Not designated for publication.

DIVISION III

CACR06-1261

September 19, 2007

DARRA BARRITT APPELLANT	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. CR-2005-477-1]
V.	HON. TOM J. KEITH, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED ON DIRECT APPEAL; CROSS APPEAL DISMISSED

ROBERT J. GLADWIN, Judge

Appellant Darra Barritt appeals her conviction on the charge of first-degree battery of her two-month-old daughter, for which she was sentenced to twelve years' incarceration in the Arkansas Department of Correction. She raises three points on appeal, asserting that the trial court erred: (1) in denying her motion for a directed verdict because the evidence was not sufficient to support the jury's verdict; (2) by failing to grant a mistrial, or alternatively sequester the jury, because of the publication of a prejudicial newspaper article during the trial; (3) in denying her motion for a mistrial due to allegations of pre-deliberation or discussion of the evidence by jurors prior to the conclusion of the case. Additionally, the State filed a cross-appeal, alleging that the trial judge erred in refusing to recuse from the sentencing phase of the trial subsequent to a juror's ex parte communications that occurred prior to the formal sentencing of Ms. Barritt, during which the juror expressed reservations

about the guilty verdict and the recommended fifteen-year sentence and $15,000 fine. We affirm on direct appeal and dismiss the State's cross-appeal due to a lack of jurisdiction.

On March 18, 2005, Ms. Barritt and her then two-month-old daughter were visiting Ms. Barritt's parents' medical office when they noticed that the child was "twitching." She was sent to Dr. Dan Weeden's office to determine whether she was having a seizure. Upon examining the child, Dr. Weeden suspected that the child had been shaken, at which time he called for an ambulance to take her to St. Mary's Hospital and reported the incident to the police. Dr. Scott Lafferty, the treating emergency-room physician, observed the left-sided focal seizure and visible hemorrhage in the child's right eye and ordered a CT scan of the child's head. The results indicated extensive hemorrhaging, primarily in the subarachnoid space, and swelling of the brain. Although she declined to talk to law enforcement officers at the hospital, Ms. Barritt did tell Dr. Lafferty that she had not injured her baby and that the only time she ever shook her was when they were playing, although not hard.

The child was then moved to Arkansas Children's Hospital in Little Rock for additional treatment. Retinal camera pictures indicated the presence of retinal hemorrhages that were diffuse and extended to the periphery of the child's eyes. After additional CT and MRI scans confirmed that she had severe bleeding and swelling of the brain, but no definite evidence for a rare condition known as cerebral venous thrombosis, Doctors Karen Farst and Mark Heulitt examined the child and concluded that her injuries were caused by non-accidental trauma. That conclusion was further confirmed by radiologist Dr. Charles Glacier.

Ms. Barritt was arrested and charged with one count of first-degree battery. A five-day jury trial was held on June 14, 2006, during which numerous witnesses presented expert and lay testimony about the case. On day two of the trial, June 15, 2006, *The Morning News - Bentonville* published a story on the lower left-hand side of its front page entitled "Barritt Admits Possible Fault" with a smaller heading "Mother Accused of Injuring Baby Testifies In her Own Defense." The article was published prior to the conclusion of the State's case-in-chief, and actually referred to comments from Ms. Barritt that were testified to by Dr. Farst on the first day of trial. Ms. Barritt moved for a mistrial, or alternatively for sequestration of the jury, both of which were denied. On June 16, 2006, the third and final day of testimony, prior to the conclusion of Ms. Barritt's case, the jury sent out a note that read, "so much about brain w/trauma - can we see picture of 'normal' brain." Following the conclusion of evidence but prior to closing arguments, Ms. Barritt requested a mistrial, claiming that the note from the jury indicated that the jury had begun the deliberation phase of the trial prior to the introduction of all of the evidence. That request was also denied.

On June 20, 2006, the jury returned a verdict of guilty on the charge of first-degree battery and recommended a fifteen-year prison sentence and a fine of $15,000. The sentencing hearing was scheduled for June 27, 2006. The following day, on June 21, 2006, one of the jurors met with the trial judge in his chambers and subsequently met with defense counsel for Ms. Barritt. On June 26, 2006, the trial judge and defense counsel met to discuss their communications with the juror. At no time was a representative of the State included in these discussions; however, the State learned of the communications independently and

requested a meeting with the trial judge and defense counsel to ascertain the substance of their respective communications with the juror. Both indicated that the juror reported misgivings he had with the guilty verdict and the sentencing recommendation, and allegedly requested leniency for Ms. Barritt. The State filed a motion on June 27, 2006, requesting that the trial judge recuse from the sentencing portion of the case. Ms. Barritt's counsel responded to the motion,[1] and a memorandum order was filed on June 28, 2006, followed by a judgment and commitment order on July 5, 2006, pursuant to which Ms. Barritt was sentenced to a sentence of twelve years' incarceration in the Arkansas Department of Correction and no fine. Ms. Barritt filed her notice of appeal on August 4, 2006, and the State filed its notice of cross-appeal on the same day.

I. Sufficiency of the Evidence

Rule 33.1 of the Arkansas Rules of Criminal Procedure requires a motion for directed verdict to challenge the sufficiency of the evidence at the close of the State's evidence and again at the close of all evidence to avoid a waiver. Ms. Barritt's counsel moved for a directed verdict at the end of the State's case on the basis that the State had not met its burden of proof with respect to the required element that she knowingly or intentionally caused serious physical injury to the child under conditions manifesting an extreme indifference to the value of human life. The motion was denied, as was the renewed motion for directed verdict that was made at the end of all the evidence on the same grounds.

[1]The response was actually filemarked July 11, 2006, after the order and judgment and commitment order were filed.

We treat a motion for directed verdict on appeal as a challenge to the sufficiency of the evidence. *See Young v. State*, __ Ark. __, __S.W.3d __ (May 31, 2007). We will affirm the circuit court's denial of a motion for directed verdict if there is substantial evidence, either direct or circumstantial, to support the jury's verdict. *See id.* This court has repeatedly defined substantial evidence as "evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture." *Id.* at __, __ S.W.3d at __. Furthermore, "[t]his court views the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered." *Id.*

Ms. Barritt contends, in her brief argument on the point, that all of the evidence presented against her was merely circumstantial and that there was an absence of any direct evidence that she caused, or intended to cause, severe physical injury to her daughter under circumstances manifesting extreme indifference to the value of human life. She points out that, because the treating physicians failed to rule out the possibility that the child was suffering from a rare condition, cerebral venous thrombosis, when symptoms consistent with that condition were present, the jury was left with little choice but to speculate and overlook other reasonable hypotheses consistent with innocence.

The State recognizes that while circumstantial evidence is adequate to support a conviction, it must exclude reasonable hypotheses consistent with innocence. *See Reams v. State*, 45 Ark. App. 7, 870 S.W.2d 404 (1994). However, whether the evidence does so is a question for the factfinder at trial. *Id.* Although Ms. Barritt presented her alternative theory that the child's injuries could have been due to cerebral venous thrombosis through testimony

from her expert, Dr. Thomas Schweller, medical experts testifying for the State disagreed with that possibility. The applicable standard leaves to the finders of fact whether the circumstantial evidence is adequate to reject hypotheses consistent with innocence, and in this situation, the testimony presented by Drs. Glacier, Farst, Heulitt, and Lafferty, that only non-accidental traumatic injury consistent with shaking caused the child's injuries, was sufficient to support the jury's rejection of Ms. Barritt's alternative hypotheses.

Additionally, it is settled that proof of a defendant's mental state is seldom available through direct evidence, and circumstantial evidence must often be relied upon. *DeShazer v. State*, 94 Ark. App. 363, __ S.W.3d __ (2006). Additionally, individuals are understood to intend the natural and probable consequences of their actions. *Id.* The State was not required to put on direct proof regarding Ms. Barritt's mental state; however, the State maintains that just such evidence was presented in the form of her admissions to Dr. Lafferty that she only shook the child, although not hard, while playing. Dr. Farst also testified that she told him that "she may have done something out of frustration to cause the injuries[,]" and that "she may have shaken [the child] some when [she] was frustrated with her crying."

We hold that substantial evidence exists to support the jury's verdict. Accordingly, we affirm on this point.

II. Publication of Prejudicial In-Trial Publicity

Our supreme court has made it clear that 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 it cannot be cured by an instruction. *Holsombach v. State*, 368

Ark. 415, __ S.W.3d __ (2007). 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.*

As previously set forth, on day two of the trial, June 15, 2006, *The Morning News - Bentonville* published a story on the lower part of its front page entitled "Barritt Admits Possible Fault" with a smaller heading "Mother Accused of Injuring Baby Testifies In her Own Defense." The article was published prior to the conclusion of the State's case-in-chief, and actually detailed comments from Ms. Barritt that were testified to by Dr. Farst on the first day of trial. Ms. Barritt moved for a mistrial, with her counsel arguing that the false headline functionally conveyed that she had abandoned her Fifth Amendment right against self-incrimination, and that the falsity of the article's headline coupled with its prominent location was sufficiently prejudicial to prevent her from receiving a fair trial. The trial judge brought the jurors into the courtroom and asked if any of them subscribed to the publishing newspaper, to which three of the jurors and the alternate answered affirmatively. Upon further questioning, all of the jurors and the alternate denied having seen that particular day's edition of the newspaper. The trial judge reminded the jurors and the alternate of the earlier admonition to refrain from reading or watching the news and denied the motion for a mistrial.

Ms. Barritt's counsel then asked the court to sequester the jury because the possibility existed that one or more of the jurors could inadvertently come in contact with that day's edition of the paper and see the headline. The trial judge took the motion under advisement

and, prior to the dismissal of the jury at the end of the day, instructed the subscribing jurors and alternate to call their respective homes and instruct whoever was there to remove that day's edition of the paper. He reminded them all of the previous admonishment and dismissed them for the day, effectively denying the motion to sequester.

Ms. Barritt cites *United States v. Williams*, 604 F.2d 1102 (8th Cir. 1979), regarding such "in-trial publicity," stating that to the extent the information concerns a criminal defendant, it is more likely to stay in a juror's mind than pre-trial publicity and cannot be cured by extensive voir dire or the granting of a continuance or a change of venue. Unlike *Williams*, Ms. Barritt explains that the article in question directly referred to her by name and clearly asserted that she had testified in some fashion that was an admission of fault for her daughter's injuries. In reality, she had not yet testified and unless and until she did, she enjoyed the privilege against self-incrimination pursuant to U.S. Const. Amend. V and Ark. Const. Art. 2 § 8. She reminds us that any evidence that tends to establish the guilt of a defendant is inherently prejudicial, *see Hinkston v. State*, 340 Ark. 530, 10 S.W.3d 906 (2000),[2] and contends that nothing could be more prejudicial than creating a perception that she had confessed to the charges, as plainly suggested by the headline of the article in question. Accordingly, she claims that the trial judge erred in denying her motion for a mistrial or alternatively to sequester the jury.

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[2]We note that *Hinkston* dealt with a situation where the court stated that the mere fact that certain statements were incriminating did *not* render them unfairly prejudicial under Rule 403 because "any evidence that tends to establish the guilt of the defendant is inherently prejudicial."

The State maintains that, with regard to in-trial publicity, it is well settled that jurors are presumed to be unbiased and to comprehend and follow a court's instructions and that it is a defendant's burden to prove otherwise. *See Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002). When jurors deny having read a newspaper article, a defendant hardly can show prejudice merely by the publication, and this court will not reverse in the absence of a showing of prejudice. *See Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001). In the instant case, all the jurors denied reading the article, and the trial judge reminded them to avoid news accounts of the trial. He even instructed those who subscribed to the paper to call household members prior to leaving the courthouse and have them remove that particular edition from their residences. The State claims that neither a mistrial nor sequestration was required under these circumstances, and if it were, such would be the situation in almost every case. Even in situations where a juror has read an article, the denial of such extreme relief has been upheld where the jury has been sufficiently admonished. *See Smith*, *supra* (discussing *Howell v. State*, 220 Ark. 278, 247 S.W.2d 952 (1952)). Because Ms. Barritt has failed to demonstrate prejudice from a particular juror's exposure to the in-trial media coverage, we hold that the trial court's denial of her motions related to this issue was not an abuse of discretion and affirm on this point.

III. Alleged Pre-Deliberation by Jurors - juror note

As part of the foundation of a criminal defendant's right to a fair and impartial jury is the rule that jurors not engage in discussions of a case or consideration of the evidence until all of the evidence has been submitted, they have been instructed by the trial court as to the

applicable law, and they have retired to collectively begin the deliberation process. *See United States v. Resko*, 3 F.3d 684 (3rd Cir. 1993). In alleging juror misconduct, an appellant bears the burden of proving that the misconduct resulted in a reasonable possibility of prejudice. *Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002). Ordinarily, prejudice will not be presumed, and the moving party must demonstrate that his or her substantial rights have been affected. *Larimore v. State*, 309 Ark. 414, 833 S.W.2d 358 (1992).

On June 16, 2006, the third and final day of testimony, prior to the lunch break and conclusion of Ms. Barritt's case, the jury sent out a note that read, "so much about brain w/trauma - can we see picture of 'normal' brain." Ms. Barritt completed the presentation of her case, and the jury was dismissed with instructions to return on the following Tuesday morning, June 20, 2006, for jury instructions, closing arguments, and deliberations. Prior to the commencement of the proceedings that Tuesday morning, Ms. Barritt requested a mistrial, claiming that the note from the jury on the previous Friday indicated that the jury had begun discussing the evidence and that the pre-deliberation prior to the introduction of all of the evidence violated the court's earlier admonitions and indicated that they were attempting to formulate an opinion "one way or the other" about the case. The request was denied.

Ms. Barritt cites *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000), and *Resko*, *supra*, in her discussion as to when improper intra-jury misconduct is sufficient to warrant a mistrial. It appears that the determination hinges, at least partly, on whether such questions from a jury could have come from a single juror mulling

over the issues in his or her mind rather than providing some affirmative proof that the juror, in fact, had been discussing the case prematurely. Ms. Barritt contends that in this case, the fact that the note in question had the word "we" in it indicates that the entire jury had begun discussing the evidence prematurely.

As to the reasonable possibility of prejudice, Ms. Barritt cites *Cherry v. State*, 341 Ark. 924, 20 S.W.3d 354 (2000), where a new trial was granted when seven of the twelve jurors admitted to either hearing or participating in conversations about the trial prior to formal deliberations but denied that their decisions were affected by the discussions. She contends that the pre-deliberation discussions, which culminated in the jury's note, occurred no later than half-way through the presentation of her case, when only two of her four witnesses had testified. She claims that according to both *Resko* and *Cherry*, it is the nature of the intra-jury misconduct, not the actual or subjective effect, that should determine whether a reasonable possibility of prejudice was created. At the time the note was delivered, several medical experts had testified, none of whom testified in conjunction with a picture of "a normal brain." She asserts that the jury's note clearly and strongly implies that some or all of the jurors had reached the deliberative conclusion that Ms. Barritt's conviction or acquittal hinged on her ability to present a picture of a "normal brain." As a result, she contends that the jury effectively lowered the State's burden of proving her guilty beyond a reasonable doubt and created the reasonable possibility that her right to a fair trial had been prejudicially compromised.

The State argues that Ms. Barritt has failed completely to meet her burden, pointing only to the handwritten note from the jury, or some member thereof, on the last day of evidence. In contrast to *Cherry*, there was no evidence of jurors admitting that they heard or participated in premature conversations about the case; in fact, the trial judge had the jurors affirm that over the intervening weekend, subsequent to the submission of the note, they had followed the instructions not to talk about or investigate the case. All of them so affirmed by raising their right hands. Both before and after the note was discovered and discussed, the trial judge reminded the jurors on numerous occasions of the admonition, which applied to all recesses. The State maintains that any suggestion that the note was a product of juror discussions was dispelled by the explanation from the trial court, who was in the best position to gauge the import of, and any potential prejudice from the note, that it was merely the product of an attentive jury. *See Holsombach*, *supra*. Additionally, there was no testimony that jurors had either discussed or decided the merits of the case. At the time this occurred, prior to the adoption of Ark. R. Crim. P. 33.8 earlier in the year, jurors could be permitted to ask questions of witnesses. The State alleges that, while the note in question was not treated as such, the note suggests no more than a question from an attentive jury or perhaps even from a single juror, and the trial court's similar treatment of such did not constitute an abuse of discretion. We agree and specifically note that appellant's counsel failed to request the opportunity to ask additional questions of the jury regarding this issue. We affirm on this point as well.

IV. Cross-Appeal - Denial of Motion to Recuse

We have long held that a judge must avoid even the appearance of impropriety. *Elmore v. State*, 355 Ark. 620, 144 S.W.3d 278 (2004); Canon 2, Arkansas Code of Judicial Conduct. When recusal is in issue, this court has held that a judge has a duty to sit on a case unless there is a valid reason to disqualify, and, on appeal, we presume impartiality on the trial judge's part. *See Walls v. State*, 341 Ark. 787, 20 S.W.3d 322 (2000). The decision to recuse lies within the discretion of the judge, and to decide whether there has been an abuse of discretion, we review the record to see if prejudice or bias was exhibited. *Walls, supra.*

Additionally, in *Thomas v. State*, 349 Ark. 447, 79 S.W.3d 347 (2002), the supreme court discussed how Ark. Code Ann. § 16-90-107(e) does not conflict with sections 5-4-103 and 16-97-101, both of which provide that the jury shall "fix" or "determine" punishment. Section 16-90-107(e) does not authorize the trial judge to "fix" or "determine" punishment or in any way interfere with the jury's right to do so. Rather, it merely allows the judge to reduce the punishment assessed by the jury if, under the circumstances, the judge considers the punishment excessive. In this respect, section 16-90-107(e) is a safety net of sorts, placing discretion with the trial judge to check jury sentences that are excessive or unduly harsh under the particular circumstances of a case. It is harmonious with, and complementary to, the jury's power to fix punishment found in sections 5-4-103 and 16-97-101. The State points out that the statutes do not authorize a judge to do so founded upon ex parte discussions with jurors about the meanings of their verdicts. *Coran v. Keller*, 295 Ark. 308, 748 S.W.2d 349 (1988).

The State asserts that a juror's visit to the trial judge in chambers prior to the sentencing hearing for the specific purpose of expressing reservations about the guilty verdict and recommended sentence and making a request for leniency for Ms. Barritt created an appearance of impropriety, and the trial judge should have granted the motion to recuse from the sentencing portion of the trial. The State maintains that his failure to do so in this criminal case amounted to an abuse of discretion, the prejudice of which was illustrated by his subsequent reduction of the jury's sentencing recommendation. The State takes issue only with the *appearance* of impropriety that occurred as a result of the ex parte encounter. The State argues that it was because of, not despite, his power to reduce the sentence that the circumstances created an appearance of impropriety. However he exercised that power, the juror's post-verdict request could only create such an appearance, although through no fault of the trial judge. There is no way to know whether or not the trial judge would have reduced Ms. Barritt's sentence in the absence of the juror's request. The State contends that justice demands the appearance of justice, and that only the judge's recusal could have ensured that by avoiding the appearance of impropriety in the formal sentencing following the juror's contact to ask for leniency.

While a criminal defendant may appeal as a matter of right, the State may only appeal as allowed by the criminal procedural rules, specifically, Ark. R. App. P.-Crim. 3. *State v. Hayes*, 366 Ark. 199, __ S.W.3d __ (2006). An appeal must concern an issue of law. *Id.* It must be narrow in scope. *Id.* If an appeal by the State includes mixed issues of law and fact, it will not be heard. *Id.* Appeals by the State to the supreme court are not allowed merely

to demonstrate the fact that the trial court erred. *State v. Brooks*, 360 Ark. 499, 202 S.W.3d 508 (2005). Where a State's appeal does not present an issue of interpretation of the criminal rules with widespread ramifications, such an appeal does not involve the correct and uniform administration of the law within the meaning of the rule governing cases appealable by the State to the supreme court. *Id.* In the instant case, the State's cross-appeal is a clear example of an issue raised solely to demonstrate that the trial court erred, here, by creating the appearance of impropriety by failing to recuse from the sentencing phase of the trial. We hold that such an appeal does not fall under the spectrum of issues contemplated by Ark. R. App. P.-Crim. 3, and that even if it were, the Arkansas Supreme Court would be proper court in which to bring such a challenge. Accordingly, we decline to address the merits of the State's cross-appeal.

Affirmed on direct appeal; cross appeal dismissed.

GRIFFEN and VAUGHT, JJ., agree.