Not designated for publication.

DIVISION II

ARKANSAS COURT OF APPEALS

No. CACR06-818

	Opinion Delivered OCTOBER 24, 2007
TANGELA MONIQUE JOHNSON APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CR04-3039]
V.	HON. BARRY ALAN SIMS, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Robert J. Gladwin, Judge

Appellant Tangela Johnson appeals her conviction of manslaughter and abuse of a corpse, for which she was sentenced to terms of imprisonment of twenty years and twelve years, respectively, to run concurrently. On appeal, she argues that the circuit court erred in prohibiting her counsel's inquiry into the victim's reputation for violence with John Harris, limiting her counsel's cross-examination of John Scales, and disallowing the testimony of Tosha Hall. We affirm.

Appellant was charged with first-degree murder and abuse of a corpse arising from the death of her boyfriend, Gaylord Artis. On or about May 15, 2004, appellant and Artis engaged in a violent fight, during which he was killed, and she subsequently placed his body on a burning trash pile. Appellant was tried by a Pulaski County Circuit Court jury and was ultimately convicted of manslaughter and abuse of a corpse. All three of appellant's points on appeal deal with evidentiary rulings made by the circuit court. The circuit court has broad

discretion in its evidentiary rulings; hence, the circuit court's findings will not be disturbed on appeal unless there has been a manifest abuse of discretion. *Mhoon v. State*, 369 Ark. 134, ___ S.W.3d ___ (2007). Moreover, an appellate court will not reverse a circuit court's evidentiary ruling absent a showing of prejudice. *Harris v. State*, 366 Ark. 190, ___ S.W.3d ___ (2006).

I. Prohibition of Inquiry Into Victim's Reputation for Violence

Appellant's defense at trial was justification. She did not dispute that she and Artis had engaged in a violent fight, during which he sustained fatal injuries. She explained that he had been a violent person and had been physically violent with her in the past. She testified that, during the course of this particular altercation, Artis had pulled a gun on her. She asserted that she was in fear for her life and struggled with him until she was unable to fight any longer. It was at that time that she noticed that Artis was not moving, and she wondered if he might be dead.

John Harris, a friend of appellant, was called as a witness by the State. During cross-examination, appellant's attorney questioned Harris about specific acts of violence and threats made by Artis that were directed at appellant, including vulgar and threatening phone messages. Counsel also asked Harris about an alleged confrontation between appellant and Artis that occurred at Harris's home. Subsequently, Harris was asked if he was familiar with Artis's reputation in the community for violence or illegal activities, at which time the prosecutor objected, arguing that only testimony concerning a reputation for truthfulness was permitted. The circuit court sustained the objection, and no proffer of additional testimony

was made. Appellant contends that the circuit court's limitation of her cross examination of Harris was improper and erroneously curtailed her counsel's ability to establish her justification defense.

The State points out that appellant's challenge with respect to Harris is barred because she made no proffer of such additional testimony, and accordingly, there is no way for this court to evaluate the circuit court's evidentiary ruling. *See Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003). Appellant responds that, pursuant to *Arnett*, a proffer is not necessary where the substance of the evidence is apparent from the context. *See also Swinford v. State*, 85 Ark. App. 326, 154 S.W.3d 262 (2004). We hold that while this is true in some situations, in the instant case, the substance of what Harris would have said is not necessarily apparent. Appellant's challenge is barred due to her failure to proffer Harris's testimony on this issue.

Additionally, we note appellant was able to procure similar testimony when she called Sylvester Levy to testify regarding Artis's violent nature. Levy testified that he was personally acquainted with both appellant and Artis, and attempted to explain that Artis was the kind of person who "would not be crossed." The State again objected to the testimony regarding Artis's reputation, and the circuit court ruled that he could testify only as to what he personally knew, rather than what he had heard in the community. After further testimony and objections, appellant's counsel explained that he was attempting to show, from Levy's personal knowledge and observations, that Artis was a violent person with constant companions who were willing and able to do his bidding and that appellant was afraid of him. The circuit court did not allow appellant's counsel to continue the examination of Levy but

did allow a proffer of his testimony regarding Artis's reputation. Appellant argues that the ruling was an abuse of discretion that denied her the ability to present evidence in support of her justification defense.

With regard to Levy, appellant did proffer the anticipated testimony; however, to the extent that testimony involved specific violent acts of Artis, appellant's argument is misplaced because Artis's character as an aggressive person is not an essential element of appellant's self-defense claim for the first-degree murder charge. *See Anderson v. State*, 354 Ark. 102, 118 S.W.3d 574 (2003). As such, the State claims, and we agree, that the circuit court did not abuse its discretion by excluding that specific testimony. Alternatively, the State claims that any error was not prejudicial because it was merely cumulative, in that Levy did testify that Artis was "not to be crossed." Additionally, Harris and other witnesses were able to testify as to specific violent and threatening acts as well. *See Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003) (stating that merely cumulative evidence is not prejudicial); *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998) (holding that evidentiary error is harmless if the same or similar evidence was otherwise introduced). Because a significant amount of evidence was elicited on this issue, appellant has failed to demonstrate how she was prejudiced. We hold that there has been no manifest abuse of discretion and affirm on this point.

II. Refusal to Allow Cross-Examination of John Scales

Appellant next argues that the circuit court erred by refusing to allow her counsel to cross examine witness John Scales, with a "view toward attacking the witness's credibility," based on a conversation her counsel witnessed between Scales and the prosecutor during a

recess that occurred while Scales was testifying. Appellant acknowledges that there is no rule that prohibits prosecutors from talking with witnesses, but she asserts that there is a line which delineates acceptable witness preparation from impermissible influencing of a witness. *See Bayless v. State*, 326 Ark. 869, 935 S.W.2d 534 (1996). This includes being careful not to indicate to a witness the substance of other witnesses' testimony. *Id.* Appellant argues that, at a minimum, her counsel should have been allowed to inquire as to the substance of that conversation because it could have had a bearing on Scales's credibility.

Again, the State asserts that appellant's argument is barred because appellant failed to proffer the excluded testimony. *See Arnett, supra.* In response to appellant's argument that she could not have made such a proffer because only Scales and the prosecutor knew what was said, the State cites *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999), for the proposition that where the substance of anticipated testimony cannot be discerned because of a failure to proffer the testimony, no prejudice can be shown and the appellate court must affirm. Additionally, we hold that appellant is unable to show prejudice because her counsel was able to attack Scales's credibility on a number of occasions, including both his possible bias based upon his relationship with her during her simultaneous relationship with Artis and the inconsistencies between his testimony at trial and his previous statements to police. Furthermore, the prosecutor addressed the concerns regarding the alleged conversation by asking Scales if he had "reason to lie today" and whether "anybody told [him] to lie or make something up[.]" He answered negatively to both questions. Appellant has simply failed to show how she was prejudiced on this issue; accordingly, we affirm on this point as well.

III. Exclusion of Testimony of Tosha Hall

Appellant's final argument focuses on the circuit court's refusal to allow Tosha Hall to testify for allegedly violating "the rule." Arkansas Rule of Evidence 615 deals with the exclusion of witnesses, and states that:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

There was considerable debate as to whether Hall had in fact violated the rule, but there is evidence in the record to support the allegation that members of the audience, as well as the circuit judge himself, witnessed Hall being in the courtroom during various parts of the proceedings. Appellant argued before the circuit court that the exclusion of her testimony was improper because the period of time Hall was in the courtroom occurred during irrelevant portions of the trial.

While the circuit judge stated in his ruling that he believed both that Hall would not have come into the courtroom had she known to do so was improper and that appellant's counsel had sent her out when he noticed her presence, he also believed that she had been present in the courtroom during the presentation of testimony. Appellant primarily argues on appeal that the rule had not even been invoked during the proceeding. Alternatively, she contends that the circuit court had other viable alternatives to excluding her testimony, particularly, citing her for contempt, or permitting comment on her noncompliance in order to reflect on her credibility. *See Blaylock v. Strecker*, 291 Ark. 340, 724 S.W.2d 470 (1987).

Appellant failed to proffer the testimony that Tosha Hall would have presented and is therefore unable to demonstrate any prejudice. Additionally, appellant appears to have changed her argument on appeal related to this point. At trial, she argued that no violation of the rule had occurred by Hall being in the courtroom because she was only there during irrelevant portions of the trial. Now on appeal, she asserts that the rule was never invoked by either party and therefore no violation could have occurred. It is elementary that an appellant cannot change his argument on appeal and that he is limited to the scope and nature of the argument made below. *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004). Likewise, while appellant asserts other viable alternatives that were available to the circuit court, she failed to develop those below and is precluded from asserting them on appeal. This court has repeatedly stated that we will not address arguments, even constitutional arguments, raised for the first time on appeal. *Dowty v. State*, 363 Ark. 1, 210 S.W.3d 850 (2005). Accordingly, we affirm on this point as well.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.