ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION III

CACR07-26

September 12, 2007

NATHAN DEMON MARBLEY
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[CR-2006-1684]

HON. WILLARD PROCTOR, JR., CIRCUIT JUDGE

AFFIRMED

Nathan Marbley was convicted of aggravated robbery, theft of property, and employing a firearm as a means of committing these crimes. Marbley appeals his convictions, arguing that the trial court abused its discretion in denying his motions for mistrial. We disagree and affirm.

On March 20, 2006, a man entered Arkansas Ostomy, held a gun to the head of employee Jane Witcher, screamed profanities, threatened to shoot and kill Ms. Witcher, and demanded that she give him money. Two other employees of Arkansas Ostomy, Jacque Olsin and Keltie Tezel, along with the owner Jerry Hyde also testified at trial as all three were present during the robbery. The witnesses testified that the perpetrator obtained money from the business and Ms. Witcher's purse. During the robbery, the perpetrator became distracted by a noise in the back of the business, ran toward the front door, fired the gun into the air,

and then exited. Ms. Witcher, within an hour and a half of the incident, identified Marbley—a customer of Arkansas Ostomy—as the perpetrator.

Tommy Hudson, a detective with the Little Rock Police Department, testified that he investigated the March 20, 2006, robbery. Officer Hudson was asked by the prosecutor at trial what he did with the information Ms. Witcher provided concerning the identity of the robber, and he answered, "I called our communications section and ran a check on Mr. Marbley to see if he had any kind of criminal history." This response drew a relevance objection from Marbley, and the trial court sustained the objection. Officer Hudson further testified that, based on the information provided by Ms. Witcher, he created a "photo spread." The prosecutor then asked Officer Hudson how he created the photo spread, at which time the trial court held a bench conference, and the following colloquy took place:

THE COURT: I can see where this is going. I don't want a mistrial. I don't want him to say anything about he got this photo spread by photos of criminal cases. I know they use driver's licenses.

PROSECUTOR: Your Honor, I will tailor my questions more specifically, but what I'm asking is the general description of a person.

THE COURT: [Officer Hudson] almost caused a mistrial, so you need to pull him in or retry this case tomorrow with a new jury panel.

DEFENSE COUNSEL: I don't know what the relevance is, what it matters.

PROSECUTOR: I'll just ask him if he prepared a photo spread in this case and if this is the photo spread that he created.

THE COURT: Okay.

Officer Hudson's testimony continued: he confirmed that he created a photo spread, and he identified the photo spread at trial. At that point, Marbley asked for a bench conference and argued to the trial court:

DEFENSE COUNSEL: I think based on what's already been said, the door is open. We can't close it and I'm going to ask for a mistrial because I think the prejudice is too great to be overcome or set aside.

THE COURT: Well, I mean he hasn't said anything other than the fact that he – to see whether or not he had a criminal history. He didn't go any further than that. It was stopped at that point. I don't think there's any prejudice to that. I think, you know – I don't think it's unreasonable. There's nothing out there that says he does or does not.

DEFENSE COUNSEL: I'm asking for one.

PROSECUTOR: As far as anyone knows at this point, they could be from driver's license photographs.

THE COURT: I deny your motion for mistrial.

Marbley renewed his motion for mistrial after the State's case and at the end of the defense case. All renewed motions for mistrial were denied by the trial court. On appeal, Marbley concedes that "this is not a case in which the witness blurts out information about prior offenses." However, Marbley argues that a mistrial was warranted because Officer Hudson's testimony implied that Marbley had a prior criminal record.

Our supreme court has held that any reference to a defendant's prior conviction during the guilt phase of a criminal trial results in some prejudice to the defendant. *Kimble v. State*, 331 Ark. 155, 959 S.W.2d 43 (1998). Declaring a mistrial, however, is a drastic remedy and proper only where the error is beyond repair and cannot be corrected by any curative relief.

Kimble, 331 Ark. at 159, 959 S.W.2d at 45. The trial court is in the best position to decide the issue of prejudice because of its first-hand observation. *Moore v. State*, 87 Ark. App. 385, 192 S.W.3d 271 (2004). The trial court has wide discretion in granting or denying a motion for a mistrial, and absent an abuse of that discretion, the trial court's decision to deny a motion for a mistrial will not be disturbed. *Id.*

Furthermore, an admonition to the jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial. *Id.* More specifically, our supreme court has concluded that an admonition is sufficient to cure a reference a witness made to a defendant's "previous record." *Heard v. State*, 322 Ark. 553, 910 S.W.2d 663 (1995), *overruled on other grounds by MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). It is the defendant's obligation to request a curing instruction, and a failure to request one will not inure to the defendant's benefit on appeal. *Moore*, 87 Ark. App. at 395, 12 S.W.3d at 277. When there is doubt as to whether the trial court abused its discretion, a failure to request an admonition will negate a mistrial motion. *Weaver v. State*, 324 Ark. 290, 920 S.W.2d 491 (1996).

We cannot say that the trial court abused its discretion in denying Marbley's motions for mistrial. First, as noted by the trial court, Marbley did not suffer any prejudice because Marbley's criminal record was never revealed. Officer Hudson testified only that he contacted the police department to determine if Marbley had a criminal history. No one testified as to whether Marbley had a criminal record. *See e.g. Davis v. State*, 317 Ark. 592, 879 S.W.2d 439 (1994) (holding that there was no prejudice where criminal record was never revealed at trial;

only that there was a photograph closely matching defendant's photograph in police department file).

Second, assuming arguendo that Marbley did suffer prejudice as a result of Officer Hudson's testimony, at no time did Marbley request an admonishment to the jury, which, in this case, would have cured any such prejudice. *See Heard*, *supra* (holding that admonishment to jury would have been sufficient to cure reference witness made to defendant's prior record, specifically, time served in penitentiary); *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994) (affirming denial of motion for mistrial because trial court admonished jury to ignore testimony about defendant's prior record, specifically, that his fingerprints were on file with FBI); *Kimble*, *supra* (holding that defendant failed to request admonishment, which would have cured prejudicial statement made by witness that defendant "had gotten out of prison about a year an a half ago"; that it was defendant's obligation to ask for curative instruction; and that failure to do so would not inure to his benefit on appeal).

Because the possibility of prejudice was remote, and because Marbley failed to request an admonition, which would have cured any potential error, the trial did not abuse its discretion in denying the motions for mistrial.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.