ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION I

CACR07-956

September 24, 2008

	APPEAL FROM THE UNION COUNTY CIRCUIT COURT
JOHNNY FRANK EVANS APPELLANT	[CR2005-448]
V.	HONORABLE HAMILTON H. SINGLETON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant, Johnny Evans, was tried by a jury and found guilty of the following offenses: possession of controlled substance with intent to deliver–methamphetamine; possession of controlled substance with intent to deliver–marijuana; possession of controlled substance with intent to deliver–Xanax; maintaining a drug premises; possession of drug paraphernalia. He was acquitted of the charges of simultaneous possession of drugs and firearms, possession of a controlled substance–ecstasy; and possession of a firearm by certain persons. He raises three points of appeal: 1) the trial court erred in denying his motion to sever, 2) the trial court erred by commenting on the evidence, 3) the trial court erred in denying his motion for a mistrial. We affirm.

For his first point of appeal, appellant contends that the trial court erred in denying his motion to sever the charge of possession of a firearm by certain persons from the other charges on which he was being tried. We agree.

Rule 22.2 of the Arkansas Rules of Criminal Procedure provides:

> Severance of offenses.
>
> (a) Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.
>
> (b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of offenses:
>
> (i) If before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or
>
> (ii) If during trial, upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

In *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991), our supreme court explained that under subsection (a) of Rule 22.2, a defendant has a right to severance when two or more offenses have been joined solely on the ground that they are of the same or similar character, but that a severance motion will be denied if the two offenses were part of a single scheme or plan or if both offenses require the same evidence. Otherwise, granting or refusing a severance is within the discretion of the trial court, and its decision will not be disturbed absent an abuse of discretion. The court in *Ferrell* determined that the trial court erred initially in refusing to sever the firearm/felon count from the murder count for trial. It concluded, however, that the prejudicial impact of refusing to sever the offense was

significantly reduced by other circumstances in the trial, and, therefore, the case could be affirmed.

In *Sutton v. State*, 311 Ark. 435, 437-38, 844 S.W.2d 350, 352 (1993), our supreme court again discussed the prejudicial impact of combining a felon/firearm charge with one or more other felony charges:

> In the last year and a half, we have examined the prejudicial impact that occurs when a felon/firearm charge is combined with a murder charge for trial on two occasions. *Sullinger v. State*, ... *Ferrell v. State*, ... In each instance, we affirmed the conviction and judgment, though we held that the trial court had erred in failing to sever the charges for trial. We did so, based on what amounted to a harmless error analysis. Though there was error, we held that the error was not prejudicial to the defendant because of the existence of *one or more* overriding factors, including: (1) the overwhelming evidence of guilt; (2) cross-examination of the defendant on the prior conviction; and (3) a limiting instruction to the jury.
>
> In both *Sullinger* and *Ferrell*, we scrutinized the circumstances of the case in light of these factors and concluded that the joinder error was harmless, primarily due to overwhelming evidence of guilt and the fact that the defendant would have taken the stand in any event and been cross-examined about his felony conviction.

(Citations omitted and emphasis added.) The supreme court went on to discuss approaches from other jurisdictions and concluded that their analytical approaches in assessing prejudicial error were similar to that employed in Arkansas. In *Sutton*, the supreme court also concluded:

> We are disinclined, as are other jurisdictions, to conclude that joinder of a felon/firearm charge with a second felony charge constitutes prejudice by that fact alone in all instances. *However, we agree with the Ninth Circuit Court of Appeals "that the danger that the jury's perception of the defendant will be adversely affected is so strong as to create a presumption favoring severance*."
>
> Further, we do not believe that the circumstances in this case are sufficient to overcome that presumption of prejudice. *The evidence of guilt was weak, and the prior felony was inadmissible for purposes of impeachment. In addition, the error was not cured by the*

> *instruction on the prior conviction and credibility at the end of the trial.* Sutton, accordingly, was prejudiced by the joinder and is entitled to a new trial.

Id. at 441, 844 S.W.2d at 354 (citations omitted and emphasis added). *See also Burton v. State*, 367 Ark. 109, 238 S.W.3d 111 (2006). Thus, in *Sutton*, the supreme court expressed its agreement with the notion that there should be a *presumption in favor of severing* a felon/firearm charge from other felony charges because the danger of prejudicing the defendant with the jury is so strong. The court stopped short of holding that joinder of a felon/firearm charge *alone* constitutes prejudice; but in *Sutton*, the court did not find the evidence of guilt, or any other circumstances, so overwhelming as to reduce the prejudicial impact of the refusal to sever. Consequently, on that basis, the case was reversed and remanded for a new trial.

Here, while we do not disagree with the State's assertion that firearms are generally regarded as tools in drug-trafficking activities and that their possession may be relevant to establish intent where a defendant is charged with possession of a controlled substance with intent to deliver, that position does not change the fact that a prior felony conviction is not relevant to those charges. Neither does it weigh against the presumption in favor of severance. Consequently, we conclude that the trial court erred in refusing to sever the felon/firearm offense.

We turn now to consider whether appellant was so prejudiced by the denial of his motion to sever that this case must be reversed and remanded for a new trial. We find no such prejudice. In *Sutton*, our supreme court indicated that the existence of even one of the previously discussed factors, *i.e.*, overwhelming evidence of guilt, limiting jury instructions,

or the inevitable introduction of a prior conviction, may be sufficient to satisfy a harmless-error analysis. Here, appellant does not challenge the sufficiency of the evidence, and he does not abstract in detail the evidence from the trial that supported his convictions on the offenses. In its reply brief, however, the State contends that the evidence of appellant's guilt was overwhelming on the charges for which he was found guilty. The State then summarizes that evidence and lists the pages in the record where the evidence can be found. After reviewing the record, we agree that the evidence of appellant's guilt was overwhelming. In addition, the trial court specifically instructed the jury that appellant's status as a felon could only be considered with respect to the felon/firearm offense, and not with respect to his guilt on any of the other charges. Consequently, we hold that the trial court's error was rendered harmless by other circumstances in the trial, particularly the overwhelming evidence of appellant's guilt on the charges for which he was convicted and the trial court's specific limiting instruction to the jury.

For his second point of appeal, appellant contends that "not only did the trial court comment on the evidence [in violation of our state constitution], he went so far as to completely satisfy an element of the possession of a weapon by certain persons charge by announcing that the defendant is a felon." We do not address the merits of this point because the argument that the trial court satisfied an element of the possession-of-a-weapon-by-certain-persons charge by announcing that appellant was a felon was rendered moot by the fact that appellant was found not guilty of that charge. *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999).

For his final point of appeal, appellant contends that the trial court erred in denying his motion for a mistrial based upon Deputy David Gates calling the appellant a felon. We disagree.

During the State's examination of Deputy Gates, the following line of testimony developed:

> [Prosecutor]: After you observed the firearm what did you do?
>
> [Gates]: I notified Sheriff Jones of what we had found and I gave out a BOLO of the suspect that had ran from the residence.
>
> [Prosecutor]: What is a BOLO?
>
> [Gates]: Be on the lookout.
>
> [Prosecutor]: Some people may not have heard that term before.
>
> [Gates]: I gave it out on the radio so everybody would know. I contacted Sheriff Jones and let him know what we had and the situation and that there was a pistol just inside the window of the residence. He arrived at that time I believe shortly thereafter I showed him where the pistol was inside the bedroom window. We went around to the garage door where Investigator Thomas was. Investigator Thomas I believe identified Johnny in some of the photos through the window on the dresser at which time Sheriff Jones had called Investigator Reyes to type a search warrant for the residence based on the fact that *both Johnny and Lavelle were felons*.

(Emphasis added.) Appellant moved for a mistrial, which was denied by the trial court. Without objection from appellant, however, the trial court addressed the jury and cautioned:

> Ladies and gentlemen, we're here today about drugs and about what happened and what happened on February 21, 2005. I want you to disregard the reference to this Defendant and his brother Lavelle being felons. Can you do that? Will you put that out of your minds and address these charges as they stood on the 21st of February, 2005? Can we do that?

The jurors affirmatively nodded that they could, and the trial court denied appellant's motion for a mistrial.

A mistrial is a drastic remedy, to be employed only when an error is so prejudicial that justice cannot be served by continuing the trial, and when it cannot be cured by an instruction to the jury. *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003). The decision to grant a mistrial is within the sound discretion of the trial court and will not be overturned absent a showing of abuse or manifest prejudice to the appellant. *Id.* Moreover, in *Jones v. State*, 349 Ark. 331, 338, 78 S.W.3d 104, 109 (2002), our supreme court explained:

> Among the factors to be considered in determining whether or not a trial court abused its discretion in denying a mistrial motion are whether the prosecutor deliberately induced a prejudicial response, *see Brown v. State*, 320 Ark. 201, 895 S.W.2d 909 (1995), and whether an admonition to the jury could have cured any resulting prejudice. *Id.; see also Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997). While there is "always some prejudice that results from the inadvertent mention of a prior conviction," *see Strawhacker v. State*, 304 Ark. 726, 804 S.W.2d 720 (1991), this court has upheld denials of mistrials where, by chance remarks, it was brought out that the defendant had prior arrests, and even prior convictions, where the comment was inadvertent. *Cobbs v. State*, 292 Ark. 188, 728 S.W.2d 957 (1987); *see also Novak v. State*, 287 Ark. 271, 698 S.W.2d 499 (1985) (where juror commented during voir dire that he knew the defendant because he had arrested him, the trial court's denial of a mistrial did not require reversal because the evidence of guilt was overwhelming).

Here, it is clear from the quoted portion of the record that the prosecutor did not deliberately solicit the objectionable testimony from Deputy Gates. In addition, the trial court issued a cautionary instruction to the jury. Without the complications injected into this trial by the refusal to sever the felon/firearm offense, there is no question that the deputy's inadvertent mention of appellant's felon status would not require a mistrial. The considerations involved in this point of appeal, however, are intertwined with those

concerning appellant's first point of appeal regarding the denial of his motion to sever the felon/firearm offense, which have already been fully discussed. Thus, under the circumstances of this case, we need not address whether the trial court should have granted a mistrial because, as discussed previously, the evidence of appellant's guilt on the charges for which he was convicted was overwhelming. Accordingly, the trial court's denial of appellant's motion for mistrial does not require reversal.

Affirmed.

VAUGHT, J., agrees.

BAKER, J., concurs.