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SUPREME COURT OF ARKANSAS

No. CR10-1035

MILTON RAY HENDRIX
APPELLANT

VS.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered March 31, 2011

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT,
NO. CR09-1077,
HON. JAMES O. COX, JUDGE,

AFFIRMED.

JIM HANNAH, Chief Justice

Appellant Milton Ray Hendrix was convicted by a Sebastian County jury of one count of second-degree sexual assault and one count of fourth-degree sexual assault, for which he was sentenced to twenty years' imprisonment in the Arkansas Department of Correction and one year of imprisonment in the Sebastian County Adult Detention Center, respectively, to be served consecutively. On appeal, Hendrix challenges the sufficiency of the evidence to support his convictions. Hendrix also contends that the circuit court abused its discretion in admitting testimony regarding prior bad acts under the pedophile exception to Rule 404(b) of the Arkansas Rules of Evidence. Finally, Hendrix contends that the circuit court abused its discretion in refusing to grant a mistrial or give a cautionary instruction when the deputy prosecutor, during closing argument, attempted to improperly shift the burden of proof from the State to the defendant. We affirm.

I. *Sufficiency of the Evidence*

Hendrix moved for a directed verdict on both counts at the end of the State's case and at the close of all evidence, and both motions were denied by the circuit court. He argues on appeal, as he did before the circuit court, that the testimony of the victim, W.D., was so inherently improbable and physically impossible, as to be utterly unbelievable.

In reviewing a challenge to the sufficiency of the evidence, the court assesses the evidence in the light most favorable to the State and considers only the evidence that supports the verdict. *E.g.*, *Gillard v. State*, 366 Ark. 217, 234 S.W.3d 310 (2006). This court will affirm a judgment of conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Pursuant to Arkansas Code Annotated section 5-14-125(a)(3) (Supp. 2009), a person commits sexual assault in the second degree if the person, being eighteen years of age or older, engages in sexual contact with another person who is less than fourteen years of age and not the person's spouse. A person commits sexual assault in the fourth degree if the person, being twenty years of age or older, engages in sexual contact with another person who is less than sixteen years of age and not the person's spouse. Ark. Code Ann. § 5-14-127(a)(1)(B) (Supp. 2009). "Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female. Ark. Code Ann. § 5-14-101(10) (Supp. 2009).

The following evidence was presented at Hendrix's trial. W.D., who was sixteen years old at the time of the July 2010 trial, testified that she had known Hendrix for the last ten years because he and his wife, Debbie Hendrix, picked her and her mother up to go to church almost every Sunday. She stated that she sat behind Hendrix, who drove, while her mother sat behind Debbie on the passenger side. W.D. testified that Hendrix began touching her inappropriately when she was five years old, when, while giving her piggy-back rides, he would put two fingers near her vagina. According to W.D., when she began puberty, at approximately the age of twelve, Hendrix began touching her breasts. She stated that on most Sundays after church, Hendrix would open the car door for her and pretend to tickle her, "which gave him the perfect opportunity to put his arm up or down [her] shirt" and touch her breast. According to W.D., her mother never saw Hendrix touch her because Hendrix would often knock her shoe off her foot and turn her, facing toward the door with her back to her mother, bend her over to pick up her shoe so that her mouth was on or near her knee and close to Hendrix's stomach, and pretend to tickle her while reaching up her shirt to touch her breasts.[1] W.D. also testified that Hendrix would come up behind her while walking out to the vehicle after church and put his arms underneath her breasts and pull her back into him. In addition, W.D. testified that Hendrix would pat her on the butt when she was getting into the car and that "he made it look like he was playing around. He did it in church when no one was looking. Like he just made it look like it was a joke."

[1]W.D. performed a physical demonstration while testifying.

W.D. stated that when she was nine or ten, Hendrix took her into a dark room in the church and tried to kiss her. W.D. said that Hendrix's actions made her feel uncomfortable, and, when she asked him to stop, he would say that he knew she liked it. W.D. testified that when she was approximately thirteen years old and home alone, Hendrix came to her home, tried to shut the door behind him, put her body up against the wall, pressed his body against hers, and started kissing her.

W.D. stated that, once, when she told him to stop, Hendrix stopped touching her inappropriately "for about a month," but then "started up again" one Sunday during church. She said that the last incident occurred the Sunday before she left for camp in June 2009.

John Lindgren, who knew Hendrix through church, testified that one Sunday after church, he saw W.D.'s mother and Hendrix's wife walking in front of W.D. and Hendrix. He stated that he saw W.D. jerk away from Hendrix after Hendrix "reached over and grabbed [W.D.] by the butt and she give him the go-to-double-hockey-stick look, and he looked at her with a smirky grin like, 'What are you going to do about it?'"

Karen Carter testified that she knew Hendrix and W.D. because she attended church with them. Carter further testified that while she was sitting in the church parking lot talking on her phone, she saw Hendrix's wife and W.D.'s mother walking in front of W.D. and Hendrix and he "c[a]me up behind [W.D.] and put his arms around her, underneath her breasts, and pull[ed] her back into him, against him, and walk[ed] that way for several feet before he let her go." Carter stated that she thought Hendrix's touching was inappropriate.

Hendrix testified in his own defense. He stated that for about ten years, he transported W.D. and her mother to church on Sundays. He further stated that there was no truth to W.D.'s allegations that he had touched her inappropriately.

Hendrix asserts that W.D.'s testimony is not credible because she could not have been "physically bent over in the contorted position she described" while all four people were inside the vehicle; she could not have been bent over with her mouth on her knee and her head on his stomach; and she could not have been sexually assaulted by him without his wife or W.D.'s mother seeing or becoming suspicious of anything for approximately ten years.

We have held that the credibility of witnesses is a matter for the jury's consideration. *E.g.*, *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007). Where the testimony is conflicting, we do not pass upon the credibility of the witnesses and have no right to disregard the testimony of any witness after the jury has given it full credence, where it cannot be said with assurance that it was inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon. *E.g.*, *Davenport v. State*, 373 Ark. 71, 281 S.W.3d 268 (2008).

Here, in addition to testimony from W.D., the State also introduced testimony from Lindgren, who corroborated W.D.'s testimony that Hendrix touched her on the buttocks, and testimony from Carter, who corroborated W.D.'s testimony that Hendrix touched her breasts. Although W.D.'s testimony was at times inconsistent and contradicted by other witnesses, the weighing of evidence and witness credibility are matters left solely to the discretion of the

jury. *E.g.*, *Wyles v. State*, 368 Ark. 646, 249 S.W.3d 782 (2007). Moreover, even though Hendrix denied the allegations that he sexually assaulted W.D., the jury is not required to believe his self-serving testimony. *E.g.*, *Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008). We hold that Hendrix's convictions are supported by substantial evidence.

II. *Admission of 404(b) Testimony*

Hendrix next asserts that the circuit court abused its discretion in admitting testimony regarding prior bad acts under the pedophile exception to Rule 404(b) of the Arkansas Rules of Evidence. Prior to trial, at a hearing on Hendrix's motion in limine, Jennifer Mertell testified that, when she was a child, she saw Hendrix, a family friend, two or three times a week at her parents' convenience store. Mertell stated that, when she was approximately eight years old, Hendrix began giving her hugs that were "longer than [she] would . . . like . . . [and] he would squeeze [her] chest into his chest and it would make [her] nervous." Mertell said that Hendrix made her so nervous, she began hiding behind shelves or going into the cooler whenever he stopped by the store.

Mertell stated that Hendrix would hug her while moving his hand to one of her buttocks, and she "knew at that point that these [touches] weren't accidents. These . . . were done purposefully." She further stated that, when she was approximately twelve years old, Hendrix would put his hand on her buttock and keep his index finger and pinky on the back of her buttock by her legs, "but the middle two fingers would go between [her] legs."

Mertell testified that when she was sixteen or seventeen, Hendrix visited the video store where she was working, and while he was squeezing her, he began rubbing his hands on her breasts. She stated that she told Hendrix to stop, but he continued, telling her, "Come on, we're friends. Come on, you know, I've always liked you." Mertell said that Hendrix squeezed her hips against his to the point where she could tell his penis was erect. She stated that she asked him to stop, and he said, "Come on, you know you want to touch it," and then put her hand down the front of his pants. Mertell said that she again told him to stop and he told her he was sorry and did not mean to scare her. She testified that Hendrix said something like "I thought you liked me" or "you wanted it," and then left the store. Mertell said that, after she read an article about Hendrix's arrest in this case, she decided to contact a detective to tell what Hendrix had done to her.

The admission or rejection of evidence under Rule 404(b) is within the sound discretion of the circuit court, and it will not be reversed absent a manifest abuse of discretion. *E.g.*, *Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008). According to Rule 404(b), "[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). This court's precedent has recognized 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. *E.g.*, *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. *E.g.*, *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.*

Hendrix contends that the State has failed to show that there was a sufficient degree of similarity between the charged conduct and the conduct about which Mertell testified. We disagree. According to W.D., Hendrix began inappropriately hugging and touching her when she was approximately five years old. Mertell, who testified at the hearing on the motion in limine and during the trial, said that Hendrix began fondling her when she was approximately eight years old. Hendrix met each of the victims after he befriended their parents. The testimony showed that Hendrix touched both W.D. and Mertell in a similar manner in the vaginal area, that he grabbed their breasts while hugging or tickling them, and that his touching escalated as they each got older and developed physically. Mertell's testimony was helpful in showing Hendrix's proclivity for sexually assaulting young girls over a period of several years. We conclude that the evidence showed that the incidents with Mertell were sufficiently similar to the incidents with W.D.

Hendrix also contends that the circuit court abused its discretion in admitting Mertell's testimony because there was no evidence of an intimate relationship between Mertell and

him. For purposes of the pedophile exception, this court has defined an "intimate relationship" as "close in friendship or acquaintance, familiar, near, or confidential." *Parish v. State*, 357 Ark. 260, 270, 163 S.W.3d 843, 849 (2004). This court has recognized an intimate relationship where a perpetrator puts himself in a position to obtain access to a child. *See, e.g.*, *Dillard v. State*, 333 Ark. 418, 971 S.W.2d 764 (1998).

Here, Hendrix put himself in a position to gain regular access to Mertell by visiting her parents' business two to three times a week for several years. Mertell testified that she considered Hendrix to be a friend of the family. Moreover, according to Mertell, Hendrix referenced his friendship with her while rubbing her breasts. We conclude that the State established that Hendrix had an "intimate relationship" with Mertell. In sum, based upon both the sufficient degree of similarity between the evidence of sexual assaults perpetrated by Hendrix on W.D. and Mertell and the "intimate relationship" between Hendrix and Mertell, we hold that the circuit court did not abuse its discretion in admitting Mertell's testimony.

Before leaving this point, we note that Hendrix also claims that the admission of Mertell's testimony denied him due process of law and the right to a fair trial. Specifically, he states that "he should have only been required to defend the exact offense, not allegations of wrongdoing from 25-30 years ago." Aside from citing inapposite case law, Hendrix fails to state a basis for his claim that he was required to defend himself against an uncharged offense. Hendrix's failure to develop an argument precludes review of the issues by this court on appeal. *See, e.g.*, *Davis v. State*, 375 Ark. 368, 291 S.W.3d 164 (2009).

III. *Closing Argument*

Hendrix contends that the circuit court abused its discretion in refusing to grant a mistrial or give a cautionary instruction when the deputy prosecutor, during closing argument, attempted to improperly shift the burden of proof from the State to the defendant. As part of his closing argument, the deputy prosecutor stated, "There's no reason, not one reason has been presented in this case why this is made up, or why this girl would make this up out of thin air." Hendrix objected and requested a mistrial, contending that the deputy prosecutor was attempting to shift the burden of proof to the defendant. The circuit court denied Hendrix's motion for a mistrial and told the deputy prosecutor that he did not want to get in a position where he was stating that it was Hendrix's obligation to prove why W.D. stated that the assaults took place so he should move on from that portion of it." Hendrix then requested a cautionary instruction, which the circuit court denied as unnecessary at that time.

The circuit court is given broad discretion to control counsel in closing arguments and is in a better position to determine the possibility of prejudice by observing the argument firsthand. *E.g.*, *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999). Absent a manifest abuse of discretion, this court will not reverse the action of the circuit court in matters pertaining to controlling, supervising, and determining the propriety of the arguments of counsel. *Id.*

Closing arguments must be confined to questions in issue, the evidence introduced during trial, and all reasonable inferences and deductions that can be drawn therefrom. *Id.* "Where an attorney's comment during closing arguments is directly reflecting or inferable

from testimony at trial, there is no error." *Woodruff v. State*, 313 Ark. 585, 592, 856 S.W.2d 299, 303–04 (1993).

Hendrix testified at trial and denied that he had inappropriately touched W.D. During cross-examination, the deputy prosecutor asked Hendrix if he could think of any reason why W.D. "would make [the allegations] up." Hendrix responded, "I have no idea. I am just as dumbfounded about that as you are, sir."

When taken in context, it is clear that the deputy prosecutor's statement that "[t]here's no reason, not one reason has been presented in the case, why this is made up, or why this girl would make this up out of thin air" was not an attempt to shift the burden of proof; rather, it was an attempt to reiterate the attack on Hendrix's credibility. The statement, in direct response to Hendrix's testimony, did not constitute error that warranted a mistrial or a cautionary instruction to the jury. We hold that the circuit court did not abuse its discretion in denying Hendrix's motion for a mistrial and in denying Hendrix's request for a cautionary instruction.

Affirmed.