

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-729

MARK EDWARD CAMPBELL
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered April 28, 2010

APPEAL FROM THE
MONTGOMERY COUNTY
CIRCUIT COURT
[NO. CR-2007-11]

HONORABLE JERRY WAYNE
LOONEY, JUDGE

AFFIRMED

JOSEPHINE LINKER HART, Judge

Mark Edward Campbell was found guilty in a Montgomery County jury trial of five counts of first-degree sexual assault. He received consecutive thirty-year sentences for a total of 150 years in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in denying his motion for a mistrial and in failing to give an admonition to the jury. We affirm.

The allegation of trial error that Campbell complains about on appeal occurred during the direct testimony of his victim—Campbell’s teenage daughter. Prior to the victim’s testimony, the victim’s mother, Glenda Anderson, testified about a letter that she found from Campbell to his daughter that stated in pertinent part, “I can’t wait to make sweet love to you tonight.” Anderson testified that she confronted her daughter about the letter, but she said

it was “nothing.” Anderson alerted the county prosecutor, who dispatched Meghan Janci to interview the victim. Janci closed her investigation after the interview, in which the victim denied any sexual contact. Janci “reopened” her investigation after the victim gave birth to Campbell’s child.

During the victim’s testimony, the State asked why she did not disclose the sexual abuse to Janci. The victim responded, “I didn’t want to be responsible for my dad’s suicide.” Probing further, the State asked why she thought she would be responsible for her father’s suicide. She replied that she intended to disclose the name of her baby’s father just before the child’s due date in March, and she told her father that he had to leave before then. The State then asked how that related to Campbell threatening to kill himself. She replied, “He told me that he would not go back to prison, that he would—” Campbell’s trial counsel immediately objected and requested a mistrial. He also requested a curative instruction, but nonetheless stated, “It is our position that no instruction from this Court can cure the prejudice that has just occurred.”

When asked by the trial court what curative instruction he was seeking, Campbell’s trial counsel stated, “I cannot imagine a curative instruction that will remove this prejudice, I cannot offer any words.” The trial court advised against giving a curative instruction at that time because it would “emphasize the point.” It noted that there had already been references to Campbell’s “problems with police” and opined that “if we just leave this where it is and don’t say anything more it’s fine.” Further, the trial court stated that when it charged the

jury, it would give the usual instruction not to consider “any other wrongs.” Campbell’s trial counsel made no further objection or argument.

However, after both sides had rested, when the trial court presented the packet of jury instructions to the parties for approval, conspicuously absent was the instruction not to consider “any other wrongs.” Nonetheless, Campbell’s trial counsel expressly approved the instructions.

On appeal, Campbell argues that the trial court erred in denying his motion for a mistrial and in failing to give a curative instruction to the jury. He concedes that a mistrial is a “drastic remedy,” but contends that he was “manifestly prejudiced by the inflammatory remark” and that the mistrial should have been granted. Citing *Jones v. State*, 349 Ark. 331, 78 S.W.3d 104 (2002), he urges us to employ the “reviewing factors” set forth by the supreme court and conclude the trial court abused its discretion in failing to grant the mistrial motion. He asserts that the relevant factors in this case are whether the prosecutor deliberately induced a prejudicial response and whether an admonition to the jury could have cured any resulting prejudice. Regarding the former, Campbell argues that the State “knowingly pursued a line of questioning that would reveal that [he] had previously served a prison sentence.” Regarding the latter, Campbell asserts, without citing an analogous case, that the statement was “too inflammatory and prejudicial” for a curative instruction to be “effective.” We find no merit to these arguments.

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. *Williams v. State*, 2010 Ark. 89, 377 S.W.3d 168. A mistrial is a drastic remedy and should only be declared when there is error so prejudicial that justice cannot be served by continuing the trial, and the error cannot be cured by an instruction to the jury. *Id.*

First, we are unconvinced that the State deliberately attempted to elicit testimony about Campbell's prior convictions. The State's questions regarding Campbell's threat to commit suicide was apparently explored because it was one of the ways that Campbell controlled his victim and also explained why she delayed coming forward with her allegations. The mention of Campbell's intention not to return to prison appears to be spontaneous and not particularly responsive to the State's question. The supreme court has upheld denials of mistrials where, by chance remarks, it was brought out that the defendant had prior arrests, and even prior convictions, where the comment was inadvertent. *Cobbs v. State*, 292 Ark. 188, 728 S.W.2d 957 (1987).

Second, it is not apparent that the remark, which was cut off almost immediately by Campbell's trial counsel, was, as Campbell asserts, "too inflammatory and prejudicial" for a curative instruction to be effective. The supreme court has held that the trial judge is in a superior position to evaluate the effect of the testimony on the jury, and generally it is proper to defer to the judge's finding that the error was not so prejudicial as to constitute grounds for a mistrial. *Jacuzzi Bros., Inc. v. Todd*, 316 Ark. 785, 875 S.W.2d 67 (1994); see *Davis v. State*, 365 Ark. 634, 232 S.W.3d 476 (2006). We likewise defer to the trial court's conclusion

in this instance that the prejudice was not so extreme as to warrant a mistrial. Accordingly, we hold that the trial court did not abuse its discretion in denying Campbell's mistrial motion.

Finally, with regard to the trial court's failure to give the limiting instruction, Campbell himself essentially asserts that it was of no consequence. He states on appeal, much as he did at trial, "A limiting instruction to the jury would not have cured the prejudice that immediately resulted from [the victim's] statement." However, to the extent that he argues that the trial court's failure to give such an instruction was error, we note that Campbell did not request an immediate curative instruction and expressly approved of the packet of jury instructions that did not include the "other wrongs" instruction. Failure to object to the failure to give an instruction to a jury before or at the time the instruction is given, constitutes a waiver of this argument on appeal. *Conley v. State*, 267 Ark. 713, 590 S.W.2d 66 (Ark. App. 1979).

Affirmed.

PITTMAN and BAKER, JJ., agree.