

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-1144

JOSEPH ANTHONY SCAMARDO, JR.
APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 25, 2012

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DISTRICT
[No. CR-08-1443]

HONORABLE STEPHEN TABOR,
JUDGE

REBRIEFING ORDERED

LARRY D. VAUGHT, Chief Judge

Appellant Joseph Scamardo, Jr., was found guilty by a Sebastian County Circuit Court jury of second-degree sexual assault. On appeal, he raises two evidentiary issues, arguing that the trial court abused its discretion in (1) excluding extrinsic evidence of a prior inconsistent statement by the alleged victim and (2) permitting the alleged victim's father to testify about what the victim told him about the incident. We cannot reach the merits of Scamardo's appeal because of deficiencies in the abstract.

This case is before us for a second time. In his initial appeal, *Scamardo v. State*, 2011 Ark. App. 578, we returned the case for rebriefing based on the fact that Scamardo's abstract was only eight pages despite the trial record being 372 pages. Although fourteen witnesses testified at trial, the initial abstract included only three pages of witness testimony, and those three pages did not include any of the victim's allegations of sexual assault. The remaining five pages of the



abstract consisted of argument to the trial court concerning the two evidentiary objections made by Scamardo's counsel.

We held that because there was "scant testimony abstracted before or after the objections, the objections [were] without context and essentially meaningless for purposes of appellate review." Additionally, we held that Scamardo's addendum was deficient because he failed to include the jury-verdict form as required by our rules, and he failed to file a motion for waiver of the addendum obligation.

In his second appeal, he has corrected most of the deficiencies that plagued his first attempt. In fact, because he does not make a sufficiency argument, the brief before us would be sufficient in most cases. However, both of the arguments that he makes on appeal are evidentiary arguments, and both arguments are compelling. Should Scamardo prevail on either (or both) of the arguments he outlines in his appeal, the case is not resolved there. The evidentiary error (or errors) would be subject to a harmless-error analysis. It is commonplace that evidentiary error is harmless if the same or similar evidence is otherwise introduced. *Elliott v. State*, 2010 Ark. App. 809, at 8. In order to conduct such a review, we have to understand the totality of the evidence presented below. However, the abstract before us still does not contain all relevant evidence introduced at trial. Especially essential to our review is a complete abstract of the testimony of each witness who testified at trial.

As such, we hereby order rebriefing and direct Scamardo to file a substituted brief that complies with our rules. Ark. Sup. Ct. R. 4-2(b)(3) (2011) (allowing parties who file a deficient brief an opportunity to file a conforming brief). The substituted brief, abstract, and addendum



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shall be due fifteen days from the date of this order. After service of the substituted brief, abstract, and addendum, the State shall have an opportunity to revise or supplement its brief in the time prescribed by the court, or it may choose to rely on the brief previously filed in this appeal. While we have noted the above-mentioned deficiencies, we encourage Scamardo's counsel to review Rule 4-2 in its entirety as it relates to the abstract and addendum, as well as the entire record, to ensure that no additional deficiencies are present.

Rebriefing ordered.

ABRAMSON and HOOFFMAN, JJ., agree.