Cite as 2018 Ark. App. 572

# ARKANSAS COURT OF APPEALS

DIVISION II
**No.** CR-18-89

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| | **Opinion Delivered** November 28, 2018 |
| CHARLES DWIGHT KING, JR.<br>APPELLANT | APPEAL FROM THE BOONE COUNTY CIRCUIT COURT<br>[NO. 05CR-16-353] |
| V. | HONORABLE GORDON WEBB, JUDGE |
| STATE OF ARKANSAS<br>APPELLEE | AFFIRMED |

**LARRY D. VAUGHT, Judge**

Charles Dwight King, Jr., was convicted by a Boone County Circuit Court jury of raping AF (born July 16, 2009). On appeal, Charles challenges the sufficiency of the evidence supporting the rape conviction and argues that the circuit court abused its discretion in excluding an order of appointment of emergency temporary guardian of AF. We affirm.

In September 2016, AF was seven years old and lived with her grandmother, Elaine Files, in Omaha, Arkansas.[1] Elaine and AF lived in a one-bathroom trailer that was

[1]Elaine testified that her son, Robert Files, is AF's father and that he has seven children with different women. According to Elaine, Robert is not involved with AF's care. Sarah Gregory is AF's mother. In 2013, the Arkansas Department of Human Services removed AF from the custody of her mother, and in 2014, Elaine was awarded permanent legal custody of AF.

connected by a porch to an adjacent trailer.[2] Charles lived in the adjacent trailer. Elaine testified that she was sixty-three years old and had known Charles, who was fifty-four years old at the time of trial, since she was in her thirties when they "went together."

Elaine testified that AF was often in and out of Charles's trailer. Elaine stated that there was a period of a few months when she was remodeling the bathroom in her trailer, and she and AF used the bathroom in Charles's trailer. Elaine further testified that AF was never alone with Charles at night except for on one occasion near the end of September 2016 when Elaine left AF in Charles's care because Elaine stayed the night at the hospital with Brittany, who was pregnant, after Brittany had been in a car accident.

On October 11, 2016, Elaine was contacted by someone at AF's school and informed that AF had been acting inappropriately. When Elaine asked AF about her behavior and if anyone had touched her inappropriately, AF said yes and identified Charles. Elaine called Charles and told him what AF had said. Elaine said that Charles denied the allegations, but she told him she believed AF and not to come home. Elaine then called local law enforcement, and an investigation followed.

Melanie Sonnette Panell testified that she lives in Springfield, Missouri, with her husband Jarrod Panell. Sonnette has three children with Robert, who have been adopted by Jarrod. Elaine and AF lived with Sonnette and her family in Springfield from 2006 to 2009, and AF lived with Sonnette for a few months in 2015. After AF returned to Elaine in 2015, Sonnette filed for guardianship of AF based on allegations that Elaine and AF were living in a run-down trailer that did not have water or electricity and that Charles is an alcoholic.

[2]Elaine testified that Robert and Brittany Allen were also living with her at this time.

Sonnette testified that a decree denying her request for guardianship was entered in August 2016. After the 2016 decree was entered, Sonnette testified that there was no communication between Elaine and Sonnette or between Sonnette and AF.

Sonnette also testified that Brittany and Robert told her about the allegations that Charles had sexually abused AF, and Sonnette immediately filed for emergency temporary guardianship of AF, which was granted on October 24, 2016. Sonnette has had custody of AF since that time.[3]

The parties stipulated to the body-camera recording of Scott Hornaday, a Boone County sheriff's deputy, in lieu of his testimony. Scott was the officer who responded to Elaine's call. Elaine reported to Scott that AF told her Charles had been touching her, that he had her touch him, and that it had happened several times. Scott directed Elaine and AF to the sheriff's department.

Ryan Watson, corporal investigator for the Boone County Sheriff's Office, testified that he met with Elaine and AF at the sheriff's office where Elaine reported that Charles had licked AF's "privates." Ryan arranged for Elaine and AF to be seen at Grandma's House Children's Advocacy Center (Grandma's House) where Ryan observed AF's interview. Thereafter, Ryan sought to interview Charles but could not locate him. Ryan testified that his department actively searched for Charles but was unable to locate him until October 25, 2016. When Charles was brought in for questioning, Charles denied the charges against him and claimed that Elaine had coached AF to make the sexual-abuse allegations. Nevertheless, Ryan believed that he had probable cause to arrest Charles and did arrest him.

[3]Sonnette received permanent guardianship of AF in January 2017.

AF was eight years old when she testified at trial. She stated that things would happen with Charles in his trailer when Elaine was not there or when she was taking a nap, using the computer, or watching TV. AF testified that the night Elaine stayed at the hospital with Brittany, she (AF) stayed the night in Charles's bed but that nothing happened. However, she said on other occasions, Charles touched her where she went to the bathroom with his mouth and hand. She said that he rubbed her there, it hurt, and she could not go to the bathroom later. She said that it happened at bath time and that it happened more than once. AF further testified that Charles got into the bathtub with her and made her wash and suck his penis. AF said that on other occasions, Charles kissed her on the mouth, licked her nipples, and put his penis in her butt.

Bryttany Jones, a forensic interviewer at Grandma's House, testified that AF disclosed multiple incidents and multiple forms of maltreatment of a sexual nature. Bryttany also stated that there were things that AF said Charles did to her, but she later retracted those statements.

Jacquelyn Cheek, a registered nurse, performed a head-to-toe physical examination of AF at Grandma's House on October 11, 2016. Jacquelyn testified that AF's exam was normal. However, she explained that physical findings of sexual assault are discovered in less than ten percent of all cases because injuries that may have occurred usually heal before a child reports a rape. Jacquelyn also stated that just because she marked the box on her report that sexual-assault findings were absent, that did not mean that sexual abuse did not happen to AF.

The jury convicted Charles of rape and sentenced him to forty years' imprisonment. This appeal followed.

Charles's first point on appeal is a challenge to the sufficiency of the evidence supporting the rape conviction. Our standard of review for a sufficiency challenge is well settled. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Price v. State*, 2010 Ark. App. 111, at 8, 377 S.W.3d 324, 330 (citations omitted). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.*, 377 S.W.3d at 330–31. We affirm a conviction if substantial evidence exists to support it. *Id.*, 377 S.W.3d at 331. Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Id.*, 377 S.W.3d at 331.

On appeal, Charles argues that the circuit court erred in denying his motions for directed verdict because

> [t]here was a dearth of any physical connection supporting the alleged victim's claims. There were no forensic findings, such as DNA, supporting the alleged victim's claims. The only uncontested evidence at . . . trial was that the alleged victim was under the age of fourteen. There was a motive for the custodial family member to have contacted the authorities as the family member was in a heated custodial battle with [AF's] grandmother, Elaine Files, and this family member successfully challenged Elaine Files for the custody of [AF] after the rape allegations against [Charles] were lodged . . . . The alleged victim's testimony in this case is insufficient to prove beyond a reasonable doubt that [Charles] had sexual intercourse or deviate sexual activity with [AF].

Charles's motions for directed verdict at trial, however, were much more limited in scope. He argued below that the State "failed to present evidence that would establish a prima facie case that there has been penetration of the minor child" and that the only evidence of

deviant sexual activity was AF's inconsistent testimony as to whether Charles put his penis in her butt. A party cannot enlarge or change the grounds for an objection or motion on appeal but is bound by the scope and nature of the arguments made at trial. *Daniels v. State*, 2018 Ark. App. 334, at 5–6, 551 S.W.3d 428, 432. Therefore, we will address only those sufficiency arguments that Charles raised at trial in his motions for directed verdict; specifically, that there was no evidence of penetration and that AF's inconsistent testimony is insufficient to support deviate sexual activity.

"A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person: who is less than fourteen (14) years of age." Ark. Code Ann. § 5-14-103(a)(3)(A) (Supp. 2017). The definition of "deviate sexual activity" is any act of sexual gratification involving (1) the penetration, however slight, of the anus or mouth of a person by the penis of another person, or (2) the penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person. Ark. Code Ann. § 5-14-101(1)(A), (B).

Based on this law, we hold that there is substantial evidence to support Charles's rape conviction. AF testified that when she was seven years old, Charles put his penis in her butt and that he forced her to suck on his penis while they were in the bathtub. This testimony meets the definition of "deviate sexual activity" and the crime of rape. Ark. Code Ann. §§ 5-14-101(1)(A), (B) and -103(a)(3)(A). Our supreme court has made it clear that evidence from a witness who testifies to what he or she saw, heard, or experienced is direct evidence. *Hanlin v. State*, 356 Ark. 516, 525, 157 S.W.3d 181, 187 (2004). With regard to a rape conviction, the testimony of a rape victim, standing by itself, constitutes sufficient evidence to support a

conviction. *Id.*, 157 S.W.3d at 187 (citing *Laughlin v. State,* 316 Ark. 489, 872 S.W.2d 848 (1994)); s*ee also Price v. State*, 2010 Ark. App. 111, at 8, 377 S.W.3d 324, 331 (holding that the uncorroborated testimony of a rape victim alone is sufficient to sustain a conviction) (citing *Ward v. State*, 370 Ark. 398, 260 S.W.3d 292 (2007); *Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002); *Hayes v. State*, 2009 Ark. App. 133; *Chrobak v. State*, 75 Ark. App. 281, 58 S.W.3d 387 (2001)). Contrary to Charles's argument, AF's testimony alone is substantial evidence to support his rape conviction.

Charles argues that AF lacks credibility because she had a motive to lie about the sexual abuse so she could escape "a life of squalor" in a "dilapidated trailer park" with Elaine and instead live with Sonnette. The jury was presented with substantial evidence regarding the custody battle for AF between Elaine and Sonnette. It was up to the jury to determine the credibility of the witnesses, and resolutions of any inconsistent evidence are left to be made by the jury. *Daniels*, 2018 Ark. App. 334, at 6–7, 551 S.W.3d at 432. The jury is free to believe all or part of any witness's testimony. *Id.* at 7, 551 S.W.3d at 432; s*ee also Weber v. State*, 326 Ark. 564, 567, 933 S.W.2d 370, 372 (1996) (holding that an appellant's sufficiency argument that focused on the inconsistencies in the testimony of a child rape victim and her mother could have affected the jury's assessment of the credibility of the witnesses, but it did not provide a reason for the appellate court to hold that the circuit court erred in refusing to grant a directed verdict in favor of the appellant). In the case at bar, the jury chose to believe AF's testimony.

Charles's second point on appeal is that the circuit court abused its discretion in excluding an order of appointment of emergency temporary guardian of AF (order of

appointment). When Charles's counsel sought to introduce the order or appointment, the State objected based on relevance. The circuit court sustained the objection. In response, Charles's counsel stated:

> Judge, I'm going to proffer this as Defendant's 4 and the relevance is that the officer's testimony was that nothing else was done after October the 11th. The decision to arrest him was done October the 25th which was one day after this was done. It is our proposition that this order is what sparked this officer to make an arrest. Nothing else happened in this file, other than this, after October the 11th. This is what forced his hand to make an arrest.

On appeal, Charles maintains his argument that the order of appointment is relevant because it prompted law enforcement to arrest him, when before that time there had been no active investigation into the rape allegations and no arrest warrant had been issued.

The decision to admit or exclude evidence is within the sound discretion of the circuit court, and this court will not reverse a circuit court's decision regarding the admission of evidence absent a manifest abuse of discretion. *Gillean v. State*, 2015 Ark. App. 698, at 14, 478 S.W.3d 255, 264. An abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires that the circuit court acted improvidently, thoughtlessly, or without due consideration. *Id.*, 478 S.W.3d at 264. Moreover, an appellate court will not reverse a circuit court's evidentiary ruling absent a showing of prejudice. *Id.*, 478 S.W.3d at 264.

Rule 401 of the Arkansas Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at 14–15, 478 S.W.3d at 265 (citing Ark. R. Evid. 401). Arkansas Rule of Evidence 402 further provides that "[e]vidence which is not relevant is not admissible." For

evidence to be relevant, it is not required that the evidence prove the entire case; rather, all that is required is that it have any tendency to make any fact that is of consequence to the determination of the action more or less probable. *Id.* at 15, 478 S.W.3d at 265.

Here, the entry of the order of appointment does not have the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable. Charles argues that the entry of the order motivated law enforcement to arrest him, but what prompted Charles's arrest has nothing to do with the issue at hand—whether he raped AF. Therefore, we hold that the circuit court did not abuse its discretion in excluding the order of appointment.

Affirmed.

WHITEAKER and MURPHY, JJ., agree.

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