

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-1424

KEVIN W. PAYTON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 21, 2009

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[CR-2007-1022-2]

HONORABLE ROBERT H. WYATT,
JR., JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Appellant, Kevin Payton, was tried by a jury and found guilty of the offenses of rape and tampering. He was sentenced as an habitual offender to a cumulative sentence of fifty-five years in the Arkansas Department of Correction. We affirm.

Appellant does not challenge the sufficiency of the evidence supporting his convictions. Therefore, it is not necessary to set forth the facts of this case in great detail. It is sufficient to say that the rape offense involved him engaging in sexual intercourse and deviate sexual activity with his ten-year-old niece, and the tampering offense involved him asking another niece to get her brother to take the blame for the child's sexual abuse. Appellant's points of appeal primarily challenge evidentiary rulings made by the trial court. We review evidentiary rulings under an abuse-of-discretion standard, and we will not disturb those rulings on appeal



Cite as 2009 Ark. App. 690

unless there has been a manifest abuse of discretion. *Allen v. State*, 374 Ark. 309, 287 S.W.3d 579 (2008). To the extent additional facts are necessary to understand an argument, those facts will be discussed with respect to the applicable point of appeal.

For his first point of appeal, appellant contends that the trial court erred by refusing to allow him to question the alleged victim about her upbringing for credibility purposes. The following colloquy surrounds this point of appeal:

[VICTIM]: I have lived with my mimi for a year this last time. This was not the only time period with which I lived with her. I had lived with her pretty much most of my life. Without my father, without my mother, and without my stepmother.

[DEFENSE]: Even when your dad and Tonya were married the first time —

[PROSECUTOR]: Your Honor, I'm going to object to the relevance at this point.

COURT: You may approach.

[The following occurred at the bench and outside the hearing of the jury:]

How is this relevant?

[DEFENSE]: The influence over the child and lack thereof of supervision and what she's doing and what she's allowed to watch and who's in charge of her and everything is certainly relevant to her credibility. When we talked about this in *voir dire*, all the jury agreed that they thought this would have some bearing on who would be influential over her and who would not be and everything else. And this is right along the lines, and I'm certainly not doing it to embarrass the little girl or to embarrass the mother or the father, but it is a fact that she's primarily resided there.

[PROSECUTOR]: And he made that point, Your Honor.

[DEFENSE]: I'll move forward.



Cite as 2009 Ark. App. 690

COURT: I'm going to sustain the objection. I don't see how it's relevant.

Appellant's explanation to the trial court about the relevance of his line of questioning was not clear. As shown above, even before the trial court ruled on the objection, appellant's counsel was content to move forward. He did not sufficiently develop the relevance of the evidence; a trial court cannot merely accept a notion that children of divorced parents are inherently untrustworthy. Appellant further notes that the State discussed this topic in its closing argument, but appellant raised no objection at that point. To the extent that appellant is challenging those comments made in the State's closing, we do not address that portion of his argument.

For his second point of appeal, appellant contends that the trial court erred by refusing to allow the appellant to question the alleged victim whether her New Year's resolution for 2007 was to "stop lying so much." Appellant was apparently under the impression that the victim made a New Year's resolution to "stop lying so much." When appellant's counsel attempted to ask the victim what her 2007 New Year's resolutions were, the State objected to their relevance. At the bench, appellant's counsel contended that the victim's credibility was at the crux of the case and that her New Year's resolution regarding lying would be relevant to that issue and should be considered by the jury. The State responded by noting that if the child had recanted with respect to any portion of the charge, then this evidence might be relevant, but not just "to put it out there in general." The court sustained the objection.



Cite as 2009 Ark. App. 690

We find no abuse of the trial court's discretion. Appellant did not lay a sufficient foundation to establish the relevance of this testimony. The New Year's resolution remark is too nebulous to show that the victim had any tendency to lie or that she had a pattern of lying. Thus, the trial court did not abuse its discretion in weighing the evidence under Ark. R. Evid. 403 and denying its admission.

For his third point of appeal, appellant contends that the trial court erred by admitting into evidence both pornographic magazines and photographs of them over his objection that the prejudicial nature outweighed the probative value. We do not address the merits of this point because appellant expressly abandoned it in his reply brief.

For his fourth point of appeal, appellant contends that the trial court erred by permitting references to his marijuana use in the jury's presence over his objection because the prejudicial nature outweighed the probative value. We find no abuse of the trial court's discretion.

In the last of five statements that appellant made to police, he twice made references to marijuana. In the first, when asked by one of the officers if he had been "smoking any dope," "doing any drugs," appellant responded: "I wasn't on any drugs and I haven't smoked no dope since probably ten o'clock that day or something. And I haven't smoked nothing since Thursday. Nothing. I've quit." In the second reference, he explained: "I made a move on her [his wife] and she told me she was tired and I was angry, so I went outside and I was going to smoke a joint. I didn't have no papers, so I went over to my mom's to get a



Cite as 2009 Ark. App. 690

cigarette to roll the joint. I was going to dump the tobacco out and roll the joint up and I went to the bathroom and I jacked off.” The victim was staying at appellant’s mother’s house.

Appellant moved to have those references redacted from the statement because the prejudice would outweigh the probative value. As our supreme court explained in *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006), a broad scope of evidence has been determined to be admissible as *res gestae* evidence under our case law. All of the circumstances intermingled with a particular crime may be shown as part of the *res gestae* in order to give the jury knowledge of the entire transaction surrounding an alleged offense. *Id.*; see also Ark. R. Evid. 404(b). The trial court did not abuse its discretion in refusing to redact appellant’s own references to his marijuana use because it was part of the entire transaction surrounding the alleged rape.

For his fifth point of appeal, appellant contends that the trial court erred by denying a motion for mistrial, which he premised upon cumulative error. Because we have already found no abuse of discretion in the trial court’s several rulings challenged by appellant, there is no basis for this argument. We do not recognize the cumulative-error doctrine when there is no error to accumulate. See *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006).

For his sixth and final point of appeal, appellant contends that the trial court erred by refusing to permit him to discuss during closing arguments the alleged victim’s possible motives for falsely accusing him. We disagree.



Cite as 2009 Ark. App. 690

During his closing argument, appellant’s counsel stated: “You know, I don’t have any idea why K.P. would make this up. I can speculate. Some of my speculation would be is, create a crisis, circle the wagons.” The State asked for a bench conference, during which it objected to the statements because they were admittedly based on speculation and not facts in evidence. The trial court sustained the objection, stating that appellant could not argue facts that were not in evidence. Appellant then offered no further argument.

On appeal, he contends that the evidence presented—even by the State— provided “indicia of such a motive” to falsely accuse appellant. And he gives us examples: appellant’s statement that maybe K.P. thought it would allow her to go to Dallas; that he had imposed discipline upon her; and that K.P. herself had acknowledged being angry with appellant concerning an incident involving her older cousin. We find no abuse of the trial court’s discretion. At trial, not only did appellant’s counsel use the term “speculate” in making his closing on this topic, he did not offer any facts in evidence that would support his comments—despite the fact that was the basis of the State’s objection. He does not get to fill in the missing pieces on appeal.

Affirmed.

PITTMAN and HART, JJ., agree.

Robinson, Zakrzewski & Achorn, P.A., by: Luke Zakrzewski, for appellant.

Dustin McDaniel, Att’y Gen., by: Lauren Elizabeth Heil, Ass’t Att’y Gen., for appellee.