IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01230 COA

TYRONE WILSON A/K/A TYRONE JAVON WILSON

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. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GEORGE T. HOLMES

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: CYNTHIA SPEETJENS

NATURE OF THE CASE: CRIMINAL: ARSON AND MANSLAUGHTER

TRIAL COURT DISPOSITION: CT I: MANSLAUGHTER; SENTENCED TO SERVE 20 YRS IN CUSTODY OF MDOC. CT II: ARSON; SENTENCED TO 20 YRS IN CUSTODY OF MDOC. SENTENCES ARE TO RUN CONSECUTIVELY

MANDATE ISSUED: 6/5/97

BEFORE McMILLIN, P.J., KING AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Tyrone Wilson, indicted on a two-count indictment for capital murder and arson, was tried on a reduced charge of murder and arson. Wilson was convicted of manslaughter and arson and sentenced to twenty (20) years for manslaughter and twenty (20) years for arson. The sentences are to be served consecutively and shall be served in the custody of the Mississippi Department of Corrections. The court denied Wilson's motion for JNOV or, in the alternative, a new trial. We find that Wilson's issues on appeal have no merit and therefore affirm.

FACTS

On August 27, 1993, a fight between rival college fraternities broke out at the Palm Beach Club which resulted in numerous injuries including injuries to Malik Ali, the cousin of the Appellant, Tyrone Wilson. After the fight, in the early morning hours of August 28, 1993, a molotov cocktail was thrown through the window of a house located at 1313 Barrett Street. A fire erupted in the house killing Donnell Bouie. Thereafter, acting on tips from witnesses, the Jackson police arrested Shannon Green, Tyrone Wilson, Leon Covin, and Aaron Thompson.

Wilson, contrary to his attorney's advice, gave a thirty-six page statement to arson investigator Ed Morgan. In the statement, Wilson admitted that after the fight, he obtained a shotgun from his home and loaded it with one shotgun shell, that he was present with Shannon Green when Green filled beer bottles with gasoline and stuffed newspaper into the necks of the bottles, and that he [Wilson] accompanied Green to the house at 1313 Barrett Street while in possession of the shotgun, and that he was present when Green threw the bomb into the house.

Wilson defends his actions on the grounds that he was merely a "go-along" with Shannon Green and was unaware of Green's plans to burn down the house which resulted in the death of Donnell Bouie. The jury was instructed on the elements of depraved heart murder, manslaughter, and arson. The jury subsequently returned a guilty verdict for manslaughter and arson, and Wilson was sentenced to serve two consecutive twenty-year terms. Feeling aggrieved, Wilson appeals the judgment of the trial court.

ANALYSIS

I. DID THE TRIAL COURT ERR IN SUBMITTING THE CASE TO THE JURY ON BOTH DEPRAVED HEART MURDER AND ARSON?

Wilson contends that the giving of instructions on both depraved heart murder and arson

was reversible error because arson is a lesser included offense of depraved heart murder, and thus conviction and sentencing for both would constitute double jeopardy.

The State responds that Wilson is procedurally barred from raising this objection because he does so on entirely different grounds than he argued at trial. We agree. The record indicates that Wilson objected on the grounds that he was not indicted for depraved heart murder but for capital murder; and, he also objected on the ground that "depraved heart" is an ambiguous term. Here, Wilson bases his argument on double jeopardy. The law for preserving an issue for appeal is well-established. The Mississippi Supreme Court has held that "[t]he assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal." *Ballenger v. State*, 667 So. 2d 1242, 1256 (Miss. 1995) (citing *Haddox v. State*, 636 So. 2d 1229, 1240 (Miss. 1994); *Baine v. State*, 606 So. 2d 1076 (Miss. 1992); *Willie v. State*, 585 So. 2d 660, 671 (Miss. 1991); *Crawford v. State*, 515 So. 2d 936, 938 (Miss. 1987); *Watson v. State*, 483 So. 2d 1326 (Miss. 1986)). "A trial judge will not be found in error on a matter not presented to him for decision." *Id.* (quoting *Jones v. State*, 606 So. 2d 1051, 1058 (Miss. 1992) (citing *Crenshaw v. State*, 520 So. 2d 131, 134 (Miss. 1988); *Howard v. State*, 507 So. 2d 58, 63 (Miss. 1987); *Ponder v. State*, 335 So. 2d 885, 886 (Miss. 1976)).

Although Wilson is procedurally barred from raising this issue on appeal, we will also address the issue on its merits. In his brief, Wilson relies on *Meeks v. State*, 604 So. 2d 748, 753 (Miss. 1992), in which the defendant was charged, convicted, and sentenced for capital murder, kidnapping, burglary, and assault. Meeks appealed the kidnapping charge on the grounds that he had been twice put in jeopardy on the kidnapping charge because the State based its capital murder charge on the underlying felony of kidnapping for which Meeks was convicted. *Id.* The Mississippi Supreme Court reversed and rendered on the kidnapping charge stating that Meeks could not be sentenced for both capital murder and kidnapping. *Id.* The court relied on *Blockburger v. United States*, 284 U.S. 299, 303 (1932) which stated that if an individual is charged with two offenses, and all of the elements of one are included within and are a part of a second greater offense, and where no further evidence is needed to establish the lesser offense, then once the prosecution has proved the greater offense, punishment for the lesser offense is barred. Thus, Wilson argues that his case is analogous to *Meeks*. Wilson contends that in his case, no further evidence would be needed to establish the arson charge once the prosecution presented proof of its depraved heart murder charge, and therefore, punishment for the lesser offense of arson would be barred. Wilson contends that the facts of the case do not support two inseparable crimes, but one alleged crime with arson being the underlying or lesser offense. Wilson argues that because he was acquitted of depraved heart murder he could not be convicted of the underlying eminently dangerous act of arson. Wilson contends that the only procedurally appropriate conviction in this case was manslaughter, and it was not supported by the evidence.

The State responds that Wilson's argument that acquittal of depraved heart murder necessitates an acquittal on the charge of arson is misleading. We agree. In the present case, Wilson seems to be confusing depraved heart murder with capital murder. The Mississippi Supreme Court has interpreted section 97-3-19(2)(e) of the Mississippi Code to mean that a valid capital murder conviction "*must be supported by evidence legally sufficient to support a conviction of both the murder and the*

underlying felony had either been charged alone." *Fisher v. State*, 481 So. 2d 203, 212 (Miss. 1985) (emphasis added). Wilson, although indicted for capital murder, was tried for the reduced charge of depraved heart murder, thus his *Meeks* argument fails. In *Meeks*, the Mississippi Supreme Court stated, "had the prosecution not been so intent on seeking the penalty of death, it could have indicted and prosecuted Meeks for murder under section 97-3-19(1) and separately prosecuted him for the kidnapping of Tana and, upon conviction of each, obtained consecutive sentences that would likely withstand review." *Meeks v. State*, 604 So. 2d 748, 754 (Miss. 1992). The State, in the present case, did exactly what the prosecution in *Meeks* could have done. Here, the State prosecuted not for capital murder but for depraved heart murder under section 97-3-19(1)(b) of the Mississippi Code. Therefore, the trial court did not err when it instructed the jury on both depraved heart murder and arson. In the present case, the jury determined that the State had proved the charge of arson and returned a verdict of guilty on that charge. The jurors, for reasons known only to themselves and fortunately for Wilson, chose not to convict Wilson of depraved heart murder but instead returned a verdict of guilty for manslaughter. Although the jury's verdict seems a bit inconsistent, we cannot say that its decision to convict on the charges of manslaughter and arson was error. Therefore, we find Wilson 's argument to be without merit and affirm on this issue.

II. DID THE TRIAL COURT ERR IN DENYING WILSON'S MOTION FOR A MISTRIAL DURING CLOSING ARGUMENTS?

Wilson contends that the State, during closing argument, made statements concerning the testimony of its witness, Maury Richardson, which exceeded a reasonable interpretation of what Richardson actually said. During the trial, Richardson was asked by the State to describe what Wilson had in his hands. Richardson replied: "Yeah, it was a long object, you know. It was long and it was like he was pointing it at us, you know, like a gun or something." The State then asked, "Consistent with a shotgun?" to which Richardson replied yes. During closing argument, the State made reference to Wilson's having pointed a gun at Richardson. Wilson's attorney objected stating that there was no evidence that the Defendant had pointed a gun at Richardson. Wilson's attorney then moved for a mistrial. The court sustained the objection and denied the motion for a mistrial. Wilson contends that the trial court erred in denying his motion for mistrial.

In *Ormond v. State*, 599 So. 2d 951, 961 (Miss. 1992), the Mississippi Supreme Court, citing *Craft v. State*, 226 Miss. 426, 84 So. 2d 531, 535 (1956), set forth the test to be used when determining if an improper argument by a prosecutor to the jury requires reversal. The test is whether "the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created." *Ormond*, 599 So. 2d at 961. In the present case, we are hard pressed to determine that the State's comments regarding the gun were improper much less prejudicial and inflammatory. The record indicates that Richardson believed that Wilson had pointed a gun at him. We do not find the State's comments regarding the gun to be beyond the scope of Richardson's testimony.

Nevertheless, the trial judge, for reasons of his own, saw fit to sustain the objection and deny Wilson's motion for a mistrial. The Mississippi Supreme Court has held that a trial judge has the discretion to determine if a closing comment is so prejudicial that a mistrial should be granted.

Alexander v. State, 602 So. 2d 1180, 1182 (Miss. 1992) (citation omitted). Here, the judge obviously did not find the closing argument to be so prejudicial as to warrant a mistrial. We find no abuse of discretion in the trial judge's decision and therefore will not disturb his ruling. We do note, however, that the law states that where serious and irreparable damage has not occurred, a judge should remedy the situation by admonishing the jury to disregard any impropriety. *Id.* at 1182-83 (citations omitted). In the present case, the judge sustained those statements he believed to be improper, but no admonishment was given as Wilson made no such request. The Mississippi Supreme Court has held that "where an objection to a question is sustained and no request is made that the jury be instructed to disregard the question, there is no error." *Brock v. State*, 530 So. 2d 146, 155 (Miss. 1988) (citing *Gardner v. State*, 455 So. 2d 796, 800 (Miss. 1984)). The *Brock* court stated further that this "same rationale applies to objections made during closing argument unless a fundamental right is clearly involved." *Id.* We believe that the judge properly exercised his discretion when he determined that irreparable damage had not occurred and remedied the situation as he saw fit. The trial court committed no error, and this issue therefore has no merit.

III. DID THE TRIAL COURT ERR IN SENTENCING WILSON TO TWO (2) TWENTY (20) YEAR SENTENCES RUNNING CONSECUTIVELY?

Wilson contends that the sentences were not proportional to his involvement in the crime committed and therefore violate the Eighth and Fourteenth Amendments. Wilson argues that he was merely a "follower or go along" with Shannon Green, the person who made the molotov cocktails and actually threw them into the house killing Donnell Bouie. Wilson takes issue with the fact that he was given the same sentences as Shannon Green even though he was not as culpable.

The Mississippi Code states that "[e]very person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such; and this whether the principal have been previously convicted or not." Miss. Code Ann. § 97-1-3 (1972). Section 97-3-25 states that the maximum sentence for manslaughter shall be twenty (20) years. *Id.* § 97-3-25. Likewise, section 97-17-1 states that arson of a dwelling house carries a maximum penalty of twenty (20) years. *Id.* § 97-17-1. The Mississippi Supreme Court has long held that "a trial court will not be held in error or held to have abused its discretion if the sentence imposed is within the limits fixed by statute." *Edwards v. State*, 615 So. 2d 590, 597 (Miss. 1993) (citing *Johnson v. State*, 461 So. 2d 1288, 1292 (Miss. 1984)); *see also Barnwell v. State*, 567 So. 2d 215, 221 (Miss. 1990) (save for instances where the sentence is "manifestly disproportionate" to the crime committed, extended proportionality analysis is not required by the Eighth Amendment); *Corley v. State*, 536 So. 2d 1314, 1319 (Miss. 1988); *Reed v. State*, 536 So. 2d 1336, 1339 (Miss. 1988).

However, where a sentence is "grossly disproportionate" to the crime committed, the sentence is subject to attack on the ground it violates the Eighth Amendment prohibition of cruel and unusual punishment. *Edwards*, 615 So. 2d at 598 (citing *Wallace v. State*, 607 So. 2d 1184, 1188 (Miss. 1992); *Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992)). In determining proportionality, the Mississippi Supreme Court has followed the three-prong test set forth in *Solem v. Helm*, 463 U.S. 277 (1983). *See Edwards v. State*, 615 So. 2d 590, 598 (Miss. 1993). "The elements are: (1) the gravity of the offense and the harshness of the penalty; (2) comparison of the sentence with sentences

imposed on other criminals in the same jurisdiction; and (3) comparison of sentences imposed in other jurisdictions for commission of the same crime with the sentence imposed in this case." *Id*. The only element raised by Wilson is the first: gravity of the offense and harshness of the penalty. The remaining elements were not raised nor any argument presented for the Court's consideration. Even if we had concluded that Wilson's sentence required further analysis, Wilson has not produced facts either in this Court or in the lower court concerning sentences in this or other jurisdictions. The Mississippi Supreme Court has held that "[i]n the complete absence of facts showing that [the appellant's] sentence exceeds others imposed for the same crime in either the same or other jurisdictions, it is impossible for this Court to hold the second and third prongs of the Solem test favor reversal of [the appellant's] sentence." *Id.* (quoting *Wallace v. State*, 607 So. 2d 1184, 1189 (Miss. 1992)).

We conclude that the trial court was not in error and did not abuse its discretion because the sentence imposed was within the limits fixed by statute and not so grossly disproportionate nor shockingly excessive as to warrant its reversal.

> IV. DID THE TRIAL COURT ERR IN DENYING WILSON'S MOTIONS FOR DIRECTED VERDICT AND JNOV\NEW TRIAL?

Wilson contends that the State did not prove the element of intent necessary to sustain a guilty verdict for the charge of arson. He also argues that the State offered no proof that he acted in the heat of passion, or that his actions were so cruel and unusual as to constitute manslaughter. Wilson contends that there was no evidence that he threw the molotov cocktail or participated in making the bomb. Wilson argues that he was merely riding around with Shannon Green and was unaware of Green's plans to burn down the house. Wilson frames his argument as a weight of the evidence issue; however, his argument clearly attacks the sufficiency of the evidence. We will address both the sufficiency and weight issues.

A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled Wilson's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

> [T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Wilson's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Id. (citations omitted).

We find that the evidence was legally sufficient to warrant jury consideration of murder, manslaughter, and arson. In the present case, the evidence indicated that Wilson was very angry after his cousin was injured in a fight at the club. Witnesses testified that Wilson retrieved a shotgun from his house and took it with him to the hospital and later had the gun with him at 1313 Barrett Street just before the fire was started. Arson Investigator Ed Morgan testified that Wilson gave a thirty-six page statement to authorities after waiving his rights. Morgan summarized this statement which included an admission by Wilson that he had been drinking, that he did have a shotgun with him at the scene of the arson, and that he was with Shannon Green when Green filled beer bottles with gas and then stuffed strips of newspaper into the tops of the bottles. Wilson's statement indicated that he accompanied Shannon Green to 1313 Barrett Street, that he walked up to the house with the shotgun in his possession, and that he was present when Green threw the molotov cocktails into the house. The statement further indicated that Wilson left the scene of the crime with Green and then aided Green, who feared retaliation, in moving his [Green's] stuff out of Green's apartment. Wilson also indicated in his statement that he returned to his apartment and disposed of a second bomb by emptying the contents of the bottle in his backyard and throwing the beer bottle away. Leon Covin testified that he was in the car with Wilson and Green when Green suggested burning down the house at 1313 Barrett Street. Covin testified that he asked to be taken home when he realized that Green was serious about burning down the house. Covin testified that Wilson and Green did take him home, and that he did not see Wilson and Green again until after the bombing.

The evidence consistent with the guilty verdict must be accepted as true. *Id.* Considering the elements of the crimes along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Wilson not guilty of manslaughter and arson. Here the evidence was legally sufficient to support the conclusion, both directly and by inference, that Wilson knew that Green planned to burn down the house, and that Wilson willingly accompanied Green as the events unfolded resulting in the burning of the house at 1313 Barrett Street and the death of Donnell Bouie. The evidence was amply sufficient to support the trial court's denial of Wilson's motions for directed verdict and of his post-trial motion for JNOV.

Wilson also argues that the jury verdict was against the overwhelming weight of the evidence and requests a new trial. The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain*, 625 So. 2d at 781 (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, the jury heard the witnesses for, and the evidence presented by the State. Wilson

rested his case without offering any evidence. The testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Wilson. The trial court did not abuse its discretion by refusing to grant Wilson a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to promote an unconscionable injustice. The trial court properly denied Wilson's motion for a new trial.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION ON COUNT I OF MANSLAUGHTER AND SENTENCE OF TWENTY (20) YEARS; AND COUNT II OF ARSON AND SENTENCE OF TWENTY (20) YEARS TO RUN CONSECUTIVELY WITH SENTENCE IN COUNT I AND ALL SENTENCES TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. FRAISER, C.J., NOT PARTICIPATING.