NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II

No. CACR 07-1099

	Opinion Delivered MAY 7, 2008
MELVIN TODD RELIFORD APPELLANT	APPEAL FROM THE HEMPSTEAD COUNTY CIRCUIT COURT, [CR-2006-355-2]
V.	HONORABLE DUNCAN CULPEPPER, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Melvin Todd Reliford appeals his conviction for possession of marijuana with intent to deliver, as determined by a Hempstead County Circuit Court jury. He was sentenced to a twenty-year prison term, and he appeals, asserting that the trial court erred in failing to declare a mistrial sua sponte, or at least question or admonish the remaining jury members. We affirm because appellant failed to ask for relief at trial, thus failing to preserve these contentions for consideration on appeal.

To give context to his argument, we briefly outline what occurred during trial. During a recess, a juror informed the trial court that appellant's girlfriend, who was a witness in the trial, came up to her in the hallway outside the courtroom and spoke to her, which made her uncomfortable. She went further and said that she did not know if she could now render a fair and impartial verdict. The juror said that other jury members were present, and

that "I'm just speaking for the other jurors, too, that that made us uncomfortable." The judge removed this juror. Back in open court, the judge selected the alternate juror to sit in the removed juror's place. No objections, requests, or comments of any kind were made to this procedure. Appellant was found guilty, sentenced, and appellant filed a timely notice of appeal to our court.

The single issue raised is an assertion that the trial court should have acted on its own to declare a mistrial, or to inquire further of the other jurors about any discomfort they may have had, or to give a curative instruction to the jury about what had occurred. Because none of these arguments are preserved for review, we affirm the trial court without reaching the merits of any of these assertions.

A juror is presumed to be unbiased and qualified to serve, and the burden is on the appellant to prove actual bias. *Spencer v. State*, 348 Ark. 230, 72 S.W.3d 461 (2002). It is the appellant's burden to show that he was prejudiced by the juror or jurors. *Id*.

It is well settled that a contemporaneous objection is required to preserve an issue for appeal. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998). A mistrial is a drastic remedy and should only be declared when there is error so prejudicial that justice cannot be served by continuing the trial, and when it cannot be cured by an instruction to the jury. *Tryon v. State*, 371 Ark. 25, __ S.W.3d __ (2007). Motions for mistrial must be made at the first opportunity. *Edwards v. Stills*, *supra*. Appellant's counsel did not ask for a mistrial, did not ask for a curative instruction, and did not ask the trial court to inquire further of the remaining jurors. Thus, the issue is not preserved.

We hasten to add that our supreme court has recognized four exceptions to the contemporaneous-objection rule, known as the *Wicks* exceptions. *See*, *e.g.*, *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003). These exceptions occur when (1) a trial court, in a death-penalty case, fails to bring to the jury's attention a matter essential to its consideration of the death penalty itself; (2) a trial court errs at a time when defense counsel has no knowledge of the error and thus no opportunity to object; (3) a trial court should intervene on its own motion to correct a serious error; and (4) the admission or exclusion of evidence affects a defendant's substantial rights. *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992).

To the extent that appellant's argument could be construed as attempting to apply the third *Wicks* exception, we reject it. The third *Wicks* exception applies when the error is so flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to intervene. *See*, *e.g.*, *Springs v. State*, 368 Ark 256, __ S.W.3d __ (2006). It is a rare and sparingly applied exception indeed. In *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005), the supreme court reaffirmed the narrowness of the third exception, stating that it has only been applied to cases in which a defendant's fundamental right to have a trial by jury is at issue. The error of which appellant complains is not of this caliber.

Affirmed.

PITTMAN, C.J., and MARSHALL, J., agree.