IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00862 COA

ROBIN LYNN DUVALL 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 CLAY VANDERBURG

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT T. ALLRED III

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: CRIMINAL: KIDNAPPING

TRIAL COURT DISPOSITION: CT I CONSPIRACY: CT II KIDNAPPING: CT I SENTENCED TO SERVE A TERM OF 5 YRS; CT II SENTENCED TO SERVE 25 YRS; CT II TO RUN CONCURRENTLY WITH CT I; CT I & CT II SHALL RUN CONSECUTIVELY TO U.S. DISTRICT COURT #2:94CR109-S-A

MANDATE ISSUED: 8/19/97

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

PAYNE, J., FOR THE COURT:

This is an appeal from the Circuit Court of Panola County wherein Robin Lynn Duvall was convicted of conspiracy and kidnapping. The trial court sentenced Duvall to five years for conspiracy and twenty-five years for kidnapping to be served concurrently. Feeling aggrieved, Duvall appeals

arguing double jeopardy, improper testimony was admitted against her, and an improper instruction was given to the jury. Finding no error, we affirm.

STATEMENT OF THE FACTS

On August 7, 1994, Robin Lynn Duvall assisted her boyfriend, Kelly Wayne Drott, in escaping from a prison in New Orleans, Louisiana, where Drott had been serving time for manslaughter. The two had become involved several months prior to the escape. Duvall provided a shotgun, duct tape, and a station wagon. When their vehicle broke down, Duvall and Drott stole a white vehicle and a .357 magnum pistol from a security guard. They bound the guard with the duct tape and beat him with the shotgun. The two traveled to Batesville, Mississippi and stopped at a convenience store. Also at the same convenience store was Lindsey Michelle Dye who had stopped at the convenience store to purchase a soft drink. Duvall and Drott approached Dye under the premise of needing directions. After Dye gave the pair directions, Drott pulled a pistol on Dye and forced her inside Dye's car. At the same time, Duvall returned to the stolen white vehicle which belonged to the security guard. Both automobiles departed from the scene. During the drive, Drott made several statements to Dye. When the two vehicles stopped at a cove, Duvall took steps indicating that she intended to tie Dye up with the duct tape, but Drott told Duvall "not yet." Duvall then hid the white car behind some bushes. As Duvall exited the car, Drott shot her in the face. Drott then left with Dye in Dye's car. Duvall managed to get assistance. Drott and Dye were later involved in a high-speed chase in Arkansas at which time Dye was rescued.

At trial, Dye was allowed to testify regarding alleged statements made by Drott during the time they

were in Dye's vehicle together. These statements included how Drott and Duvall had discussed how to get a hostage and another vehicle; how Duvall had made a mistake by asking Dye

for directions before Dye had reentered her vehicle; how Drott had escaped from prison several days before; and that Duvall and Drott had been together since the escape.

Sheriff David Bryan of Panola County also testified at trial. The sheriff testified to, among other things, the processing of the white vehicle at the Mississippi Highway Patrol Headquarters in Batesville. Sheriff Bryan testified that he tracked the ownership of the white vehicle to Whitfield Banks of Louisiana. Sheriff Bryan also testified that the vehicle had a Lincoln County, Mississippi, license plate which had been stolen from a vehicle registered in Lincoln County, Mississippi.

Drott was dead at the time of Duvall's trial.

DISCUSSION

1. DOUBLE JEOPARDY

Duvall contends that she was faced with indictments concerning the same matters in both state and federal courts. The salient issue presented here is whether Duvall was exposed to double jeopardy.

The State propounds that it is evident that the crimes prosecuted by federal authority and by the State were for different offenses, thus there was no double jeopardy. Alternatively, the State asserts that there is no violation of double jeopardy because the United States and Mississippi are different sovereigns.

We agree with the State as the law is quite clear:

Where the same transaction constitutes a crime under the laws of the United States and also under the laws of the state, accused may be punished for both crimes, and an acquittal or a conviction in the court of either is no bar to an indictment in the other, in the absence of statutory provisions to the contrary.

Bankston v. State, 236 So. 2d 757, 760 (Miss. 1970) (citations omitted). *Bankston* involved an appellant who had previously been convicted in federal court on a federal offense of robbing a bank.

The State of Mississippi then sought and obtained a conviction for the state crime of armed robbery. "Both convictions involved and were based upon the robbery of the Citizens National Bank of Plain by Bankston on September 11, 1968, this robbery having been a crime against the United States and the State of Mississippi." *Bankston*, 236 So. 2d at 757. Just as in the present case, the appellant in *Bankston* argued double jeopardy contrary to both the Mississippi Constitution and the United States Constitution. The Mississippi Supreme Court recognized:

Many decisions of the United States Supreme Court sustain the proposition that trial or conviction or acquittal upon a charge of violating a state criminal law does not bar prosecution of the offender

upon a charge of violating the criminal laws of the United States although the offense, in each case, is constituted by the same lawful act or conduct or is based upon the same transaction.

Bankston, 236 So. 2d at 758. Accordingly, we find Duvall's double jeopardy argument unpersuasive.

2. HEARSAY

Duvall argues that Sheriff Bryan should not have been allowed to testify about the stolen license plate which was found on the white automobile driven by Duvall. Duvall argues that any information the sheriff had was hearsay and consisted of alleged other crimes--the theft of the license plate.

The State maintains that the issue of the stolen license plate was not in dispute because the evidence established that the vehicle driven by Duvall was a Louisiana car which had a Mississippi license plate upon its recovery. The State correctly points out that the sheriff did not testify that Duvall stole the license plate or that she knew that Drott had stolen it. The State also argues that the sheriff learned of the facts concerning the stolen tag through official channels. Official information of this sort is presumed to be authentic. *Fuqua v. State*, 246 Miss. 191, 201, 145 So. 2d 152 (1962). Alternatively, the State submits that the sheriff's testimony was admissible under M.R.E. 803(6), this being the exception for records of a regularly conducted activity.

We agree that the hearsay nature of the sheriff's testimony is admissible under the business records exception to the hearsay rule. *See* M.R.E. 803(6). Additionally, we note that little, if any, prejudice could have resulted from the admission of this testimony as the evidence clearly established that the white vehicle was stolen from the security guard in Louisiana. Evidence that the license plate was also stolen, albeit from a different location, was of little consequence. We also note that there was no testimony that Duvall was involved in the theft of the license plate.

As to Duvall's contention that the sheriff's testimony included improper evidence of other crimes, the State contends that the theft of the license plate was part of the series of criminal events which commenced with the escape from prison and culminated with the kidnaping of Dye. Under M.R.E. 404 (b), this evidence should be admitted to prove a plan.

The Mississippi Supreme Court has recognized:

The general rule is that in a criminal prosecution evidence which shows or tends to show that accused is guilty of the commission of other offenses at other times is not admissible, unless the other offenses are reasonably connected with that for which he is on trial. There is a substantial number of these exceptions. Evidence of other crimes is admissible to prove identity of the defendant, scienter or guilty or criminal knowledge, criminal intent or purpose, motive, a plan or system of criminal action where a continuing offense is charged, or where other crimes form a part of the res gestae.

Engbrecht v. State, 268 So. 2d 507, 510 (Miss. 1972) (citing *Lee v. State*, 244 Miss. 813, 146 So. 2d 736 (1962); 29 Am. Jur. 2d *Evidence* §§ 320, 321 (1967)). We find no error in the admission of the testimony regarding the stolen license plate. Any inference that Duvall was involved with the theft of the license plate is admissible as part of the plan she had with Drott to conceal their identity from law enforcement officials.

Duvall also contends that the victim, Dye, should not have been permitted to testify regarding statements made by Drott, Duvall's co-conspirator. Duvall was not present when the statements were made. Duvall argues Dye's testimony was improperly admitted under MRE 801(d)(2)(e), admission of a party opponent. The State correctly points out that the statements were made by Drott in the automobile while Dye was still the victim of kidnapping, and the conspiracy of Duvall and Drott was ongoing. The Mississippi Supreme Court has held that the statements of co-conspirators are admissible under M.R.E. 801(d)(2)(e) after the central event as long as the conspiratorial scheme is still in existence. *Nixon v. State*, 533 So. 2d 1078, 1092 (Miss. 1987). In the present case, the kidnapping was still in progress and occurred in furtherance of the conspiracy. We find no error in the trial court's admission of the statements made by Duvall's co-conspirator.

3. JURY INSTRUCTIONS

Duvall cites defective jury instructions. Duvall contends that the instructions are misleading, and that jury instruction 11 contradicts jury instruction 13. Jury instruction 11 required the jurors to find that the State has proved every element of the crime of kidnapping beyond a reasonable doubt. Instruction 13 reads as follows:

The Court instructs the jury that each person present at the time, and consenting to and encouraging the commission of a crime, and knowingly, willfully and feloniously doing any act which is an element of the crime, or immediately connected with it or leading to its commission, is as much a principal as if he had, with his own hand, committed the whole offense; and if you believe from the evidence, beyond a reasonable doubt, that Robin Lynn Duvall, was present at the time of kidnap, and consented to and encouraged the commission of the crime of kidnap, and did knowingly, willfully, unlawfully and feloniously do any act which is an element of the crime of kidnap or immediately connected with the kidnap, or leading to its commission, then you shall find Robin Lynn Duvall guilty of the crime of kidnap.

The State counters this argument by stating that the instructions clearly articulate the proper language needed to apprize the jury of what is needed to convict Duvall.

Duvall cites *Hornburger v. State*, 650 So. 2d 510, 514-15 (Miss. 1995) and makes a similar argument as the appellant in that case. In *Hornburger*, the appellant contended that an instruction very similar to instruction 13 cited above conflicted with another instruction which charged the jury that the State must prove every element of the crime charged, also similar to instruction 11 in the present case.[(1)] Hornburger argued that the instructions did not adequately apprise the jury of the law. *Hornburger*, 650 So. 2d at 514-15. Like Duvall, Hornburger asserted that one instruction tells the jury that if they found he had committed any act which was an element of the crime or led to its commission, they could find him guilty as charged, without first finding that he was present, consenting and encouraged the commission of the crime (i.e., an aider and abettor). *Id.* Hornburger argued that the instructions were in conflict and gave the jury two choices to find him guilty by either instruction. *Id.*

In *Hornburger*, the Mississippi Supreme Court rejected the State's argument that the court had previously approved instructions virtually identical to the one in Hornburger and found the instruction to be error. However, the court found persuasive the rule that all instructions must be read together, and the court determined that when read together, the instructions required that the State prove each element of the crime. *Hornburger*, 650 So. 2d at 514-15. In affirming, the court

stated, "when read together, these instructions adequately informed the jury of the law making the improper instruction a harmless error . . . and [this instruction] does not warrant a reversal." *Hornburger*, 650 So. 2d at 515 (citing *Gray v. State*, 487 So. 2d 1304, 1308 (Miss.1986) (stating that when instructions are read together, no error can be predicated on failure of one instruction to set out properly a necessary element of the crime, where the element was included correctly in other instructions)).

In keeping with the supreme court's holding in *Hornburger*, we find instruction 13 to be harmless error, and therefore, we find no basis for reversal.

THE JUDGMENT OF THE CIRCUIT COURT OF PANOLA COUNTY OF CONVICTION OF COUNT I OF CONSPIRACY AND SENTENCE OF FIVE YEARS; COUNT II OF KIDNAPPING AND SENTENCE OF TWENTY-FIVE YEARS, WITH SENTENCE IN COUNT II TO RUN CONCURRENTLY TO SENTENCE IN COUNT I, AND SENTENCES IN COUNTS I AND II TO RUN CONSECUTIVELY TO SENTENCE IN U.S. DISTRICT COURT #2:94CR109-S-A, ALL TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO PANOLA COUNTY.

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

1. The charge in *Hornburger* was for burglary, here the charge was kidnapping. *Hornburger*, 650 So. 2d at 510.