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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR10-802

OLIVER J. DELP APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 9, 2011 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. CR-2009-815] HONORABLE STEPHEN MERRILL TABOR, JUDGE AFFIRMED

CLIFF HOOFMAN, Judge

Appellant Oliver J. Delp appeals from his conviction for delivery of methamphetamine, for which he was sentenced to ten years' imprisonment. For his first point on appeal, Delp argues that the trial court erred in denying his motion for a mistrial and by failing to give an admonishment to the jury when a spectator, who appeared to be crying, approached him prior to the trial. For his second point, Delp argues that the trial court erred when it did not allow him to cross-examine a witness about a prior overdraft conviction that was more than ten years old. We affirm on both points.

Delp was charged with delivery of methamphetamine on July 15, 2009, and his jury trial was held on April 7, 2010. According to evidence presented at the trial, on June 11,

2009, Fort Smith Narcotics Officers conducted a controlled buy using a paid confidential informant, Carrie Jamison. Jamison testified at trial that she had known "O.J.," who she identified at trial as Delp, for nine or ten years and that she went to his apartment on June 11th to arrange to buy a gram of methamphetamine. When she left to obtain the money, Jamison contacted Detective Ray Whitson. Detective Whitson, along with Detective Scott Campbell, searched Jamison and her vehicle to ensure that she did not have any drugs or other money. They then gave her an audio tape recorder and $100 in cash. The detectives followed Jamison to Delp's apartment and conducted surveillance. Jamison testified that she went into the apartment, gave Delp $100, and purchased .52 grams of methamphetamine. Because Delp had less than a gram available, Jamison stated that he gave her back $10. After she left the apartment, Jamison testified that she went directly to meet with the detectives and turned in the half-gram of methamphetamine, the recorder, and the $10 in change. The detectives also searched Jamison and her vehicle a second time and found no additional contraband.

The detectives testified that the audio recording was on the entire time that Jamison was in Delp's apartment and that they had the apartment under surveillance. Another officer that was assisting in the surveillance, Officer Eric Fearless, testified that Delp followed Jamison out of the apartment after the controlled buy and watched her get into her car and leave. At that time, Officer Fearless recognized Delp from a previous incident and later informed Detective Whitson of his name. Following the trial, the jury found Delp guilty of delivery of

methamphetamine, and he was sentenced to ten years' imprisonment.

For his first point on appeal, Delp argues that the trial court erred when it refused to grant a mistrial upon motion by his attorney, or in the alternative, by not issuing a clarifying instruction to the jury. According to Delp, on the morning of his trial, prior to voir dire, a spectator in the courtroom approached Delp and appeared to be crying. Delp's attorney moved for a mistrial, arguing that many of the potential jurors witnessed these actions and the inference was that Delp was guilty and that the spectator was never going to see him again. The trial court denied the motion, stating that there were many inferences the jury could make from the spectator's actions, including that it was a concerned relative who believed in Delp's innocence. Delp did not request an admonition to the jury, and none was given by the trial court.

It is well settled that a mistrial is a drastic remedy and is to be employed only when an error is so prejudicial that justice cannot be served by continuing the trial. *Zachary v. State*, 358 Ark. 174, 188 S.W.3d 917 (2004); *Kenyon v. State*, 58 Ark. App. 24, 946 S.W.2d 705 (1997). The determination of whether to grant a mistrial is within the sound discretion of the trial court, and the decision will not be reversed absent a showing of abuse or manifest prejudice to the appellant. *Zachary*, *supra*.

We find that the trial court did not abuse its discretion in denying Delp's motion for a mistrial. As the trial court stated, there were many inferences that the jury could form from the actions of the spectator, including that Delp was innocent. Also, as the State argues, the

jury was not even empaneled at this point, and Delp has failed to show that any of the potential jurors actually saw the spectator approach him. Thus, Delp has failed to show prejudice. *See Kenyon*, *supra* (where spectators in first row of negligent-homicide trial wore badges with victim's picture on them, trial court did not abuse its discretion in denying mistrial motion as there was no indication the jurors saw the badges, what was on the badges, or that it affected their ability to be impartial jurors).

Even Delp admits in his argument on appeal that the actions of the spectator in this case "may not have risen to the level requiring a mistrial." Instead, he argues that the trial court should have at least issued a clarifying instruction to the jury. As Delp asserts, an admonition to the jury usually cures a prejudicial statement or action unless it is so patently inflammatory that justice cannot be served by continuing the trial. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001). Delp, however, did not ask the trial court for any further relief, including an admonition, after his motion for a mistrial was denied. The failure of the trial court to give an admonition or cautionary instruction is not error where none is requested, and in fact, the failure of the defense to request one may even negate the mistrial motion. *Id.*; *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997). Thus, we find no error on this point.

In his second point on appeal, Delp argues that the trial court erred when it refused to allow evidence of a witness's conviction on misdemeanor overdraft charges. The trial court held a hearing on the State's motion in limine prior to the trial, where the State sought to prevent cross-examination by the defense as to the prior misdemeanor overdraft conviction

of Jamison, the confidential informant. The trial court ruled that this conviction in 1998, which did not include confinement, would not be admitted under Ark. R. Evid. 609(b) because it was more than ten years old. The trial court did, however, allow evidence of Jamison's 2009 theft-of-property conviction. Delp argues, as he did to the trial court, that the refusal by the trial court to allow cross-examination on this overdraft conviction violated his Sixth Amendment right to confront witnesses against him.

Trial courts have wide discretion in their evidentiary rulings, and there must be an abuse of discretion, as well as a showing of prejudice, to justify reversal of that decision. *McCoy v. State*, 354 Ark. 322, 123 S.W.3d 901 (2003). According to Ark. R. Evid. 609 (2009), which governs impeachment of a witness by evidence of a prior conviction, "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." Ark. R. Evid. 609(b).

The trial court did not abuse its discretion in disallowing evidence of the overdraft conviction where it was expressly prohibited under Rule 609(b). Our appellate courts have repeatedly upheld the application of this rule to evidence of convictions where the crimes were more than ten years' prior. *See, e.g.*, *Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998); *Jones v. State*, 317 Ark. 587, 880 S.W.2d 522 (1994); *Sutton v. State*, 311 Ark. 435, 844 S.W.2d 350 (1993). As our supreme court stated in *Jones*, "Rule 609, in effect, determines for the Trial Court those convictions which will be considered relevant and those which will

not." *Id.* at 590, 880 S.W.2d at 523.

In his argument, Delp relies heavily on the decision in *Davis v. Alaska*, 415 U.S. 308 (1974), which found that the defendant's Sixth Amendment rights of confrontation were violated by the trial court's decision to exclude evidence of the fact that a witness was on probation after a juvenile-delinquency adjudication, evidence of which was not allowed under state law. In that case, the witness that testified against Davis may well have been trying to shift attention from himself as a suspect in the crime by identifying Davis for the police. *Id.* at 311. The Court found that Davis's right to cross-examine the witness on the issue of bias outweighed the state's interest in maintaining confidentiality of juvenile proceedings. *Id.* at 315–20.

As the State argues, Delp's reliance on *Davis*, *supra*, is misplaced. Unlike in *Davis*, *supra*, Delp's intent in seeking to introduce the overdraft conviction was not to show the witness's bias or motivation to lie, but rather, to impeach her character in general. Here, Delp was allowed to impeach the witness's character with evidence of the much more recent theft-of-property conviction. The right to cross-examine the state's witnesses is not unlimited, and trial judges have wide latitude where the Confrontation Clause is concerned to impose reasonable limits on such cross-examination. *Bowden v. State*, 301 Ark. 303, 783 S.W.2d 842 (1990).

It is apparent that Delp's Sixth Amendment rights were not violated by the trial court in this case. Although Jamison's testimony was certainly important to the prosecution's case, there was testimony from several officers corroborating the evidence presented by her, and

the prosecution's case was very strong. In addition, the evidence relating to Jamison's 1998 overdraft conviction was merely cumulative to the evidence that Delp was allowed to introduce during cross-examination as to her more recent theft-of-property conviction. *See Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987) (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), and discussing the factors that need to be considered when confronting an alleged violation of the Confrontation Clause). Therefore, we find that the trial court did not abuse its discretion in ruling that Delp was not allowed to introduce this evidence under Rule 609(b), and we affirm.

Affirmed.

GLADWIN and BROWN, JJ., agree.