

NOT DESIGNATED FOR PUBLICATION

DIVISION II

CACR07-110

October 31, 2007

KENNETH RAY PITTS

APPELLANT

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR 05-4343]

V.

HONORABLE TIMOTHY DAVIS FOX,
CIRCUIT JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

A jury found appellant, Kenneth Ray Pitts, guilty of second-degree sexual assault and of sexual indecency with a child. On appeal, he contends that the circuit court erred in admitting evidence of appellant's prior acts of sexual misconduct against minors. Specifically, appellant argues that the circuit court erred in allowing a former victim to testify under the "pedophile exception" to Rule 404(b) of the Arkansas Rules of Evidence. Further, he asserts that the circuit court erred in failing to weigh the probative value of this and other evidence against the danger of unfair prejudice, in accordance with Rule 403 of the Arkansas Rules of Evidence and as provided by Ark. Code Ann. § 16-42-103 (Supp. 2007). We affirm.

At trial, the victim, C.M., who was seven years old at the time of trial, testified about

appellant, whom she called “Uncle Kenny,” and events that occurred in 2004. She testified that appellant would visit her at home while she was living with her mother, Stephanie Moore, and her “grandfather,” Manuel (also referred to as Emanuel) Benton. She described how, when Moore and Benton were outside of the residence, appellant took her into a bathroom and later to a bedroom and “touched me with his pee-pee” while both had their pants off, and that he touched her on her “pee-pee.” She further testified that appellant told her not to tell anyone. On cross-examination, she was asked if appellant “actually put it in your pee-pee?” C.M. replied, “Half, a little bit.”

C.M.’s mother, Stephanie Moore, testified regarding C.M.’s relationship to appellant and to Benton. Moore testified that she knew appellant as “Uncle Kenny,” and that Benton was C.M.’s great-great grandfather. She had recently learned, however, that appellant was not Benton’s biological son. She further testified that in 2004 she and C.M. had lived with Benton, and appellant visited frequently.

Chevette Ewing, who was twenty-five years old at the time of trial, testified regarding appellant’s conduct toward her when she was approximately nine years old. According to Ewing, appellant was her mother’s boyfriend and lived with them. Ewing testified that appellant would play with his penis in front of her and touch her face and vaginal area with it. She stated that this would occur in her mother’s bedroom as well as other rooms and that appellant told her he would hurt her mother or her brother if she told anyone what he was doing.

The State also introduced into evidence a certified copy of a judgment and commitment order showing that appellant was convicted of first-degree sexual abuse in 1990, which stemmed from the events involving Ewing. Additionally, the State introduced a certified copy of a judgment from 1984 showing that appellant pleaded guilty to first-degree sexual abuse and the felony information from 1983 charging appellant with the crime and alleging that appellant “engaged in sexual contact with [S.H.], who is less than fourteen (14) years old.”

Beatrice Burns testified for appellant regarding her family relationship with appellant and Benton. She stated that she was appellant’s sister, and that Benton was her step-father. She further testified that while they were growing up, they believed that Benton was appellant’s father and that he raised them, but when appellant was grown, he learned that Benton was not his biological father.

As he argued to the circuit court, appellant contends that the circuit court erred in allowing Ewing to testify under the “pedophile exception” to Rule 404(b). He asserts that the events testified about by Ewing were not sufficiently similar to the acts committed against C.M., in that no allegation of vaginal penetration was made by Ewing. Further, he asserts that appellant did not have an “intimate” relationship with C.M., as he did not live in the same household as C.M., and C.M. was never under his care or authority.

The Arkansas Supreme Court has recognized a “pedophile exception” to Rule 404(b),¹ which allows evidence of similar acts with the same or other children when it shows a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. *Hamm v. State*, 365 Ark. 647, ___ S.W.3d ___ (2006). The stated reason for this exception is that such evidence proves the depraved instinct of the accused. *Id.* The basis of the “pedophile exception” was the court’s acceptance of the notion that evidence of sexual acts with children may be shown, as that evidence demonstrates a particular proclivity or instinct. *Id.* For the pedophile exception to apply, the court requires that there be a sufficient degree of similarity between the evidence to be introduced and the sexual conduct of the defendant. *Id.* Further, the court requires that there be an “intimate relationship” between the perpetrator and the victim of the prior act. *Id.* “Intimate relationship” has been defined as close in friendship or acquaintance, familiar, near, or confidential. *Parish v. State*, 357 Ark. 260, 163 S.W.3d 843 (2004).

We disagree with appellant’s argument that the conduct was dissimilar. In both instances, appellant engaged in sexual contact with female victims who were less than fourteen years old. Furthermore, contrary to appellant’s assertions, there was an “intimate

¹Rule 404(b) provides that “[e]vidence 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.”

relationship” between appellant and his victims. In Ewing’s case, he was her mother’s live-in boyfriend. In C.M.’s case, he was a frequent visitor to the household who was left alone with the child while her mother was outside. Further, he was known to C.M. as her “uncle,” and despite, as suggested by Moore and Burns, the lack of a biological relationship to C.M., appellant’s connection to C.M. and her family is apparent. Thus, we conclude that Ewing’s testimony was properly admitted.

For his second and third points, appellant asserts that the circuit court erred in failing to weigh the probative value of Ewing’s testimony and evidence of appellant’s two prior convictions for first-degree sexual abuse against the danger of unfair prejudice, in accordance with Rule 403,² and as provided by Ark. Code Ann. § 16-42-103(a).³ We observe, however, that though appellant argues that the circuit court failed to conduct a Rule 403 analysis, it is apparent from the record that the court did rule on appellant’s Rule 403 objection to Ewing’s testimony and the two convictions.

But to the extent that appellant also argues that the circuit court erred in failing to

²Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

³ The statute provides that “[i]n a criminal case where the defendant is accused of a sexual assault, evidence of the defendant’s commission of another sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant, subject to the circuit court’s consideration of the admissibility of any such evidence under Rule 403 of the Arkansas Rules of Evidence.” Ark. Code Ann. § 16-42-103(a).

exclude Ewing's testimony under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice, we note that the standard of review is whether the circuit court abused its discretion. *Flanery v. State*, 362 Ark. 311, 208 S.W.3d 187 (2005). In view of the similarities discussed above, Ewing's testimony and appellant's conviction stemming from those events were highly probative on the issue of the appellant's sexual proclivities. Considering the broad discretion of the circuit court in admitting evidence, we cannot say that the court abused its discretion in concluding that the probative nature of the challenged evidence was not substantially outweighed by the danger of unfair prejudice.

We are mindful of appellant's assertion that the probative value of Ewing's testimony is diminished because those events occurred fifteen years prior to the incidents involving C.M. But given the similarities involved, and in light of prior case law finding such evidence admissible under Rule 404(b) even when a significant time gap exists, *see Flanery, supra*, we still conclude that the probative value of the evidence was not outweighed by the danger of unfair prejudice. Further, he asserts that the State failed to provide appellant with forty-five days' notice that the State would introduce Ewing's testimony, as required by Ark. Code Ann. § 16-42-103(b),⁴ and that this failure heightened the risk of potential prejudice.

⁴Subsection (b) of the statute provides that "[i]n a case where the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant or the defendant's attorney if an attorney is representing the defendant, including statements of witnesses or a summary of the substance of any testimony at least forty-five (45) days before the scheduled date of trial

Appellant, however, failed to object to the admission of Ewing's testimony based on the failure to receive notice, so that argument was not preserved for appellate review. *See, e.g., Flanery, supra* (holding that we will not address arguments raised for the first time on appeal).

Further, the circuit court did not abuse its discretion in weighing the probative value against the danger of unfair prejudice of the certified copy of a judgment from 1984 showing that appellant pleaded guilty to first-degree sexual abuse and the felony information from 1983 charging appellant with the crime and which alleged that appellant "engaged in sexual contact with [S.H.], who is less than fourteen (14) years old." Despite appellant's contention that the court could not ascertain and hence could not weigh the probative value of the evidence, we conclude that the judgment and information together showed appellant's proclivity to engage in sexual contact with females less than fourteen years old. Accordingly, the circuit court did not err in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Affirmed.

GLOVER and MILLER, JJ., agree.

or at such later time as the court may allow for good cause." Ark. Code Ann. § 16-42-103(b).