

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR07-1025

WOODRUFF THOMAS SPARACIO
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered April 29, 2009

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT,
[NO. CR-05-457]

HONORABLE GARY RAY
COTTRELL, JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Woodruff Sparacio appeals his convictions for two counts of rape, entered after a jury trial in Crawford County Circuit Court. He was sentenced as a habitual offender to forty years' imprisonment for each count. Appellant's sentences were to run concurrently for a net effective term of forty years. On appeal, appellant argues that (1) the trial court erred in failing to exclude the evidence of his prior conviction and refusing to grant a mistrial and (2) there was insufficient evidence to support the two convictions for rape. We affirm.

In August 2005, Jessica Cummings told her mother that appellant, her ex-stepfather, had raped her when she was between the ages of eight and twelve years old. Jessica and her mother, Cindy, went to the Crawford County Police Department on August 25, 2005. Cindy informed detectives that Jessica told her that something happened between Jessica and appellant. Jessica was not interviewed, but was sent to Jamerson Forensics. Detective Aaron

Beshears made contact with appellant regarding the rape allegations and appellant agreed to come to the police station for an interview. Appellant came to the police station on September 13, 2005, he was read his *Miranda* warnings, and he subsequently waived his rights. Appellant confessed that there was oral sex between him and Jessica between 1995 and 2000, when Jessica was a child. Appellant stated that he could not remember ejaculating when Jessica performed oral sex on him but that it could have happened. Appellant said that he never stuck his penis in Jessica and he denied ever placing his fingers in her. However, upon further questioning, appellant stated that he did not remember when he stuck his finger in Jessica. Appellant was allowed to go home following the interview and a warrant was later issued for his arrest. A felony information was filed on September 27, 2005, alleging that appellant committed two counts of rape. The information was amended on May 9, 2007, to include his habitual-offender status.

Appellant's jury trial took place on May 10, 2007. At the beginning of the trial, appellant made a motion in limine to exclude his 1989 or 1990 conviction under Rule 609. Appellant's motion was granted. Appellant also made a motion to exclude his 2002 conviction for first degree sexual abuse against Jessica's older sister. In the motion, appellant argued that the conviction was a result of a no contest plea and as such, could not be admitted into evidence according to Rule 410.¹ The State acknowledged that it planned to use the conviction as 404(b) evidence. The court denied appellant's motion, stating that appellant

¹Appellant stated Rule 401; however, this appears to be a typo.

was convicted of the charge and that his no contest plea was not an admission of guilt. Testimony then took place.

Jessica Cummings, the victim, testified that her date of birth was September 23, 1987, and that she was nineteen years old. She stated that she knew appellant because he was once married to her mother. According to Jessica, appellant and her mother married when she was two years old. Jessica lived with her mother and appellant until age six, when her father got custody of her and her older sister, Felicia. She stated that appellant “acted as our father until that time.” Jessica testified that when she was about twelve or thirteen, she would visit her mother and appellant every other weekend and four weeks during the summer. She said that in 1999 to 2000 her mother, appellant, and her younger brothers lived at the KOA Campground. Jessica stated that she was real comfortable with appellant when she visited them. According to Jessica, she and appellant would watch TV together and appellant’s sexual advances would progress. She said “[i]t’d go from him just putting his arm around me and rubbing my shoulders or rubbing my arms and - and rubbing my leg. And it progressed into him putting his hands like on my private parts. And, then, eventually, into my pants.” She stated that this would happen any time they were alone and appellant had the opportunity. The opportunities usually arose when Jessica’s mother was working at a nursing home overnight or when she ran out to the grocery store or something without Jessica. Jessica stated that during her weekend visits at her mother’s, appellant would stick his hands in her clothes and insert his fingers into her vagina. She testified that there was one occasion when her older sister had gone to sleep and appellant went into the bedroom and called her in there.

She stated that appellant took his clothes off and made her perform oral sex on him; appellant also had her remove her clothing so that he could perform oral sex on her. According to Jessica, this only happened once. Jessica stated that she could not count how many times appellant placed his hands inside her pants and stuck his fingers inside her but that she knew it happened a lot. She testified that “[i]n a weekend that type of behavior would take place probably two or three times. So, at least two or three times a weekend, which would be four to six times a month, times however many months I lived there.” She stated that appellant never said anything when it was happening but that he did apologize. Jessica testified that appellant continued to do things to her following his apology. Jessica stated that in 2000 or 2001 when she was asked if appellant had touched her, she said nothing happened. She went on to say “[t]he reason why I would say that back then and then change my story now is because I wasn’t comfortable with talking. I’m still not - hard, but I, - Felicia was going through it, and I saw, you know, her struggling with it and how hard it was, and I just wasn’t willing, I guess, to go through it.” Jessica testified that she talked to Detective Beshears in August 2005 about appellant sexually abusing her some years prior. She stated that she went to law enforcement when she did because her mother told her that they needed to do something about what happened to her. Jessica said that she did not know that her mother and appellant were going through a custody battle at that time.

On cross, Jessica stated that she lied when she was thirteen about appellant not touching her because she was not comfortable with it. She said that she was comfortable telling about some physical abuse she suffered at appellant’s hands because it was a little less

vulgar. Jessica stated that she did not become comfortable with talking about her sexual abuse until she became friends with Brittney Goodleaf. She stated that she never told her father and stepmother what was happening during her visits to her mother's. She also said that she never told her mother what happened until 2005. Jessica testified that she was aware that her mother made allegations against appellant in about 2000; however, she stated that she did not know that appellant did not get custody of her two brothers as a result of those allegations.

On redirect, Jessica stated that she was aware that appellant had a conviction for touching her older sister. After a sidebar, the court recessed. Appellant made a motion for a mistrial arguing that appellant's conviction was not properly before the court at the time. The motion was denied and the jury was admonished about the statement. Jessica testified that no one asked her to bring up her allegations of rape against appellant to help out her mother's custody case. Jessica stated that when she realized that she was not going to be able to put the sexual abuse behind her and that she needed to get it off of her chest, she told someone.

On re-cross, Jessica stated that she did not remember telling the nurse at Jamerson Forensics that she never said anything about her abuse because she was not comfortable. She also admitted to telling someone that she never objected to appellant's actions.

Jessica stated on redirect that appellant was like a father figure and that she was comfortable with him. She said that appellant did not necessarily hurt her when "doing these acts." Jessica testified that she still felt uncomfortable about telling someone what appellant was doing to her.

Felicia Cummings testified that she was Jessica's older sister. She stated that she and Jessica would visit their mother every other weekend at the KOA Campground. Felicia testified that she and appellant would end up alone sometimes during the weekend visits. She said that, initially, appellant had her sitting in his lap. Felicia stated that when appellant got comfortable, he began putting his hands up her shirt and down her pants. She said that appellant told her that it was normal. Felicia testified that appellant offered her things when she would let him touch her. She stated that in the beginning, appellant touched her every time she visited her mother; however, it got to the point that she was able to visit two or three times without appellant touching her. Felicia said that she was unaware that appellant was also doing similar things to Jessica. Felicia stated that she found out about Jessica in 2005 when Jessica filed charges against appellant.

On cross, Felicia stated that she and Jessica slept in the living room when they visited their mother. She said that appellant and her mother had a bedroom and that her brother Aaron had his own bedroom. She stated that Tyler was a baby at the time. Felicia testified that she and Jessica were close but that she never knew that appellant was sexually abusing Jessica. Felicia stated that she believed her mother and appellant were going to court concerning appellant's visitation with Aaron and Tyler in 2005. She said that Jessica began talking about what happened between her and appellant during this time. Felicia stated that she never asked Jessica anything about appellant touching her. Felicia testified that she had driven her brothers over to appellant's house at least once following her sexual allegations against appellant. Felicia said that they never had any contact with appellant after he and their

mother were divorced. She stated that they would sit in the truck when their mother took the boys to him and that they never spoke to him. Felicia admitted that she never told anyone that appellant was touching her during the time it was happening. She stated that Jessica never confided in her. Felicia testified that her mother told her that appellant had also abused Jessica. She stated that she did not know if this was about the time appellant and her mother were going to court in Oklahoma concerning visitation.

On redirect, Felicia stated that her mother never told her that she needed some help to make sure she kept her sons. She stated that she told her mother what appellant had done to her because she was tired of carrying it around. Felicia testified that appellant usually touched her when no one else was around.

On re-cross, Felicia stated that she never told her mother or natural father what appellant was doing to her. She stated that she was upset with what was happening but that she figured if it was happening to her, it was not happening to Jessica. Felicia testified that she finally told her mother what had happened when her mother and appellant separated and were in the process of getting a divorce. She stated that she did not bring up her allegations against appellant because he was seeking custody of his sons. Felicia denied ever telling anyone that if she made the allegation against appellant, her mother would get custody of her brothers.

Aaron Beshears testified that he was the Major Crimes Detective for the sheriff's department. He stated that in his official capacity, he investigates child abuse, sexual abuse, death, and things of that nature. Beshears said that he came into contact with appellant in

2005 after being contacted by appellant's ex-wife, Cindy, and her daughter. Beshears referred Jessica to Jamerson Forensic Clinic, which specializes in interviewing victims and conducting forensic exams. Beshears stated that he obtained a copy of the forensic interview, that he spoke with the attending nurse, and that he then contacted appellant. Beshears testified that he asked appellant to come to the sheriff's department to make a statement. According to Beshears, appellant fully cooperated. Beshears stated that appellant was read his rights and that he signed a waiver of those rights. Appellant's interview whereby he confessed to inappropriate sexual behavior between him and Jessica was recorded. Beshears admitted that he had to build a rapport with appellant and that part of his tactic was to tell appellant that Jessica stated that it was her fault. There was a malfunction with the original tape and the tape was turned over to another detective for correction. A transcript was also made of the tape.

On cross, Beshears stated that the interview with appellant lasted twenty-seven to thirty minutes. He said that appellant told him that he felt that the new allegations had come up now because of a custody battle between him and Cindy. Beshears testified that appellant was concerned how the new allegations would affect his outcome in the custody case. Beshears stated that he had two options after appellant confessed to the allegations: he could arrest him on the spot or he could take the information to the prosecutor's office and have them issue a warrant for appellant's arrest. Beshears chose to do the latter.

Appellant made a motion for directed verdict at the conclusion of the State's evidence. In his motion, appellant argued that the State failed to meet its burden that there was a sexual offense either through testimony or physical evidence. Appellant's motion was denied.

Jauenema Sparacio, appellant's mother, testified that Felicia still came around appellant after allegations were made that he touched her inappropriately. She stated that Felicia's allegations did not come up until appellant filed for divorce and that Jessica's allegations did not come up until appellant went back to court in 2005 for visitation.

The State questioned Jauenema about appellant's aggravated assault conviction and appellant objected. The court sustained the objection and admonished the jury. On cross, Jauenema stated that she did not believe that Felicia's allegations against her son were true.

Another sidebar took place in which the court ruled that the State would be allowed to bring in evidence of appellant's 2002 conviction stemming from Felicia's 2000 allegations against him. The court stated that evidence of the conviction would be allowed because appellant's defense was basically that the allegations were nothing more than attempts by his ex-wife to prevent him from having custody or visitation with his sons.

Jauenema testified that she remembered appellant took a no contest plea following Felicia's allegations against him. She stated that she did not know the specifics of Felicia's allegations but that she knew that it had something to do with sexual abuse. Jauenema testified that appellant received a five-year suspended sentence and had to pay to take classes for a year.

On redirect, Jauenema stated that Felicia still came around appellant after his no contest plea. She said that Felicia and Jessica continued to come around until 2005 when Jessica made her allegation.

Appellant testified that he filed for a divorce from Cindy and sought custody of his two sons in 2000. According to appellant, he was granted temporary custody on September 12, 2000, and Cindy was served with divorce papers on September 29, 2000. Appellant stated that on October 4, 2000, Cindy took Felicia to authorities alleging he had touched her. On December 18, 2000, Cindy was granted custody of their sons. Appellant testified, “[t]here were no allegations before I filed the divorce and got a Temporary Order giving me custody. The only way I lost custody was because of the allegations.” Appellant testified that Cindy brought Felicia around, even though he was ordered not to be around her. Appellant said that he was able to see his sons after he pled no contest to Felicia’s allegations. Appellant testified that Cindy filed a motion to modify his visitation to supervised visitation in July 2005 and that a hearing was set for August 15, 2005. According to appellant, Cindy subsequently asked for a continuance. On August 25, 2005, the new allegation concerning Jessica came up. Appellant stated that the new allegation was filed to thwart his efforts to maintain unsupervised visitations with his sons. The visitation hearing was held on September 29, 2005, and the trial court ordered supervised visitations until this case was resolved.

On cross, appellant stated that he pled no contest to the allegations involving Felicia in 2002 because he wanted to be able to see his sons. According to appellant, he did not sexually abuse Felicia after she turned fourteen. Appellant testified that he was on the road a lot of the times Felicia and Jessica visited their mother and that when he was home, they did things as a family. Appellant stated that he did not remember Cindy working at all when they

lived at the KOA Campground. Appellant denied admitting to Detective Beshears that he performed oral sex on Jessica even though the taped interview said otherwise.

On redirect, appellant stated that allegations concerning sexual abuse come up every time “there’s court papers out of Oklahoma.” Appellant testified that Felicia and Jessica only came to visit four days a month and that he was out of town working during most of those visits. According to appellant, he might have seen Felicia and Jessica four or five times in a six-month period. Appellant said that the weekends he was home, the girls were at their father’s house. Appellant stated that there was never a time that he was alone with Jessica.

John Joseph Sparacio, appellant’s father, testified that he visited appellant between 2002 and 2004 and that Felicia was around appellant during that time. According to John, Cindy would bring Felicia and Jessica around appellant after his 2002 conviction. John stated that everyone acted “like nothing had happened.”

At the conclusion of the evidence, appellant renewed his motion for directed verdict. Appellant argued that the State had “failed to prove *res gestae* or the necessary proof for this case to go to the jury.” That motion was denied. Appellant was found guilty of two counts of rape and sentenced as a habitual offender. Appellant was sentenced to a total of forty years in ADC. This appeal followed.²

²The notice of appeal states that appellant appeals from the judgment “entered on February 16, 2007.” No judgment was entered on that date. The only judgment by which appellant was aggrieved was the May 25, 2007 judgment, and every argument appellant makes on appeal is directed at the May 25 judgment. Under these circumstances, we do not think that appellant’s failure to designate the May 25 judgment in its notice of appeal is fatal to his appeal of that judgment. *See Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Sudrick*, 49 Ark. App. 84, 896 S.W.2d 452 (1995).

Double-jeopardy considerations require this court to review a directed-verdict argument before other points are addressed. *See Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001). We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006). This court has repeatedly held that in reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Cluck, supra*. Whether the evidence excludes every other hypothesis is left to the jury to decide. *Id.* The credibility of witnesses is an issue for the jury and not the court. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

Appellant was convicted of two counts of rape. Arkansas Code Annotated § 5-14-103 (a)(3)(A) (Repl. 2006), states that a person commits rape if he engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. Appellant contends that the victim's testimony and that of her sister were the only true evidence the jury had on which to base its findings of guilt. We disagree.

A rape victim's testimony may constitute substantial evidence to sustain a conviction for rape, even when the victim is a child. *Brown v. State*, 374 Ark. 341, --- S.W.3d ---- (2008). The rape victim's testimony need not be corroborated, nor is scientific evidence required. *Id.* The victim in this case testified that she and appellant engaged in oral sex at least once and that appellant placed his fingers in her vagina numerous times. Even if there was no corroboration, this victim's testimony would have been enough to sustain appellant's conviction.

Felicia testified that appellant touched her during the same time period and that she had made allegations against appellant years earlier. Felicia's testimony was allowed under the "pedophile exception" to Rule 404(b). Arkansas appellate courts have long recognized a "pedophile exception" to Rule 404(b). *Allen v. State*, 374 Ark. 309, --- S.W.3d ---- (2008). We have approved allowing evidence of the defendant's similar acts with the same or other children when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. *Id.* The rationale for this exception is that such evidence helps to prove the depraved sexual instinct of the accused. *Id.* For the pedophile exception to apply, we require that there be a sufficient degree of similarity between the evidence to be introduced and the sexual conduct of the defendant. *Hamm v. State*, 365 Ark. 647, 232 S.W.3d 463 (2006). We also require that there be an "intimate relationship" between the perpetrator and the victim of the prior act. *Id.* Appellant's sexual conduct with Felicia satisfied the requirements of the pedophile exception and her testimony of the abuse was properly allowed at appellant's trial.

Detective Beshears testified that appellant confessed to having oral sex with the victim and that appellant did not know how many times he had stuck his fingers in Jessica's vagina. The interview was taped and the tape and transcript were entered into evidence without objection. Here, even though the victim's testimony was enough to sustain appellant's convictions, it was corroborated by appellant's confession to law enforcement. Appellant contends that the victim's allegations are untrue and questions why it took the victim so long to report the alleged acts. These issues go to the credibility of the witness, which is the sole province of the fact-finder. *Cluck, supra*. We hold that there was sufficient evidence for the jury to convict appellant of rape.

Appellant also argues that the trial court erred in failing to exclude the evidence of his prior conviction under Rule 410 of Arkansas Rules of Evidence and in refusing to grant a mistrial. Rule 410 states:

Evidence of a plea of nolo contendere, whether or not later withdrawn, and of a plea, later withdrawn, of guilty or admission to the charge, or of an offer to plead to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.

Appellant's plea of no contest was accepted and he was convicted in 2002. When appellant initially objected to evidence of his prior sexual conviction coming in through testimony, the trial court sustained his objection and admonished the jury. However, appellant's subsequent objection was overruled because he opened the door for the admission of the conviction. The trial court told appellant that it was allowing the evidence in because appellant's defense was basically that the girls were just making up the allegations of sexual abuse to prevent him from

having custody or visitation with his sons. Since appellant opened the door, the court did not err by allowing evidence of appellant's 2002 conviction.

Appellant contends that he should have been granted a mistrial because evidence of his 2002 conviction "would lead the jury to believe that the allegations were true." It is well settled that a mistrial is an extreme remedy that should be granted only when the error is beyond repair and cannot be corrected by curative relief. *Brown v. State*, 74 Ark. App. 281, 47 S.W.3d 314 (2001). A trial court has wide discretion in granting or denying a motion for a mistrial, and the appellate court will not disturb the court's decision absent an abuse of discretion or manifest prejudice to the movant. *Id.* We have already held that the evidence was properly admitted, thus no mistrial was warranted. Accordingly, we affirm.

Affirmed.

GLOVER and HENRY, JJ., agree.