IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00585 COA

JERRY BRIDGES A/K/A JERRY MICHAEL BRIDGES 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. ROBERT G. EVANS

COURT FROM WHICH APPEALED: SIMPSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: L. WESLEY BROADHEAD

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: DEWITT L. FORTENBERRY, JR.

NATURE OF THE CASE: BURGLARY OF AN OCCUPIED DWELLING

TRIAL COURT DISPOSITION: GUILTY: SENTENCED TO SERVE A TERM OF 15 YRS IN THE MDOC AS A HABITUAL OFFENDER & THAT THIS SENTENCE BE SERVED WITHOUT PAROLE

MANDATE ISSUED: 8/19/97

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

DIAZ, J., FOR THE COURT:

Jerry Bridges (Bridges), the Appellant was tried and convicted in the Simpson County Circuit Court of burglary. He was sentenced as an habitual offender to serve fifteen (15) years in the Mississippi Department of Corrections without the possibility of parole. Aggrieved from this judgment, Bridges appeals to this Court asserting the following issues: (1) that the lower court erred in denying his motions to suppress; and (2) that the lower court erred in denying his motion for new trial or in the alternative his motion for JNOV.

FACTS

On August 28, 1994, Etta Ree Floyd (Floyd) was awakened in the middle of the night by Bridges, who was holding a pillow over her face. When Floyd reached out and felt Bridges' arm, she asked him what he wanted; he replied that he wanted money. When Floyd told him that she only had a few dollars cash on her, he told her to write a check for one thousand dollars. Bridges covered Floyd's face with a bed sheet and led her to her purse. Bridges told Floyd to make the check out to Jeffery Holbrook. Floyd testified that she could see Bridges' feet and the sandals that he was wearing from underneath the blanket.

After Bridges left with the check, Floyd called her son, and then called the sheriff. Deputy Johnny Abernathy arrived at Floyd's house and gathered information from her. Apparently, a timber crew had been working around her residence, and Bridges, who was part of that crew, had approached Floyd a few weeks before the incident and asked her about the work she was doing around her house. Footprints were found underneath an open window of Floyd's house where the screen was missing.

Officers went to Bridges' house where they saw shoes matching the description of the ones Floyd saw her intruder wearing. They also found a window screen that matched Floyd's windows. The officers read Bridges his *Miranda* rights, and he admitted to going into "the lady's house." He admitted to receiving a check from Floyd, but said that he burned it. The officers allowed Bridges to get dressed, but while he was in a back room, he attempted to jump out of a back window to escape. He was apprehended and brought to the county jail. Bridges' defense is that Floyd's window was already open when he climbed through it.

DISCUSSION

MOTIONS TO SUPPRESS

A. Handcuffs

Bridges argues that the lower court erred in allowing the jury to see the videotaped confession of him with handcuffs. Bridges argues that allowing the jury to see the videotape was effectively the same as if he had been in the courtroom with handcuffs. We agree.

This issue presented by the defendant is troubling in that it affects a constitutional right of the defendant. The leading Mississippi cases concerning a defendant being seen in shackles by the jury all deal with brief and inadvertent instances where the jury or some of its members unintentionally observes the defendant. Here, the prosecutors intentionally placed the defendant before the jury in shackles. The State planned for and prepared a trial strategy and knew exactly what the jury could see. What is even more troubling is that this evidence could have been presented to the jury by audio tape or a transcript thereby avoiding any infringement of the defendant's constitutional rights. The entire incident will be strictly scrutinized in this analysis.

Requiring a defendant to wear handcuffs before the jury at trial infringes on his constitutional presumption of innocence. *Dennis v. State*, 925 S.W.2d 32, 41 (Tex. Ct. App. 1995). Our state supreme court has stated that a defendant shall be tried free from all shackles or handcuffs when in the presence of a jury, unless in exceptional cases where there is evident danger of his escape or in order to protect others from an attack by the prisoner. *Davenport v. State*, 662 So. 2d 629, 633 (Miss. 1995).

Finding no Mississippi case directly on point, we turn to cases from our sister states. The present case is factually similar to *Lucas v. State*. *Lucas*, 791 S.W.2d 35, 54 (Tex. Ct. App. 1989)(judgment vacated and remanded on different grounds). In that case, the appellant argued that the trial court erred in admitting a videotaped confession that he had made because he appeared on film before the jury in handcuffs. *Id.* The court considered the general rule regarding handcuffs along with its exceptions and "declined to order reversal even in death penalty cases, on the ground that the accused were brought into the presence of the jury handcuffed, in the absence of showing injury or prejudice to the accused." *Lucas*, 791 S.W.2d at 54. The court went further to state that, although there was a distinction between physically appearing at trial in restraints and merely appearing in a videotape, there is essentially no difference pragmatically speaking if the underlying rationale regarding restraining the defendant is to stand. Therefore, unless the record shows where there is evident danger of the defendant's escape or as a necessary protective measure for others from an attack by the prisoner, it was error to admit the videotape.

However, finding error does not necessarily mandate a reversal unless we find injury or prejudice. We are not required to reverse a case based solely upon the showing of an error in the evidentiary ruling. *Newsom v. State*, 629 So. 2d 611, 614 (Miss. 1993). A denial of a substantial right of the defendant must be affected by the ruling; in the case at bar, it is Bridges' right to a fair trial. See *Id.* Because this is a constitutional right, reversal is required unless based on the entire record, the error was harmless beyond a reasonable doubt. *Id.* In the present case, the jury was given several presumption of innocence instructions, and we presume they followed those instructions. We find the admission of the videotape was error; however, based on the whole record, as well as the overwhelming evidence, we do not find the requisite injury or prejudice to Bridges, and the error was harmless beyond a

reasonable doubt.

B. Confession

Bridges also argues that the lower court erred in admitting his confession that he made to the police. Bridges claims that his confession was not given voluntarily because he was placed in a downstairs office at the police station where the only people he saw before he gave his statement were armed police officers.

The standard used for determining whether a confession is voluntary is whether, taking into consideration the totality of the circumstances, the statement is the product of the accused's free and rational choice. *Herring v. State*, 691 So. 2d 948, 956 (Miss. 1997). In determining whether a confession is freely and voluntarily given, the circuit court judge sits as a trier of fact. *Id.* We will not reverse the decision unless the circuit judge is manifestly wrong. *Id.*

In the present case, Officer Abernathy of the Simpson County Sheriff's Department testified that he was present when Officer Purser read Bridges his *Miranda* rights both at his house and again at the police station. At the station, the warnings were read to him and read again by Bridges himself before he signed the form. Officer Abernathy testified that Bridges did not appear to be under the influence of any drugs or alcohol when he signed the waiver. He was not threatened in any manner, nor was he promised any hopes of reward for signing the form. Bridges was kept in handcuffs at the police station because he posed an escape risk because he tried to escape through a back window when the officers arrived at his house. The evidence supports the finding that Bridges' statement to the police was voluntary. We find no merit to this issue.

II. J.N.O.V./NEW TRIAL

Bridges argues that the lower court erred in overruling his motion for a new trial or his motion for JNOV because he contends that verdict was against the overwhelming weight of the evidence. When we review the sufficiency of the evidence, we look to all of the evidence before the jurors to determine whether or not a reasonable, hypothetical juror could find beyond a reasonable doubt, that the defendant is guilty. *Morgan v. State*, 681 So. 2d 82, 93 (Miss. 1996). The evidence which supports the verdict is accepted as true, and the State is given the benefit of all reasonable inferences flowing from that evidence. *Id.* We will not reverse a trial court's denial of a motion for new trial unless we are convinced that the verdict is so contrary to the weight of the evidence that, if it is allowed to stand, it would sanction an unconscionable injustice. *Id.*

In the case before us today, the evidence shows that Bridges pried open the screen and climbed through the window into Floyd's house. Bridges' defense was that he climbed through an open window. Thus, there was no breaking. It is well settled that the jury is the final arbiter of a witness's credibility. *Id.* Here, the jury apparently chose to disbelieve Bridges' account of the story. We find no merit to this issue. Accordingly, we affirm the judgment of the lower court.

THE JUDGMENT OF CONVICTION IN THE SIMPSON COUNTY CIRCUIT COURT OF BURGLARY OF AN OCCUPIED DWELLING AND SENTENCE OF FIFTEEN (15) YEARS WITHOUT THE POSSIBILITY OF PAROLE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS AN HABITUAL OFFENDER IS AFFIRMED.

COSTS OF THIS APPEAL ARE TAXED TO SIMPSON COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY KING, J.

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BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY KING, J.