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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-22-402

EVAN COLUMBUS ANDERSON
APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 20, 2023

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. 04CR-19-2401]

HONORABLE ROBIN F. GREEN,
JUDGE

AFFIRMED

MIKE MURPHY, Judge

A Benton County Circuit Court jury convicted appellant Evan Anderson of three counts of sexual indecency with a child pursuant to Arkansas Code Annotated section 5-14-110 (Supp. 2023) for which he was sentenced to five years' incarceration in the Arkansas Department of Correction on each count to be served consecutively. On appeal, Anderson argues that the circuit court erred in denying his motion to exclude MC 2's testimony and in denying his motions for mistrial surrounding the State's questioning of Detective Chris Collins. We affirm.

On appeal, Anderson does not attack the sufficiency of the evidence supporting his convictions. Nevertheless, we set forth the following summary as a foundation for this opinion. On August 25, 2019, MC 1 and MC 2 filed a police report disclosing that their

male cousin by marriage, Anderson, had made sexual comments toward them, soliciting sexual intercourse. MC 1 disclosed that in the spring of 2019, she was alone with Anderson in her home and that Anderson approached her while she was watching videos on her phone and asked if she was watching porn. Anderson also asked her about having sex, told her that she should consider having sex for the first time with him, told her that he is a sex addict, and that she could confirm that he is a sex addict by asking his wife. He also sent her a message on Snapchat “proposing a sexual encounter,” and on another occasion, while they were at her grandmother’s house, he again asked her to have sexual intercourse with him. MC 1 did not tell anyone about the incident with Anderson until she learned MC 2 also had a similar encounter.

MC 2 disclosed that, after church one day, she was alone with Anderson in that same grandmother’s house when he “asked her for sex.” Anderson, his wife, and two kids lived at the grandmother’s house. MC 2 further disclosed that Anderson described to her that he had “morning wood” and asked her to “fix it for him.” Anderson told her that he is a sex addict, that he had seen her vagina once when she was sleeping, that he had masturbated to her, and that he wanted to “put his dick inside her.” Out of fear that Anderson would become physical, she began secretly recording him. MC 2 stated that once Anderson left the room to check on his laundry, she ran next door to her aunt’s house (MC 1’s mother).

On September 27, Anderson was arrested for sexual indecency with a child for acts committed against MC 1. When interviewed by Detective Chris Collins on that same date, Anderson denied the conversations with MC 1 and MC 2 but acknowledged they are his

cousins-in-law. Anderson admitted that he once told his wife he is a sex addict “as a joke.” When told that recordings existed of the conversations with MC 2, he requested an attorney and the interview ceased.

On November 5, 2020, Anderson filed a motion in limine to exclude MC 2 as a witness at trial under Arkansas Rules of Evidence 403 and 404(b). Following a hearing, the court denied the motion, finding the testimony relevant and that its probative value outweighed the prejudicial effect. It additionally found the testimony permissible under the pedophile exception. On November 1, 2021, Anderson filed a motion in limine to exclude another minor child the State intended to call as a witness (MC 3), which the court granted.

A jury trial was held over the next two days. Following the testimony of MC 1, MC 2, and MC 1’s mother, Detective Collins testified he was the detective assigned to the case. He testified that he observed the forensic interview of the minors conducted at the Children’s Advocacy Center and drafted the probable-cause order. After the State rested, Anderson testified in his own defense. The jury found him guilty on all three counts, and he was sentenced to fifteen years. He now appeals.

Anderson first argues the court erred in denying his motion in limine to exclude MC 2’s testimony because the testimony contained improper propensity evidence in violation of Arkansas Rule of Evidence 404(b). He also argued its probative value was substantially outweighed by its prejudicial effect in violation of Rule 403.

Challenges to an evidentiary ruling are reviewed under the abuse-of-discretion standard. *Baumann v. State*, 2018 Ark. App. 564, at 4, 566 S.W.3d 494, 498. We will not

reverse the circuit court's ruling absent a showing of manifest abuse. *James v. State*, 2021 Ark. App. 33, at 8–9, 616 S.W.3d 267, 273. Abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires that the circuit court act improvidently, thoughtlessly, or without due consideration. *Id.* Additionally, prejudice must have resulted. *Id.*

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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The first sentence provides the general rule excluding evidence of a defendant's prior bad acts, while the second sentence provides an exemplary, but not exhaustive, list of exceptions to that rule. *Hortenberry v. State*, 2017 Ark. 261, at 9, 526 S.W.3d 840, 846. We have explained that evidence is not admissible under Rule 404(b) simply to establish that the defendant is a bad person who does bad things. *See id.* Rule 404(b) permits the introduction of evidence of prior bad acts if the evidence is independently relevant to make the existence of any fact of consequence more or less probable than it would be without the evidence. *Id.*

Anderson argues that the circuit court abused its discretion in admitting MC 2's testimony under Rule 404(b) because the evidence was not independently relevant to prove some material point at issue but was rather introduced merely to demonstrate that he had a propensity for soliciting sex and that he acted within that propensity that day. We disagree.

Anderson denied ever making inappropriate statements to MC 1. Therefore, MC 2's testimony was independently relevant to establish Anderson's motive, intent, and plan. *See, e.g., Arendall v. State*, 2010 Ark. App. 358, at 15, 377 S.W.3d 404, 413 (noting that any circumstance that ties a defendant to the crime or raises a possible motive for the crime is independently relevant and admissible evidence); *Anderson v. State*, 357 Ark. 180, 197, 163 S.W.3d 333, 342 (2004). In both instances, Anderson asserted to the minors that he is a "sex addict." MC 2's testimony demonstrates Anderson's intent to satisfy that addiction by seeking sex from his wife's young cousins.

Here, both MC 1 and MC 2 were minor female relatives of Anderson. They were both alone with him on separate occasions when he solicited them for sexual intercourse and spoke in a sexually graphic and explicit manner to both. These interactions occurred only a few months apart. *Cf. Donaldson v. State*, 2009 Ark. App. 119, 302 S.W.3d 622 (stating the only similarity between the incidents allowed into evidence under Rule 404(b) and the incident charged was that they involved young women whom the defendant met at work, but the alleged assaults occurred at different times and places and involved different forms of behavior). Additionally, MC 2's testimony corroborated the motivation for his conduct with MC 1. *See Fitting v. State*, 94 Ark. App. 283, 296, 229 S.W.3d 568, 577 (2006) (recognizing that evidence offered by the State to corroborate other evidence is relevant).

Given the facts and degree of similarity, the circuit court's decision to admit MC 2's testimony under Rule 404(b) was not an abuse of discretion. Because we hold that the

testimony was independently relevant under Rule 404(b), we do not address the court's alternative pedophile-exception finding.

Further, as Anderson argues, even if evidence is relevant under Rule 404(b), Rule 403 provides that the evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The standard of review for the admission of Rule 403 evidence is whether the circuit court abused its discretion. *Walker v. State*, 2023 Ark. App. 295, at 19, 669 S.W.3d 243, 256. In reviewing a circuit court's ruling under Rule 403, we have noted that "it is likely that evidence offered by the state will be prejudicial to the accused, or it probably would not be offered," but evidence should not be excluded unless the accused can show that the evidence lacks probative value in view of the risk of unfair prejudice to the defendant. *Morris v. State*, 367 Ark. 406, 240 S.W.3d 593 (quoting *Beed v. State*, 271 Ark. 526, 542, 609 S.W.2d 898, 909 (1980)).

In the instant case, despite the apparent prejudice to Anderson, the similarities between the interactions between Anderson and the minors are sufficient to make this evidence probative on the issue of Anderson's motive, intent, and plan. *See Morris*, 367 Ark. 406, 240 S.W.3d 593 (holding that similarities between interactions with witness and victim were sufficient to make the testimony probative on the issue of defendant's motive, intent, and plan). Considering the circuit court's broad discretion in weighing the probative nature of the challenged evidence against its prejudicial effect, here, we cannot say that the circuit court abused its discretion when it allowed the evidence to be admitted under Rule 403.

Accordingly, Anderson is wrong that MC 2's testimony served no other purpose than to attempt to illustrate his propensity to commit the crime for which he was charged. The testimony had independent relevance and was highly probative; thus, the court did not abuse its discretion in admitting the testimony.

Next, Anderson argues the court erred in denying his motions for mistrial. A mistrial is an extreme and drastic remedy that will be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing the trial. *Bragg v. State*, 2023 Ark. 66, at 8, 663 S.W.3d 375, 381. The circuit court is in a favorable position to evaluate potential prejudice, so we give general deference to its discretion in these matters. *Id.* We will not reverse a decision in the absence of an abuse of discretion or manifest prejudice to the complaining party. *Id.*

Anderson first moved for a mistrial in response to the State's questioning of Detective Collins. Anderson argues Detective Collins improperly provided commentary on the weight of certain evidence by calling it valid, compelling, and convincing. In response, the court admonished the jury. Although Anderson moved for a mistrial, the court never granted or denied the motion. An appellant seeking to challenge the denial of a mistrial motion must "obtain a clear ruling on the issue to preserve" the argument for appeal. *Jenkins v. State*, 2019 Ark. App. 419, at 12, 582 S.W.3d 32, 39. We affirm on this point.

Anderson's second motion for a mistrial came after the State's inquiry about a previous investigation involving Anderson. The details of the investigation were excluded by

the court when it granted Anderson's motion in limine to exclude MC 3 as a witness. The motion for mistrial was based on the following exchange:

STATE: Back in 2013, when you were 18 years old, you were investigated for the -

ANDERSON'S COUNSEL: Judge, can I - can I approach? (*upon which he moved for a mistrial*)

The court questioned the State's good-faith basis for the question. The State asserted the purpose of the question was to impeach Anderson's credibility only regarding the fact that he lied to police during the investigation. The court then denied the mistrial motion and asked the State to rephrase its question. The court stated, "You can ask him if he's ever lied to police before; and if he says - if he says yes, then you have to move on." It then instructed the jury to disregard the statement:

The question that was asked and - and - of Mr. Anderson - or was started to be asked of Mr. Anderson, I'm not going to allow that to continue. It was out of - out of context, inappropriate. I'm going to ask you to disregard it. The prosecutor is going to - to move forward.

In determining whether a circuit court abused its discretion in denying a mistrial motion, we consider factors such as whether the prosecutor deliberately induced a prejudicial response and whether an admonition to the jury could have cured any resulting prejudice. *McClendon v. State*, 2019 Ark. 88, at 7, 570 S.W.3d 450, 454. We have held that while there is always some prejudice that results when a prior bad act is mentioned in front of the jury, if the infraction induces only minimal prejudice, the proper remedy is an admonition or

instruction to the jury to disregard the remark. *Hall v. State*, 314 Ark. 402, 405, 862 S.W.2d 268, 270 (1993).

Here, the State's question was vague and did not indicate to the jury what crime Anderson was previously investigated for. The court admonished the jury and told it to disregard the beginning of the question. Any problem resulting from the incomplete question was cured by this instruction to the jury. We therefore affirm on this point as well.

Affirmed.

GLADWIN and GRUBER, JJ., agree.

Miller | Butler | Schneider | Pawlik | Rozzell | PLLC, by: *Alicia M. Canfield*, for appellant.

Tim Griffin, Att'y Gen., by: *Joseph Karl Luebke*, Ass't Att'y Gen., for appellee.