ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION I

CACR08-74

December 17, 2008

	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT
KENNETH LEMASTER APPELLANT	[CR-06-300]
V.	HONORABLE BARBARA ELMORE, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant, Kenneth Lemaster, was tried by a jury and found guilty of the offenses of rape and sexual assault in the second degree, both of which involved the same victim, appellant's five-year-old stepdaughter, S.F. At the time of trial, appellant was twenty-eight years old. He was sentenced to twenty-three years on the rape conviction and ten years on the sexual-assault conviction. The trial court ordered the sentences to run consecutively. We affirm.

Appellant raises five points of appeal, and they all involve evidentiary issues. The decision to admit or exclude evidence is within the sound discretion of the trial court, and we will not reverse a trial court's decision regarding the admission of evidence absent a manifest abuse of discretion. *Rollins v. State*, 362 Ark. 279, 208 S.W.3d 215 (2005). Nor

will we reverse absent a showing of prejudice, as prejudice is not presumed. *Hanlin v. State*, 356 Ark. 516, 157 S.W.3d 181 (2004).

1) Legal Adult Films

For his first point of appeal, appellant contends that the trial court "erred in allowing the introduction of State's exhibits 5-10, legal adult films seized from appellant's home." The evidentiary items at issue under this point of appeal are DVDs and DVD cases of pornographic videos that were retrieved from appellant's house approximately seven months after the alleged abuse. Appellant contends that these items had no relevance under Rule 401 of the Arkansas Rules of Evidence because they did not tend to make any fact that was of consequence in the case more or less probable. In addition, he argues that the prejudicial effect of the exhibits substantially outweighed any probative value that they might have had, in violation of Rule 403 of the Rules of Evidence.

The exhibits at issue are: 1) Exhibit No. 5, a DVD case for a film entitled, *500 Oral Cum Shots*; 2) Exhibit No. 6, a DVD entitled, *Guys Who Crave Big Tits*; 3) Exhibit No. 7, a DVD entitled, *Beachside Bitches*; 4) Exhibit No. 8, a DVD entitled, *Leisure Time Entertainment or Leisure Time Europe*; 5) Exhibit No. 9, a DVD case marked, *Unusual Objects*; and 6) Exhibit No. 10, a DVD entitled, *W.S.C. and Eat Cum*.

Michelle Stracener, an investigator with the Lonoke County Sheriff's Office, testified that she had reviewed the videos, and, the significance of which will be hereinafter explained, that there were no police officers (characters) in any of them. She said that in Nos. 8 and 10, there were two males and one female on a couch. She

specifically responded that Ex. No. 5 did not support or dispute the victim's statements, and that Ex. Nos. 6 and 7 had nothing to do with what the victim had said.

Appellant argues that these items had absolutely no relevance to the case because, even though the victim alleged that appellant raped her while playing pornographic videos, her depiction of what was on the video did not show up in any of the seized videos, *i.e.*, two men dressed up like police officers, licking a woman on a couch. He further argues that even if the items could be said to be relevant, their prejudicial impact outweighed any probative value that they might have had.

We find no abuse of the trial court's considerable discretion. The victim testified at trial that she saw "a movie at Kenneth's house (when a girl put her mouth on a peepee)." The exhibits were thus relevant because they supported the victim's testimony that she viewed pornography with appellant at his house, and they rebutted any contention by appellant that the victim learned about sexual behavior from pornography seen at someone else's house. Moreover, while the exhibits may well have been prejudicial, appellant has not convinced us that they were unfairly prejudicial. We therefore find no abuse of discretion in allowing these items.

2) Other Crimes, Wrongs or Acts

For his second point of appeal, appellant contends that the trial court "erred in allowing the testimony of Tiffany Ankney, Phillip Raper, Dustin Johnson, and Tina Waters as 404(b) evidence." Under this point, appellant contends that the testimony of Tiffany (his sister, who is two years younger), Phillip (his stepbrother, who is six years

younger), Dustin (another stepbrother, who is also six years younger), and Tina (appellant's stepmother and Dustin's mother) should not have been allowed pursuant to Rule 404(b) of the Arkansas Rules of Evidence because the sexual conduct about which they testified occurred when he was between the ages of ten and fifteen.

Tiffany testified that when she was approximately ten to thirteen years of age and appellant was twelve to fifteen, he attempted to perform vaginal sex with her and had her perform oral sex on him. Phillip testified that he performed oral sex on appellant two times. Dustin testified that when he was six or seven years old and appellant was twelve, that he performed oral sex on appellant one time. Tina testified that on one occasion she saw Dustin kneeling on the floor in front of appellant with appellant standing up with his hand on his zipper. She saw no sexual conduct or nudity.

Rule 404(b) of the Arkansas Rules of Evidence provides:

> Rule 404. Character evidence not admissible to prove conduct, exceptions
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> (b) Other Crimes, Wrongs, or Acts. 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, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.*

(Emphasis added.) Appellant contends that the challenged testimony does not fall within any of the listed exceptions nor does it satisfy the pedophile exception because appellant was between ten and fifteen years of age when the alleged conduct occurred. That is, he was not an adult performing such acts on a child — he was a child himself. Appellant

relies upon *Efird v. State*, 102 Ark. App. 110, ____ S.W.3d ____ (2008), in making his argument.

The State counters appellant's argument by contending that these four individuals' testimony was relevant because it showed that appellant made the victim in this case perform the same type of conduct, forcing her to fellate him, that he had required of his younger siblings and that it therefore falls within the listed exceptions of Rule 404(b), for example, "motive," showing appellant's desire for sexual gratification by oral sex from a young child, and "knowledge and opportunity," showing that appellant took advantage of opportunities when he was alone with the five-year-old victim in the instant case to force her to fellate him as he had done with his younger siblings. We agree.

Also, while *Efird* dealt primarily with the pedophile exception to Rule 404(b), to the extent that it is applicable to the listed exceptions within the rule, it is distinguishable from the facts presented here. Briefly, in *Efird*, the challenged prior conduct involved the appellant and one other—his half-brother, who was one year younger. Our court contrasted the prior conduct with the charged offense as follows:

> In the instant case, Mr. Efird's sexual acts with his half-brother that occurred seventeen years ago were too dissimilar in character and temporally removed from the crimes charged to come under any exception to Rule 404(b), including the "pedophile exception," and only went to prove appellant's bad character.[fn1] The testimony of Doug Efird [the half-brother] showed that while he and appellant were adolescents of between twelve to fourteen years of age, they engaged in genital touching and oral sex while sharing the same bedroom. Doug could not remember whether or not he participated voluntarily. By contrast, the current charges allege that Mr. Efird, as an adult and father figure with an intimate relationship with H.M., repeatedly forced anal sex on H.M. when she was four to eight years of age. H.M. testified that Mr. Efird never touched her on her "private area in the front" and never put his penis in her mouth. And unlike the prior incident with appellant's half-brother, there was evidence that appellant threatened

> H.M. and told her not to tell anyone. Given the contrasting circumstances of the charged crimes and alleged prior conduct, we cannot say that the acts between appellant and his half-brother demonstrated any proclivity or instinct relevant to determining Mr. Efird's guilt in the present case. Such evidence was erroneously admitted and should have been excluded under Rule 404(b).

Id. at ____, ____ S.W.3d at ____.

Here, the challenged prior conduct involved three younger siblings, only one of which—his sister— was substantially the same age. Appellant's half-brothers were both six years younger than he. Moreover, both the prior conduct and the charged offenses involved the younger child performing oral sex on appellant. While it was entirely plausible for the prior conduct in *Efird* to be categorized as mutual sexual exploration between two willing participants, and thus not relevant to the charged offenses, that simply cannot be said of the testimony presented in the instant case.

Moreover, because we conclude that this evidence falls within the listed exceptions to Rule 404(b), it is unnecessary to consider whether the evidence also satisfies the pedophile exception. Finally, to the extent that appellant raises a due-process argument in this appeal, we do not address it because it was not raised below.

3) Testimony Concerning the Victim's Behavior

For his third point of appeal, appellant contends that the trial court "erred in allowing Sharon Fortner and Alberta Sanders to testify about [the victim's] behaviors." He argues that the trial court abused its discretion when it allowed the victim's mother, Sharon Fortner, and her babysitter, Alberta Sanders, to testify about sexualized conduct exhibited by the victim. For example, there was testimony that the child would "strike

sexual poses in the bathtub"; that she would lie in her bed with her legs spread, "holding her privates"; that she "licked the privates" of a Barbie doll; that she pulled her pants down and "shook her bottom"; and that she stuck a stick between her legs and asked a little boy "to suck her peepee." Appellant argues that the testimony was not relevant, but that even if it were, its prejudicial impact outweighed its probative value and should have been excluded under Rule 403.

The State counters appellant's argument by contending that the testimony from the mother and babysitter explained the events surrounding the victim's disclosure of appellant's alleged conduct and provided additional support for the actions that were subsequently taken of reporting the rape to law enforcement officials. We agree. As our supreme court explained in *Gaines v. State*, 340 Ark. 99, 110, 8 S.W.3d 547, 554 (2000):

> Under the *res gestae* exception, the State is entitled to introduce evidence showing all circumstances which explain the charged act, show a motive for acting, or illustrate the accused's state of mind if other criminal offenses are brought to light. *Haynes v. State, supra*. Specifically, all of the circumstances connected with a particular crime may be shown to put the jury in possession of the entire transaction. *Haynes v. State, supra*. Where separate incidents comprise one continuing criminal episode or an overall criminal transaction, or are intermingled with the crime actually charged, the evidence is admissible. *See Ruiz & Van Denton v. State*, 265 Ark. 875, 582 S.W.2d 915 (1989); *Thomas v. State*, 273 Ark. 50, 615 S.W.2d 361 (1981); *Henderson v. State*, 284 Ark. 493, 684 S.W.2d 231 (1985). *Res gestae* testimony and evidence is presumptively admissible. *Henderson, supra*; *Lair v. State*, 283 Ark. 237, 675 S.W.2d 361 (1984); *Love v. State*, 281 Ark. 379, 664 S.W.2d 457 (1984); *Hobbs v. State*, 277 Ark. 271, 641 S.W.2d 9 (1982).

We find no abuse of discretion in the trial court's allowance of this testimony because it put the jury in possession of the entire transaction, explaining how appellant's conduct was first brought to the attention of these two women.

4) Therapist's Testimony

For his fourth point of appeal, appellant contends that the trial court "erred in allowing Denise Maples to testify." Ms. Maples was the victim's therapist. As part of appellant's discovery requests, he asked for any reports or statements of experts made in connection with the particular case and the results of physical or mental examinations and experiments or comparisons. The request was subsequently amended to make clear that the information was sought regardless of whether it was intended to be used at trial or not. No such information was provided to appellant, and when the State called Ms. Maples to testify, appellant sought to exclude her testimony pursuant to Rules 17.1 and 19.7 of the Arkansas Rules of Criminal Procedure. In particular, Rule 19.7 provides:

> Rule 19.7. Failure to comply: sanctions.
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> (a) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant thereto, *the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems proper under the circumstances.*
>
> (b) Wilful violation by counsel or a defendant of an applicable discovery rule or an order issued pursuant thereto may subject counsel or a defendant to appropriate sanctions by the court.

(Emphasis added.)

The State counters that Ms. Maples was not presented as an expert; rather, her testimony was offered solely as the victim's therapist to present the victim's statements that were made during therapy, and, furthermore, that any testimony that might be characterized as "expert" testimony was solicited by appellant, not the State. In addition, after Ms. Maples testified, the trial court ordered that the records in question be faxed to the court for review. The sanctions set forth in Rule 19.7 are not limited to the exclusion of challenged evidence. We find no abuse of the trial court's discretion in allowing Ms. Maples to testify, and we agree that the "expert" portion of her testimony was solicited by appellant. Under the doctrine of invited error, we have held that one cannot be heard to complain of that error for which he was responsible. *Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004). Finally, in making his argument, appellant offers us no explanation as to how he was unfairly prejudiced by the therapist's testimony.

5) Babysitter's Testimony

For his final point of appeal, appellant contends that the trial court "erred in allowing hearsay evidence of [the victim] through Alberta Sanders." He argues that the trial court abused its discretion in allowing the babysitter to testify about what the victim told her when the victim reported what appellant had done to her. We do not address the merits of this point because a ruling was not obtained on the objection and, therefore, it was not properly preserved for our review. It is incumbent upon an appellant to obtain a ruling from the trial court in order to preserve an argument for appeal. *Otis v. State*, 364 Ark. 151, 217 S.W.3d 839 (2005).

Affirmed.

PITTMAN, C.J., and GLADWIN, J., agree.