Cite as 2011 Ark. App. 290

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR10-1005

	Opinion Delivered APRIL 20, 2011
WILLIAM ARTHUR MORRISON APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SECOND DIVISION [NO. CR 2009-1287]
V.	HONORABLE CHRISTOPHER CHARLES PIAZZA, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBIN F. WYNNE, Judge

William Arthur Morrison appeals from his conviction on charges of rape of a minor and sexual assault in the second degree of a minor. On appeal, appellant argues that the trial court erred by allowing the testimony of a woman who testified that appellant raped her forty-two years earlier, when she was five years old. We affirm.

On February 12, 2010, appellant was charged with rape of a minor and sexual assault in the second degree of a minor. Appellant's first trial ended in a hung jury. Prior to the second trial, the State gave notice that it intended to call as a witness a woman who would testify that appellant raped her forty-two years ago, when she was five years old. Appellant objected to the testimony, arguing that the incident was too remote in time and too dissimilar to the charged actions to be allowed under the pedophile exception to Arkansas Rule of Evidence 404(b). The trial court ruled that the testimony would be allowed.

L.W., who is appellant's granddaughter and was sixteen years old at the time of the trial, testified that appellant would give her gifts that were not given to appellant's other grandchildren. L.W. testified that one Easter, when she was five or six years old, appellant called her back into the bedroom with him and tried to lift up her dress but was interrupted. Appellant tried on a later Easter to do the same thing but was interrupted again. L.W. testified that appellant gave her painting lessons in a shed behind his house and while the two were in the shed, appellant would rape her. L.W. stated that appellant would put Vaseline on his penis and if he did not have Vaseline he would use his saliva. L.W. testified that she would kick against him and tell him it hurt but he would just tell her to relax. Appellant would also rape L.W. in his bedroom and at her house when he babysat her and her siblings. According to L.W., this went on until she was eleven years old.

A.T., who was thirteen at the time of the trial and is appellant's niece by marriage, testified that when she was five years old, she was at appellant's house watching television with him when he touched her underneath her clothes. A.T. testified that it only happened on one occasion.

Tammy Prunier, who was forty-seven years old at the time of the trial, testified that when she was five years old, she lived in the same house as appellant. While appellant was babysitting her and her older brother, appellant took her into his bedroom, threw her on the bed, held her arms above her head, and raped her. She testified that appellant spit on his hand before he penetrated her.

The jury found appellant guilty of both rape and sexual assault in the second degree. The trial court sentenced appellant to 180 months' imprisonment. Appellant has appealed to this court.

On appeal, appellant argues that the trial court erred by admitting the testimony of Tammy Prunier under Arkansas Rule of Evidence 404(b). The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *Banks v. State*, 2009 Ark. 483, 347 S.W.3d 31. Rule 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Such evidence is permissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ark. R. Evid. 404(b) (2010). Arkansas courts recognize a "pedophile exception" to this rule, whereby evidence of similar acts with the same or other children is allowed to show a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. *Flanery v. State*, 362 Ark. 311, 208 S.W.3d 187 (2005). 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. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006). There must also be an "intimate relationship" between the perpetrator and the victim of the prior act. *Id.*

All three victims were females who were around five years of age when the acts occurred or when the abuse began. Appellant engaged both L.W. and Tammy Prunier in

sexual intercourse by forcible compulsion. In addition, both L.W. and Ms. Prunier testified that appellant applied either saliva or a jelly-like substance to his penis before completing the rape. Appellant argues that there were no similarities between the incidents with L.W. and Prunier because appellant purchased gifts for L.W. but not for Prunier and appellant raped Prunier one time but raped L.W. over a period of years. We disagree. Given the similarities in age and gender of the victims combined with the testimony that the sexual acts with L.W. and Ms. Prunier were similar in nature, we hold that the similarity requirement has been met.

Appellant was also in an "intimate relationship" with all three victims. He was related to both L.W. and A.T. Ms. Prunier was in appellant's care when he raped her. Our supreme court has held that babysitting a victim satisfies the "intimate relationship" criterion. *See Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994).

Similarity of the conduct and the relationship of the accused to the victims are not the only elements to be satisfied before the pedophile exception is applied. Evidence admitted pursuant to Rule 404(b) must not be too separated in time, making the evidence unduly remote. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006). The circuit court is given sound discretion over the matter of remoteness and will be overturned only when it is clear that the questioned evidence has no connection with any issue in the present case. *Id.*

Our appellate courts have not created any bright-line standards as to length of time in analyzing Rule 404(b) evidence for admissibility. Rather, the remoteness-in-time element is but one of the factors considered in the mix of determining similarities between the evidence to be introduced and the defendant's sexual conduct. Indeed, in certain circumstances, we

have allowed evidence from many years past to be introduced for these purposes. *Butler v. State*, 2010 Ark. 259, at 3 (evidence that was a minimum of twenty-one years old held admissible); *Allen v. State*, 374 Ark. 309, 317–18, 287 S.W.3d 579, 585–86 (2008) (twelve-to-seventeen-year-old evidence held admissible); *Tull v. State*, 82 Ark. App. 159, 163, 119 S.W.3d 523, 525 (2003) (thirty-year-old evidence held admissible).

Appellant argues that admitting forty-two-year-old evidence under the pedophile exception would practically render the issue of remoteness meaningless. Our decision is not meant to establish or extend a certain number of years as an acceptable range for the admission of evidence under the pedophile exception. The purpose of considering the remoteness of the prior-act evidence that the State seeks to have admitted under the pedophile exception is to ensure that the prior-act evidence has a connection to the charged conduct and demonstrates a proclivity for a specific act with a person or class of persons. The prior-bad-act evidence in this case, although it is over forty years old, has a connection with the case at bar. The evidence presented demonstrates that appellant has a proclivity for sexual activity with pre-pubescent girls. Based upon the specific facts and testimony presented in this case, we hold that the trial court did not err by admitting the prior-bad-act evidence.

Appellant's next point on appeal is that the trial court erred by failing to subject the 404(b) evidence to the required balancing test under Arkansas Rule of Evidence 403. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Ark. R. Evid. 403 (2010). Appellant argues that the probative value of Tammy Prunier's testimony is substantially outweighed by the prejudice to appellant.[1] Although appellant complains that the trial court erred by failing to weigh the evidence under Rule 403, it is appellant's burden to obtain a clear ruling on an issue from the trial court. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004). Because appellant failed to obtain a ruling from the trial court regarding whether the probative value of the evidence was outweighed by the prejudice to him, his argument is not preserved for review on appeal. *See Wallace v. State*, 2009 Ark. 90, 302 S.W.3d 580.

Affirmed.

ABRAMSON and BROWN, JJ., agree.

[1]We note that, in an effort to ameliorate the prejudicial impact of her testimony, the trial court allowed appellant to introduce witness testimony concerning his respectable conduct with young children.