

OFFICE OF THE CLERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201

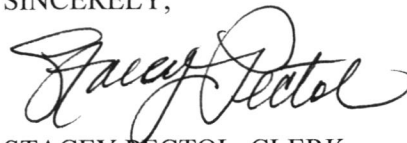
JANUARY 21, 2021

RE: SUPREME COURT CASE NO. CR-20-126
J. P. V. STATE OF ARKANSAS

THE ARKANSAS SUPREME COURT ISSUED THE FOLLOWING ORDER TODAY IN THE
ABOVE STYLED CASE:

“APPELLANT’S PETITION FOR REVIEW IS DENIED.”

SINCERELY,

A handwritten signature in black ink, appearing to read "Stacey Pectol", written in a cursive style.

STACEY PECTOL, CLERK

CC: BEN MOTAL
KAREN VIRGINIA WALLACE, ASSISTANT ATTORNEY GENERAL
VAN BUREN COUNTY CIRCUIT COURT
(CASE NO. 71JV-19-25)

OFFICE OF THE CLERK
ARKANSAS COURT OF APPEALS
625 MARSHALL STREET
LITTLE ROCK, AR 72201


DECEMBER 9, 2020

RE: COURT OF APPEALS CASE NO. CR-20-126
J.P. V. STATE OF ARKANSAS

THE ARKANSAS COURT OF APPEALS ISSUED THE FOLLOWING ORDER TODAY IN
THE ABOVE STYLED CASE:

“APPELLANT’S PETITION FOR REHEARING IS DENIED.”

SINCERELY,



STACEY PECTOL, CLERK

CC: BEN MOTAL
BRAD NEWMAN, ASSISTANT ATTORNEY GENERAL
VAN BUREN COUNTY CIRCUIT COURT
(71JV-19-25)

ARKANSAS COURT OF APPEALS

DIVISION II

No. CR-20-126

JP

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 28, 2020

APPEAL FROM THE VAN BUREN
COUNTY CIRCUIT COURT
[NO. 71JV-19-25]

HONORABLE TROY BRASWELL,
JUDGE

AFFIRMED

BRANDON J. HARRISON, Judge

The State alleged that JP, a teenager, caused substantial inconvenience to the owners of a vehicle by trying to open the door of a locked SUV parked near a boat dock. The substantial inconvenience came when the vehicle owners left a docked boat to detain JP and his cousin for thirty minutes until law enforcement officers arrived after one or more of the boys tried to enter the locked SUV by pulling on one of the door handles. The case was tried to the Van Buren County Circuit Court, which adjudicated JP delinquent.

JP challenges the sufficiency of the State's evidence against him. He argues that unsuccessfully trying to open a locked vehicle door was not "tampering with property" and did not cause a substantial inconvenience to the owner. He also contends that the court's factual findings are not supported by proof beyond a reasonable doubt given the primary witness's self-contradictory testimony about whether it was JP or his cousin who pulled on the door handles.

We do not decide the merits of JP's arguments in this appeal because they are procedurally barred. The bar is that JP did not move for dismissal at the close of all the evidence as required by Arkansas Rule of Criminal Procedure 33.1(b); his challenge to the sufficiency of the evidence is therefore not preserved for review.

JP asserts that his challenge to the sufficiency of the evidence is properly preserved for appellate review and that Rule 33.1's requirements substantially infringe on his federal constitutional rights to due process, freedom from self-incrimination, right to counsel, and the presumption of innocence. In JP's view, a "simple review of the record dooms the State's [preservation] argument" because he moved to dismiss at the close of the prosecution's case. He argues,

To put the proverbial icing on the cake, defense counsel even came back after the close of the evidence and, in response to the prosecutor's attempt to explain why the evidence was sufficient to sustain the charge, exhorted: "Your Honor, I would just add that again I would say that the purpose of this law, including substantial inconvenience, is not for this. I would just say that, and nothing about it was inconvenience. There was nothing done to the vehicle. There was nothing harmed. There was nothing missing."

JP moved to dismiss at the close of the State's case. But did he renew that motion to dismiss at the close of all the evidence? The parties dispute whether the following colloquy occurring during the adjudication trial was a renewal of JP's motion to dismiss, which happened after he finished testifying in his own defense.

THE COURT: Any other witnesses?

DEFENSE ATTORNEY: No, Your Honor.

THE COURT: Okay. All right, so I assume no rebuttal Mr. Brown?

PROSECUTING ATTORNEY: That's correct, Your Honor, no rebuttal.

The court asked the parties questions about the criminal-mischief statute that JP and his cousin allegedly violated.¹ The court specifically asked the attorneys, “What was the tampering?” The prosecuting attorney responded that the “tampering would be the pulling on the door handles of the vehicle.” The prosecutor argued further that the State was proceeding under an accomplice-liability theory so “it doesn’t really matter so much which party did it [JP or his cousin] or that we can’t actually establish which party did it.” In the State’s view, both juveniles were responsible because one pulled on the door handle and the other drove a motorcycle that transported the so-called door puller.

When asked whether he had anything to add, JP’s attorney said that there was no inconvenience to the owner, that nothing was harmed, that no repairs were needed, and that nothing was missing. The court disagreed, stating that the owners “had to miss the rest of their lake day” and had to wait and talk to law enforcement. JP’s attorney argued that JP “was simply playing a prank[.]” The court said, “Okay. All right, I’ll be in recess for about five minutes, review my notes and the law and I’ll be right back with you.” The circuit judge returned to the courtroom and adjudicated the two juveniles delinquent.

We agree with the State that JP failed to renew his motion to dismiss. Our supreme court has interpreted Rule 33.1’s timing element “close of the whole case” to mean “after the last piece of evidence has been received.” *King v. State*, 338 Ark. 591, 595, 999 S.W.2d 183, 185 (1999). After JP testified, it was clear that there would be no rebuttal testimony—

¹If the State had charged JP as an adult, JP’s behavior would constitute criminal mischief in the second degree, which is a Class B misdemeanor. Ark. Code Ann. § 5-38-204(a)(2) (Repl. 2013).

meaning that the last piece of evidence had been received. JP then failed to renew his motion to dismiss after the last piece of evidence had been received. The State immediately began its closing argument in response to the court's questions about the statute.

A similar situation happened in *Jones v. State*, 347 Ark. 409, 415, 64 S.W.3d 728, 732 (2002), where the supreme court did not reach the merits of the juvenile's appeal. The supreme court held that a juvenile's failure to renew his motion for directed verdict after the close of all the evidence in a delinquency proceeding forecloses any appellate review of the sufficiency of the evidence. *Id.* at 416, 64 S.W.3d at 733. We are bound by *Jones* and therefore decline to decide this appeal's merit because JP failed to move to dismiss at the close of all the evidence.

Regarding JP's challenge to the constitutionality of Rule 33.1, this argument was raised for the first time on appeal, so it is likewise procedurally barred. *State v. McCormack*, 343 Ark. 285, 291, 34 S.W.3d 735, 738–39 (2000).

JP's challenge to the State's proof was not properly preserved under Arkansas Rule of Criminal Procedure 33.1. We therefore affirm his delinquency adjudication without deciding the merit of his sufficiency arguments, which include some accomplice-liability points.

Affirmed.

SWITZER and WHITEAKER, JJ., agree.

2020 Ark. App. 493**JP APPELLANT****v.****STATE OF ARKANSAS APPELLEE****No. CR-20-126****ARKANSAS COURT OF APPEALS
DIVISION II****October 28, 2020**APPEAL FROM THE VAN BUREN COUNTY
CIRCUIT COURT
[NO. 71JV-19-25]

HONORABLE TROY BRASWELL, JUDGE

AFFIRMED

BRANDON J. HARRISON, Judge

The State alleged that JP, a teenager, caused substantial inconvenience to the owners of a vehicle by trying to open the door of a locked SUV parked near a boat dock. The substantial inconvenience came when the vehicle owners left a docked boat to detain JP and his cousin for thirty minutes until law enforcement officers arrived after one or more of the boys tried to enter the locked SUV by pulling on one of the door handles. The case was tried to the Van Buren County Circuit Court, which adjudicated JP delinquent.

JP challenges the sufficiency of the State's evidence against him. He argues that unsuccessfully trying to open a locked vehicle door was not "tampering with property" and did not cause a substantial inconvenience to the owner. He also contends that the court's factual findings are not supported by proof beyond a reasonable doubt given the primary witness's self-contradictory testimony about whether it was JP or his cousin who pulled on the door handles.

We do not decide the merits of JP's arguments in this appeal because they are procedurally barred. The bar is that JP did not move for dismissal at the close of all the evidence as required by Arkansas Rule of Criminal Procedure 33.1(b); his challenge to the sufficiency of the evidence is therefore not preserved for review.

JP asserts that his challenge to the sufficiency of the evidence is properly preserved for appellate review and that Rule 33.1's requirements substantially infringe on his federal constitutional rights to due process, freedom from self-incrimination, right to counsel, and the presumption of innocence. In JP's view, a "simple review of the record dooms the State's [preservation] argument" because he moved to dismiss at the close of the prosecution's case. He argues,

To put the proverbial icing on the cake, defense counsel even came back after the close of the evidence and, in response to the prosecutor's attempt to explain why the evidence was sufficient to sustain the charge, exhorted: "Your Honor, I would just add that again I would say that the purpose of this law, including substantial inconvenience, is not for this. I would just say that, and nothing about it was inconvenience. There was nothing done to the vehicle. There was nothing harmed. There was nothing missing."

JP moved to dismiss at the close of the State's case. But did he renew that motion to dismiss at the close of all the evidence? The parties dispute whether the following colloquy occurring during the adjudication trial was a renewal of JP's motion to dismiss, which happened after he finished testifying in his own defense.

THE COURT: Any other witnesses?

DEFENSE ATTORNEY: No, Your Honor.

THE COURT: Okay. All right, so I assume no rebuttal Mr. Brown?

Page 3

PROSECUTING ATTORNEY: That's correct, Your Honor, no rebuttal.

The court asked the parties questions about the criminal-mischief statute that JP and his cousin allegedly violated.¹ The court specifically asked the attorneys, "What was the tampering?" The prosecuting attorney responded that the "tampering would be the pulling on the door handles of the vehicle." The prosecutor argued further that the State was proceeding under an accomplice-liability theory so "it doesn't really matter so much which party did it [JP or his cousin] or that we can't actually establish which party did it." In the State's view, both juveniles were responsible because one pulled on the door handle and the other drove a motorcycle that transported the so-called door puller.

When asked whether he had anything to add, JP's attorney said that there was no inconvenience to the owner, that nothing was harmed, that no repairs were needed, and that nothing was missing. The court disagreed, stating that the owners "had to miss the rest of their lake day" and had to wait and talk to law enforcement. JP's attorney argued that JP "was simply playing a prank[.]" The court said, "Okay. All right, I'll be in recess for about five minutes, review my notes and the law and I'll be right back with you." The circuit judge returned to the courtroom and adjudicated the two juveniles delinquent.

We agree with the State that JP failed to renew his motion to dismiss. Our supreme court has interpreted Rule 33.1's timing element "close of the whole case" to mean "after the last piece of evidence has been received." *King v. State*, 338 Ark. 591, 595, 999 S.W.2d 183, 185 (1999). After JP testified, it was clear that there would be no rebuttal testimony—

Page 4

meaning that the last piece of evidence had been received. JP then failed to renew his motion to dismiss after the last piece of evidence had been received. The State immediately began its closing argument in response to the court's questions about the statute.

A similar situation happened in *Jones v. State*, 347 Ark. 409, 415, 64 S.W.3d 728, 732 (2002), where the supreme court did not reach the merits of the juvenile's appeal. The supreme court held that a juvenile's failure to renew his motion for directed verdict after the close of all the evidence in a delinquency proceeding forecloses any appellate review of the sufficiency of the evidence. *Id.* at 416, 64 S.W.3d at 733. We are bound by *Jones* and therefore decline to decide this appeal's merit because JP failed to move to dismiss at the close of all the evidence.

Regarding JP's challenge to the constitutionality of Rule 33.1, this argument was raised for the first time on appeal, so it is likewise procedurally barred. *State v. McCormack*, 343 Ark. 285, 291, 34 S.W.3d 735, 738-39 (2000).

JP's challenge to the State's proof was not properly preserved under Arkansas Rule of Criminal Procedure 33.1. We therefore affirm his delinquency adjudication without deciding the merit of his sufficiency arguments, which include some accomplice-liability points.

Affirmed.

SWITZER and WHITEAKER, JJ., agree.

Ben Motal, for appellant.

Leslie Rutledge, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

Footnotes:

¹ If the State had charged JP as an adult, JP's behavior would constitute criminal mischief in the second degree, which is a Class B misdemeanor. Ark. Code Ann. § 5-38-204(a)(2) (Repl. 2013).

Arkansas Rule of Criminal Procedure 33.1:

Rule 33.1. Motions for Directed Verdict.

(a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor.

(b) In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.

(c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**NON-EXHAUSTIVE LIST OF RECENT PUBLISHED
APPELLATE DECISIONS APPLYING ARKANSAS RULE 33.1
(2018-2021)**

Ford v. State, 2021 Ark. App. 276 (Ark. App. 2021)
Smith v. State, 2021 Ark. App. 255 (Ark. App. 2021)
Staggs v. State, 2021 Ark. App. 259 (Ark. App. 2021)
Clark v. State, 2021 Ark. App. 252 (Ark. App. 2021)
Johnson v. State, 2021 Ark. App. 107 (Ark. App. 2021)
McCree v. State, 2021 Ark. App. 105 (Ark. App. 2021)
Heverly v. State, 2021 Ark. App. 106 (Ark. App. 2021)
Wynn v. State, 2021 Ark. App. 132 (Ark. App. 2021)
Porchay v. State, 616 S.W.3d 699 (Ark. App. 2021)
Boston v. State, 613 S.W.3d 764 (Ark. App. 2020)
Lambert v. State, 613 S.W.3d 768 (Ark. App. 2020)
Keisler v. State, 2020 Ark. App. 495 (Ark. App. 2020)
Smith v. State, 2020 Ark. App. 374 (Ark. App. 2020)
Ewells v. State, 2020 Ark. App. 321 (Ark. App. 2020)
Thomas v. State, 2020 Ark. App. 307 (Ark. App. 2020)
Neal v. State, 2020 Ark. 245 (Ark. App. 2020)
Benton v. State, 2020 Ark. App. 223 (Ark. App. 2020)
Carpenter v. State, 2020 Ark. App. 202 (Ark. App. 2020)
Thomas v. State, 2020 Ark. App. 200 (Ark. App. 2020)
Riley v. State, 2020 Ark. 99 (Ark. 2020)
Turley v. State, 2020 Ark. App. 118 (Ark. App. 2020)
Buffington v. State, 2020 Ark. App. 97 (Ark. App. 2020)
Henderson v. State, 2020 Ark. App. 96 (Ark. App. 2020)

Garner v. State, 2020 Ark. App. 101 (Ark. App. 2020)
Steen v. State, 2020 Ark. App. 73 (Ark. App. 2020)
Chambers v. State, 2020 Ark. App. 54 (Ark. App. 2020)
Richardson v. State, 2020 Ark. App. 25 (Ark. App. 2020)
Peoples v. State, 590 S.W.3d 783 (Ark. App. 2019)
Groomes v. State, 586 S.W.3d 196 (Ark. App. 2019)
Warren v. State, 567 S.W.3d 105 (Ark. App. 2019)
Daniels v. State, 588 S.W.3d 407 (Ark. App. 2019)
B.T. v. State, 588 S.W.3d 387 (Ark. App. 2019)
Hull v. State, 2019 Ark. App. 505 (Ark. App. 2019)
Adway v. State, 587 S.W.3d 617 (Ark. App. 2019)
Webb v. State, 587 S.W.3d 252 (Ark. App. 2019)
Gillard v. State, 586 S.W.3d 703 (Ark. App. 2019)
Perea v. State, 586 S.W.3d 690 (Ark. App. 2019)
Montgomery v. State, 586 S.W.3d 188 (Ark. App. 2019)
Avery v. State, 585 S.W.3d 742 (Ark. App. 2019)
Thompson v. State, 2019 Ark. App. 391 (Ark. App. 2019)
Sorum v. State, 582 S.W.3d 18 (Ark. App. 2019)
Bowman v. State, 574 S.W.3d 235 (Ark. App. 2019)
Jones v. State, 2019 Ark. App. 219 (Ark. App. 2019)
Gadsden v. State, 570 S.W.3d 527 (Ark. App. 2019)
Walker v. State, 571 S.W.3d 70 (Ark. App. 2019)
Newman v. State, 567 S.W.3d 110 (Ark. App. 2019)
Martin v. State, 567 S.W.3d 558 (Ark. App. 2019)
Lane v. State, 564 S.W.3d 524 (Ark. 2019)

Porras v. State, 2018 Ark. App. 592 (Ark. App. 2018)
Jester v. State, 2018 Ark. App. 558 (Ark. App. 2018)
Akram v. State, 560 S.W.3d 509 (Ark. App. 2018)
Rogers v. State, 558 S.W.3d 833 (Ark. 2018)
Vaughan v. State, 555 S.W.3d 922 (Ark. App. 2018)
Daniels v. State, 551 S.W.3d 428 (Ark. App. 2018)
King v. State, 2018 Ark. App. 309 (Ark. App. 2018)
Dortch v. State, 544 S.W.3d 518 (Ark. 2018)
Woods v. State, 548 S.W.3d 832 (Ark. App. 2018)
Taffner v. State, 541 S.W.3d 832 (Ark. App. 2018)
Steen v. State, 545 S.W.3d 789 (Ark. App. 2018)
Sampson v. State, 544 S.W.3d 580 (Ark. App. 2018)
Bullock v. State, 544 S.W.3d 566 (Ark. App. 2018)
Radford v. State, 538 S.W.3d 894 (Ark. App. 2018)
Hill v. State, No. CR-17-165 (Ark. App. 2018)
Reynolds v. State, 538 S.W.3d 223 (Ark. App. 2018)
McKinney v. State, 538 S.W.3d 216 (Ark. App. 2018)