NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR08-666

LELAND ALLEN RADFORD, APPELLANT	**Opinion Delivered** 24 JUNE 2009
V.	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT, [NO. CRO7-246]
	THE HONORABLE GARY COTTRELL, JUDGE
STATE OF ARKANSAS, APPELLEE	AFFIRMED

D.P. MARSHALL JR., Judge

After the jury in his first trial could not reach a verdict, Leland Radford was retried and convicted of second degree sexual assault and attempted second degree sexual assault of a seven-year-old girl. The child's babysitter was Radford's daughter. The crimes allegedly took place at his home. In well-argued briefs, Radford asserts seven errors in his trial. These alleged errors (and their subpoints) range from voir dire to sentencing. The thorniest issue is a matter of evidence: over Radford's objection, the circuit court admitted and played for the jury part of a videotape of the child—who testified at trial—being questioned by a forensic interviewer at the Child Safety Center.

1. We must consider Radford's sufficiency challenge first. *Weston v. State*, 366 Ark. 265, 268, 234 S.W.3d 848, 851 (2006). It fails. His directed-verdict motions were too general to preserve the specific argument he makes on appeal about the lack of proof on sexual gratification. *Meadows v. State*, 358 Ark. 396, 402, 191 S.W.3d 527, 530–31 (2004). On the merits, and as the State points out, sexual assault in the second degree does not include "for sexual gratification" as an element. Ark. Code Ann. § 5-14-125 (Repl. 2006). The alleged victim's testimony created a jury question on the crimes charged. *Davis v. State*, 362 Ark. 34, 39–40, 207 S.W.3d 474, 479 (2005).

2. Radford argues that a potential juror's answers during voir dire, which revealed family experiences with sexual abuse involving children, required the juror's exclusion for cause. The potential juror said that she could put those experiences aside and judge the facts impartially. The circuit court overruled Radford's objection. And the woman served on the jury.

Radford recognizes that the supreme court's decision in *Spencer v. State*, 348 Ark. 230, 238, 72 S.W.3d 461, 465 (2002) binds this court and requires us to affirm on this point. Under *Spencer*, when the potential juror said that she could put aside her preconceived notions and would be fair to Radford, the circuit court had discretion to seat her. The merits of Radford's suggested categorical rule—"in cases

involving allegations of the sexual assault of a child, the trial court should exclude any potential jurors who have been victims of sexual assault or have family members who have been victims of sexual assault"—are for the Supreme Court to judge.

3. The circuit court allowed the girl's mother to recount the child's statements to her on the night that the child reported the alleged sexual assault. The court overruled Radford's hearsay objection to this testimony, accepted the State's argument that it was to show why the mother reported the allegations to authorities, and instructed the jury that the child's words were not offered for their truth but only as a basis for the mother's actions. No abuse of discretion occurred in handling this testimony this way. *White v. State*, 367 Ark. 595, 602–03, 242 S.W.3d 240, 247 (2006).

4. Radford also argues that the circuit court abused its discretion in ruling the alleged victim competent to testify. *Chambers v. State*, 275 Ark. 177, 179, 628 S.W.2d 306, 307 (1982). We disagree. The court found the girl competent at the first trial. At the start of her testimony in the second trial, she testified that she knew the difference between telling the truth and telling a lie. She demonstrated her knowledge by responding to the prosecutor's questions about the color of the microphone. She said that she had gotten a spanking for telling a lie in the past and did not normally tell lies. When the prosecutor asked her what would happen if she

did not tell the truth today, she responded "I'll get in trouble." On this record, the circuit court did not abuse its discretion by concluding that the alleged victim was competent to testify. *Ibid*; *see also Warner v. State*, 93 Ark. App. 233, 238–39, 218 S.W.3d 330, 333 (2005).

5. Karen Blackstone, the forensic interviewer, testified at trial. Radford contends that the circuit court erred by allowing Blackstone to offer testimony that telegraphed to the jury her opinion that this child was credible. No expert may tell the fact-finder that the victim is telling the truth about the crime charged. *Cox v. State*, 93 Ark. App. 419, 422–23, 220 S.W.3d 231, 233–34 (2005) (collecting cases). This is error when done directly. *E.g.*, *Cox*, 93 Ark. App. at 422, 220 S.W.3d at 233 ("I believe her to be credible."). And it is no less error when done indirectly. *E.g.*, *Logan v. State*, 299 Ark. 255, 256–57, 773 S.W.2d 419, 420–21 (1989) (doctors' answers to hypothetical questions based on the facts alleged informed the jury that doctors believed the child was telling the truth). The precedents do not specify our standard of review on this point.

At trial, Blackstone's testimony was a mixed bag. On direct, she first testified about what she looks for when interviewing a child. She said that she evaluates the child's credibility, competency, and cognitive development. Blackstone testified that if, when she is repeating and summarizing what the child has said, the alleged victim

is comfortable enough to correct her, then that indicates that the child is telling the truth. Later in her testimony, Blackstone said that this child corrected her two or three times when Blackstone misstated or repeated incorrectly what the child had told her about the incidents. Blackstone concluded that the child was "not worried about trying to . . . tell me what I want to hear," and that Blackstone could not "suggest . . . something because she's correcting me." Radford did not object to this testimony until about thirty more questions had been asked and answered. Then, on redirect, the prosecutor asked Blackstone whether her goal was "to determine whether or not the allegations are true or not." Blackstone responded, "No, Sir."

Whether Blackstone's testimony crossed the line is a close question. This much is clear, however: Radford failed to object immediately when Blackstone came closest to vouching for the child's credibility by testifying that the girl was not worried about telling Blackstone what she (the examiner) wanted to hear and that the child was not suggestible. *Cf.*, *Cox*, 93 Ark. App. at 421–22, 220 S.W.3d at 233–34. Radford's omission waived this issue. *Hinkston v. State*, 340 Ark. 530, 538, 10 S.W.3d 906, 911 (2000).

6. Radford also argues that the circuit court improperly considered his exercise of his constitutional right to a jury trial when it sentenced him to consecutive prison terms. "The question of whether multiple sentences will be served

concurrently or consecutively is a decision left to the sound discretion of the trial court, not to be altered on appeal absent a clear abuse of that discretion." *Bell v. State*, 101 Ark. App. 144, 147, 272 S.W.3d 110, 113 (2008). A trial court may abuse its discretion in several ways. *Throneberry v. State*, 102 Ark. App. 17, 18, 279 S.W.3d 489, 490 (2008). Among those ways is "when an irrelevant or improper factor is considered and given significant weight." *Ibid*. (internal quotation omitted).

Here, the jury recommended that Radford serve his two sentences consecutively. Before the circuit court imposed sentence, it called for argument from both parties. Then this exchange occurred.

THE COURT:	This jury has found you guilty of the charge of sexual assault in the second degree. The court does fix your sentence at fourteen (14) years in the Arkansas Department of Corrections. . . . this jury has also found you guilty of attempted sexual assault in the second degree. This court does hereby sentence you to a term of seven (7) years in the Arkansas Department of Corrections. . . . I have . . . tried this case twice?
[DEFENSE COUNSEL]:	Yes, Your Honor.
MR. RADFORD:	Yeah.
THE COURT:	. . . this little girl has been through . . . two trials.
[DEFENSE COUNSEL]:	Yes, Your Honor.
THE COURT:	. . . I feel that . . . as far as . . . this court's

consideration is that, . . . I believe what – what you're talking about is mercy . . . to some degree, [Defense Counsel].

[DEFENSE COUNSEL]: Yes, Sir.

THE COURT: And . . . the circumstances to where she's been placed, and the circumstances she's been placed under, I don't feel that's becoming. The court does . . . run these two sentences . . . consecutive, one with the other . . .. Consecutive . . . for a total of twenty-one (21) years in the Arkansas Department of Corrections.

Radford relies on well-reasoned cases from other jurisdictions and the Eighth Circuit because no Arkansas precedent exists on point. He contends that the circuit court abused its discretion by fixing his sentence based on an improper factor—Radford's exercise of his constitutional right to a trial and then a retrial after his first jury deadlocked. The State counters that the circuit court meant the crimes themselves, not the two trials, when the court spoke of "the circumstances she's been placed under."

This is a troubling allegation of error. Here again, however, Radford's failure to object below is fatal to his argument on appeal. If Radford had objected, *cf. Thornberry*, *supra*, then the circuit court could have clarified its reasoning, and his point would be preserved for us whether the record got any clearer or not. As the record stands, Radford waived his sentencing argument. *Hinkston*, 340 Ark. at 538,

10 S.W.3d at 911. The sentence was within the statutory range for the crimes, Ark. Code Ann. § 5-4-401 (Repl. 2006), and the concurrent/consecutive issue is committed to the circuit court's discretion. Ark. Code Ann. § 5-4-403 (Repl. 2006); *Bell v. State*, 101 Ark. App. 144, 147, 272 S.W.3d 110, 113 (2008). We therefore cannot look past Radford's waiver and reach this point as a matter of the sentence's legality. *Donaldson v. State*, 370 Ark. 3, 7, 257 S.W.3d 74, 77 (2007).

7. The hardest issue in the case is the Blackstone video. Over Radford's objection, the circuit court admitted into evidence a redacted video of Blackstone interviewing the child. Radford's general point, a strong one, is that he was prejudiced when the jury heard and saw essentially the same critical testimony twice—once from the child on the stand and again in the video. Radford makes three alternative arguments: First, admission of the video violated Ark. Code Ann. § 16-44-203 as construed in *Cogburn v. State*, 292 Ark. 564, 732 S.W.2d 807 (1987) and *Kester v. State*, 303 Ark. 303, 797 S.W.2d 704 (1990); second, admission of the video violated Arkansas Rule of Evidence 803(25); third, Rule 803(25) is unconstitutional as applied to him.

We do not reach the merits of either Radford's statutory or constitutional arguments. Radford waived his argument from § 16-44-203 because he did not make it at trial. *Stone v. State*, 371 Ark. 78, 83, 263 S.W.3d 553, 556 (2007). It is unclear

whether *Cogburn's* and *Kester's* application of § 16-44-203 in similar circumstances survives the amendments to Rules of Evidence 803(25) and 804(b)(7) adopted after those two cases were decided. Resolution of that issue must await a case where the defendant preserves this argument. On the constitutionality of Rule 803(25), the basis of our decision on the Blackstone video makes it unnecessary for us to consider that question.

Radford's middle argument here is straightforward: the circuit court erred in admitting the tape pursuant to Rule of Evidence 803(25). We set out this part of the Rule in the margin.[1] To admit hearsay under this provision, one threshold

---

[1]The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> (25) Child Hearsay When Declarant Is Available at Trial and Subject to Cross-Examination. A statement made by a child under the age of ten (10) years concerning any type of sexual offense, or attempted sexual offense, with, on, or against that child, which is inconsistent with the child's testimony and offered in a criminal proceeding, provided:
>
> > (A) The trial court conducts a hearing outside the presence of the jury and finds that the statement offered possesses a reasonable guarantee of trustworthiness considering the competency of the child both at the time of the out of court statement and at the time of the testimony.
> >
> > (B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.
> >
> > (C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of

requirement is inconsistency. The child victim must testify at trial and her in-court testimony must be "inconsistent" with her earlier out-of-court statement. Radford argues that the child's in-court testimony about the actual allegations was consistent with her taped interview. He argues further that the details the child could not remember at trial were "irrelevant" and did not amount to an inconsistency under Rule 803(25). We agree. While the victim's taped interview was more fulsome about some marginal details, her in-court testimony was almost identical to her earlier account of the actual sexual assault and the attempted sexual assault. This is not the type of inconsistency contemplated by Rule 803(25). *Cf. Brown v. State*, 96 Ark. App. 66, 70, 238 S.W.3d 614, 617 (2006).

But our analysis does not end here. Though the State does not press this argument, our study of the record convinces us that the circuit court relied on Rule of Evidence 804(b)(7)—not Rule 803(25)—in admitting the Blackstone video. We also quote this companion child-hearsay exception in the margin.[2] The threshold

---

evidence.

[2](b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(7) Child Hearsay in Criminal Cases. A statement made by a child under the age of ten (10) years concerning any type of sexual offense against that child, where the Confrontation Clause of the Sixth Amendment of the United States is applicable, provided:

(A) The trial court conducts a hearing outside the presence of the jury, and, with the evidentiary presumption that the statement is unreliable and inadmissible, finds that the statement offered possesses sufficient guarantees of trustworthiness that the truthfulness of the child's statement is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.

1. The spontaneity of the statement.

2. The lack of time to fabricate.

3. The consistency and repetition of the statement and whether the child has recanted the statement.

4. The mental state of the child.

5. The competency of the child to testify.

6. The child's use of terminology unexpected of a child of similar age.

7. The lack of a motive by the child to fabricate the statement.

8. The lack of bias by the child.

9. Whether it is an embarrassing event the child would not normally relate.

10. The credibility of the person testifying to the statement.

11. Suggestiveness created by leading questions.

12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

requirement for this hearsay exception is unavailability. Under this Rule, a witness is unavailable if she "[t]estifies to a lack of memory of the subject matter of [her] statement." Ark. R. Evid. 804(a)(3). Further, "[i]f a witness has only a partial recollection, the witness may be partially unavailable." *Gadberry v. State*, 46 Ark. App. 121, 127, 877 S.W.2d 941, 944 (1994).

Here we must describe the record in some detail. At a pretrial hearing, the parties argued about the introduction of the taped interview at the trial. Both Rule 803(25) and Rule 804(b)(7) were discussed. Recognizing that the application of either Rule depended on how the victim testified at trial, the circuit court ultimately concluded that "[i]f [the child] shows a lack of memory or a failure as far as her memory is concerned about some of the things . . . [the tape] would be . . . admitted for the same purpose as it was before." The prosecutor had earlier said that a redacted version of the tape had been admitted in the first trial under Rule "804.7."

Then, after the victim testified at trial, the prosecutor moved to introduce the redacted tape. Rather than pointing to inconsistencies between the victim's in-court testimony and her taped interview, the circuit court focused on the details the victim could not remember. The circuit court noted that "she probably says, I don't know,

---

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

probably 20 to 30 times during her testimony." The court ultimately concluded that "based on the number of times that she said, I don't know, I'm going to allow [the State] to play it." The conversation ended this way:

> THE COURT: Unfortunately, that – as far as the accounting, as it is now, that may be used against her. The circumstances, . . . I believe that, in fairness to a seven or eight-year-old child, . . . that given the number of times that she said that, I believe it's appropriate, . . . and I believe that's the purpose of the rule . . . to substantiate her memory or her account of it, I think is . . . specific. I haven't looked at it in a while.
>
> [THE STATE]: Yeah, and I think . . . what the case law is, is that someone could be partially available and partially unavailable, based upon . . . what they can remember and testifying to, remember that . . . 803(7), I believe.

Throughout the entire colloquy about the redacted tape, the parties intermingled arguments about both Rule 803(25) and Rule 804(b)(7). But time and time again, the circuit court reiterated its concern about the victim's lack of memory about certain facts. And this lack of memory only mattered if the court was relying on Rule 804(b)(7): the court's focus was on the child's partial unavailability, not inconsistency. By the end of the exchange, it is clear to us, the circuit court relied on Rule 804(b)(7)—not Rule 803(25)—in admitting the redacted video tape.

Radford does not challenge the admission of the victim's taped interview under

Rule 804(b)(7). We express no opinion on whether the circuit court erred in this ruling. Because Radford has not argued reversible error under Rule 804, he has abandoned the point. We are thus left with no choice but to affirm on the Blackstone video too. *Crockett v. Essex*, 341 Ark. 558, 562, 19 S.W.3d 585, 588 (2000).

Affirmed.

PITTMAN and HENRY, JJ., agree.