

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00325 COA**

STEVEN DELANO BARNES A/K/A "SHACKEY"

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

DATE OF JUDGMENT:	01/18/95
TRIAL JUDGE:	HON. ROBERT G. EVANS
COURT FROM WHICH APPEALED:	COVINGTON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	LESLIE D. ROUSSELL
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN
DISTRICT ATTORNEY:	DEWITT L. FORTENBERRY, JR.
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	ARMED ROBBERY: SENTENCED TO A TERM OF LIFE IN MDOC SENTENCE IMPOSED IN THIS CAUSE SHALL RUN CONSECUTIVELY WITH SENTENCES IMPOSED IN COVINGTON CIRCUIT COURT CAUSE# 3135, 3149, 3150 & 3151
DISPOSITION:	AFFIRMED - 9/23/97
MOTION FOR REHEARING FILED:	11/20/97
CERTIORARI FILED:	2/9/98
MANDATE ISSUED:	4/15/98

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

DIAZ, J., FOR THE COURT:

Steven Delano Barnes was convicted of armed robbery and sentenced to life imprisonment. He makes the following arguments on appeal: (1) that the indictment charging Barnes with armed robbery was

defective, (2) that the victim's in-court identification of Barnes was impermissibly tainted by a suggestive line-up, (3) that witnesses for the State made unfairly prejudicial comments during trial, (4) that the prosecutor made unconstitutionally prejudicial statements during closing arguments, (5) that the weight of the evidence presented at trial was insufficient to support a guilty verdict, and (6) that the trial court erred in allowing the State's "accomplice" jury instruction.

FACTS

On November 22, 1994, Barnes and a companion, Perry King, escaped from the Covington County jail. The following day, they drove to Mrs. Burnham's (the victim) house. Barnes asked Mrs. Burnham if he could come in and use the telephone. Although she did not know either of the men, she agreed to let Barnes enter her home and use her telephone. King then asked Mrs. Burnham for a drink of water. She allowed him to go inside and get some water from the kitchen. A few minutes later, Barnes and King came back out of the house. As they were leaving, Barnes grabbed Mrs. Burnham by the arm and asked for her money. He then held a gun to her head while King went back into the house to look for her purse. King was unable to find the purse, so he and Barnes took Mrs. Burnham into the house. After forcing her to give them the purse, Barnes shoved Mrs. Burnham into a chair, told her not to move, and left with King.

DISCUSSION

1. Was the indictment charging Barnes with armed robbery defective?

Barnes was charged with a violation of Miss. Code Ann. § 97-3-79 (Rev. 1994), which provides in part:

Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery

Barnes argues that the indictment charging him with armed robbery was defective because the language of the indictment did not include the phrase "against her will." He claims that since the phrase is contained in the statute, it necessarily connotes an essential element of the crime of armed robbery and therefore, should have been included in the indictment. We disagree.

Formal and technical words are not necessary in an indictment if the offense can be sufficiently described without them. Miss. Code Ann. § 99-7-3 (Rev. 1994). Certainly, the indictment may track the exact language of the statute, although it need not. *Harbin v. State*, 478 So. 2d 796, 799 (Miss. 1985). If the indictment as a whole gives the accused fair notice of the charges against him, the indictment is legally sufficient. *Id.* Although § 97-3-79 includes the phrase "against his will," it was not necessary to incorporate that language into the indictment. The indictment in this case charged that the act was committed by Barnes's exhibiting a deadly weapon, thus putting Mrs. Burnham in fear of immediate injury. The language of the indictment was sufficient to inform Barnes that the State would prove that the robbery was done against Mrs. Burnham's will. Applying the above rules of law to the facts of this case, we find no serious dispute as to the sufficiency of the indictment.

2. Was the victim's in-court identification of Barnes impermissibly tainted by a suggestive line-up?

A few days after the robbery, a deputy showed Mrs. Burnham five photographs of young, black males, including photographs of Barnes and King. The deputy asked Mrs. Burnham if she could identify any of the men as the ones who robbed her. She was unable to identify anyone from the photographs. Several days later, Mrs. Burnham was called to the sheriff's office, where she observed a line-up, consisting of Barnes, King, and two other black men. These other two men were law enforcement officers who were both older than either Barnes or King. At that time, Mrs. Burnham was able to identify Barnes and King as her assailants. During the direct examination, Mrs. Burnham positively identified Barnes as the person who held a gun to her head. Barnes now claims on appeal that Mrs. Burnham's in-court identification was impermissibly tainted by a suggestive line-up. He argues that the officers were much older and looked nothing like Barnes and King.

"It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)). "It is the likelihood of misidentification which violates a defendant's right to due process." *Biggers*, 409 U.S. at 198. Therefore, we must question whether, under the "totality of the circumstances," the identification was reliable. *Id.* at 199. In answering this question, we must consider "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200. Applying these factors, we disagree with Barnes's assertion that Mrs. Burnham's in-court identification was tainted. Mrs. Burnham had ample opportunity to observe Barnes during the robbery. The robbery occurred at approximately 2:30 in the afternoon, thus Mrs. Burnham had plenty of light by which to see Barnes. There can be no doubt that she was giving her full attention to Barnes at the time she was being robbed, and there was no discrepancy between Mrs. Burnham's description of Barnes and his actual description. Mrs. Burnham was unequivocal in her in-court identification. She stated: "[T]his is the boy here that was in my house. I won't ever forget this boy." Furthermore, the line-up took place within a few days of the robbery. Weighing all the factors set out in *Biggers*, we find no substantial likelihood of misidentification.

3. Were witnesses for the State allowed to make unfairly prejudicial comments during trial?

The record shows that two law enforcement officers who testified for the State made comments while on the stand that Barnes had escaped from jail prior to the robbery of Mrs. Burnham. Barnes argues on appeal that the statements were unfairly prejudicial and were intended to inflame the jury. However, Barnes failed to object at trial to the introduction of the statements. The supreme court has held that "[c]ounsel may not sit idly by making no protest as objectionable evidence is admitted, and then raise the issue for the first time on appeal. If no contemporaneous objection is made, the error, if any, is waived." *Cole v. State*, 525 So. 2d 365, 369 (Miss. 1987).

Even if proper objection had been made, there would still be no reversible error in this case. Barnes escaped from the county jail on the night before the robbery of Mrs. Burnham. He then stole a car in

order to execute his escape. When Mrs. Burnham reported the robbery, she provided officers with the same description of the car known to have been stolen by Barnes. These events—the jail break, the theft of the car, and the robbery of Mrs. Burnham—were all part of an ongoing and interrelated series of criminal acts. Where another crime, wrong, or act is "so interrelated [to the charged crime] as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences" evidence of the other act is admissible. *Ballenger v. State*, 667 So. 2d 1242, 1256-57 (Miss. 1995) (citations omitted). "Evidence of other crimes or bad acts is also admissible in order to tell the complete story so as not to confuse the jury." *Id.* at 1257. The State has a "legitimate interest in telling a rational and coherent story of what happened . . ." *Id.* (citations omitted). Although Barnes's other crimes took place a few hours apart, they were closely connected to the robbery of Mrs. Burnham. Thus, the testimony by the State's witnesses was not unfairly prejudicial to Barnes, but rather was admissible to present a coherent story of the events leading up to the robbery.

4. Did the prosecutor make unconstitutionally prejudicial statements during closing arguments?

Barnes next argues that the prosecutor improperly made "conscience of the community" arguments, implied guilt to the jury by pointing out Barnes's failure to testify, and erroneously commented on his personal belief as to Barnes's guilt. However, Barnes failed to object at trial to the prosecutor's statements and is precluded from now doing so on appeal. *Reed v. State*, 536 So. 2d 1336, 1339 (Miss. 1988). Yet, Barnes contends that the statements were so prejudicial as to warrant a new trial. Generally, the trial court affords counsel considerable latitude in closing argument. *Ballenger*, 667 So. 2d at 1272. A review of the prosecutor's statements shows that they were well within the court's discretion for closing argument. Therefore, in addition to the procedural bar established by Barnes's failure to object at trial, we find that the prosecutor in the present case did not go beyond the boundaries established for closing argument and thus, did not overly prejudice Barnes by his statements during closing argument.

5. Does the weight of the evidence support a guilty verdict?

In determining whether the evidence presented at trial was sufficient to support a guilty verdict, the supreme court has held that "[m]atters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury." *Fisher v. State*, 481 So. 2d 203, 212 (Miss. 1985). "We give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Hart v. State*, 637 So. 2d 1329, 1341 (Miss. 1994). "We may reverse only where with respect to one or more elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty." *Fisher*, 481 So. 2d at 212 (citations omitted). In the case at bar, Mrs. Burnham's identification of Barnes was unequivocal—she had no doubt that Barnes was the man who robbed her. Based on this and all other evidence presented at trial, the jury was justified in concluding that Barnes was guilty beyond a reasonable doubt. Since reasonable and fair-minded jurors might have reached the same conclusion, we refrain from disturbing the verdict and find that the evidence is more than sufficient to support Barnes's conviction.

6. Did the trial judge err in allowing the State's "accomplice" jury instruction?

Barnes argues that instruction S-2, an accomplice instruction, allowed the jury to find him guilty if he committed only one element of the crime of armed robbery. He maintains that he was on trial as a principal and not as an accessory, and thus, that the State's instruction incorrectly instructed the jury on the law. While we agree with Barnes that instruction S-2 was ambiguous and should not have been given, we do not, therefore, conclude that the trial judge committed reversible error. The appellate court does not examine jury instructions in isolation. Instead, "we read all instructions as a whole to determine whether the jury has been correctly instructed." *Malone v. State*, 486 So. 2d 360, 365 (Miss. 1986). A combined reading of the jury instructions presented at the trial in this case appropriately provided the jurors with the direction they needed in order to render a fair and just verdict. Accordingly, the trial judge committed no reversible error in allowing the State to present instruction S-2.

THE JUDGMENT OF THE COVINGTON COUNTY CIRCUIT COURT OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE IMPOSED SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO COVINGTON COUNTY.

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

McMILLIN, P.J., NOT PARTICIPATING.