Not designated for publication
Judge Karen R. Baker DIVISION I

CACR06-189

NOVEMBER 14, 2007

LILLIE FAYE JACKSON

APPELLANTS

v.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT
[CR-2004-188A, CR2004-188B]

HONORABLE RALPH EDWIN WILSON, JUDGE

AFFIRMED

Appellant, Lillie Faye Jackson, and her son, Jonathan Jackson, were convicted by a Crittenden County jury of battery and permitting abuse of a minor. Appellant was sentenced by the jury to eleven (11) years in the Arkansas Department of Correction for the first-degree battery conviction, and four years for permitting abuse, to be served concurrently. On appeal, she alleges only that the testimony of the Department of Human Services staff was improperly admitted under Arkansas Rule of Evidence 803(24), the residual hearsay exception. We affirm.

On November 19, 2004, the victim in this case, T.J., a four-year-old boy, was taken by ambulance by the West Memphis Fire Department to LeBonheur Hospital in Memphis. He was non-responsive, suffering from seizures and a bleeding head injury. He was treated and subsequently released from the hospital on December 1, 2004, into the care and custody of Arkansas Department of Human Services (DHS) family service worker, Chiquita Butler, and her supervisor, Jenny Grant. On July 6, 2005, the State filed a notice of intent to use T.J.'s statement to the DHS

staff at trial, certifying therein that a copy was mailed to the defense counsel that same day. The State asserted on the record that, also, a copy of the notice was hand-delivered to defense counsel that same day. At the *Denno* hearing, held on the same day and preceding trial, the court heard the testimony to be elicited from the DHS employees concerning T.J.'s statements to them.

Although the notice provided by the State identifying the testimony only addressed the child's statements made at DHS offices, the testimony submitted included other statements not included in the notice. Butler testified that as she was driving her car, transporting T.J. from the hospital to the DHS offices in West Memphis, she asked the boy who had hurt him. Both Grant and Butler testified that T.J. replied that it was "Zhonnie [Johnny] and Faye." Each witness testified that at the DHS office, T.J. viewed appellant and her son through a two-way mirror as the Jacksons visited with T.J.'s siblings and identified them as Zhonnie [Johnny] and Faye. Grant testified that the child was concentrating on his finger that was hurt and that the finger had dried blood under the nail. She stated that T.J. said both appellant and her son hit his finger with a stick. Butler further testified that T.J. complained of pain in his finger and headaches. However, while she confirmed that T.J. identified appellant and her son through the two-way mirror, she did not recall hearing T.J. identify them as his abusers.

The trial court in this case specifically stated that it found that the statements challenged by appellant possessed the equivalent trustworthiness of other exceptions and that the court had considered the mental age and state of mind of the child who had been traumatized by the injuries. Rule 804(24) only applies to statements "not specifically covered by any of the [other] exceptions but having equivalent circumstantial guarantees of trustworthiness."

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Ark. R. Evid. 801(c). Hearsay

testimony is generally inadmissible. Ark. R. Evid. 802. Admissibility of evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. See *Ark Dep't of Human Servs. V. Huff*, 347 Ark. 553, 63 S.W. 3d 880 (2002).

Rule 803, entitled *Hearsay exceptions-Availability of declarant immaterial,* includes the following residual exception:

> (24) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Ark. R. Evid 803(24).

In its argument asserting that the trial court did not abuse its discretion in ruling that the testimony was admissible, the State relies heavily upon *Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001), which was also cited by the trial court in its decision. In *Martin*, our supreme court explained the limited availability of the exception:

> The residual hearsay exception was intended to be used very rarely, and only in exceptional circumstances. *Barnes v. Barnes,* 311 Ark. 287, 843 S.W.2d 835 (1992). If a statement is to be admitted under the exception, it must have circumstantial guarantees of trustworthiness equivalent to those supporting the common-law exceptions. *Id.; Blaylock v. Strecker,* 291 Ark. 340, 724 S.W.2d 470 (1987). In determining that trustworthiness, the trial court must, under the language of the rule, determine that (1) the statement is offered as evidence of a material fact, (2) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts, and (3) the general purposes of these rules and the interests of justice will best be served by admission of the statements into evidence. *Blaylock,* 291 Ark. at 350, 724 S.W.2d 470.
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> A trial court has substantial latitude under Rule 803(24) to admit evidence which it feels meets the spirit of the rule. *Hess v. Treece,* 286 Ark. 434, 693 S.W.2d 792 (1985). Further,

> this court has repeatedly recognized that matters pertaining to the admissibility of evidence are left to the sound discretion of the trial court. *See, e. g., Harmon v. State,* 340 Ark. 18, 8 S.W.3d 472 (2000). We will not reverse a trial court's ruling on a hearsay question unless the appellant can demonstrate an abuse of discretion. *Sera v. State,* 341 Ark. 415, 17 S.W.3d 61 (2000); *Bragg v. State,* 328 Ark. 613, 946 S.W.2d 654 (1997).

Martin v. State, 346 Ark. 198, 206, 57 S.W.3d 136, 142 (2001).

In narrowly construing this residual exception clause, our supreme court has admonished us that this exception is not meant to authorize trial courts to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(b). *See Hill v. Brown,* 283 Ark. 185, 672 S.W.2d 330 (1984). All the common-law exceptions to the hearsay rule are based upon necessity or upon some compelling reason for attaching more than average credibility to the hearsay. Consequently, any new exception must have circumstantial guarantees of trustworthiness equivalent to those supporting the common-law exceptions. *Id.*

The trial court in this case recognized that this exception should be rarely used. It also purported to make the requisite findings regarding the three prongs of the test. However, the trial court's admission of the statements made by the child in the vehicle to the DHS employees is fatally flawed because, as the trial court found, the Notice of Intent to Submit Child's Statement to the Department of Human Services Personnel Pursuant to Rule 803(24) only gave notice of the child's statements made during the viewing of appellant and her son through the two-way mirror. No notice of the statements made in the car was provided by the State nor presented to appellant. The rule specifically requires that this notice be given. Although the testimony of both workers regarding the statements in the car and at the two-way mirror are inextricably intertwined, the notice of the statements made by the child at DHS offices while viewing appellant and her son through the mirror cannot be imputed as notice to use the statements made by the child in the car. Furthermore, the

hearing in which the trial court reviewed and ruled upon the use of the statements was held and preceded the trial on that same day.

Accordingly, applying the language of the rule, the trial judge abused his discretion in admitting the statements by the child made to the workers in the car. Neither is the trial court's reasoning that the child's statements contained the same indicia of trustworthiness as a state of mind, present sense impression, an excited utterance, and medical diagnosis well-founded. As our supreme court directed in *Hill*, *supra*, the exception cannot be used to admit hearsay that is otherwise inadmissible. However, we find the trial court's error was not prejudicial in this case.

The trial court during the *Denno* hearing specifically found that the declarant, who was the victim in this case and five years old at the time of the hearing, was not qualified nor competent to testify as a witness in this case. Following the hearing, which was held immediately prior to the trial, the State called T.J. as a witness at trial and the trial court found him competent to testify. The child reluctantly stated under direct examination by the State, that "Faye" had caused the injury on the back of his head. When asked how she caused the injury, he simply answered, "I was bad." Later, in response to questioning about marks on his arm, he reluctantly said that Faye had pinched him when he was bad, and that "I got these marks on my arm because I was bad." In open court with appellant and her son present, the victim responded to questioning about who had caused the injuries by saying that he had been bad and wanted to be good. He was reluctant to testify and kept repeating similar phrases about being bad when asked who caused the injuries.

Ordinarily, evidence of prior consistent statements is not admissible to bolster credibility because it is hearsay. *Kitchen v. State,* 271 Ark. 1, 607 S.W.2d 345 (1980). However, Rule 801(d)(1)(ii) provides an exception to that rule where there has been a charge of recent fabrication or improper influence. *Todd v. State*. 283 Ark. 492, 678 S.W.2d 345 (1984). Rule 801(d)(1)(ii),

states:

> (d) Statements Which are Not Hearsay. A statement is not hearsay if: (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, ...

Todd v. State, 283 Ark. at 494, 678 S.W.2d at 347 (1984).

Although there was no allegation of recent fabrication in this case the admission of the prior consistent statement was not prejudicial because the child's testimony at trial specifically identified appellant as the perpetrator of the abuse that resulted in his head injury, while the statements to the DHS workers did not.

In this case, the child's statements made to DHS workers were consistent with his testimony at trial but were much less specific and positive than the testimony of the child given at trial. Appellant has in no way demonstrated how she was prejudiced by the admission of the testimony, other than the fact that she was convicted. There was sufficient evidence, without the hearsay testimony, supporting appellant's conviction, so that any error from the admission of that hearsay testimony was harmless. *See, e.g.*, *Gage v. State,* 295 Ark. 337, 748 S.W.2d 351 (1988) (holding that even an error of constitutional proportions will not require reversal if it is harmless beyond a reasonable doubt). In this case, the only two potential abusers were appellant and her son. The child's statements to the DHS workers merely identifies both appellant and her son without specifying her as the single abuser.

Accordingly, we affirm.

VAUGHT, J., agrees.

ROBBINS, J., concurs.