

Dennis Ray ALLEN *v.* STATE of Arkansas

CR 08-47

Supreme Court of Arkansas

Opinion delivered September 25, 2008

1. EVIDENCE — RAPE-SHIELD STATUTE — APPELLANT'S RAPE-SHIELD ARGUMENT WAS NOT PRESERVED BECAUSE APPELLANT FAILED TO FOLLOW PROPER PROCEDURE IN REQUESTING EXCEPTION. — Section 16-42-101(c) is clear: a defendant must file a written motion, and written record must be made of the in camera hearing on the motion when the defendant seeks to establish relevancy and admissibility of evidence otherwise excluded by the rape-shield statute; the admissibility of a victim's prior sexual conduct as an exception under the rape-shield statute must therefore be determined in accordance with the procedures set forth in that section; the record did not contain a written motion requesting an exception for relevant evidence, nor did it contain a written record of an in camera hearing; because appellant failed to follow the required procedure, the circuit court's decision to exclude testimony regarding an alleged sexual relationship between one of the victims and his mother was affirmed.
2. EVIDENCE — RULE 404(b) PEDOPHILE EXCEPTION — NO REQUIREMENT THAT PRIOR ACT BE CHARGED OR SUBSTANTIATED. — Under the pedophile exception to Rule 404(b), evidence of a defendant's similar acts with the same or other children is admissible when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship; application of this exception does not, however, require that the prior act be charged or substantiated; accordingly, the trial court did not err in admitting evidence that a witness was abused by appellant even though the alleged prior abuse was never substantiated and appellant was never charged for that conduct.
3. EVIDENCE — RULE 404(b) PEDOPHILE EXCEPTION — NO REQUIREMENT THAT VICTIM OF PRIOR ACT BE A MEMBER OF ABUSER'S FAMILY AS LONG AS THERE IS SUFFICIENT EVIDENCE OF AN INTIMATE RELATIONSHIP. — In order for the pedophile exception to Rule 404(b) to apply, there must be a sufficient degree of similarity between the evidence to be introduced and the sexual conduct of the defendant; there must also be an intimate relationship between the perpetrator

and the victim of the prior act; here, the alleged prior bad acts and the conduct underlying the present charges were sufficiently similar for application of the pedophile exception, even though the victim of the prior bad acts was not a member of appellant's family or household at the time of the alleged abuse; the State successfully established the existence of an intimate relationship between appellant and the victim of the prior acts through testimony that the victim viewed appellant as a role model, that they referred to each other as father and son, that appellant purchased things for the victim, that appellant took the victim out to eat, that appellant gave the victim special attention, and that appellant told another person that the victim was his son.

4. EVIDENCE — RULE 404(b) PEDOPHILE EXCEPTION — TRIAL COURT'S DECISION TO ADMIT EVIDENCE OF PRIOR ACTS THAT WERE REMOTE IN TIME WAS NOT ERROR WHERE TESTIMONY REGARDING PRIOR ACTS HELPED TO DEMONSTRATE APPELLANT'S INTENT AS IT RELATED TO THE PRESENT CHARGES. — The supreme court has allowed testimony regarding alleged prior sexual conduct even when a significant time gap exists; remoteness determinations have generally been upheld when the similarities between the alleged prior act and the charged offense tend to show an intent to commit the charged offense; here, the victim of the prior acts was between the ages of thirteen and eighteen when the abuse allegedly occurred, and at the time of his testimony in the immediate case, he was thirty; because the testimony of the victim of the prior acts helped to demonstrate appellant's intent as it related to the present charges, it was not error for the trial court to admit this evidence.
5. EVIDENCE — RULE 404(b) PEDOPHILE EXCEPTION — FACT THAT VICTIM OF PRIOR BAD ACTS WAS HIMSELF AN ADMITTED PEDOPHILE WAS AN ISSUE OF WITNESS CREDIBILITY FOR THE JURY TO RESOLVE. — It is well settled that credibility of witnesses is an issue for the jury and not the court; the fact that the victim of prior sexual abuse by appellant was himself an admitted pedophile was an issue of witness credibility for the jury, which was free to believe all or part of the victim's testimony.
6. EVIDENCE — RULE 403 — EVIDENCE OF PRIOR SEXUAL ABUSE WAS PERMISSIBLE BECAUSE SIMILARITIES BETWEEN PRIOR ACTS AND THE CONDUCT CHARGED WERE PROBATIVE OF ISSUE OF THE ACCUSED'S DEVIATE SEXUAL IMPULSES. — In cases involving evidence subject to

the pedophile exception, the appellate court looks to similarities between the alleged prior conduct and the conduct charged to determine whether they make the evidence probative on the issue of the accused's motive, intent, preparation, plan, and scheme; more specifically, the evidence is permissible when the similarities make it probative on the issue of the accused's deviate sexual impulses; appellant was alleged to have fondled the victim of the prior sexual abuse as well as the victims in the instant case, and to have forced them all to perform oral sex on him; in addition, all of the victims were, to a certain degree, under appellant's care at the time of the abuse; these similarities are significant and probative on the issue of appellant's sexual impulses; accordingly, it could not be said that the probative value of the evidence at issue was substantially outweighed by the danger of unfair prejudice.

7. APPEAL & ERROR — EVIDENCE OF PRIOR SEXUAL ABUSE — ARGUMENT NOT PRESERVED FOR APPEAL. — It is a well-settled principle of appellate law that arguments not raised at trial will not be addressed for the first time on appeal; appellant never objected to witness testimony regarding his subsequent sexual abuse of a child and his belief that appellant was to blame; accordingly, the supreme court was precluded from addressing this argument on appeal.

Appeal from Lonoke Circuit Court; *Lance Lamar Hanshaw*, Judge; affirmed.

Teresa M. Smith, Attorney at Law, PLLC, by: *Teresa M. Smith*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Farhan Khan, Ass't Att'y Gen.*, for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant Dennis Ray Allen was convicted by a Lonoke County jury of four counts of rape and four counts of second-degree sexual assault in connection with the alleged abuse of four of his minor step-grandchildren. He was sentenced to life imprisonment in the Arkansas Department of Correction on each of the rape convictions and to twenty years' imprisonment on each of the sexual-assault convictions, totaling four life sentences plus eighty years. The circuit court accepted the jury's recommendation that the sentences be served consecutively. Allen now appeals, alleging two points of error: 1) the