IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00426 COA

WENDELL AVERY DUNCAN

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. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: CIRCUIT COURT OF WASHINGTON COUNTY

ATTORNEY FOR APPELLANT:

RABUN JONES

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

NATURE OF THE CASE: CRIMINAL--FELONY (ARMED ROBBERY)

TRIAL COURT DISPOSITION: CONVICTION AND SENTENCED TO THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Wendell Duncan was convicted of armed robbery. He assigns the following issues as error:

I. WHETHER THE TRIAL COURT ERRED IN DENYING JURY INSTRUCTION D-10;

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO IMPROPERLY ATTACK THE DEFENDANT'S CHARACTER AND IMPERMISSIBLY IMPEACH THE DEFENDANT BY SHOWING THAT THE DEFENDANT HAD BEEN INCARCERATED;

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO IMPEACH THE DEFENDANT'S WITNESSES ;

IV. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ASK THE DEFENDANT ON CROSS EXAMINATION WHETHER HE THOUGHT THAT THE VICTIM AND THE EYEWITNESS WERE "LIARS";

V. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A CONTINUANCE; AND

VI. WHETHER THE TRIAL COURT ERRED IN FAILING TO ADMIT EVIDENCE.

Finding no error, we affirm.

FACTS

On the afternoon of July 15, 1994, in the vicinity of the Douglas Club, in Greenville, Mississippi, Wendell Duncan approached Derrick Williams and asked Williams if he wanted to buy some crack cocaine. Williams agreed to the purchase and gave Duncan ten dollars to buy the cocaine. After Duncan bought the cocaine, he refused to give it to Williams while threatening Williams with a knife.

Around midnight that evening, Williams and his brother, Don Thomas, entered a club across the street from the Douglas Club in order to purchase some beer. As the two men left the club, they saw Duncan exit the Douglas Club. From the opposite side of the street, Duncan asked Williams for money. Williams replied that he had no more money, and Williams and Thomas turned and walked down the street away from Duncan.

After approaching the two men from behind, Duncan grabbed Williams' left arm and twisted it behind his back while placing a knife to Williams' throat. Duncan demanded that Williams give him all of his money. Duncan ordered Thomas to the other side of the street. Williams gave Duncan four dollars.

After the robbery, Williams and Thomas ran a few blocks to Thomas' mother's house and called the police. Duncan went back to the Douglas Club. Williams and Thomas then returned to the scene, where they met the police. Williams told the police officers that Duncan was inside the Douglas Club. Officer Roger Hutchins arrested Duncan inside the Douglas Club and took the knife from Duncan.

At trial, Duncan denied that he placed the knife to Williams' neck and insisted that the only encounter with Williams occurred earlier in the day when he bought the crack cocaine with Williams' money and then refused to give the cocaine to Williams.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN DENYING JURY INSTRUCTION D-10.

Duncan asserts that the trial court erred in denying a jury instruction regarding prior inconsistent statements. Instruction D-10 provided as follows:

> The testimony of a witness or witnesses may be discredited or impeached by showing that on a prior occasion they have made a statement, testified or engaged in conduct which is inconsistent with or contradictory to their testimony in this case. In order to have this effect, the inconsistent or contradictory prior statement, testimony or conduct must involve a matter which is material to the issues in this case.
>
> The prior statement, testimony or conduct of the witness or witnesses can be considered by you only for the purpose of determining the weight or believability that you give to the testimony of the witness or witnesses that made them.

This assignment of error is without merit for several reasons. First, Duncan is procedurally barred from raising this issue. Duncan failed to object to the refusal of this instruction. As a result, this Court is not bound to address the alleged error on appeal. *Nicholson ex rel. Gollottv. State*, 672 So. 2d 744, 752 (Miss. 1996) (*citing Lockett v. State,* 517 So. 2d 1317, 1332-33 (Miss.1987), *cert denied,* 487 U.S. 1210 (1988)).

Notwithstanding the procedural bar, Duncan fails to show this Court any prior inconsistent statement made by Williams or Thomas. The only testimony Duncan complains about is Williams' testimony that he had seen the knife used in the robbery earlier in the day when Duncan threatened him regarding the cocaine. We fail to see how such testimony is inconsistent with Williams' assertion that Duncan used the same knife later that night. A trial court may refuse to give instructions that have no evidentiary foundation. *Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990).

Even if Duncan was entitled to an instruction on the credibility of impeached witnesses, the instruction he submitted was an incorrect statement of the law. Duncan failed to include the vital portion of this instruction which informs the jury that the inconsistent statement must not be considered as proof of the innocence or guilt of the defendant. *See Ferrill v. State*, 643 So. 2d 501, 504-05 (Miss. 1994); *McGee v. State*, 608 So. 2d 1129, 1134-35 (Miss. 1992). The trial court did not err in refusing to grant an instruction which misstates the law. *Allman v. State*, 571 So. 2d 244,

250 (Miss. 1990). There is no merit to this issue.

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO IMPROPERLY ATTACK THE DEFENDANT'S CHARACTER AND IMPERMISSIBLY IMPEACH THE DEFENDANT BY SHOWING THAT THE DEFENDANT HAD BEEN INCARCERATED.

Duncan called Vashon Williams to testify at trial that he had observed the victim smoking crack cocaine in the past. On cross-examination, Vashon testified that he was presently incarcerated in the county jail and that he had seen Duncan in the past few weeks. The following exchange took place:

CROSS-EXAMINATION BY MR. CARLTON:

Q. Mr. Williams, where do you reside now?

MR. JONES: Your Honor, may I have a continuing objection to that question and the impeachment questions on prior convictions?

THE COURT: All right, the record will note your continuing objection. The objection will be overruled.

MR. CARLTON CONTINUING:

A. Could you repeat the question?

Q. Where do you reside now? Where do you stay?

A. Where I stay? 421 Cherry Street.

Q. Is that where you -- are you incarcerated at this time? Are you in jail?

A. Yes, sir.

Q. Where?

A. Washington County.

Q. Okay. So you stay in the county jail right now; is that correct?

A. Yes, sir.

Q. What sentence are you serving? What are you serving -- what are you in jail for?

A. Possession of marijuana.

Q. When did you start serving that sentence?

A. January 31st of '95.

. . . .

Q. Do you know the defendant, Wendell?

A. Yes, sir.

Q. Have you had an occasion to see him in the last several months?

A. No, sir.

Q. Has he been in the county jail at any time, to your knowledge?

MR. JONES: Your Honor, I object.

. . . .

[The following exchange took place outside the presence of the jury.]

THE COURT: What are you leading up to?

MR. CARLTON: Have they been in the same cellblock.

THE COURT: Okay. I'm going to overrule the objection then.

MR. JONES: Your Honor, may I state for the record what the nature of my objection is just for the purpose of the record?

THE COURT: Yes, sir.

MR. JONES: Your Honor, the State is going to put into evidence -- not -- well, through the back door they're getting into evidence my client's prior conviction which this Court has already ruled are (sic) inadmissible, and I think this -- the line of questioning the State is getting ready to pursue could be brought out not -- wouldn't necessarily have to be brought out by disclosing my client is in the county jail with this man. He could ask simply has he put any pressure on you to testify one way or the other.

THE COURT: Well, the fact that he's in the county jail doesn't mean that he's been convicted of anything.

MR. JONES: Well, it means that he's either been charged with something or convicted.

THE COURT: Well, we know he's charged. That's why we're here.

MR. CARLTON: We know he's charged.

MR. JONES: Well, I think it's improper impeachment.

THE COURT: Well, I'm going to allow it.

. . . .

[The following exchange took place in the jury's presence.]

CROSS-EXAMINATION CONTINUED BY MR. CARLTON:

Q. Mr. Williams, my question to you was have you had occasion to see the defendant -- do you know him?

A. Yes, sir.

Q. Okay. And have you seen him in the last two weeks?

A. Yes, sir.

Q. Have you seen him in the last two months?

A. Yes, sir.

Q. Have you talked to him?

A. Yes, sir.

Q. Do you talk to him everyday?

A. No, sir.

Q. Have you discussed this case?

A. No, sir.

Duncan asserts that the trial court erred when it allowed this testimony since Duncan had not yet and did not ever place his character in issue. However, this Court fails to see how this testimony improperly impeaches or places Duncan's character in issue. Although Vashon's testimony establishes that Duncan was most likely incarcerated during the two months prior to trial, there is no evidence that this incarceration was for anything other than the armed robbery at issue in the instant case.

Even if the testimony was improper, the error is harmless. Duncan admitted on direct examination that he was incarcerated in the county jail. He also admitted to smoking crack cocaine and even told the jury how one went about smoking crack. While on the witness stand, Duncan pulled a crack pipe from of his shoe and testified that the pipe had been in his possession since his incarceration for armed robbery eight months previously. Duncan stated that the police had failed to find the pipe when searching him upon arrest. Duncan even admitted to smoking crack with that very pipe while incarcerated. Considering the unique facts of this case, there is simply no merit to this issue.

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE

TO IMPEACH THE DEFENDANT'S WITNESSES.

Four of Duncan's witnesses were impeached with their prior convictions. The State was allowed to show that Gerald Brantley was currently imprisoned in Parchman for the sale of marijuana and cocaine. The State elicited testimony from Vashon Williams that he was incarcerated in the county jail on a sentence of possession of marijuana. Although it is unclear from the record whether Watson had actually been convicted of either offense, Harold Watson testified on cross-examination that he was being held in the county jail "for a charge" of burglary and uttering a forgery. Johnny Peacock was impeached by a prior conviction for sale of cocaine.

The trial court erred since it did not hold a hearing or conduct the balancing test required before allowing the use of prior convictions for impeachment. *See Peterson v. State*, 518 So. 2d 632 (Miss. 1987). However, under the skewed facts of this case, this error was harmless. At trial, Duncan, Derrick Williams, and Duncan's four witnesses admitted that they smoked cocaine. Each of the four defense witnesses testified only to collateral matters. Brantley and Vashon Williams merely testified that they had smoked cocaine with Derrick Williams and Thomas. Watson testified that he had smoked cocaine with Williams. Peacock testified that he had smoked cocaine with Duncan and Williams on the afternoon of July 15, 1994, and that he accompanied Duncan and Williams to the Douglas Club around 8:00 P.M. that evening. However, Peacock testified on cross-examination that the three men "went [their] separate ways" after walking to the Club and that he did not know what happened later that night.

Duncan's entire defense centered around his version of the afternoon's events. Duncan asserted that his only encounter with Williams was the initial confrontation between the two men when Duncan took Williams' money to buy cocaine and then refused to share the drugs with Williams. Duncan admitted that he threatened Williams with the knife during that early encounter, and Duncan argued at trial that the second encounter, the one culminating in the armed robbery charge, never occurred at all. Duncan implied that Williams knew he had the knife from the afternoon encounter and contacted the police for revenge.

Although the trial court erred in failing to conduct a *Peterson* hearing, the error was harmless. It is hard to imagine how a conviction for the possession or sale of illegal drugs would damage any of these witnesses' credibility any more severely that their own testimony on direct examination did. There is no merit to this issue.

V. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ASK THE DEFENDANT ON CROSS EXAMINATION WHETHER HE THOUGHT THAT

THE VICTIM AND THE EYEWITNESS WERE "LIARS."

Duncan asserts that the trial court erred in allowing the State to ask him whether it was his position that Williams and Thomas were liars. Duncan objected to the question at trial on relevancy grounds, and the trial court overruled the objection. Duncan is now procedurally barred from asserting that

this question was improper impeachment and unfairly prejudicial. Objection on one or more specific grounds at trial constitutes a waiver of all other grounds. *Duplantis v. State*, 644 So. 2d 1235, (Miss. 1994); *Conner v. State*, 632 So. 2d 1239, 1255 (Miss. 1993); *Fleming v. State*, 604 So. 2d 280, 292 (Miss. 1992).

Notwithstanding the procedural bar, Duncan asserts that this question was improper under Rule 608 of the Mississippi Rules of Evidence. Rule 608 allows the limited use of reputation evidence, opinion evidence, and specific acts evidence for impeachment purposes. M.R.E. 608. This testimony is clearly not impeachment evidence. Duncan's entire defense is based on the proposition that Williams and Thomas are lying, and he is telling the truth. Ultimate findings regarding the credibility of witnesses are left to the discretion of the jury. *Harris v. State*, 527 So. 2d 647, 649 (Miss. 1988); *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983); *Young v. State*, 420 So. 2d 1055, 1057 (Miss. 1982). Additionally, this question was simply a rehashing of Duncan's testimony on direct examination. Duncan cannot complain on appeal concerning evidence that he himself elicited at trial. *Fleming v. State*, 604 So.2d 280, 289 (Miss. 1992).

Duncan also asserts that the testimony should have been excluded as unfairly prejudicial under Rule 403 of the Mississippi Rules of Evidence; however he fails to specify how the testimony is prejudicial or to cite this Court to any authority supporting this position. Duncan admitted to using crack cocaine, demonstrated the use of a crack pipe on the witness stand, and admitted to smoking contraband drugs while incarcerated pending trial on this matter. The victim admitted that he used crack cocaine. There was testimony that the other eyewitness also used crack cocaine. In light of his testimony on direct examination and the other testimony at trial, Duncan was not prejudiced by this question on cross-examination.

V. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A CONTINUANCE.

During trial, Duncan requested a continuance to allow him to have testing performed on the knife used in the robbery in order to determine whether there was any blood on the knife. The trial court denied the continuance. It is apparent from the record of his opening statement that Duncan knew about the marks on Williams' neck allegedly made by the knife. The record also shows that there was a preliminary hearing in this matter and that defense counsel was aware of photographs of the victim's neck. Denial of a continuance is within the sound discretion of the trial court. This Court will reverse such a ruling only upon a showing of an abuse of discretion, the result of which would be manifest injustice to the defendant. *Jackson v. State*, 672 So. 2d 468, 476 (Miss. 1996); *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995); *Johnson v. State*, 631 So. 2d 185, 189 (Miss. 1994). If Duncan wanted the knife tested, he should have asked much earlier. His request for a continuance during the middle of trial was too little, too late. The trial court did not abuse its discretion in denying the motion for continuance.

VI. WHETHER THE TRIAL COURT ERRED IN FAILING TO ADMIT EVIDENCE.

Duncan asserts that the trial court erred in refusing to allow him to admit two subpoenas for Don Thomas into evidence. Duncan argues that he was attempting to show that Thomas was a reluctant witness. The trial court ruled that the subpoenas were irrelevant. The relevancy and admissibility of evidence are largely within the discretion of the trial court, and we will reverse such a ruling only where that discretion has been abused. *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990). The trial

court did not abuse its discretion in allowing this testimony.

Finding no reversible error in any of these issues, we affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY OF CONVICTION OF ARMED ROBBERY AS A HABITUAL OFFENDER AND SENTENCE TO THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE TO RUN CONSECUTIVELY TO ANY PREVIOUSLY IMPOSED SENTENCE. ALL COSTS ARE ASSESSED TO WASHINGTON COUNTY.

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

KING, J., NOT PARTICIPATING.