ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 08-1007

GLENDLE WAYNE BARNETT APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 4, 2009 APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT, [NO. CR-2007-0271] HONORABLE DAVID G. HENRY, JUDGE AFFIRMED

COURTNEY HUDSON HENRY, Judge

In a bench trial, the Arkansas County Circuit Court found appellant Glendle Wayne Barnett guilty of second-degree sexual assault and sentenced him to a term of eight years in prison. For reversal, appellant argues that the evidence is insufficient to sustain the court's finding of guilt and that the trial court erred in denying his motion to suppress the statements he made to the police. We find no error, and we affirm.

The record reflects that appellant and Becky Jenkins became romantically involved sometime in 2004. During the relationship, Ms. Jenkins and her two children, M.M. and Z.M., lived with appellant in Ward. Appellant and Ms. Jenkins ended their relationship on fairly good terms. In the summer of 2007, Ms. Jenkins spent the month of July in jail on drug-related charges. After her release, Ms. Jenkins made contact with appellant, who was

living in Stuttgart. Having no place to stay, she and the children spent an evening with appellant. On Sunday, August 5, 2007, appellant agreed to babysit the children for Ms. Jenkins, and he kept them until Tuesday, August 7.

Ms. Jenkins testified that the children were alone when she returned to get them. She said that her daughter, M.M., was crying and that M.M. disclosed something "alarming." Ms. Jenkins said that her son, Z.M., confirmed M.M.'s statements, which prompted her to take the children to the Lonoke County Sheriff's Department. At the sheriff's office, they advised her to take M.M. to the Jacksonville Hospital for an examination.

Z.M., who was ten years old, testified that, at bedtime on Sunday night, appellant told M.M. to get into the bed and to remove her pajama bottoms, leaving her clothed in a t-shirt and panties. He said that M.M. did not want to sleep with appellant but that appellant said to her, "Get in the bed or I'm going to whoop you." Z.M. was to sleep on the floor by the bed, and he witnessed appellant remove his underwear. Z.M. related that he heard M.M. exclaim "stop it" three or four times and that she got out of bed and went into the bathroom. He said that appellant told her to come back to bed with him, but that M.M. refused, and that she stayed with Z.M. on the floor the remainder of the night.

M.M., then age twelve, testified that appellant told her to remove her pants and that appellant removed his underwear when he was in the bed. M.M. testified that appellant was trying to touch her private area and that appellant "put his hand on my pants and rubbed me." M.M. said that she told appellant "no" and that she moved to the floor with her brother when

appellant would not stop.

Barbara Foster treated M.M. in the emergency room at the hospital in Jacksonville. Ms. Foster testified that M.M. related that appellant had touched her through her pajamas and had placed his hands in her pants. She observed that M.M.'s hymen was intact and saw no signs of bruising or trauma, which Ms. Foster said was consistent with M.M.'s account of what happened. Ms. Foster placed a call to the Arkansas State Police Child Abuse Hotline.

Denore Paladino, an investigator with the state-police division dedicated to crimes against children, interviewed M.M. and Z.M. individually on August 8, 2007. During the interview, M.M. related that appellant told her to remove her pajamas and threatened to "whoop" her if she did not comply. M.M. reported that she had her panties on when she got into bed and that appellant touched her breast and her private area through her clothing. M.M. reported to Paladino that she repeatedly told appellant to stop, that she then went to the bathroom, and afterwards slept on the floor with her brother. Paladino stated that Z.M.'s version of the events matched the account given by M.M.

Next, Rick Newton of the Arkansas State Police testified that he was in his office at the sheriff's department in Stuttgart on August 8, 2007, when he overheard appellant making a complaint to the sheriff about his ex-girlfriend breaking the windshield on his vehicle. Newton also heard appellant advise the sheriff that his ex-girlfriend might pursue molestation charges against him. As Newton passed by them to get a cup of coffee, the sheriff told appellant that Newton dealt with sex-based crimes. Newton said that appellant then asked

to speak with him. Newton testified that appellant initiated the conversation, which Newton recorded on a video camera. He further testified that he knew nothing about M.M.'s allegation until appellant brought it to his attention that day.

In the statement, appellant told Newton that, on the evening in question, M.M. was wearing shorts and a t-shirt and climbed into bed with him because it was hot. Appellant advised that, while he was sleeping, he rolled over and his hand landed on M.M.'s private area. Appellant stated that he woke up and realized that his hand was there and that he removed it after a second or two. Later in the statement, appellant said that, while he was asleep, he had his hand on her private area and that he rubbed it before he awakened. Appellant stated that, about thirty minutes later, he rolled over again and his hand was on her bottom. Appellant said that he then made M.M. sleep on the floor with her brother. Appellant denied touching M.M. underneath her clothing and said that he experienced no sexual gratification from touching M.M. Newton drafted a synopsis of appellant's statement and read it to him. Appellant signed the statement and wrote that it was "true and correct."

Newton further testified that appellant appeared unannounced at the sheriff's office the next day and asked to speak with him again. By this time, Newton was in possession of the investigative report that was prepared by the state police and given to the prosecuting attorney. In this conversation, which was also recorded, appellant held firm to the version of events he recounted the previous day, adding only that he had forgotten to mention that M.M. had gone to the bathroom. This interview ended when appellant advised Newton that

he had spoken with an attorney. Afterwards, Newton placed appellant under arrest.

After the State rested, appellant testified in his own defense. He stated that the children were both sleeping on the floor and that he realized that M.M. was in bed with him when he rolled over and hit her in the stomach. Appellant testified that he made her get out of the bed and that she went to the bathroom. He said that he rolled over again thirty minutes later and hit her on the backside and then told her to stay off the bed and not to get in bed with him again. Appellant testified that he did not touch the child's private parts, and with regard to his statements to Officer Newton, appellant said that Newton had put words in his mouth. Appellant further testified that he and Ms. Jenkins had sex the night she spent with him after her release from jail. He said that he later received a text message from her threatening him if he did not give her twenty dollars "for a good time."

Martin Barnett, appellant's brother, testified that he had a conversation with Ms. Jenkins sometime after August 8, 2007. He said that Ms. Jenkins started giggling while she was telling him about the alleged abuse. Mr. Barnett also testified that Ms. Jenkins urged a friend of hers to break appellant's windshield.

Appellant moved for dismissal at the end of the State's evidence and again at the close of all the evidence. The trial court denied those motions, and the court rendered a finding of guilt on the charge of second-degree sexual assault. Appellant first argues on appeal that the evidence is not sufficient to support the trial court's finding.

As pertinent here, a person commits second-degree sexual assault if the person, being

eighteen years of age or older, engages in sexual contact with another person who is less than fourteen years of age and who is not his spouse. Ark. Code Ann. § 5-14-125(a)(3)(A)–(B) (Repl. 2006). The term "sexual contact" means 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) (Repl. 2006).

As to his challenge to the sufficiency of the evidence, appellant contends that the State failed to prove that sexual contact occurred or, if there was any touching, that it was an act of sexual gratification. The State asserts that appellant's arguments are not preserved for appeal because his motions to dismiss lacked specificity. The State's point is well-taken.

Pursuant to Rule 33.1(b) of the Arkansas Rules of Criminal Procedure (2008), a criminal defendant in a bench trial must challenge the sufficiency of the evidence by raising a motion to dismiss. Rule 33.1(b) also requires the defendant to specifically advise the trial court as to how the evidence is deficient. *See Smith v. State*, 367 Ark. 274, 239 S.W.3d 494 (2006). When a motion to dismiss does not identify particular or specific elements of proof that are missing from the State's case, the motion fails to properly apprise the trial court of the asserted error. *See Tyron v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007). A general motion that merely asserts that the State has failed to prove its case is not adequate to preserve the issue for appeal. *See Davis v. State*, 97 Ark. App. 6, 242 S.W.3d 630 (2006). The reason underlying this requirement for specific grounds to be stated and for the absent proof to be pinpointed is that it allows the trial court the option of either granting the motion or, if justice requires, allowing the State to reopen its case to supply the missing proof.

Gillard v. State, 373 Ark. 98, 270 S.W.3d 836 (2008). A further reason that the motion must be specific is that the appellate court may not decide an issue for the first time on appeal and cannot afford relief that is not first sought in the trial court. *Lamb v. State*, 372 Ark. 277, 275 S.W.3d 144 (2008). Here, appellant moved for dismissal at the conclusion of the State's case by saying, "Your Honor, at the [sic] time the defense would make a motion for directed verdict, which the State has not proved the case beyond a reasonable doubt. And that – we would ask for a dismissal of the charges." At the close of the case, appellant renewed this motion without offering any additional argument. Because appellant's motion was general and did not inform the trial court of any specific deficiencies in the State's proof, the issues that appellant raises on appeal are not preserved for our review. Therefore, we cannot address his arguments challenging the sufficiency of the evidence.

In his reply brief, appellant asserts that, if we determine that trial counsel's motion to dismiss was inadequate, then we should summarily hold that trial counsel was ineffective as a matter of law. We decline to address that issue as well. If trial counsel failed in his duty, appellant must assert that point in a Rule 37 petition; he cannot raise the issue of ineffective assistance of counsel for the first time on appeal. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004).

Appellant's next argument concerns the trial court's denial of his motion to suppress the two statements he made to Officer Newton. Appellant contends that the trial court erred by not granting the motion because Officer Newton failed to apprise appellant of the warnings required by *Miranda*.

In reviewing a trial court's ruling denying a motion to suppress a confession, we make an independent determination based upon the totality of the circumstances. *Wedgeworth v. State*, 374 Ark. 373, 288 S.W.3d 234 (2008). We review the trial court's findings of fact for clear error, and the ultimate question of whether the confession was voluntary is subject to an independent, or *de novo*, determination by this court. *Clark v. State*, 374 Ark. 292, 287 S.W.3d 567 (2008). The ruling will be reversed only if it is clearly against the preponderance of the evidence. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003).

Miranda warnings are only required in the context of custodial interrogation. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). A person is "in custody" for purposes of *Miranda* warnings when he is deprived of his freedom by formal arrest or restraint on freedom of movement of the degree associated with formal arrest. *Hall v. State*, 361 Ark. 379, 206 S.W.3d 830 (2005). In resolving the question of whether a suspect was in custody at a particular time, the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation. *Wofford v. State*, *supra*. The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being interrogated. *Id*.

The trial court found that appellant was not "in custody" for purposes of *Miranda* when either of the statements were made. Our review of the record convinces us that the trial court's ruling is not clearly against the preponderance of the evidence. Without question, appellant voluntarily and of his own accord presented himself at the sheriff's department the

day he made the first statement. The record further shows that appellant asked to speak with Officer Newton, who at that time had no knowledge about the charges. Appellant's freedom of movement was not curtailed in any way, and he left the sheriff's department after making the first statement. Appellant also appeared at the sheriff's office the next day of his own volition and once again asked to speak with Newton. The record does not show that appellant was detained or restrained while he spoke with Newton. Although Newton undoubtedly considered appellant a suspect by that time, the *Miranda* warnings are not required simply because the questioned person is one whom the police suspect. *Hall v. State*, *supra*. The totality of the circumstances do not support a conclusion that appellant was in custody when the statements were made. Accordingly, we affirm the denial of the motion to suppress.

Affirmed.

HART and GLOVER, JJ., agree.