

Cite as 2010 Ark. App. 470

ARKANSAS COURT OF APPEALSDIVISION III
No. CACR09-1074

DAUD AMIR JONES

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered JUNE 2, 2010APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[CR-08-2107]HONORABLE MARION A.
HUMPHREY, JUDGE

AFFIRMED

RITA W. GRUBER, Judge

A Pulaski County jury found appellant Daud Amir Jones guilty of first-degree murder for killing his girlfriend. He argues on appeal that the trial court abused its discretion in denying his motion for a mistrial. Specifically, he contends that the jury should not have been allowed to consider a murder count for the death of his unborn child in its deliberations because the court directed a verdict on that count. We affirm his conviction.

Because appellant is not challenging the sufficiency of the evidence in this appeal, only a brief recitation of the facts is necessary. Appellant and the victim, Melony Graham, had lived together for eleven years and had two children together. Late in the evening on April 21, 2008, appellant and Ms. Graham argued while she held appellant's pistol. Appellant took the pistol away from Ms. Graham and shot her, killing her. The prosecution contended that he purposely shot and killed Ms. Graham; appellant testified that, while he was attempting

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to put the pistol away, he dropped it and it discharged. At the time of her death, Ms. Graham was four months pregnant.

The State pursued two counts of first-degree murder against appellant, count one for the death of Ms. Graham and count two for the death of her unborn fetus. At the close of the State's evidence, appellant moved for a directed verdict on count two, arguing that the State had failed to prove that the unborn child was alive before Ms. Graham's death. The trial court granted appellant's motion and recessed for lunch.

After lunch, the trial court set aside the directed verdict and allowed the State to reopen its case on count two. Appellant contended that this violated the constitutional prohibition against double jeopardy, but the trial court rejected his argument. The State put Dr. Frank Peretti, the medical examiner, back on the stand to testify that, in his opinion, the child was alive at the time of Ms. Graham's death. The parties continued to try the case, including both counts one and two. After the defense rested, appellant renewed his motion for directed verdict on count two, which the trial court denied. The court instructed the jury on both counts, counsel presented closing arguments, and the court adjourned for the day, directing the jury to return at 8:30 the next morning to begin deliberating.

There is no record of precisely when the jury began deliberating the next morning, but the record reflects that, while the jury was deliberating, appellant again argued that the trial court's reopening of the case on count two violated the constitutional prohibition against double jeopardy. Just before 10:09 a.m., the court granted appellant's motion for directed

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verdict on count two. The court recessed to take up matters in other cases until 10:17 a.m., at which time appellant moved for a mistrial on count one, including the following relevant arguments: “cumulative errors in this case, . . . the fact that the State was allowed to reopen the case—the jury knew that they had rested . . . and, finally, the fact that the jury in their deliberations had been considering and had been contaminated by the fact that the evidence and also the jury instructions concerning the fetus which they wouldn’t have considered.” The court denied appellant’s motion for mistrial, agreed to give appellant’s instruction (it is not clear from the record what the instruction provided), and said that it was going to instruct the jury on count one only for sentencing. The court also explained its decision:

I think the jurors are able to make a distinction between Count 1 and Count 2 and I think, moreover in this particular case, the jurors are already aware of—whether or not they made a decision on it, they’re aware that the fetus is dead in this case. That is—that is not a matter that they would not have been notified of one way or the other. They are aware of the fact that she was pregnant. That’s even in his statement. So, I don’t see the prejudice.

The court then recessed at 10:23 a.m. and returned with the jury present at 10:30 a.m. The jury returned verdicts of guilty on both counts, and then the court informed the jury that it had directed a verdict of not guilty on count two. The court instructed the jury on sentencing and then accepted the jury’s recommendation of twenty years’ imprisonment plus a five-year enhancement for using a firearm. Appellant brought this appeal.

Appellant’s sole point on appeal is that trial court abused its discretion in denying his motion for mistrial based on contamination of the jury’s deliberations. Specifically, he argues that the deliberations were contaminated because evidence and jury instructions regarding the

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unborn fetus were considered. He also challenges reference to the unborn fetus in closing arguments, but he failed to make this argument at trial, so we will not consider it here. *See Rye v. State*, 2009 Ark. App. 839, ___ S.W.3d ___ (holding appellate court will not consider arguments raised for first time on appeal).

A mistrial is a drastic remedy and should be declared only when there has been an error so prejudicial that justice cannot be served by continuing the trial or when the fundamental fairness of the trial itself has been manifestly affected. *Parker v. State*, 355 Ark. 639, 649, 144 S.W.3d 270, 276 (2004). The trial court has wide discretion in granting or denying a motion for mistrial and, absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. *Id.* In *Boyd v. State*, 318 Ark. 799, 804, 889 S.W.2d 20, 22 (1994), the supreme court said that “[t]he bottom line on mistrials is that the incident must be so prejudicial that the trial cannot, in fairness, continue.” In this case, we cannot say that the jury's deliberations, which included consideration of count two, were so prejudicial with regard to count one that the fundamental fairness of the trial itself was manifestly affected.

There is no dispute in this case that counts one and two were properly joined and tried together. They were based on the same conduct and arose from the same criminal episode. *See Ark. R. Crim. P. 21.3* (2009). Thus, we fail to see how any evidence presented before the State rested its case contaminated the jury's deliberations. *See, e.g., United States v. Holzer*, 840 F.2d 1343, 1349 (7th Cir. 1988) (“No rule of evidence is violated by the admission of evidence concerning a crime of which the defendant is acquitted, provided the crime was

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properly joined to the crime for which he was convicted and the crimes did not have to be severed for purposes of trial. It makes no difference, moreover, whether the jury acquits on some counts or the trial or reviewing court sets aside the conviction.”). Several prosecution witnesses testified that Ms. Graham, the victim in this case, was four months pregnant. In fact, appellant testified that Ms. Graham was pregnant in his statement, which was played for the jury before the State rested its case. It is likely that this fact would have been in evidence even if the State had not charged appellant with count two. Moreover, Dr. Peretti’s testimony, after the State was allowed to reopen its case, merely added his opinion that the unborn fetus was alive at the time of Ms. Graham’s death.

Appellant committed only one act in this case: he shot Ms. Graham. Appellant’s defense in this case was that the act was an accident. Although the court took from the jury the question of whether appellant’s act resulted in the death of the unborn fetus, whether the unborn fetus was or was not alive when Ms. Graham was shot was not relevant to the decisive question the jury had to answer with regard to count one: that is, whether appellant’s act was committed with the purpose of causing Ms. Graham’s death. Accordingly, we think it defies common sense to assume that the jury’s consideration of testimony and jury instructions about the unborn child so prejudiced appellant with regard to count one that justice could not have been served by continuing the trial.

Finally, appellant’s motion for directed verdict on count two the morning of day two of deliberations appears to have been granted after the jury had already begun its consideration

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of guilt or innocence. Appellant's motion for a mistrial was made and argued between 10:17 a.m. and 10:23 a.m. The jury was seated to render its decision on both counts at 10:30. While the better practice of the trial court might have been to interrupt deliberations to direct the jury to consider only count one, it appears deliberations were all but concluded by the time the motion for mistrial was made. Further, while defense counsel did request an instruction of some sort, it does not appear from the record that appellant made a request for the jury to be interrupted and admonished. Many times an admonishment may be sufficient to cure any suspected prejudice. See *Parker*, 355 Ark. at 649, 144 S.W.3d at 276. While we have held that the failure of defense counsel to request an admonition may negate a mistrial motion, *Rohrbach v. State*, 374 Ark. 271, 280–81, 287 S.W.3d 590, 598 (2008), we cannot tell from the record whether deliberations had concluded by the time the court denied the motion in this case. Accordingly, we hold that the trial court did not abuse its discretion in denying appellant's motion for mistrial in this case because the jury's consideration of count two was not so prejudicial that it fundamentally affected the fairness of the trial.

Affirmed.

ROBBINS and HENRY, JJ., agree.