IN THE COURT OF APPEALS 08/20/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00193 COA

DEVON ADAMS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOSEPH LOPER, JR.

COURT FROM WHICH APPEALED: CHOCTAW COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

KEVIN NULL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DeWITT ALLRED, III

DISTRICT ATTORNEY: CHARLES DOUGLAS EVANS

NATURE OF THE CASE: CRIMINAL: SALE OF COCAINE

TRIAL COURT DISPOSITION: CONVICTED; SENTENCED TO 20 YRS IMPRISONMENT

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Devon Adams was convicted of selling cocaine and sentenced to twenty years in prison. He appeals, objecting to the jury pool's racial composition, raising a *Batson* challenge, claiming that the jury should have been given lesser included offense and entrapment instructions, and challenging a ruling on impeachment of one State witness. We reverse the conviction and remand for a new trial, concluding that the jury should have been allowed to consider Adams' entrapment defense. Because they may recur, we also address the remaining issues.

FACTS

While working in Ackerman, Adams was approached by confidential informants with requests that he help them purchase illegal drugs. According to Adams, he refused or put-off the informants on many occasions. However, after several weeks of being asked to help, Adams relented in his refusal. With an informant driving, Adams showed the way to a house in Ethel. Evidence differed on whether Adams purchased crack cocaine with money supplied by the informant, or whether Adams was just a bystander. The pair returned to Ackerman, where Adams or the informant, depending on whose view is accepted, gave the cocaine to an agent of the North Central Narcotics Task Force who posed as a drug purchaser. Adams was arrested and charged with selling cocaine.

DISCUSSION

1. Entrapment Defense

Adams contends that the refusal to grant his requested jury instruction on entrapment was erroneous. We are compelled to agree. Our supreme court has mandated that such instructions be given in circumstances similar to those presented in this case.

At the outset, we must confront a preliminary issue concerning whether Adams was entitled to an entrapment instruction even if he did not admit to having committed the crime of selling cocaine. Traditionally, Mississippi had required such an admission as a condition of obtaining the instruction. *Hopson v. State*, 625 So. 2d 395, 399 (Miss. 1993). However, following the trial in Adams's case, the supreme court abolished the requirement. *Id.* In so doing, the supreme court stated that a defendant is not "hereinafter" precluded from "asserting entrapment if he or she denies any or all of the elements of the offense . . . ." *Id.* at 400. In light of the language used by the court, there is a question regarding the retroactive nature of the charge.

The retroactivity question is not central, however. Even under the prior practice, Adams should have been allowed to assert entrapment. Adams admitted to engaging in conduct sufficient to secure his conviction and, while not admitting to the crime of selling cocaine itself, Adams admitted to the acts constituting the crime. There was no dispute that he was a passenger in an informant's car and that he directed the informant to a crack dealer. Adams testified to receiving payment for taking the agent to the cocaine seller and that cocaine was ultimately sold to the informant. In short, Adams admitted to facilitating the sale. Therefore, the condition that existed before *Hopson* would not have barred the presentation of the defense. *See Hopson*, 625 So. 2d at 399.

With this bar set aside, we are left with deciding whether the jury should have been allowed to

consider the entrapment defense. Consistent with the standard of review for the denial of other instructions, the supreme court requires that, in reviewing whether an entrapment instruction should have been given, the accused "be given the benefit of all doubts about the evidence." *King v. State*, 530 So. 2d 1356, 1359 (Miss. 1988) (citations omitted). An instruction should only be refused when "the evidence is so one-sided that no reasonable juror could find" entrapment. *Id.* A defendant is entitled to have an instruction on his theory of the case submitted to the jury if there is evidence to support it. *See Payton v. State*, 642 So. 2d 1328, 1335-36 (Miss. 1994). Here, Adams testimony differed in substantial respects from that presented by the State concerning the elements of entrapment. It is not for us to decide if the testimony was particularly credible, but only whether, taking the evidence in the light most favorable to Adams, he made out a *prima facie* case of entrapment. *King*, 530 So. 2d at 1359. Adams testified that one informant had "hounded" him for three months and several times on the day of the sale. When asked whether but for the informants "repeatedly coming to you, would you have taken them and shown them were they could buy crack cocaine," Adams responded "definitely no." He continued by saying that avoiding the drug culture motivated him to move to Ackerman and away from the big city where drugs are a constant. In our view, this testimony is sufficient to create a jury question on inducement and predisposition.

"Entrapment is an affirmative defense" and, to obtain an instruction on the defense, an accused is obligated to make out a *prima facie* case of entrapment. *King*, 530 So. 2d at 1358-59; *Bush v. State*, 585 So. 2d 1262, 1264 (Miss. 1991) (citations omitted). "The defense of entrapment is available where criminal intent did not originate in the mind of the accused, or stated differently, where the accused was not [pre]disposed to commit the crime." *King*, 530 So. 2d at 1359 (citations omitted). "Where, however, the intent to commit the crime already existed in the mind of the accused so that the inducement merely served to give him an opportunity to commit that to which he was already predisposed, the entrapment defense does not lie." *Id.* (citations omitted); *see Walls v. State*, 672 So. 2d 1227, 1229-30 (Miss. 1996). Thus, the Defendant must make a two part *prima facie* showing, *i.e.*, that he had no predisposition and that he was induced. *Hopson v. State*, 625 So. 2d 395, 400-01 (Miss. 1993); *King*, 530 So. 2d at 1359.

In *King*, the court reversed a conviction for sale of marijuana based on the failure of the trial court to give an entrapment instruction when the evidence showed that the accused had not previously sold drugs and that he would not have done so "had it not been for the constant importuning of the Bureau of Narcotics' confidential informant . . . ." *King*, 530 So. 2d at 1359. Thus, the court concluded, it would not have been irrational for a jury to find that King had no predisposition to commit the crime of sale of marijuana. *Id.*; *cf.*, *Ervin v. State*, 431 So. 2d 130, 134 (Miss. 1983) (holding that entrapment was not a valid defense in face of proof that accused knew where to get drugs, had the means to obtain it, and stood to profit from the transaction, without proof of coercion) . "The essence of the defense is that the entrapping party conceived the criminal plan and persuaded one not theretofore so predisposed to commit it." *Phillips v. State*, 493 So. 2d 350, 354 (Miss. 1986) . "A single state agent may entrap a person by successfully persuading that person to commit an illegal act the person was not theretofore predisposed to commit." *Pulliam v. State*, 592 So. 2d 24, 26 (Miss. 1991) (citations omitted).

In another more recent case, a conviction was reversed on the conclusion by the supreme court that a *prima facie* case of entrapment had been established, entitling the accused to an entrapment instruction. There, the proof showed that the accused had been called by the State's agent fifteen or

twenty times trying to persuade the accused to obtain drugs for him and the accused did not profit from the transaction. *Avery v. State*, 548 So. 2d 385, 387 (Miss. 1989).

We are confronted, however, with contradictory authority that makes our determination of this issue on appeal less certain. The supreme court has held that a defendant is not entitled to an instruction on the defense of entrapment simply because he was asked on several occasions to engage in a crime. *See Jones v. State*, 285 So. 2d 152, 158 (Miss. 1973) (citations omitted). We are instructed that entrapment is not raised as an issue on a mere solicitation of criminal activity by an officer. *Id*. We are also instructed that "[t]he fact that an informer had on several occasions requested defendant to secure drugs for him does not excuse a sale of drugs to the informer." *Alston v. State*, 258 So. 2d 436, 438-39 (Miss. 1972) (citations omitted) (holding that, despite repeated requests to commit crime, there "was no factual issue for the jury on the question of entrapment"); *see, Boone v. State*, 291 So. 2d 182, 185 (Miss. 1974) (citation omitted). Our challenge is to reconcile the competing views as they both constitute mandatory authority in our jurisprudence.

The evidence viewed in the light most favorable to Adams demonstrates the applicability of the defense. The testimony at trial would have permitted a jury to conclude that Adams had been pursued by two confidential informants for three months in their efforts to have him find cocaine for them. The informants consistently appeared at Adams' business while customers were present. Initially, Adams told the informants that he did not know where they could find drugs. The informants camped out in his business or slept in their cars outside the shop—waiting for Adams. Adams finally relented in consistently putting them off and was driven by one of the informants to a drug dealer's residence. In the words of one of the informants, the informants "put the deal together." Adams testified that he would not have done any of this without the constant entreaties of the informants. The jury could easily have rejected all of Adams' claims, but there was sufficient evidence at least to require an instruction.

The State argues on appeal that the informants in this case were at most trying to induce Adams into telling them who might be selling cocaine, and not actually to participate in the sale. We find this too narrow a view of the inducement that Adams alleges and is entitled to have the jury consider. The undercover agents were attempting to get Adams to help them buy drugs. Actually taking the undercover agents to the drug seller as an accessory before the fact is a practice commonly seen in cases that have been reviewed by this Court. We cannot accept the State's view of inducement as somehow only asking for an innocent act by Adams, and that he went beyond the innocent act requested and independently decided to commit the criminal act.

In holding that Adams conviction must be reversed and this case remanded for a new trial, we are cognizant of the ongoing battle against illicit drug use and sales. The State put on evidence to support the result of its investigation. We are simply holding that Adams was entitled to have a jury instruction that presented his defense.

2. Jury Challenges

Adams argues that the racial composition of the venire did not reflect the racial composition of Choctaw County and contends that the prosecution impermissibly used race as a factor for rejecting jurors. These issues are without merit.

In the absence of proof of a deliberate tampering with the racial composition of the jury pool, an objection to the racial composition of a venire is unavailing. To establish such a claim "the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364 (1979). Adams made no effort to present evidence supporting his assertion that blacks were under represented or that they had been systematically excluded.

As to Adams' challenge of the prosecution's use of peremptory challenges, he failed to raise the issue for the trial court and is precluded from raising the issue here. A contemporaneous objection at trial is necessary to preserve a *Batson* objection for appellate review. *Chase v. State*, 645 So. 2d 829, 843-44 (Miss. 1994), *cert. denied*, 115 S. Ct. 2279 (1995). Put another way, failure to object at trial bars review of a *Batson* challenge. *Thomas v. State*, 517 So. 2d 1285, 1286 (Miss. 1987).

3. Lesser Included Offense

Adams contends that he was entitled to a lesser included offense instruction allowing the jury to consider his guilt of possession of cocaine. However, to obtain such an instruction, there must have been sufficient evidence for a jury to find Adams not guilty of the sale of cocaine, yet guilty of possessing cocaine. *Ballenger v. State*, 667 So. 2d 1242, 1254-55 (Miss. 1995), *cert. denied*, 116 S. Ct. 2565 (1996). That evidence is not present in this case. Adams denied possessing the drugs at all. The State's proof only supported that Adams was involved in a sale. There was no evidence to support a lesser included offense instruction on possession.

4. Limited Cross-Examination of Witnesses

During the trial, Adams sought to introduce evidence that five years prior to the trial one of the informants had been accused by a former employer of theft and that, in exchange for his cooperation with police in another county as an informant, the employer did not press charges relating to the theft. The trial court refused to permit examination of the witness on the issue considering the matter insufficiently relevant and too inflammatory. We conclude that the trial judge did not abuse his discretion in so ruling.

The trial judge is afforded ample discretion in deciding what evidence is admitted. *Wade v. State*, 583 So. 2d 965, 967 (Miss. 1991) (citations omitted). In this case, the judge was called upon to consider the relevance of the evidence and its potential impact on the jury. The interplay of Mississippi Rules of Evidence 401, 403, 607, 608(b), and 611 constitutes the center of the trial judge's deliberations concerning admission of the evidence. *Brent v. State*, 632 So. 2d 936, 943-45 (Miss. 1994). The probative value of the evidence against the informant to impeach his credibility makes the evidence relevant. *See* M.R.E. 401; *Johnson v. State*, 655 So. 2d 37, 42 (Miss. 1995). However, simple relevance does not automatically mandate admission. The trial judge must consider whether the evidence is unduly prejudicial. M.R.E. 403. Moreover, with respect to impeachment of credibility, a whole host of concurrent considerations is added. The general rule that a witness' credibility may be attacked, is tempered by the requirement that attacks such as that proposed in this case may be made at the discretion of the court only "if probative of truthfulness or untruthfulness." M.R.E. 607; *id.* 608(b). It is accepted that the theft alleged here has such probative value. *See Brent*, 632 So. 2d at

943 n.4. The last gateway to admission of the evidence is Rule 611 which affords the trial court with the standards for the exercise of its discretion. "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." M.R.E. 611(a). In this case, the trial court properly exercised its discretion.

The accusations against the informant could properly be viewed by the trial court as too temporally remote to make them relevant. They arose five years prior to Adams' trial. In addition, an acceptable conclusion for the trial court to make would be to decide that the product of the pressure on the informant to serve the government was his work for another government agency in another county. The court could correctly conclude that the pressure on the informant to comply with the government's goals was absent in this informant's work. This is especially true in this case, where the informant was never formally charged with any crime against his employer and his initial foray into helping law enforcement was the result of private pressure from his employer.

THE JUDGMENT OF THE CHOCTAW COUNTY CIRCUIT COURT IS REVERSED AND THIS CASE IS REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE TAXED TO CHOCTAW COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.