

# ARKANSAS COURT OF APPEALS

DIVISION II  
No. CACR11-1147

JOHN WEBB, JR.

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered SEPTEMBER 19, 2012

APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT, FORT  
SMITH DISTRICT  
[NO. CR-10-1316]

HONORABLE J. MICHAEL  
FITZHUGH, JUDGE

AFFIRMED

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## JOSEPHINE LINKER HART, Judge

A jury found John Webb, Jr., guilty of raping both S.R. and A.R. The victims are sisters who were minors at the time of the rapes and resided in a household with their mother and Webb, their mother's boyfriend. During the trial, the State also presented the testimony of a third sister, Marquettia Joseph, who testified about a past act that Webb had committed against her when she resided in the household. The basis of Webb's appeal is that the circuit court abused its discretion by allowing the State to present Joseph's testimony because the act was not sexual or sufficiently similar to the sexual acts he committed against her two sisters and was not committed when she was a similar age. We hold that the circuit court did not abuse its discretion and affirm Webb's convictions.

When the charged crime involves sexual acts with a child, the State may present evidence of similar acts with the same child or other children in the same household when



Cite as 2012 Ark. App. 495

it is helpful in showing a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship, as such evidence is admitted to assist proving the depraved sexual instinct of the accused. *See, e.g., Bell v. State*, 371 Ark. 375, 266 S.W.3d 69 (2007) (describing the rule as the “pedophile exception” to Rule 404(b) of the Arkansas Rules of Evidence). The circuit court had broad discretion in this decision, and we will not reverse absent an abuse of that discretion. *Id.*

At a pretrial hearing on Webb’s motion to exclude Joseph’s testimony, Joseph testified that when she was sixteen or seventeen years old, Webb came into her bedroom to awaken her. She did not respond and pretended to remain asleep while lying on her stomach with one leg straight and the other leg “up.” She testified that Webb shook “the bottom part of my behind” and then “swiped his fingers across my vagina” over her clothing “[I]ike he was trying to feel.”

At trial, S.R., who was sixteen at the time of the trial, testified that when she was nine or ten years old, Webb began touching her vagina. She testified that this later progressed to rubbing his penis against her. She also testified that it progressed further and that on several occasions Webb engaged in sexual intercourse with her at various homes in which they resided. A.R., who was twelve at the time of the trial, testified that when she was eight or nine years old, Webb would touch her vagina after she bathed. She further testified that Webb vaginally and anally raped her on multiple occasions and that these acts occurred in the homes in which they resided.



Cite as 2012 Ark. App. 495

After considering Joseph's pretrial testimony and the testimony of her two sisters, the circuit court allowed Joseph to testify at trial. In so ruling, the court found that there was a similarity in all three accounts regarding Webb's touching of the vagina. The court further noted that the acts were directed at a specific class of people, minor children, and that he had a similar relationship with each of the minors. At trial, Joseph testified that when she resided in their shared home, Webb came into her bedroom to awaken her, and he touched her "behind area" and then moved his hand lower and lower and touched her vagina through her clothing.

On appeal, Webb argues that Joseph's testimony was not admissible because the act described by Joseph was not sexual or similar to those described by the victims and because the act was not committed when she was a similar age. We hold that the circuit court did not abuse its discretion. In each instance, Webb touched the vagina of a minor child; it is not significant that he proceeded further with the two victims because there was a sufficient degree of similarity in his conduct. *See Bell, supra* (holding that there was a sufficient degree of similarity where the defendant had the victim touch his penis and later had the victim perform oral sex on him). Moreover, in response to Webb's concerns over the age differences, we note that these acts were nevertheless directed at the same class, that is, minor female children who were sisters that resided in the same household with Webb. *See Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002) (approving admission of testimony despite an age differential where all victims were minors). Furthermore, Webb was an authority figure who



Cite as 2012 Ark. App. 495

was their mother's boyfriend and resided in the same household with them; thus, he had an intimate relationship with the three girls. While Webb further suggests in his brief that the probative value of Joseph's testimony was substantially outweighed by the danger of unfair prejudice, given these similarities, we cannot find an abuse of discretion. *See Flanery v. State*, 362 Ark. 311, 208 S.W.3d 187 (2005) (holding there was no abuse of discretion in admitting evidence over an objection based on Rule 403 of the Arkansas Rules of Evidence where there were enough similarities to make the evidence probative of the defendant's deviate sexual impulses). Accordingly, we affirm Webb's convictions.

Affirmed.

WYNNE and GRUBER, JJ., agree.

*Robert M. "Robby" Golden*, for appellant.

*Dustin McDaniel*, Att'y Gen., by: *John A. Mallory, Jr.*, Law Student No. 1707 Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar of the Supreme Court under the supervision of *Kathryn Henry*, Ass't Att'y Gen., for appellee.