DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DAVID M. GLOVER, Judge

CACR 05-848

April 12, 2006

APPEAL FROM THE STONE COUNTY CIRCUIT COURT
[CR-04-16]

TEDDY JONES
APPELLANT

V.

HONORABLE JOHN DAN KEMP, JR., CIRCUIT JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant, Teddy Jones, was tried by a jury and found guilty of the offense of rape. He was sentenced to ten years in the Arkansas Department of Correction. While the actual facts related to the offense of rape do not affect the points of appeal in this case, we will briefly state them at the outset. Appellant's niece, M.P., who was thirteen at the time, accused him of engaging in sexual intercourse with her during the early morning hours of October 5, 2003, and appellant denied the accusations. He was charged, tried, and convicted. Appellant's points in this appeal deal with: 1) the trial court's refusal to give jury instructions on certain offenses that appellant argued were lesser-included offenses of rape; and 2) appellant's contention that his trial counsel was so incompetent that the trial court erred in not relieving him *sua sponte*. We affirm the conviction.

For appellant's first point of appeal, he contends that sexual assault in the second degree and sexual assault in the fourth degree are lesser-included offenses of the charged offense of rape, and that the trial court erred in refusing to allow jury instructions on those lesser offenses. The problem with his argument is that he totally denied ever touching his

niece in an inappropriate manner: "I am not guilty of these charges. I did not do any of the things that have been stated I did here. ... I have never touched [M.P.] in an inappropriate way. ... I have never touched her in a sexual way." Our supreme court has held that there is no rational basis for a lesser-included offense instruction when the defendant denies entirely any sexual encounter with the purported victim. *See, e.g., Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992). Here, appellant denied ever touching his niece in an inappropriate or sexual way. Appellant's denial of such conduct makes the trial court's refusal of the requested instructions entirely proper. Therefore, it is not necessary for us to address whether the sexual-assault offenses are lesser-included offenses of rape because, regardless, the trial court did not err in refusing to give the requested instructions.

For appellant's remaining point of appeal, he contends that the trial court erred in not relieving appellant's counsel from his post *sua sponte* when the court learned that counsel was suffering from a mental disease. The issue was not raised by appellant below, and, therefore, we will not address it on appeal.

Counsel's incompetence in a case is generally handled on direct appeal if it is raised at trial or in a Rule 37 petition if it is raised as a collateral matter. Here, appellant is trying to have the issue addressed by this court when it was not raised below and it was not part of a Rule 37 proceeding, *i.e.*, it is being heard for the first time on appeal. *See*, *e.g.*, *McKenzie v. State*, ____ Ark. ____, ____ S.W.3d ____ (May 12, 2005) (expressing serious concern over prosecutor's improper cross-examination and closing argument and defense attorney's obvious failure to object to the prosecutor's overly aggressive conduct, but concluding that the errors of which the defendant complained

were not the sort that fall into the third exception in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), and that would require the trial court to intervene on its own motion)*; Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004) (declining to create an exception to rule that ineffective assistance of counsel will not be addressed as a point of appeal unless that issue has been considered by the trial court); *Cook v. State*, 76 Ark. App. 447, 68 S.W.3d 308 (2002) (holding that ineffective-assistance-of-counsel issue was not preserved because it was not raised at trial and court did not believe that it was an appropriate case for application of the "serious error" exception of *Wicks, supra*).

While neither party in the instant appeal discusses whether this issue was properly preserved for our review, we have concluded that it was not. Appellant's effort to couch the issue in terms of "trial-court error," *i.e.*, that the *trial court* erred in not stepping in *sua sponte*, does not change the fact that what he is truly arguing is that his attorney was incompetent. Without an objection below, we will not address such an issue on direct appeal. Finally, we note that appellant's citation to the cases of *Cason v. State*, 271 Ark. 803, 610 S.W.2d 891 (1981), *Davis v. State*, 253 Ark. 484, 486 S.W.2d 904 (1972), and *Franklin v. State*, 251 Ark. 223, 471 S.W.2d 760 (1971), are of no help to him because they involved appeals from the denials of petitions for postconviction relief.

Affirmed.

HART and ROBBINS, JJ., agree.