NOT DESIGNATED FOR PUBLICATION

DIVISION IV

ARKANSAS COURT OF APPEALS

No. CACR06-1039

Opinion Delivered October 31, 2007

LEE ANTHONY CROY
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[CR-05-3049]

HON. WILLARD PROCTOR, JR., CIRCUIT JUDGE

AFFIRMED

LARRY D. VAUGHT, Judge

Appellant Lee Anthony Croy was convicted of two counts of first-degree sexual assault. On appeal, he argues that the trial court erred in: (1) denying his motion for a continuance based on the unavailability of a material defense witness; (2) not requiring the State to produce witness statements; (3) admitting the testimony of three witnesses who allegedly were sexually assaulted by Croy; (4) admitting victim-impact testimony from witnesses who testified that they were sexually assaulted by Croy. We affirm.

Because Croy does not challenge the sufficiency of the evidence, we offer only a brief recitation of the facts. The victim, who was eighteen years old at the time of the trial, testified that on his first day of his freshman year at Parkview Arts and Science Magnet High School he met Croy, who was thirty-eight years old at the time and was the campus-security guard. They began spending time together not only at school but also outside of school. The victim joined Croy's pit crew (Croy was a race-car driver), and the victim accompanied Croy to his

volunteer fire-fighter job. The victim testified that he spent the night with Croy, who lived with his mother. When asked about his feelings for Croy during this time, the victim testified, "I felt like we had become really, really good friends[,] like best friend kind of friend and then I even began to kind of think of him as like a father figure."

One day, Croy put his hand down the victim's pants and fondled his penis. The fondling occurred every time they were together thereafter, and eventually progressed to oral sex, which occurred between ten and fifty times. The victim testified that Croy attempted to have anal sex with the victim on three occasions. The victim further testified that during this time his relationship with his parents "got really bad." "Tony would always tell me how bad my parents were for me and I believed that, so I never wanted to be around them." The victim testified that he became suicidal and began to engage in self-mutilation because he could not handle the situation with Croy. Eventually, the victim told his mother that he did not want to see Croy anymore, and he asked her to contact Croy to tell him to discontinue all future contact.

At trial, Croy admitted knowing the victim and that they "had a good friendship." However, Croy testified that he absolutely never had sex with the victim or inappropriately touched him. Each of Croy's four points on appeal revolve around evidentiary rulings. His first point is that the trial court erred in denying his motion for continuance. We review the grant or denial of a motion for continuance under an abuse-of-discretion standard. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). An appellant must not only demonstrate that the trial court abused its discretion by denying the motion for a continuance, but must also show prejudice that amounts to a denial of justice. *Id.*

Four days before trial, Croy moved for a continuance arguing that one of his material witnesses, Sean Flynn, was unavailable for trial due to surgery. Croy filed an amended motion for continuance two days before trial claiming that Flynn would testify that he knew Croy well, spent significant time with Croy, and "emphatically denies that there was any sexual contact between he and [Croy]...." The trial court denied the motion.

Croy argues that Flynn's testimony was essential to the defense of his case as Flynn's testimony directly contradicted the testimony of three State witnesses who testified that they too were sexually assaulted by Croy. The State responds that Croy cannot show that he was prejudiced by this ruling because (1) the substance of Flynn's testimony was entered into evidence through the testimony of investigating Officer Marilyn Scott; and (2) Croy introduced the testimony of four other defense witnesses whose testimony was very similar in substance to Flynn's.

The substance of Flynn's testimony was presented to the jury through the testimony of Officer Scott. Officer Scott testified that during her interview with Flynn, who was seventeen, he told her that he knew Croy from Parkview and the race track and that he worked on Croy's pit crew. Flynn stated to Officer Scott that Croy never acted inappropriately towards him. Moreover, Flynn's testimony was nearly identical to the testimony of Cameron Burdess, Charlie Smart, Steven Hill, and Trey Goacher, four defense witnesses who testified at trial that they met Croy in their early to mid-teens, that they worked on his pit crew, that they spent time with Croy alone, and that Croy never

inappropriately touched them. Therefore, Croy showed no prejudice resulting from the denial of his continuance motion. As such, we hold that the trial did not abuse its discretion.

Next, Croy argues that the trial court erred when it did not require the State to produce witness statements. Prior to trial, Croy filed a motion for discovery seeking, among other things, "written or recorded statements and the substance of any oral statements made by Defendant or any other person." The State filed a response describing its "open file" policy whereby defense attorneys can inspect the entire file upon three-days' notice up to three days prior to trial. At trial, defense witnesses Goacher and Burdess testified that they were interviewed by the State, but their witness statements were not included in the State's file. Croy immediately moved for the production of these statements arguing that they contained exculpatory information. The State responded that these were defense witnesses, and all it possessed were notes taken during the interviews, which were work product. The trial court denied Croy's motions for production and motions for mistrial.

In his brief, Croy contends that the trial court violated the Supreme Court of the United State's mandate in *Brady v. Maryland*, 373 U.S. 83 (1963), which holds that the prosecution is required to disclose to a defendant all favorable evidence that is material to either guilt or punishment. Croy further contends that there is no work product exception for the production of witness statements. In *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001), our supreme court outlined the three elements of a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or

inadvertently; (3) prejudice must have ensued. Croy has failed to establish all three of the required elements.

We first note that the State did offer to show its notes to Croy's counsel at trial—Croy did not accept the offer. More importantly, Croy never proffered the notes. Because we cannot determine the substance of the notes, we cannot determine whether they contained exculpatory information. *See Brown v. State*, 368 Ark. 344, ___ S.W.3d ___ (2007) (holding that the supreme court could reach the issue of whether information on a calendar was admissible or prosecutor's work product because the defendant did not proffer the calendar and make it part of the record). Furthermore, because Croy has not presented any evidence demonstrating that the content of the State's notes was any more favorable to him than the already exculpatory testimony of Goacher and Burdess, Croy has failed to show prejudice. We also note that Goacher and Burdess were defense witnesses, and as such, Croy cannot maintain that the State suppressed evidence from the interviews of these witnesses. Croy could have easily interviewed Burdess and Goacher to determine what information they possessed. *See Johninson v. State*, 317 Ark. 431, 878 S.W.2d 727 (1994) (holding that "[a] defendant in a criminal case cannot rely upon discovery as a substitute for his own investigation"). Accordingly, we hold that Croy has failed to establish a *Brady* violation.

Croy's third argument is that the trial court abused its discretion in admitting the testimony of Chris Donley, Jeremy Palmer, and Andrew Brown. Donley, age thirty-three at the time of trial, testified that when he was twelve he met Croy at the skating rink where Croy was a referee. Croy began giving Donley rides home from the rink. Over time, Croy

initiated sexual contact with Donley at various locations. Donley testified that Croy forbid Donley from having conversations with family and friends without his permission. Croy referred to Donley's mother and sisters as "whores" and was constantly trying to turn Donley against them.

Brown, now twenty-nine years old, testified he met Croy on his school bus when Brown was fourteen. Brown, who was also involved in race-car driving, began to work with Croy on his pit crew. Brown testified that he "looked up to [Croy]. He's an awesome driver and that's where I learned all my skills from, but he also – seemed like he had everything. He had a race car, had a big truck, and it's just – in a 15-year old's eyes, that was real cool." Brown testified that eventually, Croy began touching him inappropriately. He testified that they fell into a pattern of touching each other's penis, masturbating, and performing oral sex. Brown testified that this occurred over a two to three-year period. Brown also testified that Croy tried to alienate him from his family.

Palmer, now twenty-four, testified that when he was thirteen he met Croy through some friends involved with car racing. Palmer started working on Croy's pit crew. Each day, Palmer rode a bus driven by Croy but instead of getting off at his stop, Palmer testified that he would stay on the bus to the terminal so that Croy could drive him home. Palmer testified that he thought Croy was "pretty cool. I mean he drove a race car and, you know, let me help on the race car and, you know, just [was a] pretty good driver...." Palmer testified that he spent the night at Croy's mom's house and that Croy lived with the Palmer family until Palmer turned eighteen.

Palmer testified that the sexual relationship began when Croy touched Palmer's "privates" and then placed Palmer's hand on Croy's "privates." Croy next put his hand down Palmer's pants. Palmer testified that the sexual activity progressed, leading to oral and anal sex. According to Palmer, these encounters occurred almost daily. Palmer testified that Croy tried to turn Palmer against his friends, girlfriends, and family.

The trial court allowed the testimony of Donley, Palmer, and Brown pursuant to Arkansas Rule of Evidence 404(b). Croy argues that these alleged acts are too remote, as they occurred between twelve to twenty years ago, and therefore, they are not relevant.[1]

The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998). While Rule 404(b) specifically excludes evidence of other crimes, wrongs, or acts to prove the character of a person in order to show that he acted in conformity therewith, the rule does allow the admission of evidence of other wrongs, crimes, or acts to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ark. R. Evid. 404(b) (2007).

The testimony of Donley, Palmer, and Brown was strikingly similar. They were all boys around the same age when they met Croy. They all met him at places where young boys are easily found—at school, on the school bus, at the skating rink, or at the race track. They all worked on Croy's pit crew. They each testified that they gradually spent more time with

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[1]Croy also argues that the prejudicial value of the 404(b) testimony far outweighs the probative value of the testimony and should be excluded pursuant to Arkansas Rule Evidence 403. However, Croy failed to raise this argument below, and therefore, it is not preserved for appeal.

Croy, which included him picking them up and taking them places, sleeping over at each other's homes, going camping/hunting, and having dinner with their families. They all considered him a very close friend and/or a father figure. As the relationship progressed, they each testified about how Croy started the physical relationship by touching them inappropriately. Each testified that the touching developed into sexual acts, which occurred daily. Finally, they each testified that Croy tried to alienate them from their families and friends. This testimony clearly demonstrates motive, opportunity, intent, preparation, and planning on the part of Croy, and therefore was admissible under Rule 404(b).

This evidence was also admissible under the pedophile exception of Rule 404(b). The pedophile exception allows evidence of other crimes, wrongs, or acts in cases of child abuse where such evidence helps to prove the depraved sexual instinct of the accused. *See Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994). In *Hernandez*, *supra*, our supreme court outlined the four factors to be considered when determining whether the pedophile exception applies: (1) the time interval; (2) similarity of acts; (3) intimate relationship; (4) the order of events. The only element that Croy addresses in his brief is the time-interval element, arguing that alleged conduct that occurred twelve to twenty years prior to the alleged sexual assault of the victim is too remote.

We reject Croy's argument. The time interval of the testimony in the present case, twelve to twenty years, falls within the parameters established in our case law and was thus admissible. *See Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996) (holding that the Rule 404(b) pedophile exception applied to a guilty plea of carnal abuse that was eleven years prior to the charged conduct); *Tull v. State*, 82 Ark. App. 159, 119 S.W.3d 523 (2003) (holding that

the Rule 404(b) pedophile exception applied to evidence from the appellant's forty-five year old daughter that she was sexually violated by appellant thirty years ago).

Croy's final argument is that the trial court abused its discretion in admitting victim-impact testimony from Donley and Palmer during sentencing. Croy objected claiming that these witnesses were not the victims in this case, and therefore, their victim-impact testimony was irrelevant and extremely prejudicial. The trial court overruled the objection and allowed the testimony; however, the court limited Donley and Palmer's testimony to facts demonstrating a pattern of sexual abuse and excluded testimony about how Croy affected their lives.

A trial court's decision to admit or exclude victim-impact testimony during the sentencing phase of trial is reviewed under an abuse of discretion standard. *See Springs v. State,* 368 Ark. 256, ___ S.W.3d. ___ (2006). Our supreme court has said that when victim-impact evidence is unduly prejudicial, it may render the trial fundamentally unfair and violate the Due Process Clause. *Walls v. State*, 336 Ark. 490, 986 S.W.2d 397 (1999).

Arkansas Code Annotated subsections 16-97-103 (5) and (6) (Repl. 2006) specifically provide that character evidence of the defendant and evidence of aggravating circumstances are relevant to sentencing. The statute further provides that the criteria for departure from the sentencing standards may serve as examples of aggravating circumstances. One of the statutory criteria for departure from the sentencing standards is that the offense was a sexual offense and was part of a pattern of criminal behavior with the same or different victims under the age of eighteen years of age manifested by multiple incidents over a prolonged period of time. Ark. Code Ann. § 16-97-804(c)(2)(F) (Repl. 2006).

We hold that based on these statutory provisions, the trial court did not abuse its discretion in permitting the limited testimony of Donley and Palmer. In fact, the trial court exercised extreme caution on this issue; it only allowed Donley and Palmer testify about the pattern of sexual abuse perpetrated by Croy and prevented them from going into their own personal victim-impact testimony.

Croy cites *Walls v. State*, *supra*, and claims that the holding in that case requires reversal here. In *Walls*, a bench trial, the defendant pleaded guilty to raping several young boys. During sentencing, the court allowed one of the rape victims to testify that Walls was responsible for the murders of multiple people. Walls had not been tried or convicted of these murders. Thereafter, on the record, the trial court stated that it found that Walls was responsible for the murders and then sentenced Walls to two forty-year terms and four life terms in prison. *Walls*, 336 Ark. at 492, 496, 986 S.W.2d at 398, 401. On appeal, our supreme court reversed the sentence, holding that the trial court abused its discretion in admitting the victim-impact testimony, because it was irrelevant and highly prejudicial. *Walls*, 336 Ark. at 499–500, 986 S.W.2d at 402.

Walls is clearly distinguishable from the case at bar. In *Walls*, the relevance of the victim-impact testimony was called into question because it involved evidence of murders allegedly committed by Walls when he was being sentenced for unrelated rapes. Further, the prejudicial nature of the victim-impact evidence was clear—the trial court stated that it found Walls responsible for the murders based on the victim-impact evidence and then used that evidence to sentence Walls for the rapes.

In the instant case, the victim-impact testimony was clearly relevant because Donley and Palmer testified that Croy sexually assaulted them in almost exactly the same way as Croy sexually assaulted the victim. In addition, the record contains no evidence that the jury used the victim-impact testimony to actually sentence and find Croy responsible for sexually assaulting Palmer and Donley. Because we hold that there was no abuse of discretion by the trial court, we affirm.

Affirmed.

ROBBINS and BAKER, JJ., agree.