7/1/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00753 COA

FRED LITTLE A/K/A FRED M. LITTLE A/K/A FREDDIE JAMES GONYAW

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 B. READY

COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

SUSAN BREWER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTSDISTRICT ATTORNEY: ROBERT J. KELLY

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: DEFEND. CONVICTED OF LARCENY UNDER LEASE; SENT. TO SERVE 3 YRS IN MISS. DEPT. OF CORRECTIONS WITH 2 YRS SUSPEND.; ORDERED TO PAY $400 RESTITUTION.

MANDATE ISSUED: 7/22/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT:

Fred Little was convicted by a jury in the Circuit Court of DeSoto County of larceny under lease. Little now brings this appeal asserting that the State failed to present sufficient evidence to support the verdict; that the court failed, in several instances, to properly instruct the jury on the necessary elements of the crime; and that the court violated Mississippi Rule of Evidence 404(b) by

allowing the State to present evidence that Little gave a bad check at the time of the lease agreement. Finding these issues to be without merit, we affirm the conviction.

I.

Facts

On February 14, 1994, Fred Little rented a purple dinosaur costume, popularly known as Barney, from the Southaven Fun Shop. He gave the store clerk a check for $64.20 for the rental fee and a $60.00 check for the security deposit. Both checks listed Little's address as 1440 Central Avenue, Memphis, Tennessee. The costume was due back the next day; however, Little did not return the costume as agreed. The check for the rental fee was returned by the bank marked "insufficient funds." One week after the costume was rented, the store owner attempted to contact Little at the Central Avenue address listed on the check by registered mail. The letter was returned by the post office undelivered. The envelope bore a marking dated February 23, 1994 and the word "Moved." The costume was never recovered. Little was indicted for larceny under lease, and convicted by a jury. From this verdict Little brings his appeal.

II.

Other Bad Acts

As his first issue on appeal, Little claims that it was error to permit the State to introduce the rental fee check together with evidence that the check was returned marked "insufficient funds." Little claims that this was evidence of other bad acts inadmissible under Mississippi Rule of Evidence 404(b). Rule 404(b) excludes such evidence if its only purpose is to prove the defendant's character and to suggest that, in the instant case, he was acting in conformity with this character. Such evidence is admissible for other purposes, including to show "intent." M.R.E. 404(b). It is not uncommon that, in the course of committing one criminal act, a defendant may violate a number of different criminal statutes. A bank robber, for example, may commit any number of aggravated assaults in the course of the robbery; however, such evidence may not be excluded if it is necessary for the jury to have a complete understanding of the events constituting the crime. The Mississippi Supreme Court has held that "evidence of a defendant's other crimes is admissible, where it is integrally related in time, place, and fact to that for which he stands trial, thereby permitting the State to tell a rational and coherent story. . . ." *McFee v. State,* 511 So. 2d 130, 136 (Miss. 1987). We conclude that the evidence of the check was an integral part of the State's case and was relevant as tending to establish the defendant's intent to exercise unlawful control over the property.

III.

The Remaining Issues on Appeal

The remaining three issues raised by Little on appeal all relate to the matter of post-rental notice to Little to return the costume and all share a common misconception of the effect of section 97-17-64(2) on the State's case. We will, therefore, consider these issues in a single discussion.

The actual issues raised by Little are (a) that the evidence was insufficient to convict because of lack of proof that he actually was served with notice to return the property, and (b) failure to give an instruction defining the ways in which "notice" under the statute can be given, and (c) failure to give an instruction that told the jury that it could not rely on the undelivered notice as proof of "purpose to deprive."

The second subsection of the statute on larceny under a lease provides three separate methods by which the State *may* make a prima facie case on the element of "purpose to deprive" as set out in section 97-17-64(1). Miss. Code Ann. 97-17-64(2) (1972). The error committed by Little is to conclude that the provisions of this second subsection are, in fact, necessary elements of the crime; *i.e.*, that the State must make its case by proving one of these scenarios. In essence, the subsection establishes that a prima facie case of "purpose to deprive" is made if the defendant gave false identification at the time of leasing, or failed to either (a) return the property, or (b) contact the true owner to arrange a return, within ten days of receipt of notice. Miss. Code Ann. 97-17-64(2) (1972). The third subsection of the statute defines proper notice to include actual notice or a certified mail receipt signed personally by the defendant. Miss. Code Ann. 97-17-64(3) (1972).

The fact that the statute offers three possible means of making a prima facie case of "purpose to deprive" does not, in the opinion of this Court, mean that these methods are the exclusive means of such proof. The first subsection of the statute provides a number of different factual settings that, if proved, would support a conviction, including evidence that the property was being held ransom for payment of a "reward or other compensation." Miss. Code Ann. 97-17-64(1) (1972). Certainly, a case could be made under the "reward" portion of the statute even where the renter gave proper identification and never received certified notice to return the property. Likewise, in this case, we are of the opinion that the State could make a case that the defendant intended to "withhold [the] property . . . permanently or for so extended a period that a significant portion of its economic value, or the use or benefit thereof, is lost to the owner . . ." without necessarily relying upon any of the means permitted, *but not required*, by subsection (2). Miss. Code Ann. 97-17-64(1) (1972).

Our review of the record shows that the only real affirmative evidence presented by Little at trial to justify his failure to return the costume was proof that seemed to indicate that the costume was seized against his will as a part of a foreclosure or other legal proceeding relating to Little's residence. We will not comment on this rather bizarre proposition other than to note that it was not advanced on appeal. Because we have concluded that the State could make a case under the statute without the necessity of proving notice to the defendant demanding return of the property, we determine that the evidence is sufficient to support the verdict under the standard set out in *McClain v State*, 625 So. 2d 774, 778 (Miss. 1993). We also conclude that there were no procedural errors in the trial court's failure to instruct the jury concerning the intricacies of serving notice on the defendant since notice

was not a necessary element of the State's case. We find no error in the trial court's decision to deny requested Instruction D-5, which proposed to tell the jury that it "must look to other evidence" than the undelivered certified mail in order to find "purpose to deprive." There was no contention by the State that this notice established such purpose, and such an instruction could reasonably be seen as tending to confuse rather than enlighten the jury. The instructions, when reviewed as a whole, properly informed the jury of the issues it was being called upon to decide. For all these reasons, we conclude that this verdict must be affirmed.

THE JUDGMENT OF THE DESOTO COUNTY CIRCUIT COURT OF CONVICTION OF LARCENY UNDER LEASE AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH TWO YEARS SUSPENDED AND ONE YEAR TO SERVE WITHOUT PROBATION OR PAROLE AND ORDER TO MAKE RESTITUTION IN THE AMOUNT OF $400 TO THE VICTIM, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO DESOTO COUNTY.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.