Cite as 2024 Ark. App. 134

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-23-483

JERRY LEE WASHINGTON APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered February 28, 2024 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. 35CR-21-276] HONORABLE ALEX GUYNN, JUDGE AFFIRMED

RAYMOND R. ABRAMSON, Judge

Jerry Lee Washington appeals his convictions from the Jefferson County Circuit Court. Following a March 2023 jury trial, Washington was found guilty of sexual assault in the second degree pursuant to Arkansas Code Annotated section 5-14-125(a)(3) (Supp. 2019); sexual indecency with a child pursuant to Arkansas Code Annotated section 5-14-110(a)(1)(A)–(C) (Supp. 2019); and sexual indecency with a child pursuant to Arkansas Code Annotated section 5-14-110(a)(2)(A). He was sentenced as a habitual offender to a $35,000 fine and forty years' imprisonment. On appeal, Washington challenges the sufficiency of the evidence supporting his convictions and the circuit court's admission of certain evidence. For the following reasons, we affirm.

On March 28, 2021, officers were dispatched to an apartment complex in Pine Bluff after it was reported that Washington had solicited an eight-year-old female, Minor Victim

(MV), to allow him to perform oral sex on her in exchange for five dollars. While officers were speaking to MV, Washington pulled into the parking lot in an SUV, but when a detective approached him, he jumped out and fled the scene. He was later arrested and charged.

Prior to trial, the State filed a notice of intent to admit evidence of Washington's prior sex act with a Minor Witness (MW) in 2016. The State asserted that this prior act was relevant to Washington's 2021 sex crimes, that MW's testimony was admissible under the pedophile exception to Arkansas Rule of Evidence 404(b), and that evidence of this act was not barred by Rule 403 of the Arkansas Rules of Evidence. Washington responded that his alleged prior sex act with MW was insufficiently similar to his criminal conduct with MV, that the State could not establish an intimate relationship with both minors, and that any probative value of MW's testimony was substantially outweighed by the risk of prejudice, barring it under Arkansas Rule of Evidence 403.

The circuit court considered the merits of the parties' arguments at a pretrial hearing on February 8, 2023. At this hearing, then ten-year-old MV identified Washington, whom she called "Bogey," and stated that she was outside her grandmother's apartment in 2021, when Washington offered her "five dollars if I let him . . . [l]ick my private part." MV further testified that on another occasion, Washington showed her a picture on his phone of "a man licking another girl's private part."

MV stated that she was eight when these events occurred. She also recounted that Washington touched her "private part" in March 2021. Recounting this latter incident, MV

stated that she was alone outside playing when Washington approached her and then put his hand "[o]n top" of her vagina. Rosie Cannon, MV's grandmother, also attested that Washington had been over to her apartment, where she and her granddaughter lived, on multiple occasions prior to March 2021, confirming that MV "kn[e]w him." Cannon further testified that she had known Washington for years, likening him to a "family member."

MW, then thirteen years old, also testified. MW also knew Washington as "Bogey," testifying that he is a former college boyfriend of her birth mother and that he lived with them in 2016. When asked about what Washington had done to her, MW explained that "he touched me in my . . . vagina" around the time she was six or seven years old.

The circuit court granted the State's motion at the hearing's conclusion, ruling that Washington's prior sex act with MW was "almost identical" to one of his 2021 charges, that her testimony was permissible under the pedophile exception, and that the probative value of this testimony was not substantially outweighed by any risk of unfair prejudice.

At trial, on March 13, 2023, MV again testified that Washington "touched [her] private part" through her clothing while she was outside her grandmother's apartment in March 2021, opined that it was "[d]efinitely on purpose," and identified a vagina on a nude female anatomical figure introduced as a State exhibit. MV stated that on another occasion inside her grandmother's apartment, Washington "showed [her] his thing." When asked to identify what Washington pulled out of his pants and exposed to her, MV circled the penis depicted on a male anatomical figure.

MV also attested that on March 28, 2021, Washington approached her while she was playing alone outside, and in a low voice, he offered "to give [her] five dollars to suck [her] private part."

While she did not see the sex acts committed against her granddaughter, Cannon stated that, in retrospect, she should have been concerned because Washington brought MV treats without her permission and, after watching her play, would spend "long" periods of time in the bathroom of her apartment.

Moreover, the State presented evidence concerning MV's disclosure on March 28, 2021. One of the officers dispatched to the scene, Detective Deshawn Bennett, testified that he arrived within minutes, and Washington's SUV pulled into the apartment parking lot while officers were speaking to MV. However, Detective Bennett was unable to speak to Washington because he "jumped out and ran" into the apartment complex. An investigator confirmed that MV's allegations against Washington were similar to the earlier ones made by MW.

Washington moved for a directed verdict as to each of the alleged offenses at the close of the State's case-in-chief, arguing that its witnesses' testimony was insufficient to support the convictions. Washington did not testify on his own behalf and rested without presenting any evidence. The circuit court denied Washington's motion for directed verdict. The jury found Washington guilty on each charge. His timely appeal is properly before this court.

Because of double-jeopardy concerns, we first address Washington's challenge to the sufficiency of the evidence. *See Bolen v. State*, 2023 Ark. App. 373, at 20, 675 S.W.3d 145,

156. On appeal, Washington argues that the circuit court erred by denying his directed-verdict motions because MV's testimony regarding his sex crimes was "improbable and unbelievable[.]"

A motion for a directed verdict is treated as a challenge to the sufficiency of the evidence. *E.g.*, *id.* at 20, 675 S.W.3d at 156. On review, this court views the evidence in the light most favorable to the State and considers only the evidence that supports the verdict. *E.g.*, *id.* at 20, 675 S.W.3d at 156. We will affirm a conviction if there is substantial evidence to support it, and evidence—either direct or circumstantial—is substantial if it compels a conclusion and passes beyond mere speculation or conjecture. *E.g.*, *Milton v. State*, 2023 Ark. App. 382, 675 S.W.3d 173. This determination, along with the credibility of witnesses and the weight of the evidence presented at trial, is left to the jury. *Id.* at 6. 675 S.W.3d at 177. It "is the function of the jury, and not the reviewing court, to evaluate [such] and to resolve any inconsistencies in the evidence." *Bolen*, 2023 Ark. App. 373, at 21, 675 S.W.3d at 156.

We note, as is the case here, in sex-crime prosecutions, a victim's testimony need not be corroborated to support conviction. *E.g.*, *Bahena v. State*, 2023 Ark. App. 261, at 3, 667 S.W.3d 553, 555–56. We have consistently held that a victim's testimony alone amounts to substantial evidence that will support a conviction if the testimony adequately specifies the acts prohibited by law. *E.g.*, *Langlois v. State*, 2023 Ark. App. 263, at 8–9, 666 S.W.3d 884, 889. And such testimony is substantial evidence of guilt "even when the victim is a child." *McCauley v. State*, 2023 Ark. 68, at 4, 663 S.W.3d 383, 386. In accordance with these

standards, the evidence presented at trial clearly substantiated that Washington sexually assaulted and engaged in sexually indecent acts with MV.

Washington was convicted of second-degree sexual assault pursuant to Arkansas Code Annotated section 5-14-125(a)(3). Under this subdivision (a)(3), a person commits sexual assault in the second degree if being eighteen years of age or older, he "[e]ngages in sexual contact with another person who is . . . [l]ess than fourteen (14) years of age" and not the person's spouse. *Id.* Sexual contact "means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs . . . of a female[.]" Ark. Code Ann. § 5-14-101(11) (Supp. 2019).

At trial, then ten-year-old MV testified that Washington touched her vagina while she was outside playing in March 2021, opining he did so "[d]efinitely on purpose." Washington argues otherwise, but MV's testimony specifically described and—alone—substantiated that he engaged in prohibited sexual touching of MV and, thus, committed second-degree sexual assault. *See, e.g.*, *Bynum v. State*, 2017 Ark. App. 41, at 8, 511 S.W.3d 860, 865. Also, while not required, Detective Bennett's testimony that Washington fled from the scene on March 28, 2021, further supports each of Washington's convictions since flight is evidence of consciousness of guilt. *See, e.g.*, *Hunt v. State*, 2015 Ark. App. 53, at 5–6, 454 S.W.3d 771, 774–75.

The evidence likewise substantiated that Washington twice committed sexual indecency with a child. Washington was convicted of one count for having engaged in sexually indecent behavior with MV pursuant to Arkansas Code Annotated section 5-14-

110(a)(1)(A)–(C), which provides that a person commits sexual indecency with a child if, being eighteen years or older, he solicits another person who is less than fifteen years of age to engage in sexual intercourse, deviate sexual activity, or sexual contact.

While "solicitation" is not expressly defined under our criminal code, this court has instructed that such prohibited conduct includes "approaching" a child with a request or plea to engage in the unlawful conduct specified under Arkansas Code Annotated section 5-14-110(a)(1). *E.g.*, *Renderos v. State*, 92 Ark. App. 293, 293—94, 213 S.W.3d 37, 38–39 (2005) (citing *Heape v. State*, 87 Ark. App. 370, 376, 192 S.W.3d 281, 285 (2004)).

It is unlawful for a person to propose engaging in "deviate sexual activity" with a child, Ark. Code Ann. § 5-14-110(a)(1)(B), which includes "any act of sexual gratification involving . . . [t]he penetration, however slight of the labia majora . . . by any body member . . . [of] another person[.]" Ark. Code Ann. § 5-14-101(1)(B) (Supp. 2019). Arkansas Code Annotated section 5-14-110(a)(1)(C) also prohibits the solicitation of sexual contact with a minor, i.e., the same unlawful touching for sexual gratification prohibited under Arkansas's second-degree sexual-assault statute. *See* Ark. Code Ann. § 5-14-125(a)(3); *see also* Ark. Code Ann. § 5-14-101(11).

MV testified that Washington offered her five dollars to lick her vagina in March 2021. The jury was entitled to credit the minor victim's testimony, *e.g.*, *Thatcher v. State*, 2023 Ark. App. 369, at 8–9, 675 S.W.3d 439, 445, and this independently supported the finding that Washington committed sexual indecency with MV because he solicited her to engage in sexual contact.

The State also substantiated Washington's other count of sexual indecency with a child pursuant to Arkansas Code Annotated section 5-14-110(a)(2)(A). Under this provision, a person commits sexual indecency with a child if, "with the purpose to arouse or gratify a sexual desire[,] . . . the person purposely exposes his . . . sex organs to another person who is less than fifteen (15) years of age." Ark. Code Ann. § 5-14-110(a)(2)(A). A person acts purposely when it is the person's conscious object to engage in conduct of that nature or to cause the result. Ark. Code Ann. § 5-2-202(1) (Repl. 2013).

MV's testimony substantiated that Washington committed this offense. She testified that Washington exposed his penis to her inside her grandmother's apartment in 2021. She confirmed she knows what a penis is by identifying one on an anatomical figure admitted at the trial. The jury was entitled to credit MV's testimony. *E.g.*, *Langlois*, 2023 Ark. App. 263, at 8–9, 666 S.W.3d at 889. It was reasonable to infer that Washington purposely exposed his penis to MV for sexual gratification. *See, e.g.*, *Ward v. State*, 2014 Ark. App. 408, at 4, 439 S.W.3d 56, 59. Thus, we agree with the State that substantial evidence supported Washington's conviction for sexual indecency with a child under Arkansas Code Annotated section 5-14-110(a)(2)(A).

On appeal, Washington also argues that the circuit court erred by permitting testimony of his prior sex act with MW. Specifically, Washington claims that the circuit court abused its discretion by finding that his sexual touching of MW was sufficiently similar to the alleged offenses against MV and that the State failed to establish he had an intimate relationship with both minors. Washington also maintains that his prior sex act was

irrelevant and that MW's testimony was barred by Rule 403 of the Arkansas Rules of Evidence because its probative value was substantially outweighed by the risk of its prejudicial effect. We disagree.

MW's relevant testimony was admissible under Rule 404(b)'s pedophile exception, and Rule 403 did not bar its admission. The admissibility of evidence falls within the sound discretion of the circuit court, and its decision will not be disturbed absent an abuse of discretion. *E.g.*, *Torres-Garcia v. State*, 2021 Ark. App. 174, at 10. An abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires that a circuit court act improvidently, thoughtlessly, or without due consideration. *Id.*. Moreover, even if a circuit court errs in admitting evidence, this court may affirm a conviction and deem the error harmless if the evidence of guilt is overwhelming and the error is slight. *Id.* at 16. Prejudice is not presumed on appeal; and an assessment of prejudice must take into account that the uncorroborated testimony of a minor victim alone is substantial evidence to sustain a conviction for sex offenses. *See, e.g.*, *id.* at 16; *see also, e.g.*, *Mondy v. State*, 2019 Ark. App. 290, at 7–8, 577 S.W.3d 460, 466.

Rule 404(b) of the Arkansas Rules of Evidence provides that evidence 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 latter provides an exemplary, but not exhaustive list, of exceptions to that rule. *E.g.*, *Bronson v. State*, 2020 Ark. App. 50, at 4, 595 S.W.3d 6, 8.

This evidentiary rule bars the admission of evidence merely to show a defendant is a bad person, but it does not preclude independently relevant evidence, *e.g.*, *id.*, 595 S.W.3d at 8, that is, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more . . . or less probable[.]" Ark. R. Evid. 401. This includes any circumstance that links the accused to the crime or raises a possible motive for it. *E.g.*, *Mondy*, 2019 Ark. App. 290, at 5, 577 S.W.3d at 465.

Arkansas's appellate courts also recognize a separate "pedophile exception" to the general rule that evidence of a defendant's prior bad acts cannot be used to prove that he committed a sex crime. *E.g.*, *Bronson*, 2020 Ark. App. 50, at 4, 595 S.W.3d at 8; *Warner v. State*, 2021 Ark. 215, at 8. The pedophile exception permits the State to introduce evidence of similar sex acts with the same or other minors when it helps show a defendant's proclivity for a specific act with the victim or a class of persons with whom the defendant has an intimate relationship. *E.g.*, *Warner*, 2021 Ark. 215, at 8–9.

This "class" of persons extends to "all minor children and is not restricted to children of specific age or gender." *Craigg v. State*, 2012 Ark. 387, at 10, 424 S.W.3d 264, 269. For the pedophile exception to apply, there first must be a sufficient degree of similarity between the evidence to be introduced and the charged sexual conduct. *E.g.*, *Watson v. State*, 2015 Ark. App. 721, at 4, 478 S.W.3d 286, 289. "The previous acts do not have to be identical, just similar[,]" and a circuit court's determination that the act in question warrants admission

under the pedophile exception is given "considerable leeway" on appellate review. *Mondy*, 2019 Ark. App. 290, at 6, 577 S.W.3d at 465.

In order to be admitted, there also must be an "intimate relationship" between the defendant and the victim of the prior act. *E.g.*, *Bronson*, 2020 Ark. App. 50, at 5, 595 S.W.3d at 8. This standard is not strictly construed, and despite its earlier jurisprudence, this court now recognizes that such a relationship does not require that the minor be a family member of, or live in the same household with, the accused. *E.g.*, *Torres-Garcia*, 2021 Ark. App. 174, at 9–10. Instead, to establish an intimate relationship, the State need "only demonstrate a relationship close in friendship or acquaintance, familiar, near, or confidential" between the accused and a minor, *id.* at 10, and this court has held that evidence of a defendant's cohabitation with a minor suffices. *See, e.g.*, *Webb v. State*, 2012 Ark. App. 495, at 3–4 (finding intimate relationship established because accused resided in the same household with minor victim).

Here, the circuit court did not abuse its discretion by admitting MW's testimony regarding Washington's prior sex act under the pedophile exception. Washington was charged, in part, with second-degree sexual assault as the result of his sexual contact with MV, who testified at the pretrial hearing that he purposely touched her vagina through her clothing when she was eight years old. Similarly, MW attested that, when she was around six or seven, Washington touched her vagina through her clothing while he was living with her mother. The circuit court noted that these acts were "almost identical" when it granted the State's pretrial motion. Further, the circuit court did not abuse its discretion by concluding

that Washington had an intimate relationship with both MW and MV, both of whom identified him by the same nickname—Bogey.

Additionally, the circuit court properly concluded that the probative value of Washington's prior act with MW was not substantially outweighed by its prejudicial effect to render it inadmissible under Rule 403 of the Arkansas Rules of Evidence. Rule 403 instructs that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, but it is axiomatic that evidence offered by the State is often likely to be prejudicial to the accused and such "should not be excluded unless the accused can show that it lacks probative value[.]" *Chunestudy v. State*, 2012 Ark. 222, at 6, 408 S.W.3d 55, 60. In granting the State's motion, the circuit court properly considered and determined that MW's testimony about the prior 2016 sex act was highly probative because it was relevant evidence of Washington's depraved sexual instinct to target another minor adolescent female, MV, by similarly touching her vagina in 2021.

Washington argues that MW's testimony was "far more prejudicial than probative," but this allegation does not demonstrate that the testimony lacked any probative value as to the 2021 offenses. *See, e.g.*, *Chunestudy*, 2012 Ark. 222, at 6–7, 408 S.W.3d at 60–61. Our supreme court has rejected arguments that evidence of a prior sexual act committed against a child is unfairly prejudicial, rendering it inadmissible under Rule 403 of the Arkansas Rules of Evidence. *See Hernandez v. State*, 331 Ark. 301, 311, 962 S.W.2d 756, 761–62 (1998). Indeed, the "fact that evidence is prejudicial to a party is not reason, in itself, to exclude

evidence[,]" *Branstetter v. State*, 346 Ark. 62, 74, 57 S.W.3d 105, 113 (2001). We do not find merit in Washington's claims; accordingly, we affirm his convictions.

Affirmed.

VIRDEN and THYER, JJ., agree.

Potts Law Office, by: *Gary W. Potts*, for appellant.

Tim Griffin, Att'y Gen., by: *Michael Zangari*, Ass't Att'y Gen., for appellee.