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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 11-186

	Opinion Delivered OCTOBER 26, 2011
ADAM EVERETTS APPELLANT	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. CR-09-228-1]
V.	HONORABLE GARY COTTRELL, JUDGE
STATE OF ARKANSAS APPELLEE	REVERSED AND DISMISSED

JOHN B. ROBBINS, Judge

Appellant Adam Everetts appeals the Crawford County Circuit Court's denial of his motion to dismiss based upon double-jeopardy grounds. Appellant was being tried to a jury for third-degree battery of his twelve-year-old daughter and for resisting arrest. A supervisor with children's services testified to the agency's conclusion after investigating the allegations of child abuse. This was in direct contravention of the trial judge's ruling that she not do so, which led to the trial judge admonishing the jury to disregard the comment. The State moved for a mistrial, which the trial court granted over defense counsel's objection. Defense counsel then moved to dismiss the charges upon retrial on double-jeopardy grounds, which was denied, and this interlocutory appeal followed. We reverse and dismiss.

When a jury is sworn to try a case, jeopardy attaches, and when the jury is discharged before the case is complete without the defendant's express or implied consent, then the constitutional right against double jeopardy may be invoked, unless the termination was

justified by overruling necessity. *Wilson v. State*, 289 Ark. 141, 712 S.W.2d 654 (1986); Ark. Code Ann. § 5-1-112(3) (Repl. 2006). If a defendant consents to a mistrial, then the demonstration of "overruling necessity" is not required, so that a defendant may be retried for the same offense. *Williams v. State*, 371 Ark. 550, 268 S.W.3d 868 (2007). The State concedes here that, although defense counsel asked for and was denied a mistrial earlier in the proceedings, this mistrial was for the State's benefit. The sole issue on appeal is whether there was an "overruling necessity" to discharge this jury.

The ultimate decision by the circuit court, that the defendant's protection against double jeopardy was not violated, is reviewed by the appellate court de novo, with no deference to the circuit court's determination. *Shelton v. State*, 2009 Ark. 388, 326 S.W.3d 429; *Koster v. State*, 374 Ark. 74, 286 S.W.3d 152 (2008). When the analysis itself presents a mixed question of law and fact, the factual determinations made by the circuit court are given due deference and are not reversed unless clearly erroneous. *Koster*, *supra*. A mistrial is an extreme remedy that should only be granted when the error is beyond repair and cannot be corrected. *Shelton, supra*. The State bears the heavy burden to prove an overruling necessity for the grant of mistrial. *Koster*, *supra*. The trial court has discretion, however, to determine whether an overruling necessity exists, which will not be reversed absent an abuse of discretion. *Id*.

"Overruling necessity" means a circumstance that is forceful and compelling and is in the nature of a cause or emergency over which neither court nor attorney has control, or which could not have been averted by diligence and care. *Id*. The phrase has been construed

in harmony with the United States Supreme Court's definition of "manifest necessity," as described in *Arizona v. Washington*, 434 U.S. 497 (1978). *Id.* Although each case must turn on its own facts, examples of an "overruling necessity" upheld on appeal include when the jury was exposed to matters outside the courtroom that could affect its judgment, a juror or material witness was ill, or defense counsel was intoxicated. *See Koster*, *supra*; *Shaw v. State*, 304 Ark. 381, 802 S.W.2d 468 (1991); *Jones v. State*, 288 Ark. 162, 702 S.W.2d 799 (1986); *Franklin v. State*, 251 Ark. 223, 471 S.W.2d 760 (1971).

The Supreme Court explained in *Arizona v. Washington*, *supra*, that although a defendant's right to have his trial completed by a particular tribunal is a valued right, it can be subordinated to the public's interest in fair trials designed to end in just judgments. *Id.* at 503. The reviewing court must be satisfied that the trial judge utilized sound discretion. *Id.* at 514.

With these citations in mind, we examine what transpired at this trial. The battery charge rested upon the credibility of the witnesses. The defense's position was that appellant spanked his daughter (R.E.) for being disrespectful and disobedient, but he was not physically abusive as R.E. alleged. R.E. testified that, during a weekend visitation, her father became angry at her for being loud while he tried to sleep. R.E. testified that he hit and kicked her, threw her to the ground, grabbed her by the hair, and threw her against a wall. Police responded to a concerned neighbor's 911 call and arrested appellant. R.E.'s mother took her to a local DHS (Department of Human Services) office, where she was interviewed two days after the alleged event.

Appellant sought to have a DHS county supervisor (Debbie Pippin) testify about DHS's investigation, although she was not personally involved in this particular investigation. The State objected to (1) admission of the written report, authored by another DHS employee, (2) admission of any impermissible hearsay included in the report, and (3) admission of any final conclusions made by DHS about whether abuse did or did not happen. These issues were discussed at length outside the presence of the jury.

The trial judge ruled that the report itself was inadmissible but that the supervisor could testify about the facts of the investigation process, any inconsistent statements made by R.E., and that DHS took no action, "but nothing further." The judge specifically stated that the supervisor was not to testify about the decision-making process and related conversations because it "goes to the ultimate decision that's this jury's and not the Department of Human Services." The supervisor affirmed that she understood the parameters of her testimony.

The trial judge clarified for the attorneys and the supervisor that it was not permissible for DHS to express an opinion whether appellant abused his daughter because this was a decision for the jury. The judge specified that the supervisor was permitted to testify that DHS personnel did not observe any injuries on the child; she was permitted to verify the authenticity of photographs of R.E. taken by DHS; and she could testify that DHS took no action. The judge offered to allow defense counsel to take a moment to confer with the supervisor about what she could and could not say.

The jury returned, and the supervisor testified that she oversaw all the investigations in Crawford County. For this incident, a DHS employee named Tracy Acton generated an

investigation report after interviewing various family members. Defense counsel asked what the findings were regarding injuries, and the supervisor replied that the investigator "unsubstantiated the investigation." This drew a State's objection, which was sustained and followed by the trial judge's sua sponte admonition to the jury "not to consider that last answer." The judge then called for a conference with the attorneys in chambers.

In chambers, the State moved for a mistrial, arguing that there was no admonition that could cure the improper testimony. Defense counsel objected, asserting that this was curable, not deliberately elicited, and "just came out." Defense counsel added that there was no context for the jury to know what "unsubstantiated" meant. The trial judge responded that the witness "went out of her way to bring up unsubstantiated findings which was wholly and completely outside the parameters . . . wholly and completely against my order." The judge said again that whether the defendant committed the crime was for the jury, not DHS, to determine. The judge concluded that he would reconsider and grant defense counsel's earlier motion for mistrial, as well as grant the State's present motion for a mistrial. Defense counsel interjected that he was satisfied with the trial judge's earlier ruling on his motion and that he was objecting to the State's motion for mistrial. The ruling stood, and the jury was dismissed.

Defense counsel filed a motion to dismiss, contending that Ark. Code Ann. § 5-1-112 and the Arkansas and United States Constitutions barred a second prosecution due to double-jeopardy concerns. The trial court entered an order denying the motion to dismiss, noting that it granted the State's and defense's motions for mistrial. Appellant filed a notice of interlocutory appeal.

On appeal, the State concedes that it is only the State's motion, granted over defendant's objection, that is at issue. The core concern was how to rectify this witness's testimony that was perceived to exceed the trial judge's evidentiary ruling. The judge was clearly focused on preventing this witness from telling the jury what conclusion to reach. Ark. R. Evid. 704; *W.E. Pender & Sons, Inc. v. Lee*, 2010 Ark. 52; *Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008). The trend in our appellate case law, however, is not to limit opinion testimony that touches upon the ultimate issue, as long as it does not mandate a conclusion. *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998); *Brown v. State*, 66 Ark. App. 215, 991 S.W.2d 137 (1999).

We hold that this witness did not tell the jury what conclusion to reach, and the judge's sua sponte admonition sufficiently cured any evidentiary error or potential prejudice. There was no forceful or compelling emergency, nor was the jury exposed to matters outside the courtroom. Upon de novo review, we hold that the State failed to meet its heavy burden of presenting an overriding necessity to end this trial, and the trial court rendered a manifestly incorrect decision in denying appellant's motion to dismiss. *Compare Shelton*, *supra*.

Reversed and dismissed.

WYNNE and GLOVER, JJ., agree.

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

Dustin McDaniel, Att'y Gen., by: *Eileen W. Harrison*, Ass't Att'y Gen., for appellee.