ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION II

CA CR 07-1135

May 21, 2008

JOHN STEVEN CROFT	APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CR-2006-1230]
V.		HONORABLE CHRISTOPHER CHARLES PIAZZA, CIRCUIT JUDGE
STATE OF ARKANSAS	APPELLEE	AFFIRMED

A jury found appellant guilty of two counts of sexual assault in the second degree involving his daughter and stepdaughter. He now appeals his conviction, arguing that the trial court erred in (1) denying his motions for directed verdict and (2) not performing an in camera review of the girls' sealed counseling records to look for any exculpatory evidence. We find no error and affirm.

Appellant was charged with two counts of sexual assault after his stepdaughter, CR, reported that appellant had sexually abused both her and her stepsister, MC. A trial was held on March 21, 2007. Immediately prior to trial, the court and the attorneys had a discussion concerning sealed counseling records. The court determined that there were additional

counseling records that it had not yet seen, and these records were to be immediately brought to the court by courier. In the meantime, the court continued to hear pre-trial motions, and appellant's attorney requested that there not be any mention of counseling in the guilt phase of the trial, "assuming we get them [the counseling records], and the Court reviews them, and there's nothing in there that's missing on our part for purposes of impeachment or that's exculpatory." Some time later, during voir dire, the court stated, "I've got those records … and there's just nothing exculpable in there." With the consent of both parties, the court then sealed the records, marked them, and made them a part of the record.

Once the trial commenced, eleven-year-old CR testified that when she was approximately eight years old, appellant took her and her stepsister to a back bedroom, told them to take their clothes off, and had them each sit on his naked "privacy area" and rock back and forth. CR testified that this happened on at least three occasions. CR also testified that she and her stepsister were directed to touch appellant in his "privacy area" with their hands, and sometimes they were told to use their mouths. CR admitted that she had testified in a previous juvenile proceeding that the abuse had not happened, but she explained that she did so because she overheard her mother telling someone how upset she would be if appellant went to prison. CR also admitted that she had denied the abuse when first questioned by the Department of Human Services, but she stated that she had done so because she had been taught not to give personal information to strangers, she did not know why they were questioning her, and she was scared.

Appellant's daughter, twelve-year-old MC, also testified at trial, but she refused to

answer the majority of the questions posed to her. MC did confirm that when she, her stepsister, and appellant were alone in the bedroom, things would happen that made her feel bad or uncomfortable. MC refused to answer further questions, however, because she did not want her dad to get into trouble.

After presenting additional testimony from Tessie Mullen, the girlfriend of CR's father; Danielle Cobb, the detective who took statements from the girls; and Dr. Jerry Jones, a pediatrician who had examined both girls, the State rested. Appellant then made motions for directed verdict as to both counts. The court denied the motions and the later renewal of the motions after the defense rested. Appellant was found guilty and sentenced to two consecutive sentences of fifteen years' imprisonment. This appeal followed.

For his first point on appeal, appellant argues that the trial court erred in denying his motions for directed verdict. A motion for directed verdict is viewed as a challenge to the sufficiency of the evidence. *Williams v. State*, 96 Ark. App. 277, 241 S.W.3d 290 (2006). The test for determining evidentiary sufficiency is whether there is substantial evidence to support the finding of guilt. *Id*. On appeal, the court reviews the evidence in the light most favorable to the appellee and sustains the conviction if there is any substantial evidence to support it. *Id*. Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id*.

In his argument, appellant asserts that he was convicted based solely on the basis of CR's testimony, and because her testimony was "clearly unbelievable" and "a plethora of inconsistencies and direct contradictions," the trial court should have disregarded her testimony

and granted his motions for directed verdict. However, this is not the argument that appellant presented to the trial court. At trial, appellant presented the following motion:

> With regard to count one, I would argue that there's not been any substantial evidence to show that John Croft engaged or had any contact with the sex organs of [CR], and even if there was evidence to show that he did in fact engage or that somebody in fact engaged or had sexual contact with her, I don't believe there's been any identification by [CR] as the individual that, that she had contact with. She was asked to identify him at some length, and never did identify him. And, so, I would argue that he has not been identified as the person she is accusing of this, nor has there been substantial evidence that, that he had any contact with her sex organs.
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> [W]ith regard to count two, with regard to [MC], the same argument. No identification. In fact, I think the question was have you seen your father in the courtroom today, and she says no, nor did she ever identify him as the individual that she says had contact with her organs although I'm not sure there was any evidence that she actually said that. There's some evidence that he did something that she didn't like in the, in the bedroom by their selves, but I think as far as any substantial evidence that he in fact had any kind of sexual contact with her sex organs or engaged in any other improper conduct with her is, is not found in the record, and, therefore, I would ask for a directed verdict with regard to count two also.

Arguments not raised at trial will not be addressed for the first time on appeal, and parties cannot change the grounds for an objection on appeal, but are bound by the scope and nature of the objections and arguments presented at trial. *Tryon v. State*, 371 Ark. 25, ___ S.W.3d ___ (2007).

Even if we were to reach the merits, appellant's argument presents no basis for reversal, as the credibility of witnesses is a matter for the jury's consideration. *Davenport v. State*, ___ Ark. ___, ___ S.W.3d ___ (Mar. 20, 2008). Where the testimony is conflicting, we do not pass upon the credibility of the witnesses and have no right to disregard the testimony of any witness after the jury has given it full credence, where it cannot be said with assurance that it

was inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon. *Id.*

For his second argument on appeal, appellant contends that the trial court erred in not performing an in camera review of the sealed counseling records. Appellant asserts that no review of the records occurred, that the trial court made no ruling regarding the possible exculpatory nature of the records, and that such a review was required to ensure appellant received a fair trial. However, according to the facts of the case as revealed in the record and recited above, the court did in fact receive the records, conduct a review, and rule that the records contained no exculpatory evidence. Appellant's attorney, who also represented him below, apparently does not remember this, or perhaps appellant is referring to different records than those referred to by the court below. In any case, appellant's own argument reveals its fatal flaw—appellant argues that there was "no further discussion of the counseling records from the court" and that "the trial judge never made any sort of ruling regarding the exculpatory nature, or lack thereof, of the counseling records," but what appellant fails to recognize is that it was his responsibility to bring the matter to the trial court's attention and obtain a ruling on the issue prior to the end of the trial. *See Thomas v. State*, 370 Ark. 70, ___ S.W.3d ___ (2007) (holding that failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes review on appeal). We therefore decline to address the issue and affirm the judgment of conviction.

Affirmed.

GRIFFEN and GLOVER, JJ., agree.