**REL: February 5, 2021**



# Alabama Court of Criminal Appeals

## OCTOBER TERM, 2020-2021

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## CR-19-0230

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**M.R.F.**

**v.**

**State of Alabama**

**Appeal from Montgomery Circuit Court**
**(CC-18-1616)**

MINOR, Judge.

A jury convicted M.R.F. of one count of incest, see § 13A-13-3, Ala. Code 1975, and the Montgomery Circuit Court sentenced M.R.F. to 120 months' imprisonment.[1] M.R.F. appeals

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[1]The circuit court also ordered M.R.F. to pay court costs and a $50 crime-victims-compensation assessment.

C.F., M.R.F.'s daughter, testified that, on January 15, 2017, when C.F. was only 17 years old, M.R.F. committed incest against her. DNA evidence corroborated C.F.'s testimony.[2]

On appeal, M.R.F. argues (1) that the circuit court erred by allowing the State to cross-examine a character witness about M.R.F.'s prior rape charge; (2) that the circuit court erred by limiting his ability to cross-examine C.F. about prior allegations of rape she allegedly had made against other family members; and (3) that his sentence does not comply with the version of § 13A-5-6(a)(3), Ala. Code 1975, in effect when the act of incest for which he was convicted occurred.

I.

M.R.F. argues that the circuit court erred by allowing the State to cross-examine his wife A.F. about his prior rape charge.[3] M.R.F. also

[2]Because M.R.F. does not challenge the sufficiency of the evidence, only a brief recitation of the facts is necessary.

[3]Although M.R.F. argues in his appellate brief that it was reversible error for the State to offer evidence of the prior rape charge with no basis for proving the validity of the charge (M.R.F.'s brief, pp. 10-11), that argument is not preserved for appellate review. "Review on appeal is limited to review of questions properly and timely raised at trial." Newsome v. State, 570 So. 2d 703, 716 (Ala. Crim. App. 1989).

argues that "[that evidence] had little, if any, probative value." (M.R.F.'s brief, pp. 8-11.)

" 'The admission or exclusion of evidence is a matter within the sound discretion of the trial court.' " Brownlee v. State, 197 So. 3d 1024, 1035 (Ala. Crim. App. 2015) (quoting Taylor v. State, 808 So. 2d 1148, 1191 (Ala. Crim. App. 2000), aff'd, 808 So. 2d 1215 (Ala. 2001)).

In M.R.F.'s defense, A.F. testified about M.R.F.'s reputation stating that she was unaware of any problems M.R.F. had had with children at church; that he was a good provider for her family; that he was a good father; that he disciplined his children according to scripture; and that he was loving, kind, and understanding. She also testified that M.R.F. is a pastor, a religious man, and a Christian. When asked if M.R.F. had ever done anything that would make A.F. question his love for her daughters or had ever acted improperly around them, A.F. responded: "No, sir." (R. 624.) The State then cross-examined A.F. about whether she knew that M.R.F. "was charged with a rape in the first degree allegation back in 2000?" (R. 678.) A.F. testified, after the circuit court overruled M.R.F.'s

objection, that she did not know about the charge and that it did not affect her opinion of him.

> " 'Where a witness testifies as to the general reputation or character of the defendant, the knowledge of the witness as to such reputation or character may be tested on cross-examination by asking him if he had heard of the defendant being charged with other offenses or of specific acts of bad conduct on the part of the defendant.' Aaron v. State, 271 Ala. 70, 83, 122 So. 2d 360 (1960)."

Neely v. State, 469 So. 2d 702, 704 (Ala. Crim. App. 1985); see also Moseley v. State, 448 So. 2d 450, 452-453 (Ala. Crim. App. 1984).

The State's line of questioning was proper. And we hold that the probative value of the evidence outweighed its prejudicial effect. See Rule 403, Ala. R. Evid. (providing that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ..."). Thus, the circuit court did not err by allowing the State to cross-examine A.F. about M.R.F.'s prior rape charge, and M.R.F. is due no relief on this issue.

II.

M.R.F. argues that the circuit court erred by limiting his ability to cross-examine C.F. about prior rape allegations she allegedly had made against her grandfather and her uncle.

> " 'Initially we note that
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> > " ' " ' "[t]he scope of cross-examination in a criminal proceeding is within the discretion of the trial court, and it is not reviewable except for the trial judge's prejudicial abuse of discretion. The right to a thorough and sifting cross-examination of a witness does not extend to matters that are collateral or immaterial and the trial judge is within his discretion in limiting questions which are of that nature. Collins v. State, [Ala. Crim. App., 364 So. 2d 368 (1978).]" '
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> " ' "Burton v. State, 487 So. 2d 951, 956 (Ala. Crim. App. 1984), quoting Coburn v. State, 424 So. 2d 665, 669 (Ala. Crim. App. 1982)."
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> " 'Gamble v. State, 791 So. 2d 409, 434 (Ala. Crim. App. 2000).'

> "Moore v. City of Leeds, 1 So. 3d 145, 151 (Ala. Crim. App.), cert. denied, 1 So. 3d 157 (Ala. 2008)."

McMillan v. State, 139 So. 3d 184, 224-25 (Ala. Crim. App. 2010).

The circuit court made it clear that defense counsel could question C.F. about whether she had ever made false rape allegations against certain family members to impeach her (C.F. later denied that she had made false accusations of rape in the past (R. 231)). The circuit court told M.R.F. that he could introduce evidence or other witnesses to prove that C.F. had made such false allegations, but it limited the scope of the specific questions M.R.F. could ask C.F. on cross-examination. (See R. 149, 161, 163.)[4]

> "Alabama's rape-shield rule, Rule 412, Ala. R. [Evid.], generally prohibits the admission of evidence of a victim's past sexual behavior. Nonetheless, it is well settled that evidence that a sexual-assault victim has made false allegations of sexual abuse against persons other than the defendant is admissible to show a pattern by the victim of making false allegations. See Ex parte Loyd, 580 So. 2d 1374, 1375–76 (Ala. 1991). However, only 'when it has been shown that the

[4]The circuit court stated: "That's not limiting anything you can go into when you start putting on your evidence or maybe with other witnesses. That only limits you in regards to that series of questions on this complaining witness."

> witness's prior charges were false [is] the fact of their having been made ... admissible.' Phillips v. State, 545 So. 2d 221, 223 (Ala. Crim. App. 1989). '[D]emonstrated falsity is the sine qua non of admissibility of this species of evidence.' Peeples v. State, 681 So. 2d 236, 238 (Ala. 1995). In this case, Brownlee failed to establish that the allegations D.D.H. had made in her journals or the allegations D.D.H. had made against C.C. were, in fact, false."

Brownlee v. State, 197 So. 3d 1024, 1033 (Ala. Crim. App. 2015).

M.R.F. made no showing that C.F. had made false allegations of rape. Based on Brownlee, we hold that the circuit court did not abuse its discretion by limiting M.R.F.'s ability to cross-examine C.F. about her alleged prior rape allegations against her relatives. Thus, M.R.F. is due no relief on this issue.

III.

Finally, M.R.F. argues that his 10-year sentence does not comply with the version of § 13A-5-6(a)(3), Ala. Code 1975, in effect when the act of incest for which he was convicted (a Class C felony) occurred.[5]

[5]See § 13A-13-3(c), Ala. Code 1975 (providing that incest is a Class C felony).

The record shows that M.R.F. committed incest on January 15, 2017. At that time, § 13A-5-6(a)(3), Ala. Code 1975, provided that "[t]he punishment for committing a Class C felony is a sentence of not 'more than 10 years or less than 1 year and 1 day and must be in accordance with subsection (b) of Section 15-18-8[, Ala. Code 1975,] unless sentencing is pursuant to Section 13A-5-9[, Ala. Code 1975].' "[6] Jackson v. State, [Ms. CR-18-0454, Feb. 7, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020).

Section 15-18-8(b) provides, in pertinent part:

> " Unless a defendant is sentenced to probation, drug court, or a pretrial diversion program, when a defendant is convicted of an offense that constitutes a Class C ... felony offense and receives a sentence of not more than 15 years, the judge presiding over the case shall order that the convicted defendant be confined in a prison, jail-type institution, treatment institution, or community corrections program for a Class C felony offense ... for a period not exceeding two years in cases where the imposed sentence is not more than 15 years, and that the execution of the remainder of the sentence be suspended notwithstanding any provision of the law to the contrary and that the defendant be placed on probation for a period not exceeding three years and upon such terms as the court deems best. ...' "

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[6]Section 13A-5-6(a)(3) has since been amended, effective September 1, 2019, to allow for sentencing outside the restrictions of § 15-18-8 for sex-related offenses. See Act No. 2019-465, Ala. Acts 2019.

Because M.R.F. was not sentenced as a habitual felony offender under § 13A-5-9, Ala. Code 1975, and because the circuit court sentenced M.R.F. to a "straight" sentence of 120 months' imprisonment, we reverse the circuit court's sentence and remand the case to the circuit court for it to resentence M.R.F. in accordance with this Court's opinion in Jackson[7]

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[7]In Jackson, this Court stated:

> "In short, §§ 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975, do not allow a trial court to impose a 'straight' sentence for a Class C felony when the Habitual Felony Offender Act does not apply. Instead, under § 13A-5-6(a)(3), once the trial court imposes on a defendant a sentence length between 1 year and 1 day and 10 years, the trial court must either:
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> > "(1) Sentence the defendant to probation, drug court, or a pretrial diversion program; or
> >
> > "(2) 'Split' the confinement portion of the defendant's sentence to a period not exceeding two years, suspend the remainder of the defendant's sentence, and impose a term of probation on the defendant that does not exceed three years.
>
> "Here, Jackson is not a habitual felony offender,

and the version of § 13A-5-6(a)(3) in effect as of January 15, 2017 (the date M.R.F. committed the crime of incest), which required that M.R.F.'s sentence comply with § 15-18-8(b). "'"A defendant's sentence is determined by the law in effect at the time of the commission of the offense."'" S.R.A. v. State, 292 So. 3d 1108, 1113 (Ala. Crim. App. 2019) (quoting Garner v. State, 977 So. 2d 533, 539 (Ala. Crim. App. 2007), quoting in turn Davis v. State, 571 So. 2d 1287, 1289 (Ala. Crim. App.

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> and thus could not be sentenced under § 13A-5-9, Ala. Code 1975. (See Sentencing Transcript R. 6-8.) Yet the trial court sentenced Jackson to a 'straight' 10-year sentence in the custody of the Alabama Department of Corrections, which, as explained above, is impermissible under § 13A-5-6(a)(3), Ala. Code 1975. Thus, we must remand this case to the trial court to impose a sentence on Jackson that complies with §§ 13A-5-6(a)(3) and 15-18-8(b).
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> "In so doing, however, we note that Jackson's 10-year sentence is valid; thus, the trial court cannot change the underlying sentence. See generally Moore v. State, 871 So. 2d 106, 110 (Ala. Crim. App. 2003) (recognizing that, when the base sentence imposed by the trial court is valid, the trial court cannot alter it on remand)."

___ So. 3d at ___ (footnotes omitted).

1990)). Due return is to be made to this Court within 42 days from the date of this opinion.

AFFIRMED AS TO CONVICTION; REVERSED AS TO SENTENCE; AND REMANDED WITH INSTRUCTIONS.

Windom, P.J., and McCool and Cole, JJ., concur. Kellum, J., concurs in the result.