Cite as 2012 Ark. App. 479

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR11-1101

	Opinion Delivered September 12, 2012
MYRICKKI MCCLENDON APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIRST DIVISION [CR-08-2532, CR-08-3461, CR-09-4215]
V.	HONORABLE LEON JOHNSON, JUDGE
STATE OF ARKANSAS APPELLEE	REVERSED AND REMANDED

DAVID M. GLOVER, Judge

Myrickki McClendon was tried by a jury and found guilty of the offense of rape involving a child less than fourteen years of age. His victim, S.S., was eight at the time of the rape and ten at the time of trial. McClendon was sentenced to twenty-five years in the Arkansas Department of Correction, with 540 days' jail credit. The trial court then immediately addressed the petition for revocation of his probation in Case Numbers CR08-2532 and CR08-3461; ordered revocation in both, based upon the rape conviction; and sentenced McClendon to six years in each case, to run concurrently with the twenty-five-year sentence for rape.

McClendon raises two points of appeal: 1) that the trial court abused its discretion in refusing to allow him to introduce extrinsic evidence in the rape case (prior inconsistent

statement) pursuant to Arkansas Rule of Evidence 613, and 2) that the State failed to prove in the revocation cases that he was on probation when he allegedly committed the rape. We find merit in McClendon's first point of appeal and reverse and remand for a new trial on that basis. Because we are reversing and remanding this case for a new trial, we must also reverse the two revocations to be reconsidered upon retrial.

Sufficiency of the evidence supporting the rape conviction is not challenged on appeal, so it is not necessary to recount all of the trial testimony other than to say that S.S., his eight-year-old victim, testified that when McClendon babysat her, she was trying to pull him by the arm in the morning to get him out of bed to get her some cereal. She said that in looking for his arm, she accidentally "touched his thing." She stated that he then put her hands behind her back, put her face in the pillow, and "then he put his thing in my bottom and my front." She testified that, "By my bottom, that is where I poop, and then my butt hole just like his thing. . . . When I said his thing, that is where he goes to the bathroom." She then identified McClendon as the person who put his "thing" in her bottom.

Rule 613 Challenge

There were bench proceedings concerning the first point of appeal, which can be summarized as follows: during the trial, it was brought to the trial court's attention that bystanders in the hallway outside the courtroom had overheard S.S. say some things when she exited the courtroom after testifying; the bystanders felt obligated to report to court officials, who then brought the situation to the court's attention; the trial court held a

hearing outside the presence of the jury to try to resolve the matter. In short, and paraphrasing the testimony of two disinterested witnesses, S.S. came out of the courtroom saying: "I did it. I did it. I lied about something in there. I said what y'all told me to say." One of the witnesses put an approximate fifteen-minute time lag between S.S. saying, "I did it," and then saying, "I lied about something in there." S.S. also testified briefly, and confined her words to the effect, "I did it. I did it; I did it." The trial court ruled that defense counsel could recall S.S. to pursue the matter, but severely limited the manner in which counsel could question her. The trial court further stated that if, after asking S.S. the limited question, she responded "no," then that would "be the end of it." The court then allowed defense counsel to question other witnesses who had also overheard S.S. in the hallway and to proffer their testimony. The jury trial resumed the next day, and the details of S.S.'s further testimony at that point will be discussed in more detail later in this opinion.

The first hurdle we have to address is whether McClendon properly preserved this point of appeal. That is, while his argument is based on Rule 613 of the Arkansas Rules of Evidence, that rule was never specifically mentioned below. What was clear at the trial level, however, was that S.S., the State's primary witness against McClendon, came out of the courtroom after testifying and made some statements that were of enough concern to some bystanders that they reported the situation to court officials. A very lengthy hearing outside the presence of the jury ensued, where counsel and the trial court seemed very

clear about the evidentiary problem. Moreover, at least once during the extended hearing, defense counsel specifically referenced the phrase "prior inconsistent statement." Under these circumstances, that reference is sufficient to preserve the Rule 613 argument, even if the rule number itself was never mentioned. *Pryor v. State*, 71 Ark. App. 87, 27 S.W.3d 440 (2000).

Rule 613 of the Arkansas Rules of Evidence provides:

> Rule 613. Prior statements of witness.
>
> (a) *Examining Witness Concerning Prior Statement.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) *Extrinsic Evidence of Prior Inconsistent Statement of Witness.* 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 interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

(Emphasis added.)

Here, on the day following the extensive hearing concerning this issue outside the jury's presence, S.S. was recalled to the stand, in front of the jury, by defense counsel. However, defense counsel was limited by the trial court's very specific instructions, which were to merely ask S.S. if she had said anything when she left the courtroom the day before. Defense counsel was not allowed to ask her about her specific alleged statements. In response to the question that was asked, S.S. said, "I remember saying something to Ms.

Christie after I left court yesterday. We were talking about seahorses and flowers. I don't know what all I said. I don't remember what I said. I didn't say anything else after court yesterday. I didn't say anything the rest of the afternoon. ... I didn't say anything when I left the courtroom yesterday." The State was offered the opportunity to cross-examine S.S., but declined to do so.

At that point before the jury, S.S. had made a statement on the witness stand that was inconsistent with the statements she reportedly made the day before when she left the courtroom, as attributed to her by the bystanders. When a 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. *Scamardo v. State*, 2012 Ark. App. 392. Extrinsic evidence of S.S.'s prior inconsistent statements existed in the form of witness testimony. Specifically, at least two disinterested persons reported to the court that S.S. had said she "lied about something in there" as she was leaving the courtroom after testifying; yet, S.S., when recalled to the stand, denied saying anything when she left the courtroom after first testifying. Pursuant to Rule 613(b), the trial court should have allowed defense counsel to introduce that extrinsic evidence so that the jury could weigh it against S.S.'s testimony in judging her credibility.

In reviewing a trial court's ruling regarding the admissibility of evidence under Arkansas Rule of Evidence 613(b), this court will not reverse absent an abuse of discretion. *Demarest v. State*, 25 Ark. App. 205, 755 S.W.2d 577 (1988). Abuse of

discretion involves a high threshold that does not simply require error in the trial court's decision, but requires that the trial court act improvidently, thoughtlessly, or without due consideration. *Grant v. State*, 357 Ark. 91, 161 S.W.3d 785 (2004). The trial court here devoted a tremendous amount of time, thought, and energy to addressing this situation. Whether the trial court "acted improvidently, thoughtlessly, or without due consideration," in the end, the trial court did not follow Rule 613 and that amounts to an abuse of discretion.

The evidence of rape in this case rested primarily upon S.S.'s testimony. The jury's assessment of her credibility was crucial to the outcome of the case. Consequently, we cannot conclude that the evidence in this case was so overwhelming and the error so slight as to make it harmless. We have no choice under the circumstances but to reverse and remand for a new trial. Because we are reversing and remanding this case for a new trial, which was the basis for the revocations, we must also reverse the two revocations to be reconsidered upon retrial.

Reversed and remanded.

HOOFMAN and BROWN, JJ., agree.

Jim Phillips, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

Dustin McDaniel, Att'y Gen., by: *LeaAnn J. Irvin*, Ass't Att'y Gen., for appellee.