IN THE COURT OF APPEALS

8/26/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00968 COA

EARNEST PERRYMAN, A/K/A "POOKIE" 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 LEVENE THOMAS

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: AZKI SHAH

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTED OF AGGRAVATED ASSAULT AND SENTENCED TO 15 YEARS IN CUSTODY OF MDOC MANDATE ISSUED: 9/16/97

BEFORE THOMAS, P.J., HERRING, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Earnest Perryman appeals his conviction of aggravated assault, raising the following issues as error:

I. WHETHER THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON AIDING AND ABETTING.

II. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT OF AGGRAVATED ASSAULT.

III. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING DANNY HILL TO TESTIFY AS TO SPENT CASINGS FOUND AT THE ALLEGED SCENE.

Finding no error, we affirm.

FACTS

State witness John Brooks testified that at approximately 7:15 p.m. on March 10, 1995, he was walking north on Center Street in Clarksdale with Jesse Franklin, Ken Weston and Eric Thompson. The group of four walked past Earnest Perryman, his brother Willie, and another male named Sheldon traveling south on Center Street. Brooks testified that shots were fired from the direction of the defendant and his associates. Brooks stated that neither he nor anyone with him had a gun. Brooks started running and hid behind a car. Brooks looked back to where the shooting was coming from, and he saw that Willie Perryman was firing a gun at his group. Brooks did not see Earnest Perryman fire a gun. According to Brooks, six or seven shots were fired.

Ken Weston was next to testify for the State. He was struck in the back by one of the bullets. Weston identified Earnest Perryman as a member of the group that had passed him and his companions on the street that evening. Weston testified that the shots were being fired from the group of three, and that he actually saw Willie Perryman shooting. He stated that more than one person was doing the shooting. The bullet still remains lodged in Weston's back.

Detective Sergeant Danny Hill of the Clarksdale Police Department testified that he had been

dispatched to the scene of the shooting. He testified that he found four spent shell casings from a .25 caliber gun at the crime scene. He determined that the casings were from an automatic .25 caliber gun. No other cartridges were found at the scene, and no weapon was ever recovered.

Sergeant Greg Hoskins was the last witness to testify for the State. He testified that he arrested Earnest Perryman at approximately 10:00 a.m. on April 5, 1995. He took a statement given by Earnest Perryman. Earnest Perryman and his mother, Joyce, both signed the waiver of rights form and the actual statement itself. In his statement given to Hoskins, Earnest Perryman stated that around 3:00 p.m. on March 10, 1995, he and a friend were in a car talking to a girl on Center Street, and a guy came up to the car and told Earnest Perryman that he was talking to his sister. The guy then told Earnest to straighten up his hat. Earnest and his friend drove off, and the guy started shooting at the car. Earnest then stated that he, Willie Perryman, and Sheldon got their guns and went back to Center Street around 5:00 p.m. Earnest Perryman admitted that he fired six rounds from a .25 caliber pistol. He also stated that his brother, Willie, pulled his .22 caliber revolver out of his pocket and fired six rounds.

The defense presented no evidence on its behalf.

Willie Perryman has since pled guilty to aggravated assault for his involvement in the shooting of Ken Weston.

ANALYSIS

I.

WHETHER THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON AIDING AND ABETTING.

Perryman argues that the trial court impermissibly granted the State's instruction on aiding and abetting given the State's total failure to produce evidence to support such an instruction. Perryman contends that neither John Brooks nor Kenneth Weston offered any evidence to support giving the instruction on aiding and abetting. The State asserts that the proof amply supported the granting of the instruction.

At the close of evidence, the State proposed the following instructions:

Instruction S-A-1

The Defendant, Earnest Perryman, also known as "Pookie," has been charged in an indictment with the crime of aggravated assault.

If you believe from the evidence in this case beyond a reasonable doubt that:

(1) on or about March 10, 1995, the defendant, Earnest Perryman, also known as "Pookie" while aiding and abetting or acting in concert with another, did purposely or knowingly cause bodily injury to Kenneth Weston,

(2) with a deadly weapon,

(3) by shooting Kenneth Weston in the back with a firearm,

then you shall find the defendant guilty of aggravated assault.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction S-2

The Court instructs the jury that if two or more persons are engaged in the commission of a felony, then the acts of each in the commission of such felony are binding upon all, and all are equally responsible for the acts of each in the commission of such felony.

Over Perryman's objection, the trial court granted both instructions.

This case is analogous to *Hogan v. State*, 580 So. 2d 1275 (Miss. 1991). In *Hogan,* the defendant's husband was robbed and beaten outside of a nightclub. *Id.* at 1276. The defendant then returned to the nightclub with two other persons in a van. *Id.* Gun shots rang out from the van, and six people standing in a crowd were shot. *Id.* The defendant was convicted of aggravated assault. *Id.* The defendant argued on appeal that the trial court erred in granting an instruction on aiding and abetting. The supreme court, in finding that the evidence supported the granting of the instruction, held that the defendant was upset about her husband being robbed and beaten, that she was present in the van at the time of the shooting, and that the jury might reasonably have concluded that the defendant was not the shooter, but that she was present, and aiding and abetting the crime since she encouraged and directed the drive back to the nightclub. *Id.* at 1278.

In the case at hand, Earnest Perryman did not testify, but his theory of defense was that his brother, Willie, shot Ken Weston in the back. In his statement to police, Earnest Perryman noted that he was shot at earlier in the day while driving away from Center Street. He also stated that both he and his brother had their guns with them before they walked back to Center Street later that evening. Earnest Perryman admitted in his statement that he fired six shots from a .25 caliber pistol, and his brother fired six shots from a .22 caliber revolver. From this, the jury could have concluded that even if

Earnest Perryman was not the actual shooter of Weston, that he was present and aiding and abetting the crime since he consciously got his gun before returning to Center Street and that according to his own statement to police, he fired his gun at the group in which Weston was walking. Therefore, the evidence supports the granting of the instruction on aiding and abetting.

II.

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT OF AGGRAVATED ASSAULT.

At the close of the State's case, Perryman moved for a directed verdict. The trial court denied Perryman's motion. At that point, Perryman did not go forward with his case, and he did not have witnesses to testify on his behalf. Perryman argues that the evidence presented by the State was insufficient to prove the jury verdict of aggravated assault. Specifically, he asserts that the testimony of both John Brooks and Ken Weston prove that he was not shooting a gun on March 10, 1995, only Willie Perryman was firing a gun. The State submits that the evidence recounted at trial, including the statement of the defendant, overwhelmingly supports the jury's verdict.

When considering a motion for a directed verdict, we must consider the evidence introduced at trial in the light most favorable to the State, accepting all evidence introduced by the State as true, together with all reasonable inferences therefrom. *Smith v. State*, 646 So. 2d 538, 542 (Miss. 1994). The motion for directed verdict must be denied if there is sufficient evidence to support a guilty verdict. *Smith*, 646 So. 2d at 542 (citing *Barnwell v. State*, 567 So. 2d 215, 217 (Miss. 1990); *Davis v. State*, 530 So. 2d 694, 703 (Miss. 1988); *Thompson v. State*, 457 So. 2d 953, 955 (Miss. 1984)). Alternately, if the evidence does not support a directed verdict, the motion for directed verdict must be granted. *Smith*, 646 So. 2d at 542. A new trial will not be ordered unless we are convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice. *Robinson v. State*, 662 So. 2d 1100, 1105 (Miss. 1995).

These assignments of error test the sufficiency and weight of the evidence. To test the sufficiency of the evidence of a crime, this Court must

[w]ith respect to each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair minded jurors could only find the accused not guilty.

Wetz, 503 So. 2d at 808 (citations omitted).

The standard of review employed upon a challenge to the weight of the evidence in a criminal case is

provided by *Thornhill v. State*, 561 So. 2d 1025, 1030 (Miss. 1989):

In determining whether or not a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when it is convinced that the circuit court has abused its discretion in failing to grant a new trial.

The lower court has the discretionary authority to set aside the jury's verdict and order a new trial only where the court is "convinced that the verdict is so contrary to the weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice." *Roberts v. State*, 582 So. 2d 423, 424 (Miss. 1991) (citations omitted). Based on the record before us, suffice it to say that the evidence was sufficient to allow the case to go to the jury, and the jury's verdict was not against the overwhelming weight of the evidence. This assignment of error is without merit.

III.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING DANNY HILL TO TESTIFY AS TO SPENT CASINGS FOUND AT THE ALLEGED SCENE.

Perryman argues that the trial court committed reversible error in admitting the spent casings into evidence and in allowing Detective Danny Hill to testify about them. Perryman contends that Hill's testimony was irrelevant and immaterial. The State asserts that the trial court committed no error in admitting into evidence the spent casings found at the crime scene.

During the testimony of Detective Hill, the following took place:

Q. You said that this is a .25 automatic?

A. Yes, sir.

Q. Does a .25 automatic eject the shells after the gun is fired?

A. Yes, it does.

Q. Do all guns eject the shell after it is fired?

A. No, sir. Revolvers do not eject the spent casings unless the shooter manually opens the gun and ejects them. But as part of its operation it does not eject the spent casings.

Q. If I understand what you said about a revolver, the person shooting would have to empty those out into his hand?

BY MR. SHAH: Your Honor, we would object. I don't see the relevance of this line of questioning. It is totally irrelevant and immaterial. There is no factual basis to support even the question or the answer.

BY THE COURT: Do you wish to touch upon relevancy?

BY MR. ROSSI: I can, Your Honor, in that there is more than one shooter involved in this.

BY MR. SHAH: Your Honor, that has to be established. At this point it has not been established. It is totally immaterial and irrelevant.

BY MR. ROSSI: The purpose would be to establish the possibility, based on his knowledge of firearms, that another gun could be fired that is not an automatic weapon.

BY MR. SHAH: Again we're dealing in possibilities. I thought we were supposed to be dealing with facts.

BY MR. ROSSI: Now Counsel is making argument.

BY THE COURT: Overruled.

BY MR. ROSSI: Thank you, Judge.

BY MR. ROSSI:

Q. So, again, as you were saying about the revolver, a revolver would have to be emptied by the shooter?

A. Yes, sir, that's correct.

Q. But an automatic gun ejects the cartridge?

A Each time a shot is fired it ejects the empty cartridge or empty casing.

Q. And you only found what type of cartridges?

A. All four cartridges we found were .25 automatic.

Mississippi Rule of Evidence 401 states:

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Evidence as to the condition of the crime scene and objects found at the crime scene are admissible if relevant and not remote in time and place. *Wilkins v. State*, 264 So. 2d 411, 413 (Miss. 1972). *See also Rhodes v. State*, 676 So. 2d 275 (Miss. 1996); *Ethridge v. State*, 418 So. 2d 798 (Miss. 1982). The decision whether to admit evidence is left to the sound discretion of the trial judge, and his decision will not be reversed unless there had been a clear indication that he abused his discretion. *Johnson v. State*, 655 So. 2d 37, 43 (Miss. 1995); *Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992).

In the case at hand, spent casings were found at the crime scene from a .25 caliber gun. Earnest Perryman admitted in his statement to police that he fired a .25 caliber gun on March 10, 1995, after returning to Center Street. The evidence was certainly relevant, and the trial court did not err by admitting the spent casings into evidence or by allowing the testimony of Detective Hill.

THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE IMPOSED SHALL RUN CONSECUTIVE TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. APPELLANT ORDERED TO MAKE FULL RESTITUTION TO VICTIM. ALL COSTS ARE TAXED TO COAHOMA COUNTY.

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