

ARKANSAS COURT OF APPEALSDIVISION III
No. CACR11-198

KARLA L. BROWN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

OPINION DELIVERED October 12, 2011APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT,
[NO. CR-2009-3-IV]HONORABLE MARCIA R.
HEARNSBERGER, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Karla Brown appeals from the judgment and commitment order filed by the Garland County Circuit Court on September 3, 2010, wherein she was sentenced to fifteen years' imprisonment in the Arkansas Department of Correction and ordered to pay victim restitution in the amount of \$98,198 to the Garland County Chapter of the American Red Cross after pleading guilty to one count of theft of property over \$2500. Appellant argues that the circuit court erred in allowing certain testimony during the sentencing hearing and that the circuit court's jury instruction regarding victim restitution was improper. We affirm.

Facts

On January 6, 2009, appellant was charged with theft of property over \$2500 related to money she embezzled while serving as the executive director of the Garland County Chapter of the American Red Cross. Appellant pled guilty to the charge on June 16, 2010, and a jury sentencing was conducted on June 28–29, 2010.

During sentencing, the circuit court allowed, over the objection of appellant's counsel, testimony from Debbie Ugbade, the chairman of the board of the Garland County Chapter of the American Red Cross at the time the theft at issue occurred, regarding a flooding disaster that had a devastating effect on the community a few months prior to the trial. Previous testimony of witnesses for the State, including that of Ms. Ugbade, had established that no person impacted by any disaster was denied the aid of the Red Cross as a result of appellant's theft. However, testimony from those same witnesses also indicated that staff positions had to be cut and the office was temporarily closed two days a week because of the lost revenue. There was also testimony that the office lost credibility with the community and that both the volunteer base and the reserve fund decreased because of the scandal.

The circuit court's instructions to the jury included a non-AMCI instruction regarding victim restitution. Appellant neither objected to the instruction in question nor proffered an alternative instruction.

The jury sentenced appellant as previously set forth pursuant to a judgment and commitment order entered on September 3, 2010. Appellant's notice of appeal was timely filed on October 1, 2010.

I. *Testimony Regarding Albert Pike Flooding*

The sentencing phase of a criminal trial amounts to a trial in and of itself, and the introduction of evidence during this stage must be governed by our rules of admissibility and exclusion. *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994); Ark. R. Evid. 1101(b)(3) (2010). The familiar standards of review of evidentiary decisions recognize the circuit court's superior position for evaluating the appropriateness of the admissibility of evidence under the

rules and permit reversal only upon a showing of an abuse of discretion. *Hill, supra*. Likewise, a circuit court's decision to admit victim-impact evidence is reviewed for abuse of discretion. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006).

Arkansas Rule of Evidence 402 (2010) provides that evidence must be relevant in order to be admissible. If evidence is determined to be relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Ark. R. Evid. 403 (2010). Rule 401 (2010) 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.

The Arkansas General Assembly has enacted legislation providing that particular types of evidence, including victim-impact evidence, are relevant for the purpose of sentencing. Ark. Code Ann. § 16-97-103 (Repl. 2006). Appellant submits that, although victim-impact evidence is deemed relevant by statute, it is not automatically admissible. The Arkansas Supreme Court has held that victim-impact evidence must be governed by our rules of admissibility and exclusion; otherwise, the proceedings would not pass constitutional muster. *Walls v. State*, 336 Ark. 490, 986 S.W.2d 397 (1999).

The first witness that the State called during sentencing was Ms. Ugbade. Although not the core of her testimony on the incident, Ms. Ugbade did testify that the Garland County Chapter never failed to give services to people in need as a result of appellant's crime. That testimony was confirmed by other witnesses for the State, Bernie Hegglund and Jerome Rhodes. Before resting its case, the State called Ms. Ugbade back to the stand, where she

testified about the Garland County Chapter's recent response to a flooding disaster that had occurred at the nearby Albert Pike recreation area. She spoke in depth about the disaster, the resulting funerals, and her personal relationships with the bereaved.

Appellant notes that, in evaluating the admissibility of proffered victim-impact evidence, the victim of the crime must be identified. The restitution section of the Arkansas Code defines "victim" as "any person, partnership, corporation, or governmental entity or agency that suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's criminal episode." Ark. Code Ann. § 5-4-205 (Supp. 2009). Appellant urges that, in this case, the victim is the Garland County Chapter, not the casualties of the Albert Pike flood or their families, particularly considering the consistent testimony of the State's witnesses that relief efforts were not hampered by appellant's theft.

Appellant argues that Ms. Ugbade's testimony regarding Red Cross donors was likewise irrelevant. Because there was no evidence presented that donors to the Red Cross or victims of the Albert Pike flood suffered a loss of any kind as a result of the thefts, appellant maintains that they cannot be considered victims, and the testimony concerning them was not relevant as victim-impact evidence. Appellant maintains that the scope of Ms. Ugbade's testimony far exceeded the impact appellant's crime had on the only victim, the Garland County Chapter.

We disagree. The State explained the basis of this testimony was to show that the funds stolen by appellant impacted the Garland County Chapter in its ability to respond to disasters *such as* the Albert Pike flood in June of 2010. In the words of the prosecutor, the

Albert Pike testimony was offered to show the Garland County Chapter’s “ability to respond to disasters.” He argued, “The basis would be that the lack of funding, the funds stolen by [appellant] would have impacted the ability of the Red Cross and they’re trying to recover and it has affected their ability to respond.” The State’s position was that this testimony was relevant as victim-impact evidence. Although the office was able to scramble to meet the needs of the victims of that particular disaster, the testimony was relevant to illustrate of the difficulties the Garland County Chapter experienced as a result of appellant’s theft.

Appellant next claims that, even if the Albert Pike flood testimony and the testimony regarding Red Cross donors was relevant to some issue in the case, it was highly prejudicial and should have been excluded under Rule 403 of the Arkansas Rules of Evidence. The Arkansas Supreme Court has held that when victim-impact evidence is unduly prejudicial, it may render the trial fundamentally unfair and violate the Due Process Clause. *See Walls, supra*.

The Albert Pike flood was a flash-flood disaster that occurred on June 11, 2010, forty-seven days prior to the jury sentencing and approximately fifty miles from the Garland County courthouse. As a result of the flood, twenty people from nearby communities died. Appellant argues that by allowing testimony regarding the victims of the floods, the circuit court gave the message to the jury that the suffering caused by the disaster was somehow relevant to the case and permitted the jury to consider the casualties and bereaved families when determining an appropriate sentence. She maintains that the testimony suggested to the jury that the victims of the crime included those who suffered at the hands of a natural disaster that occurred over two years *after* the crime had occurred—despite the testimony of the same

witness that every person who needed aid from the Red Cross received it. Appellant asserts that because the testimony unduly prejudiced and misled the jury by implying that appellant's theft somehow affected the aid they received, even if it met the threshold requirement of relevance, the testimony rendered the sentencing fundamentally unfair and should not have been allowed pursuant to Rule 403.

The mere fact that evidence is prejudicial to a party does not make it inadmissible; it is only excludable if the danger of unfair prejudice substantially outweighs its probative value. *Jones v. Coker*, 90 Ark. App. 151, 204 S.W.3d 554 (2005). The circuit court has wide discretion in balancing the conflicting interests, and its judgment will be upheld absent a manifest abuse of discretion. *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997).

Additionally, a jury may consider all the evidence in deciding punishment, and when victim-impact evidence is relevant, admissible, and properly submitted to the jury, it should be weighed against evidence regarding punishment. *Anderson v. State*, 367 Ark. 536, 242 S.W.3d 229 (2006). Victim-impact evidence is not an aggravating circumstance, and it likewise does not violate the statutory-weighting process. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006). Victim-impact evidence has been sanctioned both by the United States Supreme Court as relevant and specifically by the Arkansas General Assembly. *Id.* Because victim-impact evidence is not an element contained in a statute but is simply evidence to be considered by the jury, we hold that the circuit court did not abuse its discretion by allowing the Albert Pike flooding testimony.

II. *Jury Instruction*

With regard to our standard of review, our appellate courts have stated that a party is entitled to a jury instruction when it is a correct statement of the law and when there is some basis in the evidence to support giving the instruction. *Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006). We will not reverse a circuit court's decision to give an instruction unless the court abused its discretion. *Id.*

Instruction number six instructed the jury that, as a result of appellant's crime, the Garland County Chapter of the American Red Cross suffered monetary loss. Based on this fact, you may also order the defendant to pay restitution if you find that the State proved the amount of loss by a preponderance of the evidence.

Appellant notes that instruction number six was not an AMCI instruction, but was presumably modeled after Arkansas Code Annotated section 5-4-205. However, she claims that the instruction did not accurately reflect the language of the statute and notes that criminal statutes are to be strictly construed, with any doubts being resolved in favor of the defendant. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

We decline to reach the merits of appellant's argument because she neither objected below to the circuit court's instruction nor proffered an instruction of her own reciting what she believed to be an accurate statement of the law governing restitution. In the absence of either of these actions, this point is not preserved for this court's review. *See Shockley v. State*, 282 Ark. 281, 668 S.W.2d 22 (1984).

Affirmed.

WYNNE and GRUBER, JJ., agree.