

ARKANSAS COURT OF APPEALS

DIVISION III

No. CACR11-858

MIKAL RASUL

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 27, 2013

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FOURTH DIVISION
[NO. CR2007-4870]HONORABLE HERBERT THOMAS
WRIGHT, JR., JUDGE

AFFIRMED

ROBIN F. WYNNE, Judge

Mikal Rasul was found guilty by a Pulaski County jury of second-degree murder in the 2007 death of Henry Onukwube. The jury also determined that appellant used a firearm in the commission of the offense. The trial court sentenced appellant to a total of 384 months' imprisonment. He appeals, arguing that the trial court erred by denying his motions for a mistrial and a new trial. We disagree and affirm.

The jury deadlocked during the sentencing phase of the trial. After the jury deadlocked, the judge who presided over the guilt phase of the trial recused upon the State's motion, stating that his relationship with one of the defense witnesses rendered it improper for him to determine appellant's punishment. The trial judge had disclosed the relationship prior to the start of the trial and neither party objected to his presiding over the trial. After the verdict and prior to the entry of the judgment and commitment order, appellant filed a

motion for mistrial. In the motion, appellant argued that the trial judge should have recused prior to trial and that juror misconduct occurred that prejudiced him.

At the hearing on appellant's motion for a mistrial, Charles Marsh, the foreman of the jury, testified that he had heard two other jurors discuss information that was not presented in court. He stated that, after the jury was selected, a juror named Alissa Gormley indicated that she was looking up the case history on her phone. She was, according to Mr. Marsh, adamant during deliberations that appellant was guilty. Mr. Marsh did not hear her tell anyone anything, nor did she tell him or anyone else on the jury anything during deliberations that was not heard in court. Mr. Marsh also testified that he heard an unidentified male juror say on the second morning of the trial that he "looked up all the history of this trial last night." That was all the unidentified juror said.

Dr. Gary Ezell, who also served on the jury, testified that Ms. Gormley stated, after the jurors learned appellant's name and that it was a murder trial, that she was going to look him up on her phone. According to Dr. Ezell, all she found was information on someone with the same last name and a different first name. He testified that nothing else happened. Dr. Ezell also stated that nothing was mentioned during deliberations that was not mentioned during the trial. Lisa Brown testified that she heard Ms. Gormley say that she had looked up the defendant but did not hear her say anything else. She never heard a male juror say anything about looking for information about appellant. Robert Robinson also testified that Ms. Gormley said that she had looked up appellant and found someone with the same last name but a different first name. He did not hear her say anything else about it. He stated that

no one told him anything about the case other than what was presented in court.

Alissa Gormley testified that, before the jury was selected, she looked up appellant on her phone and pulled up a PDF file of what looked like a court document with a 2007 date. The name on the document was different from appellant's, so she disregarded it and never looked it up again. According to Ms. Gormley, all that she said to the other jurors was that the document she found was not about the same person. She denied looking up anything else after she was instructed not to do so.

The trial court denied appellant's motion for a mistrial. After the judgment and commitment order was entered, appellant filed a motion for new trial in which he restated the allegations of juror misconduct made in his earlier motion for a mistrial. The trial court never ruled on the motion for new trial and, as a result, the motion was deemed denied thirty days after it was filed. This appeal followed.

Appellant's first point on appeal is that the trial court erred by denying his motion for a mistrial. A mistrial is an extreme and drastic remedy that will be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing with the trial or when the fundamental fairness of the trial has been manifestly affected. *Harrison v. State*, 371 Ark. 652, 656, 269 S.W.3d 321, 324 (2007). A circuit court has wide discretion in granting or denying a mistrial motion, and, absent an abuse of that discretion, the circuit court's decision will not be disturbed on appeal. *Id.* The moving party bears the burden of proving prejudice. *Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002). Prejudice will not be presumed. *See id.* Whether prejudice occurred is also a matter for the sound discretion

of the trial court. *Id.*

We hold that the trial court did not abuse its discretion by denying appellant's motion for a mistrial. Regarding the allegation of juror misconduct, the moving party bears the burden of proving both the misconduct and that a reasonable possibility of prejudice resulted from it. *Dimas-Martinez v. State*, 2011 Ark. 515, at 9, 385 S.W.3d 238, 244. The testimony at the hearing on appellant's mistrial motion was that one, or perhaps two, of the jurors looked up the appellant's name prior to the start of the trial. Alissa Gormley told the rest of the jurors that what she found referenced a different person, and nothing else was said about the matter. Specifically, the jurors who testified stated that nothing was said during deliberations that was not presented in court. Alissa Gormley testified that, because what she saw pertained to someone with a different name, she disregarded it. The trial court did not err in determining that appellant failed to prove a reasonable possibility of prejudice.

Appellant also argues that a mistrial was proper because it was error for the judge who presided over the guilt phase of the trial to recuse from the sentencing phase. The decision to recuse is within the trial court's discretion, and it will not be reversed absent abuse. *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994).

The original trial judge determined, after the jury deadlocked on sentencing, that his relationship with a defense witness made it improper for him to determine appellant's sentence. The trial judge disclosed the relationship prior to the start of the trial, and neither party voiced any concern or requested that he recuse at that time. The original trial judge articulated a reasonable basis for recusing from the sentencing phase, and there is no allegation

of any improper conduct by that judge during the guilt phase. Appellant correctly states that evidence presented during the guilt phase of the trial is relevant to sentencing. Ark. Code Ann. § 16-97-103(7) (Repl. 2006). However, his assertion that having a different judge preside over the sentencing phase of the trial means that the evidence presented during the guilt phase was not considered is without merit. The circuit judge who presided over the sentencing phase stated that he read the transcript of the guilt phase prior to determining appellant's sentence. Therefore, he had access to the same relevant evidence as the original trial judge. No prejudice can be shown from the sentence itself because appellant received less than the maximum sentence, and a defendant who has received a sentence within the statutory range short of the maximum sentence cannot show prejudice from the sentence. *Walden v. State*, 2012 Ark. App. 307, ___ S.W.3d ___.

Appellant's second point on appeal is that the trial court erred by denying his motion for a new trial. That motion merely restates the same allegations of juror misconduct that formed part of the basis for appellant's motion for a mistrial. The decision whether to grant or deny a motion for new trial lies within the sound discretion of the circuit court, and this court will reverse only if there is a manifest abuse of discretion. *Feuget v. State*, 2012 Ark. App. 182, ___ S.W.3d ___. As explained above, the trial court did not abuse its discretion in finding that appellant failed to prove a reasonable possibility of prejudice from juror misconduct. The trial court's decision to deny appellant's motion for new trial was not in error.

Affirmed.

GLADWIN, C.J., and HIXSON, J., agree.

Ronald L. Davis, Jr., Law Firm, PLLC, by: *Ronald L. Davis, Jr.*, for appellant.
Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.