SLIP OPINION

ARKANSAS COURT OF APPEALS

DIVISIONS I & II

No. CACR08-666

LELAND ALLEN RADFORD, APPELLANT V. STATE OF ARKANSAS, APPELLEE	**Opinion Delivered** 2 SEPTEMBER 2009 APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT, [NO. CR07-246] THE HONORABLE GARY COTTRELL, JUDGE SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

D.P. MARSHALL JR., Judge

Leland Radford has petitioned for rehearing of our recent opinion affirming his convictions for second-degree sexual assault and attempted second-degree sexual assault. 2009 Ark. App. 506 (unpublished). We deny his petition. But three of his many points merit discussion.

1. As Radford suggests, we made a mistake on the law in our discussion about the sufficiency of the evidence. We could not reach Radford's specific argument on appeal because his general argument at trial did not preserve it. 2009 Ark. App. 506, at 2. This was our holding, and we stand by it. We went on, however, to discuss the merits in *dictum*. We said: "On the merits, and as the State points out, sexual assault in the second degree does not include 'for sexual gratification' as an element." *Ibid*.

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We were wrong. This crime includes the element of sexual contact. Ark. Code Ann. § 5-14-125(a)(3) (Repl. 2006). And the statutes elsewhere define sexual contact as an act of sexual gratification involving certain touching. Ark. Code Ann. § 5-14-101(9) (Repl. 2006). The alleged act being for sexual gratification is thus an embedded element of second-degree sexual assault. We thank Radford for catching our mistaken *dictum* and providing the opportunity for us to correct it.

2. In his petition, Radford emphasizes that we decided several issues against him based on his waivers at trial even though on appeal the State did not argue waiver. He argues, in essence, that the State waived his waivers. We reject this argument. The State cannot create preservation of an issue in the trial court by standing silent on appeal about preservation. Even when an appellee goes beyond silence and confesses error, the appellate court has an independent obligation to evaluate the appellant's arguments on the record presented and under the controlling law. *Burrell v. State*, 65 Ark. App. 272, 276, 986 S.W.2d 141, 143 (1999).

3. Finally, Radford argues vigorously that the circuit court admitted the redacted Blackstone video under Rule of Evidence 803(25), not Rule of Evidence 804(b)(7) as we held. He asked us to revisit this issue and reverse. Radford's detailed argument sent us back to the record. It is murky. But having studied the record again, this time with the benefit of Radford's parsing and argument, we come to the same conclusion.

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The circuit court admitted some of the Blackstone video because the child victim's trial testimony was full of I-don't-remembers. That is not a matter of inconsistency—the threshold inquiry under Rule 803(25). It is a matter of unavailability—the threshold inquiry under Rule 804(b)(7). The lawyers and the circuit court were all over the map at the pre-trial hearing and the trial sidebars about the video. Both Rules were discussed, sometimes cryptically and sometimes incorrectly. At trial, however, the circuit court was clear about the ultimate basis for its decision: the child victim's failures of memory. Acknowledging that the matter is tangled and not free from doubt, we again conclude that the circuit court decided about the redacted Blackstone video using a Rule 804(b)(7) analysis. Radford did not then renew his constitutional challenge to that Rule. And he made no Rule 804(b)(7) argument on appeal. The point was thus abandoned.

Petition denied.

PITTMAN, HART, ROBBINS, HENRY, and BAKER, JJ., agree.