IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01094 COA

ERIC HARRIS A/K/A ERIC MICHAEL

HARRIS A/K/A "DO-DIRTY" 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 LEWIS GIBBS

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: GEORGE T. HOLMES

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: JOLENE M. LOWRY

DISTRICT ATTORNEY ED PETERS

NATURE OF THE CASE: CRIMINAL: POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE

TRIAL COURT DISPOSITION: CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE.

MANDATE ISSUED: 9/30/97

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

HERRING, J., FOR THE COURT:

Following a trial held on September 27, 1995, in the First Judicial District of Hinds County, Mississippi, Eric Harris was convicted of possession of cocaine with intent to distribute. He was thereafter sentenced to serve ten years in the custody of the Mississippi Department of Corrections, with three of those years being suspended. Aggrieved by this conviction, Harris now raises the following issues on appeal:

I. WHETHER THE COURT ERRED IN ALLOWING IRRELEVANT BUT PREJUDICIAL HEARSAY TESTIMONY?

II. WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR CONTINUANCE?

III. WHETHER THE COURT ERRED IN ALLOWING THE STATE TO MAKE IMPROPER CLOSING ARGUMENT?

IV. WHETHER THE VERDICT WAS CONTRARY TO THE EVIDENCE?

After careful review of the arguments and the applicable law, we affirm.

I. THE FACTS

On November 17, 1994, at approximately 9:15 P.M., Officer Eric Wall and Holly Haywood were working with the Direct Action Response Team (DART), a unit of the Jackson, Police Department.

Officer Wall testified that in response to a briefing held earlier that evening, DART was paying special attention to the Eminence Row area of the city of Jackson. In the briefing, Wall's supervisors informed him that they had received numerous calls reporting sporadic gunfire and incidents of "flag-down" or curbside sales of narcotics. In response to this briefing, Officers Wall and Haywood approached Eminence Row in an unmarked police vehicle, followed by several other unmarked vehicles. They observed a Lincoln Towncar parked illegally on the side of the street and also noticed a man standing by the driver's window, leaning into that open window.

Officer Wall testified that there were three men in the Lincoln Towncar, two white males and one black male. His testimony was corroborated by Haywood. Wall testified that he had witnessed hundreds of curbside drug sales during his tenure with the police department and immediately became suspicious that this was in fact a drug transaction. Acting upon that suspicion, he turned on the blue lights installed in his vehicle and pulled in behind the Lincoln. Both Wall and Haywood got out of their car and approached the man who had been standing outside the driver's window of the Lincoln. According to the police officers, this man, who was later identified as Eric Harris, did not notice the officers until they were only a few feet away from him. When he finally noticed the officers, Harris immediately tossed a few white, rock-like objects behind him with one hand, and with the other hand, he threw a folded twenty-dollar bill in the same direction. Wall and Haywood observed Harris's actions, seized the money and the rock-like objects, and placed Harris under arrest. The rock-like objects were sent to the Mississippi State Crime Laboratory and identified as crack cocaine. Upon his arrest, Harris was informed of his *Miranda* rights and immediately made the following statement: "Why aren't you arresting that white boy? I was selling that white boy my s---. He's got my s--- in his mouth. Check that white boy." Officer Wall testified that he did search all of the persons located in the car including the driver, who was the person Harris referred to as the "white boy." None of the three men in the vehicle possessed any crack cocaine. Harris was then taken into custody and charged with possession of a controlled substance with intent to distribute.

Although Harris did not testify at trial, his witnesses presented an entirely different version of the events that took place on the night of November 17, 1994. Harris's first witness was Jerry Johnson, who according to the State's witness, was the man in the back seat of the Lincoln. Johnson testified that he was walking down the street when Frank Edwards, the driver of the Lincoln, approached him to inquire as to where he could find Eric Harris. According to Johnson, Edwards wanted to talk to Harris about repairing an automobile for him. Johnson stated that he went to Harris's home and informed him that Edwards was looking for him. Thereafter, Johnson and Harris returned to where Edwards was waiting in his vehicle. Johnson testified that the police officers approached them and arrested Harris only a few moments after they reached Edwards's Lincoln Towncar. Johnson claims that he was never inside the Lincoln, despite the testimony of Officers Wall and Haywood to the contrary. Johnson was arrested for public drunkenness, but he claimed that he was sober and that the police officers had falsely arrested him. Furthermore, he testified that he overheard Officer Wall tell the other officers to "put the handcuffs on Eric" and "if we find anything, we're going to give it to Eric."

Frank Edwards substantially corroborated Johnson's version of the events that occurred on the night of November 17, 1994. However, he claims that the police officers hit Johnson in the stomach and threatened Edwards that they would beat him if he did not testify against Harris. Both Edwards and Johnson testified that they never heard Harris admit to the police officers that he had sold drugs to

Edwards. However, Edwards did acknowledge that the police searched his mouth for drugs. Following the search and arrest of Harris, Edwards was arrested and taken into custody on several traffic violations, but he was not charged with any drug related crimes.

Harris was indicted during January 1995, and a trial on the merits was held on September 27, 1995. At trial, the jury found Harris guilty of the illegal possession of cocaine with the intent to distribute.

II. ANALYSIS

I. DID THE TRIAL COURT ERR BY ALLOWING IRRELEVANT BUT PREJUDICIAL HEARSAY TESTIMONY?

At trial, Officer Wall testified as to the events surrounding the incident in question. When asked why he was in the Eminence Row area on the night of November 17, 1994, he stated as follows:

A: At approximately five o'clock on November 17, we were called into a meeting in the supervisor's office regarding that particular area.

MR. HOLMES: Objection to hearsay, Your Honor.

THE COURT: Overruled.

A: Regarding that area, the 500 block of Eminence Row. The supervisor advised us that he had received numerous calls--

MR. HOLMES: Objection to hearsay, Your Honor.

THE COURT: Overruled.

A: The supervisor advised that he had received numerous calls complaining about sporadic gunfire and individuals involved in the flag-down sale of narcotics.

Harris claims that this testimony was inadmissible hearsay, irrelevant, and prejudicial to his right to a fair trial. However, it is clear from the above portion of the record that defense counsel only objected to the testimony on hearsay grounds. By specifically objecting to the testimony based upon hearsay, Harris has waived all other grounds for objection. *Lester v. State*, 692 So. 2d 755, 772 (Miss. 1997). An objection made at trial cannot be expanded on appeal. *Harvey v. State*, 666 So. 2d 798, 800 (Miss. 1995). Thus, Harris's objections based on relevancy and prejudice are procedurally barred, and we will only comment on his original hearsay objection.

Rule 801 of the Mississippi Rules of Evidence defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. In the case *sub judice*, the testimony objected to by Harris does not fall within the Rule 801 definition of hearsay. The statement was simply offered to show why the officers were in the Eminence Row area, rather than to prove the truth of the matter asserted. Thus, since the testimony was not admitted to prove that flag-down drug sales were in fact taking place in the

Eminence Row area of the city of Jackson, it does not fall within the core definition of hearsay, and was therefore admissible. *Gayten v. State,* 595 So. 2d 409, 414 (Miss. 1992). Moreover, even if the trial court erred in allowing the testimony to be heard by the jury, there was no showing that Harris was unduly prejudiced by the testimony or that some substantive right of Harris was affected. Thus, no reversible error occurred. *See* M.R.E. 103(a).

Harris argues, nevertheless, that the testimony of Officer Wall concerning why he went to the Eminence Row area should have been excluded pursuant to the Mississippi Supreme Court's ruling in *Sample v. State*, 643 So. 2d 524 (Miss. 1994). In *Sample*, a police officer was allowed to testify that he was suspicious of the defendant because he had been informed during a briefing to be on the lookout for a vehicle matching the description of the defendant's car. The officer testified that he also learned during the briefing that a shooting had occurred at the defendant's residence. The Mississippi Supreme Court reversed the trial court's decision to allow the testimony, stating that it "was unduly prejudicial in that it allowed an inference that Sample was engaged in other crimes." *Sample*, 643 So. 2d at 529.

We hold that the decision in *Sample* is distinguishable from the case before us. In *Sample*, the prejudicial testimony singled-out the defendant as the source of the criminal activity. *Id.* The jury was informed that he was driving a stolen car, and that shots had been fired at his house. *Id.* However, in this case nothing in the testimony of Officer Wall, regarding the information he received in the briefing, implicated Harris directly or indirectly in any crimes or bad acts. The jury was merely informed that a certain type of drug transaction was commonly occurring in the Eminence Row area of the city of Jackson. The record does not disclose that the police officers went to the area looking for Eric Harris or any other individual.

II. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR CONTINUANCE?

The decision to grant or deny a continuance is within the sound discretion of the trial court. Only when manifest injustice appears to have resulted from the decision to deny a continuance should an appellate court reverse as a result of the denial of a continuance. *Jackson v. State*, 684 So. 2d 1213, 1221 (Miss. 1996). We now turn to the facts of the case *sub judice* to determine if the trial court abused its discretion.

Harris was arrested on November 17, 1994. The indictment was returned against him during the January 1995 term of court, and the case went to trial on September 27, 1995. Thus, over ten months passed between the date of the arrest and the date of trial. It is noteworthy that four attorneys were at least partially involved in Harris's defense from the date of indictment to the date of trial. Following his arrest on November 17, 1995, Harris was represented by the Hinds County, Mississippi, Public Defender's Office. On July 21, 1995, the Public Defender's Office withdrew and was replaced by Hugh Tedder as attorney for Harris. On September 26, 1995, the day before the Harris's trial was scheduled to begin, Tedder sought to withdraw as counsel for Harris and allow Ross Barnett, Jr. to be substituted as Harris's new attorney. However, Tedder's withdrawal never became final because of a conflict in Barnett's schedule.

On the day of trial, September 27, 1995, both Tedder and George Holmes, who was retained by

Harris on that same day, appeared on Harris's behalf. Mr. Tedder moved for a continuance on the basis George Holmes had just been retained by Harris and had not had adequate time to prepare for trial. Tedder also stated that he thought Barnett would be lead counsel and that he was not prepared to act in that capacity. The trial judge overruled the motion for continuance and stated:

The Court has considered this matter and I want the record to clearly reflect that this matter has been set before. Originally, Mr. Harris had the Public Defender's office representing him. The Public Defender's office withdrew when he retained you, Mr. Tedder. Then on the eve of trial, he hired another attorney, Mr. Barnett. I did not deny Mr. Barnett's right to become a party to this case. Mr. Barnett chose not to become a party because I would not grant a continuance.

It has been a common practice, particularly when you're involved with drugs, to on the eve of trial switch attorneys so the case can be continued. That will not be tolerated in this court. Mr. Harris has had sufficient time to decide who he wants to be his attorney in this case and I'm not going to allow him or any other defendant the opportunity to misuse this court system by switching attorneys on the eve of trial.

So the motion to continue will be denied and the case will proceed to trial today as originally scheduled.

After reviewing the facts of this case, we conclude that the trial court did not abuse its discretion in denying Harris' request for a continuance. Thus, this issue has no merit.

III. DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO MAKE IMPROPER CLOSING ARGUMENT?

At trial, the prosecutor tendered the following argument to the jury during his summation:

MR. MAYFIELD: First of all, there's not a single one of you who is on the jury today because you went out looking for it, did you? You're not here because of anything you did or I did or the Court did. Let's keep one thing in proper perspective and that is that you are here today because on November the 17th of last year Eric Harris was in the dope business. That's why we're here. And I can tell you that nobody told you at any time in this proceeding that your job was going to be easy, it was going to be pleasant, or was going to be just a whoopee lot of fun. But I want to tell you something. If we don't have people like you twelve to come up here - -

MR. HOLMES: Your Honor, we're going to object. This golden rule argument is improper. It's currying favor with the jury.

THE COURT: Overruled.

MR. MAYFIELD: If it were not for jurors like yourselves who are willing to come up here - - now, there are ways that you could weasel out of jury service, I guess. You could have told the judge some story but you didn't. You stayed. And if it weren't for people like you twelve who were willing to come down here and serve - - no doubt it must be a hardship and it certainly isn't a fun way to spend all day. If the time ever comes when we won't have people willing to do this, we might as well all go to

the house.

Harris now contends that the prosecutor's closing argument constituted reversible error because it attempted to curry favor with the jury and suggested that the jury is linked with the prosecution of criminals. In support of this proposition, Harris cites *Carleton v. State,* 425 So. 2d 1036, 1039 (Miss. 1983), *Ramseur v. State,* 368 So. 2d 842, 845 (Miss. 1979), *Fulgham v. State,* 386 So. 2d 1099, 1101 (Miss. 1980), and *Williams v. State,* 522 So. 2d 201, 209 (Miss. 1988). We have reviewed Harris's cited authorities and find that they provide him no relief.

In *Carleton* the prosecutor stated in his closing argument that "[y]ou know, we have got to let people know what the people of Harrison County stand for." Defense counsel objected to this statement, but the trial court overruled the objection. *Carleton,* 425 So. 2d at 1039. On appeal the Mississippi Supreme Court held that the statement was not improper. *Id.* In fact, none of the cases cited by Harris resulted in a reversal based on the ground that the closing arguments were improper. In *Fulgham*, the Mississippi Supreme Court held that the prosecutor's statement that the jury was a "link in the chain" of the criminal justice system was improper. However, the Court went on to hold that "[w]e do not think that this assignment of error, standing alone, would require a reversal." *Fulgham*, 386 So. 2d at 1101.

In general, trial courts are given discretion in ruling on comments made by attorneys during closing arguments, and we will only reverse if the argument was so prejudicial that a new trial should be granted. *Harvey v. State,* 666 So. 2d 798, 801 (Miss. 1995). The test to determine if the comment is overly prejudicial is "whether the natural and probable effect of improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by prejudice." *Harvey,* 666 So. 2d at 801. In light of the facts of this case, and the prior rulings of the Mississippi Supreme Court, we hold that the statements made by the State did not deny Harris a fair trial and decline to reverse Harris's conviction on this issue. However, we would caution prosecutors that a closing statement such as that made by the prosecutor in this case is improper and should be avoided in the future.

IV. WAS THE JURY'S VERDICT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?

Our standard of review in cases involving an objection to a jury verdict based upon the claim that the verdict was against the overwhelming weight of the evidence has most recently been explained by the Mississippi Supreme Court in *Herrington v. Spell,* 692 So. 2d 93 (Miss. 1997), wherein the court stated:

In determining whether 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 convinced that the circuit court has abused its discretion in failing to grant a new trial. Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal.

Herrington, 692 So. 2d at 103-04 (citations omitted). Although *Herrington* was a civil case, the standard of review is the same in criminal cases. *See Thornhill v. State*, 561 So. 2d 1025, 1030 (Miss.

1989); *Benson v. State*, 551 So. 2d 188, 193 (Miss. 1989) (citing *McFee v. State*, 511 So. 2d 130, 133-34 (Miss. 1987)).

A review of the record in the case *sub judice* reveals no unconscionable injustice resulting from the jury's findings. While it is true that the defendant presented witnesses who presented a totally different version of what occurred on the evening of November 17, 1994, from the version presented by law enforcement officials, the determination as to who was telling the truth was properly made by the jury as finder of fact. One of the basic tenets of our judicial system is that any questions regarding the weight and worth of witness testimony or witness credibility are for the jury to resolve. *Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995). In this case, the jury rejected Harris's version of the events that took place on November 17, 1994, and believed the testimony of Officers Wall and Haywood. We will not overturn the findings of the jury unless those findings are clearly erroneous. *Herrington*, 692 So. 2d at 104. All things considered, we cannot say that the jury's verdict in this case was clearly erroneous. Therefore, we hold that the verdict was not against the overwhelming weight of the evidence.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH THREE YEARS SUSPENDED, IS AFFIRMED. ALL COSTS OF THIS APPEAL TO BE TAXED TO THE APPELLANT.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. McMILLIN, P.J., NOT PARTICIPATING.