

IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01133 COA

TERRY EARL JONES

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. GEORGE C. CARLSON JR.

COURT FROM WHICH APPEALED: PANOLA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID L. WALKER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT S. FLYNN

DISTRICT ATTORNEY: JOHN CHAMPION

NATURE OF THE CASE: CRIMINAL-AGGRAVATED ASSAULT, CONSPIRACY

TRIAL COURT DISPOSITION: CT I CONSPIRACY: CTS II, III & IV AGGRAVATED
ASSAULT; CT I SENTENCED TO SERVE 5 YRS IN THE MDOC; CT II 20 YRS TO RUN
CONCURRENTLY WITH CT I; CT III 20 YRS TO RUN CONCURRENTLY WITH CTS I & II;
CT IV 20 YRS TO RUN CONCURRENT WITH CTS I, II & III; PAY ALL COURT COSTS

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

BRIDGES, P.J., FOR THE COURT:

Terry Earl Jones was convicted on three counts of aggravated assault and one count of conspiracy to commit aggravated assault. He was sentenced to twenty (20) years in the custody of

the Mississippi Department of Corrections on each of the aggravated assault convictions, with the sentences to be served concurrently. He was also sentenced to five (5) years on the conspiracy charge with the sentence to run concurrently with the aggravated assault sentences. Aggrieved, Jones appeals to this Court arguing the following issues:

I. WHETHER THE VERDICT OF THE JURY IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

II. WHETHER THE TRIAL COURT ERRED IN DENYING JURY INSTRUCTION D-2 AS CONFUSING.

III. WHETHER THE TRIAL COURT ERRED IN DENYING TO GRANT JONES' MOTION FOR A DIRECTED VERDICT.

IV. WHETHER THE TRIAL COURT ERRED IN DENYING JONES' MOTION FOR A JNOV OR IN THE ALTERNATIVE FOR A NEW TRIAL.

We find no merit in any of Jones' issues and therefore affirm.

FACTS

On the night of February 15, 1994, twin brothers Cedric and Kedrick Johnson, Mike Jones, Avery Dugger, and others were in an apartment in Sardis playing Nintendo. Dugger had argued with Clay earlier in the day. A group of men, including Clay and the Defendant came to Sardis looking for Dugger and wanting to settle the dispute. At least three in the group had guns.

When the group found Dugger's car, they blocked it in its parking place and sent one of the group into the apartment to lure out Dugger. After a few minutes, some of the men who had been inside the apartment exited; at which time, the man sent into the apartment to retrieve Dugger yelled, "Here they come," and ran. A hail of gunfire came from the group who had been waiting outside for Dugger. The Johnson twins and Mike Jones were hit and seriously injured.

Terry Jones was charged and indicted with violations of sections 97-1-1(a) for conspiracy and 97-3-7(2)(b) for aggravated assault of the Mississippi Code of 1972. At trial, the Johnson twins testified that they saw Terry Jones shoot them. There was also other testimony that Terry Jones had shot into the crowd. Terry Jones explained that he had come with the group that night to "fight" with Dugger, but not to shoot him.

ARGUMENT AND DISCUSSION OF THE LAW

Because our discussion of Jones' Issue I implicates the discussions of issues III and IV, the three shall be discussed together.

I. WHETHER THE VERDICT OF THE JURY IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

III. WHETHER THE TRIAL COURT ERRED IN DENYING TO GRANT JONES' MOTION FOR A DIRECTED VERDICT.

IV. WHETHER THE TRIAL COURT ERRED IN DENYING JONES' MOTION FOR A JNOV OR IN THE ALTERNATIVE FOR A NEW TRIAL.

Jones appeals arguing that the jury verdict is against the overwhelming *weight* of the evidence. The substance of his argument on Issue I, however, attacks the *sufficiency* of the State's evidence of conspiracy. This Court views challenges to the weight of the evidence differently from challenges to the sufficiency of the evidence. The sufficiency of the evidence may be challenged by way of a motion for a directed verdict or a motion for JNOV. A directed verdict entitles the defendant to a discharge. A verdict based upon insufficient evidence entitles the defendant to a discharge by way of a JNOV. However, a verdict against the weight of the evidence entitles the defendant to a new trial. We shall now consider the above in support of the conviction.

This Court's standard of review of denials of directed verdicts is as follows:

In passing upon a motion for a directed verdict, all evidence introduced by the state is accepted as true, together with any reasonable inferences that may be drawn from that evidence, and, if there is sufficient evidence to support a verdict of guilty, the motion for directed verdict must be overruled.

Gray v. State, 549 So. 2d 1316, 1318 (Miss. 1989) (citing *Guilbeau v. State*, 502 So. 2d 639, 641 (Miss. 1987)).

Appeals from an overruled JNOV motion are viewed by this Court in a light most favorable to the State. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). Any credible evidence consistent with guilt must be accepted as true. *McClain*, 625 So. 2d at 778. A challenge to the sufficiency of the evidence can result in a reversal only where the evidence, with respect to one or more of the elements of the offense charged, is such that reasonable and fair-minded jurors could only find the accused not guilty. *Id.* at 778.

On the other hand, where the defendant contends that a new trial should have been granted because the jury verdict was against the weight of the evidence, the standard of review is as follows:

The challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. Procedurally such challenge necessarily invokes [Mississippi Uniform Criminal Rule of Circuit Court Practice] 5.16. 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. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

Id. at 781. All matters concerning the weight and credibility of the evidence are resolved by the jury. *Id.*

The Supreme Court of Mississippi condensed this standard stating:

[O]nce the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part from that [sic] the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty.

Williams v. State, 463 So. 2d 1064, 1068 (Miss. 1985).

Jones' argument of Issue I attacks the sufficiency of the State's evidence of a conspiracy. A conspiracy is the combination of two or more persons to accomplish an unlawful purpose. The agreement may be shown by circumstantial evidence. There must exist some evidence that a defendant associated himself with the venture. *Rose v. State*, 556 So. 2d 728, 735 (Miss. 1990). Furthermore, to constitute conspiracy, an agreement need not be formal or expressed, but may be inferred from the circumstances, particularly from the declarations, acts, and conduct of the alleged conspirators. *Nixon v. State*, 533 So. 2d 1078, 1092 (Miss. 1987). Our search of the record revealed testimony that Jones went with the group that night with the sole, organized purpose of attacking Dugger. It was understood that the plan was to attack Dugger. The record also reveals that Jones had a gun with him. It is the opinion of this Court that there was sufficient evidence to support the jury's verdict regarding the conspiracy charge and, therefore, we shall not disturb it.

Jones' Issue III is labeled as an attack on the sufficiency of the evidence. Jones argues that he should have been indicted pursuant to section 97-3-7(2)(a) of the Mississippi Code of 1972 instead of section 97-3-7(2)(b). Sections 97-3-7(2)(a) and (b) of the Mississippi Code of 1972 read in pertinent part as follows:

A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm

We find no merit in Jones' argument on Issue III. He was indicted pursuant to section 97-3-7(2)(b), and the jury was properly instructed in accordance with the wording of this statute. Furthermore, the record reveals sufficient evidence to convict Jones as indicted.

In Jones' argument of Issue IV, he fails to give any reason why the denial of his motion for JNOV or in the alternative a new trial should be reversed. Based on our review of the record and the standard of review stated above, we find no merit in Jones' Issue IV.

II. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT PROPOSED JURY INSTRUCTION D-2 BECAUSE IT WAS CONFUSING.

Jones argues that the trial court erred in refusing his proposed jury instruction D-2, which read as follows:

Evidence has been presented that the defendant Terry Earl Jones acted in ignorance or on a mistake of fact. "Ignorance" or "Mistake of Fact" is a defense to the commission of a crime provided that:

1. the mistaken belief is honestly held; and
2. the belief is of such a nature that the conduct would have been lawful and proper, had the facts been as they were believed to be; and
3. the mistaken belief is not the result of the negligence or fault of the defendant.

If the State has failed to prove from the evidence in this case beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that the defendant acted with knowledge of the true facts, then you shall find the defendant Terry Earl Jones not guilty.

The trial court judge refused to give this instruction because he felt that it was confusing and sufficiently covered by other instructions. We agree. The supreme court has repeatedly condemned confusing and misleading instructions. *Holmes v. State*, 483 So. 2d 684, 686 (Miss. 1986).

The instruction is silent on exactly what is the alleged mistake of fact. Had the jury received this instruction, it might have thought that the mistake of fact was that the group was going to a fist fight and not a shooting. On the other hand, it might have thought that the mistake of fact was that Jones shot someone that he did not intend to shoot. Furthermore, the second part of the instruction requires that the innocent course of action thought to be pursued by Jones be legal. Simple assault is certainly not legal, and the record was replete with references to the "fistfight" that was supposed to happen. Accordingly, we feel that the trial judge was justified in denying instruction D-2 as confusing.

THE JUDGMENT OF THE PANOLA COUNTY CIRCUIT COURT OF CONVICTION OF COUNT I OF CONSPIRACY TO COMMIT AGGRAVATED ASSAULT AND SENTENCE OF FIVE (5) YEARS; COUNTS II, III AND IV OF AGGRAVATED ASSAULT AND SENTENCES OF TWENTY (20) YEARS FOR EACH COUNT, WITH ALL SENTENCES TO BE SERVED CONCURRENTLY, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO PANOLA COUNTY.

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