Cite as 2011 Ark. App. 391

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR10-838

	Opinion Delivered MAY 25, 2011
DENISSE SERRANO APPELLANT	APPEAL FROM THE SALINE COUNTY CIRCUIT COURT, [NO. CR-09-283-2]
V.	HONORABLE GARY ARNOLD, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

CLIFF HOOFMAN, Judge

Appellant Denisse Serrano was convicted of two counts of permitting the abuse of a minor. She raises three arguments on appeal regarding the admissibility of testimony and a motion to disqualify the prosecuting attorney's office. We find no error and affirm.

Appellant was charged with permitting the abuse of a minor, under Ark. Code Ann. § 5-27-221. Because appellant does not challenge the sufficiency of the evidence, only a brief recitation of the facts is necessary. The charges stem from sexual abuse inflicted upon appellant's three children by her boyfriend Jeffery Garcia. In a separate trial, Garcia was convicted of two counts of rape and one count of sexual assault in the second degree, and his convictions were affirmed on appeal. *Garcia v. State*, 2011 Ark. App. 340. Appellant's three children testified at trial: MC1 (minor child one), a fifteen-year-old girl; MC2, a

thirteen-year-old boy; and MC3, a twelve-year-old girl. MC2 and MC3 testified that they were anally raped on multiple occasions over a period of a few years. All three children testified that they, either together or separately, reported Garcia's abuse to their mother on three separate occasions. Appellant was convicted by a Saline County jury of two counts of permitting the abuse of a minor, and she was sentenced to forty years in the Arkansas Department of Correction.

For her first point on appeal, appellant argues that MC1's testimony regarding being abused by Garcia was improperly admitted against appellant. When the State called MC1 to the stand, appellant asked the court to exclude her testimony regarding abuse by Garcia because it did not go to the guilt or innocence of the appellant, due to MC1 not telling her mother about this abuse. The prosecutor responded by stating that the State has the burden of proving abuse occurred and that MC1's testimony would be admissible under Rule 404(b) as a pedophile exception to show that Garcia had the proclivity to sexually assault children. The court agreed and overruled the objection. MC1 testified about being molested by Garcia once when she was eight or nine years old, and she testified that she never told her mother about this incident.

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. *Hancock v. State*, 2011 Ark. App. 174, ___ S.W.3d ___. Moreover, we will not reverse absent a showing of prejudice. *Id.*

Appellant argues that the testimony at issue could not come in under the pedophile exception because it did not describe an act done by her. The testimony she objected to described acts done by her children's abuser. She also argues that the act described in the testimony was not even the basis for charges against her; the abuse against the other siblings was the basis for her charges. She claims that the testimony prejudiced the jury against her for abuse she did not inflict on this witness and could not have prevented and that there was no probative value to this testimony.

The State concedes that Rule 404(b) and the pedophile exception did not apply here, but instead argues that the testimony was an "integral part of MC1's explanation of why she wanted to warn her mother of the ongoing abuse of MC2 and MC3." Arkansas Rule of Evidence 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The "pedophile exception" to Rule 404(b) allows for the admissibility of evidence of the defendant's similar acts with the same or other children when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. *Mason v. State*, 2009 Ark. App. 598, 330 S.W.3d 445.

The testimony at issue here is the testimony of a victim about something Garcia, not the defendant, did to her. Because the testimony objected to did not describe an act of the defendant, the pedophile exception is inapplicable. The evidence of a similar act done by

Garcia offered to show that he acted in conformity therewith in committing the abuse that is the basis of appellant's charges should have been excluded under Rule 404(b). However, as stated above, we will not reverse the trial court's admission of evidence absent a showing of prejudice. The State argues that appellant cannot show that she was prejudiced by the admission of this testimony because the evidence of abuse was overwhelming and appellant does not challenge the evidence of abuse of MC2 and MC3. This court has said that even when a circuit court errs in admitting evidence, we will affirm the conviction and deem the error harmless if there is overwhelming evidence of guilt and the error is slight. *Rodriguez v. State*, 372 Ark. 335, 276 S.W.3d 208 (2008). To determine if the error is slight, we look to see whether the defendant was prejudiced by the erroneously admitted evidence. *Id.* Prejudice is not presumed, and this court will not reverse a conviction absent a showing of prejudice by the defendant. *Id.* When the erroneously admitted evidence is merely cumulative, there is no prejudice, and a conviction will not be reversed for harmless error in the admission of evidence. *Id.* The testimony here was cumulative as it was merely more evidence of abuse inflicted by Garcia. MC2 and MC3 testified to being abused themselves. Additionally, MC1 stated that she did not tell her mother or anyone about the abuse inflicted upon her. Appellant was not prejudiced by the admission of evidence regarding abuse by Garcia toward MC1 when much more evidence of abuse was admitted and the testimony at issue did not incriminate appellant. Thus, any error was harmless, and we affirm on this point.

For her next point on appeal, appellant argues that the trial court allowed MC3 to answer a pivotal question a third time after a timely, proper objection from defense counsel. MC3 testified that prior to trial she had called her mother and asked if there was a number she could call to help the case. Appellant gave MC3 a phone number for a man named John Beck, and MC3 called him. MC3 testified on direct that she told Beck that she had lied about her mom knowing about the abuse, but she testified that her statement to Beck was not the truth. During redirect examination, the following exchange occurred over what MC3 told Beck:

Q. And what you told him was not true? Is that right?
A. I don't know.
Q. MC3, I want you to think about it because it's important. You have sworn to tell the truth to these people. Tell them what the truth is. I don't want there to be any confusion about what the truth is.
A. I'm not sure.
Q. Did you tell your mother?
[Defense Counsel]: Your Honor, I'm going to object. That question's been asked and answered several times now.
The Court: Go ahead and ask the question.
Q. Did you tell your mother?
A. Yes.

Appellant argues that when a question has been asked and answered once, objecting when it is asked again is recognized as a proper objection. Appellant argues that even though the third question was phrased differently, it was seeking information already conveyed by the witness in response to the two questions immediately preceding it. Appellant claims that because the answer to the question went to the heart of her potential criminal liability, this

was reversible error and the testimony would have been very favorable for her had the objection been sustained.

The State argues that the trial court has broad discretion in eliciting testimony from minor witnesses and that some latitude in allowing the State to ask leading questions is permitted, particularly in cases involving the sexual abuse of a minor, where the natural embarrassment and fear of the child can be expected to inhibit her testimony. *Hamblin v. State*, 268 Ark. 497, 501–2, 597 S.W.2d 589, 592 (1980). The State argues that it is clear that the trial court did not abuse its considerable discretion by allowing the State to ask MC3 a repetitive question for the same reason that the State was allowed to ask leading questions of the thirteen-year-old abuse victim in *Hamblin*. The factors noted in *Hamblin* were at play here including the youth of the witness, her immaturity, and embarrassment. Furthermore, when considering MC3's testimony as a whole, it appears that she was attempting to protect her mother by testifying that although her mother was told about the abuse, she did not think her mother really knew or understood. Also, the question objected to was a different question than the preceding two questions. Since MC3 distinguished between telling her mother and her mother actually knowing, the questions had different meanings to her. Furthermore, MC3 had already testified clearly that her mother had been told. Thus, it was not an abuse of discretion for the trial court to allow the State's question, and we affirm on this point.

For her last point on appeal, appellant argues that the prosecuting attorney had a potential conflict that should have mandated the recusal of his office to avoid the appearance

of impropriety. Prior to trial, appellant filed a motion to disqualify the Saline County Prosecuting Attorney's office due to conflict of interest. The motion was based on the fact that the children's attorney ad litem in their Department of Human Services case was the wife of the Saline County Prosecuting Attorney. On appeal, appellant argues that it was an abuse of discretion for the trial court to deny her motion. The State argues, however, that appellant failed to obtain a ruling on her motion. While appellant asserts that the trial court denied the motion without a hearing, the State notes that appellant offers no citation to the record to locate the court's denial. As the State claims, we too have been unable to locate any place in the trial record where the trial court denied the motion or where appellant again raised this issue. In order to preserve a point for appellate review, a party must obtain a ruling from the trial court. *Vaughn v. State*, 338 Ark. 220, 992 S.W.2d 785 (1999). We will not review a matter on which the trial court has not ruled, and a ruling should not be presumed. *Id.* The burden of obtaining a ruling is on the movant; matters left unresolved are waived and may not be raised on appeal. *Id.* As there is no ruling on this motion in the record, appellant has failed to preserve this issue for appeal.

Affirmed.

GRUBER and GLOVER, JJ., agree.