

TESTIMONY OF VICTIM'S PRIOR INCONSISTENT STATEMENT WAS ADMISSIBLE FOR IMPEACHMENT PURPOSES AND ITS EXCLUSION WAS NOT HARMLESS ERROR; VICTIM'S STATEMENT ONE MONTH AFTER INCIDENT WAS NOT CONSIDERED SHORTLY AFTER PURSUANT TO THE HEARSAY EXCEPTION

The Supreme Court of Arkansas heard the appeal of Joseph Anthony Scamardo on appeal from an order of the circuit court finding him guilty of sexual assault and sentencing him to 144 months in prison.¹ Scamardo was accused of sexually assaulting his stepdaughter while on a trip to his parent's house.² The victim testified at trial that while she slept, Scamardo came into the room she was sleeping after her stepsister left and inappropriately touched her.³

In addition to the victim's testimony, her biological father testified at trial.⁴ He stated that while driving her to a court-ordered counseling session approximately a month after the alleged incident, he could tell that something was wrong and decided to talk to her about it.⁵ It was at this time that she told him about Scamardo inappropriately touching her.⁶ The victim's father told the councilor about the conversation and they decided to contact the police.⁷ The victim was examined by a sexual-assault nurse who testified at trial that she could not conclude that the victim had been sexually assaulted which was not uncommon based on the nature of the alleged touching.⁸

The jury found Scamardo guilty of sexual assault in the second degree. He first appealed his conviction to the Arkansas Court of Appeals.⁹ The court of appeals reversed and remanded for new trial. The State petitioned the Supreme Court of Arkansas for review and was granted.¹⁰

Scamardo first argued that the testimony of the victim's aunt should not have been excluded because it was proper impeachment testimony under Ark. R. Evid. 613(b).¹¹ The State countered that the evidence was correctly prevented from being admitted and that Scamardo should not get to use Rule 613 to circumvent basic evidentiary concerns of relevance, prejudice, and confusion.¹² The Supreme Court of Arkansas found that by excluding the testimony the

¹ Scamardo v State, 2013 Ark. 163, at 1, 426 S.W.3d 900, 901.

² *Id.* at 1–2, 426 S.W. 3d at 901.

³ *Id.* at 2, 426 S.W. 3d at 902.

⁴ *Id.* at 5, 426 S.W. 3d at 903.

⁵ *Id.* at 5–6, 426 S.W. 3d at 903.

⁶ *Id.* at 6, 426 S.W. 3d at 903.

⁷ *Scamardo*, 2013 Ark. at 6, 426 S.W. 3d at 903.

⁸ *Id.*, 426 S.W. 3d at 903.

⁹ *Id.*, 426 S.W. 3d at 903.

¹⁰ *Id.*, 426 S.W. 3d at 903.

¹¹ *Id.* at 6–7, 426 S.W. 3d at 904.

¹² *Id.* at 7, 426 S.W. 3d at 904.

lower court abused their discretion.¹³ The abuse of discretion standard “is a high threshold that does not simply require error in the circuit court’s decisions, but requires that the circuit court act improvidently, thoughtlessly, or without due consideration.”¹⁴ During the trial, the victim was asked if she was being made to lie, a statement that was allegedly made in front of her aunt.¹⁵ Scamardo tried to introduce the aunt’s testimony, but the state court found that the aunt’s statement as inadmissible hearsay.¹⁶

The Court reversed the finding because hearsay is offered to prove the truth in the matter asserted, but in the case before them, it was not offered to prove the truth of the matter asserted, that the victim was being made to lie.¹⁷ Instead, the statement was offered to impeach evidence of previous inconsistent statements by the victim.¹⁸ The Court concludes that impeachment of a witness by introducing extrinsic evidence of a prior inconsistent statement through testimony of a second witness must be allowed.¹⁹ In this case, the error could not be considered harmless because the main evidence used to convict Scamardo was the victim’s testimony and her statements to third parties.²⁰ For this reason, the Court reversed and remanded on this point.²¹

Scamardo also argued that the court erred in allowing the victim’s biological father to testify about what he had been told about the incident because it had occurred approximately one month after the alleged incident and not shortly after the offense after as required.²² The Court recognized that they usually do not address additional issues after they have already reversed and remanded on another issue, but in this case, they ruled on it to prevent additional errors.²³ Because the victim’s statement to her father was approximately a month after the alleged incident, they found it not “shortly after the incident” and reversed and remanded the issue for a new trial.²⁴

¹³ *Scamardo*, 2013 Ark. at 7, 426 S.W. 3d at 904.

¹⁴ *Id.* at 7, 426 S.W. 3d at 904. (quoting *Grant v. State*, 357 Ark 91, 93, 161 S.W.3d 785, 786 (2004)).

¹⁵ *Id.*, 426 S.W. 3d at 904.

¹⁶ *Id.*, 426 S.W. 3d at 904.

¹⁷ *Id.*, 426 S.W. 3d at 904.

¹⁸ *Id.* at 9, 426 S.W. 3d at 904.

¹⁹ *Scamardo*, 2013 Ark. at 9, 426 S.W. 3d at 904–05.

²⁰ *Id.*, 426 S.W. 3d at 905.

²¹ *Id.*, 426 S.W. 3d at 905.

²² *Id.* at 9–10, 426 S.W. 3d at 905.

²³ *Id.* at 9, 426 S.W. 3d at 905.

²⁴ *Id.* at 10–11, 426 S.W. 3d at 905-06.