IN THE COURT OF APPEALS 06/18/96

OF THE

STATE OF MISSISSIPPI

NO. 92-KA-01120 COA

CARL NEELY A/K/A "POP-EYE"

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. GEORGE C. CARLSON, JR.

COURT FROM WHICH APPEALED: YALOBUSHA COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT: SHERRY S. FERNANDEZ

ATTORNEY(S) FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEAN SMITH VAUGHAN

DISTRICT ATTORNEY(S): J. MICHAEL HORAN

NATURE OF THE CASE: SALE OF CRACK COCAINE

TRIAL COURT DISPOSITION: CONVICTION AND SENTENCE TO A TERM OF THIRTY (30) YEARS IN THE MDOC AND TO PAY ALL COSTS OF COURT.

BEFORE BRIDGES, P.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Carl Neely was indicted, convicted, and sentenced for the sale of cocaine as a subsequent offender. The court sentenced him to serve thirty years in the Mississippi Department of Corrections and to pay all costs of court. The court subsequently denied Neely's motion for JNOV or, in the alternative, a new trial. We find that Neely's issues on appeal have no merit and therefore affirm.

FACTS

On October 23, 1991, undercover agent Richard Gordon of the Mississippi Bureau of Narcotics and confidential informant Roy Barr were working in Water Valley in an effort to buy illegal narcotics from willing sellers. Gordon and Barr testified that they saw an individual, who Barr recognized as Neely and having the nickname Popeye, leaning against a parked car. Gordon wore a body transmitter and, according to their initial plans, was the one who would actually make the buys. Gordon and Barr testified that Barr approached Neely and asked him if he had any crack. Neely said that he did, after which Barr told him that Gordon had money and wanted to buy it. Neely told him that he would not sell to Gordon because he did not know him. Gordon then gave Barr $40.00 of bureau funds, which Barr subsequently used to buy two rocks of crack from Neely. Both Gordon and Barr testified that Barr actually handled the entire sale after Barr and Neely walked behind an eighteen-wheeler tractor and outside of Gordon's sight. Randy Corbin of the Bureau of Narcotics and Roger Thomas of the Water Valley Police Department testified that they observed Neely through binoculars walk behind the tractor with Barr. They stated that they did not observe the actual sale. Both witnesses testified that they knew Neely prior to the sale and identified him in court.

Neely testified in his own defense that he did not sell cocaine to anyone, but that he actually bought it from Barr. He moved for a directed verdict at the end of the State's case, and the court denied the motion. The jury found Neely guilty of the sale of crack cocaine, and the court sentenced him to a term of thirty years in the Mississippi Department of Corrections and to pay all costs of court. The court denied Neely's motion for JNOV or new trial. Neely now appeals the jury's verdict.

ANALYSIS

I. WAS NEELY DENIED THE RIGHT TO PARTICIPATE IN HIS OWN DEFENSE?

Neely argues that the court denied him his constitutional right to be heard. He contends that the court failed to advise, instruct, or warn him on: (1) the effects of his making an opening statement upon his right not to testify; (2) what was expected when he made his opening statement; or (3) what to do regarding any objection to his remarks. He believes that the State improperly and untimely repeatedly objected to his first attempt at an opening statement. Neely also contends that the court tainted his second opportunity to give the jury an opening statement. He believes that the court erred because it failed to instruct the jury, on the second day and prior to his second attempt at an opening statement, that all court instructions from the previous day regarding his first attempt should be disregarded.

The Mississippi Supreme Court has held that a defendant is procedurally barred from raising issues

on appeal if he either cites support for his arguments that is different from the support cited at trial or if he fails to raise the issue at trial. *Ballenger v. State*, 667 So. 2d 1242, 1256 (Miss. 1995) (citations omitted). "A trial judge will not be found in error on a matter not presented to him for decision." *Id.* (citations omitted). Moreover, the court has stated that objections to admissibility of evidence must be timely made when the evidence is offered, or the issue is waived. *Lambert v. State*, 518 So. 2d 621, 625 (Miss. 1987).

The court has also addressed the issue of whether a defendant was properly afforded his right to participate in his own defense and its relationship to that defendant's decision to make an opening statement. *Bevill v. State*, 556 So. 2d 699, 710-11 (Miss. 1990). The *Bevill* court held that the trial court in that case should have allowed the defendant himself to make an opening statement. *Id.* at 710. The trial judge is charged with "conducting a decorous, orderly trial, and protecting an accused's rights." *Id.* A defense attorney whose client wishes to personally conduct his defense must advise his client of his constitutional rights, responsibilities, and risks. *Id.* Defense counsel must also inform the court of his client's request, so that the court can instruct and warn the defendant, outside the jury's presence, of his rights and responsibilities. *Id.* The court must then inform the defendant that civility will be required of his conduct and statements made to the court, jury, witnesses, and counsel. *Id.* The court should also instruct the defendant on what to do regarding objections and court rulings. *Id.* When a defendant chooses to make an opening statement, the court must also provide a warning that if he states facts that only he can support, and he does not later testify in his own defense, then the State is free to comment on the fact that no such statements were made by him or no such facts were sworn by him as a witness under oath. *Id.* (citation omitted). "An accused who does not intend to testify himself under oath cannot be permitted, any more than any other litigant, to have the jury consider as evidence any statements of fact not subject to rigorous cross-examination of the witness under oath." *Id.* at 710-11.

In the present case, Neely's arguments regarding an alleged violation of his constitutional right to be heard are procedurally barred. The record indicates that his arguments regarding this issue were not raised at trial. Neely failed to complain at trial of any lack of instruction, warning, or advisement by the court regarding the decision to make his first opening statement. He did not allege at trial that the State's objections were untimely or unwarranted. Further, Neely did not complain of any alleged failure by the court to uphold that same instructional duty when he was given a second chance to present an opening statement to the jury. He did not complain at trial of the lack of any curative instruction, prior to giving his second opening statement, regarding the court's instruction to the jury the previous day to disregard his first opening statement. Moreover, Neely failed to raise this issue in his motion for JNOV or new trial.

Additionally, Neely's arguments regarding this issue are invalid on their merits. The trial court gave Neely an opportunity to present an opening statement on the first day of trial. The State objected on three separate occasions to his opening statement. The State's objections were based on the grounds that Neely was giving unsworn testimony in his opening statement without the benefit of cross-examination. The court sustained each objection and ultimately granted the State's request that the court instruct the jury to disregard his opening statement. On the second day of trial and after the State had rested its case, the court gave Neely a second opportunity to present an opening statement, the substance of which was exactly the same as his first attempt. Although his second statement was most likely subject to the same objection by the State as his first statement, neither the State nor the

court interfered with Neely's second attempt to present an opening statement.

We believe that the court properly followed the principles laid out in *Bevill*. The court clearly told Neely of the potential consequences of his decision to make an opening statement prior to his first attempt. Moreover, prior to Neely's second opportunity to present an opening statement to the jury and after the State rested its case, the judge read portions of *Bevill* to him and into the record. The judge explained at length the legal guidelines, the potential consequences, and his constitutional rights regarding presenting an opening statement pro se and his right to later agree to or refuse to testify. The trial judge conducted an orderly and completely candid and fair trial regarding Neely's opening statements and according to the *Bevill* criteria. The State objected to Neely's first opening statement because it was a testimonial statement of fact that only he could support and was not simply a statement of what he or the evidence would ultimately prove during trial. Neely's second opening statement was again a testimonial statement of fact, but neither the court nor the State interfered. His second opening statement was ultimately and properly subjected to cross-examination when he later decided to testify. The judge clearly protected Neely's rights to make an opening statement by providing Neely with guidance prior to both statements. Neely gave his second opening statement, which was substantively the same as the first, completely unimpeded by either the court or the State. Although Neely's belief that his opening statement should have been allowed unimpeded is incorrect, that is precisely what the court allowed to occur. Finally, the judge's failure to cure the previous day's instructions to the jury to disregard Neely's opening statement, prior to allowing him another chance the next day, is irrelevant in light of the instructions, warnings, and guidance that Neely received prior to his second statement. Moreover for the record and for Neely's benefit, the judge rea d portions of the *Bevill* opinion itself in order to follow its mandate. This issue fails both procedurally and on its merits.

II. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A MISTRIAL WHEN, ON CROSS-EXAMINATION AND AFTER NEELY REQUESTED THAT THE AUDIOTAPES BE PLAYED FOR THE JURY, THE STATE QUESTIONED HIM ABOUT MORE THAN ONE EVENT, DATE, OR CASE AGAINST HIM?

Neely contends that the State, on cross-examination, improperly tried to elicit evidence of a prior conviction for the sale of marijuana in contravention to Mississippi caselaw, rules of evidence, the trial judge's ruling of inadmissibility, and the prosecutor's statement that he would not use that evidence. He argues that this constituted reversible error and grounds for a mistrial.

The Mississippi Supreme Court has addressed the issue of the use of prior convictions against a defendant. *Peterson v. State*, 518 So. 2d 632, 636-37 (Miss. 1987). The *Peterson* court held that Mississippi Rule of Evidence 609 requires the trial judge to make an on-the-record determination that the probative value of the prior conviction outweighs its prejudicial effect before admitting evidence of a prior conviction. *Id.* The court provided various factors for the trial judge to consider when weighing probative value against prejudicial effect: (1) the type of crime involved; (2) when the prior conviction occurred; (3) importance of the witness' testimony to the case; (4) importance of the credibility of the defendant; (5) impeachment value of the prior crime; (6) point in time of the conviction and the witness' subsequent history; (7) similarity between the past crime and the charged

crime; (8) importance of the defendant's testimony; and (9) centrality of the credibility issue. *Id.* (citations omitted).

Uniform Rule of Circuit and County Court Practice 3.12 states that "the court may declare a mistrial if there occurs during the trial . . . misconduct . . . resulting in substantial and irreparable prejudice to the movant's case." URCCC 3.12. Upon motion of a party or on its own motion, the court may declare a mistrial if the trial cannot proceed in conformity with the law. *Id.*

The Mississippi Supreme Court has on numerous occasions addressed the question of whether an error or misconduct may warrant a mistrial. It has held that "[w]hen the trial judge determines that the error [or misconduct] does not reach the level of prejudice warranting a mistrial, the judge should admonish the jury to disregard the impropriety in order to cure its prejudicial effect." *Holly v. State,* 671 So. 2d 32, 38 (Miss. 1996) (citations omitted). Such action is sufficient to remove any prejudice resulting from improper testimony. *Id.* (citing *Baine v. State,* 604 So. 2d 249, 256 (Miss. 1992)). Moreover, the trial judge is permitted considerable discretion in determining if a mistrial is justified because the judge is in the best position to weigh prejudicial effect. *Id*. (citing *Roundtree v. State,* 568 So. 2d 1173, 1178 (Miss. 1990)). The *Holly* court found that the overall prejudicial effect of improper hearsay testimony at trial was minimal and that any prejudicial effect was cured by the court's admonitions to the jury. *Id.* at 39; *see also Johnson v. State,* 666 So. 2d 784, 794 (Miss. 1995) (decision to grant mistrial is within the sound discretion of trial court and failure to grant motion for mistrial will not be reversed on appeal unless trial court abused its discretion). The court also recently addressed a situation involving trial testimony allegedly revealing *prior criminal activity* by the defendant that was very similar to the crime charged. *Gossett v. State,* 660 So. 2d 1285, 1290 (Miss. 1995). The *Gossett* court stated that the trial judge is given considerable discretion in determining whether a mistrial is warranted. *Id.* (citation omitted). If the judge determines that the error does not reach the level of prejudice justifying a mistrial, the judge should admonish the jury to disregard the impropriety in order to cure its prejudicial effect. *Id*. at 1291 (citations omitted). In *Gossett*, the trial judge admonished the jury to disregard testimony of the defendant's past criminal activity because it was irrelevant to the case at hand. *Id.* The trial judge followed the admonition with an inquiry addressed to each juror as to whether each could disregard the testimony. *Id.* Each individual juror answered in the affirmative. *Id.* The *Gossett* court found, under those circumstances, that the trial judge's remedial actions were enough to cure any harm and that he properly denied the motion for mistrial. *Id.*

In the present case, the trial judge ruled outside the jury's presence that Neely's prior conviction for the sale of marijuana would be inadmissible on cross-examination. However, he told Neely that if he testified and denied selling cocaine to Barr and ever selling any drugs before, then the door would be opened for the State to inquire into his past conviction. Neely did testify on his own behalf and stated that he did not sell Barr cocaine on the day in question. He mentioned that all he wished to do was to play the tapes to the jury to prove that he did not sell Barr cocaine on that day. On cross-examination, the following exchange took place:

> Q. Mr. Neely, you say tapes. There was more that one event, wasn't there?
>
> A. Yes, sir.
>
> Q. There was more than one date, wasn't it?

A. Yes, sir.

Q. When they came to you. They made more than one case on you, didn't they?

A. Yes, sir.

Q. Are you saying on both of those times he sold dope to you?

A. Yes, sir.

Q. And you didn't sell to him?

A. Yes, sir.

Neely objected and moved for a mistrial on the grounds that any other case was irrelevant to the current charges. The judge sustained Neely's objection and admonished the jury to disregard any reference to any other sales, case, or charge. He asked the jury if any of them could not disregard any reference or inference to any other alleged drug sale by Neely other than the current charge. He further asked if the jury could assure him that it would consider only the evidence regarding the currently alleged cocaine sale. None of the jurors responded that they could not, and the judge stated that their lack of response indicated to him that they would consider only the evidence presented as it related to the alleged sale with which Neely was currently charged. The judge therefore implicitly denied Neely's motion for mistrial.

The present case deals with a defendant's prior conviction and, although not exactly on point factually with the *Gossett* case that dealt with prior criminal *conduct*, the legal principles are likewise clearly applicable here. The prior conviction's admissibility hinges upon the judge's weighing of probative value against prejudicial effect. The judge determined on the record and outside the jury's presence that Neely's prior sale of marijuana conviction was inadmissible unless he opened the door. He followed the *Peterson* criteria in his determination of inadmissibility. When the State attempted to bring in Neely's prior conviction on the grounds that he opened the door, the judge sustained Neely's objection, admonished the jury, and finally inquired of the jury as to whether it could consider only the evidence as it related to the current charge of the sale of crack cocaine. He impliedly denied Neely's motion for mistrial.

We believe the judge properly exercised his discretion in denying a mistrial. He was in the best position to evaluate prejudicial effects of any reference to a prior conviction or prior bad conduct. The judge determined that the level of prejudice warranting a mistrial was not met. He admonished the jury to disregard the testimony and therefore cured any potential prejudicial effect. Additionally, the judge inquired of the jury if it was able to consider only the evidence as it related to the current charge against Neely. He determined that the jury was able to consider the evidence only in light of the current charge. We do not feel that the trial judge abused his discretion in denying Neely's motion for mistrial.

We believe that prior Mississippi caselaw does not require an inquiry into each jurors' ability to

disregard the improper testimony. An inquiry following the admonition to each juror regarding whether each could disregard the improper testimony simply confirms or rebuts the curative effect of the admonition and supports or negates the denial of a motion for mistrial. However, we do believe that an admonition to the jury to disregard the improper testimony is clearly required to cure any prejudicial effect following the judge's decision that an error fails to reach the level of prejudice justifying a mistrial. The trial judge in the present case both admonished the jury *and* inquired into whether each juror could disregard the improper testimony. We believe that the judge was in the best position to weigh any prejudicial effect and correctly followed caselaw procedure and circuit court rules. Moreover, he even went beyond the call of duty, by questioning the jury to ensure that both Neely and his case were not prejudiced.

We do not address the merits of arguments of whether Neely opened the door to prior conviction inquiry on cross-examination. Likewise, we do not reach the question of whether the prior conviction testimony was inadmissible based on relevancy or a rule of evidence violation. We believe that Mississippi caselaw and circuit court rules are dispositive of this case. The judge properly followed both and cured any prejudice that may have occurred by references to any prior drug conviction. He did not abuse his discretion in denying a mistrial.

CONCLUSION

Finding no error in the trial below, we affirm the jury's verdict and the court's sentence.

THE JUDGMENT OF THE CIRCUIT COURT OF YALOBUSHA COUNTY OF CONVICTION OF THE SALE OF COCAINE AND SENTENCE OF THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE TAXED TO YALOBUSHA COUNTY.

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