ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION I

CACR05-839

June 28, 2006

KEITH ALAN PETRAS
APPELLANT

AN APPEAL FROM BENTON COUNTY CIRCUIT COURT
[NO. CR03-1363-1]

V.

HON. TOM J. KEITH, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

A Benton County jury found Keith Petras guilty of the rape and incest of his daughter, Th.P. He appeals from his rape conviction, challenging the sufficiency of the State's evidence regarding the element of forcible compulsion. He also argues that the trial court erred by amending a jury instruction to add a definition of physical force and by refusing an instruction on specific unanimity. Finally, he contends that the trial court abused its discretion when it allowed the State to introduce improper character evidence. We attempted to certify this case to the Arkansas Supreme Court pursuant to Ark. Sup. Ct. R. 1-2(b)(1), as the need for a specific-unanimity instruction is an issue of first impression in Arkansas. However, the supreme court denied certification. We affirm appellant's convictions.

At trial, Th.P. testified that appellant first abused her in 1999 while her family was living in Lawton, Oklahoma. She was thirteen years old at the time. Th.P. stated that her mother was at a wedding out of town and that she had asked appellant questions about "sexual things." She testified that appellant "decided he had to show me rather than tell me." He then touched her breasts and the outside of her vagina. Days later, appellant touched

Th.P.'s vagina and breasts again, but this time, he took her clothes off. Eventually, appellant escalated to putting his finger inside her vagina. Th.P. stated that the abuse continued when the family moved to Bentonville, Arkansas, in December 1999, and that it was not uncommon for appellant to abuse her more than once a week. Appellant would digitally penetrate Th.P.'s vagina, but did not do anything more at that time. The abuse continued when the family moved to a different Bentonville residence in October 2000. Th.P. testified that appellant began removing his clothing and putting her hand around his penis.

Th.P. recounted a specific occasion when appellant abused her. According to her testimony, while the family was living in the second Bentonville residence, appellant came into her room late one night. Th.P. was lying on her stomach and was pretending to be asleep. Appellant came into Th.P.'s room and took off her clothes and his clothes without saying anything. At first, appellant touched Th.P.'s breasts and digitally penetrated her. Then, he started rubbing his penis against her vagina. Appellant tried to flip Th.P., but she refused to move. He then attempted to put his penis inside her vagina, but Th.P. moved her hips. He eventually penetrated her vagina and made a loud grunting noise. Appellant then stood up, kissed Th.P. on the forehead, and left the room. Th.P. started crying. Appellant later returned to her room, put a robe over her, and whispered in her ear, "Save yourself for your husband."

Th.P. testified that she never consented to anything her father did; however, she did not always know that what he was doing was wrong. She noted that she watched a movie, and after watching the movie, she realized what was going on and learned that it was not right. Th.P. stated that she often tried to avoid the contact. For example, appellant would ask if she wanted a back rub, insinuating that he wanted to do something. She would attempt to think of an excuse, but he would always tell her that whatever she needed to do could wait until later. Th.P. testified that she felt that she could not object because her dad was a

disciplinarian and had always made the rules. She also stated that her dad was a military man who could do pushups with her sitting on his back and could throw her across the room.

On cross-examination, Th.P. stated that the abuse first started in Lawton and that, at that time, she and appellant were "pretty open about talking about those things." She testified that appellant never stated that he was going to kill or beat her, but that she was afraid that he would do something like that. Th.P. testified that after the incident when she pretended to be asleep, the abuse stopped. She stated that her mother found out approximately a year later, but she recalled telling defense counsel that she was going to tell her mother about the abuse while she still lived in Lawton. Th.P. testified that appellant had held her by her throat and against the wall. Her mother came into the hall, and she was afraid to tell her.

Ti.P., Th.P.'s twin brother, testified that he became aware of the abuse when he walked in on appellant and Th.P. He was fourteen years old at the time. Ti.P. testified that he saw Th.P. lying face down on the bed naked and appellant straddled atop her in his underwear. Shortly after, Th.P. came into his room crying and seeming scared, frantic, and confused. She told him that appellant put his finger insider her, showed her how to put on a condom, and inserted his penis inside her anus. Over appellant's objection, Ti.P. testified that appellant disciplined him when he was younger, that appellant spanked him when he was younger, and that he was afraid of appellant. He stated that appellant would pick him and his siblings up by their necks and put them against the wall. Ti.P. said that he never disobeyed any of his father's direct orders for fear of being yelled at or hit.

Amber Collins of the Arkansas State Police Crimes Against Children Division testified that this case was first reported on October 24, 2003. She first talked to Th.P.'s mother and Th.P. She spoke to appellant on October 28, 2003, at her office. During the interview, appellant told Collins that he was not going to contest anything Th.P. said.

Appellant gave a full account of the abuse, which was very similar to Th.P.'s trial testimony. After Collins's testimony, the State closed its case. Appellant then moved for directed verdict. On the rape, appellant argued that the State presented insufficient evidence of forcible compulsion. Specifically, he argued that forcible compulsion required some type of physical force and that, while Th.P. described appellant as a disciplinarian, he never used any physical force. The court denied the motion.

Appellant testified that he lived in the home until his arrest on October 31, 2003. He stated that Th.P.'s mother did not know about the abuse until over a year after the last incident. Appellant testified that he told his wife after finding a letter written by Th.P. He acknowledged telling Collins that he was not going to contest anything said by Th.P. On cross-examination, he stated that he started molesting Th.P. when the family moved to Bentonville. He admitted showing Th.P. how to put on a condom, but he did not consider that sexual abuse. He stated that the abuse began because Th.P. had dry skin, which required ointment. He said that the massages started with clothes on, then with clothes off. He admitted that he fondled Th.P.'s breasts and touched her vagina. He also admitted ejaculating on Th.P. Appellant also recalled the time he penetrated her with his penis. He testified that Th.P. was on her bed and was either sleeping or pretending to be asleep. He stated that she asked him to give her a massage and that he knew it might lead to a sexual session. Appellant testified that he removed his clothes and pressed against her. He denied penetrating her, but he admitted telling her that he could not teach her anymore and that "it's for your husband."

A Benton County jury found appellant guilty of rape and incest. Appellant was sentenced to forty years in the Arkansas Department of Correction on the rape count with ten years suspended and thirty years on the incest count, with the sentences to be served concurrently.

Sufficiency of the Evidence Regarding Rape

Appellant argues that the State presented insufficient evidence of rape.[1] He contends that there was no evidence that the acts committed against Th.P involved forcible compulsion. A motion for directed verdict is a challenge to the sufficiency of the evidence. *Pinder v. State*, 357 Ark. 275, 166 S.W.3d 49 (2004). The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.* A rape victim's testimony need not be corroborated to support a conviction. *Id.*

A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person by forcible compulsion. Ark. Code Ann. § 5-14-103(a)(1) (Repl. 1997).[2] Forcible compulsion is defined as "physical force or a threat, express or implied, of death of physical injury to or kidnapping of any person." Ark. Code Ann. § 5-14-101(2) (Repl. 1997). Physical force has been further defined as "any bodily impact, restraint or confinement, or threat thereof." *Pinder*, 357 Ark. at 282, 166 S.W.3d at 54. The quantum of force need not be considered as long as the act is committed against the will of the victim. *West v. State*, 27 Ark. App. 49, 766 S.W.2d 22 (1989). A victim's age and relationship to the assailant are key factors in weighing the sufficiency of the evidence in proving forcible compulsion, and

---

[1]He does not challenge the sufficiency of the evidence to support the incest charge on appeal.

[2]The rape statute has been amended to include engaging in sexual intercourse or deviate sexual activity with another person who is under eighteen years of age when the actor is the victim's guardian, regardless of consent. *See* Act 298 of 2001, codified at Ark. Code Ann. § 5-14-103(a)(4), (b). However, as appellant correctly notes in his brief, the substantive law in effect when a crime is allegedly committed controls how a criminal defendant is charged and tried on the offense. *See Young v. State*, 287 Ark. 361, 699 S.W.2d 398 (1985).

age is an important factor in determining whether the victim consented to intercourse out of fear of harm. *Pinder v. State*, *supra*. Furthermore, when the assailant stands *in loco parentis* to a victim, the law regarding force is satisfied with less than a showing of the utmost physical resistance of which the victim is capable. *Id.*

Appellant relies in part on *Mills v. State*, 270 Ark. 141, 603 S.W.2d 416 (1980). There, the supreme court reversed a conviction for rape by forcible compulsion when the evidence failed to show that appellant used physical force against the victims. The only evidence of force in that case was testimony by one of the victims that the appellant threatened to "kick his butt" if he told anyone. The victim in that case testified that he was afraid of being killed or beaten up by appellant if he resisted, but the supreme court stated that there was no evidence that the appellant ever threatened him before he committed the act. It noted, "Subjective feelings of fear of physical injury by the victim must be based on some act of the accused that can be reasonably interpreted to warrant such fear." *Id.* at 144, 603 S.W.2d at 418.

While the supreme court held that there was insufficient evidence of forcible compulsion in *Mills*, such evidence is present here. Th.P. testified that she was scared of her father because he was a stern disciplinarian. She also testified about her efforts to avoid penetration by moving her hips during the last time the abuse occurred. While appellant may not have threatened physical harm while abusing Th.P., he clearly used physical force. Further, Th.P. explicitly testified that appellant abused her without her consent.

In *Griswold v. State*, 290 Ark. 79, 716 S.W.2d 767 (1986), the supreme court held the evidence to be sufficient for a rape conviction when the thirteen-year-old victim told the appellant not to have intercourse, and the ten-year-old victim testified that the appellant told her to "do it or else." Like in *Griswold*, appellant penetrated Th.P. even though she attempted to avoid it, either by trying to make excuses or by attempting to avoid the sexual

contact.

Also, in *Dillon v. State*, 317 Ark. 384, 877 S.W.2d 915 (1994), the supreme court held the evidence to be sufficient for a rape conviction when the appellant started squeezing the victim's breasts and putting his fingers in her vagina, even though she told the appellant to leave her alone. The victim testified in that case that she felt like she would not make it home because she knew that he was a police officer with a weapon, and she feared that he would kill her. The victim also testified that she told the appellant repeatedly that she had to pick up her kids from the sitter and that when she tried to get away from appellant, he would pull her back to him.

Like in *Dillon*, Th.P. feared what appellant might do. While there was no evidence that appellant had a weapon, Th.P. testified that appellant was a disciplinarian and afraid to tell anyone for fear of what he might do to her. After reviewing the evidence and the applicable case law, we hold that the State presented sufficient evidence of rape by forcible compulsion.

Amendment of a Model Jury Instruction

Next, appellant argues that the trial court erred when it amended a model jury instruction to add the definition of "physical force" to the instruction. He contends that the AMI jury instruction was a correct statement of the law; therefore, no modification of the language should have been allowed. At the request of the State and over appellant's objection, the court instructed the jury:

> Forcible compulsion means physical force, or a threat, express or implied, of death or physical injury to or kidnapping of any person. *Physical force means any bodily impact, restraint or confinement or threat thereof. The quantum of the force need not be considered as long as the act is committed against the will of the victim.*

(Emphasis added.) The non-emphasized portion is taken from AMI Crim. 2d 1401 and is word-for-word from Ark. Code Ann. § 5-14-101(2). The emphasized portion is not part of

AMI Crim. 2d 1401 but is based on the language from applicable case law. *See Pinder v. State*, *supra*; *Wells v. State*, *supra*. The trial court found that a definition of physical force should be included in the instruction in order for the jury to have a complete statement of the law.

Non-model jury instructions are to be given only when the trial court finds that the model instructions do not accurately state the law or do not contain the necessary instruction on the subject at hand. *Jackson v. State*, 359 Ark. 297, ___ S.W.3d ___ (2004); *see also Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996) (holding no error in rejecting the appellant's proffered instruction, even though that statement was based on language from case law, when the AMI instruction was a proper statement of the law). Any party that wishes to challenge the accuracy of an instruction, be it the State or the defendant, must rebut the presumption of correctness. *McCoy v. State*, 348 Ark. 239, 74 S.W.3d 599 (2002) (supplemental opinion upon denial of rehearing). If there is no instruction on a subject upon which the judge determines the jury should be instructed, an appropriate instruction can be given. *Hutcheson v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (Sept. 14, 2005). A court is not required to give an instruction just because it accurately states the law, particularly if the instruction is sufficiently covered by those given. *Love v. State*, 281 Ark. 379, 664 S.W.2d 457 (1984). Furthermore, a trial judge must ordinarily state his reasons when he modifies an AMI instruction; when he does modify, he is to use simple, brief, and impartial language that is free from argument. *Beasley v. State*, 29 Ark. App. 104, 777 S.W.2d 865 (1989).

Appellant relies heavily on *Beasley v. State*, *supra*, where we reversed a conviction for felon in possession of a firearm. There, after the trial court read the standard instruction for the crime, it added the following non-model language:

"Possess" means to exercise actual dominion, control or management over a tangible

> object. Neither actual physical possession nor ownership is necessary for a conviction of possession of a firearm. Possession may be imputed when the contraband is found in a place which is immediately and exclusively subject to his dominion and control.

Id. at 105–06, 777 S.W.2d at 866. We reversed the appellant's conviction after concluding that an instruction telling the jury that actual ownership was not necessary to convict appellant of the charge was prejudicial. *Also cf. Martin v. State*, 354 Ark. 289, 119 S.W.3d 504 (2003) (stating in dicta that, in a statutory-rape case, the trial court did not err in failing to admonish the jury not to consider acts of sexual intercourse after the victim's fourteenth birthday when the jury was correctly instructed that only acts of sexual intercourse prior to the victim's fourteenth birthday were evidence of rape); *Lipscomb v. State*, 271 Ark. 337, 609 S.W.2d 15 (1980) (holding no error in the trial court's refusal to give an instruction that defined "mental disease or defect" or the word "appreciate" as used in AMI Crim. 4009, an instruction on the defense of criminal insanity); *Gabrion v. State*, 73 Ark. App. 170, 42 S.W.3d 572 (2001) (holding no error in the trial court's refusal to give an instruction that defined "lewd," stating that common words with ordinary meanings need not be explained to the jury).

In response, the State relies on *Hutcheson v. State*, *supra*, where this court affirmed a conviction for rape on an accomplice-liability theory. The appellant, mother of the victim, argued that the trial court erred in giving a jury instruction regarding a parental duty to protect children from abuse.[3] We held that no error resulted from the additional instruction

---

[3]Relying on Ark. Code Ann. § 9-27-303 (Supp. 2003), the jury was instructed:

> A parent has a legal duty to prevent the abuse of her child when the parent knows or has reasonable cause to know the child is or has been abused. A parent has a legal duty to take reasonable action to protect her child from abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness where the existence of this condition was known or should have been known. A parent has a legal duty to appropriately supervise her child and prevent the child from being left alone at an inappropriate age or in inappropriate circumstances which put the child in danger.

because the jury should have been instructed on a parent's duty to protect her child.

The trial court erred in giving the modified jury instruction. Both the trial court and the State claimed that the additional instruction made "a complete statement of the law"; however, AMI Crim. 2d. 1401 was already a correct statement of the law. Pursuant to the long line of Arkansas case law, the trial court was obligated to read the model instruction without modification. The additional definition of physical force was unnecessary. *See Misskelley v. State*, *supra*.

However, we affirm because the error in modifying the jury instruction was harmless. Arkansas appellate courts presume prejudice from the giving of an erroneous instruction, unless the error is rendered harmless by other factors. *Union Pac. R.R. Co. v. Barber*, 356 Ark. 268, 149 S.W.3d 325 (2004); *Napier v. State*, 74 Ark. App. 272, 46 S.W.3d 565 (2001). While the trial court should not have given the modified model instruction, we consider that error harmless after considering other factors. The added language did not take away from the State's burden of proving forcible compulsion. Further, the harm in giving the additional language in *Beasley* is absent here. In *Beasley*, the jury was instructed that "actual possession" was not necessary to find the appellant guilty of the possession charge. Here, the jury was given a definition of forcible compulsion, modified by an additional definition of physical force based on applicable case law. The jury was not given an instruction that would lead a jury to believe that anything less than the statutory definition of forcible compulsion was necessary to convict appellant. In addition, Th.P. gave very detailed descriptions of the abuse, many of the details were undisputed by appellant, and there was overwhelming evidence of forcible compulsion. Accordingly, we hold that the error in giving the modified instruction was harmless.

Hutcheson, ___ Ark. at ___, ___ S.W.3d at ___.

Appellant's Specific-Unanimity Argument

Next, appellant argues that he was denied his right to a unanimous verdict when the trial court refused to instruct the jury on the requirement of specific unanimity. Appellant proffered the following jury instruction at trial:

> Keith Alan Petras is charged with the offenses of Rape and Incest. He may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of such acts, but in order to find the defendant guilty, all jurors must agree that he committed the same act or acts. It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict.
>
> In order to prove the defendant guilty, it is necessary for the prosecution to prove beyond a reasonable doubt the commission of a specific act or acts constituting Rape and/or Incest within the period alleged. In order to find the defendant guilty, you must unanimously agree upon the commission of the same specific act or acts constituting Rape and/or Incest within the period alleged. It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict.[4]

Appellant notes that he was charged with only one count of rape and incest and that the State offered evidence of several incidents over a period of time. Appellant cites cases from a number of jurisdictions to support the proposition that a jury must be instructed that they must be unanimous with regard to a particular incident for each count (*R.A.S. v. State*, 718 So. 2d 117 (Ala. 1998); *State v. Arceo*, 84 Haw. 1, 928 P.2d 843 (1996); *State v. Davis*,

---

[4]The State argues that issue was not preserved. However, appellant indisputably proffered a specific-unanimity instruction that the court rejected. Further, appellant argued at trial:

> Your Honor, with regards to the unanimity instruction, which we are proffering for the record, the Defense is asking for this instruction for several reasons. One is to avoid double jeopardy on the part of the defendant; *second, to ensure that the jury focuses on one particular incident, which insures him a unanimous - unanimous verdict in that one juror may think that Mr. Petras committed rape when he digitally penetrated his daughter at one time, another juror may feel that he committed rape or incest when he had intercourse with her. This instruction would ensure that all jurors agreed on a particular incident with which they're finding him guilty on both offenses.*

(Emphasis added.) Appellant made a specific argument requiring specific unanimity and proffered a jury instruction. We do not understand why this issue is not preserved for appellate review.

275 Kan. 107, 61 P.3d 701 (2003); *Commonwealth v. Conefrey*, 420 Mass. 508, 650 N.E.2d 1268 (1995)). Relying on these cases, he contends that the failure to give his proffered instruction resulted in a violation of his right to have the State prove each and every element of the offense against him beyond a reasonable doubt.

The State makes multiple arguments. First, the State argues that the jury received an instruction that all twelve of them had to agree on the verdicts, and argues that such an instruction was sufficient. Second, the State argues that appellant did not use language that was simple and brief. Finally, the State argues that specific unanimity is unnecessary in a case of continuing sexual conduct.

We agree with the State that the trial court did not err when it rejected appellant's requested specific-unanimity instruction; however, we do not embrace the State's position that specific unanimity is unnecessary because the case involved continuing sexual conduct. The State's argument ignores our well-settled case law stating that rape is not a continuing offense. *Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997). Where multiple acts of rape involving conduct occur at different points in time, there is no continuing offense because a separate impulse must necessarily be proved for the commission of each offense. *Id.*; *Anderson v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (Dec. 14, 2005).

Rather, we hold that no specific-unanimity instruction was necessary because the trial court properly instructed the jury that the prosecution was obligated to prove each element of every offense beyond a reasonable doubt and that all twelve jurors had to agree on the verdicts. That was a clear, concise, and accurate statement of the law. Each incident that the jury received proof about was a factor in its verdict.

Furthermore, we reject appellant's specific-unanimity argument because the law generally does not provide for jury verdicts in criminal cases to be issued upon

interrogatories. The following encyclopedia entry is instructive:

> No criminal defendant has a right to have a special issue submitted except in a capital case. The use of jury interrogatories in criminal trials is not by itself impermissible, but rather is generally disfavored. *Special interrogatories tend to dilute the jury's exclusive and ultimate responsibility for determining guilt or innocence, and may impermissibly catechize, color, or coerce the jury's decisionmaking.* Indeed, some courts have held that statutes permitting answers to interrogatories to control a general verdict are inapplicable to criminal cases, for the reason that their application would constitute an impairment of the right to trial by jury. In such a case the trial court may refuse to submit the questions, but if submitted, the answers are immaterial and not controlling.

75B Am. Jur. 2d *Trials* § 1865 (emphasis added) (footnote references omitted).

The specific-unanimity instruction proposed by appellant would have obligated the jury to engage in a *de facto* interrogatory process in order to arrive at the required general-unanimous verdict. The longstanding policy of American jurisprudence is to interfere with jury deliberations as little as possible. Juries are presumed to follow the instructions given to them by the court. *State v. Robbins*, 342 Ark. 262, 27 S.W.3d 419 (2000); *Logan v. State*, 300 Ark. 35, 776 S.W.2d 341 (1989). Once the jury deliberates and renders its verdict, Arkansas law protects those deliberations by rendering inadmissible as evidence any statements made during the course of jury deliberations or inquiries into the emotions or mental processes influencing the jury in reaching its verdict. Ark. R. Evid. 606(b); *Davis v. State*, 330 Ark. 501, 956 S.W.2d 163 (1997); *see also Ashby v. State*, 271 Ark. 239, 607 S.W.2d 675 (1980) (affirming the refusal to set aside a jury verdict despite comment made by a juror that the defendant could be released early factored into its sentencing decision).

By proposing a specific-unanimity instruction, appellant sought to require that the jury deliberate on every specific allegation of abuse and unanimously agree that the State proved every element of the crime regarding any specific allegation before reaching a general verdict. We see no justification in Arkansas law for imposing such a deliberative

process upon jurors. Indeed, the process countenanced by appellant's specific-unanimity instruction would essentially dictate how jurors would deliberate in cases where multiple incidents have been proven in support of a single criminal charge. Our regard for the exclusive power of the jury to reason its way to reaching a verdict leads us to conclude that the specific-unanimity instruction was both unnecessary and inappropriate.

Finally, our conclusion that the trial court properly rejected appellant's specific-unanimity instruction appears in accord with the decision in *Clayton v. State*, 191 Ark. 1070, 89 S.W.2d 732 (1935), where our supreme court affirmed the death sentences for the defendant based upon a verdict that read: "We, the jury, find the defendant, Jim X. Caruthers, guilty as charged in the indictment, and fix his punishment at death by electrocution." That verdict was upheld as sufficient on appeal against the contention that because the indictment for rape included several separate offenses, a particular offense should have been found. The court stated that the jury's verdict was definite and certain because it had sentenced the appellant to death, which it could not have done for any of the other offenses. Admittedly, the defendant in *Clayton* was not making what we consider a specific-unanimity argument and did not request a specific-unanimity instruction. However, it appears that appellant's requested instruction in the present case would have obligated the jury to engage in an exercise similar to that held unnecessary in *Clayton*.

If a defendant wishes to challenge the contention that a reasonable jury could not unanimously find him guilty of the crime charged, then the proper method for challenging the sufficiency of the evidence is by a motion for directed verdict. *See Pinder v. State*, *supra*. If the evidence is insufficient, no jury instruction or special interrogatories can cure that error. *Accord Craig v. State*, 70 Ark. App. 71, 14 S.W.3d 893 (2000) (holding that an appellant is not procedurally barred from attacking the denial of the motion to dismiss a first-

degree felony-murder charge if he fails to proffer special interrogatories or a different first-degree murder instruction).

Appellant's 404(b) Argument

Finally, appellant argues that the trial court abused its discretion when it allowed the State to introduce improper character evidence related to him to show that he acted in conformity with those bad character traits when he allegedly committed the offenses of rape and incest. Specifically, appellant argues that Ti.P.'s testimony that he (appellant) was violent around the house should have been excluded as improper character evidence.

Rule 404(b) of the Arkansas Rules of Evidence (2005) states:

> 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.

The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court, and we will not reverse absent a showing of manifest abuse or a showing of prejudice. *Swift v. State*, ___ Ark. ___, ___ S.W.3d ___ (Oct. 13, 2005); *Hanlin v. State*, 356 Ark. 516, 157 S.W.3d 181 (2004). Evidence offered pursuant to Rule 404(b) must be independently relevant. *Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004). Evidence is independently relevant if it tends to prove a material point and is not introduced solely to prove that the defendant is a bad person. *Id.* However, even if independently relevant, evidence of other crimes may still be excluded under Rule 403 if the probative value of that evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.*

We hold that no error resulted from the admission of Ti.P.'s character testimony. Such evidence is relevant to the mental state of Th.P. and supports her testimony that she had reason to believe that her father would harm her if she did not let him abuse her. Further, had

the court erred in admitting Ti.P.'s character testimony, such error would be harmless. Where evidence of guilt is overwhelming and the error slight, we can declare the error harmless and affirm. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002); *Lewis v. State*, 74 Ark. App. 61, 48 S.W.3d 535 (2001).

Here, with the exception of Ti.P.'s testimony that appellant spanked the children, his testimony about how he feared appellant and how appellant was a disciplinarian was similar to Th.P.'s testimony, which was admitted without objection. This, along with Th.P.'s graphic testimony of the abuse, is overwhelming evidence of appellant's guilt in comparison to any error that may have occurred by admitting Ti.P.'s testimony.

Affirmed.

PITTMAN, C.J., agrees.

HART, J., concurs.

JOSEPHINE LINKER HART, Judge, concurring. While I agree with the disposition reached in our majority opinion, I do not join the discussion regarding jury verdicts in criminal cases issued on interrogatories, which is found in the portion of the opinion subtitled "*Appellant's Specific-Unanimity Argument*." There is no issue relating to jury interrogatories before us, and because the discussion is dicta, this case should not be considered as having precedential value should this issue ever arise in a future case.