Cite as 2023 Ark. App. 373

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-22-286

MICHAEL BOLEN APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered September 6, 2023 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. 35CR-19-356] HONORABLE ALEX GUYNN, JUDGE AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Michael Bolen appeals his conviction by a Jefferson County Circuit Court jury of rape of his daughter, MC1.[1] He was sentenced to twenty-five years' imprisonment. On appeal, he argues that the circuit court erred by allowing two videos into evidence pursuant to the pedophile exception because they were not relevant. Alternatively, he contends that even if the videos were relevant, their prejudicial effect outweighed their probative value. We affirm.

In September 2018, appellant's other daughter, MC2,[2] then twelve years old, reported to her school counselor that she was having suicidal ideations. The counselor called MC1 and MC2's mother, Kelly Adams, and asked her to come to the school to discuss what was

[1]MC1 was born in July 2003.

[2]MC2 was born in November 2005.

going on with MC2. Kelly agreed that MC2 should be evaluated at Pinnacle Point Hospital in Little Rock. Upon evaluation, it was recommended that MC2 stay at the facility for at least one week. During that time, MC2 revealed that appellant had physically abused her. She subsequently revealed that appellant touched her inappropriately and would help her bathe even though she was capable of bathing herself. An investigation took place, which resulted in appellant's being charged in Lincoln County case No. 40CR-19-67 with rape; second-degree sexual assault; and two counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child.[3] Interviews conducted in regard to MC2's disclosure also led to appellant's being charged in Jefferson County on July 8, 2019, by criminal information with one count of rape against MC1. According to the information, the rape took place from January 1, 2010, to December 31, 2013. The information was amended on July 23, 2019, to correct the defendant information.

On September 30, 2019, the State filed a notice of its intent to introduce evidence pursuant to Rule 404(b) of the Arkansas Rules of Evidence. In the notice, the State indicated that it intended to introduce evidence that appellant had been charged with fondling his other daughter, MC2, in Lincoln County. The State filed a second notice of intent to introduce Rule 404(b) evidence on February 28, 2020, indicating that it intended to introduce two videos showing young girls engaging in sexual acts obtained from appellant's

[3]In February 2020, the circuit court directed a verdict in favor of appellant on the charge of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child. The jury subsequently deadlocked on the remaining charges in that case.

phone during the Lincoln County investigation. It also stated that it intended to introduce MC2's testimony describing appellant's sexual conduct toward her. Appellant filed a response to the State's second notice on March 4 asking the circuit court to exclude the videos from evidence. In the response, appellant contended that the videos had little, if any, probative value and that any probative value was substantially outweighed by the danger of unfair prejudice. An amended response was filed on March 5, noting that the circuit court in the Lincoln County case had directed a verdict in his favor for the charges concerning the videos. His other responses remained pretty much the same. Following a number of continuances, the circuit court held a Rule 404(b) motion hearing on August 25. After hearing and seeing the evidence, the circuit court asked the parties to brief the matter before it rendered a decision. The circuit court entered an order on February 5, 2021, granting the State's motion to introduce the videos under Rule 404(b). The circuit court noted that appellant was not challenging the testimony of MC2.

At some point, Carla Thomas—a witness in the Lincoln County case—died, and the State subsequently gave notice of its intent to use her testimony from Lincoln County in appellant's trial in Jefferson County under the former-testimony exception since Thomas was unavailable. Appellant filed a brief on September 18, 2021, challenging the State's attempt to use the testimony, arguing that he did not have an opportunity or similar motive to develop Thomas's testimony for how the State sought to use it (to show that appellant has a proclivity for underage females) in the current trial. The State filed a response on September 21, contending that the testimony regarding the ages of the girls in the videos was admissible

because appellant did have a similar motive to cross-examine Thomas during the Lincoln County trial. The State included a transcript of Thomas's testimony with its brief. Appellant's jury trial took place September 27–29, 2021. At the beginning of the trial, the circuit court ruled that the former testimony of Thomas should come in.

MC1 testified that she had just turned eighteen years old and was currently attending Arkansas Tech University in Russellville. She stated that appellant is her father; and that she has a younger sister, MC2; a little brother; and a half sibling. She said that when she was about seven or eight, appellant got her out of her bed and placed her on his lap in the living area. She described the seat as a grayish recliner with a "stand-up lamp" behind it. She stated that every time she attempted to get up, he would place her back on his penis. She said that her mom got up and told appellant to put her back in bed, but she did not return to bed until the sun was coming up. She testified that at this time, they were living on Cummins Prison's property. She said that after they moved in with her grandmother in Pine Bluff, she told Kelly that appellant was sexually abusing her. She stated that Kelly confronted appellant and that appellant subsequently came to her (MC1) denying that he had done anything to her and telling her to apologize to Kelly and tell Kelly that it never happened. MC1 testified that she did as appellant told her because she was afraid that she would get in trouble or be punished if she did not. She explained that appellant has a "very big tendency to be aggressive." She stated that she remembered being dragged by her hair down some stairs by appellant when she was younger for misbehaving. She said that appellant would yell, punch random things, and speed off when he was angry. She stated

that the abuse she told Kelly about was true. She said that she did not want appellant to go to jail, as Kelly told her that appellant would, so she said she apologized some more.

MC1 testified that the abuse by appellant did not end when they moved in with her grandmother. She said that she had her own bedroom and that her room and her parents' room shared a common bathroom. She stated that appellant would lock the bathroom door on her parents' side and would come into her room and vaginally, orally, or anally penetrate her with his fingers and penis. She said that appellant would also touch her on the outside and inside of her vagina with his fingers and penis. She stated that this made her feel very uncomfortable. She testified that appellant was "very sweet with it, like caring." She said that he was not trying to be aggressive with her and that he used a "softer, caring touch" when he put his penis in her. She stated that she would just "sit there and take it." She stated that appellant started having anal sex with her when she was about eight or nine years old. She said that Kelly and her grandmother would be gone during this time and that appellant did this with a "caring touch." She denied having any pain or bleeding or having to seek medical attention after the abuse. She stated that appellant would put his penis inside her mouth or place her mouth on his penis at least ten times since she was eight years old. She testified that one time while Kelly and her grandmother were Christmas shopping and the other children were outside playing, appellant shut the door, sat her in front of him and said, "I'll teach you how to do this." She stated that he put his penis inside her mouth and told her that he would teach her how to "pleasure [him] this way." She said that he guided her head toward his penis and "up and down." She stated that her parents divorced

when she was ten years old but that the abuse continued until she was thirteen years old. She said that appellant asked her for nude photos when she was twelve, but she did not send them to him. She identified herself in two pictures found on appellant's phone that showed her in her panties and bra with her back turned in the laundry room at the house appellant shared with his second wife, Amanda. She denied sending the pictures to appellant or knowing that they had been taken.

MC1 testified that MC2 was sent to Pinnacle Point and that, after MC2 made certain disclosures, she, too, was asked to speak to Investigator Jonathan Fallis of the Lincoln County Sheriff's Office. She said that she told Fallis that appellant had sexually assaulted her. She stated that she was unaware that MC2 had also made allegations against appellant. She denied making the statements because she was in some sort of trouble or that she had been coaxed into making them. She said that after her interview with Fallis, she spoke with someone at the Child Advocacy Center (CAC) and told them that appellant had "sexually assaulted [her] in multiple ways."

On cross-examination, MC1 stated that she was about seven years old when appellant began sexually abusing her. She testified that Kelly and her grandmother would sometimes be at home when appellant would sexually abuse her. She stated that her grandmother stayed in her bedroom due to hip problems and that Kelly would be outside with the kids or in her bedroom. She said that, initially, the abuse was once every two weeks, but it progressed to more than once a week after her parents' divorce. She stated that she did not visit appellant much after she started extracurricular activities. She testified that she got in trouble with

appellant for getting a tattoo without permission. She stated that appellant was very upset and yelled at her. She said that she was thirteen or fourteen when she got the tattoo.

On redirect, MC1 testified that she was older than twelve when the photos found in appellant's phone were taken. She stated that she also got in trouble about the tattoo when Kelly found out about it. She reiterated that appellant only yelled at her and said that she did not recall him taking anything away from her. She said that any punishment she received from appellant would be limited to his house. On recross, she said that she did not remember any punishment from appellant because of the tattoo but that Kelly grounded her and did not allow her to go out with friends.

Anita Hammons, an investigator for the Arkansas State Police Crimes Against Children Division (CACD), testified that she has conducted thousands of interviews with children. She stated that she received a report about MC2 on September 2, 2018, and interviewed her for twenty minutes later that day. She said that since there was evidence of abuse, she contacted law enforcement in both Lincoln and Jefferson Counties. She stated that it is not uncommon for abuse to be reported several years later. She said that she spoke with the members of MC2's household to see if any disclosures had been made to them. She stated that she interviewed MC1 on September 17 at CAC. She said that following that interview, she requested medical exams for both girls. She stated that Carla Thomas conducted the exams, but Ms. Thomas had since died.

On cross-examination, Hammons stated that MC1 did not say anything about the incident in the recliner or when appellant taught her how to perform oral sex during their

interview. She said that the information may have been disclosed to law enforcement. She stated that MC1 told her that the abuse by appellant did not stop until MC1 was thirteen years old and that appellant had penetrated her vaginally, orally, and anally. She also stated that MC1 told her that when she was about five years old, appellant dragged her by the hair down some stairs.

On redirect, Hammons stated that, looking over her notes, there was information from MC1 about an incident in which MC1 was sitting in appellant's lap when they were living on the prison grounds. She said that all three of appellant's children with Kelly talked about his anger issues.

MC2 was fifteen at the time of appellant's trial and was attending White Hall High School. She had a stuffed animal with her for comfort during her testimony. She stated that Kelly and appellant are her parents. She said MC1 is her older sister and that she has a brother and half-brother. She testified that she was having suicidal thoughts in September 2018 and told her school counselor, who called Kelly and informed her of what was going on. The counselor recommended sending MC2 to Pinnacle Point. She said that she did not know that she was going to have to go to treatment when she disclosed her thoughts to the counselor, but that she knew she needed help. She stated that she was at Pinnacle Point for about eight days. She said that while there, she told a staff member that appellant had physically abused her and that her suicidal thoughts were mostly due to what he had done to her. She stated that she told the staff member because she did not want her siblings to go through the abuse. She said that she told someone else about appellant touching her

inappropriately. She testified that appellant was letting her sit in his lap and steer his truck while he operated the brakes and gas. She said that he placed his hand on her thigh and then scooted it back and rubbed her vagina as she was watching the road. She stated that she believes she was eleven at the time of the incident. She said that it was appellant's idea to teach her to drive and that she felt uncomfortable when he touched her. She stated that she did not believe it was an accident because appellant's hand was all the way up the inside of her thigh, towards her vagina, and he was rubbing her with his thumb as he was moving his hand towards her vagina. She described the rubbing as "secretive" and "very soft." She said that the rubbing lasted longer than a couple of seconds and he touched her vagina. She also stated that appellant had touched her in that manner before. She described other incidents during which appellant made her feel uncomfortable: (1) they were swimming at the Arkansas River and she did not have a swimsuit, so appellant told her to take off her panties and swim in her shorts and shirt. When it was time to leave, she had to take off the wet shorts and ride in her panties to appellant's house. She went into the house and put on some pants and a long-sleeve shirt, and appellant wanted to know why she did that because she "looked cute" in her panties; (2) appellant has slapped her butt in a "flirty-type" way; (3) appellant has washed her body when she was taking a shower or bath or just walked in while she is bathing. She said that she did not say anything to appellant about these things because she did not want to get in trouble.

On cross-examination, MC2 stated that she was not sure where exactly appellant was living at the time of the incidents but said that she was pretty sure it was somewhere in Star City.

Fallis testified that he currently works for the Star City Police Department, but in 2018, he worked as a criminal investigator for the Lincoln County Sheriff's Office. He stated that he received a report on September 14, 2018, involving MC2. He said that he interviewed her at her home on September 16. He stated that MC2 told him that she was contemplating suicide because of what appellant had been saying and doing to her. He said that the interview with MC2 lasted about twenty minutes and that he interviewed MC1 for thirty minutes immediately afterwards. He stated that, based on his interview with the girls, he requested a forensic interview with CAC. He said that he also received a search warrant for appellant's residence to seize any device that could contain digital content since appellant requested pictures from MC1. He stated that two cell phones were collected, and a secondary search warrant was secured to retrieve digital content from them. He said that the phones were sent to Pine Bluff Detective Matthew Pate. He stated that two photos of MC1 in her panties and bra were found on one phone, and two videos were found on the other phone. He said that one video showed sexual interaction between two females and a male and had a tag "bestteens.com" across it. He stated that the second video showed a female who "appeared to be young"—maybe between thirteen to fifteen years old—with a male who appeared to be around fifty years old. He said that the older man was instructing the young

girl how to show her body off and that the video progressed to sexual intercourse between the two.

On cross-examination, Fallis stated that MC1 told him that appellant started sexually abusing her when she was about seven years old. He said that according to MC1, appellant would take her into the bedroom and have sex with her while Kelly and MC1's grandmother were gone and that he would take her into the bathroom at midnight for sex while Kelly was asleep. He stated that MC1 told him that the sexual assault would happen three to four times a week and that appellant would also take her away from the house to have sex. He said that MC2 told him about two incidents that occurred while she and appellant were in appellant's truck. He stated that in total, MC2 reported five incidents.

Detective Pate testified that he is the Pine Bluff Police Department's digital forensic expert. He said that he was asked by Fallis to complete a forensic extraction on appellant's two cell phones. He stated that he found "several instances of web searches that would direct to sites . . . whose primary purpose is the distribution of pornography, including pornography that is not legal to view [or] possess." He testified that he found two videos on one of the phones and that one video "featured an adult male and what was obviously a minor female engaging in sexual conduct." He said that the video originated from xvideos.com, which has any type of pornography imaginable, including child pornography. He stated that the second video showed a "nude male with two nude, obviously, juvenile females engaged in multiple sex acts." He said that the video was posted on bestteens.com, which specializes in pornography featuring juveniles. He testified that, given his experience, it is extremely

unlikely that the videos were accidental downloads. He stated that the two photos of MC1 in her underwear were found on appellant's other phone.

On cross-examination, Pate stated that he knew appellant was in control of the devices because he is their owner. He said that he did not know when the videos were downloaded. He testified that he is not an age-identification expert, but said that "any reasonable person would conclude that those were children [in the videos]." He said that he could not say for sure whether the videos were viewed but that they were stored or possessed. He estimated that there were thousands of digital contents on the phones but that he only found the two videos and photos to be possible evidence of a crime.

Kelly testified that MC1 and MC2 are her daughters by appellant. She said that they were married for almost ten years between August 2003 and July 2013. She stated that after the divorce, the children lived with her but visited appellant every other weekend and for two weeks during the summer. She said that they lived in a trailer on the prison grounds for a few years before they moved in with her mother in 2009. She stated that MC1 was five and MC2 was three when they moved on the prison grounds. She testified that when they lived there, they had two recliners with a lamp situated in the back between them. She said that she remembers being told by MC1 when she was nine that appellant had touched her inappropriately. She stated that MC1 said that appellant had "put his finger inside her and licked his finger and then put it inside her." She said that she told appellant not to come back to the house, so he went to Robert (Bob) Rawlison's home. Bob was a lieutenant at the Pine Bluff Police Department at the time. She stated that she allowed appellant to return

after Bob told her that he did not think there was anything to be concerned about and after MC1 had recanted. She said that she still had concerns and did not allow appellant to be alone with the children for a while. She stated that appellant had anger issues and would yell, throw things, and punch holes in the walls and doors. She admitted witnessing appellant drag MC1 down the hall of her (Kelly's) sister's house to the front porch when MC1 was about five or six years old because MC1 had opened a "souvenir-type toy that wasn't supposed to have been opened." She said that she and appellant "got into it about that." She testified that appellant would get angry in front of the children, and they would be scared and cry.

Kelly said that the school counselor contacted her about MC2's being suicidal. She stated that she took MC2 to Pinnacle Point where they decided to keep her for at least a week because she had a plan of committing suicide. She testified that about a day before the school called, she noticed that MC2 was very distant and not herself; however, MC2 said that everything was okay. She stated that MC2 was not released from Pinnacle Point on time because she had made accusations about appellant and had to undergo interviews. She said that a DHS worker came to her house to speak to MC2 and that Fallis interviewed both girls at the house. She stated that before the interview with Fallis, MC1 told her that appellant had, in fact, touched her (MC1) and that she had recanted because she did not want appellant mad at her. She said that before the new disclosure, the children went to appellant's house often and would do things with him and his new wife's family. She denied any issues between her and appellant and denied any ongoing custody battles. She also stated

that the girls did not have any major vaginal issues or problems that would put her on notice that something was wrong. She identified the two photos on appellant's phone as pictures of MC1 in her underwear. She said that she would not have taken those pictures. She testified that in 2003, when she was dating appellant, she found a picture of a naked girl no older than eight years old in appellant's room, but he denied that the picture belonged to him and said that it must have been his friend's picture. She said that she believed him.

On cross-examination, Kelly stated that appellant told her that he had not seen the picture before. She said that he ripped the picture up and threw it away. She stated that MC1 was almost nine years old when she made the accusations about appellant. She said that MC1 did not discuss appellant's abuse of her until Fallis came to the house. She stated that she believed MC1 when she said that appellant made her say she was lying. She said that MC2's behavior had changed after returning from visiting appellant before she was admitted into Pinnacle Point. She stated that MC1 was angry beginning in 2012 or 2013. She said that appellant went to Bob's house after she put appellant out because he knew Bob from church.

Nancy Rawlison, Bob's wife, said Bob died in 2015. She stated that she knows appellant and Kelly from church and through Kelly's mom. She said that when MC1 made the accusations against appellant, Kelly and her mom came and spoke with them. She stated that appellant showed up at their life group the following Sunday night asking "for prayer for what he had done."

On cross-examination, Nancy stated that appellant spoke privately to Bob before coming into the house seeking prayer. She said that Bob did not share the nature of his and appellant's conversation. She stated that Bob and appellant knew each other but that she did not know if they were good friends.

Amanda testified that she married appellant in 2017 and that they were married for about a year and a half. She stated that they lived in Star City and that the children would visit appellant at their home. She said that she was there most of the time when the children visited. She agreed that appellant has an anger problem and said he would hit and knock holes in walls, throw things, and get "very violent, up in your face screaming and yelling." She said that the children would be terrified when this happened and "would huddle together, [and] try to get as far away from him as they [could]." She stated that appellant would lash out on whoever. She said that she had a very good relationship with appellant's children. She stated that there had been some physical violence between appellant and the children, but she never witnessed it. She testified that appellant had multiple phones when they were married, but no more than one at a time, as far as she knew. She said that when his phone broke, she gave him her old phone. She described appellant as "very protective of [his cell phone]" and said that he had a passcode on it and would not share the code with anyone. She stated that he always had the phone on him and had the volume turned down. She said that this caused problems with their relationship because she "felt like [appellant] was hiding something." She denied taking the pictures of MC1 in her underwear and said it would be inappropriate "to take pictures of someone in their underwear when they're not

looking at you." She denied downloading the videos. She said that she was aware that appellant watched porn and that it caused some problems at the beginning of their relationship because he had the DVR recording "multiple hours of multiple channels of porn."

On cross-examination, Amanda stated that she told Fallis that appellant never laid a hand on her or the children. She said that she did not watch porn, so she did not know who was depicted on the porn appellant watched. She stated that appellant spent numerous hours sitting on the porch on his phone and that she had no idea what he was doing. She said that she occasionally had access to appellant's phone.

The prior testimony of Thomas, the witness in the Lincoln County case, was read into the record. Thomas stated that she is a registered nurse and sexual-assault nurse examiner, which means she does sexual-assault exams on persons ages zero to eighteen years old. She stated that she performed an examination of MC1, but there was no lingering evidence of trauma two years after the abuse had stopped, which was not uncommon due to the fast rate children's bodies heal. She said that she did not examine MC2 because she only alleged touching on the outside of her clothing. Thomas testified that she uses the Tanner Scale to determine the stage of development of a child. She said that she was asked to view the two videos found on appellant's phone and to use the scale to determine the development of the girl in one of the videos. She said that she placed the girl's age under eighteen years old.

Appellant unsuccessfully moved for a directed verdict at the end of the State's case, arguing that the evidence lacked credibility.

Appellant denied having raped MC1. He said that they moved into the trailer at the prison grounds right after MC2 was born in 2005, and they stayed there until 2010 when they moved to Pine Bluff. He said that he had visitation with his children every other weekend, two weeks during the summer, and every other birthday and holiday. He stated that he moved into his mother's house in Star City when he and Kelly divorced. He denied committing any sexual abuse against MC1, and he denied ever physically abusing the children. He also denied any sexual contact while teaching his children how to drive. He stated that Bob was an acquaintance from church, and he denied ever communicating to Bob the allegations made by MC1 or going to Bob's home asking for forgiveness. He said that he and Amanda moved to a residence in Star City when they got married and that before the September 2018 allegations, he and Amanda were looking for a bigger place because she was pregnant, and he wanted custody of his children. He said that the children were getting out of control and they were not practicing good hygiene. He stated that he began talking to MC1 about gaining custody in January 2018 and began talking to MC2 about it around April. He said that MC1 was "all for it. She wanted to come live with [them] and you know, have her own room." He stated that MC2 was a "little bit more hesitant, but she still wanted to come." He said that Amanda had contacted MC2's school about her wanting to kill herself before September and that the counselor told them not to worry about it because MC2 did not have a plan. He also said that the counselor told him that MC2 stated that

she wanted to live with him and Amanda in Star City. He testified that he learned of the allegations against him the day he buried his father when the police showed up with a search warrant. He said that he went to the Lincoln County Sheriff's Office for an interview and was released. He stated that he and MC1 were fine until around August when he learned she had gotten a tattoo. He said that he told her that she would not be able to take her driver's exam for a year and that she would not be getting the Toyota 4Runner as her vehicle. He stated that that was the last weekend he saw MC1. He denied having seen or ever seeing a nude picture of a young child. He said that Kelly did not tell him or ask him about such a picture. He denied taking the two photos of MC1 in her underwear. He said that he may have downloaded the two videos and watched them. However, he stated that he did not believe the videos were child pornography because "the website at the bottom of it states that all models are 18 years of age or older." He stated that his relationships are usually with older women as evidenced by his two ex-wives.

On cross-examination, appellant denied having any anger issues. He admitted to yelling and screaming when he is upset, but he denied punching or destroying things in anger. He said that he did not file any paperwork for custody of the children. He admitted that he was teaching MC2 to drive but denied that she sat in his lap during the sessions. He stated that he rode on the passenger side of the truck as MC2 drove the truck. He denied taking the pictures of MC1 and said that anyone could have accessed the phone in his unlocked truck and taken the pictures. He stated that the pictures were inappropriate but that there was nothing provocative about them, meaning that they were not sexual. He

testified that he was protective with his phone around Amanda. He agreed that the videos are porn but stated they showed "young women." He said that it was not fair to say that he has an interest in teen girls having sex with older men. He stated that the site he went to, bestteens.com, has a disclaimer stating that the models are eighteen years old or older. He said that he did not know what motive MC1 would have had to make up sexual-abuse allegations against him when she was younger. He stated that his children are "misguided" and "misdirected," and that is why they made the allegations against him.

Betty McGregor, appellant's sister, stated that when she was around appellant and the children during holidays, she did not see anything that would lead her to believe that something out of the ordinary was taking place. She said that he told her about his intentions to get custody of the children and that he and Amanda had raised concerns to her about the children's care.

On cross-examination, Betty conceded that if appellant was sexually abusing his children, he probably would not do it in front of his family.

Freddy Thompson testified that he and appellant had been friends for about fifteen years; that they worked together; that they lived next door to each other; and that they did things with their children together. He said that he never saw anything that would make him think something was wrong with appellant and his children. He stated that appellant wanted to get custody of his children when he and Amanda were together. He testified that MC2 sent a message through his daughter for him to tell appellant that she (MC2) wanted to come live with him.

On cross-examination, Freddy conceded that sexual abuse would not be something he would see. He said that it was not long after MC2 sent the message that the accusations came up. He stated that allegations do not always mean it is true.

At the conclusion of the evidence, appellant renewed his directed-verdict motion based on credibility. The circuit court denied that motion and appellant was subsequently convicted of raping MC1. He was sentenced to twenty-five years' imprisonment. He filed a timely notice of appeal.

Appellant moved for directed verdict, challenging the credibility of the evidence at the appropriate times during his trial. Although he vaguely addresses that argument at the end of his brief, double-jeopardy concerns require us to address it first. A motion for directed verdict is treated as a challenge to the sufficiency of the evidence.[4] In reviewing this challenge, we view the evidence in the light most favorable to the State and consider only the evidence that supports the conviction.[5] We will affirm the verdict if substantial evidence supports it.[6] Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to

[4]*McClendon v. State*, 2019 Ark. 88, 570 S.W.3d 450.

[5]*Id.*

[6]*Id.*

speculation or conjecture.[7] It is the function of the jury, and not the reviewing court, to evaluate the credibility of witnesses and to resolve any inconsistencies in the evidence.[8]

In relevant part, a person commits rape if he engages in sexual intercourse or deviate sexual activity with another person who is a minor, and the actor is the victim's guardian.[9] Rape is a Class Y felony if the victim is younger than fourteen years old.[10] MC1 stated that appellant began sexually assaulting her when she turned seven, and the assaults lasted util she was thirteen years old. She described being touched and penetrated by appellant in her vagina, mouth, and anus. MC1 is the biological daughter of appellant. At the time of the trial, she had just turned eighteen. A rape victim's testimony may constitute substantial evidence to sustain a conviction of rape.[11] A rape victim's testimony need not be corroborated, nor is scientific evidence required, and the victim's testimony describing penetration is enough for a conviction.[12] Even when an appellant denies all the allegations or contradicts the victim's testimony, the jury is free to disbelieve the appellant's self-serving

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[7]*Id.*

[8]*Breeden v. State*, 2013 Ark. 145, 427 S.W.3d 5.

[9]Ark. Code Ann. § 5-14-103(a)(4) (Supp. 2023).

[10]Ark. Code Ann. § 5-14-103(c).

[11]*Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008).

[12]*Id.*

testimony and believe the victim's testimony instead.[13] Where the jury as trier of fact has given credence to inconsistent testimony, the appellate court will not reverse unless the testimony is inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon.[14] The jury obviously believed MC1's testimony that appellant committed at least one act of rape against her when she was under the age of fourteen.

Appellant argues that the circuit court erred by admitting the two videos into evidence. He argues that there was no basis for the videos' admission under Arkansas Rule of Evidence 404(b) and that it should have been excluded under Rule 403 because its prejudicial effect outweighed any slight probative value. The State responds that the evidence was highly probative of appellant's intent, motive, and absence of mistake or accident and to refute appellant's contention that the charge against him was fabricated. Alternatively, the State argues that any evidentiary error was harmless.

Circuit courts have broad discretion in deciding evidentiary issues, and we will not reverse a circuit court's ruling on the admission of evidence absent an abuse of discretion.[15] Abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires that the circuit court act improvidently, thoughtlessly, or

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[13]*Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008).

[14]*Id.*

[15]*Collins v. State*, 2019 Ark. 110, 571 S.W.3d 469.

without due consideration.[16] Furthermore, we will not reverse unless the appellant demonstrates that he was prejudiced by the evidentiary ruling.[17]

Arkansas Rule of Evidence 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 or she 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 admitted under Rule 404(b) must be independently relevant to a material issue in the case.[18] Evidence is independently relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.[19]

MC1 testified that appellant had coaxed or taught her how to perform oral sex on him. She stated that the otherwise aggressive appellant was "soft" and "caring" during the sexual assaults. One video introduced into evidence showed an older man coaxing a younger girl, who appeared to be a minor, into showing off her body and then into sexual intercourse. The other video showed what appeared to be two minors engaged in multiple sexual acts

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[16]*Id.*

[17]*Id.*

[18]*Cook v. State*, 345 Ark. 264, 45 S.W.3d 820 (2001).

[19]*Fowlkes v. State*, 2020 Ark. 56, 592 S.W.3d 702.

with a much older man.[20] The State stated that the videos were to show appellant's proclivity toward underaged persons. Given the circuit court's considerable leeway in admitting Rule 404(b) evidence, we cannot dispute the independent relevance of the videos in proving appellant's intent, motive, and absence of mistake.[21]

Appellant also argues that even if the evidence was relevant, it was so prejudicial that the circuit court abused its discretion when it refused to exclude it under Arkansas Rule of Evidence 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[22]

Even if we agree that the danger of unfair prejudice outweighed the probative value of the videos, we conclude that the harmless-error doctrine applies. When a circuit court errs in admitting evidence, this court may declare an evidentiary error harmless if the evidence of guilt is overwhelming and the error is slight.[23] In this case, MC1's testimony alone was enough to support appellant's conviction for rape. The jury was instructed not to

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[20]Ark. Code Ann. § 5-27-607(b) (Repl. 2013) allows the jury to determine whether the person depicted as engaging in sexually explicit conduct is a minor when it comes to child pornography.

[21]*See Lewis v. State*, 2023 Ark. 12.

[22]Ark. R. Evid. 403.

[23]*Lewis*, *supra*.

take evidence of other crimes, acts, or wrongs into consideration as evidence of appellant's bad character, and this court presumes that jurors follow the circuit court's instructions.[24] Additionally, the jury sentenced appellant to twenty-five years' imprisonment for a Class Y felony that carries up to life in prison. Therefore, we hold that any evidentiary error was harmless.

Affirmed.

ABRAMSON and GRUBER, JJ., agree.

Dusti Standridge, for appellant.

Tim Griffin, Att'y Gen., by: *Rebecca Kane*, Ass't Att'y Gen., for appellee.

[24]*See id.*