Cite as 2010 Ark. App. 439

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR09-1341

CHAD ANTHONY GAINES APPELLANT	**Opinion Delivered** MAY 19, 2010
V.	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. CR-2008-313]
STATE OF ARKANSAS APPELLEE	HONORABLE GARY RAY COTTRELL, JUDGE
	AFFIRMED

KAREN R. BAKER, Judge

A Crawford County jury convicted appellant Chad Anthony Gaines of two counts of rape in violation of Arkansas Code Annotated section 5-14-103 (Supp. 2007). The jury sentenced appellant to the minimum sentence for the charged offenses, two twenty-five year sentences to be served concurrently. On appeal, appellant argues that the trial court erred in failing to *sua sponte* issue a curative instruction to potential jurors in response to the prosecutor's alleged misstatement of the law during *voir dire* regarding the State's burden of proof. We find no error and affirm.

A detailed recitation of the facts presented at trial is not necessary, as the facts are not in dispute and appellant does not challenge the sufficiency of the evidence produced. The

State filed a felony information against appellant on July 11, 2008, which it amended to include an additional count on December 1, 2008, alleging that on or between October 1, 2006, and February 1, 2007, appellant committed rape, a Class Y felony, by engaging in sexual intercourse or deviate sexual activity with another person who was under fourteen years of age. Appellant was accused of forcing his minor stepdaughter to masturbate him and perform oral sex on him.

Appellant's jury trial began on August 13, 2009. During the trial's *voir dire*, the State discussed the standard of proof in the trial, stating to one group of potential jurors that proof beyond a reasonable doubt is "not 100 percent. It's not 90 percent. It's not 80 percent. It's beyond a reasonable doubt, and the judge will have an instruction about what beyond a reasonable-doubt is." Appellant made no objection to this statement, and *voir dire* of that panel continued. When the judge called the next potential panel of jurors, appellant's counsel objected to the State's characterization of reasonable doubt in the prior panel. Appellant's counsel acknowledged that the level of proof is not one hundred percent, but argued that the court should not allow the State to attempt to attach a percentage like 80 or 90 percent in *voir dire*. The State agreed to just leave it at not being 100 percent, and appellant's counsel acknowledged that this would be satisfactory. No contemporaneous objection was made at the time of the comments, and no contemporaneous curative instruction was either requested or given regarding the State's comments.

At trial, an audio CD and audio/visual DVD of interviews between detectives and appellant were played to the jury. Appellant did not testify at trial; however, in the taped

interviews, appellant denied the allegations against him, but he did estimate that there was probably an 85 percent chance that his stepdaughter had seen him masturbate. Detective Hartley, one of the officers who interviewed appellant during the investigation, commented after the recordings were played that an "80 to 85 percent chance of a man–a child seeing their father [masturbate]. That's not right–no questions asked." In addressing the jury during closing arguments, the State argues that appellant "admits just a little bit. And he tells you . . . about [an] 80 to 85 percent chance of my daughter–my stepdaughter saw me masturbate."

At the close of the evidence, the judge instructed the jury as to the definition of reasonable doubt as follows:

> Reasonable doubt is not a mere possible or imaginary doubt. It is a doubt that arises from your consideration of the evidence and one that would cause a careful person to pause and hesitate in the graver transactions of life. A juror is satisfied beyond a reasonable doubt if, after an impartial consideration of all of the evidence, he has an abiding conviction of the truth of the charge.

The jury found appellant guilty of two counts of rape and sentenced him to concurrent terms of twenty-five years each. This timely appeal follows.

Appellant's sole argument on appeal is that the prosecutor, in discussing the State's burden of proof during *voir dire*, improperly lowered the State's burden of proof, imposing on the trial court a duty to intervene and admonish the potential jurors. Appellant argues that because the reasonable-doubt standard is at the heart of due process, the trial court's failure to do so resulted in a violation of appellant's rights under the Arkansas and federal constitutions.

We will not reverse the action of a trial court in matters pertaining to its control,

supervision, and determination of the propriety of arguments of counsel in the absence of manifest abuse of discretion. *Anderson v. State*, 353 Ark. 384, 395, 108 S.W.3d 592, 598 (2003) (citing *Cook v. State*, 316 Ark. 284, 872 S.W.2d 72, (1994)). The extent and scope of *voir dire* examination is within the sound discretion of the trial court, and the latitude of that discretion is wide. *Miller v. State*, 2010 Ark. 1, ___ S.W.3d ___ (citing *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004)). We will not reverse the trial court unless that discretion is clearly abused, which occurs only when the court acts arbitrarily or groundlessly. *Id.*

We must first determine whether the issue is properly before this court. Our law is well settled that we will not consider issues raised for the first time on appeal, even constitutional ones, because the trial court was deprived of an opportunity to rule on them. *Thomas v. State*, 370 Ark. 70, 74, 257 S.W.3d 92, 96 (2007). Appellant's counsel clearly failed to object to the prosecutor's assignation of a percentage to the State's burden of proof at the time the remarks were made during *voir dire*. Appellant's counsel objected only prior to the next panel being seated for questioning, and both appellant and the State appeared to mutually agree that the State would stick to the burden being something less than 100 percent. A curative instruction was not requested by appellant. However, appellant argues on appeal that the facts in the instant case meet one of the four narrow exceptions that the supreme court has recognized to the contemporaneous-objection rule, which are commonly known as the *Wicks* exceptions. *See Wicks v. State*, 270 Ark. 781, 786, 606 S.W.2d 366, 369–70 (1980). Appellant argues that the third *Wicks* exception should apply. The court in *Anderson*, *supra*, described this third *Wicks* exception as being applicable in situations "when the error is so

flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to have instructed the jury correctly." *Anderson*, 353 Ark. at 395, 108 S.W.3d at 599. The court in *Wicks* stated that a reversal on this basis "would necessarily be an extremely rare exception to our basic rule." *Wicks*, 270 Ark. at 787, 606 S.W.2d at 370. Appellant contends that this case presents one of those extremely rare exceptions. We disagree.

In *Anderson*, the issue before the court involved prosecutorial misstatements concerning the State's burden of proof during *voir dire*, and the court concluded that prosecutorial misstatements did rise to the level of a *Wicks*-three exception. *Anderson*, 353 Ark. at 398, 108 S.W.3d at 601. In the present case, appellant argues that the State shifted the burden of proof by attempting to assign a percentage of proof to define reasonable doubt during *voir dire* and then reinforced this shift during the examination of Detective Hartley. Appellant asserts that erroneously lowering the standard of proof during *voir dire* from something less than 100 percent to maybe 80 or 90 percent without a contemporaneous curative instruction, coupled with the State's admission of testimony regarding the 85 percent chance that appellant's stepdaughter had seen him masturbate, sufficiently confused the jury into applying a constitutionally inadequate burden of proof. However, the prosecutor's statements during *voir dire* were followed immediately by his express statement that the burden is "beyond a reasonable doubt" and that the judge would instruct them on the meaning of reasonable doubt. Unlike *Anderson*, the prosecutor's comments in this case–while inappropriate–do not rise to the level of prosecutorial misstatements, which would impose a duty on the court to intervene and admonish potential jurors.

While we do not wish to imply approval of the remarks that the prosecutor made with respect to defining reasonable doubt in terms of an unknown percentage, we cannot say that the remarks as a whole were a misstatement of the law; and the court's instruction clarified any confusion that the jury may have had regarding the State's burden. Accordingly, the third *Wicks* exception does not apply, and appellant's claim is barred because it was not timely raised below.

Affirmed.

KINARD and BROWN, JJ., agree.