

IN THE COURT OF APPEALS 06/18/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00227 COA

CORD WRIGHT GRAHAM

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 H. LOPER, JR.

COURT FROM WHICH APPEALED: WINSTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

PEARSON LIDDELL, JR.

ATTORNEY FOR APPELLEE:

DEWITT ALLRED III

DISTRICT ATTORNEY: DOUG EVANS

NATURE OF THE CASE: POSSESSION OF COCAINE

TRIAL COURT DISPOSITION: GUILTY OF POSSESSION OF COCAINE, SENTENCED TO
SERVE FOUR YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF
CORRECTIONS

BEFORE BRIDGES, P.J., DIAZ, AND SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

Cord Wright Graham (Graham) was indicted, tried, and convicted of possession of cocaine in the Winston County Circuit Court and sentenced to serve four years in the custody of the Mississippi Department of Corrections. On appeal, Graham asserts that the trial court erred by allowing the jury to hear evidence of a prior felony conviction for the sale of cocaine and erred in denying his motion for a mistrial due to improper questioning by the prosecution concerning the function of razor blades in cocaine use. Finding error, we reverse and remand.

FACTS

On the night of June 6, 1994, Officer Tim Hobby stopped the vehicle operated by Graham for crossing the centerline of Highway 395 in Noxapater, Mississippi. Pursuant to the stop, Officer Hobby asked for Graham's driver's license and informed him of the reason for the stop. While obtaining Graham's driver's license, Officer Hobby observed several pill bottles in Graham's car and called for a backup unit. Another man, Tommy Creekmore, was also in the vehicle. Detective Perkins arrived at the scene as backup and proceeded to ask Graham for permission to search his vehicle. Graham consented and Detective Perkins searched the interior of the vehicle. Pursuant to this search, Detective Perkins found a steel metal tray with a piece of glass inside and razor blades. The tray contained granules of a white powdered substance, and Detective Perkins questioned Graham as to the ownership of the tray. Graham explained that he had recently removed the tray from his truck which had been confiscated in 1991 and returned to him upon his release from prison in 1994. Graham denied any knowledge of the substance contained on the tray. The substance was later determined to be cocaine by the Tupelo Police Department Crime Laboratory.

DISCUSSION

1. Did the Court Err by Allowing into Evidence Graham's

Prior Conviction for Sale of Cocaine?

Graham contends the lower court erred by allowing his prior conviction into evidence because the probative value of this evidence was outweighed by the danger of unfair prejudice, and the court failed to make the on-the-record determination required by Rule 609(a)(1). The State contends that the evidence was allowable under Rule 404(b) to prove Graham had knowledge of the nature of the contraband and that the probative value was not outweighed by the danger of unfair prejudice to Graham.

Prior to Graham's previous conviction's being entered into evidence, the following testimony transpired:

Mr. Hogan: "And, this white powder, Ms. Ard said there was some more on here and

there's some on here now, and Officer Perkins testified that there was some up in the corners. Chief Hobby testified that there was some under the glass, under here, visibly cocaine. They picked it up and saw it was cocaine and it was nighttime, but you did not know there was cocaine on the tray. That's your story."

Mr. Graham: "That's -- the first time I seen it was when he asked me what was it and I told him I didn't know what it was, when he showed it to me."

Mr. Hogan: "You didn't know what that stuff was?"

Mr. Graham: "That's it. He showed it to me and asked me what is this, and I said, 'Man, I don't know.' He said, 'Is it cocaine?' I said, 'I don't know.'"

Mr. Hogan: "And your testimony is that this stuff that was up in the corners and under the tray, you had no knowledge as to what it was?"

Mr. Graham: "No, sir."

The State then requested that they be allowed to introduce Graham's previous conviction for sale of cocaine. The State argued that Rule 404(b) allows the conviction to be admitted to show his knowledge of the nature of the substance on the tray.

The record reveals that the court and all parties considered this a Rule 404 evidentiary question. Thus, in this case we are faced with this issue: Is a prior conviction admissible under Rule 404(b) to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident? Under the facts in this case, we find that it is not.

Generally, evidence of a crime other than the one for which the defendant is being tried is inadmissible. *Ballenger v. State*, 667 So. 2d 1242, 1256 (Miss. 1995). However, Mississippi Rule of Evidence 404(b) contains several exceptions to this general rule.

Rule 404(b) provides:

Other Crimes, Wrongs, or Acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in

order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

M.R.E. 404(b).

Admission of evidence of former, unrelated crimes for the purpose of showing the defendant acted in conformity therewith is reversible error. *Duplantis v. State*, 644 So. 2d 1235, 1246 (Miss. 1994). Former crimes may be admitted if necessary to tell a complete story to the jury, or if so interrelated to the charged crime to constitute a single transaction or occurrence. *Ballenger*, 667 So. 2d at 1257 (citations omitted). Furthermore, even if evidence of other crimes or wrongs passes muster under Rule 404(b), it still must pass the Rule 403 analysis in that the risk of undue prejudice must not substantially outweigh the probative value for which it is admitted. *Id.*

In the case at bar, evidence of Graham's prior conviction was not offered to show Graham's character and that he acted in conformity therewith. However, Mississippi courts have strictly limited the admissibility of prior criminal activity under 404(b) to occasions where the evidence is necessary to tell a complete story or the prior criminal conduct is substantially interrelated to the charged crime. *See Wheeler v. State* 536 So. 2d 1347, 1352 (Miss. 1988); *Lockett v. State*, 517 So. 2d 1346, 1355 (Miss. 1987); *Brown v. State*, 483 So. 2d 328, 330 (Miss. 1986). The prior conviction of Graham for sale of cocaine does not fall within either category previously allowed by the Mississippi Supreme Court, and we decline to broaden the admissibility of prior convictions under Rule 404(b). Furthermore, an analysis under Rule 403 reveals that the chance of unfair prejudice to Graham substantially outweighed the probative value of the evidence. This is an instance where the jury hears of a prior, similar cocaine conviction and would likely find guilt because Graham had previously committed similar acts.

The trial judge did make an on-the-record determination of the probative versus prejudicial value of the prior cocaine conviction. He determined that the probative value of the evidence was not outweighed by unfair prejudice because Graham had (1) testified that he did not know what the substance was on the tray and (2) that Graham admitted on direct that he had a previous conviction. This Court finds several problems with this analysis. First, the record reveals that the tray contained very small traces of cocaine and in order for the State to determine the identity of the substance, it had to be sent to the crime lab for analysis. The most trained person cannot determine whether a substance is cocaine without laboratory testing. Thus, it is difficult for the State to argue that Graham could look at a small amount of powder and determine positively that the substance was, in fact, cocaine. Additionally, if the State sought to prove that Graham was well acquainted with cocaine and its appearance, it could have proved this fact without introducing the prior conviction. Second, Graham's testimony on direct concerning his prior arrest was not an open invitation for the prosecution to admit the cocaine conviction during cross-examination. The testimony relied upon by the lower court was as follows:

Mr. Graham: "I have a '79 Ford truck and I had -- when I got arrested back in '91 that

confiscated it, and when I got out in November '93, they told me I could get my truck back"

When the defense inquires into a subject on direct examination, the prosecution is entitled to elaborate on the matter. *Winters v. State*, 449 So. 2d 766, 771 (Miss. 1984). However, the trial judge must be conscientious not to allow the State to exceed the "invitation" extended by the defense. *Winters*, 449 So. 2d at 771. Based on our review of the record in this case, we find that the State exceeded the invitation presented by the defense. The mere mention of a prior arrest is not an open invitation to delve into all aspects of the offense. Accordingly, evidence of Graham's conviction for sale of cocaine was reversible error.

Due to our decision in Appellant's first assignment of error, we need not consider his second enumerated error.

THE JUDGMENT OF THE WINSTON COUNTY CIRCUIT COURT IS HEREBY REVERSED AND REMANDED. COSTS OF THIS APPEAL ARE TAXED TO WINSTON COUNTY.

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