Cite as 2012 Ark. 353

SUPREME COURT OF ARKANSAS

No. CR-11-1267

MARCUS W. FIELDS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** September 27, 2012 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. CR-11-29] HONORABLE J. MICHAEL FITZHUGH, JUDGE AFFIRMED.

COURTNEY HUDSON GOODSON, Associate Justice

Appellant Marcus W. Fields appeals an order of the Sebastian County Circuit Court convicting him of rape for digitally penetrating a seven-year-old child and sentencing him as a habitual offender to a term of life imprisonment in the Arkansas Department of Correction. For reversal, appellant argues that the circuit court erred in denying his motion for directed verdict and that the circuit court abused its discretion in denying his motion in limine to exclude the testimony of witnesses offered pursuant to Rule 404(b) of the Arkansas Rules of Evidence. We have jurisdiction pursuant to Arkansas Supreme Court Rule 1-2(a)(2) (2012), as appellant was sentenced to life imprisonment. We affirm.

D.A., who was seventeen at the time of trial, testified that she and her family met appellant when they moved into the West Apartments in Fort Smith. D.A. recalled one particular evening in early November 2000, when she was approximately seven years old, spending time at her father's apartment and watching a movie. Appellant came to the apartment and brought beer. D.A. went to her room while her father and appellant drank in the living room. Later that night, appellant entered D.A.'s room, smiled at her, grabbed

her, and pulled her onto the bed. D.A. called for her father, who did not answer. Appellant pulled down her pajama pants, removed her shirt, laughed, and told her to be quiet. He touched her chest, pinched her nipples, rubbed her stomach, and digitally penetrated her vagina. During the incident, D.A. tried to fight appellant and screamed for her father. After penetrating her, appellant told D.A. that she was disgusting and to clean herself, and he then left the residence. D.A. later exited her room and saw her father passed out on the living-room sofa surrounded by beer cans. D.A. did not tell anyone about her experience until she entered the eighth grade. At that time, she confided in her friends and her youth pastor. She later was admitted to Arkansas Children's Hospital for an autoimmune deficiency and told a psychologist about the rape. Shortly afterward, an investigation began.

On January 25, 2010, the State charged appellant by felony information with rape, in violation of Arkansas Code Annotated section 5-14-103(a)(3) (Repl. 2006), based on the allegation that he had engaged in sexual intercourse or deviate sexual activity with a person less than fourteen years of age. He was subsequently charged as a habitual offender, as he had been previously convicted of two or more felonies. Prior to trial, appellant filed a motion in limine, arguing that certain witness testimony, introduced by the State pursuant to the pedophile exception, must be excluded under Rule 404(b). Following a hearing, the circuit court granted appellant's motion in limine for the testimony of S.J., appellant's male cousin, but it allowed the testimony of M.E., D.S., and C.C. regarding their allegations of prior sexual acts with appellant.

On September 13, 2011, the case proceeded to trial. At the conclusion of the State's case-in-chief, appellant moved for directed verdict based on the insufficiency of the

evidence. Appellant argued that the only evidence to support the conviction was the statement of the victim. The circuit court denied the motion. Appellant did not present any witnesses and renewed his motion for directed verdict, which the court again denied. At the conclusion of the trial, the jury found appellant guilty of rape and sentenced him to life imprisonment. The circuit court subsequently entered a judgment and commitment order reflecting the jury's conviction and sentence. Appellant timely filed a notice of appeal. From the order, appellant now brings his appeal.

For his first point on appeal, appellant argues that the circuit court erred in denying his motion for directed verdict. Specifically, appellant contends that the rape victim's testimony is insufficient to support his conviction. He further asserts that her testimony recalls an event that allegedly happened ten years prior to trial and that no physical evidence exists.

On appeal, we treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Johnson v. State*, 375 Ark. 462, 291 S.W.3d 581 (2009). We will affirm the circuit court's denial of a motion for directed verdict if there is substantial evidence, either direct or circumstantial, to support the jury's verdict. *Id.* This court has repeatedly defined substantial evidence as evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lacy v. State*, 2010 Ark. 388, 377 S.W.3d 227. Furthermore, this court views the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *Id.*

A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. Ark. Code Ann. § 5-14-103(a)(3)(A) (Repl. 2006). "Deviate sexual activity" means "any act of sexual

gratification involving . . . [t]he penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person." Ark. Code Ann. § 5-14-101(1)(B) (Repl. 2006). A rape victim's testimony may constitute substantial evidence to sustain a conviction for rape, even when the victim is a child. *Witcher v. State*, 2010 Ark. 197, 362 S.W.3d 321. More particularly, we have stated that the testimony of the victim that shows penetration is sufficient evidence for conviction, even where that testimony is uncorroborated. *Id.*; *Lamb v. State*, 372 Ark. 277, 275 S.W.3d 144 (2008); *Gatlin v. State*, 320 Ark. 120, 895 S.W.2d 526 (1995).

Appellant's argument is unavailing in light of our holdings that all that is needed for a rape conviction is the uncorroborated testimony of the child victim. *Witcher*, *supra*; *Rohrbach v. State*, 374 Ark. 271, 287 S.W.3d 590 (2008); *Jones v. State*, 300 Ark. 565, 780 S.W.2d 556 (1989) (holding that testimony of a child victim, standing alone, was sufficient to sustain a rape conviction where victim clearly identified defendant and testified to the acts). The victim is not required to use the correct terms for the body parts if she uses her own terms or shows an understanding of what body parts are being described and where they are located. *Id.* (citing *McGalliard v. State*, 306 Ark. 181, 813 S.W.2d 768 (1991)). Moreover, it is not necessary that scientific evidence be introduced in order to sustain a rape conviction. *Gatlin*, 320 Ark. 120, 895 S.W.2d 526.

To prove rape, the State was required to show that there was penetration, however slight, of the labia majora of the victim. Here, D.A. testified that, when she was approximately seven years old, appellant forced her onto the bed, pulled down her pajama pants, and removed her shirt. After doing so, he touched her chest, pinched her nipples, rubbed her stomach, and digitally penetrated her vagina. Thus, D.A.'s testimony about the

incident satisfied the State's burden, and accordingly, there was substantial evidence to support appellant's conviction. For these reasons, we hold that the circuit court properly denied appellant's motion for directed verdict.

For his second point on appeal, appellant argues that the circuit court abused its discretion in denying his motion in limine to exclude witness testimony offered pursuant to the pedophile exception to Rule 404(b). Specifically, appellant asserts that the witness testimony of M.E., D.S., and C.C. allege acts that were not sufficiently similar to the rape of D.A.

Rule 404(b) provides 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.

Evidence is not admissible under Rule 404(b) simply to show a prior bad act. *Vance v. State*, 2011 Ark. 243, 383 S.W.3d 325. In reviewing the admission of evidence under Rule 404(b), this court has observed that a circuit court has broad discretion in deciding evidentiary issues, and its decisions are not reversed absent an abuse of discretion. *Rounsaville v. State*, 2009 Ark. 479, 346 S.W.3d 289.

When the charge concerns the sexual abuse of a child, evidence of other crimes, wrongs, or acts, such as sexual abuse of that child or other children, is admissible under the "pedophile exception" to show motive, intent, or plan pursuant to Ark. R. Evid. 404(b). *Hathcock v. State*, 357 Ark. 563, 182 S.W.3d 152 (2004). 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. *Kelley v. State*, 2009 Ark. 389, 327 S.W.3d 373. 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. *Eubanks v. State*, 2009 Ark. 170, 303 S.W.3d 450. We also require that there be an "intimate relationship" between the perpetrator and the victim. *Id.* Further, it is admissible to show the familiarity of the parties, disposition, and antecedent conduct toward one another and to corroborate the testimony of the victim. *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987).

In the present case, the circuit court admitted the following Rule 404(b) testimony during the guilt phase of the trial. M.E., twenty-two years of age at trial, testified that appellant was his babysitter when M.E. was eight years old. M.E. recounted a time when appellant babysat him and approached him in the bathroom as M.E. got out of the shower, wearing only a towel. According to M.E., appellant touched his genitals and penis, saying, "Mine is bigger." Appellant then pulled down his pants and exposed himself. M.E. stated that appellant would rub his penis between his legs, touch M.E.'s penis, perform oral sex on M.E., and force M.E. to perform oral sex on him.

D.S., thirty-five years of age at trial, testified that appellant was a friend of her family. D.S. testified that, when she was twelve years old, she got out of the shower, wrapped in a towel, to answer the telephone. Appellant entered through the bedroom door, unzipped his pants, and raped her. D.S. fought appellant and yelled appellant's name. When appellant heard a knock on the front door, he ran out the back door and jumped a fence. Crying, shaking, and naked, D.S. answered the door and told an individual named Jimmy

Douglas that appellant had raped her. Appellant subsequently pled guilty to first-degree sexual abuse in connection with this incident.

C.C., fifteen years old, testified that he met appellant in the third grade when he and his father resided in the same apartment building. According to C.C., appellant babysat him when he was twelve or thirteen years old. One evening, appellant called C.C. to his father's bedroom, pushed him against the bed, and held him down with one hand. Appellant pulled down his pants and digitally penetrated him. C.C. went to his bedroom and stayed there until his father came home. C.C. did not tell his father because he was afraid his father would be upset with him. At the close of the pretrial hearing, the circuit court ruled that M.E.'s and C.C.'s testimony was admissible and reserved ruling on D.S.'s testimony. However, at trial, the circuit court also admitted D.S.'s testimony.

Appellant contends that these three witnesses' testimony should not have been admitted because the acts alleged by M.E., D.S., and C.C. were not sufficiently similar to the acts alleged by D.A. Specifically, he claims that M.E. and C.C. were boys, and the abuse, particularly with M.E., involved touching the child's penis and having oral sex with him. Appellant further asserts that D.S. was an older child and that he did not have the requisite "intimate relationship" with her. However, this testimony squarely falls under the pedophile exception to Rule 404(b). Like D.A., these three victims were young children from the ages of seven to twelve at the time of the abuse, and appellant was either a babysitter or a close family friend to all three children. Thus, appellant was in an intimate relationship with the three victims. *See Parish v. State*, 357 Ark. 260, 163 S.W.3d 183 (2004). Additionally, appellant acted by cornering these children alone in their homes, forcing himself upon them, and engaging in deviate sexual activity. Further, this court has

rebuffed arguments regarding different methods of rape when considering Rule 404(b) evidence, particularly in sex crimes against children. *Id.* Therefore, we hold that the circuit court did not abuse its discretion in admitting this evidence.

Pursuant to Arkansas Supreme Court Rule 4-3(i) (2011), the record has been reviewed for all objections, motions, and requests made by either party that were decided adversely to appellant and no prejudicial error was found.

Affirmed.

Caroline L. Winningham, for appellant.

Dustin McDaniel, Att'y Gen., by: *Leaann J. Irvin*, Ass't Att'y Gen., for appellee.