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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 08-880

VICTOR CUNNINGKIN APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** FEBRUARY 25, 2009 APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NOS. CR-2005-464B-3 AND CR-2004-502-3] HONORABLE GRISHAM PHILLIPS, JUDGE AFFIRMED

WAYMOND M. BROWN, Judge

On March 17, 2008, a Saline County judge found Victor Cunningkin guilty of delivery of a controlled substance and sentenced him to ten years' probation. Cunningkin challenges the sufficiency of the evidence to support the conviction. He also contends that the court should have granted his motions for mistrial. We affirm.

Factual and Procedural History

According to the testimony presented by the State, Jennifer Burnett helped Benton police with a controlled buy on April 20, 2005. Burnett called Cunningkin and asked for $60.00 worth of crack cocaine. The afternoon of the buy, Officer Brad Cartwright searched Burnett and her house. Later, Cunningkin arrived with his brother and sold Burnett three

rocks of crack cocaine. Immediately after the buy, Officer Cartwright returned to Burnett's home, and Burnett gave the officer the drugs. Burnett also helped in a second controlled buy. Cunningkin was by himself the second time, but the second buy was otherwise similar to the first. During the State's case, there were portions of the testimony that were inconsistent. For example, Burnett testified that Cunningkin's car had tinted windows, while Officer Cartwright testified that the car did not. Burnett also claimed that she signed a statement for Officer Cartwright, while the officer testified that there was no statement.

At the end of the State's case, Cunningkin moved for dismissal, contending that Burkett was not a believable witness. The court denied the motion. Cunningkin then testified on his own behalf and denied ever selling drugs. He also presented the testimony of Carmeka Lowe, his live-in girlfriend, who stated that she had never seen Cunningkin sell drugs. At the close of the evidence, Cunningkin renewed his motion for directed verdict, which was again denied. The court then asked for closing arguments, but it interrupted the arguments to put Officer Cartwright on the stand and inquire about how he knew Burnett and to verify that he saw Cunningkin that day. After this inquiry, the court found Cunningkin guilty of delivery of a controlled substance and later sentenced him to ten years' probation.

Sufficiency of the Evidence

Ordinarily, we would consider Cunningkin's sufficiency challenge before considering

any other allegation of error. *See, e.g.*, *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006). However, Cunningkin's argument is not preserved for appellate review. Though Cunningkin referred to his motion as one for directed verdict, it was actually one for dismissal, as this was a bench trial. *See Stewart v. State*, 362 Ark. 400, 208 S.W.3d 768 (2005). To preserve a motion for dismissal in a bench trial, a defendant must make his motion at the close of all of the evidence. Ark. R. Crim. P. 33.1(b). If the defendant moved for dismissal at the end of the State's case, he must renew that motion at the close of all of the evidence. *Id.* The failure to do so constitutes a waiver of any question pertaining to the sufficiency of the evidence. Ark. R. Crim. P. 33.1(c).

Here, Cunningkin made a specific motion for dismissal at the end of the State's case and at the end of his case. However, when the court reopened the evidence to question Officer Cartwright, Cunningkin could no longer rely on the renewed motion made at the end of his case. He was obligated to renew his motion again. His failure to do so constituted a waiver of his challenge to the sufficiency of the evidence.

Had Cunningkin's argument been preserved, we would still affirm. When considering a challenge to the sufficiency of the evidence, we consider the evidence in the light most favorable to the State, considering only the evidence in favor of the guilty verdict, and affirm if the conviction is supported by substantial evidence. *Mitchem v. State*, 96 Ark. App. 78, 238 S.W.3d 623 (2006). In this case, Cunningkin argues that the evidence was insufficient

due to the inconsistent testimony of the State's witnesses. However, we are bound by the trier of fact with respect to determination of credibility of witnesses, and inconsistent testimony alone does not render proof insufficient as a matter of law. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000). Even with the inconsistencies, the trial judge was within his power to acceptt the testimony that Cunningkin sold Burnett crack cocaine on April 20.

Motions for Mistrial

Cunningkin also identifies three instances during which he argues the court should have declared a mistrial. A mistrial is a drastic remedy that should only be granted when justice cannot be served by continuing at trial, or when the error cannot be cured by an instruction or admonishment. *Holman v. State*, 372 Ark. 2, 269 S.W.3d 815 (2007). This was a bench trial, and it is presumed that a judge will only consider competent evidence. *Marshall v. State*, 342 Ark. 172, 27 S.W.3d 392 (2000). This presumption can be overcome only when there is an indication that the judge gave some consideration to the inadmissible evidence. *Id.* The trial court is granted a wide latitude of discretion in granting or denying a motion for mistrial, and its decision will not be reversed absent an abuse of discretion or manifest prejudice to the complaining party. *Hamilton v. State*, 348 Ark. 532, 74 S.W.3d 615 (2002).

First, Cunningkin identifies the following during the State's direct examination of Burkett:

MS. BUSH [PROSECUTOR]: [W]hy did you want to participate in a drug operation or a undercover buy with Victor Cunningkin?

BURKETT: Cause he sold in front of children.

MR. MARTINDALE [DEFENSE COUNSEL]: Objection, Your Honor. I'd ask for a mistrial right now and I ask for dismissal of the charges.

THE COURT: Okay. Well, I didn't hear that last response. Is our objection it's irrelevant.

MR. MARTINDALE: Well, it's extremely prejudicial. It is irrelevant and I'm asking for a mistrial and dismissal of the charges.

THE COURT: Well, I didn't hear exactly what she said. I heard something about children, but I guess I'll have to find out what she said.

MR. MARTINDALE: I don't know how you didn't hear her, Judge, I don't know what to say. It's on the record, I'm sure.

. . . .

THE COURT: Why don't we just move on. I didn't hear exactly what she said. I'm not going to ask her to repeat it. Let's move on. I'm going to deny your motion.

The trial court did not abuse its discretion in denying the motion for mistrial in this instance. The court stated that it did not hear the improper comment, and it asked the witness not to repeat it. Therefore, Cunningkin cannot show that he was prejudiced by it. We will not reverse absent a showing of prejudice. *Hamilton*, *supra*.

Second, the following occurred when the State asked Cunningkin whether he was aware that his brother pleaded guilty to the charge:

MR. MARTINDALE: And Judge, that's hearsay and again that's requesting hearsay. . . . The Prosecutor knows it's not proper and again, it's extremely prejudicial. This is the second extremely prejudicial item of evidence that the Prosecutor has tried to introduce. Again, I'm going to ask for a mistrial and ask that the charges be dismissed.

MR. BUSH: Your Honor, I don't see how it could be considered hearsay if it was stated under oath in a court proceeding.

THE COURT: Well, on top of that the question is, is does he have any explanation for why Mr. Cunningkin would have said that, Mr. Daniel Cunningkin. I think that was the question.

MR. MARTINDALE: Well, Judge, we don't know that. We weren't there. You're asking for him to confirm hearsay.

THE COURT: Well, she just asked if he had any idea why he might have said that. She didn't ask him if he said it. She didn't ask him if it was true.

MR. MARTINDALE: Well, I'm objecting and I'm saying if he's going to do something like that we should have had that record in front of us.

MR. BUSH: I'll move on, Your Honor.

THE COURT: Let's go on.

MR. MARTINDALE: So, you're denying my motions?

THE COURT: Well, she's going to move on, he doesn't have to answer the question. Your motion for a mistrial is denied if that's what your motion is.

Again, no mistrial was warranted here. After a brief inquiry, the trial court declined to have Cunningkin respond to the question, and there is nothing in the record showing that the court considered the evidence. Further, because this is a bench trial, we presume that the

trial court disregarded the question when it rendered its verdict. Absent evidence or argument to the contrary, Cunningkin has again failed to show prejudice.

Finally, the following colloquy occurred during the State's examination of Officer Cartwright:

MS. BUSH: What instructions did you give [Burnett] about this event that was about to transpire?

CARTWRIGHT: She actually told me how it would take place. I think – I don't know their past. There had been previous occasions. She said he usually drives up –

MR. MARTINDALE: Objection, Your Honor.

THE COURT: Sustained.

MS. BUSH: I'll move on, Your Honor.

There would be no basis for reversal here, as Cunningkin received the relief he sought at trial. He merely objected, and the court sustained the objection without comment. Cunningkin did not request a mistrial, and this court cannot reverse for failure to declare a mistrial when a mistrial was not sought. *Cf. Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999) (stating that when an objection to a statement during the closing argument is sustained, there is no basis to raise the issue on appeal unless the appellant requests a mistrial).

The record contains no basis for granting Cunningkin's motions for mistrial. Accordingly, we affirm on this point as well.

Affirmed.

ROBBINS and MARSHALL, JJ., agree.