Cite as 2010 Ark. App. 715

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 10-381

MICHAEL LEE COWAN APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered October 27, 2010 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. CR-2009-314] HONORABLE JAMES O. COX, JUDGE AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellant Michael Lee Cowan appeals a Sebastian County Circuit Court order convicting him as an habitual offender of two counts of second-degree sexual assault and sentencing him to consecutive terms of forty years' imprisonment in the Arkansas Department of Correction. For reversal, appellant challenges the sufficiency of the evidence and argues that the circuit court erred in denying his constitutional right to testify. We affirm.

Between July 24, 2002, and July 24, 2004, appellant dated and lived with Vivian Collins and J.C., her minor daughter. J.C. lived with her grandparents but stayed with Collins at her townhouse every other weekend, and appellant frequently visited the home. On the evening of July 24, 2002, eleven-year-old J.C. and five other children played video games in J.C.'s upstairs bedroom while appellant, Collins, Wendy Hogan, and Kenneth Hogan congregated downstairs. The adults asked J.C. to watch the other children while they went to the store.

Appellant later returned, and J.C. went downstairs to get some drinks for the children. On her way upstairs, J.C. noticed that the Hogans' autistic daughter, M.H., who was ten to twelve years old at the time, was missing. J.C. headed toward the bathroom and could hear appellant's voice. When J.C. knocked on the door, she heard a muffled sound like M.H. trying to speak. J.C. entered the bathroom and observed appellant bending over M.H. and digitally penetrating her with his finger. M.H.'s pants were partially pulled down. J.C. pushed appellant, grabbed M.H., pulled M.H.'s pants up, and asked another child to take M.H. into the bedroom. J.C. told appellant to get her mother, and appellant merely smiled in response. As J.C. proceeded downstairs to make a phone call, appellant hit her in the head with a shampoo bottle. J.C. became dazed, and appellant performed the same act on J.C. by digitally penetrating her. Appellant threatened to kill J.C. if she told anyone, and he proceeded to pick up the other adults. J.C. went into the bedroom with the other children and did not tell either the children or the adults about the incident. Over the course of the next eight months, appellant sexually assaulted J.C. in the same manner an additional seven to eight times, including one time when she played video games. At that time, J.C. did not report the assaults for fear of appellant. When J.C. later learned that appellant had been incarcerated at the Arkansas Department of Correction, she disclosed the information to her mother and to Wendy Hogan.

Appellant stood trial before a Sebastian County jury. At trial, appellant moved for a directed verdict at the conclusion of the State's evidence, arguing that the State provided insufficient evidence demonstrating that he engaged in sexual contact with the two minors. Appellant informed the court that he did not wish to call any witnesses and renewed his

motion for directed verdict. The court denied both motions. After deliberations, the jury convicted appellant of two counts of second-degree sexual assault and sentenced him to two consecutive terms of forty years' imprisonment.

For the first point on appeal, appellant argues that the circuit court erred in denying his motion for directed verdict and, specifically, that the State failed to demonstrate substantial evidence of sexual contact with either minor victim. In response, the State argues that the argument is not preserved, pursuant to Arkansas Rule of Criminal Procedure 33.1, because appellant failed to make a specific challenge.

We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Holt v. State*, 104 Ark. App. 197, 290 S.W.3d 20 (2008). This court has repeatedly held that in reviewing a challenge to the 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.*

Appellant was convicted of two counts of second-degree sexual assault. A person commits sexual assault in the second degree "if the person engages in sexual contact with another person by forcible compulsion." Ark. Code Ann. § 5-14-125(a)(1) (Supp. 2009). "Sexual contact" is defined as "any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female." Ark. Code Ann. § 5-14-101(9) (Supp. 2009).

The State contends that appellant merely made the general assertions that the State failed to prove sexual contact with the victims and failed to specify his basis for these assertions. We agree. Arkansas Rule of Criminal Procedure 33.1(a) and (c) provide that a motion for directed

verdict in a jury trial shall state the specific grounds therefor and that a defendant's failure to do so constitutes a waiver of any question pertaining to the sufficiency of the evidence. *See Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990) (holding that the defendant's argument that the State failed to prove a usable amount of methamphetamine was not preserved where it was not specifically raised in a directed-verdict motion). *See also Saul v. State*, 33 Ark. App. 160, 803 S.W.2d 941 (1991). A party cannot change the grounds for a directed-verdict motion 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).

We strictly construe Rule 33.1. *Grady v. State*, 350 Ark. 160, 85 S.W.3d 531 (2002). In light of Rule 33.1, the motion must be specific enough to advise the circuit court of the exact element of the crime that the State has failed to prove. *Pratt v. State*, 359 Ark. 16, 194 S.W.3d 183 (2004). The rationale behind this rule is that, "when specific grounds are stated and the absent proof is pinpointed, the circuit court can either grant the motion or, if justice requires, allow the State to reopen its case and supply the missing proof." *Pinell v. State*, 364 Ark. 353, 357, 219 S.W.3d 168, 171 (2005). A general motion merely asserting that the State has failed to prove its case is inadequate to preserve the issue on appeal. *Beavers v. State*, 345 Ark. 291, 46 S.W.3d 532 (2001).

In the present case, during the motion for directed verdict at the conclusion of the State's case, appellant's counsel stated, "Your Honor, at this time, the defense moves for a directed verdict on grounds that the State has failed to meet its burden by a preponderance of the evidence, that defendant Michael Cowan engaged in sexual contact with either [J.C.] or

[M.H.]. That would be defendant's motion, Your Honor." As noted above, the term "sexual contact" has a well-defined meaning that includes several elements, including the "touching" of "sex organs" "for the purpose of sexual gratification." Ark. Code Ann. § 5-14-101(9). In the motion, appellant's attorney failed to identify the specific element of sexual contact that the State failed to establish, nor did the motion assert a specific flaw in the State's case. Because appellant's directed-verdict motion was general and did not inform the circuit court of appellant's specific challenges, it did not comply with Rule 33.1, and the issue is not preserved for this court's review. *See Elkins v. State*, 374 Ark. 399, 288 S.W.3d 570 (2008). Therefore, pursuant to Rule 33.1, we affirm appellant's sexual-assault convictions.

Even if we considered the merits of appellant's argument, we would affirm the circuit court's denial of his motion for directed verdict. Viewing the evidence in the light most favorable to the State, substantial evidence supported appellant's two second-degree sexual-assault convictions. Our case law clearly states that when sexual contact occurs, and there is no legitimate medical reason for it, it can be assumed that such contact was for sexual gratification, and the State need not offer direct proof on that element. *McGalliard v. State*, 306 Ark. 181, 813 S.W.2d 768 (1991). Here, J.C. testified that appellant digitally penetrated her on numerous occasions, and J.C. also testified that she walked into the bathroom and witnessed appellant assaulting M.H., an autistic child, in the same manner. Appellant's sexual gratification is assumed in both instances. *Id.* Therefore, we hold that substantial evidence supported appellant's second-degree sexual-assault convictions.

For his second point of appeal, appellant contends that the trial court erred in failing to inquire whether appellant wished to testify or to apprise appellant of his right to testify. However, appellant's argument is misplaced.

The law is clear that an accused has the right to choose to testify on his own behalf, and counsel may only advise him in making the decision. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004). This right is based on the First, Sixth, and Fourteenth Amendments to the United States Constitution, and only the defendant is empowered to make a knowing and voluntary waiver of the right. *Henson v. State*, 94 Ark. App. 163, 227 S.W.3d 450 (2006). However, when a defendant remains silent after counsel has rested, there is a knowing and voluntary waiver of the right to testify. *Id.*; *see also United States v. Kamerud*, 326 F.3d 1008 (8th Cir. 2003) (holding that, if a defendant desires to exercise his constitutional right to testify, he must act affirmatively and express to the trial court his desire to do so at the appropriate time or a knowing and voluntary waiver of the right is deemed to have occurred).

Here, the record reveals that, at the end of the State's case, the circuit court heard appellant's motion for directed verdict and asked if counsel wanted to present anything further. Appellant's attorney responded, "I do not anticipate calling any witnesses, Your Honor. I anticipate argument only." At this time, appellant did not act affirmatively and express to the court his desire to testify. By failing to do so, appellant not only waived his right to testify at trial but also waived his appeal of this issue to our court. *See Mason v. State*, 2009 Ark. App. 794. For these reasons, we decline to address this merits of appellant's argument.

Affirmed.

ABRAMSON and BROWN, JJ., agree.