NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
D.P. MARSHALL JR., Judge

DIVISION IV

CACR06-1298

26 September 2007

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| PAMELA T. SHELNUT, APPELLANT | AN APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [CR2005-684B-2] |
| v. | |
| STATE OF ARKANSAS, APPELLEE | THE HONORABLE GRISHAM A. PHILLIPS, JUDGE |
| | AFFIRMED |

Pamela Shelnut appeals her conviction for rape as an accomplice and the denial of her motion for a new trial. We reject all of Shelnut's arguments and affirm.

George Keen started raping Shelnut's then-nine-year-old daughter, SH, in late-1999 or early-2000 after he moved in with the family. Shelnut and Keen married in February 2000. Keen continued to rape SH repeatedly until 2005, when SH confided in her stepmother who reported the rape to counselors and the police. A jury convicted Shelnut of rape as an accomplice, finding that she knew, or had reason to know, that Keen had raped her daughter, but failed to prevent it despite her legal duty to do so. Ark. Code Ann. §§ 5-14-103(a)(3)(A) (Repl. 2006); 5-2-402(2) (Repl.

2006); 5-2-403(a)(3) (Repl. 2006). After Shelnut's trial, Keen pleaded guilty to raping SH.

First, Shelnut's argument that the prosecution should have charged her with Permitting Abuse of a Minor under Ark. Code Ann. § 5-27-221 (Repl. 2006), rather than rape, fails. The prosecutor had discretion to charge her with either crime, and the evidence satisfied the rape statute's elements. Ark. Code Ann. § 5-14-103; *Simpson v. State*, 310 Ark. 493, 498, 837 S.W.2d 475, 478 (1992).

Shelnut is also mistaken when she argues that she did not have a legal duty to protect SH from rape. In *Hutcheson v. State*, this court affirmed an accomplice-to-rape conviction in similar circumstances. 92 Ark. App. 307, 213 S.W.3d 25 (2005). In that case, and others, Arkansas courts have recognized parents' duties to protect their children from harm, including sexual abuse. *Hutcheson*, 92 Ark. App. at 314–16, 213 S.W.3d at 30–31; *Burnett v. State*, 287 Ark. 158, 162, 697 S.W.2d 95, 98 (1985), *overruled on other grounds by Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987); *Williams v. State*, 267 Ark. 527, 528–29, 593 S.W.2d 8, 9 (1980). This precedent governs. Even if it did not exist, however, we would have no hesitancy in holding that our common law obligates parents to protect their children.

Viewed in the light most favorable to the verdict, substantial evidence supports Shelnut's conviction. *Hutcheson*, 92 Ark. App. at 313, 213 S.W.3d at 29. Keen raped SH repeatedly during the five years that Shelnut was married to and lived with him. SH testified that she told her mother the first time that Keen raped her and at least

twice after later rapes. Shelnut admitted at her trial that she knew Keen was raping SH, yet Shelnut refused to call the police. She even took thirteen-year-old SH to get an abortion when they suspected that she was pregnant. SH testified that Shelnut knew that it would be Keen's baby and that Shelnut acted like she was upset with SH for the pregnancy. Even then, Shelnut did not report his crime. After Shelnut left Keen, she allowed him to visit the family's home frequently, forcing SH to move in with her grandmother to get away from him. All of these circumstances provide substantial evidence for the conviction.

Shelnut's second point on appeal—that the State neglected its duty to obtain and disclose exculpatory evidence—is likewise unconvincing. Shelnut's ex-husband, Joe Hester, overstated in his trial testimony how much he had paid Shelnut in child support. His testimony undercut her argument that she let Keen return to her home only because he drew a disability check and the children felt sorry for him. The State, Shelnut says, should have obtained accurate child-support-payment records to present at trial. She argues that the State's use of Hester's inaccurate testimony to impeach her credibility violated her due-process rights.

The State has a duty to obtain and disclose exculpatory evidence. Ark. R. Crim. P. 17.1(d) & 17.3. Shelnut, however, did not make a contemporaneous objection when Hester testified at her trial. She did not cross-examine him about the amount of child support he paid, nor did she dispute his testimony when she took the witness stand. Shelnut's failure to object waived any error here. *Brenneman v. State*,

264 Ark. 460, 470–71, 573 S.W.2d 47, 52–53 (1978). More importantly, Shelnut was equally able to figure out exactly how much Hester paid her. The State did not violate Shelnut's due-process rights by failing to do so. *Morris v. State*, 302 Ark. 532, 539, 792 S.W.2d 288, 292 (1990).

Shelnut cannot prevail on her third argument either. She asserts that the circuit court abused its discretion by denying her motion for a new trial, which was based on what she characterizes as newly available exculpatory evidence. Because Keen pleaded guilty to rape after her conviction, she asserts, he no longer retains his right against self-incrimination and his testimony is newly available for her defense. At her trial, however, Shelnut never subpoenaed Keen or proffered evidence of what she expected his testimony to be. She did not object to going to trial without Keen, nor did she move for a continuance of her trial until after he had entered his plea. Finally, in her post-trial motion, Shelnut made no proffer of what Keen's testimony would be or how it could affect the outcome of this case. The circuit court did not abuse its discretion in denying Shelnut's motion for a new trial. *Misskelley v. State,* 323 Ark. 449, 478–79, 915 S.W.2d 702, 717–18 (1996) (standard of review).

Affirmed.

BAKER and MILLER, JJ., agree.