NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
SAM BIRD, JUDGE

DIVISION IV

CACR07-458

DECEMBER 12, 2007

KEVIN L. ALLBRIGHT	APPELLANT	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. CR-05-82-4]
V.		HON. LYNN WILLIAMS, JUDGE
STATE OF ARKANSAS	APPELLEE	AFFIRMED

Kevin Allbright was convicted in a jury trial for one count of rape and two counts of second-degree battery, and he was sentenced to consecutive sentences of imprisonment totaling five hundred and four months. The rape victim was his twenty-two-month-old niece; she and her brother, not quite three years old, were the battery victims. Allbright raises two points on appeal. First, he contends that the trial court erred in denying his motion to suppress his statement to police because it was not given voluntarily. Second, he contends that the trial court abused its discretion in allowing testimony about the presence of semen on the niece's clothing. We hold that the admission of the involuntary statement was harmless error, and we find no abuse of discretion in the court's allowance of the disputed testimony. The convictions are therefore affirmed.

The Denial of Appellant's Motion to Suppress His Statement

At a hearing on appellant's motion to suppress, Detective Paul Norris and officers of the Hot Springs Police Department testified for the State, and appellant testified in his own behalf. The trial court denied the suppression motion after hearing appellant's argument that he was intoxicated and had asked for an attorney. Just before jury selection on the morning of trial, appellant renewed his motion on the basis that he was intoxicated and that Norris induced him to talk by falsely promising to obtain help for him. His motion was again denied. Appellant argues on appeal only that his statement to Norris was inadmissible because it was obtained by a false promise of help and thus was involuntary.

A confession is not voluntary if the officer makes statements that are calculated to deceive. *Pyles v. State*, 329 Ark. 73, 947 S.W.2d 754 (1997). An interrogator may try to persuade an accused to tell the truth or to answer questions and may even misrepresent facts, so long as the means employed are not calculated to procure an untrue statement and the confession is otherwise voluntarily made. *See*, *e.g., id.* A misleading offer to "help" the accused, however, has been held to be a false promise rendering a statement involuntary and thus inadmissible at trial. *Id.* In reviewing a ruling on the voluntariness of a confession, the appellate court makes an independent determination based upon the totality of the circumstances. *Brown v. State*, 354 Ark. 30, 117 S.W.3d 598 (2003).

Testimony at the suppression hearing revealed that Officer Chris Atkins responded to a call of child abuse and suicide attempt at 1:00 a.m. on February 9, 2005. Officer Atkins found Brandon Folsum and Stephanie Allbright (appellant's sister) standing outside the Park

Motel. Each was holding a young child, and Ms. Allbright was crying. The two children were the niece and nephew of Ms. Allbright and appellant: S.M. had bruising about his face and back, and A.N. had a bite mark on her face. Appellant was outside the rail of the seventh-floor fire escape, hanging on by his hands. Folsum and Ms. Allbright identified appellant as the person who had injured the children.

Officers Atkins and Shoemaker entered the apartment and convinced appellant to come back onto the platform, and he stepped into the room. There was an odor of intoxicants about his person, and there were empty liquor bottles and beer cans in the room. Appellant told the officers that he "just lost his job and . . . temper." He was sobbing and his speech was unclear, but he did not appear to be intoxicated to the point of staggering or stuttering or slurring. Officer Shoemaker Mirandized appellant, handcuffed him, and transported him to the elevator. Appellant said, "I lost my temper and I hit them, but I didn't hurt them. I f***** up this time. I didn't mean to hurt them."

Officer Sawyer took custody of appellant at the motel and transported him to the county jail by patrol car. Appellant hit his head against the cage of the car several times, saying, "I beat them, but didn't hurt them." Atkins advised appellant of his Miranda rights again at the jail, where he initialed a written rights form and a waiver. Atkins testified that the statement at the elevator was not based on any prompting or questioning on his part, and Sawyer testified that he did not prompt appellant's statements in the patrol car.

Detective Paul Norris came into contact with appellant about 1:30 a.m. in the jail when he was signing the rights form, and Norris asked what had happened. Appellant

explained that the children's mother was a "crack whore," their father had run off to Massachusetts, and appellant had been watching the children for about two weeks. He said that he did not want to watch them but that they had been "put" on him. He admitted that he had slapped S.M., might have forgotten to change A.N.'s diaper, and "might have whooped them." Appellant had an odor of alcohol on his breath and admitted that he had drunk a bottle of tequila. Norris testified that appellant was solemn, slightly unsteady on his feet, and perhaps intoxicated; his speech was somewhat slurred, which Norris thought might have been due to a speech impediment.

At 5:15 a.m. the next morning, February 10, Atkins transported appellant from the county jail to the city police department to be questioned by Norris, who had spent the previous day investigating the case. In Norris's cubicle and with Atkins present, Norris read appellant his *Miranda* rights and appellant waived them. Norris, after telling appellant that doctors had reported an injury to A.M's vaginal area, asked appellant if he had "penetrated with his penis." Appellant replied that he had not, and Norris asked, "With what?" Appellant said that he had used one finger. He signed a written statement that admitted to this act and further stated, "I feel bad and I'm sorry. I don't know what to say."

Atkins testified that appellant signed the statement of the interview without hesitation, was cooperative, understood what was happening, and was neither aggressive, combative, nor argumentative. Norris described appellant as solemn, calm, and cooperative. Norris testified that appellant never requested an attorney or indicated a desire to end the interview, which lasted approximately thirty minutes.

Under cross-examination Norris testified that he had anticipated that appellant would be appointed an attorney later in the morning, that the attorney would tell appellant not to speak to the police, and that "part of the schedule" was to conduct his interview before the court appearance. Norris further testified:

> I do remember telling Kevin [appellant] that I had talked to his family and that I knew he needed help, and that I would get him help if he just cooperated with me.
>
> Honestly, offering to get them help is just something I say to try to get them to cooperate, to get them to give up their rights and talk to me. I agree that it is a "bait and switch."
>
> Knowing that this was an individual who has potential mental health problems and who had been drinking, the efforts I took to make sure his rights were enforced were just to read him his rights. ...
>
> As part of the attempt to get Kevin to give up his rights, I impressed upon him that he could help [A.N.] and his family if he told us what happened so that [she] wouldn't have to undergo any tests. I [preyed] upon his sympathies. Financial obligations regarding the tests might have been discussed, I'm not sure. Another element I mentioned was that by cooperating, he would alleviate any pain [she] might feel or have to undergo. That she wouldn't have to get any shots, and that he could really help her out by doing this.

Appellant testified that on the night of his arrest he had taken about seven hydrocodones and had drunk a Bud Light twelve-pack as well as a fifth of tequila. He essentially reiterated Norris's testimony that the detective said that he had talked with

appellant's family, knew of appellant's need for help, and would try to get help for him.[1] Appellant stated:

> Then he told me that [A.N.] had injuries to her vagina and he said it would save my family lots of money and time if I would tell him what happened. I told him I penetrated [A.N.] with my finger and we talked about [S.M.] and what happened to him.... Then he asked me to sign the sheets of paper and I signed the sheets of paper and that's it.
>
> I thought that by talking to Detective Norris I was helping my family out, helping [A.N.] out.

Appellant testified that he did not say "I don't want to talk to you" because he thought he would be getting an attorney later that day and because Norris promised to get him help. He stated that he had completed the tenth grade.

The threshold issue in the first point on appeal is Norris's offer to get help for appellant. Appellant contends that the trial court erred by failing to declare his statement involuntary and suppressing its admission because Norris intentionally misled him by promising to get help if he would cooperate. Noting his level of education and mental health, the timing of the interview before his court appearance and appointment of an attorney, and the preying upon his sympathies, he additionally argues that the statement was involuntary under the totality of circumstances surrounding its procurement. The State concedes that the statement was not voluntary but asserts that its admission was harmless error.

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[1]Appellant's testimony differed from that of the police officers regarding when and if he requested an attorney, but that testimony is not pertinent to the argument raised on appeal.

Norris admitted that his offer to obtain help for appellant was simply a means of trying to get his cooperation. There was no indication that Norris planned to get any sort of help for appellant, nor that the offer was fulfilled. We hold that the statement Norris obtained from appellant through a misleading offer of help was involuntary and that the trial court erred by failing to suppress the admission of the statement into evidence. However, we agree with the State that this error does not require reversal.

The admission of an involuntary confession is subject to a harmless error analysis. *Riggs v. State*, 339 Ark. 111, 130, 3 S.W.3d 305, 316 (1999) (citing *Arizona v. Fulminante*, 499 U.S. 279 (1991)). In *Brunson v. State*, 41 Ark. App. 39, 45-46, 848 S.W.2d 936, 941 (1993), we examined the role of the reviewing court in making such an analysis:

> As a general rule, most trial errors, including constitutional ones, do not automatically require reversal of a criminal conviction. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). Rather, if the error is harmless, the conviction will be affirmed despite the error. *Id.* In order to be harmless, a constitutional error must be harmless beyond a reasonable doubt. The test is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Id.*; *Fahy v. Connecticut*, 375 U.S. 85, 84 S. Ct. 229, 11 L.Ed.2d 171 (1963); *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992).

Here, Dr. Whorton testified that he examined both S.M. and A.N., and that both had extensive injuries. He described S.M. as "fearful," with injuries "so numerous" that they were documented by videotape. The injuries included extensive bruising across S.M.'s face, a bite on his left cheek, bruising and petechiae around his eyes consistent with strangulation, abrasions across his scalp, and extensive bruising of his entire back, groin, genitalia, thighs, knees, and buttocks. Dr. Whorton testified that none of the injuries occurred by accident.

He said that there were clearly some fresh injuries, such as bruising and blood in S.M.'s ears, but that the bruises appeared generally to be in various stages of healing, which suggested infliction over a period of time.

Dr. Whorton testified that A.N.'s left eye was bruised, she had a fresh bite mark on her right cheek, and there also was bruising on her abdomen, spine, and right thigh. He described an injury to her vagina as "so severe it was almost difficult to determine where the normal anatomy was." Besides extensive vaginal swelling, her hymen had sustained "fresh" injuries. Dr. Whorton said that he had never seen anything that could approach the extent of these "very, very severe" injuries. He testified that the vaginal injuries were caused by penetration and, because of the degree of pain that the infliction of the injuries would have caused, "absolutely" could not have been caused by A.N. herself penetrating her vagina with her finger.

Appellant's sister, Stephanie Allbright, described a series of family events in which the children were left with her, she turned them over to appellant for a couple of months when she moved to Pine Bluff, and she eventually decided to return to Hot Springs. In the early morning of February 9, 2005, she received a telephone call from a friend telling her that appellant had "snapped" and that there was something wrong with the children. Ms. Allbright went to the hotel and saw appellant hanging off of the fire escape. He was pulled back inside, and someone told her that she needed to "come see the kids."

Ms. Allbright testified that S.M. was nude on the bed and A.N., lying with him, was wearing only a sweatshirt and was bleeding from her vagina. Ms. Allbright "jumped on"

appellant and tried to push him back out the window again, and the man with her hit appellant with a chair. She wrapped the children and took them downstairs to await the police, and appellant ended up hanging from the fire escape again. She testified that she had noticed bruising on S.M. the previous day, had confronted appellant about it, and had slapped him. She testified that he admitted inflicting the bruises.

We agree with the State that there was overwhelming proof of appellant's guilt, wholly apart from the statement that he gave to Detective Norris. There was evidence that both children sustained extensive and severe injuries while in appellant's care and that A.N. had vaginal bleeding on the night of his arrest. Additionally, appellant told the officers who first encountered him that he had lost his temper, he admitted to Ms. Allbright the day before that he had caused S.M.'s bruising, and at the jail he admitted that he slapped S.M., perhaps forgot to change A.N.'s diaper, and perhaps "whooped" the children. In light of this overwhelming evidence of guilt, the trial court's error in admitting appellant's involuntary statement that he penetrated A.N.'s vagina with his finger was harmless beyond a reasonable doubt and requires no reversal.

Relevancy of Testimony

As his second point on appeal, appellant contends that the trial court abused its discretion by allowing testimony that there was semen on the sweatshirt that A.N. was wearing when appellant was taken into custody. The semen was not tested for DNA.

Appellant's attorney contended in a pretrial motion that testimony about the presence of semen on the sweatshirt was irrelevant. He argued, "As I understand it, the State's theory

is that there was digital penetration and not penile penetration. . . . Therefore, the semen has no relevance and can't be linked to Mr. Allbright." He argued that there were other males around the child, that the State had not attributed the semen to anyone, and that the length of time it had been on the sweatshirt was unknown.

The State responded that the presence of semen was highly relevant as a part of a sexual offense on the child. The State maintained that the sample was so minimal that it could not be further tested, which would be explained by trial testimony. The State argued that appellant had admitted "committing these acts" and was the only person with custody of the children when the injuries occurred. Finally, the State noted that, although appellant confessed to digital penetration only and although there was no evidence of penile penetration, the State's information alleged that appellant had committed sexual intercourse or deviate sexual activity. The trial court denied the motion, stating that any problems could be handled in cross-examination.

During testimony by Officer Atkins at trial, the trial court overruled appellant's objection when the State offered A.N.'s sweatshirt into evidence. Jane Parsons, a forensic serologist for the State Crime laboratory, then testified over appellant's objection that she identified blood and a small stain of semen on the sweatshirt. The seminal stain, located on the back of the garment, was "less than a quarter inch" in size, and Parsons testified that she had to use all of it to verify that it was semen. She eventually found two sperm cells through confirmatory tests, but the tests consumed the sample and left nothing further for DNA

testing. Her tests did not confirm appellant as the source, and she could not determine how long the stain had been there. She stated that the semen could have come from "any male."

On appeal appellant argues that Parsons's testimony had very little probative value and should have been excluded because of its prejudicial effect on the jury. He notes that she could not identify him as the source of the semen stain on the sweatshirt.

We will not reverse a trial court's ruling on the admission of evidence absent an abuse of discretion, nor will we reverse absent a showing of prejudice. *McClellan v. State*, 81 Ark. App. 361, 101 S.W.3d 864 (2003). 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. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003). The State is entitled to prove a case as conclusively as possible. *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003).

The State alleged in its information that appellant engaged in sexual intercourse or deviate sexual activity with A.N., without restricting the charge to digital penetration. Therefore, the State was entitled to put on any evidence tending to show that a sexual act had occurred involving the child. Even though the source of the semen could not be identified, the presence of semen on her clothing, at a time when she was bleeding from vaginal injuries, had some tendency to show the occurrence of a sexual act. We hold that the trial court did not abuse its discretion by allowing testimony about the presence of semen on her sweatshirt. Affirmed.

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