

7/1/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01173 COA

LARRY EUGENE SMITH

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. GASTON H. HEWES JR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

KEITH ROBERTS (WITHDRAWN)

CECIL GERALD WOODS JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL - AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: AGGRAVATED ASSAULT: SENTENCED TO 10 YEARS,
WITH 5 YEARS SUSPENDED, LEAVING 5 YEARS TO SERVE IN THE CUSTODY OF THE
MDOC AND 5 YEARS ON PROBATION.

MOTION FOR REHEARING FILED: 7/11/97

MANDATE ISSUED: 11/25/97

BEFORE BRIDGES, C.J., McMILLIN, P.J., AND SOUTHWICK, J.

McMILLIN, P.J., FOR THE COURT:

Larry Smith was convicted in the Circuit Court of Harrison County of aggravated assault and sentenced to serve five years in the custody of the Mississippi Department of Corrections. Aggrieved by his conviction, Smith has appealed. He assigns four issues on appeal that he claims warrant reversal. We find Smith's assigned errors to be without merit, and, therefore, affirm the judgment of the circuit court.

I.

Facts

On May 15, 1993, an altercation occurred on the beach adjacent to Highway 90 in Biloxi. During the course of this altercation, Jake Aucoin was struck in the face with the butt of a shotgun. The blow to Aucoin's face caused severe injuries that required surgery to implant several metallic plates to reconstruct the crushed bone. In December 1993, officers of the Biloxi Police Department showed Ken Davis, a witness to the altercation, a group of photographs that included the defendant, Larry Smith. Davis identified Smith from the photograph as the assailant who struck Aucoin. Smith was subsequently indicted, tried, and convicted of aggravated assault.

II.

The Sufficiency of the Evidence

Smith contends that the jury's verdict was not supported by sufficient evidence. In his brief, Smith states that "[t]here was absolutely no physical evidence" linking him to the commission of the crime, and that "all evidence even most favorable to the State is still insufficient." The State responds by pointing out that the jury had the benefit of the testimony of several witnesses to the incident. One witness, Ken Davis, testified that he observed Smith strike the victim with the butt of a shotgun. The State contends that the testimony of Davis was sufficient to create a factual issue upon which "reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions," therefore placing the verdict beyond the court's authority to disturb.

Directed verdict and JNOV motions challenge the legal sufficiency of the evidence. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). With regard to the legal sufficiency of the evidence, all credible evidence consistent with the defendant's guilt must be accepted as true, and the prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *McClain*, 625 So. 2d at 778. This Court is 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. *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987).

As correctly stated by Smith in his brief, "[t]his is an extremely difficult burden for the [defendant] to overcome." At trial the jury was presented with testimony from the witness Davis, who described the events surrounding the altercation and stated that he observed Smith strike the victim with the butt of a shotgun. Davis also stated that prior to the incident in question he had never met the victim or the defendant and had no knowledge of either of them. Another witness, Sean Cook, testified that, although he did not see Smith strike the victim, he saw Smith pull a shotgun out of his pick-up truck immediately prior to the victim being struck. Additionally, the victim testified that Smith was his assailant. Considering the testimony of these witnesses, we hold that the jury's verdict of guilty was supported by sufficient evidence. This assignment of error is without merit.

III.

Prosecutorial Misconduct in Closing Argument

Smith contends that the trial court committed reversible error in not ordering a mistrial when the State allegedly "made inappropriate and prejudicial comments during the closing argument." The State, however, directs this Court's attention to the fact that Smith did not request a mistrial at the time the allegedly prejudicial comments were made. We have reviewed the transcript of the proceedings and find that the State's assertion is correct. The transcript reveals that at the time the remarks were made by the State, Smith objected, and the objection was sustained. However, Smith failed to follow up with a motion for mistrial. It was only after the jury returned a verdict of guilty, during the post-trial hearing on Smith's motion for new trial/JNOV, that Smith first asserted that a mistrial was warranted.

The Mississippi Supreme Court has, on several occasions, addressed the issue of who bears the responsibility for making motions for mistrial. The rule pronounced in these cases is simple: "[i]f the argument is improper, and the objection is sustained, it is the further *duty of trial counsel* to move for a mistrial." *Johnson v. State*, 477 So. 2d 196, 210 (Miss. 1985) (emphasis added); *Saucier v. State*, 328 So. 2d 355, 358 (Miss. 1976) (holding that if defendant regarded sustaining of his objection as insufficient to remove "any supposed harmful effect which may have resulted from the district attorney's remark to the court," it was necessary that he immediately move for mistrial).

Regarding the timeliness of motions for mistrial, in addressing a case procedurally analogous to the one at bar, our supreme court held that "[i]f a defendant is of the opinion that he is entitled to a mistrial at any stage of the proceedings, such motion should be timely made." *Auman v. State*, 271 So. 2d 427, 432 (Miss. 1973). In *Auman*, a criminal defendant made an objection to certain testimony, and his objection was sustained by the trial court. *Auman*, 271 So. 2d at 430-31. The defendant, however, waited until the jury returned a verdict of guilty to seek a mistrial. *Id.* at 431. In addressing the timeliness of the motion for mistrial, our supreme court stated that the defendant "took his chance on submitting the case to the jury. It is now too late after an adverse jury verdict to argue that error was committed." *Id.* at 432. The *Auman* court concluded by holding that the trial court:

did all that was requested of it by the [defendant] and we do not consider this to be error. If a defendant is of the opinion that he is entitled to a mistrial at any stage of the proceedings, such

motion should be timely made. He is not permitted to submit the question of his guilt or innocence to a jury and, after an adverse jury verdict, contend on appeal that a mistrial should have been granted absent such request.

Id.

The situation in the case at bar is identical to that addressed in *Auman*. This issue is without merit.

IV.

The Question of the Unanimity of the Jury Verdict

After the jury returned a verdict finding him guilty of aggravated assault, Smith requested that the jury be polled. One of the jurors initially gave an ambiguous response to the trial court's inquiry. Because of this initially ambiguous response by one of the jurors, Smith contends that the trial court was under a duty to conduct a "voir dire" of the juror in question. Smith fails to elaborate as to what he thinks the judge was required to do in order to satisfy this duty of inquiry. The State contends that, although one of the jurors's initial response to the judge's questioning was perhaps ambiguous, nevertheless, the juror's final response was an unequivocal agreement with the verdict, and that there was, therefore, no need to inquire further. The State also notes that Smith failed to make any contemporaneous suggestion to the court that further inquiry was warranted, therefore waiving any error that may have been committed.

The exchange in question was as follows:

THE COURT: All right. Ladies and gentlemen of the jury, there's been a request that I poll the jury. As I call your name, if you would answer whether you agree or disagree with the verdict. Ms. Harvey, I believe, do you agree or disagree with the verdict?

MS. HARVEY: Well, I disagreed the first time, but I agree the second.

THE COURT: The verdict is guilty of aggravated assault. Do you agree with the verdict or disagree?

MS. HARVEY: Well, I disagree now -- then, but I have agreed.

THE COURT: All right. You agree now?

MS. HARVEY: Yes.

After this exchange with the first juror polled, all the remaining jurors answered with an unequivocal "yes" to the judge's questioning.

This Court is of the opinion that the juror's statements, reasonably interpreted, indicated only that this juror may have had some misgivings regarding the guilty verdict during early stages of deliberation, but ultimately agreed to join in the return of a guilty verdict. It is evident that her statement, "Well, I disagree now," was simply a misstatement immediately corrected by the ensuing substitution of the word "then" for the previously-stated "now" and was not an expression of any presently-existing disagreement with the verdict. No further inquiry by the trial court appeared warranted. There is no

basis to find reversible error in the manner in which this verdict was returned or in the manner in which it was verified by the subsequent inquiry of the trial court.

V.

Ineffective Counsel Claim

Smith claims that his conviction should be reversed because of the poor performance of his trial counsel. He says the substandard performance effectively denied him the assistance of representation in violation of his rights under the Sixth Amendment. In support of this argument, Smith recites a litany of eight separate complaints with his trial counsel's performance. They involve primarily a number of things that defense counsel did not do during the course of the trial that Smith feels should have been done. In most instances, it appears to this Court that there is a legitimate question as to whether the inaction arose out of attorney incompetency or because defense counsel simply concluded that there was no arguable basis to undertake the action. This observation covers such matters as failure to file pre-trial motions, failure to seek to suppress out-of-court identifications, failure to mount some unspecified challenge to the indictment, and failure to request a lesser-included-offense instruction. There exists a presumption that counsel's performance fell "within the wide range of reasonable conduct and that decisions made by trial counsel are strategic." *Vielee v. State*, 653 So. 2d 920, 922 (Miss. 1995). We are unconvinced that counsel's performance in the areas specified in Smith's brief were outside the range of acceptable conduct.

Even so, there is a two-prong test to determine whether a conviction ought to be overturned due to ineffectiveness of counsel. The defendant must not only show that counsel's performance was deficient to the prejudice of the defendant. He must also establish that there is a reasonable probability that, but for the defective performance, the outcome of the proceeding would have been different. *Mohr v. State*, 584 So. 2d 426, 430 (Miss. 1991) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Smith advances no facts and no reasonable argument to support a conclusion that more vigorous activities in these areas would have had any possibility of altering the outcome of this case. Thus, even assuming for sake of argument that counsel failed to perform satisfactorily in the suggested areas, we cannot determine that Smith has successfully met the second prong of the *Strickland* test.

Smith also complains of counsel's lack of preparation through failure to fully investigate and interview potential witnesses. The extent of counsel's trial preparation is not normally something that can be determined from the record itself, except possibly in those situations where counsel's lack of preparation is so glaring that it becomes evident from simply reading the transcript. We do not find such an inadequate performance to be self-evident on the face of this record. Thus, in order to fully develop this issue, there would have to be an evidentiary hearing to determine what exculpatory evidence was left undiscovered by counsel's lack of diligence and the potential for such evidence to alter the probable result of the trial. This is a matter properly cognizable under the State's post-conviction relief statutes rather than as an issue on appeal. *See* Miss. Code Ann. 99-39-1 to -29 (1972). We, therefore, find this issue to be without merit; however, our decision is without prejudice to the defendant's right to pursue the matter further in an appropriate post-conviction relief proceeding. *See Read v. State*, 430 So. 2d 832, 841 (Miss. 1983).

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TEN (10) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH FIVE (5) YEARS SUSPENDED, AND ORDER TO MAKE RESTITUTION IN THE AMOUNT OF \$8,422.30, IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT.

BRIDGES, C.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.