

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
TERRY CRABTREE, JUDGE

DIVISION I

CACR 06-186

JOHN SWATY

December 13, 2006

	APPELLANT	APPEAL FROM THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS [NO. CR-2005-97-2]
V.		
STATE OF ARKANSAS		
	APPELLEE	HONORABLE JAMES SCOTT HUDSON, JR., CIRCUIT JUDGE

AFFIRMED

Appellant was convicted by a Miller County jury of second-degree sexual abuse, and he was sentenced to a term of twenty years in the Arkansas Department of Correction. Appellant challenges the sufficiency of the evidence, and he alleges it was error for the trial court to deny his motion for directed verdict on the ground that the victim did not make an in-court identification of him. Appellant further alleges that the trial court should have intervened, on its own motion, to prohibit an expert witness from testifying about her opinion of the victim's truthfulness, and that it was error for the trial court to find that the victim was competent to testify at the trial. We find no error and affirm.

J.R. is a developmentally delayed boy who was attending a self-contained special education class at Arkansas High in Texarkana, Arkansas, in September, 2004. J.R. was

sixteen years old in September 2004, but he had the functioning capacity of a four year old. Appellant John Swaty was the teacher of J.R.'s special education class. There was testimony from Lisa Tirrito, a classroom aide who had worked with J.R. in the special needs classroom for several years, that after J.R. returned from an errand to the mail room with Mr. Swaty, J.R. looked distressed. She asked J.R. some questions, and eventually she asked him if Mr. Swaty had touched him. Ms. Tirrito testified that J.R.'s face became flushed, he lowered his head, and he began clenching his fingers down at his side. When she asked J.R. if Mr. Swaty touched him around his underwear, J.R. pointed to the area of his penis and said, "right there."

Ms. Tirrito notified another classroom aide, Ms. Park, about her conversation with J.R. The principal of the school was notified, and J.R. was called to the principal's office and questioned. During the questioning in the principal's office, J.R. denied that anything happened. The day after J.R. was questioned in the principal's office, the principal called J.R.'s parents and told them about the accusation. J.R.'s mother called her sister-in-law, Josana Reed, who is an elementary school teacher, and Josana immediately went to their house. Josana Reed testified that J.R. was very agitated, rocking back and forth, clenching his fists, and in constant motion. J.R. told his aunt Josana that Mr. Swaty went into the restroom with him and "Mr. Swaty pee when I pee. Mr. Swaty reach over and slap my hand and say, 'Stop that peeing. Stop that peeing.'" Josana Reed testified that J.R. told her Mr. Swaty took his penis and rubbed it up and down J.R.'s leg and went "Woo, woo, woo. Woo, woo, woo." Josana Reed testified that J.R. is capable of using the restroom by himself and

does not need assistance. She said that after talking with J.R., she called the principal of Arkansas High and requested a meeting. She attended the meeting along with several family members and their attorney. Josana Reed testified that at this meeting J.R. said that Mr. Swaty touched his penis.

There was also testimony from Texarkana Police Detective Paul Nall. Detective Nall testified that he interviewed J.R., and that J.R. told him Mr. Swaty was his teacher. J.R. told Detective Nall that Mr. Swaty “took his weenie and he whipped me with it and pinched it.” In response to Detective Nall’s question about what happened in the mail room, J.R. responded that “he shut the door and he stick his weenie on me.” J.R. indicated that Mr. Swaty also used his hand to pinch J.R.’s penis. Detective Nall used an anatomical drawing during his questioning of J.R., and J.R. circled the penis on the drawing to indicate where Mr. Swaty touched him. J.R. also marked the drawing on the buttock area to indicate where Mr. Swaty used his penis to “whip” him.

J.R. testified at the trial. He testified that Mr. Swaty used to be his teacher, but that he is no longer in his classroom. When asked how he felt about Mr. Swaty, J.R. responded “bad.” When asked why Mr. Swaty was a bad man, J.R. responded that he “hit me with his weenie.” J.R. testified that this happened in the mail room bathroom. J.R. also indicated that Mr. Swaty “whipped” another classmate’s penis. This testimony is not identical to the testimony J.R. offered at the competency hearing held the previous month.

At the competency hearing J.R. indicated that if a person tells a lie he goes to hell and if he’s a good boy and tells the truth he goes to heaven. He responded affirmatively when

asked by the court if he understood that you could go to jail or be punished somehow for telling a lie. J.R. promised the court that he would tell the truth. When asked by the prosecutor what Mr. Swaty did that was a bad thing, J.R. indicated that he didn't want to tell. J.R. testified that he thought he was in trouble. He identified Mr. Swaty in the courtroom and said he was scared of Mr. Swaty. J.R. answered in the affirmative when asked if he thought Mr. Swaty was going to hurt him. When asked a second time to tell what Mr. Swaty did that was a bad thing, J.R. said that Mr. Swaty hurt him. When questioned about how Mr. Swaty hurt him, J.R. was reluctant to answer but responded that Mr. Swaty hit him on his hand. At the end of the competency hearing the court found that J.R. had the ability to understand the legal obligation to tell the truth and the consequences of not telling the truth while under a legal obligation to do so. The court found that while J.R.'s capacity is limited with regard to numbers and with time, J.R. does have the ability to receive and retain accurate impressions and to transmit them through his testimony in court. Therefore, the court found that J.R. was competent to testify.

Sufficiency of the Evidence

We first address appellant's contention that the evidence is insufficient to support his conviction. Our standard of review is well-settled. When a defendant makes a challenge to the sufficiency of the evidence on appeal, the appellate court views the evidence in the light most favorable to the State. The test for determining sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond

suspicion or conjecture. Only evidence supporting the verdict will be considered, and when a challenge to sufficiency of the evidence is reviewed, the conviction will be affirmed if there is substantial evidence to support it. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003).

Arkansas Code Annotated section 5-14-125 (Repl. 2006) provides that a person commits sexual assault in the second degree if the person engages in sexual contact with another person who is less than eighteen years of age and the actor is a professional and is in a position of trust or authority over the minor. Appellant argues that, because J.R. gave testimony that was conflicting, the jury would have to engage in speculation or conjecture to reach the conclusion that he was guilty of engaging in sexual contact with J.R. However, it is the duty of the jury to resolve questions of conflicting testimony, and the jury is free to believe all or a portion of any witness's testimony. *Baughman supra*. Although J.R. testified that appellant hit his hand, he also testified that appellant engaged in sexual contact with him. Further, there was testimony from several other witnesses that J.R. reported that appellant engaged in sexual contact with him. Substantial evidence supports appellant's conviction for sexual assault in the second degree.

Identification

Appellant argues that because J.R. did not make an in-court identification of him at trial, the identification evidence is insufficient to support his conviction. We find appellant's argument to be without merit. In the case of *Stewart v. State*, 88 Ark. App. 110, 195 S.W.3d 385 (2004), the rape victim was unable to recognize her attacker in the courtroom. However, she did recognize the rapist at the time of the rape as her supervisor

on her first day of work. We reasoned that while identification of the defendant as the perpetrator is an element of every criminal case, there is no requirement that the identification must be provided by the victim. Therefore, we held that because there was “other evidence to show that appellant was in fact the victim’s supervisor at the time in question, we hold that the jury was not required to find that the identification of appellant was patently unreliable, and that there is substantial evidence identifying appellant as the rapist.” *Id.* at 113. In the case at bar, J.R. testified that Mr. Swaty was his teacher and was the person who engaged in sexual conduct with him. Detective Nall testified that he interviewed Mr. Swaty about J.R.’s allegations, and he pointed to appellant in court when asked to identify Mr. Swaty. We find that there was substantial evidence identifying appellant as the perpetrator.

Expert Testimony

Harriet Whitten, a licensed professional counselor, testified at the trial. During her testimony she was questioned by the prosecutor about whether J.R.’s behavior was consistent with that of a child who had been sexually abused. Ms. Whitten gave her opinion, and there was no objection from defense. Ms. Whitten was also asked whether J.R.’s reporting of the facts was consistent, and she replied that it was. Again, there was no objection from defense.

In hundreds of cases we have reiterated our fundamental rule that an argument for reversal will not be considered in the absence of an appropriate objection in the trial court. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). Appellant asserts on appeal that pursuant to Ark. R. Evid. 103(d), the trial court had an affirmative duty to prohibit Ms.

Whitten's testimony. The Arkansas Supreme court addressed the Ark. R. Evid. 103(d) argument in *Wicks supra*. In that case, the court recognized four exceptions to the fundamental rule that an argument will not be considered on appeal in the absence of an appropriate objection in the trial court. The exceptions are: (1) when the trial court fails to bring to the jury's attention a matter essential to its consideration of the death penalty itself; (2) when defense counsel has no knowledge of the error and hence no opportunity to object; (3) when the error is so flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to intervene and correct the error either by admonition to the jury or by ordering a mistrial; and (4) on the basis of Ark. R. Evid. 103(d), which provides that "nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court." Although the court recognized the potential for a Rule 103(d) exception, it went on to state that "that statement, however, is negative, not imposing an affirmative duty." *Id* at 787. Clearly, Rule 103(b) does not impose an affirmative duty on the court, and appellant cannot now complain about an issue he failed to raise below.

Competency

The criteria for determining whether a witness is competent to testify are: (1) the ability to understand the obligation of an oath; (2) an understanding of consequences of false swearing; (3) the ability to receive and retain accurate impressions; and (4) the extent that the capacity exists to transmit to the fact-finder a reasonable statement of what was seen, felt or heard. *Chambers v. State*, 275 Ark. 177, 628 S.W.2d 306 (1982). Appellant asserts that,

due to the inconsistencies in J.R.'s testimony at the competency hearing and the trial, the last two criteria were not met. While there were some inconsistencies in J.R.'s testimony, the trial court correctly noted that those would affect J.R.'s credibility, not his competency. Competency as referred to in Ark. R. Evid. 601, is not to be confused with reliability. *Hammon v. State*, 338 Ark. 733, 2 S.W.3d 50 (1999). The issue of competency of a witness is one in which the trial judge's evaluation is particularly important due to the opportunity he or she is afforded to observe the witness and the testimony. *Byndom v. State*, 344 Ark. 391, 39 S.W.3d 781 (2001) (citing *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994)). The trial court applied the correct standard to determine whether J.R. was competent to testify, and it found that he met the requirements of a competent witness. That finding was not an abuse of the trial court's discretion, and is, therefore, affirmed.

Affirmed.

GLOVER and VAUGHT, JJ., agree.