IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01182 COA

KIMBERLY CRIMMIEL A/K/A KIMBERLY CRIMMEL

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. KEITH STARRETT

COURT FROM WHICH APPEALED: LINCOLN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOSEPH A. FERNALD, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: DUNN LAMPTON

NATURE OF THE CASE: CRIMINAL--FELONY

TRIAL COURT DISPOSITION: CONVICTED OF TWO COUNTS OF AGGRAVATED ASSAULT AND SENTENCED TO SEVENTEEN YEARS ON EACH COUNT WITH TWO YEARS SUSPENDED--SENTENCES TO RUN CONCURRENTLY

BEFORE THOMAS, P.J., BARBER, AND MCMILLIN, JJ.

THOMAS, P.J., FOR THE COURT:

Crimmiel was convicted of two counts of aggravated assault. He appeals, assigning two issues as error:

I. DID THE TRIAL COURT ERR IN DENYING HIS MOTION FOR MISTRIAL; AND

II. DID THE TRIAL COURT ERR IN DENYING HIS MOTION FOR JNOV OR, ALTERNATIVELY, NEW TRIAL.

Finding no error, we affirm.

FACTS

On the night of February 14, 1994, Charles Hodges, Demetrius Kelly, David McCall, and Kimberly Crimmiel were playing video games at Jack's Store in Brookhaven. Apparently, at some point after the men had left the store, Crimmiel found that the drugs he had in his jacket were missing, and he decided that Hodges and Kelly had robbed him. When Crimmiel saw Hodges on a street later that night, Crimmiel stopped him and said that somebody had "been getting his stuff" and "somebody better up his stuff." Hodges told Crimmiel that he had nothing to do with taking his "stuff." Hodges then went to his girlfriend Sandra Nelson's apartment where he was staying at the time. Kelly went to his brother's girlfriend's apartment where he was staying. Although it is unclear from the record which shooting occurred first, around 1:00 A.M. on February 15, Crimmiel went to each apartment and shot Hodges and Kelly.

Regarding the assault on Hodges, the following transpired. Hodges testified that Crimmiel shot him while he held his one-year-old son after he answered a knock on the back door to Nelson's apartment. David McCall, whose girlfriend also lived in the apartment, testified that he heard Crimmiel's voice call Hodges' name right before he heard two gunshots. Sandra Nelson also testified that she heard and recognized Crimmiel's voice immediately prior to the gunshots. Hodges walked back into the living room of the apartment and told Nelson and McCall that Crimmiel had shot him.

Regarding the assault on Demetrius Kelly, who was deceased at the time of trial, the evidence at trial showed that the following transpired. Darryl Kelly, his brother, (Darryl) testified that Kelly and Crimmiel had been at the apartment around 4:00 P.M. on February 14, and that Crimmiel was wearing a distinctive Texas A &M jacket and "Texas hat." Darryl testified that the two left the apartment and went to Jack's Store. Later that night, Crimmiel came back to the apartment and had a discussion with Kelly in the bathroom. Crimmiel left the apartment, and Darryl went into a back

bedroom. Not long after, Darryl heard a knock on the door. Kelly answered the door, and Darryl testified that he heard a shot and then heard Kelly call for him from the den. Darryl stated that he went into the den and saw that Kelly had been shot. As soon as Kelly told Darryl that Crimmiel had shot him, Darryl ran to the door of the apartment and saw a man in a Texas A & M jacket and "Texas hat" that he thought was Crimmiel running away.

Raymond Lenoir testified at trial that he gave Crimmiel a ride that night and that Crimmiel told him that Hodges and Kelly had robbed him. Lenoir testified that he drove Crimmiel to the apartment where Kelly was staying, and Crimmiel went into the apartment while he stayed in the car. Lenoir testified that they then saw Hodges walking down the street, and Crimmiel told Hodges that he "got him that time" but he "won't get him like that no more."

Crimmiel did not testify at trial. The only witness for the defense was Tasha Williams, Crimmiel's sister, who testified on direct that she did not see her brother between approximately 7:00 P.M. on February 14 until 3:00 A.M. on February 15, 1994, during which time the assaults took place. Williams' testimony provided only two pages of the trial transcript, and we are at a loss to understand the purpose of her testimony since it added nothing to the case.

Crimmiel was convicted of two counts of aggravated assault.

I. DID THE TRIAL COURT ERR IN DENYING

CRIMMIEL'S MOTION FOR MISTRIAL.

During voir dire, the prosecution asserted the "it may turn out that this thing was a drug deal that was gone bad . . . , that may have been the well from which all of this sprung." Crimmiel did not object during voir dire, but he did make a motion for mistrial following voir dire. The trial court denied the motion and instructed the jury after opening statements that statements made during voir dire and opening statements are not evidence. The trial court further stated, "There was something that came out in the voir dire questioning by Mr. Lampton, he was trying to explain or saying something about the reason for his shooting. That is not evidence and is not to be considered by you in rendering your verdict. You are to base your verdict only on what comes from the witness stand. . . ."

Crimmiel asserts that the curative instruction was insufficient, and the trial court erred in denying his motion for mistrial. The jury was instructed to disregard the statements made by the attorneys during voir dire and opening. Juries are presumed to follow the law and the court's instructions to disregard all sustained objections. *Walker v. State*, 671 So. 2d 581, 618 (Miss. 1995); *Harmon v. State*, 453 So. 2d 710, 712 (Miss. 1984). When the trial court sustains an objection and instructs the jury to disregard the improper comments, there is a presumption that any potential error is cured. *Alexander v.* State, 602 So. 2d 1180, 1183 (Miss. 1992); *Perkins v. State*, 600 So. 2d 938, 941 (Miss. 1992).

The decision to grant a mistrial rests in the sound discretion of the trial court. We will not reverse such decisions absent a finding that the trial court abused its discretion in ruling on the matter. *Brent v. State*, 632 So. 2d 936, 941 (Miss. 1994). Since any potential error was cured by the trial court's instruction, the trial court properly denied the mistrial. There is no merit to this issue.

II. DID THE TRIAL COURT ERR IN DENYING

CRIMMIEL'S MOTION FOR JNOV OR NEW TRIAL.

A. MOTION FOR JNOV

Crimmiel asserts that the trial court erred in denying his motion for JNOV or, alternatively, new trial. A motion for JNOV challenges the sufficiency of the evidence supporting a guilty verdict. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Butler v. State*, 544 So. 2d 816 (Miss. 1989); *Wetz v. State,* 503 So. 2d 803, 807-08 (Miss. 1987). To test the sufficiency of the evidence of a crime, this Court must

> [w]ith respect to each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may 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.

Wetz, 503 So. 2d at 808 (citations omitted).

The jury had more than sufficient evidence to convict Crimmiel. The trial court properly denied the motion for JNOV. There is no merit to this issue.

B. MOTION FOR NEW TRIAL

A motion for a new trial challenges the weight of the evidence rather than its sufficiency. *Butler,* 544 So. 2d at 819. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. *Jones v. State*, 635 So. 2d 884,

887 (Miss. 1994) (citations omitted); *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993) (citation omitted). On review we accept as true all evidence favorable to the State, and the State is given the benefit of all reasonable inferences that may reasonably be drawn from the evidence. *Id*.; *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992). This Court will reverse such a ruling only for an abuse of discretion. *McClain*, 625 So. 2d at 781.

Clearly, the jury's verdict was not against the overwhelming weight of the evidence, and the trial court properly denied the motion for new trial. This issue is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF LINCOLN COUNTY OF CONVICTION OF TWO COUNTS OF AGGRAVATED ASSAULT AND SENTENCE TO SEVENTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ON EACH COUNT TO BE SERVED CONCURRENTLY, THE LAST TWO YEARS SUSPENDED, WITH FIVE YEARS PROBATION, AND TO PAY RESTITUTION, IS AFFIRMED. ALL COSTS ARE ASSESSED TO LINCOLN COUNTY.

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