Cite as 2010 Ark. 259

SUPREME COURT OF ARKANSAS

No. CR09-1353

JAMES BUTLER,
APPELLANT,

VS.

STATE OF ARKANSAS,
APPELLEE,

Opinion Delivered May 27, 2010

APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT,
NO. CR2008-268 I,
HON. JOHN HOMER WRIGHT, JUDGE,

AFFIRMED.

PAUL E. DANIELSON, Associate Justice

Appellant James Butler appeals from the judgment and commitment order of the Garland County Circuit Court, convicting him of two counts of rape and sentencing him to life imprisonment on each count, to be served consecutively. His sole point on appeal is that the circuit court abused its discretion in admitting certain evidence over his objections in accordance with Arkansas Rule of Evidence 404(b) (2009). We find no error and affirm Butler's convictions and sentence.

Because Butler does not challenge the sufficiency of the evidence to support his convictions, we will only briefly recite the general facts here and will set forth the more specific facts relevant to the point on appeal as it is discussed. *See, e.g.*, *Davis v. State*, 367 Ark. 330, 240 S.W.3d 115 (2006). The State charged Butler with two counts of rape, alleging that (1) on or about April 1, 2007, through September 1, 2007, Butler engaged in sexual intercourse or deviate sexual activity with a nine-year-old female, S.K., by inserting his penis

into her vagina, and (2) on or about August 1, 2002, through April 4, 2008, Butler engaged in sexual intercourse or deviate sexual activity with a minor, S.K., by repeatedly inserting sex toys into her vagina. A jury trial commenced on September 2, 2009. The jury heard testimony from multiple witnesses, including the victim herself, the victim's mother, medical professionals, law enforcement officials, and others about the events and circumstances. Additionally, Butler's prior conviction for a violation of a minor in the first degree was admitted into evidence along with the testimony of the victim of that prior conviction, A.P., Butler's biological daughter. Butler was found guilty, and a judgment and commitment order was entered against him on September 15, 2009. He filed a timely notice of appeal on September 18, 2009.

Butler argues that, pursuant to Ark. R. Evid. 404(b), the circuit court erred in allowing evidence of his prior conviction at trial. The State avers that the circuit court properly admitted the evidence pursuant to the pedophile exception to Rule 404(b). The admission or rejection of evidence under Rule 404(b) is committed to the sound discretion of the circuit court, which this court will not disturb on appeal absent a showing of manifest abuse. *See Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996).

Rule 404(b) provides as follows:

> 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.

Ark. R. Evid. 404(b) (2009). Evidence offered under Rule 404(b) must be independently relevant to make the existence of any fact of consequence more or less probable than it would be without the evidence. *See Eubanks v. State*, 2009 Ark. 170, 303 S.W.3d 450. In other words, the prior bad act must be independently relevant to the main issue, in that it tends to prove some material point rather than merely proving that the defendant is a criminal. *See id.*

This court has long recognized a "pedophile exception" to Rule 404(b). *See id.* We have approved allowing evidence of the defendant's prior 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. *See id.* The rationale for this exception is that such evidence helps to prove the depraved sexual instinct of the accused. *See 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. *See Hamm v. State*, 365 Ark. 647, 232 S.W.3d 463 (2006). We also require that there be an "intimate relationship" between the perpetrator and the victim of the prior act. *Id.* at 652, 232 S.W.3d at 468–69.

At Butler's trial, S.K. testified that she had known Butler, whom she called "Uncle Jim," since she was about three years old and that she would spend time with him in the summer, including overnight visits. S.K. further testified that during her visits, Butler would touch her "bobo," her word for her vagina, and used toys to touch her "bobo." She stated

that he used toys "a bunch" and confirmed that they would go in a little bit. S.K. testified that Butler would put a "gel kinda stuff" that came from a tube on the toys before he used them on her and that the toys would "buzz." S.K. said that she would be in Butler's house or truck when he used the toys on her. S.K. also testified about an incident that occurred when she was on a boat with Butler and his adopted toddler. She stated that he "stuck his wiener inside [her] bobo."

A.P., who was 37-years-old at the time of trial, testified that she had been sexually abused by Butler on "numerous occasions" and "for basically as long as [she] can remember . . . until the age of sixteen." A.P. stated that he had penetrated her vagina with toys as well as his penis.

A.P.'s testimony falls squarely under the pedophile exception to Rule 404(b). The relationship between her and her father was clearly an intimate one. *See White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006). Butler argues that the reason the pedophile exception does not apply here is because there was not a sufficient degree of similarity between the prior bad act introduced at trial, the sexual abuse against A.P., and the alleged conduct for which he was being prosecuted, sexual acts with S.K. We disagree.

The conduct about which A.P. testified was sufficiently similar to the charged conduct to warrant application of the exception. A.P. testified that her father penetrated her both with toys and his penis. This conduct is identical to that alleged by S.K. This court has suggested that when the sexual acts alleged are identical, there is at least some evidence of a connection

between the two allegations demonstrating a depraved sexual instinct. *See Kelley v. State*, 2009 Ark. 389, 327 S.W.3d 373. Additionally, A.P. and S.K. were both under Butler's care at the time of the abuse. Moreover, both had been adolescent girls when the abuse occurred. We have consistently considered similarities in age and gender of victims to be demonstrative of a depraved sexual instinct, such that the pedophile exception is applicable. *See id.*

In *Flanery v. State*, 362 Ark. 311, 208 S.W.3d 187 (2005), this court upheld the application of the pedophile exception even where the prior conduct was not identical to the charged conduct. We noted that the victim and the witness were similar in age when the abuse happened, that both had a close relationship with the appellant, and both were in the appellant's care at the time of the abuse. *See id.* More recently, in *Bryant v State*, 2010 Ark. 7, 377 S.W.3d 152, we again upheld the application of the pedophile exception where the victim of the prior bad act gave testimony similar to the victim in that case. Both witnesses were young boys at the time of the abuse, both testified that the appellant was often intoxicated at the time of the abuse, and both were subjected to the sexual abuse while staying in the appellant's home. *See id.* In light of such precedent, we cannot say that the degree of similarity in the instant case between the prior conduct and the charged conduct was insufficient. For this reason, we conclude that A.P.'s testimony was properly admitted in accordance with the pedophile exception, and we affirm Butler's convictions and sentence.

In accordance with Rule 4-3(i) of the Arkansas Supreme Court Rules, the record has been reviewed for all objections, motions, and requests made by either party that were

decided adversely to the appellant, and no prejudicial errors were found.

Affirmed.