IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00527 COA

BRENDA FAYE CLAY 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. L. BRELAND HILBURN, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT: KATE S. EIDT

LEE B. AGNEW, JR.

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: JOHN DAVIDSON

NATURE OF THE CASE: CRIMINAL: DRUGS

TRIAL COURT DISPOSITION: CT I C/S POSS COCAINE W/I: CT II C/S CONSPIRACY TO DIST COCAINE: CT I SENTENCED TO 20 YRS IN MDOC 10 YRS SUSPENDED & 5 YRS PROBATION TO RUN CONSECUTIVELY TO CT II; CT II SENTENCED TO 10 YRS IN MDOC 5 YRS SUSPENDED & 5 YRS TO SERVE

MANDATE ISSUED: 8/5/97

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Brenda Faye Clay was convicted in Count I for possession of cocaine with intent to distribute and in Count II for conspiracy to distribute cocaine. In Count I, the trial court sentenced Clay to serve a term of twenty (20) years in the custody of the Mississippi Department of Corrections with ten (10) years suspended, ten (10) years to serve, and five (5) years probation. In Count II, Clay was sentenced to serve a term of ten (10) years in the custody of the Mississippi Department of Corrections with five (5) years suspended. The sentence in Count II is to run consecutively to the sentence in Count I. Clay's motion for JNOV or, in the alternative, a new trial was denied. Finding Clay's arguments to be without merit, we affirm on all issues.

FACTS

This conviction arises from an investigation by Detective Avaline Baggett of the Jackson Police Department. Detective Baggett testified that a confidential informant contacted her by phone and told her that she was going to make a third party call so that Detective Baggett could listen to the conversation. According to Baggett, the informant dialed a third party and a female answered. The informant asked for Faye and the female on the other end said, "This is Faye." During the conversation, Faye indicated that "her guys" would be in later that evening and asked the informant if she had gotten some "buyers up because they wanted to move the stuff as soon as they could." Baggett testified that Faye identified these "guys" as "Mike and his partner" who were bringing "eight or more" from out of town. Baggett, based on her experience as a narcotics officer, stated that this terminology indicated to her an amount of eight ounces or more of cocaine.

Based on the above phone call, Baggett obtained a search warrant for the home in which Brenda

Faye Clay resided. The search of Appellant's home occurred on February 12, 1994, one day after the phone call. The police were met at the door by a child and then spoke with the owner of the property, Rose Magee. Magee is Clay's sister, and she indicated to the police that she had no knowledge of any drugs being in her house. Clay was found sleeping in her sister's bedroom when the police arrived. A search of the premises resulted in the discovery of substances later determined to be eight ounces of cocaine. This evidence was located in the bedroom usually occupied by Clay, but at the time, was being used by Michael Jackson and Cedric Johnson. Clay and Johnson were arrested on the scene and later released on bond. Johnson subsequently jumped bond, and Jackson has yet to be apprehended.

Baggett testified further that Clay informed her that the drugs belonged to Mike and Cedric but that she wanted to cooperate and give the police information about the "cocaine-trafficking enterprise." According to Baggett, Clay indicated that her role in the enterprise was to set up buyers for Mike. Clay testified in her own behalf and denied making any statements to Detective Baggett regarding her involvement in the cocaine-trafficking enterprise. Clay maintains that she was not involved in any drug trafficking scheme nor did she know that Michael Jackson had brought drugs into her home.

The jury subsequently returned a verdict of guilty on both counts. Feeling aggrieved, Clay filed this appeal asserting four issues.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN DENYING CLAY'S MOTION FOR MISTRIAL BASED UPON PREJUDICIAL STATEMENTS AND EVIDENCE OFFERED BY THE PROSECUTOR RELATING TO CRIMES NOT CHARGED IN THE AFFIDAVIT FOR WHICH CLAY WAS BEING TRIED.

Clay contends that the prosecution's introduction of two exhibits, a cheese ball can and a Coke can found in Clay's bedroom, each with a false bottom and containing cocaine and/or marijuana, necessitated a mistrial. Clay argues that the exhibits contained marijuana and should not have been brought out before the jury because she has not been charged with possession of marijuana.

Clay's attorney objected and requested that the exhibits be excluded from any further exposure to the jury. The State contends that the record contains no indication that the jury had any additional observation of the exhibits. Therefore, the State argues, Appellant was granted the relief

that she requested and cannot now seek a new trial based on the failure of the trial court to grant a mistrial.

It has long been the law that upon the happening of an occurrence that might entitle a defendant to a mistrial, a contemporaneous objection must be made. *McGarrh v. State*, 148 So. 2d 494, 507 (Miss. 1963). In the present case, the record reveals that Clay made no objection when the State offered the containers into evidence. Instead, she waited until the State rested its case in chief and then requested that the containers be excluded from further exposure to the jury. Clay explains that at the time the State offered the containers into evidence, she did not know where they were going and only later realized that the State failed to establish a connection between the containers and the cocaine. Even

so, when Clay came to this realization, she did not request a mistrial. While the judge failed to make a specific ruling on Clay's objection, the record contains nothing to indicate that the containers were further exposed to the jury. Therefore, it would seem that Clay got exactly what she requested, and since the judge did all that he was asked to do, the error complained of does not entitle Clay to a reversal. *Id. See also Cole v. State*, 525 So. 2d 365, 368 (Miss. 1987) (stating that "[w]e will not put the trial court in error for failing to grant relief which was never requested.").

Clay also takes issue with comments and statements made during the cross-examination of Rose Magee. The prosecutor asked Ms. Magee the following question to which Clay objected: "Would you be surprised also if I told you there was some marijuana found in your house?" Clay argues that this question

produced an obvious prejudicial and chilling affect for the accused as the jury was being reminded and thus convinced yet a second time that the accused was obviously being linked to at least the possession of controlled substances regardless of whether or not she was being tried for same.

The State argues that the prosecution was attempting to impeach Magee through contradiction and that such impeachment is not impermissible simply because it may show or suggest other criminal activity. Alternatively, the State contends that, by sustaining Clay's objection and instructing the jury to disregard the matter, the court averted any prejudice to the Appellant's case. We agree.

The Mississippi Supreme Court has held that a "trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case." *Gossett v. State*, 660 So. 2d 1285, 1290 (Miss. 1995). "The trial judge is permitted considerable discretion in determining whether a mistrial is warranted since the judge is best positioned for measuring the prejudicial effect." *Id.* "To find error from a trial judge's failure to declare a mistrial, there must have been an abuse of discretion." *Brent v. State*, 632 So. 2d 936, 941 (Miss. 1994).

In the present case, neither Clay nor the record demonstrates to this Court how the question by the prosecution substantially and irreparably prejudiced the Appellant's case. Perhaps it would have been best if the prosecution had avoided the question pertaining to marijuana, but we do not find that the reference prejudiced Clay in any way. Clay objected and asked that the question be stricken. The judge sustained the objection and instructed the jury to disregard the prosecution's question. Generally, it has been held that "[s]uch remedial acts of the trial court are usually deemed sufficient to remove any prejudicial effect from the minds of the jurors." *Reynolds v. State*, 585 So. 2d 753, 755 (Miss. 1991). "The jury is presumed to have followed the instructions of the trial court." *Id.* We therefore find Clay's argument to be without merit.

II. WHETHER OR NOT THE COURT ERRED IN REFUSING CLAY'S REQUEST FOR ACCEPTANCE OF A JURY INSTRUCTION DIRECTING THE JURY NOT TO GIVE A LAW ENFORCEMENT OFFICER'S TESTIMONY ANY ADDITIONAL WEIGHT OVER THE TESTIMONY OF ANY OTHER WITNESS.

Clay takes issue with the denial of the following instruction: "The Court instructs the Jury that you are not to give any more weight to the testimony of a law enforcement officer, solely because he is a

law enforcement officer, that [sic] you give to any other witness." Clay argues that this instruction was necessary to her defense in light of the fact that the State's entire case rested on the testimony of a police officer.

The trial court refused to give the requested instruction because it felt as though such an instruction might try to instruct the jury as to how they should view the testimony of the police officer. The State argues that such an instruction is an improper comment on the weight of the evidence and was properly denied. We agree.

The Mississippi Code provides, in part, that: "The judge in any criminal cause, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case." Miss. Code Ann. § 99-17-35 (Rev. 1994). The Mississippi Supreme Court addressed an identical issue in *Stewart v. State*, 355 So. 2d 94, 96 (Miss. 1978), in which the court stated that an instruction, such as the one before us, "by its very terms constitutes a comment upon the weight of certain evidence, namely that given by the law enforcement officers who testified." The *Stewart* court went on to hold that the denial of an instruction suggesting that the testimony of a police officer not be given any more weight than the testimony of other witnesses was a proper ruling by the trial judge. *Id.* Accordingly, we find that the trial judge in the present case committed no error in refusing Clay's instruction. We therefore find Clay's argument to be without merit.

III. WHETHER OR NOT THE COURT ERRED IN ALLOWING HEARSAY EVIDENCE TO BE PRESENTED THROUGH THE TESTIMONY OF PROSECUTION'S ONLY FACT WITNESS AS A THIRD PARTY TO A TELEPHONE CONVERSATION PLACED OUT OF HER PRESENCE AND OVER WHICH SHE HAD NO CONTROL.

Clay argues that Detective Baggett should not have been allowed to testify to what she heard over the phone because she (1) did not place the call, (2) did not know to what location the call was being directed, and (3) had never heard the voice on the other end prior to the arrest of Clay. Clay relies on Mississippi Rules of Evidence 901(b)(5) and (6) to support her proposition that in order for the hearsay statements to be admissible, Detective Baggett would had to have been able to identify the voice on the telephone as being that of Brenda Faye Clay at the time the telephone call was made. Clay contends that Detective Baggett had never heard her voice prior to the phone call and therefore could not have positively identified the voice as being hers.

Clay is correct to the extent that evidence rule 901(b)(5) governs this issue. It is apparent, however, from Clay's argument that she misinterprets Rule 901(b)(5). Rule 901(b)(5) reads as follows:

Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based *upon hearing the voice at any time under circumstances connecting it with the alleged speaker.*

M.R.E. 901(b)(5) (emphasis added). Even more pertinent to this issue is the comment to Rule 901(b)(5), which reads as follows:

Voice Identification. This authentication method has been utilized in Mississippi practice. Familiarity may be acquired *either before or after the speaking which is the subject of the identification.*

M.R.E. 901(b)(5) advisory committee's note (emphasis added). The comment to Rule 901(b)(5) clearly indicates that familiarity with the speaking voice in question may be gained either before or after the speaking takes place. In the present case, Detective Baggett testified that she had spoken with Clay at least twenty times during the course of her investigation and unequivocally stated that the voice she recalls hearing on February 11, 1994, was that of Brenda Faye Clay. Accordingly, we find that Detective Baggett was able to sufficiently identify the voice she heard over the phone on February 11, 1994.

We therefore find, as the State correctly points out, that the statements made by Clay during the phone call with the confidential informant were not hearsay pursuant to Mississippi Rule of Evidence 801(d)(2)(A). Rule 801(d)(2)(A) provides, in pertinent part, as follows:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

(2) Admission by Party-Opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity . . . .

In the present case, the statements testified to by Detective Baggett were statements made by Clay in her individual capacity, and the statements were offered against the declarant, Clay. We therefore find Clay's argument to be without merit and find no error in the admission of Detective Baggett's testimony.

IV. WHETHER THE JURY VERDICT WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Clay challenges the weight of the evidence by reiterating her argument in the previous issue. Clay contends that there was absolutely no evidence connecting her to the contraband found in the house other than the inadmissible hearsay statements submitted by Detective Baggett. As we have previously discussed, the testimony submitted by Detective Baggett was admissible.

The Mississippi Supreme Court has held that "[t]he 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); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (stating that witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (stating that witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for

a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, the jury heard the witnesses and the evidence as presented by both the State and the defense. The State presented testimony from Detective Baggett that Clay had told the confidential informant that she was trying to set up drug buys for Mike. Detective Baggett testified that, acting on this information, she searched Clay's bedroom and found eight ounces of cocaine. Detective Baggett further testified that Clay told her that she wanted to cooperate with the police and help them catch the leader of the drug enterprise, Michael Jackson. Detective Baggett indicated that Clay then admitted that she knew that Jackson had brought the drugs into her house and that she was involved with Michael to the extent that she helped set up drug buys with potential customers. Clay testified in her own behalf and denied having ever spoken to a confidential informant about selling drugs. Clay also denied that she had admitted any involvement with Michael Jackson and his drug enterprise.

The testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Clay. The trial court did not abuse its discretion by refusing to grant Clay a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that to allow it to stand would be to promote an unconscionable injustice. The trial court properly denied Clay's motion for a new trial.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION ON COUNT I OF POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE AND SENTENCE OF TWENTY YEARS WITH TEN YEARS SUSPENDED, TEN YEARS TO SERVE, AND FIVE YEARS PROBATION; COUNT II OF CONSPIRACY TO DISTRIBUTE COCAINE AND SENTENCE OF TEN YEARS WITH FIVE YEARS SUSPENDED AND FIVE YEARS TO SERVE TO RUN CONSECUTIVELY TO SENTENCE IN COUNT I, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, AND SOUTHWICK, JJ., CONCUR. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

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KING, J., DISSENTING:

I respectfully dissent.

I am troubled by the majority holding that the defendant suffered no prejudice when the prosecutor asked Rose Magee, "Would you be surprised also if I told you there was some marijuana found in your house?"

The State offers two suggestions as to why this is not error.

First, it was an attempt at impeaching Magee through contradiction. When one reads the series of questions and answers, it is clear that this is not an effort at impeachment The series of question and answers is as follows:

Q. Mrs. Magee, you and your sister are real close; aren't you?

A. Yes, sir, we are.

Q. You love her very much?

A. Yes, sir, I do.

Q. You don't want to see her get in trouble for this; do you?

A. No, sir.

Q. Would you agree with me if I said that a lot of times loved ones have

a hard time believing that other loved are involved in things that they shouldn't be

involved in?

A. Would I believe it?

Q. Well, you know, sometimes loved ones let their love shade and block

the truth from them sometimes. Would you agree that sometimes loved ones have a

hard time seeing the truth because of the love? In other words, it is hard to see any-

thing bad in your own child; is that correct?

A. No. When a child is bad, it is bad.

Q. All right. Let me put it to you this way: Just assume that Brenda Faye told

the police officers that she was, in fact, involved in all of this with Michael and Cedric. Okay? You have got to answer out loud.

A. Okay. You said, "Okay." If she had told them that?

Q. Just assume that she has told them that. Okay?

A. Okay.

Q. Can you tell me whether or not that would surprise you at all?

A. No, because I don't think Brenda would do that. I know Brenda

wouldn't do that.

Q. So, it would surprise you if I told you that she had, in fact, confessed

to the police that she was helping these two individuals move some cocaine?

A. Yes. That would surprise me.

Q. All right. Did it also surprise you that Michael would be involved in this?

A. Yes, it would.

Q. So when Michael brought this cocaine into your house, you wouldn't have never thought that she would do something like that to you; is that correct?

A. Never would.

Q. And sometimes people that you care about do things that aren't right. Would you agree with that?

A. Yes, sir. You are right.

Q. You indicated that Brenda didn't receive any phone calls while you were at home on the 12th; is that correct?

A. Yes, sir. that's correct.

Q. And there was a period of time there during the evening when you, in fact, weren't there; is that correct?

A. Yes, sir.

Q. You can't testify to anything about that; can you?

A. Not when I wasn't there. No, sir.

Q. Mrs. Magee, you honestly don't know anything about this being in your house. Have even you seen this before?

A. No, sir. Only thing I saw was that in the bottom of the can when the policeman opened it up.

Q. You don't know anything about this being in your house; do you?

A. No, sir, I do not.

Q. Would you be surprised also if I told you there was some marijuana found in your house?

The clear reading of this series of questions and answers shows that, while it may have started as an effort to raise questions about the credibility of Mrs. Magee, it ended as what could only be seen as an effort to create a tactical advantage for the prosecutor, by the introduction of an unrelated and prejudicial subject.

It is important to note that Mrs. Magee, who was being questioned, was never charged with any offense, and Mrs. Clay was not indicted on marijuana related charges. Under these circumstances the only reasonable expectation is that this question poisons the atmosphere to the detriment of the defendant. Such action is clearly wrong. *Tobias v. State*, 472 So. 2d 398, 400 (Miss. 1985); *Mills v. State*, 304 So. 2d 651, 653 (Miss. 1974).

The State next says that the appellant has demonstrated no prejudice; therefore, this matter should be ignored. Matters affecting questions of fundamental fairness are not harmless. *Edlin v. State*, 533 So. 2d 403, 407 (Miss. 1988) (only requisite to cure proffer of other crimes is that the decision accord with fundamental fairness). Indeed some matters are so inappropriate that prejudice will be presumed.

Wilborn v. State, 394 So. 2d 1355, 1361 (Miss. 1981) (Patterson, C.J., dissenting). Such in my opinion is the case here.

That the prosecutor recognized the prejudice associated with his questions can also be established by looking again at a limited portion of this series of questions and answers.

Q. You have got a lot of children in this house; is that correct?

A. Yes.

Q. There are a lot of bad people roaming around on the streets; aren't there?

A. Not that I know of. Our neighborhood is an old neighborhood.

Q. Okay. Well, there are a lot of people roaming around in the City of Jackson.

You agree with that?

A. Well, yeah. They are everywhere.

Q. All right. You would, I assume, be very protective about people that you allow

into your home; is that correct?

A. Yes, sir.

Q. All right. And if you had at all suspected that this young man by the name of

Cedric Johnson had been involved in something like this, you wouldn't have let him into your house either; would you?

A. No, sir, I wouldn't.

The prosecutor recognized that the discussion of drugs is one of the hot button items in today's society, and that any discussion of drug selling is designed to push that button.

However, the discussion of drugs is not prohibited in this case. Rather, it is the promiscuous discussion of drugs which were unrelated to this action, and for which no charges were lodged, which is prohibited. *Killingsworth v. State*, 374 So. 2d 221, 223 (Miss. 1979).

For these reasons, I would reverse and remand.