NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR07-1285

	Opinion Delivered June 18, 2008
JAMES McNICHOLS APPELLANT	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. 2007-238]
V.	HONORABLE PHILLIP T. WHITEAKER, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOSEPHINE LINKER HART, Judge

A jury found appellant, James McNichols, guilty of two counts of rape. On appeal, he argues that (1) the evidence was insufficient to support the convictions; (2) the circuit court abused its discretion in permitting the State to excessively lead the child-victim; (3) the circuit court abused its discretion in admitting hearsay evidence in the form of handwritten notes; (4) the circuit court abused its discretion in denying his motion for a continuance. We affirm.

Appellant challenges the sufficiency of the evidence to support the two rape convictions. Rape is in part defined as engaging "in sexual intercourse or deviate sexual activity with another person ... [w]ho is less than fourteen (14) years of age." Ark. Code Ann. § 5-14-103(a)(3)(A) (Supp. 2007). "Deviate sexual activity" is defined in part as "any act of sexual gratification involving ... [t]he penetration, however slight, of the labia majora or anus of a person by any body member ...." Ark. Code Ann. § 5-14-101(1)(B) (Repl. 2006).

The seven-year-old victim described at trial two instances when appellant put his finger inside her "privates" and two instances when appellant put his finger inside her "bottom." Appellant asserts that the State failed to prove penetration, as the victim's testimony regarding penetration was not reliable, was not forceful enough to pass beyond mere conjecture, was inconsistent, was obtained almost exclusively through leading questions, did not give a full and detailed accounting of appellant's actions, and was not supported by physical evidence. A rape victim's testimony, however, may constitute substantial evidence to sustain a conviction of rape, even when the victim is a child. *Gatlin v. State*, 320 Ark. 120, 895 S.W.2d 526 (1995). Moreover, the rape victim's testimony need not be corroborated, nor is scientific evidence required, and the victim's testimony describing penetration is enough for a conviction. *Id*. Given this standard of review, the victim's testimony was sufficient evidence of penetration to support the convictions.

Appellant further contends that the circuit court abused its discretion in permitting the State to "excessively lead the child witness," and went "well beyond what would be necessary to elicit the truth." At trial, however, appellant did not argue that the leading was "excessive." Rather, appellant objected "to the leading nature of these questions." Thus, the argument was not raised below and consequently was not preserved for appeal. *See, e.g.*, *id*. Moreover, leading questions are allowed if the witness is a very young victim of sexual crimes and if it appears to the trial judge that such questions are necessary to elicit the testimony. *Johnson v. State*, 71 Ark. App. 58, 25 S.W.3d 445 (2000). The circuit court's decision to allow leading questions will not be overturned absent an abuse of discretion. *Id*. Here, the crime was a

sexual crime, the child's testimony was necessary to support the charges, and the court noted the age of the child and the child's "difficulty testifying due to the sensitive and emotional nature of the testimony." Thus, the circuit court did not abuse its discretion in permitting leading questions.

Appellant further argues that the circuit court abused its discretion when it admitted handwritten notes taken by a witness, Robin Atwell, who was the child-victim's babysitter. According to Atwell, she made the notes during a conversation with the victim after the victim had a bad dream, awoke, and was crying. Though Atwell did not testify about the contents of the notes, the notes were admitted into evidence over appellant's hearsay objection. On appeal, he asserts that the "introduction of these statements into evidence is an attempt to corroborate the alleged victim's testimony at trial by an improper means."

The Arkansas Supreme Court has previously concluded that the circuit court's erroneous admission of hearsay testimony reporting an out-of-court statement of the rape victim, a minor, was rendered harmless where the rape victim's own trial testimony independently evidenced her rape and the rape victim was available at trial for cross-examination by the appellant. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996). The same applies here.

Finally, appellant argues that the circuit court abused its discretion in denying appellant's pro se motion for a continuance to hire private counsel. On the day of trial, September 12, 2007, and following jury voir dire, counsel for appellant submitted to the court appellant's pro se motion for a continuance. In the typed motion, appellant alleged that he

had not met with his court-appointed counsel until the two days before trial, that he was not shown any documentation in the case file and instead had only been shown the two taped interviews of the victim, that his appointed counsel discussed only the State's plea offer, and that counsel did not "contact anyone on the friend/family/contact list that I provided him nor did he subpoena them to appear on my behalf." He further wrote that he spoke with a private attorney on the day before trial, and the attorney advised him that it would take sixty to ninety days to prepare for trial. Appellant's counsel disputed these allegations, asserting that they had met two days before trial and had reviewed what he described as the "crucial" evidence in the case, and he gave advice and did not just discuss how to "settle" the case. Further, counsel noted that he met with appellant on August 28 and appellant gave him a list of "contact people," but the majority of the persons lived in Kentucky, and he told appellant that because most of them were out of state, there might be "subpoena problems," and appellant needed to contact them and have them there. Counsel further stated that appellant told him two days before trial that two witnesses would be present at trial. Counsel also noted that appellant had spoken with "Mr. Hancock" the day before. The State objected to the motion, noting that it had "gone to great expense to bring in two witnesses from California and two other witnesses from Indiana for today's trial." The court denied the motion.

Appellant asserts on appeal that the circuit court abused its discretion in denying the motion, as he showed good cause for the continuance and was prejudiced by the denial. The refusal to grant a continuance in order for the defendant to change attorneys rests within the discretion of the trial judge, and the decision will not be overturned absent a showing of

abuse. *Edwards v. State*, 321 Ark. 610, 906 S.W.2d 310 (1995). If a change of counsel would require the postponement of trial because of inadequate time for a new attorney to properly prepare a defendant's case, the court may consider such factors as the reasons for the change, whether other counsel has already been identified, whether the defendant has acted diligently in seeking the change, and whether the denial is likely to result in any prejudice to defendant. *Id*.

Appellant, who the record shows was out on bond, asked for a continuance on the day of trial, although he could have asked for a continuance earlier. Moreover, appellant had been appointed counsel, and there was no assertion that he had the means to hire or had hired private counsel, and private counsel was not on record as being present. Furthermore, his appointed counsel essentially disputed the assertion that he was unprepared, and there was no explanation as to what these unnamed additional witnesses sought by appellant could have provided. Against this factual background, the court did not abuse its discretion in denying the motion for a continuance.

Affirmed.

HEFFLEY and BAKER, JJ., agree.