IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00325 COA

MELVIN FRANK WALLS

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. ELZY J. SMITH

COURT FROM WHICH APPEALED: QUITMAN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

THOMAS H. PEARSON

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: LAURENCE MELLEN

NATURE OF THE CASE: CARRYING A CONTROLLED SUBSTANCE ONTO MDOC PROPERTY

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE 10 YRS IN THE CUSTODY OF THE MDOC

BEFORE FRAISER, C.J., KING, AND PAYNE, JJ.

KING, J., FOR THE COURT:

Walls was convicted and sentenced to serve ten years in the custody of the Mississippi Department of Corrections for carrying a controlled substance, marijuana, onto property which was owned by the Mississippi Department of Corrections and occupied or used for offenders. Aggrieved by the conviction and sentence, Walls appeals and assigns for review issues concerning action taken by the court during voir dire and closing argument. Walls has also assigned for our review numerous issues concerning the court's admission and exclusion of evidence. We find no error and affirm.

FACTS

Mac Riley, a correctional officer employed by the Mississippi Department of Corrections at its Quitman County Community Work Center, discovered marijuana in the shoe of the Defendant, who was an inmate at the center, after he had returned from a work detail. After Riley had discovered the marijuana, the Defendant gave a statement identifying the source of the marijuana.

ANALYSIS OF THE ISSUES AND DISCUSSION OF LAW

I.

> DID THE TRIAL COURT ERR IN SUSTAINING THE STATE'S OBJECTION TO AN INQUIRY MADE BY DEFENSE COUNSEL DURING VOIR DIRE?

During voir dire, defense counsel asked the prospective jurors, "If at the conclusion of all the evidence there remains in your mind any reasonable presumption or possibility reasonable of the guilt or innocence of the Defendant, could you return a verdict of not guilty?" The State objected and argued that the query was a misstatement of the law. In response to the State's objection and argument, the court said:

> If there's a reasonable doubt, ladies and gentlemen, that the State has failed to prove any material element--that is the Court will instruct you what the material elements are. If there is a reasonable doubt after consulting with the other jurors, you would be required, of course under the law to return a verdict of not guilty. Can each of you do that? Anyone who cannot?

Defense counsel said, "Thank you, your Honor. That concludes our questions." Without citation to authority, the Defendant argues that the court erred when it denied defense counsel the opportunity to submit the query to the jury. We disagree.

The court did not deny defense counsel the opportunity to submit the query to the jury. The court

submitted the query to the jury, but phrased it differently to assuage the State's concerns. A "trial court has broad discretion in passing upon the extent and propriety of questions addressed to prospective jurors. . . Although broad, the discretion is not unlimited, and an abuse will be found on appeal where clear prejudice to the accused results from undue constraint on the defense. . . ." *Carleton v. State*, 425 So. 2d 1036, 1040 (Miss.1983) (quoting *Jones v. State*, 381 So. 2d 983, 990 (Miss. 1980)). The court's conduct in rephrasing the question did not unduly constrain defense counsel or prejudice the Defendant; therefore, we find that the court properly exercised its discretion. This assignment of error lacks merit.

II.

> DID THE TRIAL COURT ERR IN SUSTAINING THE STATE'S OBJECTION TO STATEMENTS MADE BY DEFENSE COUNSEL DURING CLOSING ARGUMENT?

Defendant alleges that the court erred when it did not allow defense counsel to argue to the jury, "If you can reconcile the evidence with any reasonable theory , of innocence, then its your sworn duty to give the benefit of the doubt to the accused, to return a verdict of not guilty." The record does not indicate that defense counsel was prohibited from presenting the argument to the jury. Defense counsel presented the argument without court interference or objection from the State. The State objected when defense counsel commanded the jury to think about what was "reasonably possible." The State argued, "That's not the burden in this case. Reasonably possible doesn't have anything to do with the burden. Reasonable doubt does but not reasonably possible." Again, the court assuaged the State's concerns by responding, "Don't misstate the law, Mr. Pearson. You will make the final argument, Mr. Weinberg." The supreme court has said:

> Undoubtedly, there is a limit to the latitude to be allowed to counsel in addressing a jury, and it is the duty of the court to interfere to prevent an abuse of the privilege of counsel, to the perversion of justice, . . . A large discretion in this matter must be exercised by the circuit judge. It is a very delicate duty; for he must be cautious not unduly to abridge the liberty of counsel, and, in restraining him within proper limits, must not deny him the full liberty of discharging his important duties, in enforcing his views of the law and the evidence.

Cavanah v. State, 56 Miss. 299, 306 (1879). The court's admonition to defense counsel did not unduly temper defense counsel's closing argument; therefore, we find no abuse in the judge's exercise of discretion. This assignment of error lacks merit.

III.

> DID THE STATE ERRONEOUSLY ARGUE TO THE JURY THAT THE STATE WAS NOT REQUIRED TO INTRODUCE EVIDENCE OVERCOMING EVERY REASONABLE THEORY OF INNOCENCE?

During the closing argument, the State told the jury, "I don't have the burden of overcoming any possible theories of innocence. I have the burden of proving beyond a reasonable doubt -- the instructions tell you what my burden is. That's the one I submit to you that I met. It's the one that's in --" Thereafter, defense counsel objected and argued that it was the State's responsibility to introduce evidence that overcomes every reasonable theory of innocence. The court responded, "They have to prove each element of the crime beyond every reasonable doubt."

Defendant contends that it was error for the court to allow the State to argue that it was not required to overcome every reasonable theory of innocence. This Court proceeds on the premise that jurors take their responsibilities quite seriously and as a matter of institutional imperative, we presume that jurors respect the law as they are instructed by the court. *Alexander v. State*, 602 So. 2d 1180, 1183 (Miss. 1992) (citations omitted). Therefore, we find that the court's response to defense counsel's objection was sufficient to advise the jury of the State's burden of proof and remove the prejudice, if any, resulting from the State's comment. Defendant's assignment of error lacks merit.

IV.

DID THE TRIAL COURT ERR IN FAILING TO SUSTAIN DEFENSE COUNSEL'S OBJECTION TO THE HEARSAY TESTIMONY OF THE WITNESS MATTHEWS?

In response to the State's query concerning Matthews' proximity to the Defendant during the work detail, Matthews responded, "Well, that particular day, he--it was a couple of dudes out from the work center say, 'Why he always hanging back?'" Defense counsel objected, and the State argued, "Well, it's not offered for the truth, but we can move past it, your Honor." The court said, "All right." Walls argues that the objection should have been sustained.

No definitive ruling was made upon Wall's objection; the court merely said, "All right." When a defendant fails to obtain a ruling upon an objection, the objection is waived. *Gayten v. State*, 595 So. 2d 409, 413 (Miss. 1992). Defendant's assignment of error is lacking in merit.

V.

DID THE COURT ERR IN OVERRULING DEFENSE COUNSEL'S OBJECTION TO THE TESTIMONY OF MICHAEL MATTHEWS REGARDING POLICIES AND PROCEDURES OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS?

During the direct examination of Matthews, the following transpired:

DA: Is there a policy about how close or how far y'all are supposed to be when you're working together?

Matthews: Each --each inmate --

Defense counsel: We would object to that as being too vague, your Honor.

Court: Overruled.

DA: Is there some kind of a policy about how -- what kind of contact you're supposed to maintain?

Matthews: Each inmate supposed to stay in eye-to-eye contact with your worker.

On appeal, the Defendant argues that the court erred when it overruled the objection because any information of an inmate as to Mississippi Department of Corrections policies, of necessity, was acquired by that inmate through hearsay and, therefore, inadmissible. The Defendant's basis for objecting to the testimony at trial differs and is unrelated to the grounds for objection assigned on appeal. "A specific objection on a specific ground stated to the court does not warrant on appeal a reversal of a case on another and different ground of objection." *Lucas v. State*, 381 So. 2d 140, 143 (Miss. 1980) (quoting *Peters v. State*, 158 Miss. 530, 534, 130 So. 695, 699 (1930)). Thus, we find no merit to Defendant's assignment of error.

VI.

DID THE TRIAL COURT ERR WHEN IT REFUSED TO ALLOW RILEY, A CORRECTIONAL OFFICER TO GIVE OPINION TESTIMONY ON THE SALE, USE, OR AVAILABILITY OF MARIJUANA ON THE PRISON GROUNDS?

Defendant contends that the court erred when it did not allow Riley to give opinion testimony on the sale, use, or availability of marijuana on the prison grounds. Assuming Riley's opinion was admissible and assuming that it was error for the court to exclude the testimony, we do not find the error to be reversible. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and, in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. M.R.E. 103. Although the substance of Riley's testimony was made known to the court, the record does not indicate that a substantial right of the Defendant was abridged by the exclusion of the evidence. Therefore, Defendant was not prejudiced by the exclusion of Riley's testimony. This assignment of error lacks merit.

VII.

DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS?

The court overruled Walls' motion to suppress statements he gave to Officer Danny Paris after the marijuana was discovered. Walls contends that the statement was obtained in violation of his Sixth

Amendment right to counsel; therefore, the court should have granted the motion to suppress.

Officer Paris and Walls were the only individuals testifying at the suppression hearing. Walls testified that Paris approached him and inquired about the source of marijuana. Walls said that he refused to tell Paris the source of the marijuana because someone had threatened to kill Walls. Walls said that after Paris read him the *Miranda* rights, he asked for a lawyer.

Officer Paris testified that Walls approached him and told him he wanted to make a statement. Before giving the statement, Walls asked Paris if he would assist him with the district attorney, and Paris told Walls that he couldn't make him any promises, but would mention Wall's voluntary statement to the district attorney. Paris testified that he advised Walls of his rights under *Miranda* and made no promises to Walls before taking the statement Paris further testified that Walls appeared to understand his rights and was not impaired in anyway. Paris denied that Walls asked for the assistance of counsel before giving the statement.

After the conclusion of Paris and Walls' testimony, the court found: (1) that Walls had been advised of his constitutional rights prior to making the statement, (2) that Walls was aware of his constitutional rights and understood the rights, and (3) that Walls waived his constitutional rights and made a statement.

This Court will not reverse a court's determination that a statement is freely and voluntarily given unless the trial judge applied an incorrect legal standard, committed manifest error, or the decision was contrary to the overwhelming weight of the evidence. *See Thorson v. State*, 653 So. 2d 876, 887 (Miss. 1994). In other words, we do not disturb suppression hearing findings if substantial credible evidence supports the findings. *Sills v. State*, 634 So. 2d 124, 126 (Miss. 1994) (citations omitted). The record contains substantial credible evidence supporting the trial judge's findings.

Walls admitted that he was advised of his constitutional rights prior to making the statement. The only issue disputed was whether Walls requested counsel after being advised of his constitutional rights. Although Walls testified that he requested an attorney, Paris testified that Walls did not ask for an attorney. We find nothing in the record which suggests that the trial judge's credibility choice was manifestly wrong. Thus, we find no error in the court's overruling of Defendant's motion to suppress. This assignment of error lacks merit.

VIII.

DID THE COURT ERR IN ALLOWING THE STATE TO LEAD ITS WITNESS?

Walls finds objectionable the State's leading of its witness, Paris. The court overruled defense counsel's objection to the following examination of Paris by the State:

> **DA:** All right, sir. Now, after you gave him these rights or at any time during the giving of this statement or from the time he first came into talk to you, was there any force or pressure used, coercion of any type used to get him to make the statement that he made to you?

Witness: No, sir.

DA: Were there any threats or promises made to him?

Witness: No, sir.

DA: Any offers or reward of any--

In *McDavid v. State*, the supreme court reiterated the rule to be applied when reviewing a trial court's decisions concerning leading questions:

> A leading question is one that suggests to the witness the specific answer desired by the examining attorney. Trial courts are given great discretion in permitting the use of such questions, and unless there has been a manifest abuse of discretion resulting in injury to the complaining party, we will not reverse the decision. This is because the harm caused is usually inconsiderable and speculative, and only the trial court was able to observe the demeanor of the witness to determine the harm.

McDavid v. State, 594 So. 2d 12, 16 (Miss. 1992) (citations omitted). We do not find that the court abused its discretion in allowing the aforementioned examination of Paris, nor do we find that the State's examination of Paris prejudiced the Defendant. Accordingly, we find no merit in this assignment of error.

IX.

> DID THE COURT ERR IN ALLOWING THE STATE TO USE A PRIOR CONVICTION FOR THE PURPOSE OF IMPEACHING DEFENSE WITNESS SEWELL?

Walls argues that the court erred when it allowed the State to impeach Sewell's credibility by introducing evidence of Sewell's prior conviction for manufacturing marijuana. In support of his argument, Walls cites Rule 609(a) of the Mississippi Rules of Evidence. Rule 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime was (1) punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on a party.

M.R.E. 609(a). Walls does not dispute that the prior conviction was punishable by death or

imprisonment in excess of one year. He argues that the conviction had little or no probative value and thus, the prejudicial effect of the conviction outweighed its probative value. Assuming that the prejudicial effect of the conviction outweighed its probative value, and the court erred by permitting the impeachment, we do not find the error to be of reversible magnitude. The gist of Walls' defense at trial was that he did not bring the marijuana to the center, but acquired it after arriving at the center. At trial, Sewell testified that he was working for the State Highway Department on the day of the offense, and he saw Walls talking to a couple of guys in a pickup truck. Sewell denied delivering or selling the marijuana to Walls. Sewell's testimony and credibility were not significant to the defense because Sewell had no personal knowledge of the marijuana's source and because Sewell was unable to corroborate Walls' testimony that the marijuana was acquired upon Walls return to camp. Thus, the error, if any, was harmless. This assignment of error lacks merit.

In conclusion, we find Walls' appeal to be lacking in merit and therefore, affirm his conviction and sentence.

THE JUDGMENT OF THE CIRCUIT COURT OF QUITMAN COUNTY OF CONVICTION OF CARRYING A CONTROLLED SUBSTANCE ONTO PROPERTY BELONGING TO THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND SENTENCE TO SERVE 10 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. THIS SENTENCE SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. COSTS OF THIS APPEAL ARE TAXED TO QUITMAN COUNTY.

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