ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 08-559

	Opinion Delivered OCTOBER 29, 2008
HERBERT GLEN BLAKE APPELLANT	APPEAL FROM THE POLK COUNTY CIRCUIT COURT, [NO. CR-2007-006]
V.	HONORABLE J.W. LOONEY, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Herbert Glen Blake appeals his convictions for three counts of rape and twelve counts of first-degree sexual abuse, entered after a jury trial in Polk County Circuit Court. Appellant was accused in the criminal information of having raped his step-granddaughter fifteen times between January 1994 and December 1997. Appellant was sentenced to concurrent terms, with a net effective term of twenty years in prison.

Appellant challenges the sufficiency of the evidence to support his convictions on the grounds that: (1) for the three convictions for rape, there was insufficient evidence that appellant engaged in deviate sexual activity, which required three distinct events of actual penetration of the victim's labia majora; and (2) for the convictions of the lesser-included offense of first-degree sexual abuse, there was insufficient evidence that the alleged sexual contact occurred twelve times. The argument on appeal is preserved as to the convictions for

rape but not sexual abuse. Therefore, we only address the merits of his arguments regarding the three convictions for rape. After reviewing this case under the proper standard, we affirm the convictions.

The means to challenge the sufficiency of the evidence is via a motion for directed verdict. Ark. R. Crim. P. 33.1(a) (2006). When an appellant challenges the sufficiency of the evidence to support a conviction on appeal, this court's test is whether there is substantial evidence to support the verdict. *Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id.* In determining whether the evidence is substantial, evidence is viewed in the light most favorable to the State, considering only the evidence that supports the verdict. *Id.* A rape victim's testimony alone can be sufficient and is substantial evidence to support a rape conviction as long as it meets with every element. *Ellis v. State*, 364 Ark. 538, 222 S.W.3d 192 (2006).

As interpreted by our supreme court, Rule 33.1 requires that for a defendant to preserve a challenge to the State's proof of lesser-included offenses, his motion for directed verdict must address the elements of the lesser-included offense. *See Brown v. State*, 347 Ark. 308, 65 S.W.3d 394 (2001); *Moore v. State*, 330 Ark. 514, 954 S.W.2d 932 (1997). A defendant must anticipate an instruction on a lesser-included offense and address the elements upon which he wishes to challenge the State's proof in his motion. *See id.* Here, appellant's motion to the trial court encompassed the charges of rape, challenging the State's proof of "penetration" and the proof of the exact number of times it was alleged to have occurred.

Nowhere in his motion did appellant challenge lesser-included offenses by name or by element. For this reason, we address the merits only of the three rape convictions.

The following evidence was presented at the jury trial. The victim, AH, was an adult when she finally revealed that her step-grandfather had abused her as a child. This led to an investigation by the Arkansas State Police in January 2007. Appellant was questioned after being given *Miranda* warnings and waiving his rights. The thirty-to-forty-five-minute interview was reduced to a type-written statement that appellant signed. Therein, appellant stated that he was fifty-nine years old and that AH was referring to incidents that started when she was about nine years old. Appellant described AH spending time with him and initiating conversations about sexual topics and acting out sexually toward him. Appellant then said that:

> There were several times that I would touch her vagina either through the clothes or under her clothes. I never penetrated her with my finger during any of these times. I don't remember how many times this happened. There were also several times that I pulled her pants down and kissed her vagina. I did not penetrate her with my tongue during these times. . . . I never rubbed my penis on her vagina. I did have on a pair of shorts once and my penis was out but I don't remember her touching it. After these incidents I never masturbated, I just waited on my wife to get home then we would have sex.
>
> Again, I never penetrated [AH] with my penis, finger or tongue. I know that these things I did were wrong, but I would not penetrate her.

This statement was entered into evidence.

AH was twenty-one-years old at the time of trial and lived out of state. She said she had only recently revealed this when she was asked if she trusted appellant with other children; AH did not. AH testified that she had never told anyone what happened to her as a child because she did not think anyone would believe her, and it was embarrassing. AH

testified that she remembered that these events occurred when she was nine or ten years old, in the third grade, and that it happened fifteen to twenty times but no less than fifteen times in that year span.

AH stated that the first time, he touched her on her vaginal area and on her breasts on the outside of her clothing. She said it progressed after the second or third time to touching her with no clothes on, in her vaginal area. AH stated that when appellant used his fingers to touch her vaginal area, he touched inside her vagina. She said that appellant also used his tongue to penetrate her vagina. She said these things happened when her grandmother was at work and that appellant would tell AH not to tell their "little secret." Given their family's schedules, AH said these happened mostly on Friday nights when her grandmother worked and she was allowed to go to their house. AH was not able to recall exact dates and times from that year, but stated that she knew what had happened to her and would not have forgotten. AH was upset during her testimony.

AH affirmed that appellant had shown his penis to her and had her touch it with her hand. She affirmed that although appellant never penetrated her with his penis, he rubbed it on her. She said he showed her pornographic magazines, dildos, and her grandmother's lingerie. AH said that she finally told appellant that this was not okay to do this to a child, and that was when the behavior stopped.

The State entered into evidence a recent email from appellant to AH, in which appellant asked for her forgiveness for his "sins." AH's grandmother testified, agreeing that there were pornographic materials, sex toys, and lingerie at their house during the relevant

period of time. The grandmother also stated that she worked most Friday nights. The grandmother testified that it was unlikely she was going to remain married to appellant.

At the conclusion of the State's presentation, appellant moved for directed verdict, challenging the State's proof that there was ever penetration and the State's proof that there were fifteen incidents of penetration. The motion and its renewal were denied, the jury found appellant guilty of three counts of rape and twelve counts of first-degree sexual abuse. After sentencing and judgment, appellant timely appealed.

Appellant was charged with rape according to Ark. Code Ann. § 5-14-103, which required the State to prove that appellant engaged in "deviate sexual activity" with AH, a person under the age of fourteen. "Deviate sexual activity" is defined, as relevant to this case, in Ark. Code Ann. § 5-14-101 as "any act of sexual gratification involving: . . . (B) the penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person." Certainly the State presented proof of penetration through AH's testimony that appellant penetrated her vagina with his fingers and his tongue. AH's testimony was that after the second or third time, the incidents included digital and oral penetration and were no less than fifteen events total. This would support the jury's conclusion that there were at least three events of penetration. Time is not an essential element of the crime of rape when the victim was a child, and any discrepancies in the witness's testimony are for the jury to resolve. *See Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997); *Yates v. State*, 301 Ark. 424, 785 S.W.2d 199 (1990).

We do not address the merits of the twelve convictions for the lesser-included offense of sexual abuse in the first degree, but had we done so, we would have concluded that they were supported by sufficient evidence. For those convictions, the State would have had to present sufficient evidence of twelve incidents of "sexual contact," defined by Ark. Code Ann. § 5-14-108. AH was resolute that at the very least, there were fifteen incidents in total. In appellant's statement to the police, he admitted that he could not remember how many times he had engaged in sexual contact with AH by his hands and mouth, but that there were "several." Appellant stated that he knew what he did was wrong but that it never went so far as penetration of any kind. Thus, appellant waived a challenge to those lesser crimes and provided significant evidence for the prosecution to support convicting him of the lesser crimes.

For the foregoing reasons, we hold that there was sufficient evidence to allow the charges of rape to go to the jury. The trial court's denial of the motions for directed verdict is affirmed.

We affirm appellant's convictions.

GRIFFEN and GLOVER, JJ., agree.