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ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-23-684

	Opinion Delivered April 17, 2024
TYLER CHANDLER APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72CR-22-638]
V.	HONORABLE JOANNA TAYLOR, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

KENNETH S. HIXSON, Judge

Appellant Tyler Chandler appeals after he was convicted by a Washington County Circuit Court jury of two counts of second-degree sexual assault and one count of introducing a Schedule IV controlled substance into the body of another. He was sentenced to serve an aggregate of three hundred months' imprisonment. On appeal, appellant does not challenge the sufficiency of the evidence. Instead, he argues that we must reverse because (1) the State made improper comments during closing arguments; (2) a jury instruction failed to comport with the underlying statutory language; and (3) his defense counsel failed to perform an adequate investigation to aid in his defense. We affirm.

I. *Relevant Facts*

On January 19, 2022, appellant sexually assaulted the minor victim (MV), a day before her sixteenth birthday, after giving her a benzodiazepine. Appellant was charged by a third

amended felony information with two counts of second-degree sexual assault, a Class B felony, in violation of Arkansas Code Annotated section 5-14-125(a)(4)(A)(iv) (Supp. 2023) and one count of introducing a Schedule IV controlled substance into the body of another person, a Class C felony, in violation of Arkansas Code Annotated section 5-13-210(b) and (c)(3) (Supp. 2023). A jury trial was held on June 20, 2023.

Amanda McClain, a licensed practical nurse, testified that she has two children. Appellant is the father of one of her children, and Ms. McClain explained that, despite some custody issues, they had been coparenting at the time of the incident. She had asked appellant to watch both children on the night of January 19, 2022, while she worked an overnight shift. MV is Ms. McClain's niece. Ms. McClain testified that she had not suggested nor had appellant told her that MV would also be at her home that night. When she returned home after her shift, she found MV asleep in her bed. She thought appellant's behavior was "erratic," and she testified that she discovered a plastic bag containing white-colored rocks in appellant's pocket that she suspected was drugs. Ms. McClain additionally testified that she had seen appellant's prescription bottle for clonazepam. She described the side effects of the medication and stated that the pills inside the bottle were yellow and round. She further opined that the bottle felt lighter the morning she returned home than it had felt the night before she left. After appellant left the home and MV woke up, MV disclosed to Ms. McClain that appellant had sexually assaulted her, and Ms. McClain called law enforcement as a mandated reporter. Ms. McClain further testified that she purchased and administered a home drug-screening test, which showed that MV tested positive for

benzodiazepine. Ms. McClain explained that clonazepam is a benzodiazepine and that none of MV's prescriptions would "show positive for benzodiazepine."

MV testified at trial that appellant sent her a message on Facebook Messenger on January 19, 2022, asking her how she was feeling. She had been recovering from COVID-19. These messages were admitted into evidence. MV told appellant that she felt better, and appellant asked her if she wanted to come over to help him watch the children. MV agreed, and appellant picked her up. MV testified that appellant left the children back at the home in a closed bedroom while he picked her up. MV stated that she played video games for a while, and appellant put a frozen pizza in the oven for dinner. While waiting on the pizza to cook, appellant asked MV if she had ever smoked marijuana and offered MV two pills that he said would calm any anxiety she had. MV explained that she took one of the pills, which she described as a tiny yellow disc.

After dinner, appellant put the two younger children to bed. MV stated at trial that she had been watching television in the living room but "suddenly got, like really tired, but [she] was, like, really aware of [her] surroundings . . . [she] just felt weird." MV explained that appellant sat down on the couch with her and started holding her hand, which she felt weird about but did not say anything. At that point, appellant moved closer to MV and slid his hand under her sweatshirt and felt her breasts, both above and under her bra. Appellant then unbuttoned MV's pants, pulled them down a bit, and tried to put his hand down her pants. He then laid down next to MV. MV stated that appellant was not wearing any pants

or underwear and that she could feel appellant's penis against her leg.[1] Appellant proceeded to put his mouth on her breasts and tried to pull MV's pants completely off. MV explained that she became "really freaked out," and appellant carried her to the bedroom. Appellant laid down next to MV on the bed and continued to hold her. MV testified that appellant told her that she was "a very sexy girl." MV eventually was able to get up and get dressed. She explained that she pretended that nothing had happened because she was afraid appellant would hurt her. After appellant left the next morning, she reported the incident to her aunt, Ms. McClain.

Officer Chase Scallorn testified that he responded to the scene and saw that MV "was very calm and reserved, almost like in a state of shock." He explained that her behavior was very common with victims who had experienced traumatic incidents.

Detective Hunter Helms testified that he investigated the allegations. He explained that he did not have MV undergo a rape kit because there were no allegations of penetration. Ms. McClain provided him with a list of medications she thought appellant was taking, including clonazepam. Detective Helms testified that clonazepam is a benzodiazepine, a Schedule IV controlled substance, and stated that it usually comes in the form of a yellowish round pill. Detective Helms further testified that during his investigation, he interviewed appellant. Detective Helms stated that although appellant denied the allegations, he thought

[1]After this testimony, the State orally moved to amend the criminal information to add a third count of second-degree sexual assault. However, the circuit court denied this motion.

appellant appeared very nervous during the interview and that appellant was being deceitful. On cross-examination, Detective Helms did admit that it was not unusual for some people to be nervous when being questioned by law enforcement.

Dale Chiddister, a civilian investigator with the Arkansas State Police Crimes Against Children Division, testified that he conducted a forensic interview of MV. He explained that after his investigation, he concluded that the allegations of sexual abuse against appellant were true. He further explained that he has experience in determining whether a victim had been coached on what to say during an interview. Based on MV's answers during the interview, he did not think MV had been coached.

Appellant testified on his own behalf and denied the allegations. He further testified that he had been communicating with Ms. McClain via Facebook Messenger on the night in question, but he claimed that the messages were then inaccessible due to Ms. McClain's account being deleted. Appellant claimed the messages proved that not only was Ms. McClain aware that MV had come over but also that it was actually Ms. McClain's idea that MV come over to have her play with the children. He denied that Ms. McClain discovered that he had drugs on him. Although he admitted he had taken three or four clonazepam pills to the home, he denied giving any to MV.

After all the evidence had been presented, the circuit court reviewed the proposed jury instructions. Both the State and appellant agreed that the jury instructions were acceptable and that there were not any other proposed instructions they wished to give the jury. The jury found appellant guilty as charged. The jury recommended that he be

sentenced to serve ten years' imprisonment on each of the two counts of second-degree sexual assault and five years' imprisonment on the count of introduction of a controlled substance into the body of another, to be served consecutively, which the circuit court imposed. This appeal followed.

II. *Points on Appeal*

As already mentioned, appellant does not challenge the sufficiency of the evidence. Instead, he argues that we must reverse because (1) the State made improper comments during closing arguments; (2) a jury instruction failed to comport with the underlying statutory language; and (3) his defense counsel failed to perform an adequate investigation to aid in his defense. He concedes that he failed to make any of these objections before the circuit court; however, he nevertheless argues that we may address these issues for the first time on appeal by applying the exceptions to the contemporaneous-objection rules as outlined in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). We disagree.

To preserve an issue for appeal, a defendant must object at the first opportunity. *Burnett v. State*, 2023 Ark. App. 242, 665 S.W.3d 283. Issues raised for the first time on appeal, even constitutional ones, generally will not be considered. *Id.* However, in *Wicks*, the supreme court approved four limited exceptions to the contemporaneous-objection rule to preserve an issue for review: (1) a circuit court's failure to bring a matter essential to consideration of the death penalty to the jury's attention; (2) when an error is made by the circuit court when counsel has no knowledge of the error; (3) when the circuit court has a duty to intervene and correct flagrant and highly prejudicial errors; and (4) under Arkansas

Rule of Evidence 103(d), which states that appellate courts are not denied review of errors affecting substantial rights regardless of whether they were brought to the attention of the circuit court. 270 Ark. at 785–87, 606 S.W.2d at 369–70. Our appellate case law is clear that *Wicks* presents only narrow exceptions that are to be rarely applied. *Chunestudy v. State*, 2012 Ark. 222, 408 S.W.3d 55.

A. Closing Arguments

Appellant first argues that the third *Wicks* exception applies to excuse his lack of a contemporaneous objection to the State's comments made during closing argument that he alleges were improper. He complains that during its closing argument, the State wrongfully argued that appellant should have produced the Facebook messages he discussed during his testimony, referred to evidence not presented at trial, alluded to the fact that appellant was a bad father, and commented that appellant could have been charged with an additional crime but was not.

The third *Wicks* exception has been applied very rarely to matters such as (1) the right to a twelve-person jury, *Grinning v. City of Pine Bluff*, 322 Ark. 45, 50, 907 S.W.2d 690, 692 (1995); (2) the right to a trial by jury, *Calnan v. State*, 310 Ark. 744, 749, 841 S.W.2d 593, 596 (1992), and *Winkle v. State*, 310 Ark. 713, 717–18, 841 S.W.2d 589, 591 (1992); (3) violation of Arkansas Code Annotated section 16-89-125(e), *Goff v. State*, 329 Ark. 513, 525, 953 S.W.2d 38, 45–46 (1997); and (4) statements by a prosecutor in voir dire that have the effect of shifting the burden of proof, *Anderson v. State*, 353 Ark. 384, 401, 108 S.W.3d 592, 603 (2003). In contrast, the third *Wicks* exception was not applied (1) to consider possible

prosecutorial errors in relation to cross-examination, *Vaughn v. State*, 338 Ark. 220, 227, 992 S.W.2d 785, 789 (1999); (2) to privileged testimony, *Hale v. State*, 343 Ark. 62, 82, 31 S.W.3d 850, 862 (2000); or (3) in closing arguments, *Chunestudy*, 2012 Ark. 222, at 10, 408 S.W.3d at 62. Although appellant cites *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999), for support, his reliance is misguided. In *Leaks*, the defendant explicitly made a contemporaneous objection to the allegedly improper statements and therefore is distinguishable from the facts presented here. Appellant has pointed to no case in which the third *Wicks* exception was applied to a prosecutor's statements during closing argument. Thus, in light of our appellate case law holding that third *Wicks* exception is not applicable to prosecutorial errors in closing argument, appellant's first point is not preserved for appeal, and we accordingly affirm. *See Chunestudy*, *supra*; *Burnett*, *supra*; *Tiarks v. State*, 2021 Ark. App. 325, 633 S.W.3d 788.

B. Jury Instructions

Appellant next argues that the jury instruction regarding introducing a Schedule IV controlled substance into the body of another failed to comport with the underlying statutory language and, therefore, violated his right to due process. Although appellant stated at trial that the jury instruction was acceptable to the defense, he now argues that the third and fourth *Wicks* exceptions should apply to excuse his lack of a contemporaneous objection. Again, we disagree.

The supreme court recently explained that it is well settled that counsel must object and proffer a jury instruction in order to appeal the instructions given to the jury. *Nowell v.*

State, 2023 Ark. 65, 663 S.W.3d 369. In *Nowell*, the defendant, like appellant here, argued that the third and fourth *Wicks* exceptions should have excused his failure to object and proffer a jury instruction. The supreme court disagreed and explained that neither exception applied to the alleged jury-instruction error. As such, we likewise affirm since appellant's alleged jury-instruction error is not preserved for appeal.

C. Ineffective Assistance of Counsel

Finally, appellant argues that his counsel was ineffective for failing to conduct "an investigation into alleged Facebook Messages between [appellant] and witness Amanda McClain" and stating during closing argument that he did not know how to recover Facebook messages. Appellant concedes that he failed to make any contemporaneous objection before the circuit court at trial. He further concedes that he has been unable to find any application of *Wicks* to an ineffective-assistance claim on direct appeal. However, he invites us to embark on "a new application of *Wicks*" and apply the third *Wicks* exception. We decline to do so.

It is well settled that this court will not consider ineffective-assistance-of-counsel claims on direct appeal unless that issue has first been considered by the circuit court. *Gordon v. State*, 2015 Ark. 344, 470 S.W.3d 673; *Davis v. State*, 2019 Ark. App. 502, 588 S.W.3d 790; *Jester v. State*, 2018 Ark. App. 558. Moreover, in *Holland v. Arkansas*, 2015 Ark. 318, 468 S.W.3d 782, the supreme court rejected a similar argument that an ineffective-assistance-of-counsel claim should fall within a *Wicks* exception on direct appeal. Accordingly, none of appellant's claims are preserved for appeal, and we must affirm appellant's convictions.

Affirmed.

WOOD and BROWN, JJ., agree.

Samuel L. Hall, for appellant.

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