Cite as 2011 Ark. App. 128

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR10-964

ROGER LEMASTER APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** FEBRUARY 16, 2011 APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. CR09-310] HONORABLE BARBARA ELMORE, JUDGE AFFIRMED

RAYMOND R. ABRAMSON, Judge

On October 5, 2010, Roger Lemaster was charged with rape for allegedly engaging in sexual intercourse or deviate sexual activity with his stepdaughter who was under the age of fourteen at the time of the alleged sexual contact. At the time of the investigation into the rape allegations, Roger Lemaster and the victim's mother, Becky, were involved in a heated divorce.

Prior to trial, the State moved in limine to prevent Lemaster from calling twelve witnesses who were expected to testify as to Becky's bias. The defense contended that, because of the divorce, Becky had encouraged her daughter to make false allegations against Lemaster. The trial court granted the State's motion, ruling that information regarding the parties' divorce proceedings was collateral and irrelevant. When defense counsel attempted to proffer the witnesses, the trial court refused to allow the proffer. The matter then proceeded to trial, but Becky Lemaster never testified.

After hearing the testimony of Cabot Police Detective Keri Jackson, the victim, and the victim's grandmother, Nancy Skinner, the jury convicted Lemaster of rape. He received a sentence of thirteen years in the Arkansas Department of Correction. He now appeals his sentence and conviction, alleging that the trial court erred in refusing to allow his proffer of witnesses.

As Lemaster correctly points out, a trial court has very limited discretion in refusing to permit counsel to proffer evidence. *Sitz v. State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988). However, it has great discretion in controlling the form of the proffer and the time at which it is to be made. *Id.* A tender of proof is required because (1) it advises the trial court of the nature of the evidence so that the trial court can intelligently consider it and (2) it places the excluded evidence in the record for purposes of appellate review. *W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 921 S.W.2d 954 (1996). "If a trial court can arbitrarily deny to counsel the right to dictate into the record their offer of proof, he can prevent any consideration upon appeal as to the correctness of his own ruling as to the exclusion of certain evidence." *Jones v. Jones*, 22 Ark. App. 267, 739 S.W.2d 171 (1987) (quoting *State v. Shaw*, 565 P.2d 1057 (N.M.Ct. App. 1977)). However, there may be circumstances in which the trial court is justified in rejecting a proffer, such as where the request to tender proof is untimely or where the tendered proof is clearly repetitious. *Shaw*, *supra*.

Here, the trial court should have allowed defense counsel to proffer the testimony of at least some of the witnesses—proffers from all twelve witnesses regarding the same subject

matter would have likely been cumulative and unnecessary. At the very least, counsel should have been allowed the opportunity to state for the record the nature of the expected testimony. However, the court's failure to allow a proffer in this case is not reversible error.

In *Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999), our supreme court noted that, generally, a witness may not be impeached on a collateral matter. However, a matter is not collateral if the evidence shows bias, knowledge, or interest of the witness. *Id*. Thus, if a witness denies the facts claimed to show bias, the attacker has a right to prove those facts by extrinsic evidence. *Id.* Stated differently, before a witness may be impeached by extrinsic evidence, that witness must first deny the bias. *Id.*

Here, Becky Lemaster never testified at trial and, therefore, never gave any testimony denying bias—the sole basis argued by defense counsel for admitting the contested evidence. Thus, when she failed to testify, the basis for the introduction of the excluded evidence disappeared, and the trial court's failure to allow the proffer became moot.

Affirmed.

GLOVER and HOOFMAN, JJ., agree.