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SUPREME COURT OF ARKANSAS

No. CR-18-329

DAVID WAYNE MCCLENDON APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered: April 4, 2019 APPEAL FROM THE LAFAYETTE COUNTY CIRCUIT COURT [NO. 37CR-16-64-2] HONORABLE BRENT HALTOM, JUDGE AFFIRMED.

RHONDA K. WOOD, Associate Justice

A jury found appellant David McClendon guilty of first-degree murder. He argues two points on appeal. First, McClendon asserts that the circuit court erred in denying his motion for directed verdict. Second, he argues that the circuit court abused its discretion by denying his mistrial motion. We affirm. The State presented sufficient evidence to convict McClendon of first-degree murder, and the circuit court did not abuse its discretion in denying his mistrial motion.

I. *Facts*

On July 15, 2016, Ricardo Martin was shot and killed at his home in Stamps, Arkansas. An autopsy revealed that Martin was shot through the hand, chest, and head; the shot to the head proving fatal. Martin was a drug dealer and was seen earlier that day with a large quantity of meth. By nature of his trade, he was known to carry several

hundred dollars in cash on his person at all times. When police arrived at the scene, they found Martin lying in a pool of blood with his pockets partially turned out and bloody footprints trailing away from his body. The morning of the murder, McClendon had been to Martin's house looking for meth. According to Martin's girlfriend, Martin turned McClendon away because McClendon did not have any money. But later that day, Martin's neighbor saw McClendon's truck back at Martin's house.

Shortly after the murder, law enforcement searched McClendon's house and discovered a substantial amount of cash and meth. Behind his house, police found McClendon's truck, a burn pile, a gas can, and a hoe. The doors of the truck stood wide open, and the floorboards were wet as if they had recently been washed. Next to the truck, the garden hose was still running when police arrived. Police recovered charred portions of the clothes that McClendon had been wearing earlier that day, khaki pants and a white shirt, in the trees behind McClendon's house. Nearby, they found Martin's cellphone. When McClendon arrived at the police station for an initial interview, he was not wearing pants, a shirt, or shoes.

A jury convicted McClendon of first-degree murder. He was sentenced as a habitual offender to life in prison, plus a fifteen-year firearm enhancement pursuant to Arkansas Code Annotated section 16-90-120 (Repl. 2016). He argues two points on appeal. First, McClendon asserts that the circuit court erred in denying his motion for directed verdict. Second, he argues that the circuit court abused its discretion by denying his mistrial motion. We affirm.

II. *Sufficiency of the Evidence*

McClendon moved for a directed verdict at the close of the State's case and again at the close of all the evidence. On appeal, a motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Arnold v. State*, 2018 Ark. 343, at 4, 561 S.W.3d 727, 729. In reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the State, considering only evidence that supports the verdict. *Id.* We will affirm the verdict if substantial evidence supports it. *Id.* Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Id.* McClendon argues that the State failed to prove beyond a reasonable doubt that he was responsible for the murder. However, the State met its burden.

The State's evidence established that McClendon was at Martin's home on the morning of the murder, and that his truck returned to Martin's house that evening. Although the murder weapon was never recovered, McClendon's wife testified that he called her that day searching for his nine-millimeter pistol—the same caliber used to kill Martin. McClendon's wife had hidden the gun from him earlier that day after he fired it in their living room. When McClendon's wife told him where the gun was hidden, McClendon confirmed, "I've got it. I've got everything I need." Ballistics testing revealed that the two shell casings and two bullets recovered at the crime scene were fired from the same weapon as the shell casing and bullets recovered at McClendon's house, which his wife stated he fired from his nine-millimeter earlier that day.

Additionally, the State presented evidence that McClendon's original purpose in visiting Martin was to purchase meth. Although Martin turned him away that morning because he did not have any money, shortly after the murder, McClendon was found with a substantial amount of both cash and meth. And although Martin's girlfriend testified that Martin's sole source of income came from selling meth, police found no meth in Martin's house and no money on Martin's person.

Finally, the State presented evidence demonstrating McClendon's efforts to conceal his involvement in the crime. Our court has held that efforts to conceal a crime and evade detection can be considered as evidence of consciousness of guilt. *E.g.*, *Howard v. State*, 2016 Ark. 434, at 13, 506 S.W.3d 843, 850. When police searched the perimeter of McClendon's house the next morning, they found a burn pile, a gas can, and McClendon's truck. The doors of the truck stood wide open, and the floorboards were wet as if they had recently been washed. Testimony from McClendon's wife established that McClendon had been wearing khaki pants and a white shirt on the day of the murder. Charred portions of both articles of clothing were recovered in the trees behind McClendon's house. And Martin's cellphone was also found in close proximity.

McClendon argues that the State never found a murder weapon, fingerprints, or DNA evidence linking him to the crime scene. He asserts that without a murder weapon or confession, the jury was necessarily left to speculate about who killed the victim. In other words, McClendon argues that the lack of direct evidence warrants reversal. This is not the law. *See Arnold*, 2018 Ark. at 4, 561 S.W.3d at 729 (explaining that substantial evidence

may be direct or circumstantial). Nor is it aligned with our standard of review. *Id.* (stating that we review the evidence in the light most favorable to the State, *considering only evidence that supports the verdict*). Therefore, considering only the evidence that supports the verdict in the light most favorable to the State, we find that substantial evidence supports the jury's verdict.

III. *Mistrial Motion*

McClendon also argues that the circuit court erred in denying his motion for mistrial after a witness alluded to his criminal history. Before trial, the court granted McClendon's motion in limine to exclude evidence of his prior crimes and instructed the State to notify all of its witnesses not to refer to McClendon's prior convictions when testifying. One of the State's witnesses was Frances Horn.

Horn's testimony served a single purpose—to establish that McClendon's vehicle was outside Martin's house around the time of the murder. But before Horn could testify to seeing McClendon's vehicle, the State had to establish her familiarity with it. This is where the infraction occurred:

> [DEPUTY PROSECUTOR]: And how do you recall that he was driving that kind of vehicle at that time?
>
> [FRANCES HORN]: Well, I worked at Dixie Mart. His dad came in. He used to drive it before he got it. *When he got out of prison this last time, that's what his dad gave him to drive.*

McClendon immediately moved for mistrial, asserting that Horn's answer directly violated the court's instruction not to mention McClendon's prior criminal record. Although the

circuit court agreed that Horn's statement violated its pretrial ruling, the court denied McClendon's motion. It reasoned that the State did not deliberately elicit the inappropriate testimony and that a curative instruction was a more appropriate remedy than declaring a mistrial. Notwithstanding McClendon's objections, the court issued the following curative instruction:

> THE COURT: Ladies and gentlemen of the jury, yesterday, I had you take a break early so the lawyers and the court could work on an issue that happened yesterday while Frances Horn was testifying, and that's gone over until this morning. That's why I've had you back there.
>
> The court has now made a ruling about her testimony, and I can tell you that Ms. Horn, when she testified yesterday, misspoke to the jury, and it may be inadvertent or whatever, but she certainly misspoke when she said that the defendant had been to prison, and you want to ignore that.
>
> The court will assure you that you're not gonna hear any testimony, or any documents, or anything in this hearing that says that, and she misspoke, and you must ignore that in its entirety, because the court has made a ruling on that, that she misspoke on that issue, and you're not gonna hear any testimony or any evidence that's going to show that, and I've got to ask you each individually, if you can follow my instruction to ignore that, and I'm just gonna start with the top.

All twelve jurors individually affirmed that they could follow the court's instruction.

Mistrial is an extreme and drastic remedy that is appropriate only when there has been 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. *E.g.*, *Armstrong v. State*, 366 Ark. 105, 113, 233 S.W.3d 627, 634 (2006). A circuit court has wide discretion in

granting or denying a motion for a mistrial, and absent an abuse of that discretion, the circuit court's decision will not be disturbed on appeal. *Id.* In determining whether a circuit court abused its discretion in denying a mistrial motion, we consider factors such as whether the prosecutor deliberately induced a prejudicial response, and whether an admonition to the jury could have cured any resulting prejudice. *Id.* 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. *Sylvester v. State*, 2016 Ark. 136, at 8, 489 S.W.3d 146, 151.

In *Hall v. State*, we affirmed the circuit court's denial of a mistrial despite a police officer's comments regarding the defendant's previous illegal conduct. 314 Ark. 402, 406, 862 S.W.2d 268, 270 (1993). We held that while there is always some prejudice that results from the mention of a prior bad act in front of the jury, if the infraction induces only minimal prejudice, the proper remedy is an admonition or instruction to the jury to disregard the remark. *Id.* Similarly, in *Strawhacker v. State*, we considered the denial of mistrial where a detective's testimony mentioned that the defendant had a prior conviction for third-degree battery. 304 Ark. 726, 729, 804 S.W.2d 720, 722 (1991). In affirming the circuit court's denial, we explained that the prosecutor's action was inadvertent and did not deliberately elicit the prejudicial response. *Id.* We further held that any resulting prejudice was cured by the court's admonition. *Id.*

Here, Horn's statement was a clear violation of the motion in limine. But similar to our ruling in *Hall*, Horn's misstatement did not warrant a mistrial. Indeed, consistent with

our caselaw, the State did not deliberately elicit the prejudicial response. Although the State admittedly failed to caution Horn against discussing McClendon's prior criminal history, her answer was nevertheless characterized by the circuit court as inadvertent. And because the infraction induced only minimal prejudice to McClendon, the remark was sufficiently cured by the court's admonition to the jury. In fact, the court's admonition went well beyond simply instructing the jury not to consider Horn's errant statement. The court strongly suggested that the statement was wrong. Accordingly, the circuit court did not abuse its discretion. We affirm the circuit court's denial of McClendon's motion for mistrial.

IV. *Rule 4-3(i)*

In compliance with Arkansas Supreme Court Rule 4-3(i), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to appellant. No prejudicial error has been found.

Affirmed.

HART, J., concurs in part; dissents in part.

JOSEPHINE LINKER HART, Justice, concurring in part and dissenting in part.

I agree with the majority's conclusion that the evidence was sufficient to sustain McClendon's convictions. However, McClendon's right to a fair trial, guaranteed by the Sixth Amendment to the U.S. Constitution, requires reversal of the trial court's denial of McClendon's motion for a mistrial.

The decision to grant or deny a motion for 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. *E.g.*, *Johnson v. State*, 366 Ark. 8, 13, 233 S.W.3d 123, 127 (2006). A mistrial is a drastic remedy and should be declared only 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. *E.g.*, *Tryon v. State*, 371 Ark. 25, 42, 263 S.W.3d 475, 488 (2007) *Maiden v. State*, 2014 Ark. 294, 438 S.W.3d 263. In determining whether a circuit court abused its discretion by denying a mistrial motion, this court looks to several factors, including "whether the prosecutor deliberately induced a prejudicial response and whether an admonition to the jury could have cured any resulting prejudice." *Armstrong v. State*, 366 Ark. 105, 233 S.W.3d 627 (2006).

Here, McClendon's trial counsel did literally everything she could conceivably do to keep out the undisputedly inadmissible evidence of McClendon's criminal history. She filed the motion. She got the order. She even got the circuit judge to specifically tell the prosecutor to instruct her witnesses that there would be no discussion of McClendon's criminal history at the trial. But the prosecutor did not abide by the circuit court's instruction. The State did not instruct its witnesses, and predictably, one of those witnesses, Frances Horn, then injected into the trial the very testimony that the circuit court's order was supposed to guard against:

> HORN: In July of 2016, I was familiar with the type of vehicle that Mr. McClendon was driving. It was a grey Dodge pickup truck.

PROSECUTOR: And how do you recall that he was driving that kind of vehicle at that time?

HORN: Well, I worked at Dixie Mart. His dad came in. He used to drive it before he got it. When he got out of prison this last time, that's what his dad gave him to drive.

DEFENSE COUNSEL: Your Honor, objection.

McClendon's attorney moved for a mistrial, and the circuit court denied the motion. The majority here affirms that denial under the guise that the prosecution's infraction was "inadvertent," that McClendon only suffered minimal prejudice from the infraction, and that the circuit court's curing instruction to the jury took care of any resulting prejudice. I see this case, and its place in our jurisprudence on the subject of mistrials, in a very different light.

First, any suggestion that an infraction of this sort was "inadvertent," or that it would not or should not have been easily prevented, must be considered closely and carefully. The majority states,

> Horn's testimony served a single purpose—to establish that McClendon's vehicle was outside Martin's house around the time of the murder. But before Horn could testify to seeing McClendon's vehicle, the State had to establish her familiarity with it. This is where the infraction occurred[.]

Not to split hairs with the majority, but its own characterization of Horn's role in the prosecution's case shows that her testimony actually served to support at least two separate factual propositions: (1) that David McClendon had a grey Dodge pickup truck, or at least that he was likely to be driving a grey Dodge pickup truck, and (2) on the date of the shooting, Horn saw that same grey Dodge pickup truck at the victim's residence. Any

testimony as to either of these propositions would be subject to Ark. R. Evid. 602, which obligates the proponent to establish that a lay witness has "personal knowledge" of whatever matter that witness testifies about. In other words, the prosecution would have known that, in order for Horn to testify that the truck belonged to McClendon, she would likely have to explain what led her to that conclusion. Since Horn's testimony indicates that McClendon "(getting) out of prison this last time" was the very impetus for the vehicle shifting from McClendon's father's hands to his own, the prosecution's failure to instruct this particular witness about the circuit court's order is troubling.

Regardless of whether this infraction was deliberate, I cannot sign on to an opinion that leaves the infraction unremedied. In short, "sorry, I forgot to tell the witness about the order" is simply untenable. The prosecutor acknowledged that she failed to instruct the witness, in contravention of the circuit court's clear directive, and this failure must be held against the prosecution, lest the threat of a mistrial become so neutered as to provide no deterrent against such plain (even if entirely inadvertent) impropriety in the future.

Litigants must be able to rely on an order in limine. McClendon's counsel did everything she could here, and the prosecution's infraction obviously prejudiced McClendon. Horn's testimony not only made it seem that McClendon had engaged in past criminal activity, not only made it seem that he had been to "prison" for that criminal activity, but also made it seem that he had been to prison *multiple times*. This is classic

propensity evidence, and the rules simply do not allow for it.[1] Moreover, the circuit court's twelve-time-repeated curing instruction to each individual member of the jury only drew further attention to this improper evidence and further exacerbated whatever prejudice McClendon suffered by the infraction itself. The circuit court should have just declared a mistrial and set another trial date.

Concurring in part; dissenting in part.

Knutson Law Firm, by: *Gregg A. Knutson*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Joseph Karl Luebke*, Ass't Att'y Gen., for appellee.

[1]Obviously, this could have been different if McClendon had elected to testify and the prosecution then used some aspect(s) of his criminal history for impeachment purposes. McClendon did not testify.