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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR10-495

TIMOTHY WALLACE FOWLER APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 2, 2011 APPEAL FROM THE CONWAY COUNTY CIRCUIT COURT [NO. CR-08-122-1] HONORABLE JERRY D. RAMEY, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

Timothy Wallace Fowler was convicted in a Conway County jury trial of rape. He received a ten-year sentence to be served in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in refusing to allow a defense witness to testify as an expert. We affirm.

Because Fowler does not challenge the sufficiency of the evidence, we will only briefly summarize the proof presented at trial. Fowler was tried for the rape of his stepdaughter. The crime allegedly took place while the victim was a minor, living in Fowler's home. The State's evidence consisted of the testimony of the victim, who was twenty-three years old at the time of trial, and a recording of a telephone conversation between the victim and Fowler, made at the behest of the Conway County Sheriff's Department. In the recorded conversation, the victim coaxed Fowler into apologizing for repeatedly having sex with her while she was a

minor.

Fowler alleges that error occurred during his case-in-chief when the trial court rejected his attempt to qualify his neighbor, John Earl, as an expert witness. Mr. Earl testified that he had practiced law in the State of Arkansas for approximately forty years, and had served as a circuit and chancery judge, deputy prosecutor, and criminal defense attorney. Mr. Earl described certain "criteria" that a prosecutor or child-abuse investigator should consider before deciding to go forward with a criminal prosecution. The criteria included inappropriate activity between the adult and the child suggestive of a romantic relationship, reasons for fabrication, and a decline in the child's achievement at school manifested by such things as failing grades or poor attendance. After considerable argument in which Mr. Earl recounted his training and experience, which included deciding child-maltreatment cases, the trial court found that his experience as a judge and as a prosecutor was too remote in time to allow him to make direct reference to what he would do as a judge or as a prosecutor. It did, however, allow Mr. Earl to testify as to what a defense attorney would consider. Mr. Earl concluded his testimony by stating that he observed Fowler and the victim on a regular basis and saw no inappropriate activity between them. He further noted that there was ample reason for fabrication due to the victim siding with her mother in a divorce situation, Fowler's remarriage, dispute over her pay for working at the family's petting zoo, and Fowler's transfer of property to his new wife and child.

On appeal, Fowler argues that the trial court erred in refusing to qualify Mr. Earl as an

expert regarding the investigation and prosecution of sexual-abuse cases. He contends that the thirty hours of training by the Arkansas Department of Human Services that Mr. Earl received as a circuit judge and the ten to twelve hours he received as a deputy prosecutor, plus the six two-to-six-week sessions that Mr. Earl attended at the National Judicial College and the two-week session he attended at the American Judicial College, were sufficient to qualify him as an expert in the investigation and prosecution of child sexual-abuse cases. Fowler concedes that Mr. Earl received this training in the 1970s and 1980s, but asserts that there was no evidence that any of the factors that were reviewed in sexual-abuse cases in that time frame had changed. We do not find reversible error in this case.

We review a trial court's decision to qualify a witness as an expert in a particular field under an abuse-of-discretion standard. *Davis v. State*, 330 Ark. 501, 956 S.W.2d 163 (1997). If some reasonable basis exists whereby the trial court may determine that the witness has knowledge of the subject beyond that of ordinary knowledge, and his or her expert testimony will assist the trier of fact in understanding the evidence presented or in determining a fact in issue, the trial court must qualify the witness as an expert and admit his or her testimony. *Id.*; Ark. R. Evid. 702. Additionally, the expert testimony must be relevant and not misleading or confusing to the jury. *Stewart v. State*, 316 Ark. 153, 870 S.W.2d 752 (1994).

In many respects, we agree with Fowler's argument—as far as it goes. Citing *Davis v. State*, Fowler argues that Mr. Earl's training and experience were at least as extensive as the witness who was qualified by the trial court in a ruling that was upheld on appeal. We agree.

Although the decision whether to qualify a witness as an expert is left to the discretion of the trial court, judicial discretion means "discretion bounded by rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of judicial whim, but the exercise of judicial judgment, based on facts and guided by law or the equitable decision or what is just and proper under the circumstances." *Black's Law Dictionary* 323 (6th ed. 1990). Accordingly, in light of the *Davis* decision, Mr. Earl should have been qualified as an expert in the prosecution of child-sexual-abuse cases. Further, we see no basis for the trial court's finding that Mr. Earl's experience as a prosecutor and as a trial judge was too remote in time to disqualify him from testifying as to what a prosecutor should consider in making charging decisions. Nonetheless, we cannot hold that the trial court's decision is reversible error.

As noted above, Mr. Earl was able to testify about the criteria that a prosecutor should employ to determine whether accusations by a sexual-abuse victim were credible. By Mr. Earl's own assessment, a criminal-defense attorney would look at the same criteria. Moreover, he was able to testify that he observed none of the signs suggesting that sexual abuse was taking place and at the same time, there were factors that suggested that the victim had a motive for fabricating her allegations. Finally, in addition to Mr. Earl's assessment that a criminal-defense attorney would be mindful of the same criteria that a prosecutor or a judge would employ, we note that Fowler failed to proffer or even suggest that he was precluded from presenting any relevant testimony by the trial court's ruling. It is axiomatic that we will not find reversible error in a trial court's decision regarding expert testimony absent

demonstrated prejudice. *Forrest v. State*, 2010 Ark. App. 686.

Affirmed.

MARTIN, J., agrees.

PITTMAN, J., concurs.

JOHN MAUZY PITTMAN, Judge, concurring. I concur in the decision to affirm appellant's conviction. I agree, as explained in the last paragraph of the majority opinion, that appellant has failed to demonstrate that he suffered any prejudice as a result of the trial court's ruling. However, it is unnecessary to decide whether the trial court erred in declining to qualify the witness as an expert, and I express no opinion on that question.