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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-1144

JOSEPH SCAMARDO JR. APPELLANT	Opinion Delivered June 20, 2012
V.	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [No. CR-08-1443]
STATE OF ARKANSAS APPELLEE	HONORABLE STEPHEN TABOR, JUDGE
	REVERSED and REMANDED

LARRY D. VAUGHT, Chief Judge

Joseph Scamardo Jr. appeals from his conviction at a jury trial of second-degree sexual assault, for which he was sentenced to 144 months' imprisonment in the Arkansas Department of Correction. He does not challenge the sufficiency of the evidence to support his conviction. Instead, 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 agree, and reverse and remand for a new trial.

According to the evidence adduced at trial, over the Labor Day weekend in 2008, the victim was sexually assaulted by her now-stepfather, appellant "Joey" Scamardo. At trial, the victim testified that she, along with her two brothers, stepsister, mother, and Scamardo, spent the night at her "Nannie and Poppy['s]" (Scamardo's parents) home, in Fort Smith, Arkansas.

She testified that she and her stepsister slept in "a little blow up bed" and her brothers slept in another bed in the Scamardos' basement. She further stated,

> That night Joey left his room and touched me on my private area. I was laying [sic] on my bed. It was where my legs were when he touched me. I had the nightgown on underneath my panties. Joey pulled my panties down and touched me on my privates. He touched me with his finger for a minute or five seconds. He didn't say anything to me. I didn't say anything to him because I didn't want him to know I was awake. I was trying to act like I was asleep. His finger felt kind of wet and uncomfortable. The kitchen light was on when this happened. There was just an open hole in the wall to this room where we were sleeping. After he touched me, I heard mom call and Joey went in the room and that's all.

The victim's biological father testified that his daughter told him, about a month after the incident, that Scamardo had touched her. He stated that at the time of the conversation, he was taking his daughter to counseling as ordered as part of his divorce. His former wife, Elaina, was living with Scamardo at the time of the alleged crime, and she later married him. The father further testified that, based on what he learned from the conversation with his daughter, he told the counselor about the touching when they arrived at the appointment, and he also called the police. In response to his call to the police, the alleged victim was taken to the Children's Safety Center in Springdale the following day, where she was interviewed and underwent a medical exam.

The forensic-nurse examiner, Sue Stockton, who examined the alleged victim, testified that her findings from the exam of the alleged victim were normal, and she admitted on cross-examination that the exam could have been consistent with no abuse.

For his first point on appeal, Scamardo argues that the trial court abused its discretion in its refusal to allow the introduction of extrinsic evidence through the testimony of Angelina Wales (the alleged victim's aunt). Specifically, he attempted to introduce a statement that the alleged victim made to her mother, in the presence of Wales, where she admitted that "they are making me lie." The trial court found the aunt's statement to be inadmissable hearsay.

As he did below, Scamardo argues on appeal that the statement he sought to introduce was not being offered for the truth of the matter asserted, but to impeach the alleged victim's credibility. All agree that the alleged victim, the first witness to testify at trial, stated unequivocally under cross-examination that she had not made the statement relating to her compromised veracity. Arkansas Rule of Evidence 613(b) provides in pertinent part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon[.]

Under this rule, three requirements must be met before extrinsic evidence of a prior inconsistent statement will be admissible. First, the witness must be given the opportunity to explain or deny the inconsistent statement. Second, the opposing party must be given the opportunity to explain or deny the witness's inconsistent statement. Third, the opposing party must be given the opportunity to interrogate the witness about the inconsistent statement. Additionally, the supreme court has held that when the witness admits to having made the prior inconsistent statement, Rule 613(b) does not allow introduction of extrinsic evidence

of the prior statement to impeach the witness's credibility. *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999); *Ford v. State*, 296 Ark. 8, 753 S.W.2d 258 (1988). In other words, once a witness acknowledges having made a prior inconsistent statement, the witness's credibility has successfully been impeached. "An admitted liar need not be proved to be one." *Id.* at 18, 753 S.W.2d at 263 (quoting *Gross v. State*, 8 Ark. App. 241, 250, 650 S.W.2d 603, 608 (1983)).

Where, on the other hand, the witness is asked about the prior statement and either denies making it or fails to remember making it, extrinsic evidence of the prior statement *is* admissible. *See* John W. Strong, *McCormick on Evidence* § 34, at 126 (5th ed. 1999); *see also Kennedy v. State*, 344 Ark. 433, 444–45, 42 S.W.3d 407, 414–15 (2001). Our supreme court has opined that impeachment of a witness by introducing extrinsic evidence of a prior inconsistent statement through the testimony of a second witness or through the admission of documentary evidence (regardless of whether the statement was given under oath) must be allowed, otherwise Rule 613(b) would have no meaning. *Id.* at 447–48, 42 S.W.3d at 416.

Here, the alleged victim's prior inconsistent statement made to Angelina Wales should have been allowed into evidence, despite the fact that it was extrinsic. We reject the State's position that it was collateral, and instead view the proffered evidence as precisely that contemplated by Rule 613(b). Furthermore, we cannot say that the evidence was so overwhelming and this error so slight as to constitute harmless error. The evidence supporting Scamardo's conviction consisted only of the victim's testimony at trial and her statements to

third parties, and the outcome of the trial necessarily turned upon the victim's credibility. Thus, we are compelled to reverse and remand for new trial.

Scamardo also argues that the trial court erred in allowing the alleged victim's father to testify as to what she had told him about the incident approximately one month after it had allegedly occurred. Because on retrial the asserted error is likely to recur, we are compelled to consider the issue. As the State correctly notes, statements by sex-offense victims made to third parties *shortly* after the offense are admissible. *Bing v. State*, 23 Ark. App. 19, 22–23, 740 S.W.2d 156, 157–58 (1987) (emphasis added). Indeed, third parties may testify as to the victim's complaint of assault, which proves that the victim did not remain silent (details of the offense are not admissible), and the testimony by third parties may involve an "excited utterance" by the victim. *Id.*, 740 S.W.2d at 157–58.

However, unlike the factual situation in the case relied on by the State, here the utterance did not occur while the alleged victim was still under the stress and excitement caused by the traumatic event. Instead, the statement was uttered several weeks later in route to a routine appointment. Based on the facts of this case, we hold that the month-long temporal gap between the event and the statement was too great to qualify as an excited utterance, and the trial court erred in its decision to allow the statement into evidence. *Id.*, 740 S.W.2d at 157–58. On remand, the error should be remedied.

Reversed and remanded.
ABRAMSON and HOOFMAN, JJ., agree.

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