DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

CACR06-529

DECEMBER 13, 2006

ROBERT LOUIS ELKINS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE MILLER COUNTY CIRCUIT COURT
[NO. CR-04-627-2]

HON. KIRK D. JOHNSON, JUDGE

AFFIRMED

Appellant Robert Louis Elkins appeals from his convictions of attempted aggravated robbery and felon in possession of a firearm, for which he was sentenced as an habitual offender to a total of 100 years in the Arkansas Department of Correction. He argues that the trial court erred by denying his motion for a directed verdict because (1) there was insufficient evidence to support the conviction of attempted aggravated robbery, and (2) he proved the affirmative defense of renunciation. Because appellant failed to preserve the issues for our review, we affirm.

On or about June 22, 2004, the Texarkana Police Department received a tip that appellant was planning to rob an Advance Auto Parts store. Officers set up surveillance over the next two evenings at the strip mall where the business was located. On the first evening, appellant parked his vehicle across the street from Advance Auto Parts and the other

businesses located in the strip mall, and the officers believed he was observing the business for approximately ten to fifteen minutes before driving away from the area. On June 23, 2004, the second night of surveillance, an unidentified woman approached the Advance Auto Parts store and told the manager that she had noticed a person walking around and looking at the store. During this time frame, one of the officers involved in the surveillance operation saw appellant put on some type of mask while walking around the area.

Appellant never attempted to enter the business and was walking away from Advance Auto Parts when he was arrested some distance from the store in question. At the time of his arrest, appellant was in possession of gloves, a plastic bag, a homemade mask, and a handgun. After arriving at the police station, appellant told Officer John Vanmeter that he knew he was being watched and that was the reason he decided "not to do it."

Appellant was tried before a jury, and at the close of the State's case in chief, his counsel moved for a directed verdict on the grounds that the State had failed to meet its burden of proof that appellant had engaged in conduct constituting attempted aggravated robbery, that he did not threaten physical force, or that he was in possession of a firearm. Additionally, he argued that even if the State had met its burden, the circuit court should have granted the motion for directed verdict because appellant had proved by a preponderance of the evidence that he had renounced any plan he had that night to rob Advance Auto Parts.

Appellant's counsel failed to renew the motion for directed verdict at the close of the evidence as required by Ark. R. Crim P. 33.1, and appellant was convicted of both counts.

However, while the jury was deliberating appellant's sentence, the following colloquy occurred:

DEFENSE COUNSEL: Judge, while we're all here.

THE COURT: Yes, ma'am.

DEFENSE COUNSEL: I've talked to Chuck about this. I don't think we renewed our motion for directed verdict at the close of all the evidence. If the record would just reflect that we renewed our motion. He didn't have a problem –

PROSECUTOR: To have the record reflect that it was timely made, I have no problem with that.

THE COURT: All right. Let it so reflect, and the motion will be denied.

During the sentencing phase, the jury was instructed that appellant had eight prior felony convictions, and he was eventually sentenced to sixty years on the attempted aggravated robbery conviction and forty years on the felon in possession conviction, with the sentences to run consecutively.

We review a motion for directed verdict as a challenge to the sufficiency of the evidence. *Cluck v. State*, 365 Ark. 166, __ S.W.3d __ (2006) (citing *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004)). We have repeatedly held that in reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Id.* (citing *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002)). 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 decline to address the merits of appellant's arguments on appeal because they are not preserved for our review. Appellant failed to move for directed-verdict at the close of all the evidence pursuant to the requirements of Ark. R. Crim. P. 33.1. *See, e.g., Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003) (holding that a directed verdict motion made after the close of all evidence, but during closing statements, is not timely, and therefore, does not preserve a sufficiency challenge on appeal). The mere fact that, during deliberations in the sentencing phase of appellant's trial, the two attorneys attempted to agree to have the record reflect that a renewal was timely made is not effective. *See Claiborne v. State*, 319 Ark. 602, 892 S.W.2d 511 (1995). Allowing such a blatant disregard of the timing aspect of Rule 33.1 would undermine the very purpose of the rule, specifically permitting the court to make a ruling at the conclusion of all the evidence but prior to the verdict.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.