ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-13-911

	Opinion Delivered April 30, 2014
FREDERICK MCCLARD and CHERYL MCCLARD APPELLANTS	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. CV-2009-360]
V.	
BRUCE L. SMITH, JR., M.D. and HOT SPRINGS BONE AND JOINT CLINIC, P.A. APPELLEES	HONORABLE LYNN WILLIAMS, JUDGE
	AFFIRMED ON DIRECT APPEAL; CROSS-APPEAL MOOT; MOTION TO ADJUST COSTS DENIED

RHONDA K. WOOD, Judge

Appellants Frederick and Cheryl McClard ("McClard") sued appellee Dr. Bruce Smith for medical malpractice. After a trial, the jury returned a verdict in Dr. Smith's favor. McClard then filed a motion for a new trial, arguing that the trial judge had improperly testified under Arkansas Rule of Evidence 605 (2013). The judge denied the motion, and McClard appeals. In addition, Dr. Smith cross appeals the court's denial of his directed verdict motion. We hold that the judge's statement in this case was not testimony under Rule 605. Accordingly, we affirm the direct appeal, which renders the cross-appeal moot. We also decline McClard's motion to adjust record-preparation costs.

I. *The Direct and Cross Appeals*

McClard sued Dr. Bruce Smith, an orthopedic surgeon, for medical malpractice. Dr. Smith performed surgery on Mr. McClard after he had fallen off a roof and broken a bone in his ankle. The surgical wound became infected, and, as a result, doctors amputated his leg. The case went to a jury trial. Dr. Chris Shewmake, a plastic surgeon, testified as an expert witness during the defense's case. Before Dr. Shewmake testified, however, the circuit court made the following comments:

> I have a disclosure to make. Dr. Shewmake and I happened to be in the same boy scout troop some 40 years ago and we were both Eagle Scouts.

McClard's attorney did not object. At the close of the evidence, the jury returned a defense verdict.

Dissatisfied, McClard filed a motion for a new trial. He argued that the court violated Arkansas Rule of Evidence 605 by making comments that bolstered Dr. Shewmake's credibility with the jury and that, as a result, he was deprived of a fair trial. The court denied the motion, and McClard appeals from that order.

Motions for new trial are governed by Ark. R. Civ. P. 59 (2013). That rule specifically enumerates eight possible grounds for granting a motion for new trial, including when there is "any irregularity in the proceedings or any order of the court or abuse of discretion by which the party was prevented from having a fair trial." Ark. R. Civ. P. 59(a)(1). The party moving for a new trial must show that his or her rights have been materially affected by demonstrating a reasonable possibility of prejudice. *Suen v. Greene*, 329 Ark. 455, 947 S.W.2d 791 (1997). A decision on whether to grant or deny a

motion for new trial lies within the sound discretion of the trial judge. *Winkler v. Bethell*, 362 Ark. 614, 210 S.W.3d 117 (2005).

The primary issue in this case is whether the circuit court's comments were actually "testimony" under Rule 605. That Rule reads as follows:

> The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

This is important because McClard's attorney never objected to the court's statements. So if the statement were not "testimony" under Rule 605, then an objection was required to preserve the issue. A judge's allegedly biased remarks are not subject to appellate review if the appellant failed to object or move for the judge's recusal. *McWilliams v. Schmidt*, 76 Ark. App. 173, 61 S.W.3d 898 (2001). This is true even if the matter was raised in a motion for new trial. *Id*.

The most relevant case addressing a Rule 605 issue, and the one McClard primarily relies on, is *Hancock v. State*, 2011 Ark. App. 174, 381 S.W.3d 908. In *Hancock*, this court reversed a criminal conviction after the circuit court provided the jury with information that was never testified to by any witness. There, the defendant had been charged with possession of pseudoephedrine with intent to manufacture. Upon the defendant's motion, the court excluded testimony that a minor had been present in the van when the defendant was arrested. During the trial, the arresting officer responded to the prosecutor's question about the van's occupants by saying, "I don't know if I can tell you everybody that was in the van." *Id*. at 9, 381 S.W.3d at 913. At the end of the officer's testimony, the circuit court disclosed to the jury that a child had in fact been in the van. The court feared

that the jury would find the officer less credible due to his hesitation and told the jury the following:

> I'd rather trust you with that information and discount my fear that you will hold it against him than to have this witness compromised or that his hesitation you think somebody is up to something when they're [*sic*] weren't.

Id. at 10, 381 S.W.3d at 914. Our court held that these comments were improper and prejudicial to the defendant. We reasoned that "the court's abandonment of its role as impartial arbiter in order to bolster the credibility of a witness for the State was tantamount to charging the jury with the facts." *Id.* at 12, 381 S.W.3d at 915.

The facts in this case are vastly different from those in *Hancock*. In this instance, the court never provided the jury with any additional, relevant facts. Whether Dr. Shewmake was an Eagle Scout had nothing to do with his testimony as an expert witness in a medical-malpractice case. Further, the court's comments in *Hancock* were explicitly directed to the substance of what the officer had said; in fact, the court's comments added to the testimony. But here, the court's statements were made before Dr. Shewmake's testimony and did not frame, construe, or otherwise add to his testimony. *Cf. Ark. State Highway Comm'n v. Suddreth*, 239 Ark. 359, 389 S.W.2d 423 (1965) (holding that the trial court improperly construed a witness's testimony).

Besides, the court said at the outset that his statements were meant to be a disclosure. The point was to disclose to the parties that he knew the witness. This was an attempt to clear up any appearance of impropriety. As such, the judge never testified for the purposes of Rule 605. An objection, therefore, was necessary to preserve the point for

appellate review. Because no objection was lodged, we cannot address this issue. *See Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001); *McWilliams*, *supra*.[1]

Even if the judge's comments were testimony under Rule 605, McClard failed to show how the comments were prejudicial. Contrary to McClard's contention, reversing on a Rule 605 violation requires a showing of prejudice.[2] In *Hancock*, our court reversed, in part, because the judge's testimony in that case was "prejudicial." *Hancock*, 2011 Ark. App. 174, at 12, 381 S.W.3d at 915. As we pointed out earlier, the fact that Dr. Shewmake and the judge knew each other 40 years ago and were Eagle Scouts together was immaterial to the case: neither of those facts had anything to do with Dr. Smith's alleged negligence. Dr. Shewmake was one of the many expert witnesses. Unlike the defendant, Dr. Shewmake was not an orthopedic surgeon and did not testify that the defendant's actions fell within the standard of care. In short, Dr. Shewmake's testimony did not go to the heart of the plaintiff's negligence claim so any "bolstering" of his credibility would have had little impact.

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[1]McClard's motion for a new trial was premised solely on Rule 605. On appeal, however, he also argues that the judge's comments violated the Arkansas Constitution as well. Ark. Const. art. VII, § 23. That argument is not preserved either because constitutional arguments must be argued below. *Finley v. Farm Cat, Inc.*, 103 Ark. App. 292, 288 S.W.3d 685 (2008).

[2]Requiring a showing of prejudice is consistent with Arkansas caselaw. We normally won't reverse evidence issues absent a showing of prejudice. *Gross & Janes Co. v. Brooks*, 2012 Ark. App. 702, 425 S.W.3d 795. Even in criminal cases, we won't reverse a conviction unless there is prejudice or if the error is harmless. *See Goodwin v. State*, 373 Ark. 53, 281 S.W.3d 258 (2008). Because our rule and the federal rule are identical, we also can look to federal cases for guidance. *Smithey v. State*, 269 Ark. 538, 602 S.W.2d 676 (1980). Federal courts also apply a harmless-error or prejudice analysis to Rule 605 cases. *See, e.g.*, *United States v. Nickl*, 427 F.3d 1286 (10th Cir. 2005); *United States v. Paiva*, 892 F.2d 148 (1st Cir. 1989).

Finally, on this point, McClard, as the appellant, has the burden to bring up a record sufficient to demonstrate that the circuit court was in error. *McCormick v. McCormick*, 2012 Ark. App. 318, 416 S.W.3d 770. In this case, the record includes testimony from only two witnesses (Dr. Shewmake and the plaintiff's medical expert) and McClard's attorney's closing statement.[3] So even if this appeal did hinge on prejudice, there is simply not enough in the record for us to find that McClard was deprived of a fair trial.

We affirm the circuit court's denial of McClard's motion for a new trial. Our holding renders Dr. Smith's cross-appeal moot.[4]

II. *Motion to Adjust Costs*

McClard's notice of appeal designated only Dr. Shewmake's testimony as part of the record. Later, Dr. Smith filed both a motion to designate additional portions of the record and a cross-appeal. This required McClard to pay the court reporter to transcribe the testimony from his expert witness and his closing argument. McClard asks us to adjust its costs for preparing this additional testimony because it was relevant only to Dr. Smith's cross-appeal. *See Darrough v. Tobacco Superstore, Inc.*, 374 Ark. 63, 285 S.W.3d 626 (2008).

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[3]During closing arguments, McClard's attorney said, "Would anyone go to Kris Shewmake and trust his opinions? You betcha. I would, I would for my family." Dr. Smith argued that McClard suffered no prejudice from the court's original comments because McClard's own attorney vouched for Dr. Shewmake's credibility by making this argument to the jury.

[4]A case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy. *Dillon v. Twin City Bank*, 325 Ark. 309, 924 S.W.2d 802 (1996). So even if we were to reverse the circuit court's ruling on the directed verdict, the outcome would be the same: a judgment in Dr. Smith's favor. Our ruling on that issue, therefore, would have no practical legal effect.

We disagree that these additional portions were relevant only to the cross-appeal and deny the motion.

Arkansas Rule of Appellate Procedure–Civil 6(b) (2013) provides as follows:

> If the appellant has designated less than the entire record or proceedings, the appellee, if he deems a transcript of other parts of the proceedings to be necessary, shall, within ten (10) days after the receipt of the notice of appeal, file and serve upon the appellant (and upon the court reporter if additional testimony is designated) a designation of the additional parts to be included. The appellant shall then direct the reporter to include in the transcript all testimony designated by appellee.

We are mindful that the Reporter's Notes to this rule allow us to "make a proper adjustment of costs." Yet, as mentioned in the section above, McClard's designated record was inadequate to meet the required showing of prejudice. He designated testimony from only a single witness. But without context from the entire trial, we were left unable to assess prejudice. We will not, therefore, shift costs to Dr. Smith for trying to provide that context: had we found a Rule 605 violation, both the closing argument and the expert's testimony would have been relevant to our prejudice consideration.

Affirmed on direct appeal; cross-appeal moot; motion to adjust costs denied.

WALMSLEY and BROWN, JJ., agree.

James E. Keever, M.D., J.D., for appellants.

Malcom Law Firm, by: *J. Phillip Malcom* and *Glenn Ritter*, for appellees.