Cite as 2022 Ark. App. 291

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-21-548

DEWAYNE TILMON APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered June 1, 2022 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. 26CR-19-701] HONORABLE MARCIA R. HEARNSBERGER, JUDGE AFFIRMED

KENNETH S. HIXSON, Judge

Appellant Dewayne Tilmon appeals after he was convicted by a Garland County Circuit Court jury of two counts of rape. He was sentenced to serve a total of 1,200 months' imprisonment as a habitual offender in the Arkansas Department of Correction. On appeal, appellant does not challenge the sufficiency of the evidence of his conviction. Instead, he argues that his conviction should be reversed and remanded for a new trial because the circuit court "abused its discretion and prejudiced [him] when it restricted his ability to ask the alleged victim about her knowledge of DNA evidence and its importance in rape cases." We affirm.

I. *Relevant Facts*

Appellant and Laschamecia Thomas were in a relationship together and began living together in October 2017. Laschamecia had three daughters living with her at that time, Ro.T., Ro.J., and Ri.J. Ro.J. later revealed to her mother that appellant had been raping her; however,

Laschamecia did not believe her, saying she needed DNA evidence. Subsequently, Ro.J.'s counselor called the child-abuse hotline as a result of what she heard in Ro.J.'s July 2018 counseling session. After an investigation, appellant was arrested and charged by amended felony information with two counts of rape in violation of Arkansas Code Annotated section 5-14-103 (Repl. 2013), a Class Y felony. The State further sought an enhanced sentence under the habitual-offender statute, Arkansas Code Annotated section 5-4-501(a) (Supp. 2021). A jury trial was held on May 19–20, 2021.

Appellant filed a written motion in limine on May 18, 2021, the day before trial. Apparently, Ro.J.'s biological father had previously been convicted of raping her years before the allegations against appellant arose. Appellant conceded that the disclosure that Ro.J. was also a victim in her father's case was precluded under the rape-shield law, codified at Arkansas Code Annotated section 16-42-101 (Supp. 2021). Instead, appellant requested "preliminary approval from the Court to present evidence via testimony of the facts surrounding the minor complainant's biological father's arrest, prosecution, and conviction on a separate offense of rape that is unrelated to the charge before the Court." He argued in his written motion that the evidence was relevant because Ro.J. and Laschamecia made "repeated reference[s] to the minor complainant's father's case when speaking to law enforcement regarding the case before the Court."

A hearing on appellant's written motion in limine was held in chambers immediately before trial. Appellant's counsel clarified that he wished to ask either Laschamecia or Ro.J. about Ro.J.'s father's conviction for rape. When the circuit court asked why that evidence would be relevant to this case, the following exchange occurred:

[DEFENSE COUNSEL]: During their interviews they mention the fact that the minor victim's father has been convicted - arrested, prosecuted and convicted of Rape involving this minor victim. And in that case they talk about how the evidence was collected and that he was prosecuted via DNA. There was a discussion between the minor victim and her mother about trying to collect DNA or trying to collect some type of evidence against my client showing that she was familiar with the process of – without getting too graphic, Your Honor - she was familiar and knew about the sexual acts in the sense of she knew that a man could ejaculate, produce semen, and that there would be DNA that could be collected for prosecution. I do not want to get into the fact that the minor victim in this case is the minor victim in her father's case. That would be rape shield. Understood. But I can - I think I should be able to question her about her father's conviction that she's aware that he was prosecuted for a Rape charge and in that case they prosecuted him because they were able to find DNA.

THE COURT: How is that relevant?

[DEFENSE COUNSEL]: It's relevant because she is aware of how that process went about with her father. . . . She is aware of how evidence can be collected.

. . . .

THE COURT: Did she?

[DEFENSE COUNSEL]: She did not collect any evidence. But, Your Honor, she also told law enforcement that there were occasions where my client allegedly had ejaculated and cleaned himself up either on a sheet or a towel or a blanket. If she was aware of her father's prosecution, then she could've been aware that that would've been DNA left on those items and she could've collected those items. . . . There was evidence right there and she chose not to collect it. Either it's not there or she just chose not to collect it. . . . It goes to her knowledge and understanding of how - of the sexual process. She understands that a man can ejaculate, produce sperm, and that sperm has DNA. She's aware of that.

. . . .

THE COURT: Her father's case is irrelevant to this case. What you are trying to do is use this to bring in another case. Your point that you're going to make is that she should have been collecting evidence when she was being raped by the Defendant? . . . And that, therefore, because she didn't collect evidence, she wasn't raped? Is that your point?

[DEFENSE COUNSEL]: Somewhat. In a roundabout way.

. . . .

[DEFENSE COUNSEL]: Let me ask you this: If I do not mention that is her father but she has awareness of what DNA is, can I question her on that?

THE COURT: Well, I think you can ask her, "Do you know what DNA is?" . . . Yeah, I don't think there's any problem with that. But we're not getting into another rape case, her as a victim. That is all protected and his conviction is irrelevant to this case. This is not the Defendant who was previously convicted. . . .

This is her father. Which only goes to confuse the issue of this trial which is this Defendant's trial. . . . I mean you can ask her, I suppose, did you collect the sheets and the things that were stained by the Defendant's semen when she had sex at twelve years old - did you collect them? . . . After you say, "Do you know what DNA is?" And if she says, "Yes," then you say, "Well why didn't you collect all the evidence."

. . . .

[DEFENSE COUNSEL]: So I just want, for record purposes, the denial is not based on rape shield. The denial is based on relevance.

THE COURT: Totally relevance. . . . Now the DNA, maybe not so much. . . . I mean I don't know how you all are gonna get that in and if there's an objection to what you're planning on doing then you need to come and see me before it happens. But I think she's a sixteen year old girl, you can ask her whether she knows about DNA, and I think it's a perfect question to say, "Well if you know what DNA is, then why

> didn't you collect the semen when the Defendant raped you?" . . . But we are not gonna talk about her father's conviction unless she would open the door to that.

Thus, the circuit court ruled that appellant was authorized to inquire whether Ro.J. knew about DNA and why she failed to collect any DNA evidence.[1] However, the circuit court specifically ruled that any inquiry into Ro.J.'s father's conviction was irrelevant and would confuse the jury.

Because appellant does not challenge the sufficiency of the evidence, it is unnecessary to give a detailed account of each witness's testimony. However, a brief description is helpful to put appellant's point on appeal in context. At trial, Ro.J.'s counselor, two sisters, and mother testified in addition to law enforcement. No one specifically saw appellant rape Ro.J., but some of the witnesses testified to odd behavior that might have corroborated Ro.J.'s allegations. Ro.T., Ro.J.'s elder sister, testified that she saw appellant and Ro.J. "always together" and "in each other's personal space." For example, Ro.T. testified that she saw Ro.J. siting on the washing machine and on the roof of appellant's car with her legs on opposite sides of appellant. Another time, Ro.T. saw Ro.J. and appellant on the couch in the dark. Appellant had his hand on Ro.J.'s leg, and Ro.J.'s legs were on opposite sides of appellant. Ri.J., Ro.J.'s younger sister, testified that she found Ro.J. and appellant in the kitchen pantry with the door closed. She described numerous other instances where she found Ro.J. and appellant alone together. Laschamecia described an incident in which Ro.J. had her bedroom door locked. When Ro.J. opened the door, she was naked with a blanket wrapped around her. Laschamecia then found appellant hiding in Ro.J.'s closet, and appellant offered that he was having a discussion with Ro.J. about giving her an allowance as his excuse for being in Ro.J.'s bedroom.

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[1]As this portion of the court's ruling is not at issue in this appeal, we offer no opinion.

Immediately before Ro.J. testified, the parties discussed whether defense counsel wished to proffer any testimony from Ro.J. regarding appellant's motion in limine, and the following exchange occurred:

[DEFENSE COUNSEL]:	There was discussion yesterday afternoon about proffering. I think if we do elect to proffer it could be done later after her direct examination. I spoke with Mr. Tilmon this morning. I'm slowly more and more leaning toward not doing a proffer at all just because I'm not a hundred percent confident what the answers are gonna be. Cause I think I have to actually elicit the answers from her, so.
[THE STATE]:	And, Your Honor –
THE COURT:	So you want some more time to think about it?
[DEFENSE COUNSEL]:	Well if you don't know what the answer's gonna be you shouldn't ask the question.
THE COURT:	Yeah, who said that?
[DEFENSE COUNSEL]:	I can't remember but I've always tried to rely on it.
THE COURT:	The king of cross-examination, right?

Thereafter, the State offered Ro.J.'s testimony, and although defense counsel cross-examined Ro.J., he did not proffer any testimony in support of his motion in limine.

Ro.J. testified that she was twelve years old in late 2017 when appellant moved in. According to Ro.J., after appellant moved in, he flirted with her and told her, after blowing marijuana smoke into her mouth, that her lips were soft. He gave her alcohol on other occasions. Ro.J. said appellant told her that he wanted to be her boyfriend. She claimed that when she said no, he threatened her, saying he would kill her family if she did not do what he wanted. Ro.J. testified that on one occasion, appellant came into her room, woke her, put her hands behind her back, and started licking her vagina. She said that she could not move and

that when she asked him to get off her, he refused. Then, "[h]e put his penis inside [her] vagina" and "came . . . [o]n the sheets." Ro.J. said she initially did not tell anybody about the incident because she was scared and did not want appellant to hurt her or her family. She said that appellant continued to threaten her.

Ro.J. testified that, after that first time, appellant did the same thing to her "mostly every week" in the kitchen, the bathroom, the living room, and the dining room. She explained that she stopped saying no after a while because she felt like it was useless because he is stronger than her. She stated that one time in the kitchen, appellant "forced [her] to suck his penis" and that he "came . . . [o]n the floor" while everybody else was in the living room. Ro.J. said the last time appellant raped her was when she was in her bedroom. She thought she was thirteen years old at that time. She said he entered the room, locked the door, woke her, and "put his penis in [her] vagina." Her mother began knocking on the door, and appellant got up and jumped into the closet, where Ro.J.'s mother later found him. Ro.J. at first told her mom that nothing had happened, but she later told her mother a couple of weeks later that appellant had been raping her. Ro.J. testified that her mother did not believe her and that her mother said she needed evidence like DNA. However, Ro.J. testified that appellant did not rape her again after she told her mother.

On cross-examination, Ro.J. testified that she did not understand what the word "ejaculated" meant. However, she admitted that she knows what DNA is and that appellant's DNA was contained in his "cum." Notably, defense counsel did not ask Ro.J. why, after knowing this, she did not collect any DNA evidence.

Appellant did not testify or offer any witnesses of his own. At the conclusion of the trial, the jury found appellant guilty of two counts of rape and recommended a sentence of fifty years on each count to be served consecutively, which the circuit court imposed. This appeal followed.

II. *Cross-Examination of Ro.J.*

Appellant does not challenge the sufficiency of the evidence for his conviction. Instead, he argues that his conviction should be reversed and remanded for a new trial because the circuit court "abused its discretion and prejudiced [him] when it restricted his ability to ask the alleged victim about her knowledge of DNA evidence and its importance in rape cases." He explains that he should have been allowed to ask Ro.J. about her "knowledge of the investigative process in rape cases, the importance of DNA in such cases, how to collect it, and that her father was convicted of rape based on DNA." He alleges that her testimony was relevant because he "sought to cast doubt on her credibility by introducing the scope of her knowledge to show that although she was familiar with the investigative process—why it was important to retain evidence, what evidence to retain, and how to retain it—she made no effort to preserve the evidence." He goes on to explain that the fact Ro.J.'s father had been charged with rape was relevant to "why she understood the critical nature of the evidence" and alleges that the circuit court abused its discretion in excluding Ro.J.'s testimony on the matter. He finally alleges that he was prejudiced because his conviction "rest[ed] on the alleged victim's testimony," and the circuit court prohibited him from "fully challenging that credibility."

The decision to admit or exclude evidence is within the sound discretion of the circuit court, and we will not reverse a circuit court's decision regarding the admission of evidence absent a manifest abuse of discretion. *Beard v. State*, 2020 Ark. 62, 594 S.W.3d 29. A circuit

court has wide latitude to impose reasonable limits on cross-examination based upon concerns about confusion of issues or interrogation that is only marginally relevant. *Newman v. State*, 327 Ark. 339, 344, 939 S.W.2d 811, 814 (1997). The abuse-of-discretion standard is a high threshold that does not simply require error in the circuit court's decision but requires that the circuit court act improvidently, thoughtlessly, or without due consideration. *Ventry v. State*, 2021 Ark. 96, 622 S.W.3d 630. Nor will we reverse absent a showing of prejudice, as prejudice is not presumed. *Edison v. State*, 2015 Ark. 376, 472 S.W.3d 474; *Scamardo v. State*, 2013 Ark. 16, 426 S.W.3d 900.

It is well settled that when challenging the exclusion of evidence, a party must make a proffer of the excluded evidence at trial so that this court can review the decision, unless the substance of the evidence is apparent from the context. *Edison*, *supra*. Here, appellant failed to proffer Ro.J.'s testimony that he argues was excluded. Under the circuit court's ruling, defense counsel was permitted to question Ro.J. about her knowledge regarding DNA and, if she had knowledge regarding DNA, why she failed to collect any DNA evidence. The circuit court, however, prohibited counsel from asking Ro.J. about whether she knew the details surrounding her father's conviction for rape because it was irrelevant to this case and would only confuse the jury. Although defense counsel did inquire whether Ro.J. had any knowledge about DNA, defense counsel failed to ask Ro.J. why she did not make any attempt to collect any DNA evidence. Defense counsel further chose not to proffer Ro.J.'s testimony on any excluded testimony. Although appellant contends in his reply brief that "it was clear from the context what the testimony would have been" at trial, defense counsel stated that he did not want to

offer a proffer because he was "not a hundred percent confident" what her answers would be, and he did not want to ask her a question when he did not know what her answer would be.

In *Edison*, the supreme court noted that while it knew from the record that Edison wanted to ask a witness about whether she suffered brain hypoxia after the shooting, there was nothing in the record from which it could determine what the witness's response would have been because Edison failed to offer a proffer of the witness's testimony. *Id.* Moreover, the supreme court held that it had no way of knowing if the witness even knew that the notation about brain hypoxia in her medical records existed. *Id.* Absent that evidence, the supreme court held that it had "no way of knowing whether Edison sustained prejudice, and [it] would only be speculating if [it] were to presume prejudice and reverse on this basis." *Edison*, 2015 Ark. 376, at 7, 472 S.W.3d at 478. Therefore, it concluded that the failure to proffer evidence so that an appellate court can make a determination on prejudice precludes our review of the issue on appeal. *Id.*

Similarly, in *Brown v. State*, 2012 Ark. 399, 424 S.W.3d 288, the supreme court held that the failure to proffer evidence precluded its review of the issue on appeal. There, Brown was convicted of raping his stepdaughter. *Id.* During trial, Brown wanted to introduce evidence and testimony concerning his sex life with his wife. *Id.* The circuit court held that the evidence was irrelevant to the rape of his stepdaughter. *Id.* However, the circuit court did allow the appellant to testify to certain details during his testimony, but appellant failed to proffer the excluded testimony. *Id.* On appeal, the supreme court held that "[g]iven the testimony that was allowed and the lack of a proffer of the substance of his purported testimony, we cannot see how Appellant's sexual relationship with his wife could fairly be said to be relevant to his raping his

stepdaughter" and that "without the proffer, Appellant has failed to preserve for our review his argument regarding the evidence he sought to admit concerning his sexual relationship with his wife." *Brown*, 2012 Ark. 399, at 11, 424 S.W.3d at 295.

As in *Edison* and *Brown*, without a proffer, we would only be speculating as to what Ro.J.'s testimony would have been on the matter at trial just as defense counsel even conceded when he declined to proffer her testimony. As such, we cannot possibly determine how Ro.J.'s excluded testimony can fairly be said to be relevant and have no way of knowing whether appellant sustained prejudice. *See Edison*, *supra*; *Brown*, *supra*; *see also Turner v. State*, 355 Ark. 541, 546, 141 S.W.3d 352, 356 (2004) (holding that the failure to proffer specific evidence renders a relevancy determination impossible). Accordingly, appellant has failed to preserve his argument for our review, and we affirm appellant's conviction.

Affirmed.

GRUBER and WHITEAKER, JJ., agree.

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Leslie Rutledge, Att'y Gen., by: *Walker K. Hawkins*, Ass't Att'y Gen., for appellee.