

# ARKANSAS COURT OF APPEALS

DIVISION II  
No. CACR08-399

JUDY COZART

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** FEBRUARY 11, 2009

APPEAL FROM THE CRAIGHEAD  
COUNTY CIRCUIT COURT,  
[NO. CR-06-795]

HONORABLE JOHN N. FOGLEMAN,  
JUDGE

AFFIRMED

**KAREN R. BAKER, Judge**

A Craighead County jury convicted appellant Judy Cozart of negligent homicide, a misdemeanor, and four counts of third-degree battery arising from an automobile accident caused by appellant. The jury sentenced appellant to a year in the county jail and a \$1,000 fine for each count. On appeal, appellant asserts two points of error: (1) The jury improperly used materials not in evidence to determine guilt or innocence; (2) The trial court erred in allowing evidence of prior automobile accidents during the sentencing phase of the trial. Appellant fails to demonstrate a reasonable probability of prejudice resulting from the jury’s use of materials not in evidence; accordingly, the verdict is affirmed as to guilt. Furthermore, appellant’s argument regarding the introduction of evidence of prior automobile accidents fails to demonstrate error. Accordingly, we affirm on both points.

On March 21, 2006, in Craighead County, a collision occurred between the vehicle driven by appellant and a vehicle driven by Edward Johnson in which Mark Reed, Kaylee Reed, Anita

Reed, and Ora Johnson were passengers. As a result of the accident, Mark Reed was killed and each of the other individuals involved in the crash, including appellant, was injured. Appellant was subsequently arrested and charged with manslaughter and four counts of third-degree battery. During the jury deliberations to determine appellant's guilt or innocence of the charges, the judge, counsel, and court reporter stood outside the door to the jury room to answer a juror's question. At that time, it was discovered that the jurors had two matchbox toy cars on top of a diagram of the scene of the wreck. The diagram was properly admitted into evidence. The cars were not evidence and no demonstration with the cars was ever presented to the jury.

Based upon the discovery of the juror's use of the toy cars, appellant moved for a mistrial claiming jury misconduct. Appellant characterized the observation of the toy cars on the diagram as improper experimentation by the jury. The trial court denied the motion. On appeal, appellant insists that the mere fact that the model cars were observed on the State's exhibit diagramming the scene of the accident is sufficient evidence of prejudice to appellant. She argues that the presence of the cars sufficiently demonstrates prejudice because there was no proof submitted to the jury as to the location of the cars, lane, skid marks, or other details sufficient to allow the jurors to correlate proper placement of the vehicles on the diagram and the proper perspective and/or scale to use in relationship to the model cars and the diagram to demonstrate the collision at issue. The State responds that after the discovery of the model cars, the trial judge reminded the jury of the jury instructions to consider only the rules of law included in the instructions, to consider the witnesses' testimony and the exhibits received in evidence, and to accept without question the trial judge's ruling as to the admissibility or rejection of evidence. It further argues that with only the observation of the cars in the room without more, such as the model cars or any evidence as to how they were

used by the jury, the record is not sufficient to prove juror misconduct or prejudice to the appellant.

While both arguments are well reasoned, the State is correct that the record in this case fails to demonstrate that either an abuse of the trial court's discretion or a manifest prejudice to appellant occurred to warrant a mistrial. A mistrial is a drastic remedy, to be employed when an error is so prejudicial that justice cannot be served by continuing the trial, and when it cannot be cured by an instruction to the jury. *Peters v. State*, 357 Ark. 297, 166 S.W.3d 34 (2004); *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003); *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002). The decision to grant a mistrial is within the sound discretion of the trial court and will not be overturned absent a showing of abuse or manifest prejudice to the appellant. *Walker v. State, supra*. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000). Furthermore, even when error has occurred, an appellant must also demonstrate prejudice. *Jim Halsey Co., Inc. v. Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985); *Hibbs v. City of Jacksonville*, 24 Ark. App. 111, 749 S.W.2d 350 (1988); *Donoho v. Donoho*, 22 Ark. App. 150, 737 S.W.2d 170 (1987); *see also McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984).

Appellant is correct that the scale of models is an important factor when evaluating the appropriateness of using models as evidence. *See Arkansas State Highway Commission v. Rhodes*, 240 Ark. 565, 401 S.W.2d 558 (1966). She is also correct that extraneous evidence may not be considered by a jury; however, a jury may use props to reenact an event for purposes of demonstrating their views of how an accident occurred:

The use of the toy cars, brought to the jury room for the purpose of a demonstration, comes close to the bringing in of extraneous evidence, and we agree it should not have occurred. That, however, is not the same as saying that a jury may not use "props" to reenact an event. While we conclude that it was improper for a juror to have brought the toy cars into the jury room, it seems a close question because we would clearly have found no impropriety had

the jurors used two items they might have found at hand, such as pencils or erasers, or perhaps books, to demonstrate their views to each other on how the accident occurred.

*New Prospect Drilling Co. v. First Commercial Trust, N.A.*, 332 Ark. 466, 478-79, 966 S.W.2d 233, 240 (1998).<sup>1</sup>

In *New Prospect*, the court concluded that it was improper for the juror to have brought the cars into the jury; however, it found no abuse of the trial court's discretion in finding that there was no reasonable possibility of prejudice.

Nor do we find in this case that the trial court abused its discretion. A review of the record and arguments indicates that the trial judge had no testimony or other evidence to determine whether the model cars present in the room were being used properly, improperly, or even ignored. The mere fact that the model cars were observed on the diagram fails to demonstrate that the jury improperly used the models and that the improper use contaminated the jury process to the extent that justice could not be served.

Arkansas Rule of Evidence 606 allows jurors to testify as to whether any extraneous information or other influence was improperly brought to the jury's attention during deliberations:

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's

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<sup>1</sup>For a more detailed discussion of the evolution of our court's balancing of the competing interests of fair proceedings with the sanctity of jury deliberations and individual juror privacy, see Ben Cormack, *New Prospect Drilling Co. v. First Commercial Trust, N.A.: Hot Wheels in the Jury Room and the Reasonable Possibility of Prejudice to the Litigants*, 52 Ark. L. Rev. 859 (1999).

mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, *but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.* (Emphasis added).

Here, appellant did not inquire of any juror regarding the cars, and the only evidence of possible impropriety was the presence of the models. Without more than the mere presence of the cars in the jury room, we cannot say that the trial judge abused his discretion in refusing to grant a mistrial. We defer to the superior position of the trial court to evaluate the credibility of the witnesses and the prejudicial effect of the misconduct, if any. *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996). Accordingly, we affirm on this point.

Neither do we find error in the trial court's allowing evidence of appellant's other accidents in the sentencing phase of the trial. Appellant argues that the evidence is precisely the kind of evidence to be excluded pursuant to Arkansas Rule of Evidence 404(b). Appellant's argument is misplaced. The admissibility of proof in the penalty phase of a jury trial is governed by Ark. Code Ann. § 16-97-103 (Repl. 2006), and it provides a list of new evidence that may be admitted in the sentencing phase, although such evidence might not have been admitted during the guilt phase of the trial. *Crawford v. State*, 362 Ark. 301, 208 S.W.3d 146 (2005); *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). Section 16-97-103(5) generally permits the admission of relevant character evidence at sentencing; whereas, Arkansas Rule of Evidence 404 provides that character evidence is not admissible, except as otherwise permitted under the rule. *Crawford, supra*. Thus, character evidence that might not be admissible at the guilt phase could, under Ark. Code Ann. § 16-97-103(5), be admissible at sentencing. Likewise, Rule 608, which pertains to evidence of character and

conduct of a witness, does not override the applicability of § 16-97-103. *See also MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006).

In the case before us, appellant fully explained the circumstances of each accident, contending that one was the fault of the vehicle that stopped suddenly in front of her and the other was caused by unsynchronized traffic lights. No evidence contrary to appellant's version of the accidents was admitted. The State argues that this evidence was relevant character evidence to show appellant's propensity for causing car accidents, while appellant argues that 404(b) requires exclusion of the evidence. Under these facts and arguments, we cannot find that the trial court's admission of the testimony was arbitrary. *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991) (abuse-of-discretion standard requires court action was arbitrary or groundless).

Accordingly, we affirm.

Affirmed.

HART and ROBBINS, JJ., agree.