

**ARKANSAS COURT OF APPEALS**

DIVISION II

No. CACR08-573

TIMMIE L. HOWARD,  
APPELLANT

V.

STATE OF ARKANSAS,  
APPELLEE

**Opinion Delivered** 19 NOVEMBER 2008

APPEAL FROM THE DALLAS  
COUNTY CIRCUIT COURT,  
[NO. CR-05-36-4]

THE HONORABLE CAROL  
CRAFTON ANTHONY, JUDGE

AFFIRMED

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**D.P. MARSHALL JR., Judge**

Timmie Lee Howard was charged with raping one young girl and sexually assaulting another. The first girl is his niece; the second is a friend of hers. The jury hung on the rape charge but convicted Howard of second-degree sexual assault of his niece's friend. On appeal, Howard challenges two evidentiary rulings. For different reasons, he preserved neither challenge for appellate review.

*Hearsay.* The first challenged testimony came from Special Agent Roland Ponthieux, who investigated the alleged rape. Here is the exchange with the speakers identified by role, rather than by name:

STATE: Can you tell us a little bit about the basis of the allegations made against Mr. Howard?

WITNESS: You mean what, what she had told me?

STATE: Yes, what, what the allegations were. What, what she, what he allegedly had done to, to her.

WITNESS: In my notes here I, I've, I've got that she disclosed that, that she had been fondled by her uncle Timmie Howard.

STATE: When you say fondled what, did she go into a little bit more detail about that eventually, or?

WITNESS: Yes, when I, in, in the interview with her on our interviews together, yes.

STATE: Okay. How did she describe that fondling?

DEFENSE: Your Honor, I have to object to hearsay.

COURT: You have [a] response?

STATE: Your Honor, I think she, he can, he can advise us as to, not necessarily what was said but that the contents and the impressions he got as to what had happened based on her, based on the interview.

DEFENSE: Well, the contents would be based on what she said.

COURT: Can you rephrase your question?

STATE: What area was she fondled in? What area was she fondled?

WITNESS: In her vaginal area.

STATE: Did she—

DEFENSE: —have to maintain it. I, I'll have to maintain objection. That's, that's just simply, it's just based on what she's stating.

COURT: Your objection's a little late.

DEFENSE: I understand, but all right.

Howard did not preserve his hearsay objection for our review because he did not object at the first opportunity—immediately after the prosecutor asked a question that called for an answer infected with hearsay. *Smallwood v. State*, 326 Ark. 813, 818–19, 935 S.W.2d 530, 532 (1996). Howard argues that the State’s questions “What area was she fondled in?” and “What area was she fondled?” were “veiled attempts” by the State to elicit hearsay. Howard thus maintains that his first opportunity to object was after Ponthieux’s hearsay answer, not after the questions were asked. We disagree. From the start, the State’s questions were not veiled at all. They called for hearsay answers because Ponthieux’s only knowledge of the alleged incident was based on the niece’s discussion with him. Howard’s untimely objection waived the hearsay issue.

Howard makes an alternative argument here. Even if Ponthieux’s hearsay answer was admissible for some reason, Howard says that Ponthieux’s response was unduly prejudicial under Arkansas Rule of Evidence 403. But Howard did not make his alternative argument at trial. We therefore may not address it now. *Simmons v. State*, 95 Ark. App. 114, 117, 234 S.W.3d 321, 324 (2006).

*The Tick Check.* Howard’s next challenge involves the niece’s testimony about the tick check. Several years before the alleged rape, Howard took his niece—who was then six or seven years old—to a deer camp to pick blackberries. The seed ticks were bad. Howard made his niece pick the ticks off him. He did not expose his

“private area” or make his niece check that area. Then Howard made his niece take off all her clothes, and he picked the ticks off her.

At trial, Howard objected to the niece’s testimony about the tick check for two reasons. Here are the key parts of the record, again with the speakers identified by role.

DEFENSE: This didn’t happen in this county. That happened in Drew County.

STATE: Four-oh-four B (404B) Your Honor it’s prior bad acts, it’s—

COURT: Just a second. Let him make his objection.

. . . .

DEFENSE: It didn’t happen in this county. And it’s simply trying to show it happened somewhere else just to trying to confirm that it, give more credence to the odds of it happening here. It is simply trying to show a prior bad act.

COURT: Well, I don’t know what she is suppose to say.

STATE: Well, there was some sexual contact when she was six (6) or seven (7) years old in another county—

. . . .

COURT: Well, what are you offering it for?

STATE: To prove classic 404b evidence, Your Honor, it is to prove consistent, he has acted consistent with the same type situation, same type actions, same victim.

COURT: Your saying it is a pattern?

STATE: Yeah, a pattern.

DEFENSE: Your Honor, we think it is simply trying to show that something else happened. It is a trial within a trial.

COURT: I am going to overrule it, you may ask.

The State did not use the term “pedophile exception,” but it argued the elements of the exception and that the tick-check testimony was admissible under Rule 404(b). *See generally White v. State*, 367 Ark. 595, 603, 242 S.W.3d 240, 248 (2006) (discussing the exception). Howard, however, never addressed the pedophile exception’s applicability by name or in substance; he couched his argument only in general Rule 404(b) terms. The court admitted the testimony without explaining its reasoning.

On appeal, Howard contends that the tick-check testimony was not within the pedophile exception to Rule 404(b) and that it was unduly prejudicial under Rule 403. He failed to make either of these arguments at trial. And we may not consider these new arguments on appeal. *Simmons*, 95 Ark. App. at 117, 234 S.W.3d at 324.

Affirmed.

BIRD and BAKER, JJ., agree.