

# ARKANSAS COURT OF APPEALS

DIVISION IV  
No. CACR09-778

FREDERICK CHILDS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** May 26, 2010

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT  
[NO. CR-07-1097]

HONORABLE HERBERT THOMAS  
WRIGHT, JR., JUDGE

AFFIRMED

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## WAYMOND M. BROWN, Judge

A Pulaski County jury found appellant Frederick Childs guilty of two counts of rape and two counts of kidnapping. Childs was sentenced to thirty-five years' imprisonment.<sup>1</sup> He argues on appeal that the trial court abused its discretion by failing to grant a mistrial based on the prosecutor's comment. Childs also contends that the trial court erred by denying his pretrial motion for severance. We affirm.

Childs was tried with codefendant, Eddrick Childs.<sup>2</sup> Childs made a pretrial motion to have his trial severed from his codefendant's trial. A hearing on the motion to sever was held on December 5, 2008. Childs's attorney argued that Childs and E. Childs had conflicting roles and that

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<sup>1</sup>Thirty-five years for each of the rape charges and twenty years for each of the kidnapping charges, to run concurrently.

<sup>2</sup>The two defendants are brothers.

the cases should be tried separately. E. Childs's attorney joined in the motion. When asked about each defendant's defense, Childs's attorney replied "I know what my client's defense is, and I guess Eddrick's attorney would tell you what her defense would be, but I think they're somewhat conflicting." E. Childs's attorney argued that DNA linked Childs to the offense(s) but there was no such DNA evidence linking E. Childs at the time of the hearing.<sup>3</sup> Thus, the attorney contended "the culpability is quite different for these [two] Defendants and I do believe the defenses will be substantially different." The trial court denied the motion:

Well, if I've got to base my opinion on the summary of facts that I've just been given, I'm going to deny your motion. If you come across something in your research and think I need to revisit that, please submit a brief and I will be glad to do it. But, at this point, I'm going to deny the Motion to Sever.

The jury trial took place on April 2, 2009. The attorneys for Childs and his codefendant unsuccessfully renewed their motions for severance. Childs testified at trial; however, E. Childs chose not to take the stand. During the cross-examination of Childs, the prosecutor commented, "[s]o that's why you're saying - - that's, this whole trial is why you've been sitting over there with this smirk on your face, laughing and giggling at times even." Childs's attorney objected to the comment, and the trial court sustained the objection. The attorneys then approached the bench, where Childs's attorney asked for a mistrial. The trial court denied the motion; however, the prosecutor was told "[y]ou're out of line. Don't do that again." Childs's cross-examination continued.

After Childs's testimony, E. Childs's attorney moved for a mistrial:

EC ATTORNEY: Your Honor, at this time Eddrick Childs moves for a mistrial again based on the fact that he's [Frederick Childs] has implicated my client and put him in specific places

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<sup>3</sup>By the time of the trial, DNA evidence also linked E. Childs to the offense(s).

and times and my client is being denied his fundamental right to not testify. This is a clear violation and I know the Motion to Sever is under advisement, and I'd renew that again, but I think at this point I have to ask for a mistrial.

PROSECUTOR: The State's arguing against that. Obviously mistrial is a drastic remedy and I know the Court's had a lot of information at its disposal to make a decision as to whether to sever or not. The only thing [Frederick Childs] did was mention that his brother was there. Obviously we know that his brother was there because his DNA was found so I don't think that is enough to implicate him and enough to grant a severance.

TRIAL COURT: I don't have much trouble about him being implicated, but as far as he was mentioned, he wasn't mentioned any more by Frederick Childs than he was by the victims. The problem I have is if the jury chooses to disbelieve Frederick Childs, then that could matter on Eddrick Childs, assuming he doesn't testify.

When I was in the back looking up, one of the things I was considering was whether one chooses to testify or whether he's forced to. In this situation, after all the evidence is in, I think it is. So, I will grant Eddrick Childs' motion for mistrial and his motion to sever.

Childs was found guilty of raping S.L. and B.W. He was sentenced to thirty-five years' imprisonment for each rape. Childs was also found guilty of kidnapping the two victims. He received a twenty-year sentence for each kidnapping charge. Childs's sentences were run concurrently for a total of thirty-five years in the Arkansas Department of Correction. This appeal followed.

Childs's first point on appeal is that the trial court erred by denying his motion for mistrial and by failing to admonish the jury. Childs concedes that a mistrial is a "drastic remedy" but contends that the prosecutor's comment was "a deliberate attempt to inflame the passions of the jury" and that a mistrial should have been granted. 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.<sup>4</sup> A mistrial is a drastic remedy and should only be declared

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<sup>4</sup>*Johnson v. State*, 366 Ark. 8, 233 S.W.3d 123 (2006).

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.<sup>5</sup>

Additionally, Childs argues that “the jury was never told to disregard the remark or that the Deputy Prosecutor had been out of line for such intentional misconduct.” It is well settled that 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.<sup>6</sup> However, the burden was on Childs to ask for a curative instruction.<sup>7</sup> Childs did not request an admonition at trial, and his failure to do so cannot inure to his benefit on appeal.<sup>8</sup> Accordingly, we hold that the trial court did not abuse its discretion by denying Childs’s motion for a mistrial.

Childs also argues that the trial court erred by denying his pretrial motion for severance. We will not disturb a trial court’s ruling to grant or deny a motion for severance absent an abuse of discretion.<sup>9</sup> The trial court shall grant a severance if it is deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants.<sup>10</sup> The issue of severance is to be determined on a case-by-case basis, considering the totality of the circumstances, with the following factors favoring severance:

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<sup>5</sup>*Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007).

<sup>6</sup>*Burks v. State*, 2009 Ark. 598, 359 S.W.3d 402.

<sup>7</sup>*See Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003).

<sup>8</sup>*See Price v. State*, 2010 Ark. App. 111, 377 S.W.3d 324.

<sup>9</sup>*Herron v. State*, 362 Ark. 446, 208 S.W.3d 779 (2005).

<sup>10</sup>*See Ark. R. Crim. P. 22.3(b)(i).*

(1) where defenses are antagonistic; (2) where it is difficult to segregate the evidence; (3) where there is a lack of substantial evidence implicating one defendant except for the accusation of the other defendant; (4) where one defendant could have deprived the other of all peremptory challenges; (5) where if one defendant chooses to testify the other is compelled to do so; (6) where one defendant has no prior criminal record and the other has; (7) where circumstantial evidence against one defendant appears stronger than against the other.<sup>11</sup>

At the pretrial hearing for severance, both defendants appeared to argue that their defenses were antagonistic. Defenses are antagonistic when each defendant asserts his own innocence and accuses the other of committing the crime.<sup>12</sup> Our supreme court has also stated that defenses are antagonistic “when to believe one defendant, it is necessary to disbelieve the other.”<sup>13</sup> Here, Childs failed to present the trial court with any evidence at the pretrial hearing to support the conclusion that he and his codefendant had antagonistic defenses. Therefore, the trial court did not err in refusing to grant Childs’s pretrial motion for severance.

Childs also argues that when the trial court granted E. Childs’s motion for severance on the second day of trial, following Childs’s testimony, the jury was left with the “impression that [Childs] was more culpable than the co-defendant.” He also argues that the “jury was forced to speculate as to what had happened to the co-defendant.” The trial court may sever a defendant at any stage of the trial when the defendant to be severed consents and severance is deemed necessary to achieve a fair determination of the guilt or innocence of one or more defendants.<sup>14</sup> Here, the trial court justified its decision to sever E. Childs from Childs’s trial because the trial court was concerned about

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<sup>11</sup>*McDaniel v. State*, 278 Ark. 631, 648 S.W.2d 57 (1983).

<sup>12</sup>*Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990) (citing *McDaniel*, *supra*).

<sup>13</sup>*Id.*

<sup>14</sup>*See* Ark. R. Crim. P. 22.3(b)(iii).

the effect on E. Childs if the jury chose not to believe Childs's testimony and the court was also concerned that E. Childs may be forced to testify against his will. Therefore, the trial court committed no error by severing E. Childs's trial.

Childs contends that the trial court's failure to grant his pretrial motion for severance violated his right to a fair trial. However, this argument is not convincing. Both victims testified that Childs raped them. DNA evidence linked Childs to B.W. Additionally, both victims testified that Childs and another codefendant, Jeffery Hayes, forced them into S.L.'s car at gunpoint, and drove them from Asher Avenue to an apartment located off of Geyer Springs Road. On appeal, Childs has the burden to prove both error and resulting prejudice.<sup>15</sup> He has been unable to show that the trial court erred by severing E. Childs on the second day of trial. Further, even if the trial court did commit error, Childs has failed to show any resulting prejudice. We, therefore, affirm.

Affirmed.

KINARD and BAKER, JJ., agree.

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<sup>15</sup>See *Casey v. State*, 2010 Ark. App. 352.