Not designated for publication.

DIVISION III

CACR06-1253

September 12, 2007

CARL EDWARD WILLIS APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. CR-2004-1041]
V.	HON. J. MICHAEL FITZHUGH, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant Carl Willis appeals his conviction in the Sebastian County Circuit Court for the second-degree sexual assault of his daughter, which resulted in a sentence of fifteen years' incarceration in the Arkansas Department of Correction. On appeal, he challenges the sufficiency of the evidence supporting his conviction and argues that the circuit court erred in allowing evidence of prior bad acts and in asking prejudicial questions to witnesses. We affirm.

Appellant was charged with second-degree sexual assault, pursuant to Ark. Code Ann. § 5-14-125, specifically, that he unlawfully, feloniously, and being eighteen years old or older, engaged in sexual contact with the sex organs of another person, not his spouse, who was less than fourteen years old. The alleged victim was S.W., his daughter. The alleged acts happened over the course of approximately two years and started when S.W. was seven years old. The jury trial in the matter was held on July 13-14, 2006, and appellant appeared pro se.

At the close of the State's case-in-chief, appellant made a general motion for a directed verdict, specifically, "I would like to make a motion for a directed verdict," which was denied by the circuit court. He made no attempt to renew the motion at the close of all the evidence, and the jury returned with a guilty verdict and sentence, as previously set forth.

I. Sufficiency of the Evidence

Rule 33.1 of the Arkansas Rules of Criminal Procedure requires a motion for directed verdict to challenge the sufficiency of the evidence at the close of the State's evidence and again at the close of all evidence to avoid a waiver. The first hurdle that appellant cannot clear is the general nature of his initial motion to dismiss made at the close of the State's case. Rule 33.1(c) of the Arkansas Rules of Criminal Procedure provides:

> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense....

Hence, our rule is clear that a motion for a directed verdict must specifically advise the circuit court about how the evidence was insufficient. *See Eastin v. State*, __ Ark. __, __ S.W.3d __ (May 10, 2007). As a further matter, this court has said that Rule 33.1(c) must be strictly construed and that the reasons behind the requirement that specific grounds must be stated and the absent proof must be specified is to allow the State an opportunity to reopen its case and present the missing proof. *Id*. Appellant's sufficiency argument is not preserved for appeal because his initial directed-verdict motion was not specific and did not advise the circuit court

or the State as to which element of the State's case was missing. Our supreme court has repeatedly said that "it will not address the merits of an appellant's insufficiency argument where the directed-verdict motion is not specific." *Smith v. State*, 367 Ark. 274, 284, __ S.W.3d __, __ (2006).

An additional reason that appellant's sufficiency challenge must fail is because appellant failed to renew his motion for directed verdict following his presentation of a defense, thus his argument is not preserved for our review on appeal. *Fisher v. State*, 84 Ark. App. 318, 139 S.W.3d 815 (2004). Therefore, his challenge to the sufficiency of the evidence is waived on appeal, and we affirm on this point.

We note that the State correctly points out that the fact that appellant represented himself at trial does not excuse his failure to comply with the requirements of Rule 33.1, as pro se litigants are held to the same standard as attorneys. *See Eliott v. State*, 342 Ark. 237, 27 S.W.3d 432 (2000).

II. Admission of Prior Bad Acts

Appellant next contends that the circuit court erred by admitting testimony from three of his children's female friends, S.T., R.G., and S.H., who each testified that appellant also had sexually abused them. He argues that the admission of their testimony was in violation of Arkansas Rules of Evidence 403 and 404(b); specifically, that their testimony should have been excluded because the events they recounted were too remote in time (between two, seven, and twelve years prior to appellant's trial on this charge) and because none of the girls had lived in the same household with appellant. He claims that the testimony was unfairly

prejudicial, confusing, and misleading to the jury. He argues that the "pedophile exception" should not apply because none of the witnesses lived in the same house with him. *See Munson v. State*, 331 Ark. 41, 959 S.W.2d 391 (1998).

At trial, appellant objected to the testimony of S.T. and R.G. on Rule 403 and 404(b) grounds, but he failed to specifically argue that the testimony should be excluded for the two reasons he now puts forth on appeal. Additionally, he failed to object on any grounds to S.H.'s testimony. Accordingly, the State maintains that he is precluded from seeking our review on his claims of reversible error. *See Burford v. State*, 368 Ark. 87, __ S.W.3d __ (2006) (holding that parties are bound by the scope and nature of objections raised below).

Alternatively, assuming that appellant's arguments are preserved, we hold that the circuit court did not abuse its discretion by admitting the girls' testimony under the so-called "pedophile exception" to Rule 404(b). Appellant's daughter, S.W., who was nine years old at the time of the trial, testified that appellant touched her on her "privates," her vagina and her buttocks, with his hand between twenty and thirty times over of the course of approximately two years. She explained that the incidents occurred at their home during times that she was under his care. As for the other girls, S.T., who was eighteen years old at the time of trial, testified that while she was under appellant's care at his home, during the time when she was between the ages of six and eleven years of age, he touched her vagina and "boobs" and kissed her "[m]ore times than [she could] count." R.G., also eighteen years old at the time of trial, testified that when she was in appellant's home when she was ten or eleven years old visiting her aunt, appellant's wife, on one occasion appellant picked her up and

rubbed her body across his penis, while on another occasion he pushed her on the couch and got on top of her. Finally, S.H., who was eleven years old at the time of the trial, testified that when she was at appellant's house when she was seven years old in 2003, appellant touched her vaginal area with his hand while she was sitting on his lap.

Prior to each of the three girls' testimony, the circuit court gave the following instructions to the jury limiting its consideration of their testimony:

> BY THE COURT: All right. Ladies and gentlemen of the jury, you are about to hear some testimony and I am going to give you an instruction as it relates; that evidence of other alleged crimes, wrongs, or acts of [appellant] may not be considered by you to prove the character of [appellant] in order to show that he acted in conformity with that character. This evidence that you are about to hear is not to be considered to establish a particular trait of character that [appellant] may have, nor is it to be considered to show that [appellant] acted similarly or accordingly on the date of the incident, but this evidence is merely offered as evidence of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or consciousness of guilt. Whether any of these other alleged crimes, wrongs or acts have been committed is for you, ladies and gentlemen, to determine.
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> ★★★★
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> BY THE COURT: All right. Ladies and gentlemen, that same instruction that I gave you relative to the use of that, that this evidence is being offered to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or consciousness of guilt. And whether any of this (sic) alleged crimes, wrongs or acts have been committed is something for you to determine. . . .
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> ★★★★
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> BY THE COURT: Again, ladies and gentlemen, you are instructed that that same rule is applicable as to how you should receive this evidence relative to other alleged wrongs or acts.

The State asserts that the circuit court did not violate Rules 403 and 404(b) by allowing testimony from the three girls. All the incidents they recounted occurred in appellant's home,

with some also occurring while they were under his care, and involved incidents of sexual contact with young girls between the ages of six and eleven years of age. S.T. and S.H. both testified that appellant touched their vaginas, just as his daughter had testified that he had touched hers while she was with him in their home and under his care. We agree. Under Arkansas law, evidence of sexual abuse of children that is similar to that for which the defendant is on trial is admissible in accordance with Rules 403 and 404(b) under the "pedophile exception" when the victims are under the authority or care of the perpetrator or in the perpetrator's home. *See Hamm v. State*, 365 Ark. 647, __ S.W.3d __ (2006). This is contrary to appellant's argument that the exception only applies to those individuals residing with the perpetrator. *See Pickens v. State*, 347 Ark. 904, 69 S.W.3d 10 (2002); *Berger v. State*, 343 Ark. 413, 36 S.W.3d 286 (2001). Finally, appellant's complaint that the incidents were too remote in time to be relevant is of no merit, and our appellate courts have affirmed the admission of similarly remote incidents of sexual abuse. *See Flanery v. State*, 362 Ark. 311, 208 S.W.3d 187 (2005) (seven years); *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996) (eleven years); *Tull v. State*, 82 Ark. App. 159, 119 S.W.3d 523 (2003) (thirty years).

We hold that appellant's challenge to the admissibility of S.H.'s testimony was not preserved. His argument with regard to the admissibility of the testimony of S.T. and R.G. on these specific Rule 403 and 404(b) grounds is tenuous, but even assuming the challenge was preserved, we hold that the circuit court did not abuse its discretion by admitting the girls' testimony under the so-called "pedophile exception" to Rule 404(b).

III. Court's Questioning of Witness

Appellant asserts that the circuit court committed reversible error by asking witnesses questions "that went towards the merits of the State's case." He claims that the questions violated Canons one and two of the Arkansas Code of Judicial Conduct because the questioning reflected that the judge was not impartial or independent. Specifically, Canon one states that, "[a] judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective." Canon two states that, "a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

During the trial, the presiding circuit court judge asked questions of R.G. concerning the alleged incidents between appellant and herself, the responses to which elicited more information than originally given during the direct examination by the State. Appellant argues that it is not the judge's responsibility to prove or elicit testimony from witnesses as the State had the burden of proving the case. Furthermore, appellant contends that such conduct by the judge detrimentally affected the appearance of impartiality in the eyes of the jury considering that the testimony was being elicited by the judge. Appellant argues that the circuit judge was neither independent nor impartial in this case. Accordingly, he asks that his conviction be reversed and remanded for a new trial with a different judge presiding.

The State generally disputes that appellant's claim has any merit, *see Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998); *see also* Arkansas Rule of Evidence 614(a) & (b) (authorizing

the trial court to call and interrogate witnesses). Additionally, the State contends that the issue is not preserved for our review because appellant failed to object to the only questions asked by the court that he claims were improper. Such an objection was necessary to preserve his current claim for appellate review, *see Franklin v. State*, 314 Ark. 329, 863 S.W.2d 268 (1993); *see also* Arkansas Rule of Evidence 614(c) (providing that objections to interrogation by the court can be made "at the time or at the next available opportunity when the jury is not present"). Moreover, appellant's pro se status did not relieve him of the obligation to object. *See Shells v. State*, 22 Ark. App. 62, 733 S.W.2d 743 (1987). We agree and affirm on this point as well.

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.