IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01212 COA

WILLIE LEE THOMAS AND JESSIE J. PAGE

A/K/A JESSIE JAMES PAGE

APPELLANTS

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. HON. ELZY J. SMITH, JR.

COURT FROM WHICH APPEALED: BOLIVAR COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

R. L. WONG FOR WILLIE LEE THOMAS

WILLIAM K. DOSSETT FOR JESSIE J. PAGE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: LAURENCE MELLEN

NATURE OF THE CASE: FELONY SHOPLIFTING

TRIAL COURT DISPOSITION: 5 YEARS, $1,000.00 FINE FOR FINAL JUDGMENT

BEFORE THOMAS, P.J., BARBER, McMILLIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Willie Lee Thomas and Jessie J. Page were convicted in Bolivar County Circuit Court of felony shoplifting. Both appeal, arguing that a statement one of them made to a police officer had not been disclosed in discovery, and that the verdict was against the overwhelming weight of the evidence. We find no error and affirm.

STATEMENT OF FACTS

Taking the evidence in the light most favorable to the conviction, the following are the operative facts. On August 11, 1994, Willie Lee Thomas, Jessie James Page, and Jacqueline McLain drove into a Wal-Mart parking lot in Cleveland. McLain and Page entered the store, while Thomas remained sitting in his truck. A "loss prevention officer" for Wal-Mart testified that he saw McLain "taking an item of clothing, I believe it was, and she appeared to be stuffing it in her clothes." Page was present while this was occurring. Page and McLain then left the store, and as they were leaving, Page "kept looking over his shoulder" back toward the store. The two entered the truck with Thomas, who then drove out of the parking lot onto a city street.

The loss prevention officer got into his vehicle and followed Thomas and the other two Defendants. After traveling down a city street for some distance, Thomas and the others pulled into a parking lot. The officer saw someone on the passenger side throwing out some clothes, and Thomas and the others then drove back onto the street. The Wal-Mart officer picked up the clothes and found that they still had Wal-Mart tags on them.

The police were summoned. They stopped Thomas and the others some distance away. Thomas was asked what he was doing, and his reply was that "they were going fishing." Thomas had it pointed out to him that there was no fishing equipment in the truck. His non sequitur response to that was that he did not know Page or McLain.

All three were indicted for felony shoplifting. The value of the clothes which were taken was said to be over $300.00. Each was convicted. Thomas and Page have appealed.

DISCUSSION

Each Defendant raises the same two arguments. They state that there was a discovery violation, in that a statement by Thomas allegedly made at the time of his arrest was not revealed to them in discovery. Secondly, they each argue that their respective convictions were against the overwhelming weight of the evidence.

1. Discovery Violation

The police lieutenant who stopped Thomas and the other Defendants as they were driving was asked by the State what Thomas had said. The relevant exchange between the assistant district attorney and the witness was as follows:

> Q. Now, when you stopped that truck, did you hear the driver of that truck make any statement?
>
> A. Yes, we asked them where they was going, and they said they was going fishing.
>
> Q. Who said they were going fishing?
>
> A. The driver, said they was going fishing.
>
> Q. All right. And to which did you respond?
>
> A. I responded, I said, "I don't see any fishing gear on the bed of the truck or in the truck."
>
> Q. All right. Was there any?
>
> A. No.
>
> Q. Did you observe any?
>
> A. No, it wasn't any fishing equipment in the vehicle.
>
> Q. And what, if anything, else was said by him, the driver?
>
> A. He said he did not know the other two individuals, the male and the female.
>
> Q. That he didn't know them?
>
> A. That he didn't know them.
>
> Q. Did he explain how they were there?
>
> A. He said they just jumped in his vehicle up there at Wal-Mart.
>
> Q. Okay.

After an objection was made by Thomas' attorney the court conducted a conference out of the hearing of the jury. Thomas' attorney alleged that the "only statements by Mr. Thomas that were given to us is that they were from Michigan, they were going fishing, and they he didn't know the other two defendants." The defense had asked for and was entitled to receive all statements made by any of the Defendants. The district attorney did not recall the police officer ever informing him of the statement that the two Defendants had jumped into his truck. Regardless of whether this was an actual discovery violation, the court concluded that for the State to use this evidence, it should have

been provided to the defense. The court therefore excluded the evidence, and gave an instruction to the jury to disregard.

It is argued that the prejudice created by this evidence that had already been introduced in front of the jury could not be cured by a direction to disregard. Thomas argues that he was the innocent driver of the vehicle, staying in the parking lot. That "unblemished" innocence had already been marred by the not very believable statement that Thomas alleged he did not know the other two individuals, but that nonetheless he was going fishing with them without any fishing gear.

The starting proposition is that under our procedural rules, if one party wishes to introduce evidence that was improperly omitted from discovery, the objecting party is entitled first to examine the new evidence. If the objector claims undue prejudice and seeks a continuance or mistrial, the court shall "in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time. . . or grant a mistrial." Uniform Circuit and County Court Rule 9.04. Here the court decided to exclude the evidence, which is consistent with the Rule.

The Defendants nonetheless argue that the evidence was so prejudicial as to be beyond curing by an instruction to the jury to disregard. The argument might have more credibility if it indeed was the sole statement that tended to undercut the innocent bystander defense. However, there are three statements, two of which Thomas' attorney had been provided in discovery:

1. They were going fishing (but there was no fishing equipment);

2. Thomas did not know the other two individuals, and;

3. That Thomas said the other two individuals after shoplifting at Wal-Mart "just jumped into his vehicle."

It is only the third statement that potentially violated the requirement of discovery. After the jury had already properly and without objection been told the suspect story about fishing and that these two individuals who were riding in his truck were unknown to him, the statement that they just jumped into his truck seems more of the same. The other statements had more than soiled his squeaky clean innocence, and the third statement merely added very similar information.

We will presume that the jury followed the trial judge's instructions to disregard, and do not find this evidence to have been sufficiently prejudicial as to beyond curing. *Cabello v. State,* 490 So. 2d 852, 857 (Miss. 1986).

2. Overwhelming Weight of Evidence

Both Defendants argue their convictions were against the overwhelming weight of the evidence. "The 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 v. State*, 625 So. 2d 774, 781 (Miss. 1993). A new trial should be granted on the grounds of weight of evidence only "to prevent an unconscionable injustice." *McClain*, 625 So. 2d at 781.

We will consider each defendant's arguments separately.

a. Weight of Evidence to Convict Jessie James Page

Page was seen inside the store with a woman who hid merchandise inside her clothes. He was present while she was rolling the clothes up and hiding them. He left the store with McLain. There was testimony that he was holding his wallet as he walked out and also brandishing a slip of paper, as if it were a store receipt, and saying "a woman will break you every time." There was in fact no receipt recovered nor did any employee of Wal-Mart see Page or McLain pay for merchandise. One witness stated that the receipt was "an old piece of paper or something." Page kept looking "nervously" over his shoulder as he and McLain left the store and went toward Thomas in the waiting truck.

The jury is entitled to draw reasonable inferences from the evidence. Page's presence, observance of the clothes being hidden, his acting as if a piece of paper in his hand was a receipt for merchandise purchased, and his furtive glances back at the store all constitute evidence that the jury could use to find that he was involved in the shoplifting. There was no injustice in the verdict reached as to Page.

b. Weight of Evidence as to Willie Lee Thomas

Thomas remained in the truck while the other two Defendants went into Wal-Mart. We have already discussed the evidence which implicated him in this defense. Thomas compares his situation to that in *Lewis v. State*, 573 So. 2d 719 (Miss. 1990). In that shoplifting case, the only evidence as to one of the defendants was that he had ridden with others who had participated in the crime, was not seen inside the store, and his own testimony was that he was in a different department looking at merchandise. Being a passenger with a possible shoplifter, without in any way having participated in the crime, did not constitute evidence of guilt. *Lewis*, 573 So. 2d at 723-24.

In the present case, there is evidence that Thomas waited behind the wheel of his truck while the other two Defendants together engaged in shoplifting. He immediately drove away when they entered the truck, and at some stage pulled into a vacant parking lot at which time someone, probably not Thomas, threw the stolen merchandise out a window. He then drove further, and was stopped by the police. At that time, he made two statements (the third not being admissible evidence), that were unbelievable and revealed a desire to mislead the investigating officer. The evidence is strong that Thomas at least was an accessory after the fact. The more difficult question is whether he was a principal. A circumstantial evidence instruction was given to the jury. The jury could reasonably infer from this evidence that not only did Thomas participate in aiding an escape by driving, pausing temporarily to allow the merchandise to be discarded, and then when stopped attempting to mislead the police, but that such incriminating evidence was strongly suggestive that his waiting in the truck while the other two "shopped" was part of the original plan of all three Defendants.

The intent of the waiting driver in a shoplifting case or other crime is rarely going to be proved with direct evidence. Even if Thomas more aggressively with a high rate of speed had attempted to elude his pursuers, it still would not be direct evidence as to exactly when his intent to further the crime began. Such decisions are for the jury, properly instructed and with all the available evidence. Thomas's conviction as a principal was not against the overwhelming weight of the evidence.

THE JUDGMENTS OF THE CIRCUIT COURT OF BOLIVAR COUNTY OF CONVICTION OF WILLIE LEE THOMAS AND JESSIE JAMES PAGE OF FELONY SHOPLIFTING, AND SENTENCES OF EACH TO FIVE YEARS, SENTENCES SHALL

RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND A $1, 000.00 FINE EACH, ARE AFFIRMED. COSTS ARE ASSESSED TO BOLIVAR COUNTY.

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