Cite as 2011 Ark. App. 749

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR11-295

	Opinion Delivered DECEMBER 7, 2011
BARRY C. FREDRICKSON, JR. APPELLANT	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. CR-2009-483-4]
V.	HONORABLE MARCIA R. HEARNSBERGER, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOSEPHINE LINKER HART, Judge

A jury found Barry C. Fredrickson, Jr., guilty of rape for engaging in multiple acts of sexual deviancy with his teenage stepdaughter beginning when she was fourteen and ending when she was seventeen. Ark. Code Ann. § 5-14-103(a) (Supp. 2011). During a bench conference at the sentencing hearing, the circuit court ruled that Fredrickson could testify about any medical diagnosis and treatment he had received, but he was not an expert witness and could not testify about how that disease or disorder might affect his behavior. Fredrickson's counsel proffered that Fredrickson would have testified that "but for" his disorder, he would have "acted differently." Following jury deliberations, Fredrickson was sentenced to twenty-five years' imprisonment. On appeal, he contends that the circuit court abused its discretion by not allowing him to testify as proffered. We affirm.

Fredrickson then testified that he retired from the U.S. Navy in June 1999 because he

was "going to be medically retired for bipolar disorder," and while he was in the service, a psychiatrist diagnosed him as ADD/ADHD, bipolar with manic-depressive episodes, borderline personality traits, and manic-depressive disorder. He further testified that he was neither seeing a doctor nor receiving medication at the time these incidents with his stepdaughter occurred. On cross, he stated that "things just went downhill" after he was unable to see a physician and get his medication.

During closing argument, Fredrickson's counsel noted that Fredrickson received early retirement from the navy for bipolar disorder, ADHD, and other mental disorders, and further, he had not been receiving medication. Counsel observed, "I think you can draw the analogy that were he on his medication, were he seeing a doctor, we wouldn't be here today." Following an objection by the State, counsel concluded, "I submit to you that if he were on his medications during this period of time when these incidents took place, this wouldn't have happened. If he had been under a doctor's care it wouldn't have happened."

On appeal, Fredrickson asserts that the circuit court should not have excluded the proffered testimony. We review the circuit court's decision for an abuse of discretion. *Crawford v. State*, 362 Ark. 301, 208 S.W.3d 146 (2005). Evidence relevant at sentencing may include evidence of mitigating circumstances. Ark. Code Ann. § 16-97-103(6) (Repl. 2006). Further, the "criteria for departure from the sentencing standards may serve as examples of this type of evidence." *Id.* That criteria includes, "[w]hile falling short of a defense, the offender lacked substantial capacity for judgment because of physical or mental impairment." *See*

Crawford, *supra* (citing Ark. Code Ann. § 16-90-804(d)(1)(B)); 2005 Ark. Acts 186, § 1.[1] Further, a lay witness may render an opinion about the mental state of a defendant. *Graham v. State*, 290 Ark. 107, 717 S.W.2d 203 (1986).

The circuit court allowed Fredrickson to testify about the diagnosis he received while in the navy, his discharge from the navy as it related to his diagnosis, his lack of treatment and medication during the time these incidents occurred, and his belief that "things just went downhill" after he was unable to see his physician and obtain his medication. Further, his counsel was allowed to argue to the jury that if Fredrickson had been on his medication and seeing a doctor, the incidents would not have occurred. Admittedly, Fredrickson was not able to testify that "but for" his mental disorders, he would have "acted differently," but it is not apparent from this limited, conclusory proffer what more he had to offer to the jury that had not already been presented.

Thus, through his own testimony and his counsel's argument to the jury, Fredrickson was able to put before the jury his theory for mitigation based on his claim that he lacked substantial capacity for judgment because of his mental impairment. Moreover, Fredrickson's sentence of twenty-five years was well within the ten- to forty- or life sentencing range. Ark. Code Ann. § 5-14-103(c)(1); Ark. Code Ann. § 5-4-401(a)(1) (Repl. 2006). We will not

[1]Though there was no repeal, this language inexplicably does not appear in the latest official edition of the statute. Ark. Code Ann. § 16-90-804(c)(1)(B) (Repl. 2006). While Fredrickson also argues that the evidence was admissible as relevant character evidence, Ark. Code Ann. § 16-97-103(5), the issue he raises on appeal more closely fits the subsection on mitigating evidence, Ark. Code Ann. § 16-97-103(6), as it speaks directly to his claim that he lacked substantial capacity for judgment because of his mental impairment, Ark. Code Ann. § 16-90-804(c)(1)(B).

reverse in the absence of prejudice. *Wilson v. State*, 100 Ark. App. 14, 262 S.W.3d 628 (2007). Accordingly, we hold that Fredrickson was not prejudiced by the exclusion of the proffered testimony.

Affirmed.

GLOVER and MARTIN, JJ., agree.

Montgomery, Adams & Wyatt, PLC, by: *Dale E. Adams, Esq.*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.