ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISION IV

CACR06-988

June 13, 2007

MOSES JONES

APPELLANT

APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, FIFTH DIVISION [NO. CR2005-2206]

V.

HON. WILLARD PROCTOR, JR., JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

The appellant was tried by a jury and found guilty of raping his twelve-year-old daughter. He was sentenced to ten years' imprisonment for that crime. On appeal, he argues that the evidence was insufficient to prove that he committed rape and that the trial judge erred in denying his motion to exclude certain evidence under Ark. R. Evid. 404(b) and 403. We affirm.

Where the sufficiency of the evidence is challenged on appeal of a criminal conviction, we review the sufficiency of the evidence, including any erroneously-admitted evidence, prior to the consideration of trial errors. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In reviewing the sufficiency of the evidence to support a criminal conviction, we view the evidence in the light most favorable to the State, considering only the evidence that supports

the verdict, and affirm if there is substantial evidence to support the jury's conclusion. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004). Substantial evidence is evidence forceful enough to compel reasonable minds to reach a conclusion one way or the other without resort to speculation or conjecture. *Id.*

Viewed in the light most favorable to the State, the evidence shows that the victim, appellant's daughter, resided with appellant from the time of her birth until January 2005, when she reported to school officials that appellant raped her. The victim testified that she noticed that appellant began to act differently toward her and her sister, showing them textbooks with photographs of actual persons and diagrams identifying genitalia. Appellant later had the victim and her sister get in the bathtub, and he demonstrated the location of the urethra by having them urinate in the bathtub.

Appellant then began showing the victim pornographic movies on the television in his bedroom, ostensibly to teach the victim more about genitalia. During one such occasion, appellant told the victim that he missed her mother and that having the victim in his bed with him made him feel less lonely. After the victim's sister had fallen asleep, appellant asked the victim to go to her room. There, appellant took off the victim's pants and rubbed his penis on the outside of her vagina, afterwards pulling up his pants and exclaiming that he "could not believe that he did that." Appellant began waking the victim in the middle of the night and continued this sort of sexual contact with her for some time. The victim testified that appellant had some oil beside his bed that he would rub on the outside of her vagina. She further testified that appellant subsequently penetrated her vagina with the head of his penis

on several occasions, including Christmas day, despite her telling him that she did not enjoy it. Appellant told the victim that her body was hot like her mother's and that he did not feel as lonely. Subsequently appellant asked, then paid, the victim to allow him to ejaculate into her mouth as he masturbated.

The victim stated that she reported those incidents, first to friends and later to teachers and police investigators, because she "had started [her] period and was not going to have a baby by [her] dad." The victim was examined by a physician, telling him that her father had penetrated her vagina with the head of his penis at least three times and had once ejaculated inside of her. Doctor Jerry G. Jones testified that he performed a pelvic exam of the victim and found no evidence of trauma, injury, or infection. He further testified that, although the victim's hymen was intact, this was not inconsistent with sexual abuse because there is always the potential that no injury may occur, that an injury may heal quickly, or that the hymen may stretch and not show breakage.

Appellant argues that this evidence is insufficient to prove rape because the victim was not a credible witness and because there was no scientific or physical evidence to corroborate her testimony. These arguments are meritless. Appellant was charged with committing rape by engaging in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age in violation of Ark. Code Ann. § 5-14-103 (a)(3)(A) (Repl. 2006). Sexual intercourse is defined as penetration, however slight, of the labia majora by a penis. Ark. Code Ann. § 5-14-101(10) (Repl. 2006). The victim testified that she was twelve years old and that appellant penetrated her by placing the head of his penis in her vagina. Our

supreme court has held repeatedly that the uncorroborated testimony of a rape victim is sufficient to support a conviction if the testimony satisfies the statutory elements of rape. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004); *Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002); *Williams v. State*, 331 Ark. 263, 962 S.W.2d 329 (1998); *Davis v. State*, 330 Ark. 501, 956 S.W.2d 163 (1997). It is likewise well established that inconsistencies in the testimony of a rape victim are matters of credibility for the jury to resolve. *Benson v. State*, *supra*. A lack of physical findings upon medical examination is not conclusive evidence that no rape occurred. *See id*. We hold that there was substantial evidence that appellant raped his daughter.

Next, appellant contends that the trial court erred in denying his motion to exclude the evidence regarding the purported anatomy lesson in the bathroom, the evidence that there was sexual lubricant in appellant's bedroom, and the evidence that appellant watched pornographic movies with the children. Appellant's argument is twofold: first, that the evidence was inadmissible under Ark. R. Evid. 404(b); and second, that the potential for prejudice of the evidence, if admissible, outweighed the probative value. We will address these arguments together.

Rule 404(b) provides that, although 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 be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Rule 403 provides that evidence, although relevant, may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Circuit courts are afforded wide discretion in making evidentiary rulings, and we will not reverse a trial court's ruling on the admissibility of evidence absent an abuse of discretion. *Brunson v. State*, 368 Ark. 313, ___ S.W.3d ___ (2006).

We have recognized the importance in sex-offense litigation of the "entire picture" theory, under which evidence of uncharged aspects of the sexual relationship between the victim and the perpetrator may be admitted. *Hyatt v. State*, 63 Ark. App. 114, 975 S.W.2d 443 (1998). Furthermore, we have held that such evidence is particularly relevant where, as here, the perpetrator engages in a course of progressively more intrusive sexual conduct with the child:

> The perpetrator may begin with seductive talk or brief touching, and progress over weeks or months to sexual intercourse, fellatio, and similar invasive acts. When the defendant is charged with a single incident of invasive sexual contact, the jury sometimes needs information about the entire course of the relationship to fairly evaluate the victim's credibility.

Id. at 117, 975 S.W.2d at 445 (quoting 2 J. Meyers, *Evidence in Child Abuse and Neglect Cases*, § 8.25, pp. 483-84 (3d ed. 1997)).

Here, the evidence regarding the purported anatomy lesson and appellant's subsequent viewing of pornographic movies with his daughters was extremely relevant to show planning and preparation by demonstrating the insidious manner in which appellant progressively introduced the victim to knowledge of sexuality, familiarity with sexual acts, external genital contact, and finally to rape. Furthermore, by showing appellant's planning and preparation for the ultimate rape, this testimony both evidenced appellant's intent and lent credibility to the

victim's testimony. Consequently, we find no abuse of discretion in the trial court's decision to admit this evidence over appellant's Rule 404(b) objection, and we hold that the trial court did not err in finding that the probative value of this evidence was not clearly outweighed by its prejudicial effect. With regard to the evidence that appellant kept sexual lubricant in his bedroom, we think that, although it was of lesser relevance, it was also of little or no prejudice, especially in light of appellant's own testimony at trial admitting that he kept the product under his bed.

Affirmed.

ROBBINS and HEFFLEY, JJ., agree.