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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-23-581

JERRY DALE CHERRY APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered April 17, 2024 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72CR-21-266] HONORABLE MARK LINDSAY, JUDGE AFFIRMED

BART F. VIRDEN, Judge

A Washington County Circuit Court jury convicted Jerry Dale Cherry of one count of second-degree sexual assault against MC1 and two counts of rape against MC2. The circuit court imposed sentences of twenty and forty years' incarceration in the Arkansas Division of Correction (ADC), respectively, to run consecutively. On appeal, Cherry asserts that the circuit court committed reversible error by (1) allowing testimony regarding the credibility of the victims, and (2) failing to exercise its discretion when it imposed consecutive sentences. We affirm.

On March 4, 2021, Cherry was charged with one count of rape and one count of second-degree sexual assault against MC1 and two counts of rape against MC2. Cherry is the children's grandfather and had been an almost daily caregiver for them since MC1 was five years old and MC2 was less than one year old. At the jury trial, MC1 testified that Cherry

began abusing her so early in her life that she did not realize she was being sexually abused, and the abuse seemed like a normal part of life. MC1 testified that Cherry digitally and with his penis penetrated her vagina, orally raped her, and forced her to perform oral sex on him. MC2 testified that Cherry raped and sexually abused her in his truck, camper, storm shelter, horse trailer, home, and side-by-side. Cherry told MC2 that if she told anyone about the abuse, she would not be believed, she would be committed to a mental institution, and everyone would be angry with her. He also threatened to hurt her animals. When MC1 was twelve years old, she realized something was wrong and began to avoid Cherry. Two years later, she and her sister told their parents about the abuse. The parents contacted the police, who reported the abuse to the Child Abuse Hotline. Sergeant Autumn Holland of the Washington County Sheriff's Office testified that she received the hotline report and interviewed the parents at the Child Safety Center. Holland observed but did not participate in the interview of the children. She testified that "[a]fter observing both interviews and talking to the parents I realized that I had a little bit of a circumstance on my hands, and I needed to move fast." Holland continued: "So based on all the evidence that I had as far as credible information and the fact that the suspect was suicidal at the time and the family was afraid—" Defense counsel objected, and the following colloquy occurred:

COUNSEL: I'm going to object to this, per earlier discussion, the information about the suicide and the credibility of the witnesses, she can't testify to that as well.

THE COURT: She can give an opinion –

COUNSEL: On the credibility?

THE COURT: As to why she did what she did.

COUNSEL: Yes, sir.

THE COURT: But the mindset of the Defendant is not admissible by her.

COUNSEL Thank you, Your Honor.

PROSECUTOR: I believe she was commenting on – this was through the course of the investigation why she acted the way she did with the information she had, so I'm not sure what you're limiting her to here.

THE COURT: Okay. The objection is sustained as to her statements as to the mindset of Mr. Cherry.

COUNSEL: Okay.

Sergeant Holland testified that she realized she needed to "get Jerry Cherry interviewed" and that this was based on "probable cause, from two corroborating victims that had been sexually abused by the same man for several years." Her interview with Cherry was played for the jury. In it, Cherry denied any wrongdoing or inappropriate touching of either child, except that he admitted he had accidentally touched MC2's vagina when they were wrestling, and MC2 had put his hand on her vagina. Cherry also repeatedly stated that MC2 had punched him in the groin and pinched his nipples and that she was "oversexed." The next day, before testimony recommenced, Cherry moved for a mistrial. In counsel's motion, she referred to her objection the day before when Holland "testified to the credibility of the witnesses and the evidence," asserting that "[Holland] said, from my review of the evidence, and, the credible testimony of the witnesses, I made the arrest." The court,

defense counsel, and the State misremembered that it was defense counsel who had elicited Holland's statement the day before. Defense counsel admitted her "mistake," and the court stated that counsel "asked the question and you asked her, what did you use? So you opened the door to that." The motion was denied due, in part, to the mistaken belief that counsel opened the door to Holland's testimony.

At the close of the defense's case, Cherry requested the inclusion of one additional jury instruction and two verdict directors. His request for jury instruction AMI Crim. 2d 912 regarding concurrent and consecutive sentencing was denied. The court stated that whether to give the instruction was discretionary, and "I did think about it, but I'm not going to give it." The first verdict director instructing the jury on alternative punishments and probation was denied. The second verdict form provided a space for the jury to recommend consecutive or concurrent sentencing and also was denied.

The jury returned guilty verdicts of second-degree sexual assault against MC1 and two counts of rape against MC2. The court determined that Cherry's sentences should run consecutively. Cherry timely filed his notice of appeal, and this appeal followed.

II. *Discussion*

A. Sergeant Holland's Testimony

For his first point on appeal, Cherry argues that the circuit court committed reversible error by denying his motion for a mistrial based on Sergeant Holland's testimony regarding the credibility of the victims. Cherry's argument is not preserved. A motion for mistrial must be made at the first opportunity. *See Ellis v. State*, 366 Ark. 46, 233 S.W.3d 606 (2006). The

reason for this is that a circuit court must be given an opportunity to correct any perceived error before prejudice occurs. *Id.* Here, defense counsel did not move for a mistrial when she objected to Holland's testimony and did not do so until the beginning of testimony the next day; thus, the denial of his motion for a mistrial is not preserved for our review.

The crux of Cherry's appeal is that Sergeant Holland impermissibly testified about the credibility of the victims, and in cases such as this that hinge solely on the credibility of the witnesses, such testimony is prejudicial and constitutes reversible error. His argument is not well taken.

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. *Price v. State*, 2019 Ark. 323, at 11–12, 588 S.W.3d 1, 8. Abuse of discretion 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. *Furlow v. State*, 2023 Ark. App. 192, at 5, 664 S.W.3d 457, 462.

In *Beard v. State*, 2020 Ark. 62, at 7, 594 S.W.3d 29, 32–33, our supreme court explained why testimony regarding the victim's credibility is barred:

> We have consistently recognized that an expert's or a witness's testimony opining or directly commenting on the truthfulness of a victim's statement or testimony is generally inadmissible. The rationale behind this rule is that such testimony invades the province of the jury, which alone determines the credibility of the witnesses and apportions the weight to be given to the evidence. It is erroneous for the circuit court to permit an expert, in effect, to testify that the victim of a crime is telling the truth.

(Internal citations omitted.)

Cherry likens the instant case to those in which the appellate court's reversal of a conviction is based on impermissible credibility testimony. Cherry cites *Cox v. State*, 93 Ark. App. 419, 220 S.W.3d 231 (2005), in which this court reversed the conviction because the forensic interviewer repeatedly testified that she believed the victim to be highly credible. In *Beard*, *supra*, the supreme court held that the investigator's testimony that she found the allegations of sexual abuse true and the victims were "very credible" directly bolstered the victims' credibility. Because *Beard* turned on the victims' credibility, the error was not slight, and Beard's conviction was reversed. In *Montgomery v. State*, 2014 Ark. 122, a Rule 37 case, our supreme court held that the appellant was entitled to a new trial because a social worker from Arkansas Children's Hospital was allowed to testify that the victim's statement that she was digitally penetrated while others were in the room was "believable" and "plausible" because of her speculation that the sexual abuse could take place without coming to the attention of others nearby. She also testified that on the basis of her conversation with the victim's mother, she believed that the mother did not coerce the child into making the accusation. None of the above cases are directly on point with the instant case because Holland did not, with the purpose of opining on the victims' credibility, directly state that the victims were credible. The thrust of Holland's testimony was to explain the steps she took in her investigation. Here, the colloquy leading up to counsel's objection to Holland's testimony shows that the State was in the process of eliciting Holland's decision-making process that led to her interview with Cherry. The State asked when the children's interviews were conducted, where they were conducted, what the Child Safety Center is, what Holland

observed, whether she talked to the parents, and what she did next. In explaining her decision to interview Cherry, Holland briefly mentioned "credible information" without specifying what information that was. The court allowed the testimony as an explanation "[a]s to why she did what she did."

There is no case law directly applicable here; however, the instant case is similar to *Sweeten v. State*, 2018 Ark. App. 590, 564 S.W.3d 575, in which a forensic interviewer who did not interview the victims testified on behalf of the State. The interviewer was cautioned that she could not testify about whether someone was telling the truth. She testified that as a forensic interviewer, she looks for consistency within the statement and sensory details, and Sweeten objected, arguing that the interviewer's testimony went to veracity. This court, relying on *Hill v. State*, 337 Ark. 219, 988 S.W.2d 487 (1999), held that the circuit court did not abuse its discretion in allowing the testimony and that

> the videos of the interviews were not played for the jury, and Davidson did not testify about the victims or the allegations in this case. Davidson's testimony was more akin to that in *Hill*, *supra*, in which a witness testified about the criteria used by the Department of Human Services in evaluating a child's allegation of sexual abuse and the guidelines employed to determine whether the allegations warranted an investigation.

Sweeten, 2018 Ark. App. 590, at 5, 564 S.W.3d at 578–79.

Here, the circuit court overruled Cherry's objection, stating that Holland could testify "as to why she did what she did." Though Holland was not testifying as to general policy as in *Sweeten* and *Hill*, she *was* describing her investigative process, and during the explanation, she made the isolated generalized comment that "based on all the evidence that I had as far

as the credible information" she decided to interview Cherry. Under these specific circumstances, we find no error and affirm.[1]

B. Sentencing

Cherry argues that the circuit court abdicated its discretion by mechanically imposing consecutive sentences due to the nature of the offenses. Cherry contends that "[p]resumptively, the sentences would have run concurrently pursuant to Ark. Code Ann. § 5-4-403, but the court decided to run the sentences consecutively because 'it's one of the most heinous crimes.'" We disagree and affirm.

The statute governing sentences for multiple convictions, Ark. Code Ann. § 5-4-403(a) (Repl. 2013), provides that when multiple sentences of imprisonment are imposed on a defendant convicted of more than one offense, the sentences shall run concurrently unless, upon recommendation of the jury or the court's own motion, the court orders that the sentences to be run consecutively; thus, the court was within its discretion to run the sentences consecutively.

[1]Cherry contends that the court, the State, and defense counsel's mutual misunderstanding that defense counsel elicited Holland's testimony regarding the "credible information" is material to the above analysis. He argues that the court based its decision to overrule Cherry's contemporaneous objection to Holland's testimony on the mistaken belief that it was defense counsel who opened the door to the victims' credibility. We disagree. The record shows that the court overruled the objection, finding that Holland was allowed to testify regarding the steps she took in the investigation. There is no evidence that the misunderstanding factored into the court's decision to overrule Cherry's contemporaneous objection to Holland's testimony. The record does reflect that the misunderstanding occurred the next day, when Cherry untimely moved for a mistrial.

The court did not fail to exercise its discretion in electing to run the sentences consecutively, as shown by the court's statement from the bench that

> it is the Court's decision by law as to whether or not these sentences run concurrently or consecutively, and the Court is required to use [its] discretion in deciding whether to run them concurrently or consecutively and there are some people who say it doesn't make any difference considering Mr. Cherry's age whether you run them concurrently or consecutively. Others, you know, say, well, you never know but I feel about the situation this way. Mr. Cherry, you've been found guilty of abusing your two blood kin granddaughters. Below murder it's one of the most heinous crimes there is and you've been found guilty of raping the younger of the two and sexually assaulting the older of the two. It wasn't on the same day, it was not a single solitary incident, before or after, whichever came first. Well, first of all you could have decided to be a law abiding citizen and not do either one. But whichever came first you could have said, I have done wrong and I'm not going to do this anymore. These were two separate decisions on your part to commit a terrible crime.

It is clear that the court considered Cherry's familial relationship with the victims, the long-term nature of the abuse, and Cherry's repeated decision to abuse both children despite his understanding of the abhorrent nature of the crime. The cases Cherry cites to support his argument are inapplicable here. In *Acklin v. State*, 270 Ark. 879, 879, 606 S.W.2d 594, 594 (1980), our supreme court reversed the circuit court when the court imposed consecutive sentences "either because the defendant asked for a jury trial without any defense or because it was the court's rule to direct that jury sentences run consecutively." *Acklin*, 270 Ark. at 881, 606 S.W.2d at 595. The court stated that if a defendant with no real defense "waste[d] my time, the jury's time and the taxpayer's money, it may very well cost you something." *Id.*, 606 S.W.2d at 595. The court also stated that it was its "customary rule to run consecutive sentences imposed by jurors . . . [because] it's just my judgment in the matter that generally that's what the jury intends to do." *Id.* Our supreme court held that it was

erroneous for the circuit court to have failed to employ its discretion and assume the intent of the jury with no information regarding such, which is not the case here.

Similarly, in *Doster v. State*, 2020 Ark. App. 456, at 3–4, 610 S.W.3d 685, 687, the circuit court "wonder[ed] aloud" as to why Doster chose a jury trial, and "speculated that it was the jury's desire to run the sentences consecutively even though there was no recommendation on the verdict form, suggesting that it was an abuse of discretion because his decision was based on speculation about the jury's intent." Here, the circuit court did not speculate as to the jury's intent. The circuit court refused the jury instructions regarding the options of consecutive or concurrent sentencing, showing that the court did not ever intend to consider the jury's intent. Moreover, even if the court had allowed the instruction and the jury made a recommendation, the court "is not bound by a recommendation of the jury concerning a sentencing option under this section." Ark. Code Ann. § 5-4-403(d). For the above reasons, we affirm.

Affirmed.

HARRISON, C.J., and BARRETT, J., agree.

Samantha J. Carpenter and *John Wesley Hall*, for appellant.

Tim Griffin, Att'y Gen., by: *Rebecca Kane*, Ass't Att'y Gen., for appellee.