

IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00119-COA

SHARON RIVERS A/K/A SHARON

RIVERS STENNIS 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. JAMES W. BACKSTOM

COURT FROM WHICH APPEALED: CIRCUIT COURT OF JACKSON COUNTY

ATTORNEY FOR APPELLANT: DAVID M. ISHEE

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: DALE HARKEY

NATURE OF THE CASE: CRIMINAL- FELONY

TRIAL COURT DISPOSITION: CONVICTED OF CONSPIRACY TO POSSESS AND DELIVER COCAINE

MANDATE ISSUED: 8/5/97

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Sharon Rivers was convicted by a Jackson County Circuit Court jury of conspiracy to possess and distribute cocaine. Rivers appeals, alleging that the State failed to prove possession with intent to distribute, that evidence of the value of crack cocaine was improperly admitted, that Rivers' prior statements should not have been introduced, that a juror should have been removed for cause, and that a mistrial should have been granted. Finding no reversible error, we affirm.

#### FACTS

Booker T. Carter was stopped for speeding on Interstate 10. A drug dog scratched at the car, indicating that there were drugs in the car. Carter consented to a search. Six kilos of powder cocaine were found in the car's second gas tank. He admitted that he was taking the cocaine to Gautier, Mississippi, where he was supposed to leave the car in the garage of Sharon Rivers. Cooperating with the police, Carter drove to Rivers' house and parked the car. Then he telephoned Rivers. With the police taping the conversation, Rivers asked Carter why he had not parked the car in the garage, since she wanted the car garaged so that the police who frequently patrolled the area would not see it. The police set up surveillance at Rivers' home. When she went outside of her house to the car, the police apprehended her.

After Rivers was read her rights, she stated that she would like to cooperate. She admitted that Carter was to leave the car in her garage. Another person was supposed to unload the car and then leave. Rivers admitted to an officer that she was to be paid \$600 for the use of her garage and said that she believed that the car had drugs in it.

At trial, Rivers denied ever speaking to the officer who claimed that she said she thought that drugs were in the car. She testified that, while she knew the car was being left there, she did not know why. She denied knowing that there were drugs in the car and also denied knowing that she had a hydraulic pump for lifting cars in her garage. After hearing the evidence, the jury convicted Rivers of conspiracy to possess and deliver cocaine.

#### DISCUSSION

### *I. Constructive Possession*

Rivers argues that the State did not prove actual or constructive possession. She cites *Cunningham v. State*, 583 So. 2d 960 (Miss. 1991), which states there must be evidence in addition to proximity to show that the defendant consciously exercised control over the contraband. The car in that case was never in the defendant's exclusive possession and she was only near or seated in the car.

Rivers was not charged with possession of cocaine, but with conspiracy to possess cocaine. The crime Rivers committed was forming an agreement to possess the cocaine, not actually possessing it. The crime of conspiracy is complete when two or more persons combine and agree to accomplish an unlawful purpose or to accomplish a lawful purpose unlawfully, which does not have to be an overt act in pursuance thereof. *Thomas v. State*, 591 So. 2d 837, 839 (Miss. 1991), citing Miss. Code Ann. § 97-1-1 (Supp. 1990). The agreement need not be formal or express, but may be inferred from the circumstances, particularly from declarations, acts and conduct of the alleged conspirators. *Id.* citing *Clayton v. State*, 582 So. 2d 1019, 1022 (Miss. 1991).

There was sufficient evidence to show Rivers' agreement to participate in the crime. She agreed to permit use of her garage. In the conversation with Carter on the phone, she was surprised that the car was not parked in the garage. She said that she wanted the car in the garage because the police often patrolled the area. She had a hydraulic jack in her garage. She admitted to the police that she suspected drugs were in the car and that she would be paid six hundred dollars for the use of her garage. Rivers' crime was complete when she entered into the agreement to possess the cocaine. We need not decide whether there was sufficient evidence for constructive possession. Taking the evidence in the light most favorable to the verdict and allowing disputes of fact to be resolved by the jury, there was substantial credible evidence of the crime charged.

### *II. Evidence of Value of Cocaine*

Rivers argues that the prosecution was allowed to introduce testimony through a Drug Enforcement Administration agent pertaining to the value of crack cocaine. Rivers argues that this cocaine was powdered, making the value of crack cocaine irrelevant.

First, the State introduced testimony as to the value of the powdered cocaine which was found in the gas tank. The value was approximately \$150,000. A police officer then explained how powdered cocaine is processed and sold on the streets as crack cocaine. The officer's testimony gave the jury a more complete picture of the conspiracy regarding the cocaine, which did not just involve delivery to Rivers' garage, but included subsequent distribution. It was proper for the jury to be given this evidence.

### *III. Statements Made By Defendant*

Detective Hall testified that Rivers made statements to him indicating that she knew there were drugs in the car. At the suppression hearing, Detective Hall testified that he gave Rivers the required warnings as to her rights. Also during the hearing, another officer testified that Rivers told him that she had been given warnings before speaking to the officer.

Rivers denied making any statements to Detective Hall, and argues that even if she did make the statements, they were inadmissible because she was never given her *Miranda* rights. She would have us find the statements inadmissible because they were not recorded, no waiver was signed, and no other officers were present when she allegedly made the statements.

The general rule is that for a confession to be admissible it must have been given voluntarily and not as a result of promises, threats or inducements. *Morgan v. State*, 681 So. 2d 82, 86 (Miss. 1996). The standard of review on voluntariness of confessions is this:

This is essentially a fact-finding function. So long as the court applies the correct legal standards, "we will not overturn a finding of fact made by a trial judge unless it be clearly erroneous." Where on conflicting evidence, the court makes such findings this Court generally must affirm.

*Morgan*, 681 So. 2d at 86, quoting *Alexander v. State*, 610 So. 2d 320, 326 (Miss. 1992).

In this case, the court heard the conflicting testimony of whether Rivers had made the statements to Detective Hall. There is no evidence in the record that the statements were a result of coercion, threats, or promises made to Rivers. The court found that the statements were voluntarily given after proper warnings. There was ample evidence to support the determination.

#### *IV. Motion To Strike Juror*

Rivers argues that the trial court erred in not granting her motion to strike a juror for cause. The juror admitted being a reserve officer for the Harrison County Sheriff's Department, one of the law enforcement agencies involved in this case. The juror was a pilot with Southern Company Services, but was also a commissioned deputy sheriff in Harrison County to fly a fixed-wing aircraft when the regular pilot was not available. The juror worked in the hanger where the Sheriff's helicopter was kept.

Rivers apparently exercised a peremptory challenge to remove this prospective juror.

The loss of peremptory challenges does not constitute a violation of the constitutional right to an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use his peremptory challenges to achieve that result does not mean that the defendant was denied his constitutional rights.

*Davis v. State*, 660 So. 2d 1228, 1243 (Miss. 1995), *cert. denied*, *Davis v. Mississippi*, 116 S.Ct. 1684 (1996), quoting *Mettetal v. State*, 602 So. 2d 864, 869 (Miss. 1992). A prerequisite to presentation of a claim of reversible error due to denial of a challenge for cause is a showing that the defendant exhausted all of his peremptory challenges and that the incompetent juror was forced to sit on the jury by the trial court's erroneous ruling. *Davis*, 660 So. 2d at 1243, citing *Chisolm v. State*, 529 So. 2d 635, 639 (Miss. 1988).

There is nothing in the record to show, nor does Rivers make the allegation, that her peremptory challenges had been exhausted or that the juror sat on the jury. The record does show the attorneys' arguments for and against the juror being struck for cause, but it does not show which jurors the parties peremptorily struck. After hearing the challenges for cause and the pretrial motions, the court stated that it would recess while the lawyers selected members of the jury. After the recess, the court noted that the jury was selected and seated. There is nothing further in the record regarding jury selection. This assignment of error is without merit.

#### *V. Motion For Mistrial*

Rivers argues that the trial court erred in not granting her a mistrial due to the following testimony. The prosecutor asked Lieutenant Bill Thickston whether the co-defendant, Booker Carter, was "familiar with 1405 Hillcrest," which was Rivers' address. Thickston answered that Carter had previously made a delivery to the same address. Rivers moved for a mistrial, which was denied. The court instructed the jury to disregard the testimony. Rivers argues that she was denied her right to a fair trial, that the question was asked for the sole purpose of bringing inadmissible evidence before the jury. She argues that the testimony was highly prejudicial and improper evidence of past crimes.

Evidence of past crimes not resulting in conviction is generally inadmissible, and a mistrial in such a case is proper unless it can be said with confidence that the inflammatory material had no harmful effect on the jury. *McNeal v. State*, 658 So. 2d 1345, 1348 (Miss. 1995). However, where an objection to such impermissible testimony is sustained and the jury is admonished by the trial court to disregard the statement, the refusal to grant a mistrial is proper. *McNeal*, 658 So. 2d at 1348.

We agree that the testimony was improper. The error was corrected when the court admonished the jury to ignore the comment. We must presume that jurors have followed the trial judge's instructions. *Id.*, citing *Sanders v. State*, 586 So. 2d 792, 797 (Miss. 1991). In this case, we find no evidence that the jury did not follow the directions of the court. Some jurors told the trial court that they could not remember what had been said.

Rivers was not denied a fair trial because of the improper testimony.

**THE JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY OF CONVICTION OF CONSPIRACY TO POSSESS AND DISTRIBUTE A CONTROLLED SUBSTANCE AND A TEN YEAR SUSPENDED SENTENCE WITH SIX MONTHS TO SERVE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND A SUSPENDED \$500 FINE, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

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