner that constituted penetration under the Arkansas rape statute. There was testimony from Vonda and Smith that K.M. told them that appellant touched her “privates” under her panties, and this court defers to the trial court on credibility. A child victim’s use of her own terms for body parts, rather than the correct anatomical terms, is sufficient evidence if it demonstrates a knowledge of what and where those body parts referred to are. *Lamb v. State*, 372 Ark. 277, 275 S.W.3d 144 (2008). K.M. testified that appellant touched her with his fingers and knuckles and described the act of using them to separate her labia majora. This court has repeatedly held that the uncorroborated testimony of a rape victim, whether adult or child, is sufficient to support a conviction, and that scientific evidence is not required. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003) (citing *Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997)); see also *Sherrill v. State*, 329 Ark. 593, 952 S.W.2d 134 (1997). While the victim had previously told different versions of her story, any inconsistencies in the testimony

²At least one federal court has held that “penetration” of the anal or genital opening of another, required for a finding of a sexual act under an aggravated sexual abuse statute, includes penetration taking place through clothing. *United States, v. Norman T.*, 129 F.3d 1099 (10th Cir. 1997), cert. denied, 523 U.S. 1031 (1998).

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of a rape victim are matters of credibility for the jury to resolve. See *Williams v. State*, 331 Ark. 263, 267, 962 S.W.2d 329, 331 (1998) (citing *Rains, supra*; *Puckett v. State*, 324 Ark. 81, 918 S.W.2d 707 (1996)). It is within the province of the jury to accept or reject testimony as it sees fit. *Id.* (citing *Riggins v. State*, 317 Ark. 636, 882 S.W.2d 664 (1994)). The jury chose to believe the testimony that deviate sexual activity had occurred, and substantial evidence supports the jury's conclusion.

Affirmed.

KINARD and BROWN, JJ., agree.