Cite as 2013 Ark. App. 139

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA12-806

J.W.H. APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 27, 2013 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. J11-824-D] HONORABLE MARK THOMPSON FRYAUF, JUDGE AFFIRMED

ROBIN F. WYNNE, Judge

J.W.H. was adjudicated delinquent by the Benton County Circuit Court for committing the offense of rape and was placed on supervised probation for two years. On appeal, he argues that the trial court erred in determining that the victim was competent to testify. We affirm without reaching the merits of appellant's argument because he failed to preserve his argument for appellate review.

In October 2011, the State filed a delinquency petition alleging that, during the summer of 2011, J.W.H. had engaged in deviate sexual activity with six-year-old J.H., who was eight years and eleven months younger. The adjudication hearing of J.W.H. and his codefendants was held on April 17, 2012. J.H., who was then seven years old, answered questions regarding her understanding of the difference between telling the truth and telling a lie. Without objection, she went on to testify about the alleged rapes. Her eight-year-old brother J.H.2 testified that he had witnessed the rapes.

After closing arguments, the court ruled from the bench. In its ruling, the court addressed the credibility of J.H. and J.H.2, noting that there were several inconsistencies in their testimony. The court found that J.H. understood the consequences of not telling the truth and was competent to testify, stating,

> The competency of [J.H.] to testify, even in spite of the inconsistencies, is credible. I believe she understood the consequences of not telling the truth. I do not believe that she was coursed or rehearsed into giving that testimony and I find that testimony to be credible.

The court credited the testimony of J.H. and J.H.2, and it adjudicated J.W.H. and the two other juveniles delinquent. This appeal followed.

On appeal, appellant's sole argument is that the circuit court erred in determining that J.H. was competent to testify. Our supreme court has consistently stated that no precise age of testimonial competency in children exists, and it is primarily for the trial court to determine whether a child has the ability to observe, remember, and relate the truth of the matter being litigated and has a moral awareness of the duty to tell the truth. *Hoggard v. State*, 277 Ark. 117, 122–23, 640 S.W.2d 102, 105 (1982). The issue rests within the trial court's sound discretion, and we will not reverse on appeal in the absence of manifest abuse. *Id.* Appellant concedes that no objection was raised below and acknowledges the well-settled law that a contemporaneous objection is required in order to preserve an issue for appellate review. *See, e.g.*, *Mathis v. State*, 2012 Ark. App. 285, 423 S.W.3d 91. He nonetheless argues that the issue of J.H.'s competency is preserved because the trial court sua sponte ruled that J.H. was competent; alternatively, he argues that exceptions to the contemporaneous-objection requirement apply to permit review and that the state and federal constitutions require review.

Appellant first argues that it is the court making a ruling that is crucial to our review, not whether there was an objection. The only case cited for this proposition is *Hardy v. Arkansas Department of Human Services*, 2009 Ark. App. 751, 351 S.W.3d 182, in which this court found reversible error in the sua sponte ruling, without statutorily required notice, that reunification services would not be provided. That case is not on point and does not require appellate review in the present case.

Our supreme court has recognized four exceptions to the contemporaneous-objection rule, commonly referred to as the *Wicks* exceptions. *See Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). The third and fourth *Wicks* exceptions are (3) when the error is so flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to have instructed the jury correctly; and (4) Ark. R. Evid. 103(d) provides that the appellate court is not precluded from taking notice of errors affecting substantial rights, although they were not brought to the attention of the trial court. *Anderson v. State*, 353 Ark. 384, 395, 108 S.W.3d 592, 599 (2003). The case law is clear that *Wicks* presents only narrow exceptions that are to be rarely applied. *White v. State*, 2012 Ark. 221, at 8–9 (citing *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003)).

Appellant argues that the third and fourth exceptions are applicable in the present case. This court has held otherwise in the context of challenging the competency of a child witness to testify, specifically rejecting the arguments that appellant makes in this appeal. *See Baker v. State*, 2010 Ark. App. 843, at 3 ("[A]ppellant did not challenge the competency of the [child] victim to testify. His failure to do so precludes this issue from being reviewed on appeal.") (citing *Stevenson v. State*, 2009 Ark. App. 582).

Accordingly, appellant's failure to object below to the victim's competency to testify means that the issue is not preserved for appellate review. The trial court's adjudication order is affirmed.

Affirmed.

GLADWIN, C.J., and HIXSON, J., agree.

Jeannette Denham-Turner, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.