

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 09-543

DWAYNE GIBSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered JANUARY 13, 2010

APPEAL FROM THE ARKANSAS
COUNTY CIRCUIT COURT
[NO. CR 2007-316]

HONORABLE DAVID G. HENRY,
JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

An Arkansas County jury found Dwayne Gibson guilty of rape and sentenced him to twenty-five years in the Arkansas Department of Correction. He argues that the trial court erred in allowing the prosecutor to lead the victim during direct testimony. We affirm.

The victim in this case, L.B., was six years old on the day of trial. On the evening in question, L.B. was taken to her aunt's house to stay the night. That evening, she slept on the floor with Gibson and his brother. At trial, the prosecutor had difficulty getting L.B. to answer his questions. The prosecutor asked L.B. if she remembered what the two of them discussed the other day. L.B. replied that she had trouble remembering, but she stated, "I think it was something that Dwayne did." The following questioning and colloquy then occurred:

PROSECUTOR: Did - - do you remember talking - - do you remember talking to your mom, first of all.

L.B.: Yes, sir. I do.

PROSECUTOR: Do you remember telling your mom something happened with Dwayne?

L.B.: Yeah. I, uh, just don't remember what happened. But I think - - -

PROSECUTOR: Do you remember what you told your mom happened?

L.B.: No, sir. I don't. Uh . . .

DEFENSE

COUNSEL: Your Honor, I - - I mean, we are all trying to be patient. But I think it - - you can only say, "I don't remember" so many times. I realize this is a tough situation for a child witness. But at some point an objection has to be voiced. And I'm compelled at this time.

. . . .

PROSECUTOR: Did you tell your mom that Dwayne touched you?

L.B.: Um, [inaudible].

PROSECUTOR: Did you tell your mom Dwayne touched you on your tee tee?

DEFENSE

COUNSEL: Now, Your Honor, the Prosecutor is being excessively leading.

PROSECUTOR: And, Your Honor - - -

DEFENSE

COUNSEL: I understand being leading to try and elicit questions. But he is putting - - putting elements of the charge in the child's mouth.

At this point, the court offered to grant a ten-minute recess, but the prosecutor declined. Gibson's attorney then asked for a mistrial, but the request was denied. After returning to open court, the prosecutor continued his direct examination of L.B., during which time L.B. recalled

telling her mother that Gibson hurt her on the night that she spent at her aunt's residence. L.B. eventually testified that Gibson touched her in a place that she did not want to be touched. After a recess, she testified that Gibson touched her private area.

Other evidence presented shows that police questioned both L.B. and Gibson. L.B. told investigators that Gibson touched her private area and that only Gibson had ever touched her that way. Gibson signed a statement, stating that he was sleeping next to L.B. when he discovered that L.B. had put his hand down her pants. At trial, however, he recanted the statement and said that he signed it because he thought he would be able to leave after doing so. At the conclusion of the trial, the jury found Gibson guilty of raping L.B.

The sole point on appeal is whether the prosecutor improperly led L.B. during direct testimony. Gibson concedes that the prosecutor was allowed to lead the witness, but he argues that the prosecutor went too far when he asked, "Did you tell your mom that Dwayne touched you on your tee tee?"

Gibson preserved his point on appeal by objecting and asking for a mistrial. A mistrial is a drastic remedy to which the court should resort only when there has been an error so prejudicial that justice cannot be served by continuing the trial. *Clark v. State*, 315 Ark. 602, 870 S.W.2d 372 (1994). A prosecutor is allowed to lead a child rape victim if it appears necessary to elicit the truth. *Id.* This is the case because of (1) the seriousness of the crime, (2) the natural embarrassment of the witness about the incident, (3) the child's fear of being in a courtroom full of people, (4) the necessity of testimony from a victim, (5) threats toward victims from those

perpetrators, and (6) to avoid the possibility that an accused might escape punishment for a serious offense merely because of the victim's reluctance to testify. *Id.* When reviewing the decision to allow a prosecution to lead a witness, the youth, ignorance, and timidity of a witness are important factors that mitigate against a finding of an abuse of discretion. *Johnson v. State*, 71 Ark. App. 58, 25 S.W.3d 445 (2000). Both the court's actions in permitting leading questions and its decision to grant or deny a mistrial are reviewed under the abuse-of-discretion standard. *Clark, supra.*

In *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986), our supreme court affirmed a rape conviction when the victim's responses to the prosecutor's questions were mostly long pauses, "yes" or "no" responses, or shaking her head to indicate yes or no. *See also Johnson, supra* (affirming when the nine-year-old victim stated repeatedly that she could not remember, but eventually provided detailed responses to specific questions and recalled telling teachers, police, and the prosecutor about the sexual abuse). Most of L.B.'s responses were similar. There were several pauses and "yes" and "no" responses, but when asked whether Gibson hurt her, she responded in the affirmative. Given L.B.'s age and the other factors that mitigate against a finding of an abuse of discretion, we hold that there was no error in allowing the prosecutor to lead L.B.

Affirmed.

HENRY and BAKER, JJ., agree.