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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR09-764

JAMES ARLEY HOLLIDAY APPELLANT	**Opinion Delivered** October 27, 2010 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. CR-2008-1190-1]
V.	HONORABLE ROBIN GREEN, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant was convicted of the rape and sexual assault of his granddaughter. On appeal, he argues that the trial court erred in refusing to allow him to introduce specific testimony regarding the victim's truthfulness, and in finding that he was not indigent and therefore not entitled to a court-appointed attorney on appeal. We affirm.

The victim, who was a teenager at the time of trial, testified that she and her sister were taken in by their grandparents when she was six years old because of instabilities in her mother's life. Because the children were at first afraid in their new surroundings, they slept with their grandparents for a time—she with her grandfather, her sister with her grandmother, each in separate rooms. The victim stated that, during that time, her grandfather touched her inappropriately on her legs and thighs, rolled her over, had her kiss his penis through his underwear, and ultimately had vaginal intercourse with her. Her grandfather told her that this

was to be their secret. After several months, the girls began sleeping together in their own room and there was no further abuse.

The memory of the abuse revived when the victim was in high school and she reported it to a staff member at her high school. The victim admitted that she recanted her story more than once when asked by investigators to repeat it in the presence of her grandfather and that, although she had frequently lied in the past, she was now telling the truth.

We first address appellant's argument that the trial court erred in excluding certain testimonial evidence. He argues that the evidence was relevant to the issues of fabrication and bias regarding the victim's truthfulness. Two items of evidence were excluded. One was testimony from the victim's sister; it concerned something that the victim told her and presumably went to the victim's truthfulness. The other was testimony from the victim's grandmother regarding some of the problems experienced by the victim in her youth, offered in an attempt to elicit reasons why the victim would lie.[1]

We cannot address these issues on the merits because the substance of the expected testimony is not apparent from the context and there was no proffer. Where evidence is excluded by the circuit court, the party challenging that decision must make a proffer of the excluded evidence at trial so that this court can review the decision, unless the substance of

[1] The trial court, in refusing to allow these inquiries, noted that the victim had already admitted that she frequently lied in the past. *Compare* Ark. R. Evid. 613(b) *with* 801(d)(2).

the evidence is apparent from the context. *Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003). Here, no proffer was made, and the substance of the expected testimony is not apparent; therefore, we cannot say whether an error occurred or whether any such error was prejudicial.

Next, appellant argues that the trial court erred in finding that he failed to prove indigency to qualify for a court-appointed attorney on appeal. Although a person need not be destitute to qualify as indigent, the burden of establishing indigency is on the defendant claiming indigent status. *Hill v. State*, 305 Ark. 193, 805 S.W.2d 651 (1991). In considering whether an appellant is indigent, which is a mixed question of fact and law, the factors to be considered include (1) income from employment and governmental programs such as Social Security and unemployment benefits; (2) money on deposit; (3) ownership of real and personal property; (4) total indebtedness and expenses; (5) the number of persons dependent on the appellant for support; (6) the cost of the transcript on appeal; and (7) the likely fee of retained counsel for the appeal. *Id.* Whether the appellant is able-bodied and his level of education are also given some consideration as is whether the appellant himself paid the cost of the appeal bond or has control or complete discretionary use of funds raised by others for his defense. *Id.*

After appellant was convicted, his attorney, who also represents appellant on appeal, stated to the trial court that he anticipated the cost of appeal, including his fee and the cost of obtaining the transcript, would range from approximately $12,000 to $22,000. On disputed

evidence, the trial court found that appellant had failed to disclose a proprietary interest in one home and, although he had approximately $100,000 equity in another home, had not attempted to obtain an equity loan to finance his appeal. On this record, we cannot say that the trial court was required to find appellant to be indigent.

Affirmed.

VAUGHT, C.J., and HART, J., agree.