Cite as 2010 Ark. App. 488

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-334

	Opinion Delivered June 16, 2010
JAMES ALLEN HILL APPELLANT	APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. CR-2006-1117-5-2]
V.	HONORABLE ROBERT H. WYATT, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant, James Hill, admittedly shot and killed Johnny Armstrong. At the time of the homicide, appellant was married to, but separated from, Rebecca Hill. Appellant, charged with capital murder, based his defense on the theory that he was so distraught to learn that the victim impregnated Rebecca Hill on appellant's own couch that he lacked capacity for the degree of intent necessary for premeditated murder, and that the homicide was therefore of a lesser degree than charged. After a jury trial, appellant was found guilty of first-degree murder and sentenced to thirty years' imprisonment. On appeal, he argues that the trial court erred in denying his motion for mistrial based on the trial court's allowance of evidence concerning deviant and incestuous group-sex acts engaged in by Rebecca Hill with the knowledge of, and sometimes participation of, appellant. Appellant also argues that the trial court erred in granting the State's motion in limine to exclude evidence of the victim's

violent criminal history. We affirm.

Appellant's first argument is based on his assertion that Rebecca Hill's testimony concerning their sexual behavior during the marriage was irrelevant and so unfairly prejudicial as to warrant a mistrial. We disagree. Rebecca Hill testified that she had sexual relations with appellant's own father in the marital home in 2005, that she told appellant that she had done so, and that, although appellant was angry, no violence ensued and she and appellant resolved the issue and continued their relationship. She also testified that, in late 2005 and 2006, appellant asked her to contact her female cousin so that they could have a "threesome," that she did so, and that the planned ménage à trois did occur. Rebecca Hill further stated that appellant later arranged another group-sex encounter involving herself, her ex-stepfather, appellant, and a girl named Rachel. Although this did not occur as planned, she testified, her ex-stepfather did come to the house, and appellant "went into the bedroom and got out a dildo and started playing with me." Appellant then moved for a mistrial.

The trial court is granted a wide latitude of discretion in granting or denying a motion for a mistrial, and we will not reverse the trial court's decision on such a motion except for an abuse of that discretion or manifest prejudice to the complaining party. *Creed v. State*, 372 Ark. 221, 273 S.W.3d 494 (2008). Here, appellant's defense was premised on his assertion that he was so outraged to learn that the victim had consensual sex with his wife that he (appellant) was incapable of intentional conduct and instead acted in the heat of passion. The unspoken assumption underlying this defense is that appellant placed such high value on his

wife's faithfulness that he essentially lost his power to reason when he learned that she engaged in sexual relations with the victim. However, the evidence of which he complains directly undermined this assumption and was therefore highly relevant. The evidence is indeed prejudicial but, in light of appellant's defense, it was not unfairly so. We hold the trial court did not abuse its discretion by permitting this testimony to rebut appellant's state-of-mind defense.

Appellant's argument that the trial court erred by excluding evidence of the victim's criminal history is also meritless. First, he asserts that the trial court was bound by a preliminary decision regarding admissibility of this evidence in a prior trial that was dismissed for insufficient jurors. This is incorrect. The law-of-the-case doctrine does not limit the power of the court to change its ruling on discretionary matters, *see Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), and res judicata applies only when there has been a final judgment on the merits, which was not the case here. *See Jackson v. State*, 2009 Ark. 572.

Next, appellant argues that the evidence of the victim's "violent criminal history" was more probative than prejudicial because he was naturally more outraged to learn that his wife had consensual sex with a violent criminal. The decision to admit or exclude evidence is within the sound discretion of the trial court, and we will not reverse a trial court's decision regarding exclusion of evidence absent a manifest abuse of discretion and a showing of prejudice by the appellant. *Lowry v. State*, 364 Ark. 6, 216 S.W.3d 101 (2005). We find no abuse of discretion or prejudice in this case. It is not self-evident that a wife's infidelity with

a violent criminal would generate the sort of outrage that would drive a man to commit murder; to the contrary, such an abhorrence of violence seems somewhat inconsistent with a compulsion to kill. Given that appellant did not argue that he acted in self-defense, and that appellant committed the murder by walking a mile through the woods, luring the victim out of his house, and shooting him in the back, we think that evidence of the victim's criminal history was of little probative value and was likely to result in a confusion of the issues. *See* Ark. R. Evid. 403. We hold the trial court did not abuse its discretion in ruling that the probative value of the evidence regarding the victim's criminal history was outweighed by the danger of unfair prejudice or confusion of the issues.

Affirmed.

BAKER, J., agrees.

HART, J., concurs.

HART, J., concurring. I agree that this case must be affirmed, but I write separately because I cannot accept a portion of the majority's rationale for affirming on the mistrial issue. Contrary to the majority's assertions, the testimony concerning Mr. Hill's deviate sexual practices was not probative, and the danger of unfair prejudice was significant and not outweighed. Indeed the trial judge's comments expose the fallacy in the majority's rationale.

> I think we've heard enough along these lines. We're going to move forward. We're going to get away from this issue. You've made your point with the jury, I believe.

> You're mighty close to the edge here. We've heard enough about this issue, and we're going to move forward. Or I'm going to grant [Mr. Hill's trial counsel's] motion for a mistrial.

In short, this evidence was a concerted effort by the State to vilify Mr. Hill by casting him in a most unfavorable light in front of the jury. The trial judge put a stop to it, yet the majority has taken it upon itself to ignore the trial judge's rulings on this issue and put this court's stamp of approval on this misconduct.

Somewhat lost in the majority's discussion of this point is the fact that the trial judge did not commit reversible error in handling this issue. The trial judge noted, and I agree, that the State was precipitously close to a mistrial. However, he gave the matter due consideration and decided not to grant the mistrial. It is axiomatic that a mistrial is an extreme and drastic remedy that will be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing with the trial or when the fundamental fairness of the trial has been manifestly affected. *Harrison v. State*, 371 Ark. 652, 269 S.W.3d 321 (2007). It is equally well settled that the trial court is in the best position to determine the effect of statements on the jury, and we generally defer to the trial judge's superior position to determine the prejudicial effect of improper testimony. *Jackson v. State*, 368 Ark. 610, 249 S.W.3d 127 (2007). I cannot conclude that the trial judge abused his discretion in this matter and would affirm on this basis alone.