

SUPREME COURT OF ARKANSAS

No. CR 11-1282

TROY JASON PATRICK RILEY
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered December 13, 2012

APPEAL FROM THE LOGAN
COUNTY CIRCUIT COURT,
[NO. CR-10-15]HONORABLE JERRY D. RAMEY,
JUDGEAFFIRMED.**PAUL E. DANIELSON, Justice**

Appellant Troy Jason Patrick Riley appeals from his conviction for rape and his sentence to 300 months' imprisonment. He asserts two points on appeal, that the circuit court erred in (1) denying his motion in limine to suppress statements he made to his psychotherapist and the medical records pertaining to his treatment, thereby denying him his right to assert the psychotherapist-patient privilege; and (2) granting the State's motion in limine to exclude any instances of abuse that might have occurred after the victim turned fourteen years old, thereby denying him the opportunity to challenge the victim's credibility. We affirm Riley's conviction and sentence.

Because Riley does not challenge the sufficiency of the evidence against him, only a brief recitation of the facts is necessary. *See, e.g., Webb v. State*, 2012 Ark. 64. Riley was charged with the rape of his stepdaughter, who was under fourteen years of age at the time. At trial, K.W. testified that while she was sleeping, Riley came into her room and touched

her on top of her clothes. She stated that after that, he began touching her under her clothes. She further testified that on one occasion he penetrated her digitally, and on three other occasions, he raped her. As already noted, Riley was convicted of rape; he now appeals.

For his first point on appeal, Riley argues that the circuit court erred in denying his motion in limine by which he sought to have suppressed certain statements he made to his psychotherapist during a psychosexual evaluation and medical records pertaining to his treatment. He contends that the circuit court erroneously relied on Arkansas Code Annotated § 12-18-803 (Repl. 2009) in admitting the evidence, where the statute directly conflicts with this court's rule establishing the psychotherapist-patient privilege, Arkansas Rule of Evidence 503(b) (2011). Riley avers that our rule "remains supreme" over any directly conflicting act or statute that would compromise the Rule's purpose.

The State responds, initially, that Riley's argument is procedurally barred, contending that Riley did not specifically argue to the circuit court the conflict between the statute and this court's rule. Alternatively, the State urges, the content of Riley's psychosexual evaluation was not confidential and therefore not privileged because Riley was evaluated by the psychotherapist as part of an investigation by the Arkansas Department of Human Services.

We agree with the State; Riley's argument is not properly preserved for our review. We have held that, while objections do not need to cite specific rules to be sufficient, an objection must be specific in that it is sufficient to apprise the court of the particular error alleged. *See Gordon v. State*, 2012 Ark. 398. A careful review of the instant record reveals that Riley failed to apprise the circuit court of the particular argument he now raises on appeal,

and he failed to obtain a ruling on it.

While Riley did cite the circuit court to our decision in *State v. Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990), and Rule 503, he did so solely for the proposition that his waiver of the psychotherapist-patient privilege was required. Riley in no way apprised the circuit court of the conflict between our rule and the statute that he now asserts, nor did he in any way apprise the circuit court of the relevant holding in *Sypult* regarding conflicts between legislation and our rules.¹ A party cannot enlarge or change the grounds for an objection or motion on appeal, but is bound by the scope and nature of the arguments made at trial. See *Gulley v. State*, 2012 Ark. 368, ___ S.W.3d ___; *Dixon v. State*, 2011 Ark. 450, ___ S.W.3d ___. Moreover, an argument is not preserved for appellate review unless the circuit court rules on the specific objection raised by the appellant. See *Gulley*, *supra*.

Riley cited the circuit court to a case for a proposition different than that asserted on appeal, and we cannot say that the mere citation of that case preserves for appeal any and every legal argument based thereon, even if not articulated to the circuit court. Because Riley neither apprised the circuit court of his particular conflict argument, nor obtained a ruling on that particular argument, this court is precluded from addressing it.

Riley next argues that the circuit court erred in granting the State's motion in limine to limit the evidence to only those instances of abuse occurring prior to K.W.'s turning

¹In *Sypult*, this court redefined the parameters of its shared rule-making power, stating, "In sum, we hold that deference to legislation involving rules of evidence and procedure will be given only to the extent the legislation is compatible with our established rules. When conflicts arise which compromise these rules, our rules remain supreme." 304 Ark. at 9, 800 S.W.2d at 405.

fourteen years of age. He contends that K.W. made an allegation of abuse against him that occurred after she turned fourteen years of age, but later recanted the allegation. He urges that by excluding any allegations after fourteen, the circuit court denied him the opportunity to question K.W.'s credibility. The State counters that the circuit court did not abuse its discretion in ruling the testimony inadmissible, as the evidence sought to be admitted by Riley fell within the parameters of the rape-shield statute, and the circuit court correctly found that its probative value was slight. The State further asserts that Riley was not prejudiced by the circuit court's ruling.

The decision to admit or exclude evidence is within the sound discretion of the circuit court, and we will not reverse a circuit court's decision regarding the admission of evidence absent a manifest abuse of discretion. *See Paschal v. State*, 2012 Ark. 127, ___ S.W.3d ___. Here, Riley contends that the circuit court erred in precluding him from introducing evidence that K.W. recanted an allegation of abuse by him after she turned fourteen. Riley, however, did not proffer any testimony by K.W. to the circuit court, but instead relied on the arguments of counsel. When challenging the exclusion of evidence, a party must make a proffer of the excluded evidence at trial so that this court can review the decision, unless the substance of the evidence is apparent from the context. *See Rodgers v. State*, 360 Ark. 24, 199 S.W.3d 625 (2004). Without a proffer of the substance of K.W.'s prior allegation or her admission or denial thereof, we are unable to determine whether that allegation would be relevant or admissible to impeach her credibility. Accordingly, we hold that Riley has failed to preserve his argument regarding the evidence he sought to admit.

Affirmed.

BAKER, J., dissents.

KAREN R. BAKER, Justice, dissenting. Because I believe Riley's first point on appeal is adequately preserved for our review, I respectfully dissent. In order "[t]o preserve an argument for appeal, there must be an objection in the trial court that is sufficient to apprise the court of the particular error alleged." *Love v. State*, 324 Ark. 526, 530, 922 S.W.2d 701, 704 (1996). Here, Riley did raise the particular issue to the circuit court. In arguing his motion in limine, Riley was not required to specifically cite the applicable rule of evidence, Rule 503 of the Arkansas Rules of Evidence, although he did so. He was not required to cite the case on point, *State v. Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990), although he did that as well. He was required to apprise the trial court of the error he alleged would be committed by allowing the State to present evidence of communications that were subject to the psychotherapist-patient privilege. Riley made precisely that argument.

Riley argued that the privilege applied to the communications from the assessment and since he had not waived that privilege, the circuit should grant his motion. The State responded citing Ark. Code. Ann. § 12-18-803, that the communications were not privileged. Defense counsel then responded to the State's argument with the following:

[U]ntil he waives the psychotherapist privilege, this cannot be used by the State That statute [Ark. Code. Ann.,] right there is inapposite to [Riley's] case That's not the proper law to follow here, Your Honor. First of all, I've not been provided with any notice and waiver Second of all, this doesn't have anything to do with [the victim] . . . and the State's bound to show that before that statute comes into effect. That statute is not in effect [The assessment] is a confidential communication. . . . Your Honor, I would like to point the Court to *State v. Sypult*

. . . . It stands for the proposition that such communications as these in these instances are confidential communication, [sic] and subject to being waived by the patient [T]hese are confidential communications . . . it's simply not usable . . . until he signs a waiver Rule 503, also, Arkansas Rules of Evidence.

Riley's motion asserting the privilege sufficiently apprised the circuit court of the alleged error and preserved the issue for appeal. Accordingly, I would address the merits of his contention.

In addressing the merits of Riley's claim, we review the denial of a motion in limine with an abuse-of-discretion standard. *Mhoon v. State*, 369 Ark. 134, 251 S.W.3d 244 (2007).

In 2008, the Arkansas Department of Human Services (ADHS) referred Riley to a psychosexual assessment. A licensed counselor at ADHS, Larry Gant, administered the assessment to Riley. Gant testified at trial that the assessment is used to evaluate one's sexual history, beliefs, and values. It is also used to determine the need for treatment and type of treatment to be administered.

Prior to the trial, Riley asserted in his motion in limine that the assessment was privileged and inadmissible under the psychotherapist-patient privilege, citing Rule 503 and *Sypult*. Then again during the trial, in his objections to Gant's testimony, Riley asserted that Gant's testimony was privileged. The State responded that the evidence was admissible under Ark. Code Ann. § 12-18-803 of the Arkansas Child Maltreatment Act, which allowed for the admissibility of such evidence. Ark. Code Ann. § 12-18-803 (Repl. 2009). The circuit court ruled that Riley's statements from the assessment were not privileged.

The issue is whether Riley could assert the privilege and prevent Gant's testimony. Rule 503 allows Riley to assert the privilege, and prohibit the testimony's admission, but §

12-18-803 does not allow Riley to assert the privilege. Clearly, there is a conflict of authority. In *Sypult*, we held that “we will defer to the General Assembly, when conflicts arise, only to the extent that the conflicting court rule’s primary purpose and effectiveness are not compromised; otherwise, our rules remain supreme. . . . In sum, we hold that deference to legislation involving rules of evidence and procedure will be given only to the extent the legislation is compatible with our established rules. When conflicts arise which compromise these rules, our rules remain supreme.” 304 Ark. at 9, 800 S.W.2d at 405.

In Riley’s case, as in *Sypult*, Rule 503 (b) conflicts with Ark. Code Ann. § 12-18-803. Where there is a conflict between our procedural rules and a statute, our rules remain supreme. See *State v. A.G.*, 2011 Ark. 244, ___ S.W.3d___; *Shoemate v. State*, 339 Ark. 403, 5 S.W.3d 446 (1999); *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994); *Hickson v. State*, 316 Ark. 783, 875 S.W.2d 492 (1994). Accordingly, the circuit court abused its discretion in denying Riley’s motion in limine. Because I would reverse and remand on the first point, I would not reach the second point on appeal.

Chad M. Green & Associates, by: *Joshua D. Gillispie*, for appellant.

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