Not designated for publication.

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-545

	Opinion Delivered DECEMBER 10, 2008
JEREMIAH WALTON APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CR-2007-2265]
V.	HONORABLE WILLARD PROCTOR, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Jeremiah Walton was convicted on two counts of rape in Pulaski County Circuit Court after a jury trial held January 16 and 17, 2008. He was sentenced to twenty-five years' imprisonment on each count, which were to be served concurrently. The issue presented on appeal is whether the trial court erred in prohibiting him from pursuing a line of questioning challenging the credibility of a State's witness. We affirm his conviction.

Statement of Facts

A felony information was filed June 8, 2007, alleging that Walton committed two counts of rape by engaging in sexual intercourse or deviate sexual activity with his daughter on or about July 15, 2003, through April 26, 2007. At the time of the trial, Walton's daughter was ten years old. An omnibus/rape-shield hearing was held on October 16, 2007, pursuant to Walton's motion to admit evidence of his daughter's prior sexual conduct. The

motion alleged that the victim's prior sexual contact with her mother's ex-stepfather, Wayne Harvey, with her grandfather, Douglas Walton, and with her brother was essential to his defense as it pertained to the victim's credibility, ability to remember, and physical state.[1] The hearing was completed on January 9, 2008, and the trial court ruled that the rape-shield statute prevented any evidence from being presented regarding the substantiated allegations made in 2001 regarding sexual abuse of the child by her maternal uncle. The trial court reasoned that Walton would be able to present evidence that the child's grandfather, Douglas Walton, had pled guilty to sexual assault against the child and was serving time in prison as a consequence. The trial court further noted that the rape-shield statute did not apply to Walton's defense theory that the victim's mother, Ada Chancellor, "wants to point a finger at anybody she can when she is angry, and that she has done it to her brother, the father-in-law, and her husband when it suits her."

At trial, Dr. Karen Farst testified that she examined the victim on May 9, 2007, at the sexual-abuse clinic on the campus of Arkansas Children's Hospital. Dr. Farst examined the girl with a culdoscope, which is a lighted magnification source, and the only abnormality found was a thinness of the hymen on the posterior portion. She stated that the thinning would be consistent with an injury that could have happened in the course of a penetrating

[1]Ada Chancellor, the victim's mother, testified at the rape-shield hearing that she had not heard of any allegations that her stepfather, Wayne Harvey, had had intercourse with the victim. She also testified that her brother, Junior Harvey, had been accused of molesting her daughter, but had been cleared by the State police. During a continued portion of the hearing, Ms. Chancellor testified that she had learned that the State police had substantiated the allegations of abuse against her brother, Junior Harvey. Further, Douglas Walton was convicted of sexual assault of the victim.

sexual-abuse event in the past that had then healed to make the hymen look thin in that area. She further stated that less than ten percent of victims of sexual abuse have an abnormal exam.

Detective Matt Nelson of the Little Rock Police Department testified that he interviewed the child and her mother, Ada Chancellor, separately. The child was nine years old at the time, and he used diagrams of the human body. The child told him that her father put his penis, which she called a ding-ding, in her vagina, which she called her kitty cat, quite often. The officer stated that he understood from her that this had been taking place since she was six years old. She told him that she was usually asleep or half asleep when he did it.

The victim testified that when she lived with both parents, her father would approach her when her mother was at work or at the store. She said she was six years old when bad things started happening to her. She stated that her dad would touch her in the "wrong spot." She said that she uses her "wrong spot" to go to the bathroom. She explained that her father would touch her wrong spot with his wrong spot. She said "his wrong spot, it would like – it would be in me right there, inside my body. It hurt it." She claimed that he also touched her with his tongue and his hands in her wrong spot. She said that this happened maybe five times when her mother and father were together, and once or twice on the weekends when she saw him for visitation. She described the last time it happened was on a Wednesday when she was visiting her father while her mother was moving. She said that her father was licking her down there and somebody pulled up. She said he hurried and pulled up his pants, and he told her to pull hers up. She told someone about what had been

happening to her that Friday, and her mother picked her up. She stated that her mother did not tell her what to say, but advised her to tell the truth and be brave.

Ada Chancellor testified that she was the victim's mother and had been married to Walton for about ten years. They had three children and divorced in February 2007. She described how she came to know of the child's assertions and what she did in response. Rosemarie Kyle, a friend of Ada Chancellor, testified that she took the child and her mother to the hospital.

Walton called Mandy Wortenburger, who testified that she evaluated a rape kit that had been performed on the victim. She found no semen or blood on the items presented to the crime lab, and the items included the child's clothing and swabs of her genital area and mouth. Amanda Walton, appellant's sister-in-law, testified that when she asked the victim about the allegations, the victim dropped her head, which was behavior the child displayed when she was not telling the truth. She testified that she did not believe the child when the child told her of the abuse, and still did not believe it to be true. She stated that Ada Chancellor was mean and vindictive, and that Ada Chancellor had told her that she had a plan to put Walton in the penitentiary. Joanne Rodriguez testified that she heard Ada Chancellor twice say that she would come up with a plan to put Walton in the penitentiary, and Vickie Bond testified that she heard Ada Chancellor say words to that effect on one occasion.

The jury found Walton guilty on both counts of rape and recommended that he be sentenced to twenty-five years' imprisonment and that the sentences should run concurrently.

The trial court filed an Amended Judgment and Commitment Order to this effect on March 26, 2008. Appellant filed a timely notice of appeal, and this appeal followed.

Statement of Law

Pursuant to Arkansas Code Annotated section 5-14-103(a)(3)(A), "a person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person .... [w]ho is less than fourteen (14) years of age." Generally, when a criminal defendant is charged with violating section 5-14-103(a)(3)(A), consent is not an issue, and the State must only prove that (1) the defendant engaged in intercourse or deviate sexual activity with the victim and (2) the victim was under fourteen (14) years of age at the time of the sexual act. *See M.M. v. State*, 350 Ark. 328, 88 S.W.3d 406 (2002).

Pursuant to the rape-shield statute, Arkansas Code Annotated section 16-42-101, a criminal defendant is barred from introducing certain evidence to prove his or her defense:

> (b) [O]pinion evidence, reputation evidence, or evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person, evidence of a victim's prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true, or evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegations is not admissible by the defendant, either through direct examination of any defense witness or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.

Ark. Code Ann. § 16-42-101(b).

The purpose of the rape-shield statute is to protect victims of rape or sexual abuse from the humiliation of having their personal conduct, unrelated to the pending charges, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt. *Harris*

v. State, 322 Ark. 167, 907 S.W.2d 729 (1995). The circuit court is vested with a great deal of discretion in ruling whether evidence is relevant and admissible under the exception to the rape-shield statute. *Graydon v. State*, 329 Ark. 596, 953 S.W.2d 45 (1997). Accordingly, we will not overturn the circuit court's decision unless it constituted clear error or a manifest abuse of discretion. *Id.*

Argument

Walton cites only one case in his argument that the trial court erred in prohibiting him from pursuing a line of questioning challenging the credibility of Ada Chancellor, thereby preventing full development of his defense. In *Crane v. Kentucky*, 476 U.S. 683 (1986), the United States Supreme Court held that, whether under the Due Process Clause of the Fourteenth Amendment or under the Compulsory Process or Confrontation Clauses of the Sixth Amendment, a criminal defendant has a right to a fair opportunity to present a defense. Based on this premise, Walton maintains that he should have been allowed to introduce testimony demonstrating a pattern on the part of the victim's mother of reporting sexual assaults against her daughter, and possibly, to challenge the mother's credibility.

Walton argues that despite the trial court's ruling at the conclusion of the rape-shield hearing that the rape-shield statute would not prohibit questions of Ada Chancellor regarding her accusations of other family members abusing her daughter in the past, the trial court ruled at the trial that Walton could not question Chancellor regarding whether or not she "told the police about a third man being sexually inappropriate with [the victim]." He recites the following bench conference at trial:

DEPUTY PROSECUTOR: Your Honor, this is the same subject of [the] rape-shield hearing and I thought the ruling was clear that Doug Walton could come in, but that's it. This is getting into the stuff about the rape shield.

DEFENSE COUNSEL: What I understand from your ruling last week, Your Honor, was that you were – I am not bringing in any evidence of the allegations against Junior Bear Harvey [the uncle]. All I am asking is if the mother has told the police that a third man – accusing a third man of touching her daughter. Yes or no. I am not going into any specifics of that. It goes to the mother's credibility, not the daughter's prior sexual experiences.

DEPUTY PROSECUTOR: Your Honor, it is the same thing. It is just a backdoor way of getting in the evidence that the Court has ruled is not coming in.

DEFENSE COUNSEL: It is about the mother — the mother's pattern of telling the police —

THE COURT: Well, I ruled that it would be excluded. It is not coming in. Objection sustained.

Walton argues that the trial judge did not previously rule that the mother's testimony regarding a prior report of sexual abuse involving the uncle and the victim would be absolutely excluded. He maintains that, in fact, the trial court stated that such testimony could be elicited if it comported with the rules of evidence. He maintains that had he been able to pursue the questioning, and the witness proved to be lacking in credibility, he could have further developed the posture he argued in closing— that a vengeful ex-wife sought to have the father of her children "in the penitentiary."

The State contends that the trial court did not abuse its discretion by limiting Chancellor's cross-examination about the victim's prior sexual conduct. Abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but requires that the trial court act improvidently, thoughtlessly, or without due consideration. *Grant v. State*, 357 Ark. 91, 161 S.W.3d 785 (2004). A trial court must determine when a matter has been sufficiently developed and when the outer limits of cross-examination have been reached, and unless the trial court's discretion has been abused, appellate courts will not reverse. *E.g.*, *Holloway v. State*, 363 Ark. 254, 213 S.W.3d 633 (2005). A substantial factor in determining the reasonableness of limits is whether the evidence is critical to the defense. *See Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998).

The State argues that Walton's written motion to admit evidence of the child's prior sexual conduct made no mention of Chancellor's credibility. At the rape-shield hearing, Chancellor testified that Douglas Walton was convicted of sexual assault against the child, but that she was not aware of any allegations that her stepfather, Wayne Harvey, had had sex with the child. She also testified that Walton had accused her brother of sexually touching the child when the child was two or three years old. Chancellor said that she took the child to Arkansas Children's Hospital where the child mentioned something about touching. Chancellor testified that the State police investigated both her brother and stepfather, and the allegations against them were found not to be true. When the hearing was continued to January 9, 2008, Chancellor testified that she did not accuse three men of sexually abusing her daughter, but that Walton had accused her brother, and she was not the one who accused

Walton or his father. She testified that, since the previous hearing, she had reviewed the hospital records from 2001 and discovered that the allegations against her brother were substantiated by the State police.

The State contends that the trial court repeatedly asked Walton's counsel what evidence she was attempting to offer other than the stipulated Douglas Walton evidence. The response was that she was trying to get evidence from a 2001 Department of Human Services report and Dr. Jenna Martin to counter Chancellor's testimony. The trial court discussed how evidence of any alleged 2001 incident would possibly be admissible. Neither Dr. Martin nor anyone from DHS testified. The following colloquy also took place at the pre-trial hearing:

DEPUTY PROSECUTOR:	Again, the other issue I will have with that is, judge, it was substantiated in 2001.
THE COURT:	That is true. You are right. There would be a question then as to whether — that would be right. You couldn't use that for impeachment because he is in jail. He is in prison.
DEPUTY PROSECUTOR:	Well, actually, I was talking about the 2001 —
THE COURT:	Oh, you are right. With the uncle, yeah, you know.
DEFENSE COUNSEL:	But I understand you are not allowing that evidence to come in, even though it was found true in 2001, correct?
THE COURT:	Right.

The State contends that the trial court agreed that any evidence of the 2001 incident would not impeach Chancellor because it was substantiated. Because the prior abuse was substantiated, and because Douglas Walton had also been convicted of abusing the child, there

was no "pattern" of Chancellor falsely reporting sexual assaults against the child with which to impeach Chancellor, and the trial court's ruling was not in error.

Moreover, Walton's written motion made no mention of a 2001 incident with the uncle or the mother's credibility. *See* Ark. Code Ann. § 16-42-101(c)(1). Walton also failed to obtain a written order clarifying exactly what evidence, if any, could be introduced. *See* Ark. Code Ann. § 16-42-101(c)(2)(C). Therefore, to the extent that the pretrial ruling was unclear, Walton's failure to correctly state the purpose of the evidence in his written motion and to obtain a written order pursuant to the rape-shield statute precludes him from complaining about it on appeal. *See Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994).

Alternatively, the State argues that Walton failed to show any prejudice, making any error harmless. *See Lewis v. State*, 74 Ark. App. 61, 48 S.W.3d 535 (2001). We agree with the State's contention that, had there been error, it was harmless. Walton's counsel asserted in opening statements that she would "show that the mother put the story in the girl's head to exact revenge against her ex-husband, at whom she was furious." Chancellor testified that she filed for divorce from Walton because they did not get along and fought over everything. Chancellor also claimed that she felt it was wrong that Walton did not pay for the electricity at the place where she and their children were staying. Chancellor admitted that when she heard that Douglas Walton had sexually touched the child, she told Walton that if it were true, she would do whatever she had to do to prosecute his father. Thus, the case had already reached the point that showed Chancellor had a reason to be biased or had a motive to give false testimony against Walton. Moreover, three witnesses testified that Chancellor told them

she was going to get Walton out of her life and put him in the penitentiary. In light of what the jury heard that could have caused it to disbelieve Chancellor, its ignorance of the child's accusation against a third perpetrator, which later was substantiated, would not affect its assessment of Chancellor's credibility.

Affirmed.

PITTMAN, C.J., and GLOVER, J., agree.