Cite as 2012 Ark. App. 665

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR12-423

Opinion Delivered November 28, 2012

MICHAEL EVERETT BALL
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT
[NOS. CR 2010-1933-1, CR2011-57-1]

HONORABLE WILLIAM A. STOREY, JUDGE

AFFIRMED

LARRY D. VAUGHT, Chief Judge

Appellant Michael Everett Ball was convicted by a jury of two counts of rape arising from the sexual assault of his stepdaughter, HH. On appeal, he does not challenge the sufficiency of the evidence supporting his convictions, but challenges two evidentiary rulings. Specifically, he claims that the trial court abused its discretion by refusing to allow into evidence a videotaped statement that HH had previously made to an investigator and that the trial court erred by allowing testimony relating to another sexual assault involving Ball. We see no error and affirm.

The first ruling that Ball challenges on appeal is the trial court's refusal to allow Ball to play a prior videotaped statement HH gave to an investigator. According to Ball, the prior statement contained on the videotape was inconsistent with HH's trial testimony and was admissible for purposes of impeachment under Ark. R. Evid. 613(b) (2011). However, Ball did not proffer the excluded videotaped statement at trial. It was never heard by the trial court, and

as such it is not part of the record on appeal. Here, Ball's failure to make a proffer of the excluded evidence creates an insufficient record for our review, and the issue is not preserved for appeal. *Randle v. State*, 372 Ark. 246, 251, 273 S.W.3d 482, 485–86 (2008).

For his second point on appeal, Ball argues that the trial court abused its discretion by admitting evidence of conduct that led to his 2004 conviction for "endangering the welfare of a minor" in connection with allegations made by SM, a second victim and stepdaughter of Ball's. He claims that the evidence of the conviction (as well as the testimony of SM) should have been excluded under Ark. R. Evid. 404(b) (2011), because he pled guilty to a "non-sexual" charge for "providing medical care to his then foster daughter." He argues that the nature of the 2004 conduct with SM was not sufficiently similar to the conduct described by HH to justify admission under Ark. R. Evid. 404(b), more commonly known as "the pedophile exception."

Ball's argument is unpersuasive. At trial, SM testified that while she lived with Ball and her mother, he sexually assaulted her on several occasions. She described one assault where Ball sat her on the sink in the bathroom and "put his limo into my private area." When asked on cross-examination about the possibility that Ball was merely attempting to "put cream on a rash," SM denied that she ever had a genital rash. Thus, Ball's theory on appeal (that his conviction arose from rendering medical assistance of a non-sexual nature) is premised on an assertion made by his counsel during a pretrial hearing. It is well-settled law that argument by counsel is not evidence. *Wright v. State*, 67 Ark. App. 365, 366–67, 1 S.W.3d 41, 42 (1999).

Furthermore, the pedophile exception to Arkansas Rule of Evidence 404(b) allows for the admissibility of evidence of similar acts with the same or other children when it is helpful

in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. *Mason v. State*, 2009 Ark. App. 598, at 9, 330 S.W.3d 445, 450. Here, SM and HH have the same biological mother, they were both living with their mother and Ball and were approximately the same age when the abuse occurred, and the abuse to SM occurred in the same manner as with HH.

At trial HH noted that one of the first incidents of rape occurred around the time of her sixth birthday. She testified that Ball followed her to the restroom, and "before I got up he told me not to pull up my pants and picked me up, set me on the counter, pulled his pants down and took his penis out and took his hand, grabbed my waist and scooted me up towards the counter and put his private inside the flaps of my vagina." SM testified that she remembered being raped by Ball when she was in the first grade: he "took me to the bathroom and put me on the sink. I had my clothes off, but I had a shirt on. Mike took off my pants, and he took off his pants, and then he put his limo in my private area." She also recalled a time where he "moved me to the right, to the left, to the front to back. This was after he put his limo in me. He had his hands on my hips . . . ."

SM's testimony, which was eerily similar to that of HH, showed that Ball has a proclivity to engage in sexual intercourse with children in his care who were around the age of six. *Kelley v. State*, 2009 Ark. 389, at 9, 327 S.W.3d 373, 378 (holding that when the sexual acts are identical, and when there are similarities in age and gender, there exists evidence demonstrating a depraved sexual instinct).

Finally, Ball claims that SM's testimony—regardless of relevancy—should have been excluded under Arkansas Rule of Evidence 403 because its probative value was substantially

outweighed by the danger of unfair prejudice associated with the evidence. As we have noted many times, the admission or rejection of testimony is a matter within the trial court's sound discretion and will not be reversed absent a manifest abuse of discretion and a showing of prejudice by defendant. *Solomon v. State*, 2010 Ark. App. 559, at 9–10, 379 S.W.3d 489, 494. It is also axiomatic that evidence offered by the State in a criminal trial is likely to be prejudicial to the defendant to some degree, otherwise it would not be offered. *Laswell v. State*, 2012 Ark. 201, at 14, 404 S.W.3d 818, 827. However, the balancing of the probative value of the evidence against the prejudicial effect is a matter left to the trial court's discretion. *Id.* Here, because there is no evidence that the trial court abused its discretion by allowing the testimony, we affirm on this point as well.

Affirmed.

WYNNE and BROWN, JJ., agree.

Wayne Williams Law Office, PLLC, by: *Wayne Williams*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Eileen W. Harrison*, Ass't Att'y Gen., for appellee.