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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR12-201

	Opinion Delivered November 7, 2012
JOHN DAVID MASHBURN APPELLANT	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [No. 17 CR-2011-195]
V.	HONORABLE GARY COTTRELL, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

LARRY D. VAUGHT, Chief Judge

John David Mashburn appeals his conviction of three counts of rape of his daughter, HM. On appeal, he claims that the trial court erred in its denial of his motion for directed verdict, his motions in limine seeking to exclude certain evidence and testimony, and his motion for mistrial. We see no error and affirm the conviction.

According to trial testimony, on December 6, 2010, Detective Jonathan Wear of the Van Buren Police Department was assigned to investigate a rape allegation made by HM. The investigation revealed that the last incident of rape occurred approximately four or five years earlier. Wear explained that the victim finally decided to come forward out of fear that the incidents would start to occur again, after Mashburn had brushed her breast with his arm the week before her report.

Over Mashburn's objection, HM testified that her father began to digitally penetrate her when she was five years old. She could not recall the specific locations or the precise frequency of the assaults. However, she estimated that he digitally penetrated her ten to twenty times in

Van Buren (located in Crawford County) and that she moved there, from Sebastian County, in the third or fourth grade. She stated that Mashburn would "touch me in my vagina and mess on me and my boobs." She also testified that Mashburn would require that she touch him and on two occasions placed his penis on the outside of her vagina. She further testified that just prior to the assaults, he would always introduce the subject by telling her that he was going to "show her something."

The victim also testified that "I did not tell anybody about the touching because I was scared of my dad . . . . I did not tell my mother because I did not think she would believe me. I had occasion to be around or in contact with police, and I didn't report that he did this to me because I grew up watching him beat my mom and fighting with cops and I was . . . terrified." Mashburn immediately sought a mistrial based on HM's incriminating remarks. The court noted that the victim did not state that Mashburn had "committed" any crimes, and the State argued that the victim's statement had to do with her mental state and to explain why she had taken so long to report. The court denied the motion for mistrial, finding that her answer was appropriate, but also ruling that she could "not go any further" with that line of thought.

Mashburn also unsuccessfully objected to the State presenting testimony of Mashburn's stepdaughter (and HM's half-sister), Tammy Noble. At trial, she testified that, although her grandmother was her custodian, she occasionally stayed overnight with her mother and her stepfather. She recalled that the first incident of abuse occurred when she was eight, and Mashburn played with her vagina using his fingers. On three other occasions, while at her mom and Mashburn's apartment, she testified that he undid her pants and her belt and "play[ed]

around" with her vagina. She noted that there was never penetration and that when she turned fourteen, she stopped visiting her mom and stepfather.

At the close of evidence, Mashburn renewed his objections. The trial court overruled the objections and denied his motion for directed verdict. The jury found Mashburn guilty of three counts of rape and sentenced him to twenty-eight years' imprisonment on each count, to be served concurrently. The trial court imposed a sentence of 336 months on count 1; a sentence of 96 months and 240 months suspended on count 2; and 336 months suspended on count 3. The court ordered that counts 1 and 2 run consecutive and count 3 run concurrent. It is from this conviction and sentence that Mashburn now appeals.

For his first point on appeal, Mashburn claims that the trial court erred in its denial of his directed-verdict motion based on the State's failure to show digital penetration of HM's vagina between 2002 and 2006 as charged in the information. Mashburn concedes that although there was testimony showing which grade the victim was in at the time of the assault. However, he argues that there was no testimony specifying the victim's age or the year that she was in a particular grade.

In *Terry v. State*, 366 Ark. 441, 442, 236 S.W.3d 495, 496–97 (2006) (citations omitted), our supreme court set forth the standard of review for challenges to the sufficiency of the evidence:

> We treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. When reviewing a challenge to the sufficiency of the evidence, this court assesses the evidence in a light most favorable to the State and considers only the evidence that supports the verdict. We will affirm a judgment of conviction if substantial evidence exists to support it. Substantial evidence is evidence which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture.

Coleman v. State, 2010 Ark. App. 497, at 4. The uncorroborated testimony of a rape victim, including a child, standing alone can constitute sufficient evidence to support a conviction, and any evaluation as to the credibility of the witness is a matter for the finder of fact. *Id.*

In Arkansas, a person commits rape if he engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. Ark. Code Ann. § 5-14-103(a)(3)(A) (Supp. 2009). "Deviate sexual activity" is defined as "any act of sexual gratification involving the penetration, however slight, of the . . . mouth of a person by the penis of another person; or the penetration, however slight, of the labia majora . . . of a person by any body member . . . manipulated by another person." Ark. Code Ann. § 5-14-101(1)(B) (Supp. 2009).

HM testified at trial that she was digitally penetrated by Mashburn ten to twenty times when she was living in Van Buren, Arkansas, which is located in Crawford County. She also stated that Mashburn would touch the outside of her vagina with his penis. Although she was not able to give her precise age at the time of each occurrence, the victim specifically noted that the abuse started when she was five and that the incidents happened ten to twenty times while she lived in Crawford County while she was in the third or fourth grade. Furthermore, if a victim's testimony contains inconsistencies, this is a matter of credibility that the jury must resolve. *Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997). The testimony of HM relating to her grade level and place of residency at the time of the assaults is sufficient proof for a jury to determine when certain assaults occurred in Crawford County, and we affirm on this point.

Next, Mashburn contends that the trial court erred in denying his motion to exclude the victim's testimony regarding acts committed against her by Mashburn outside Crawford County, and the testimony of a second alleged victim under Arkansas Rule of Evidence 404(b)(2012).

The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *Banks v. State*, 2009 Ark. 483, 347 S.W.3d 31. Rule 404(b) states 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." Such evidence is permissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ark. R. Evid. 404(b).

Arkansas courts recognize a "pedophile exception" to this rule, whereby evidence of similar acts with the same or other children is allowed to show a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. *Flanery v. State*, 362 Ark. 311, 208 S.W.3d 187 (2005). For the pedophile exception to apply, we require that there be a sufficient degree of similarity between the evidence to be introduced and the sexual conduct of the defendant. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006). There must also be an "intimate relationship" between the perpetrator and the victim of the prior act. *Flanery*, 362 Ark. at 312, 208 S.W.3d at 190.

However, similarity of the conduct and the relationship of the accused to the victims are not the only elements to be satisfied before the pedophile exception is applied. Evidence admitted pursuant to Rule 404(b) must not be too separated in time, making the evidence unduly remote. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006). The circuit court is given sound discretion over the matter of remoteness and will be overturned only when it is clear that the questioned evidence has no connection with any issue in the present case. *Morrison v. State*, 2011 Ark. App. 290, at 3–5.

We have not created any bright-line standards as to length of time in analyzing Rule 404(b) evidence for admissibility. Rather, the remoteness-in-time element is but one of the factors considered in the mix of determining similarities between the evidence to be introduced and the defendant's sexual conduct. Indeed, in certain circumstances, we have allowed evidence from many years past to be introduced for these purposes. *Butler v. State*, 2010 Ark. 259, at 3 (evidence that was a minimum of twenty-one years old held admissible); *Allen v. State*, 374 Ark. 309, 317–18, 287 S.W.3d 579, 585–86 (2008) (twelve- to seventeen-year-old evidence held admissible); *Tull v. State*, 82 Ark. App. 159, 163, 119 S.W.3d 523, 525 (2003) (thirty-year-old evidence held admissible).

Here, the testimony of HM relating to the abuse Mashburn inflicted upon her, outside of the county where Mashburn was charged, fits squarely within the prescribed pedophile exception and was properly admitted at trial. It involved the same victim, the same act (digital penetration), and the same perpetrator (her father). The acts were also closely related in time, as all abuse occurred in a continuous six-year period. As such, we see no error in allowing this testimony and affirm the trial court's denial of Mashburn's motion in limine.

On this point, Mashburn also argues that the trial court erred by failing to subject the Rule 404(b) evidence to the required balancing test under Arkansas Rule of Evidence 403 (2012). Although 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. Ark. R. Evid. 403. Mashburn argues that the probative value of the victim's testimony relating to rape in another county is substantially outweighed by the prejudice to him. Although he

complains on appeal that the trial court erred by failing to weigh the evidence under Rule 403, it is his burden to obtain a clear ruling on an issue from the trial court. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004). Because appellant failed to obtain a ruling from the trial court regarding whether the probative value of the evidence was outweighed by the prejudice to him, his argument is not preserved for our review on appeal, and we will not consider the merits of this point. *Wallace v. State*, 2009 Ark. 90, 302 S.W.3d 580.

Mashburn makes a second evidentiary claim that the testimony of his older stepdaughter should not have been allowed under the pedophile exception because they had a remote as opposed to an intimate relationship. However, this claim is a nonstarter. Contrary to his claim otherwise, Mashburn was most definitely in an "intimate relationship" with Noble—he was her stepfather—and she was in his care each time he allegedly raped her. Our supreme court has held that even babysitting a victim satisfies the "intimate relationship" criterion. *Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994). Here, Noble was his stepdaughter, spending the night in his home, which is certainly more intimate than a babysitting scenario. As such, it cannot be said that the trial court abused its discretion in allowing this testimony under the pedophile exception.

The final point on appeal is Mashburn's contention that the trial court erred in its refusal to grant a mistrial. Mashburn claims that the victim's statement relating to her failure to report until much later because she was scared to do so, based on the fact that she grew up witnessing Mashburn beating her mother and fighting with police, was inadmissible character evidence.

Mistrial is an extreme and drastic remedy, which will be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing with the trial or when

fundamental fairness of the trial has been manifestly affected. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003). The circuit court has wide discretion in granting or denying a motion for mistrial, and, absent an abuse of that discretion, the circuit court's decision will not be disturbed on appeal. *Elser v. State*, 353 Ark. 143, 114 S.W.3d 168 (2003). Among the factors to consider on appeal in determining whether a trial court abused its discretion are whether the prosecutor deliberately induced a prejudicial response and whether an admonition to the jury could have cured any resulting prejudice. *Jones v. State*, 349 Ark. 331, 78 S.W.3d 104 (2002).

In *Jones*, the supreme court further stated:

> While there is "always some prejudice that results from the inadvertent mention of a prior conviction," *see Strawhacker v. State*, 304 Ark. 726, 804 S.W.2d 720 (1991), this court has upheld denials of mistrials where, by chance remarks, it was brought out that the defendant had prior arrests, and even prior convictions, where the comment was inadvertent. *Cobbs v. State*, 292 Ark. 188, 728 S.W.2d 957 (1987); *see also Novak v. State*, 287 Ark. 271, 698 S.W.2d 499 (1985) (where juror commented during voir dire that he knew the defendant because he had arrested him, the trial court's denial of a mistrial did not require reversal because the evidence of guilt was overwhelming).

349 Ark. at 338, 78 S.W.3d at 109.

Here, the victim's statement related to why she was hesitant in reporting the crime, and it was not a specific accusation of a prior conviction. It was nothing more than an inadvertent remark. The trial court immediately stopped the line of questioning to prevent it from continuing to the point of prejudicial error. Further, if there was any error, it could have been cured by an admonishment. And, we have stated that it is a defendant's duty to request a curative instruction. *Hall v. State*, 314 Ark. 402, 862 S.W.2d 268 (1993). Here, Mashburn made no such

request, and therefore it cannot be said that the trial court abused its discretion in denying the motion for mistrial.

Affirmed.

WYNNE and BROWN, JJ., agree.

Lisa-Marie Norris, for appellant.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellee.