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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 10-480

	Opinion Delivered JANUARY 5, 2011
RAYMOND YESL BELL APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. CR-09-386]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE STEVE TABOR, JUDGE
	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Raymond Yesl Bell appeals his conviction for aggravated residential burglary as found by a jury in Sebastian County Circuit Court. This conviction was based upon evidence presented to the jury that Bell and two other persons entered and then remained unlawfully in the female victim's apartment; Bell bound her, covered her eyes, and physically assaulted her; and upon their departure, she determined that several items were gone. Appellant argues on appeal the following points: (1) there was insufficient evidence of purpose to commit theft of property within the residence; (2) the trial court erred in denying his motion for a mistrial due to improper testimony by a witness for the State; (3) the trial court erred in denying him a mistrial due to the trial court's failure to offer a proper curative instruction to the jury regarding improper closing argument by the State; and (4) the

cumulative effect of the errors deprived appellant of a fair trial. We disagree with his arguments, and consequently we affirm.

We would first consider Bell's sufficiency-of-the-evidence argument, but Bell failed to preserve this issue for our review. He contends in his appellate brief that the State failed to prove that he knowingly took or exercised unauthorized control over the victim's personal property. This argument was not presented to the trial court, and thus we cannot address the merits. At the conclusion of the State's presentation, defense counsel stated:

> Your Honor, we would also move for a directed verdict of acquittal on the charge of aggravated residential burglary based upon the insufficient evidence of the elements of the case on that.

This does not satisfy the requirements of Ark. R. Crim. P. 33.1(a) and (c) (2010). A motion for directed verdict must state specific grounds; it must "specify the respect in which the evidence is deficient." *Id.* Failure to do so constitutes a waiver of review of the sufficiency of the evidence. *Stone v. State*, 371 Ark. 78, 263 S.W.3d 553 (2007); *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006)(holding that a "surface objection" to the State failing to meet its burden to prove the elements of the offense is not a sufficient directed-verdict motion to preserve the issue for review). We summarily affirm this point.

Next, appellant contends that the trial court erred by not granting his motion for mistrial, made in response to testimony offered by a Fort Smith Police Department detective. We disagree.

Specifically, Detective Boyd testified that he learned of the suspect's name, and he stated that "with the capabilities we have with our systems and past histories of arrest and information . . ." when defense counsel entered a mistrial motion. At the bench, defense counsel argued that this suggested that Bell had a prior arrest, injecting the idea of bad character into the trial. Defense counsel also asked for a limiting instruction, although counsel stated disbelief that this could cure the problem. In response, the State suggested that he could clarify that Bell's photograph came from driver's license records.

The judge took the matter under advisement, pending further clarifying questioning. But, the judge also stated to the jury, "the last answer that the officer gave relating to certain records at the police department is to be disregarded by you. It is to be stricken, and you are not to consider it in any form in your deliberations in this case." When questioning resumed, Boyd stated that he constructed a photographic line-up by using a database with old driver's licenses. Defense counsel renewed the motion for a mistrial, but the trial judge denied it. We conclude that the trial court did not err.

A mistrial is an extreme and drastic remedy available only when the alleged error is beyond repair and cannot be corrected by any curative relief. *Moore v. State*, 355 Ark. 657, 144 S.W.3d 260 (2004); *Cupples v. State*, 318 Ark. 28, 883 S.W.2d 458 (1994). An admonition to the jury generally cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial. *Cox v. State*, 345 Ark. 391, 47 S.W.3d 244 (2001). The decision to deny a mistrial is within the sound discretion of

the trial court, and its ruling will not be reversed in the absence of an abuse or manifest prejudice to the defendant. *Hamilton v. State*, 348 Ark. 532, 74 S.W.3d 615 (2002).

Bell contends that the curative instruction was deficient because it did not clarify that the driver's license database was not derived from a criminal database. Bell contends that irreversible prejudice resulted. We disagree because the detective did not affirmatively state that Bell had a prior arrest, the judge admonished the jury to disregard the previous testimony about "records," and the detective clarified that he researched old driver's license databases to construct a photo line-up. Moreover, Bell did not request the curative instruction he argues to us now. We hold that the trial court did not abuse its considerable discretion, and Bell has failed to demonstrate manifest prejudice. *See Parker v. State*, 355 Ark. 639, 144 S.W.3d 270 (2004); *Cobbs v. State*, 292 Ark. 188, 728 S.W.2d 957 (1987). Thus, we affirm on this point as well.

Bell contends next that the trial court manifestly abused its discretion when it did not offer a curative instruction to an improper rebuttal closing argument. Specifically, the prosecutor gave a rebuttal closing argument to the defense's presentation in closing. Defense counsel had just argued, in part, that the State failed to present any video-camera evidence from the apartment complex, and the State failed to enter into evidence a hard-copy of the detective's interview with Bell. The prosecutor's rebuttal contained the following:

> I want you [the jury] to think about why didn't Mr. Joplin [defense counsel] ask Detective Boyd whether or not a camera was present at Allied Gardens [the apartment complex]? Detective Boyd was on the stand. He was ready to testify. He was available for cross examination. Because it's so much better to save for a closing argument,

> rather than to get the truth out on the stand. . . . As to Detective Boyd's report of the account of Raymond Bell to him. If that was so important, why isn't that in evidence?

Defense counsel moved for a mistrial on the basis that the defense had no duty to bring any evidence whatsoever, and this commentary suggested a shift in the burden of proof. The judge rendered this curative instruction to the jury: "I will remind you of my instruction earlier that says you're to make your decision solely on the evidence that was produced and introduced at trial." Bell did not suggest a clarified instruction that would reiterate the presumption of innocence, a specific instruction that was read to the jury before closing arguments.

Bell argues now that the judge abused his discretion by not immediately and adequately admonishing the jury. But, Bell never requested an admonition; he asked for a mistrial. And, after the judge's spontaneous curative admonishment, Bell commented no further. The trial court has broad discretion to control counsel during closing arguments, and we do not interfere absent a manifest abuse of that discretion. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994); *Cook v. State*, 316 Ark. 384, 872 S.W.2d 72 (1994). The State may argue the extent to which its proof is undisputed when its evidence could be disputed by evidence other than the defendant's testimony. *Bradford v. State*, 328 Ark. 701, 947 S.W.2d 1 (1997). And, the State may "fight fire with fire" once the defendant has opened the door to a line of questioning. *Lee v. State*, 326 Ark. 529, 932 S.W.2d 756 (1996); *Porter v. State*, 308 Ark. 137, 823 S.W.2d 846 (1992).

Because Bell failed to ask for an admonition but the judge gave one anyway, failed to ask for the specific admonition that he seeks now, failed to acquire a ruling on his motion for

a mistrial, and opened the door to this line of inquiry, we affirm this discretionary decision. *See Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995) (discussing the leeway given attorneys in closing argument).

Lastly, Bell contends that cumulative error requires reversal. Cumulative error is entertained only in rare and egregious cases, and we reverse only when the cumulative effect of errors denied the defendant a fair trial. *Childress v. State*, 322 Ark. 127, 907 S.W.2d 718 (1995). Moreover, we cannot reverse based upon cumulative error unless those alleged errors are actually errors. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). Because we hold that no reversible error exists, then no cumulative error exists.

We affirm Bell's conviction.

GRUBER and BROWN, JJ., agree.