ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR09-143

JOSHUA SWAIM, APPELLANT V. STATE OF ARKANSAS, APPELLEE	**Opinion Delivered** 2 SEPTEMBER 2009 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT, [NO. CR-08-185] THE HONORABLE CHARLES E. CLAWSON JR., JUDGE AFFIRMED

D.P. MARSHALL JR., Judge

Joshua Swaim was charged with raping his girlfriend's six-year-old daughter, H.S., while the girl and her mother were living at Swaim's home. Although H.S. told her mother that Swaim had kissed her, she kept mum about Swaim's more serious advances until they had moved out of his house. H.S. eventually confided in her therapist that Swaim had sexually abused her. A jury convicted him of second-degree sexual assault. Ark. Code Ann. § 5-14-125 (Repl. 2006). Swaim now challenges the sufficiency of the evidence and argues that the circuit court erred by excluding evidence of H.S.'s prior sexual abuse under the rape-shield statute.

First, Swaim argues that no substantial evidence shows that he sexually abused H.S. because she did not sufficiently describe what he did to her. We disagree. A

person eighteen or older commits second-degree sexual assault if he engages in sexual contact with someone who is less than fourteen and not his spouse. Ark. Code Ann. § 5-14-125(a)(3) (Repl. 2006). H.S.'s testimony that Swaim put his hands in her pants and "[r]ubbed . . . [her] private," that "[h]e started to pull out his private," and that "[h]e sticked his fingers in [her] private" provided substantial evidence that Swaim sexually assaulted this child. *E.g.*, *Johnson v. State*, 71 Ark. App. 58, 66–67, 25 S.W.3d 445, 450 (2000) (child victim's uncorroborated testimony suffices to support sexual-assault conviction).

Second, Swaim submits that the circuit court should have allowed him to show that H.S. had been sexually abused in the past by her uncle Robbie, which provided her (Swaim says) with an alternate source of sexual knowledge. The standard of appellate review is whether the court clearly erred or manifestly abused its discretion. *Parish v. State*, 357 Ark. 260, 273, 163 S.W.3d 843, 850–51 (2004).* We disagree here

* This standard of review is two standards: clear error or abuse of discretion. It has been so stated in many cases, including a recent decision. *Joyner v. State*, 2009 Ark. 168, at 3. This marriage of alternatives seems to have occurred in *Byrum v. State*, 318 Ark. 87, 97, 884 S.W.2d 248, 254 (1994). Before that decision, some cases reviewed the circuit court's judgment call under the statutory exception for an abuse of discretion, while others reviewed for clear error. *Compare*, *e.g.*, *Kemp v. State*, 270 Ark. 835, 839, 606 S.W.2d 573, 575 (1980), *with*, *e.g.*, *Houston v. State*, 266 Ark. 257, 259, 582 S.W.2d 958, 959 (1979). The combination of these alternative standards is unstable: review for an abuse of discretion is less searching than review for a clear error, which is most commonly associated with the evaluation of a circuit court's findings of fact after a bench trial under Rule of Civil Procedure 52(a). *See generally*, Brandon J. Harrison, *Standards of Review*, *in Handling Appeals in Arkansas* 9-3–9-4 (Ark. Bar Ass'n, 2d ed. 2008). The alternative standard makes no difference in this case because the circuit court's decision withstands scrutiny under both standards. In an appropriate case, however, the supreme court should consider clarifying how hard an appellate court must look at a circuit court's ruling on the statutory exception.

too. Pursuant to the rape-shield statute, evidence of a victim's prior sexual conduct is generally inadmissible in a rape or sexual assault trial. Ark. Code Ann. § 16-42-101(b) (Repl. 1999). But the circuit court has discretion to admit this kind of evidence if, after a pre-trial hearing, it finds the evidence relevant to prove a fact in issue—here, that the child had an alternate source of sexual knowledge—and that the evidence's probative value outweighs its inflammatory or prejudicial nature. Ark. Code Ann. § 16-42-101(c)(2)(C). At that hearing, Swaim had to show (among several other things) that the prior sexual acts "closely resembled those of the present case[.]" *State v. Townsend*, 366 Ark. 152, 158, 233 S.W.3d 680, 685 (2006). The timing of the child's explanation of the sexual encounter can be important. "[I]f a description is given after the first incident but before the second, it provides a basis for an assessment and comparison of the child's degree of sexual knowledge at the time of each incident." *Ibid.*; *see also State v. Blandin*, 370 Ark. 23, 27–28, 257 S.W.3d 68, 71–72 (2007).

Swaim's proof failed. The sexual abuses perpetrated by Swaim and Robbie, as recounted by H.S., hardly resembled each other. H.S.'s rendition of what happened with Robbie—he kissed her on the lips and touched her buttocks underneath her clothes once in the car—differed from her description of Swain's abuse—he kissed her with his tongue, exposed himself, touched her on top and bottom, told her to pull down her pants, and rubbed her genitals "a lot" inside their home. Moreover, H.S. spoke about Robbie's touching only after she had already told her therapist about

Swaim's abuse. On this record, the trial court neither clearly erred nor manifestly abused its discretion by rejecting evidence of Robbie's molestation.

We note that, as this case made its way from the circuit court to our court, the supreme court held that second-degree sexual assault is not a lesser-included offense of rape. *Joyner*, 2009 Ark. 168, at 10–11. To the extent that Swaim could have challenged the submission of sexual assault to the jury because he had been charged only with rape, he waived this issue. His trial counsel argued below that second-degree sexual assault was a lesser-included offense of rape. *Middleton v. State*, 311 Ark. 307, 308, 842 S.W.2d 434, 435 (1992); *cf. Wicks v. State*, 270 Ark. 781, 785–87, 606 S.W.2d 366, 369–70 (1980).

Affirmed.

HART and GLOVER, JJ., agree.