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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 08-1430

	Opinion Delivered OCTOBER 28, 2009
JOE ANTHONY SIMMONS APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, [NOS. CR2007-2359-1, CR2008-92-1]
V.	HONORABLE WILLIAM A. STOREY, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Joe Anthony Simmons appeals his convictions for drug-related offenses following a jury trial in Washington County Circuit Court. Appellant asserts three points on appeal: (1) that there was insufficient evidence to convict him of the drug and paraphernalia offenses; (2) that the trial court clearly erred in not suppressing the evidence gleaned from his home due to a facially defective warrant; and (3) that the trial court abused its discretion in not granting a mistrial for improper evidence being published to the jury. After consideration of each point on appeal under the proper standards, we affirm.

First, we examine the sufficiency of the evidence to convict appellant of delivery of cocaine, possession of cocaine with intent to deliver, and possession of drug paraphernalia. The charges arose after Fayetteville police used a confidential informant, Phillip Green, and his wife to set up a controlled drug buy with appellant at his home on September 26, 2007.

Green had a criminal history and a drug problem. Green agreed to assist law enforcement with controlled drug purchases in hopes of gaining leniency in his own pending drug-crime cases. Green and his wife were searched prior to this particular drug buy and were given $300 cash by the police. Green was wired with an audio-recording device and was told to arrange the purchase of an "eight-ball" of cocaine from appellant. Green and his wife drove to appellant's house; they were followed by police. The audio-recording device was monitored by the police outside, who heard Green and appellant making the deal inside the residence. Shortly thereafter, Green emerged, reentered his car, drove back to a nearby Harp's grocery store, gave over his purchase, and returned the remaining cash from the transaction. It was undisputed that police officers did not maintain visual surveillance on Green the entire time, but they followed his vehicle, listened to the transaction as it took place, followed Green's vehicle back to a parking lot, and recovered the drugs and remaining drug-buy money. Green reported that he saw more cocaine in the kitchen cabinet of appellant's home.

An affidavit for a search warrant was prepared that same day based upon this controlled buy, two previous buys, and appellant's criminal history. The issuing magistrate found probable cause to exist, and upon execution of the search warrant that evening, in a kitchen cabinet the police found a set of digital scales, baggies, and 3.4 grams of cocaine. Also during the search, the police searched the back bedroom closet, where they found a loaded .45 automatic rifle along with additional ammunition. At trial, Green verified the transaction and swore that appellant sold him the drugs and possessed the paraphernalia.

Appellant's argument on appeal focuses on the credibility of the informant, or lack thereof. Appellant contends that it was just as likely that the informant planted the drugs and paraphernalia in appellant's home. Appellant further asserts that he was not found to possess the actual drugs or paraphernalia on his person, but rather this trial rested on constructive possession. We reject all these arguments.

Our standard of review for a sufficiency challenge is well settled. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *See Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006). We affirm a conviction if substantial evidence exists to support it. *See id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *See id.* Circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *See id.* Whether the evidence excludes every other hypothesis is left to the jury to decide. *See id.* The credibility of witnesses is an issue for the jury and not the court. *See id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *See id.*

To the extent that the informant's testimony might not be believed, that was a function for the fact finder, here the jury, not our court on appeal. We are not persuaded by

appellant's argument that the informant's testimony was so inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon. *Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 543 (1980). The drugs and paraphernalia were found in appellant's home, where he was the sole adult present which could constitute constructive possession. We affirm the sufficiency of the evidence to convict appellant of the drug and paraphernalia related crimes.

Appellant's second point on appeal attacks the denial of his motion to suppress the evidence found in the search due to a defect in the search warrant. On the morning of trial, defense counsel filed the motion, asserting that the warrant did not describe with particularity the things to be seized, in accordance with Ark. R. Crim. P. 13.2(b)(iv). The trial court denied that motion because there was substantial compliance with Rule 13.2.

The judge found that the affidavit, executed simultaneously with the issuance of the warrant at 4:15 p.m. on September 26, 2007, stated with particularity the items to be sought—namely "cocaine, drug paraphernalia, prerecorded buy money, firearms, U.S. currency, records, documents used in the facilitation of drug trafficking, and/or other controlled substances." The search warrant referenced the affidavit by stating the affiant's name and the same address described in detail in the affidavit: 120 Florene Street in the City of Fayetteville. This, the trial judge found, was sufficient to withstand the technical attack on the warrant for its failure to repeat the drug-related items listed in the accompanying affidavit.

Our standard of review for a trial court's decision to grant or deny a motion to suppress requires us to make an independent determination based on the totality of the circumstances, to review findings of historical fact for clear error, and to determine whether those facts give rise to reasonable suspicion or probable cause. *George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004). Our review of probable cause for the issuance of a warrant is confined to the information contained in the affidavit. *See id.* Arkansas Rule of Criminal Procedure 13.1 sets forth the requirements for the issuance of a warrant, and it requires in subsection (b) that "The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized[.]" Rule 13.2 sets forth the contents of a search warrant, and it requires in subsection (b) that it describe with particularity the things that are the object of the search. Our supreme court held in *George v. State*, *supra*, that particular description of the objects of search in the affidavit was sufficient to meet with that requirement. In deciding whether a particular description is sufficient, reviewing courts must use common sense and not subject the description to hypercritical review. *See Beshears v. State*, 320 Ark. 573, 898 S.W.2d 49 (1995). We are satisfied that the trial court did not clearly err in denying this motion to suppress.

Moreover, had we determined that the warrant's omission to be in error, the search would remain appropriate under the application of the good-faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897 (1984). Law enforcement's reliance on this warrant and supporting affidavit would have been reasonable, and the fruits of

the search would nonetheless have been admissible. *See State v. Blevins*, 304 Ark. 388, 802 S.W.2d 465 (1991).

The last point on appeal concerns appellant's allegation that the trial court erred in denying his motion for a mistrial. We disagree that reversible error has been demonstrated. Appellant had moved in limine to exclude a photograph of appellant's toddler son, taken of him during execution of the search of appellant's residence.

During the State's examination of one of the detectives, the prosecutor handed the detective a photograph and asked him to identify it, to which the detective replied that it was appellant's son. Defense counsel objected, and the trial judge cleared the courtroom to address the issue. Defense counsel argued that the photo was irrelevant and prejudicial because it merely showed a scared young boy with wet pants on a couch. The trial judge agreed and excluded the evidence from admission. Appellant contended that this was insufficient to undo the harm and asked for a mistrial. The trial judge disagreed, noting that he sat closer to the witness than did the jury, which was fifteen to twenty feet away; that he could not see what the photo depicted other than that it was probably not an adult; and that the witness merely held the photo. The trial judge admonished the jury when it returned that "this witness held up some sort of photograph. It's not been offered in evidence. If any of you saw it, disregard it. Don't consider it as part of this trial. It's not relevant and whatever was on it, again, do not consider it." Appellant argues that he was entitled to a mistrial.

On review of the denial of a motion for mistrial, we are guided by the principle that mistrial is an extreme remedy that should be granted only when the error is beyond repair and cannot be corrected by curative relief. *Marta v. State*, 336 Ark. 67, 983 S.W.2d 924 (1999). The trial court is vested with wide discretion in making the decision whether to grant or deny a mistrial, which will not be disturbed on appeal absent an abuse of that discretion. *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994). An admonition to the jury usually cures the prejudice, but it does not suffice in every case. *Donovan v. State*, 71 Ark. App. 226, 32 S.W.3d 1 (2000). Appellant contends that this is one of those cases. We cannot agree.

The trial judge was in the superior position to decide whether the mention of this photo of appellant's son, and its being held by a witness, was so prejudicial as to infect the entire proceedings. The judge used his discretion to determine that to the extent, if any, that the jury was able to observe the photograph depicting appellant's son, it was able to disregard that information by instruction. Appellant fails to demonstrate how this affected the jury's deliberation on the properly admitted evidence, other than bare assertions that it must have inflamed their passions against appellant. We hold that the trial court did not abuse its considerable discretion in excluding the evidence, admonishing the jury, and denying the motion for mistrial. *Compare Kenyon v. State*, 58 Ark. App. 24, 946 S.W.2d 705 (1997).

For the foregoing reasons, we affirm appellant's convictions.

KINARD and HENRY, JJ., agree.