NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, J.

DIVISION II

CACR06-1290

JUNE 6, 2007

RODERICK GRADY
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT
[NO. CR-2005-363-5]

HON. ROBERT HOLDEN WYATT, JR., JUDGE

AFFIRMED

Appellant Roderick Grady appeals the July 25, 2006, judgment and commitment order filed in Jefferson County Circuit Court, resulting from a jury verdict of guilty on the charges of aggravated robbery and attempted rape. Appellant was sentenced to ten years' imprisonment for robbery and six years' imprisonment for attempted rape, and those sentences were ordered to run concurrently. Appellant claims on appeal that there was insufficient evidence to sustain a guilty verdict on the aggravated robbery charge; that the evidence was insufficient because the testimony of an alleged accomplice linking appellant to the crime was not corroborated; and there was insufficient evidence that he engaged in conduct that constituted a substantial step culminating in the commission of a rape. We affirm.

Around 2:30 a.m. on October 22, 2004, three males approached Simon Mosby in a common area at the Regency Inn in Pine Bluff where Mosby had a room. After one of the males brandished a gun, which later turned out to be a "BB" gun made to look like a real handgun, Mosby's pockets were searched. Ten dollars was taken from Mosby, and he was directed to lead the men back to his room. Mosby told the men that he did not want to go to his room because his girlfriend and her two children were sleeping there. The males insisted, and Mosby used his key to allow the men into his room. Upon entering, Mosby was made to lie down under the sink, and at least one of the men rummaged through the drawers of the room.

When the men first came in, Sharon Stewart was sleeping in a bed, and her two sons, then ages fourteen and fifteen, were asleep on the floor. The men told Stewart to undress. She refused to do so in front of her children. She was then told to go to the bathroom. Two of the men went into the bathroom with her and told her to undress. Stewart testified that both men tried to have anal sex with her, but could not get aroused enough to penetrate because Stewart was crying and yelling. Stewart stated that both men touched her buttocks, arms, chest, and private parts. She was allowed to dress after the males left the bathroom. In the meantime, the third male remained in the bedroom with the boys and Mosby. Later in the night, the males asked Stewart to go back to the bathroom and perform oral sex. She refused. At some point, she discovered that her purse was missing. One of the males retrieved it from outside, where it had been taken by one of the three accused and dumped. She found that her medication and her pocket knife were no longer in her purse.

After the males left the motel room, Stewart called the police and was taken by ambulance to the hospital. Stewart learned after the males left that her son, Christopher Maxwell, attended school with one of the males, Brandon Pugh. Pugh was the one who did not go into the bathroom. When Stewart was interviewed by police, she told them that her son identified Pugh. Pugh was picked up for questioning on March 25, 2005. Along with appellant, Eric Brown was identified as a suspect during Pugh's questioning. Both appellant and Brown[1] were arrested. Stewart and Maxwell identified appellant from the photographic line-up as one of the males present on the night in October. There was no physical evidence linking appellant to the crime scene.

At the trial, appellant moved for a directed verdict both at the close of the State's evidence and at the conclusion of all evidence. The trial court denied these motions. A jury found appellant guilty and sentenced him to ten years for aggravated robbery and six years for criminal attempted rape, said sentences to run concurrently in the Arkansas Department of Correction. This appeal follows.

We treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. *Whitt v. State*, 365 Ark. 580, __ S.W.3d __ (2006). When reviewing a challenge to the sufficiency of the evidence, this court assesses the evidence in a light most favorable to the State and considers only the evidence that supports the verdict. *Gillard v. State*, 366 Ark. 217, __ S.W.3d __ (2006). We will affirm a judgment of conviction if substantial evidence

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[1]Brown was convicted of aggravated assault and sexual assault in the second degree for his participation in these events.

exists to support it. *Id*. Substantial evidence is evidence 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*.

A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person. Ark. Code Ann. § 5-12-102 (Repl. 2006). Robbery becomes aggravated robbery if the person commits robbery and is armed with a deadly weapon, or represents that the weapon is deadly, or attempts to inflict death or serious injury upon another person. Ark. Code Ann. § 5-12-103 (Repl. 2006). Appellant contends that there is not enough evidence to show that he committed aggravated robbery.

He claims that the State charged him in the information with aggravated robbery against Stewart, Mosby, and Stewart's two children conjunctively. He claims that the State must show that he tried to commit a conjunctive robbery on these four, and that he was armed with a deadly weapon, or represented himself to be so. He claims there was no evidence presented to show that he committed a robbery upon Stewart and her two children. He claims that the children both testified that they had not been threatened and no one took anything from them. Further, he argues that there is not enough evidence identifying him to sustain a charge of aggravated robbery. He points out that Mosby testified that the person who had the gun, went through his pockets, and stole ten dollars was light skinned. Mosby admitted in court that

appellant was not light skinned. Therefore, appellant claims there was not sufficient evidence to convict him of aggravated robbery.

The State argues that it is not necessary to list the victims disjunctively rather than conjunctively. In *Houpt v. State*, 249 Ark. 485, 459 S.W.2d 565 (1970), the supreme court upheld a conviction where the State's proof extended only to appellant's taking of paper money, when the information charged appellant of robbery by taking silver and paper money. The court held that the variance in phrasing did not affect the substantive issue of guilt, but was simply one of form. *Id*. Also, the State claims that it did not have to show an individual threat, only a threat that physical force be used. *Robinson v. State*, 317 Ark. 17, 875 S.W.2d 837 (1994). Therefore, the State claims that as long as one of them was threatened, it does not matter whether they were all threatened. The State argues that Pugh testified that he, Brown, and appellant in fact approached Mosby, took his money, went to his hotel room, and, while brandishing a gun, asked the occupants for money. Pugh testified that appellant pointed his gun at Mosby. Finally, Pugh testified that appellant and Brown rummaged through the dresser and looked for things under the bed. The State argues, and we agree, that the above evidence establishes that appellant committed aggravated robbery upon any of the listed victims in the information.

Appellant next contends that there was insufficient evidence to sustain the guilty verdict because Pugh's testimony linking him to the robbery was not corroborated. Arkansas Code Annotated section 16-89-111(e)(1)(A) provides that a felony conviction cannot be based upon

the testimony of an accomplice unless it is corroborated by other evidence tending to connect the defendant to the commission of the offense. The corroborating evidence need not be sufficient standing alone to sustain the conviction, but it must, independent from that of the accomplice, tend to a substantial degree to connect the defendant with the commission of the crime. *Holsombach v. State*, __ Ark. __, __ S.W.3d __ (Jan. 11, 2007). The corroborating evidence may be circumstantial so long as it is substantial; evidence that merely raises a suspicion of guilt is insufficient to corroborate an accomplice's testimony. *Id*. The test is whether, if the testimony of the accomplice were completely eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Id*.

Appellant argues that Pugh's testimony that appellant accosted Mosby outside the hotel was not corroborated. He contends that Mosby testified that the person was light skinned and that appellant was not light skinned. Further, he claims that Mosby was not able to identify his assailant. The State argues that appellant did not include this argument in his directed-verdict motion, neither at the close of the State's case, nor at the end of all evidence. *E.g., Grady v. State*, 350 Ark. 160, 85 S.W.3d 531 (2002). The State claims that because appellant did not argue the accomplice-corroboration argument in his directed-verdict motions, the argument is precluded from appellate review. *See Hutts v. State*, 342 Ark. 278, 28 S.W.3d 265 (2000). Even though we agree with the State that appellant did not raise this argument at the trial-court level, we hold that there was substantial evidence to corroborate Pugh's testimony. Setting

aside Pugh's testimony, there was evidence that appellant committed aggravated robbery in that both Stewart and her son identified appellant from a photographic line-up as the individual they observed in the hotel room.

Finally, the appellant argues that there is not sufficient evidence to sustain a guilty verdict of attempted rape. Under Ark. Code Ann. § 5-14-103 (Repl. 2006), a person commits rape if he engages in sexual intercourse or deviate-sexual activity with another person by forcible compulsion. "Deviate-sexual activity" means any act of sexual gratification involving the penetration, however slight, of the anus or mouth of a person by the penis of another. Ark. Code Ann. § 5-14-101(1) (Repl. 2006). "Sexual intercourse" means penetration, however slight, of the labia majora by a penis. Ark. Code Ann. § 5-14-101(10). "Forcible compulsion" means physical force or threat, express or implied, of death or physical injury to or kidnapping of any person. Ark. Code Ann. § 5-14-101(2). Under Ark. Code Ann. § 5-3-201 (Repl. 2006), a person attempts to commit rape if he purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of rape. *Summerlin v. State*, 296 Ark. 347, 756 S.W.2d 908 (1988).

Appellant argues that there is no evidence that he tried to force intercourse with Stewart. He claims there is no evidence that he was in the bathroom or that Stewart was not free to leave the bathroom. He argues that Stewart testified that she was allowed to dress in the bathroom and refused to give oral sex without repercussion. However, Stewart testified that once inside the bathroom, she thought that the two males came behind her with the gun.

She was instructed to remove her clothes and she testified that the assailants put their hands on her buttocks, arms, chest and private parts. Stewart stated that when each tried to put his penis inside her, neither could penetrate. Pugh testified that he heard appellant and Brown request oral sex from Stewart prior to entering the bathroom. Further, Pugh stated that appellant told him that he tried to have sex with Stewart, but that he could not get aroused. This evidence demonstrates a substantial step toward raping Stewart.

Affirmed.

MARSHALL and MILLER, JJ., agree.