

Cite as 2009 Ark. App. 639

ARKANSAS COURT OF APPEALSDIVISION II
No. CACR09-287

MICHAEL A. WILLIAMS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 30, 2009APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CR-07-4636]HONORABLE WILLARD PROCTOR
JR., JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Michael Williams was convicted of sexual assault in the first degree and was sentenced to twelve years' imprisonment. Appellant argues on appeal that the trial court abused its discretion by denying appellant's objection to Officer Ricky Fortner's testimony that appellant was hiding in a closet that had been nailed shut at the time of his arrest. According to appellant, the testimony should have been inadmissible based on Ark. R. Evid. 403.¹ We find no error and affirm.

Appellant does not challenge the sufficiency of the evidence supporting his conviction; therefore, only a brief recitation of the facts is necessary. Appellant was charged with sexual

¹Appellant's point on appeal actually lists Ark. R. Evid. 404(b) as the basis for his appeal; however, a close look at the argument clearly shows that this is error and the appropriate Rule is 403.

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assault in the first degree after his daughter's friend accused him of sexually abusing her. A jury trial was held on August 18 and 19, 2008, at which the victim, who was sixteen at the time, testified that appellant abused her one night when she stayed at his house with his daughter. At the time of the alleged abuse, the victim was fifteen years old. The victim testified that on the night in question, she was awakened by appellant "touching [her] in [her] vagina." The victim stated that appellant's hands were inside her pajama pants and "inside [her] vagina." The victim said that she was afraid to tell anyone but that her friend's grandmother told her mother. When the victim was questioned by her mother, she told her what happened.

Before testimony began at appellant's trial, appellant made a motion in limine to prevent Officer Fortner's testimony concerning the circumstances surrounding appellant's arrest. Appellant sought to have any testimony that he was found hiding in a closet, which had been nailed shut, excluded. According to appellant, the evidence was "overly prejudicial." The trial court denied the request.

Officer Fortner testified that he answered a disturbance call at appellant's residence on October 22, 2007. Fortner stated that upon arrival, he noticed that the lights inside the residence were on. He went around the back of the residence as Officer Goodlowe knocked on the front door. Fortner testified that he heard shuffling inside and noticed that the lights were being turned off. No one ever answered the door. Fortner stated that in addition to the disturbance call, he also had information that there was a warrant that needed to be served on appellant. The officers "backed off the residence a little bit and kind of kept it under

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surveillance to see if anybody came in or out.” They eventually made contact with appellant’s son, who stated that he would allow the officers entrance into the residence. Appellant’s son also told the officers that he knew why they were there and that “his dad was inside the house, and he knew he had a warrant.” The officers went to the back door with appellant’s son. The son knocked and a black female, who identified herself as appellant’s wife, answered the door. The officers were allowed into the residence and they looked for appellant “with the whole family.” Fortner testified:

They were walking us through the house, opening doors for us, turning on lights. Nobody seemed to know where he was, and we noticed a very small storage closet in the kitchen. The stove was pushed up next to it, and there were nails shot through the doors of the storage closet. And based on that, we had a pretty good suspicion he was going to be inside there. We pulled the stove out, pulled the nails out, opened the door, and he was sitting there.

Officer Fortner stated on cross that he believed that someone nailed appellant in the closet but he never found out who.

The jury found appellant guilty of sexual assault in the first degree and sentenced him to twelve years in the Arkansas Department of Correction. Appellant timely filed his notice of appeal.

Appellant asserts on appeal that the trial court erred by allowing Officer Fortner’s testimony about the circumstances surrounding his arrest into evidence over his Rule 403 objection. Appellant concedes that Arkansas case law supports the proposition that a suspect’s flight from police to avoid arrest or his effort to hide from the police constitutes proof of the suspect’s consciousness of his guilt. However, appellant argues that the State failed to prove

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that appellant was hiding from the police because of his consciousness of guilt of having committed first-degree sexual assault against the victim.²

Rule 403 provides that, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.” Ark. R. Evid. 403 (2008). Our supreme court has noted that evidence offered by the State is often likely to be prejudicial to the accused, but the evidence should not be excluded unless the accused can show that it lacks probative value in view of the risk of unfair prejudice. *See Morris v. State*, 367 Ark. 406, 240 S.W.3d 593 (2006). The balancing of probative value against prejudice, under Rule 403, is a matter left to the sound discretion of the circuit court. *See Holman v. State*, 372 Ark. 2, 269 S.W.3d 815 (2007). The circuit court’s decision on such a matter will not be reversed absent a manifest abuse of that discretion. *See id.*

Here, the circuit court ruled specifically regarding appellant’s Rule 403 objection:

I am going to find that the evidence is relevant. Flight has traditionally been viewed by case law as to some evidence of guilt. It is not affirmatively definitive.

The problem in this case, obviously, is that we have got to weigh it, and the question is does the probative value outweigh the danger of undue prejudice. It is probative. I do think though that although probative and although maybe obviously prejudicial, I do not think that the prejudicial value is such that it would outweigh the [probative value] of allowing it. So I will allow it under the 403 balance. After balancing it under 403, I will still allow it.

²Appellant attempts to make this argument concerning the State’s lack of proof for the first time on appeal. This court will not consider arguments made for the first time on appeal. *Taylor v. State*, 94 Ark. App. 21, 223 S.W.3d 80 (2006).

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We cannot disagree. Although the circumstances of appellant's arrest were not vital in this case, the trial judge did not abuse his discretion in allowing such testimony. Even if the testimony about appellant's arrest should not have been admitted, it was harmless error. See *Gunter v. State*, 313 Ark. 504, 857 S.W.2d 156 (1993) (where our supreme court held that an appellant found hiding in a closet must show prejudice from the admission of testimony surrounding the circumstances of his arrest in order for the appellate court to reverse). Appellant has failed to show how he was prejudiced by the admission of Officer Fortner's testimony. Therefore, we affirm appellant's conviction.

Affirmed.

PITTMAN and KINARD, JJ., agree.