

IN THE COURT OF APPEALS 7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01008 COA

ALLAN HOWARD a/k/a "AL"

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. KENNETH L. THOMAS

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

STEPHEN A. BRANDON

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: CARLA CLARK

GLENN ROSSI

NATURE OF THE CASE: CRIMINAL--FOUR COUNT INDICTMENT FOR AGGRAVATED ASSAULT (THREE COUNTS) AND ILLEGAL POSSESSION OF FIREARM AS A CONVICT OF FELONY

TRIAL COURT DISPOSITION: DIRECTED VERDICT OF ACQUITTAL ON COUNT II FOR AGGRAVATED ASSAULT, BUT JURY VERDICTS OF GUILTY OF REMAINING COUNTS I AND III FOR AGGRAVATED ASSAULT AND COUNT IV FOR ILLEGAL POSSESSION OF A FIREARM AS A CONVICT OF FELONY -- TRIAL COURT SENTENCED APPELLANT TO SERVE A TERM OF FIFTEEN YEARS ON COUNT I FOR AGGRAVATED ASSAULT TO RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED, FIFTEEN YEARS ON COUNT III FOR AGGRAVATED ASSAULT TO RUN CONCURRENTLY WITH THE SENTENCE IMPOSED FOR COUNT I, AND THREE YEARS FOR COUNT IV FOR ILLEGAL POSSESSION OF A FIREARM AS A CONVICT OF FELONY TO RUN CONSECUTIVELY WITH THE SENTENCES FOR COUNTS I AND III, ALL IN AN INSTITUTION UNDER THE SUPERVISION AND CONTROL OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

MANDATE ISSUED: 8/19/97

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

COLEMAN, J., FOR THE COURT:

A grand jury in Coahoma County returned a four-count indictment against the Appellant, Allan Howard. The first three counts were for aggravated assault, and the fourth count was for the illegal possession of a firearm as a convict of felony. The trial court directed a verdict of acquittal of Howard on Count II of the indictment for aggravated assault after the State rested its case. Howard's defense was an alibi. A jury returned guilty verdicts against Howard on the remaining two counts of aggravated assault and the count of illegal possession of a firearm as a convict of felony. The trial court then entered separate sentencing judgments on each count by which it sentenced Howard to serve fifteen years on Count I for aggravated assault to run consecutively to any and all sentences previously imposed, fifteen years on Count III for aggravated assault to run concurrently with the sentence imposed for Count I, and three years on Count IV for illegal possession of a firearm as a convict of felony to run consecutively with the sentences imposed for Counts I and III. All three sentences were to be served in an institution under the supervision and control of the Mississippi Department of Corrections. Howard has appealed from the judgments of sentencing to raise but one issue, which is "[w]hether the verdict[s] rendered by the jury were against the overwhelming weight of the evidence." We affirm.

I. Facts

Around 9:00 o'clock on the evening of Sunday, June 4, 1995, Chauncy Horton, Robert Thomas, and Lucky Hollins drove up in a maroon Cherokee two-door truck to one of the four gas pumps situated in front of the Double Quick convenience store located on U.S. Highway No. 61 in Clarksdale. Horton noticed a white, four-door car parked near another of the four gas pumps and recognized Howard and Zachary Stewart, Howard's cousin, standing near it. While Robert Thomas put gasoline in the truck's tank, Chauncy Horton, then seventeen years of age, went in to the Double Quick to make a purchase and to pay for the gas that Thomas was putting into the tank of the truck. As Horton approached the counter inside the Double Quick to pay for the gas, a stranger bumped Horton's shoulder with his shoulder and called him "a poor (epithet deleted)." Horton responded by laughing at him. At the counter inside the Double Quick, Horton paid for the gas which his friend Thomas had pumped, and exited the Double Quick to rejoin his two friends in the Cherokee truck.

The stranger followed Horton out of the Double Quick and took a swing at Horton. Horton, by now devoid of his sense of humor, returned the lick, and the two began to fight near where both the Cherokee truck and the white, four-door car were parked at the gasoline pumps. According to Horton's version of the fracas, he was on top of the stranger when Howard "just started shooting." Thomas, Hollins, and Horton started to run. As Horton began to run he looked back at Howard and saw him shooting with the gun pointed at him. Then a bullet from Howard's pistol struck Robert Thomas in the back. Horton ran into a ditch, and Lucky Hollins ran with and beyond him into a cotton field. Once he made the ditch, Horton looked up and back and saw the white, four-door car, which was later identified as a Pontiac Parisienne, driving North on Highway 61 toward Jonestown.

After the threesome were reunited following the shooting, Thomas told Horton that he, Thomas, had been shot in the back. A friend of Thomas' mother drove him to the hospital in Clarksdale before an ambulance had time to arrive at the Double Quick. Horton escaped unscathed, although Lucky Hollins, while holding his "behind," told Horton that a bullet had grazed him in that general area of his anatomy.

Fernando Harris, a patrolman with the Clarksdale Police Department, was driving south on Highway No. 61 north of the Double Quick at approximately 9:15 p.m. when he spotted a white, four-door car, which he thought was a Buick, speeding north on Highway No. 61 toward Jonestown. His radar machine indicated that it was traveling at a speed of sixty six miles per hour in a forty-miles-per-hour speed zone, but Harris did not turn around to pursue it because, when he looked into his rear-view mirror, he saw that traffic to his rear would prevent his turning his police cruiser around on the highway to pursue the malefactors. Instead, he continued driving south, when hardly five or ten seconds later, he received a call about the incident which had just occurred in front of the Double Quick. When patrolman Harris received the call, he had just passed the Double Quick, but he was able "to just turn into the parking lot [of the Double Quick]." Several bystanders at the Double Quick told Harris that there had been a shooting at the Double Quick and that a victim of the shooting had been taken to the hospital emergency room by a private vehicle.

II. Trial

As we related, the grand jury returned a four-count indictment against Howard. Count I of the indictment charged that Howard caused bodily injury to Robert Thomas by shooting him in the back with a deadly weapon. Count II of the indictment charged that Howard caused bodily injury to Lucky Hollins by shooting him in the buttock with a deadly weapon. Count III of the indictment charged that Howard "did . . . attempt to cause bodily injury to Chauncy Horton . . . by shooting at him" with a deadly weapon. Count IV of the indictment charged that Howard "possess[ed] a firearm, after he . . . had previously been convicted of the felony of aggravated assault . . . in the Circuit Court of Coahoma County . . . on January 27, 1995."

As its witnesses the State called Chauncy Horton, Robert Thomas, Patrolman Fernando Harris, Sergeant Danny Hill, and Sergeant Billy Joe Haley. All three officers were employed by the Clarksdale Police Department. Their testimony established the facts which we have recited in this opinion. The State also introduced into evidence without objection from Howard a certified copy of the indictment and judgment of Howard's conviction of the felony of aggravated assault to establish the basis for Count IV of the indictment.

To establish his alibi, Howard's first witness was Andrea Scott, a resident of Jonestown. We summarize Scott's testimony as follows: Howard had been living with her and her children, of whom Howard was not the father, for about six months in her trailer located on Jones Avenue in Jonestown. Howard had spent the night of Saturday, June 3, with her. About 10:00 o'clock the following morning, Sunday, June 4, Zachary Lindsay, Howard's cousin, came to the door of the bedroom in which they had slept the night before, and asked Howard if he, Lindsay, could borrow his white Pontiac Parisienne automobile until tomorrow. Howard agreed and gave Lindsay the keys to his car. Lindsay left the bedroom, after which Scott heard the Pontiac drive away. Scott did not see either the Pontiac or Lindsay any more that day.

Howard spent the entire day of Sunday, June 4, with Andrea Scott. They remained at her trailer until around 9:00 o'clock that night, when the two of them walked to the home of Scott's sister, Mattie Matthews, in Jonestown. Officers located and arrested Howard at Matthews' home later that evening.

Zachary Lindsay was Howard's next witness. Lindsay testified that he borrowed Howard's Pontiac about 10:00 a.m. that Sunday morning and kept it all that day and that night. That night, Lindsay drove Howard's Pontiac to the home of Dan Adams, which was located in Lane Acres in Clarksdale. Dan Adams was Lindsay's grandfather. Next, Howard testified to corroborate the testimony of Scott and Lindsay. Howard denied being at the Double Quick when the shooting which spawned the four-count indictment occurred. Howard also testified about his encounter with Robert Thomas a year earlier over a girl, whose name was Felicia Hartman. According to Howard, he was at Hartman's house when Thomas came to her house and demanded that she let him in. She refused admittance to Thomas and asked Howard to remain. However, Howard testified that he left Hartman's house anyway and that when he went outside Hartman's house, Thomas made unspecified threats against him. Howard further testified that he had seen Thomas in jail two weeks before his trial began. Then Thomas told him that he was "going to get [Howard] throwed [sic] away."

As rebuttal, the State recalled Robert Thomas who testified that he did not know any woman named Felicia Hartman. The State next called Otha Hunter, Jr., an employee of the Coahoma County Sheriff's Department, who testified about his finding Howard standing with his girlfriend, Andrea

Scott, outside Ms. Annie B. Ewing's house in Jonestown. After Deputy Hunter took Howard into custody, he returned with Howard to Lane Acres, where they found Howard's white Pontiac parked outside Dan Adams' house. Hunter stated that the Pontiac was "still warm." Deputy Hunter further testified that Dan Adams came out of his house while Howard and he were there. The State rested on rebuttal, and the jury found Howard guilty as we have explained.

III. Review and resolution of Howard's one issue

Howard's issue is simply "[w]hether the verdict rendered by the jury was against the overwhelming weight of the evidence?" In his brief, Howard argues that "[b]ased upon the testimonies of Howard, Scott, and Lindsay, no rational trier of fact could have found proof of guilt beyond a reasonable doubt." He concludes that he "clearly established an alibi, inasmuch as he proved that he was in Jonestown, Mississippi, with his girlfriend, and that he was not in possession of his car -- which cosmetically resembled that in which the assailant was an occupant -- at the time of the commission of the crimes set forth in the indictment." Howard's argument is but an invitation to this appellate court to substitute its judgment for that of the jury, but this Court declines to accept Howard's invitation.

Motions for a new trial challenge the weight of the evidence and "[implicate] the trial court's sound discretion." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). New trial decisions rest within the discretion of the trial court. *Id.* A new trial motion should only be granted when the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987). This Court, on appeal, will reverse and order a new trial only upon a determination that the trial court abused its discretion, accepting as true all evidence favorable to the State. *McClain* at 781.

The Mississippi Supreme Court established long ago that "[t]he jury is the *sole judge* of the weight and credibility of the evidence." *Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (citations omitted). It is the responsibility of the jury to examine all the evidence and resolve any conflicts in reaching its verdict. "[A]n alibi simply raises an issue of fact to be resolved by the jury." *Id.* at 1191 (citations omitted). Contrary to Howard's argument, "[I]t is well settled the jury is under no obligation to accept an alibi defense asserted by the accused and his witnesses." *Id.* (citations omitted). Finally, "It is enough to say that the jury, *and not the reviewing court*, judges the credibility of the witnesses as well as the weight and worth of their conflicting testimony." *Id.* at 1192 (emphasis added) (citation omitted).

In the case *sub judice*, the State's first witness, Chauncy Horton, testified that he had known Allan Howard for several years as the cousin of Zachary Lindsay, in whose home he visited when he was growing up. Horton testified that he recognized Howard standing beside the white, four-door automobile, which was also parked beside one of the gas pumps at the Double Quick convenience store when Robert Thomas, Lucky Hollins, and he arrived there to get gas for their Jeep Cherokee. Robert Thomas identified Howard as his assailant from a photographic line-up of six pictures of dark-complected African American males which Clarksdale Police Sergeant Billy Joe Haley exhibited to Thomas while Thomas lay on his back in his hospital room the night he was shot. The evidence that Howard owned a white, four-door Pontiac Parisienne, which Coahoma County Deputy Sheriff Otha Hunter, Jr. described as "warm," when he located it in Howard's grandfather's yard, was consistent

with the description of the car at which Howard was standing when he began firing at Hollins, Howard, and Thomas.

From our review of the evidence and the opinion of the Mississippi Supreme Court that a jury is under no obligation to accept an alibi defense asserted by the accused and his witnesses, we can only conclude that the trial judge did not abuse his discretion when he denied Howard's motion for a new trial. *See Burrell*, 613 So. 2d at 1192. Neither does this Court find that to allow the jury's three verdicts of Howard's guilt of aggravated assault and illegal possession of a firearm as a convict of felony to stand "would be to sanction an unconscionable injustice." *See Wetz*, 503 So. 2d at 812. Thus, we reject Howard's argument that the jury's verdicts of his guilt of the three crimes for which the grand jury had indicted him were against the overwhelming weight of the evidence; and we affirm the trial court's sentencing judgments for Counts I, III, and IV of the indictment.

THE COAHOMA COUNTY CIRCUIT COURT'S JUDGMENTS AND ITS SENTENCES OF THE APPELLANT TO SERVE FIFTEEN YEARS ON COUNT I FOR AGGRAVATED ASSAULT, WHICH IS TO RUN CONSECUTIVELY TO ANY AND ALL SENTENCES

PREVIOUSLY IMPOSED, FIFTEEN YEARS ON COUNT III FOR AGGRAVATED ASSAULT, WHICH IS TO RUN CONCURRENTLY WITH THE SENTENCE IMPOSED ON COUNT I, AND THREE YEARS ON COUNT IV FOR POSSESSION OF A FIREARM BY A CONVICTED FELON, WHICH IS TO RUN CONSECUTIVELY WITH THE SENTENCES IMPOSED FOR BOTH COUNT I AND COUNT III, ALL OF WHICH SENTENCES ARE TO BE SERVED IN AN INSTITUTION UNDER THE SUPERVISION AND CONTROL OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, ARE AFFIRMED. THE APPELLANT IS ALSO ORDERED TO MAKE FULL RESTITUTION TO THE VICTIMS IN COUNT I AND

COUNT III. COSTS OF THIS APPEAL ARE ASSESSED TO COAHOMA COUNTY.

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