

SUPREME COURT OF ARKANSAS

John H. Brown v. State of Arkansas

246 S.W.3d 414 (Ark. 2007) · No. CR 06-737 · Decided January 4, 2007

SUMMARY

The Arkansas Supreme Court affirmed John H. Brown's conviction for first-degree sexual assault and twenty-five-year sentence. The court held that Brown's sufficiency-of-the-evidence claim and several other arguments were unpreserved, unsupported by an adequate proffer, or waived, including challenges involving a calendar, courtroom closure, excluded defense testimony, and alleged prosecutorial misconduct.

CASE DETAILS

COURT	Supreme Court of Arkansas
WRITING FOR THE COURT	Jim Hannah, Chief Justice
JURISDICTION	Arkansas
DECIDED	January 4, 2007
DOCKET	CR 06-737
DISPOSITION	affirmed
PROCEDURAL POSTURE	Brown appealed his conviction for first-degree sexual assault and twenty-five-year prison sentence. The Arkansas Supreme Court granted a petition for review after the court of appeals reversed and remanded.
STANDARD OF REVIEW	On petition for review, the Supreme Court of Arkansas reviews the case as if the appeal had originally been filed in that court. Sufficiency of the evidence is challenged through a directed-verdict motion, and appellate review is barred when the defendant fails to specifically identify the missing element and supporting proof. Evidentiary rulings are not reviewable without a proffer of excluded evidence unless its substance is apparent from context.
PRECEDENTIAL VALUE	Published opinion; binding precedent of the Supreme Court of Arkansas.
PARTIES	John H. Brown v. State of Arkansas

TOPICS

criminal procedure

preservation of error

appellate procedure

work product doctrine

prosecutorial misconduct

PRACTICE AREAS

criminal procedure

appellate procedure

evidence

constitutional law

QUESTIONS PRESENTED

1. Whether Brown's challenge to the sufficiency of the evidence was preserved when his directed-verdict motions failed to specify the element the State allegedly failed to prove.
2. Whether the appellate court could review the alleged discovery violation concerning the prosecutor's calendar when Brown obtained no ruling on that issue.
3. Whether the appellate court could review the ruling that the calendar was protected work product when Brown failed to proffer the calendar or make it part of the record.
4. Whether Brown could challenge the exclusion of family members from the courtroom when he agreed to the subsequent order excluding all family members during H.M.'s testimony.
5. Whether Brown preserved his claim that exclusion of Lieutenant Whitten's testimony denied him the ability to present a defense when he failed to proffer the testimony.
6. Whether Brown preserved his cumulative prosecutorial-misconduct claim when he failed to object individually to the alleged errors, make a cumulative-error objection, and obtain a ruling.

HOLDINGS

1. A defendant must specifically identify in a directed-verdict motion the element of the offense that the State allegedly failed to prove. Because Brown did not identify any missing element or proof, his sufficiency challenge was not preserved for appeal.
2. An appellate court will not consider an alleged discovery violation when the appellant failed to obtain a ruling on the issue in the trial court.
3. An appellate court cannot review the exclusion or characterization of evidence when the appellant failed to proffer the evidence and its substance is not apparent from the context.
4. A party may not appeal from a decision to which the party agreed.
5. A claim based on the exclusion of testimony is not preserved for appellate review when the appellant fails to proffer the excluded testimony.
6. A cumulative-error claim based on prosecutorial misconduct requires objections to the alleged errors individually, a cumulative-error objection in the trial court, and a trial-court ruling. Because Brown did not satisfy those preservation requirements, the court would not address the claim.

KEY QUOTATIONS

“The element of the crime that the State failed to prove must be specifically identified in a motion for a directed verdict.” (416)

“However, this court cannot review a document that is not before it.” (416)

“He may not now attack and appeal from a decision to which he agreed.” (417)

FACTUAL BACKGROUND

Brown was accused of inserting his finger into the vagina of fifteen-year-old H.M. while she was sleeping in July 2003. H.M. was the sole witness to the alleged assault and testified that she awoke at approximately 4:00 a.m. with Brown's hand down her pajama pants. At trial, Brown challenged H.M.'s credibility, sought access to a calendar concerning events and dates, challenged the exclusion of family members during H.M.'s testimony, sought to present testimony from a police lieutenant, and alleged prosecutorial misconduct.

PROCEDURAL HISTORY

Brown was convicted in circuit court of first-degree sexual assault and sentenced to twenty-five years in prison. The court of appeals reversed and remanded the case. The Supreme Court of Arkansas granted the State's petition for review and reviewed the case as if the appeal had originally been filed there.

DISPOSITION

affirmed

CASES CITED

- Brown v. State, 95 Ark. App. 348, 237 S.W.3d 95 (2006)
- Stewart v. State, 362 Ark. 400, 208 S.W.3d 768 (2005)
- Jordan v. State, 356 Ark. 248, 147 S.W.3d 691 (2004)
- McClina v. State, 354 Ark. 384, 123 S.W.3d 883 (2003)
- Jolly v. State, 358 Ark. 180, 189 S.W.3d 40 (2004)
- Arnett v. State, 353 Ark. 165, 122 S.W.3d 484 (2003)
- Camargo v. State, 346 Ark. 118, 55 S.W.3d 255 (2001)
- Newman v. State, 353 Ark. 258, 106 S.W.3d 438 (2003)
- Robinson v. State, 348 Ark. 280, 72 S.W.3d 827 (2002)
- Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)

OPINION

HANNAH, J.

246 S.W.3d 414 (2007) John H. BROWN, Appellant, v. STATE of Arkansas, Appellee. No. CR 06-737. Supreme Court of Arkansas. January 4, 2007. *415 David O. Bowden, Little Rock, for appellant. Mike Beebe, Att'y Gen., by: Kent G. Holt, Ass't Att'y Gen., Little Rock, for appellee. JIM HANNAH, Chief Justice. John H. Brown appeals his conviction of sexual assault in the first-degree and sentence of twenty-five years in prison.

He argues that the jury's finding of guilt is not supported by substantial evidence, that the trial court erred finding that a calendar was protected by the work-product doctrine, that the trial court erred by denying the right to a full, fair and public trial, that the trial court erred in denying Brown a recognized defense, and that prosecutorial misconduct denied him a fair trial.

We hold there is no error and affirm. This appeal comes to this court by way of a petition for review. Ark. Sup.Ct. R. 6-4. The court of appeals reversed and remanded this case. See *Brown v. State*, 95 Ark.App. 348, 237 S.W.3d 95 (2006). When we grant a petition for review, this court reviews the case as if the appeal had originally been filed in this court.

Stewart v. State, 362 Ark. 400, 208 S.W.3d 768 (2005). Facts Brown is accused of having inserted his finger into the vagina of fifteen-year-old H.M.H.M. was the sole witness and provided the evidence of the alleged crime.

In July 2003, she awoke at about 4:00 a.m. to find her sleeping bag unzipped, pulled down, and Brown with his hand down her pajama pants inserting his finger into her vagina. Sufficiency of the Evidence Brown argues that there is insufficient evidence to support the jury verdict. Sufficiency of the evidence is challenged by a directed-verdict motion. See *Jordan v. State*, 356 Ark.

248, 147 S.W.3d 691 (2004). At the close of the State's case, Brown moved for a directed verdict, arguing that H.M.'s testimony was "incredible and unworthy of belief." He did not specify the element the State failed to prove. At the close of the defense case, Brown again moved for a directed verdict, arguing that a reasonable finder of fact could not find beyond a reasonable doubt that Brown committed the crime.

He alleged that the State had failed to prove the elements of the crime charged, but he did not specify the element the State failed to prove. At the close of all the evidence, Brown simply renewed his prior directed-verdict motions without further argument.

The element of the crime that the State *416 failed to prove must be specifically identified in a motion for a directed verdict. *McClina v. State*, 354 Ark. 384, 123 S.W.3d 883 (2003). Here, Brown failed to specify the element and the proof that was missing.

Therefore, his claim of insufficient evidence is not preserved for appeal. The Calendar At trial, Brown attempted to show H.M. should not be believed because she could not recall dates and because she contradicted herself on events and dates. During cross-examination of H.M., Brown discovered the State had a calendar setting out events and dates. He argues both that there was a discovery violation by the State in not disclosing the calendar prior to trial and that the circuit court erred in finding at trial that the calendar was work product.

Brown failed to obtain a ruling on the issue of a failure to comply with pretrial discovery obligations. A failure to obtain a ruling is a procedural bar to this court's consideration of the issue

on appeal. *Jolly v. State*, 358 Ark. 180, 189 S.W.3d 40 (2004).

However, he obtained a ruling that the calendar was work product. That issue may be heard on appeal. At a bench conference, Deputy Prosecuting Attorney Rebecca Bush stated, "This was made in preparation. It's our notes and her notes of just what their recollection of when they moved." Work product in the context of this case is "records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of his staff or other state agents."

Ark. R.Crim. P. 17.5(a). Certainly notes could be memoranda containing the opinions, theories or conclusions of the prosecuting attorney or members of his or her staff. Bush specifically argued to the circuit court that "it's our notes,"... "it's our work-product." She further represented that the calendar was "not part of our case file." [1] A careful examination of the testimony of H.M. and her mother R.M. raises serious concerns about whether the calendar actually contained work product.

H.M. testified that she and her mother created the calendar. R.M. testified that she created the calendar, and that Bush did not participate in its creation. However, Bush told the circuit court that members of the prosecuting attorney's office were on the calendar notes.

We cannot reach the issue of whether the calendar contained work product because Brown did not proffer the calendar and make it part of the record. Where evidence is excluded by the circuit court, the party challenging that decision must make a proffer of the excluded evidence at trial so that this court can review the decision, unless the substance of the evidence is apparent from the context.

Arnett v. State, 353 Ark. 165, 122 S.W.3d 484 (2003). The substance of the evidence in this case is not apparent. The evidence concerning what is written on the calendar is conflicting; however, this court cannot review a document that is not before it. Public Trial Brown next asserts that he was denied the right to a full, fair and public trial when the circuit court excluded members of H.M.'s family from the courtroom while H.M. testified.

The State moved in limine to exclude family members from the courtroom during H.M.'s testimony, and *417 Brown opposed the motion. The motion was granted; thus, the circuit court ruled against Brown, and he could raise that issue on appeal.

However, the issue was revisited just after the jury was selected and before opening statements. Brown's counsel asked the court to visit with H.M. in camera to determine "how committed she is to this." "This" was a reference to her desire not to testify in front of family.

The circuit court did not interview H.M. and stated that it had based its decision on its duty to make sure that a witness testifies free of intimidation. The court further stated that the fair thing would be to exclude family members on both sides. A discussion followed regarding whether

H.M.'s mother R.M. would testify and whether she would be in the courtroom while H.M. testified.

The deputy prosecuting attorney stated that as the mother of a minor victim R.M. had the right to be in the courtroom when her daughter testified, but that she would not be present. Brown's counsel then stated, "Then I want the entire family excluded, Your Honor... If one goes, I want all of them out."

Thus, while the circuit court initially ruled against Brown, he was in agreement with the court's subsequent decision that all family members of both sides were to be excluded when H.M. testified. He may not now attack and appeal from a decision to which he agreed. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Denial of Right to a Defense Brown argues that by denying him the opportunity to put on the testimony of Lieutenant Earnest Whitten of the Little Rock Police Department, he was denied the ability to put on a defense.

He alleges that Whitten's testimony would have shown that this case was a sham and one of "vindictive" prosecution. However, Whitten's testimony was not proffered. While Brown offers his opinion of how Whitten would have testified, we have no testimony to review. Where evidence is excluded the party challenging that decision must make a proffer of the excluded evidence at trial so that this court can review the decision.

Arnett, supra. Again, this court cannot review what is not before it. Brown has failed to preserve this argument. Prosecutorial Misconduct Brown finally alleges that "the State engaged in prolonged, blatant, and repeated patterns of misconduct that it knew or should have known to be such as [would] inflame the jury against the defendant." It is true that where a prosecuting attorney acts to purposely arouse the passion and prejudice of the jury, reversible error may occur.

See *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003). Reversible error is often alleged to arise from statements made during closing argument. *Id.* However, in the present case, Brown argues that a number of events occurring over the course of the proceedings reveal that the prosecuting attorney was appealing to the passion and prejudice of the jury throughout the case.

Brown notes several pretrial events as well as events occurring at trial: 1. An unsuccessful pretrial motion to introduce evidence of a twenty-year-old false accusation of rape under Ark. R. Evid. 404(b);[2] 2. Reports on the prosecutor's website regarding this criminal prosecution; *418 3. Failure to produce the calendar during discovery; 4. Alleged misrepresentations of Brown's law enforcement certification, including an alleged inaccurate summary used as a demonstrative aid at trial intended to cast him as a liar; 5.

Coaching of H.M. to provide certain testimony; 6. An investigation of Sheriff Phillip Mask because he testified at trial that he saw H.M. when she came to be interviewed, and that she had a sheepish look on her face leading him to believe that she had just given a false statement; 7.

The testimony of officers to H.M.'s credibility and that they only arrest the guilty; and 8. Eliciting testimony from H.M. that she believed lying to be a sin, thereby making an impermissible reference to religion under Ark. R. Evid. 604. Citing *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), Brown argues that the prosecutorial misconduct was so severe that the trial was reduced to a "trial ritual," and that he suffered a denial of due process.

Brown asserts in essence that taken as a whole, the actions of the prosecuting attorney show an appeal to the jury's passion and prejudice in retaliation for the 1996 election campaign. This is an argument that cumulative prosecutorial misconduct rises to a level requiring that the case be reversed. See *Robinson v. State*, 348 Ark. 280, 72 S.W.3d 827 (2002) (multiple acts of misconduct by prosecution at trial alleged to amount to reversible error).

For a cumulative-error argument to be upheld on appeal, the appellant must show that there were objections to the alleged errors individually and that a cumulative-error objection was made to the trial court and a ruling obtained. *Robinson*, supra. This was not done.

Accordingly, we do not address this argument on appeal. Affirmed. DANIELSON, J., not participating. NOTES [1] The State in this case responded to discovery requests by indicating an "open file discovery policy," and thus when Deputy Prosecuting Attorney Bush stated that the calendar was not in the case file, she indicated again that it was work product not subject to disclosure.

[2] Brown alleges that these accusations were first made in the 1996 election and caused Brown to threaten to sue attorney George Ellis and opponent Judy Pridgen for defamation. Judy Pridgen later became chief investigator for the prosecutor and conducted the investigation.