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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR10-383

	Opinion Delivered May 11, 2011
JEFFREY GARCIA APPELLANT	APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. CR-09-282-2]
V.	HONORABLE GARY ARNOLD, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

LARRY D. VAUGHT, Chief Judge

On December 2, 2009, appellant Jeffrey Garcia was convicted by a Saline County jury of two counts of rape and one count of sexual assault in the second degree. He was sentenced to 100 years' imprisonment in the Arkansas Department of Correction and fined $15,000. On appeal he argues that on four separate occasions the trial court abused its discretion. We disagree and affirm.

Garcia, a former police officer, was in a long-term, cohabitation relationship with DCS, the mother of three minor children (girl 14, boy 13, girl 12). The youngest child reported to a school counselor numerous incidents of sexual abuse at the hands of Garcia. Two of the children reported being anally penetrated on multiple occasions, and the oldest child reported that she was asked to play "horsey" with Garcia without her underwear on and that he touched her vagina with his tongue. The children reported the rapes to their mother on at least two

separate occasions. She was eventually arrested for failure to report or prevent abuse to minors. Garcia was arrested and convicted of rape and sexual assault. This appeal followed.

In his first point on appeal, Garcia claims that the trial court abused its discretion by allowing testimony regarding pornography found on a computer that had been confiscated from his home. The trial court's ruling will not be reversed absent a showing that it abused its discretion and that prejudice resulted from the abuse. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003). The threshold question for reversal is whether the trial court acted improvidently, thoughtlessly, or without due consideration. *Johnson v. State*, 2010 Ark. App. 153, 375 S.W.3d 12. Furthermore, evidence that is merely cumulative of other evidence admitted without objection is not prejudicial. *Harris v. State*, 2010 Ark. App. 247.

In this case, we note that the trial court actually sustained Garcia's evidentiary objection relating to the testimony of digital evidence expert, Jeff Taylor. The court ruled that the titles of the pornographic movies found on Garcia's computer could not be placed into evidence because they were too prejudicial. The court also found that Taylor could not prove that Garcia was the party responsible for placing them on the computer. Although Taylor did not testify that the material found on the computer was pornographic in nature, the male victim testified that Garcia had shown him "dirty pictures" on the computer. Moreover, Garcia admitted in his interview to watching a pornographic film with the youngest victim and that he had pornography that featured anal sex on his computer. Garcia did not object to either the boy's testimony or the interview being played for the jury. Therefore, to the extent—if any—that Garcia did not get the relief he requested, he suffered no prejudice from Taylor's testimony as it was merely cumulative

to evidence that had been introduced without objection earlier in the trial. As such, Garcia can show no error or prejudice based on Taylor's testimony , and we see no abuse of discretion and affirm on this point.

Garcia's next argument centers on the trial court's decision to allow testimony regarding certain contraband found during the search of Garcia's home. Police officer Tommy Leath testified that during the search of Garcia's home the officers discovered marijuana and various items taken from the evidence locker that Garcia was in charge of while employed as a police officer in Alexander, Arkansas. First, Garcia claims that the items should have been excluded under Arkansas Rules of Evidence 401, 403, and 404(b). However, a party cannot change the grounds for an objection or motion on appeal, and is bound by the scope and nature of the arguments made at trial. *Johnson*, 2010 Ark. App. 153, 375 S.W.3d 12. Here, Garcia did not make these arguments below, and because he failed to present them to the trial court they are not preserved for appellate review. *Id.*

Garcia's argument below concerned an exchange between the prosecutor and a fellow officer who served with Garcia on the Alexander police force, Tommy Leath. On cross-examination Leath was asked "Do you consider [Garcia] a decent policeman?" Leath answered, "Yes." Prior to the State's redirect of Leath, at a bench conference, the State let the court know that it intended to ask the witness if he had knowledge of the contraband found during the search to factor into his assessment that Garcia was a "decent" officer. Garcia's counsel responded that he did not ask if Garcia was perfect, just merely "decent." The court allowed the question finding that Leath's character testimony "opened the door" for the State to inquire of

his knowledge, or lack of knowledge, regarding the contraband, and such inquiries and testimony provided a means by which the jury could determine what weight and credibility it should give Leath's opinion that Garcia was a "decent" police officer. The trial court did not abuse its discretion because evidence of an accused's character offered by the State is admissible to rebut character evidence offered by an accused. *Rawls v. State*, 327 Ark. 34, 937 S.W.2d 637 (1997).

For his third point on appeal, Garcia claims that the trial court abused its discretion by allowing the State to "mischaracterize" evidence during its rebuttal closing argument.[1] At the outset we note that the trial court has broad discretion in controlling trial counsel during closing arguments, and a reversal will only follow a finding of a manifest abuse of that discretion. *Price v. State*, 365 Ark. 25, 37 S.W.3d 817 (2006). In fact, a reversal of a conviction due to remarks made by counsel during closing arguments is rare and requires that counsel make an appeal to the jurors' passions and emotions. *Id.*, 37 S.W.3d 817 (2006).

Here, the evidence shows that the jury was allowed (without objection) to view a video of Garcia's interview with Benton police in which he denied that he raped or sexually assaulted any of the victims. Kory Bauer (the police officer who conducted the interview) testified that he "considered [Garcia's] lack of emotion very unusual" when describing his demeanor during the interview. The State's attorney later cross-examined the officer (without objection) about

[1] To the extent that Garcia attempts to argue that his Fifth Amendment right not to testify was implicated or triggered by the prosecutor's comments about Garcia's lack of emotion during the interview, we do not consider the claim because it was not made below. And our case law states that even constitutional issues may not be raised for the first time on appeal. *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002).

Garcia's lack of emotion, eliciting an impression that Garcia was nonchalant in his denial of the crimes. Therefore, because the comment was supported by the evidence in the record, the trial court did not abuse its discretion by allowing the prosecutor to comment on Garcia's demeanor during the interview. Furthermore, even if it were an abuse of discretion, any error was corrected by the trial court's instruction to the jury (at the opening and again at the end of trial) noting that any argument having no basis in the evidence was to be disregarded. Again, we see no error and affirm on this point as well.

Garcia's final argument alleges that because the wife of Prosecuting Attorney Ken Casady represented the victims in the dependency-neglect proceedings, Casady and his entire office should have been disqualified from prosecuting the case due to a conflict of interest. Although disqualification of an attorney may be used to protect the integrity of the attorney-client relationship, it is viewed as a drastic measure to be imposed only where clearly required by the circumstances. *Whitmer v. Sullivent*, 373 Ark. 327, 284 S.W.3d 6 (2008). The trial court's decision on whether to disqualify is viewed under an abuse-of-discretion standard and will not be reversed absent a showing of prejudice. *Herrod v. State*, 371 Ark. 7, 262 S.W.3d 609 (2007). In *Whitmer*, our supreme court held that there was no conflict of interest where a prosecutor (acting on behalf of the State) brought charges against the husband of a custodial parent while he represented the noncustodial parent in civil proceedings. Here, the conflict is even further removed. The guardian ad litem in the DHS proceeding was appointed by the court to represent the best interests of the children. These interests, insofar as the criminal proceedings are concerned, are not adverse to the best interests of the State of Arkansas. As such, we see no

concurrent conflict of interest with Casady's (who did not try the case) office prosecuting the case because any personal conflict Casady may have had as a result of a husband-wife relationship was not imputed to the entire prosecutor's office. Ark. R. Prof'l Conduct 1.10(a). Accordingly, the decision of the trial court is affirmed.

Affirmed.

GLADWIN and HOOFMAN, JJ., agree.