

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00661 COA**

CURTIS WAYNE WINTERS

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:	2/20/95
TRIAL JUDGE:	HON. JOSEPH H. LOPER JR.
COURT FROM WHICH APPEALED:	GRENADA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RAYMOND M. BAUM
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEWITT ALLRED III
DISTRICT ATTORNEY:	DEWITT ALLRED, III
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF MURDER; SENTENCED TO LIFE IMPRISONMENT AS HABITUAL OFFENDER.
DISPOSITION:	AFFIRMED - 9/23/97
MOTION FOR REHEARING FILED:	10/7/97
CERTIORARI FILED:	
MANDATE ISSUED:	2/23/98

BEFORE BRIDGES, C.J., DIAZ, HINKEBEIN, AND KING, JJ.

DIAZ, J., FOR THE COURT:

Curtis Wayne Winters was convicted of murder and sentenced to life imprisonment as an habitual offender. He appeals arguing the following: (1) that the trial court incorrectly admitted evidence of Winters's involvement in gang activity, (2) that the trial court erred in not allowing the jurors a smoke break, (3) that the trial court erred in not giving the *Sharplin* instruction for deadlocked juries, (4) that the trial court erroneously allowed the State to instruct the jury on the law during the closing argument, (5) that the trial court incorrectly granted the State's "aiding and abetting" jury instruction, (6) that the evidence was insufficient to sustain a guilty verdict, and (7) that Winters was incorrectly

sentenced as an habitual offender. Finding these arguments without merit, we affirm.

FACTS

Curtis Wayne Winters and the victim in this case, Gary Crowley, were associated with two different gangs in the Grenada area. On the night of December 17-18, 1994, Crowley and his friends were at a club when Winters and two of his friends came in. There was an altercation in which one of Crowley's friends, Toronzo Brown, was hit in the head with a bottle. As the Crowley group was helping Brown outside the club, one of Winters's friends began shooting at them. The Crowley group then left the club, parked their car, and began walking down the street to a convenience store. When they turned into an alley, the Winters group opened fire on the Crowley group. Several members of the Crowley group returned fire. Gary Crowley was killed.

DISCUSSION

1. Did the trial judge improperly admit evidence of Winters's involvement in gang activity?

This case revolved around the killing of a gang member by members of a rival gang. Therefore, evidence regarding Winters's and Crowley's affiliation with the two gangs was admissible in order to provide the jury with a rational understanding of the case. 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). Evidence regarding the altercation at the club between the two gangs, where Brown was hit with a bottle and where Winters's group fired shots at the Crowley group, was closely connected to the exchange of gunfire which led to Crowley's death. Thus, the evidence was admissible to present a coherent story of the events leading up to the murder.

2. Did the trial court err in denying the jurors' request for a smoke break?

The record in this case shows that the jury retired to deliberate at 11:05 a.m. and asked for a "smoke break" at 12:02 p.m., that the judge denied the request at that time, that there was a lunch break at 12:37 p.m., that the jury resumed its deliberations at 1:35 p.m., and that the jury returned its verdict at 3:22 p.m. Although the trial judge initially denied the jurors' request to take a smoke break, he did allow them a lunch break thirty-five minutes later, at which time the jurors were free to smoke if they chose to do so. There is no evidence in the record to suggest that the jurors were anything but concerned and alert as to their duty to render a fair and just verdict. The mere possibility that Winters was prejudiced by the trial judge's refusal to grant the jurors a smoke break is not enough to set aside his conviction. *See Carter v. State*, 493 So. 2d 327, 329 (Miss. 1986). To hold otherwise would effectively grant Winters a new trial based on a trivial and insignificant matter. The supreme court once stated: "While well-reasoned, established legal precedents and fundamental principles should never be sacrificed, it is not required that the law shall shut its eyes to the elements of common

sense." *Tillman v. State*, 225 Miss. 275, 289, 83 So. 2d 86, 90 (Miss. 1955). We agree. The trial court committed no error in denying the jurors' request for a smoke break.

3. Did the trial judge err in not providing the jury with a *Sharplin* instruction?

During deliberations, the jury sent a note to the judge asking, "What do we do if some of us do not believe anything that was said in the courtroom?" Winters argues that the trial judge erred at that point in failing to declare a mistrial or alternatively, in failing to give the *Sharplin* instruction. *Sharplin* authorizes the trial judge to bring the jury back into the courtroom and tell them to "[p]lease continue your deliberations," or to give the following longer instruction:

I know that it is possible for honest men and women to have honest different opinions about the facts of a case, but, if it is possible to reconcile your differences of opinion and decide this case, then you should do so. Accordingly, I remind you that the court originally instructed you that the verdict of the jury must represent the considered judgment of each juror. It is your duty as jurors to consult with one another and to deliberate in view of reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Please continue your deliberations.

Sharplin v. State, 330 So. 2d 591, 596 (Miss. 1976).

While there was no suggestion that the jury in our case was deadlocked as they were in *Sharplin*, the facts do indicate that the jurors were experiencing doubts about the credibility of the witnesses. For this reason, the trial judge should have given the *Sharplin* instruction and should do so in similar cases in the future. However, his failure to do so in the case at bar does not rise to the level of reversible error, especially since Winters failed to make a contemporaneous objection. "Counsel 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).

4. Did the trial court erroneously allow the State to instruct the jury on the law during closing argument?

During closing argument, the prosecutor for the State directed the jury's attention to the court's alibi instruction. Winters objected, asserting that the State was "instructing the jury on the law." The trial judge overruled Winters's objection stating that the jurors would have the instruction to read and decide for themselves. Generally, the trial court affords counsel considerable latitude in closing argument. *Ballenger*, 667 So. 2d at 1272. In the case before us, the prosecutor was arguing the court's instruction to the jury; he was not instructing the jury on the law. The trial court's instruction was before the jury, and the court's ruling on the objection made it clear that the jury was to decide

the case using the court's instruction, not the prosecutor's interpretation of the instruction.

5. Did the trial court incorrectly grant the State's "aiding and abetting" jury instruction?

At the conclusion of the trial, the State submitted and the trial court granted Instruction S-3 an "aiding and abetting" jury instruction. Winters, however, takes great pains in distinguishing between a principal and an accessory before the fact, arguing that the State's instruction was incorrect and needlessly confusing. Yet, the supreme court has stated that a defendant's status as principal or accessory before the fact is "a distinction without a difference." *State v. Peoples*, 481 So. 2d 1069, 1070 (Miss. 1986). "Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such; and this whether the principal have been previously convicted or not." Miss. Code Ann. § 97-1-3 (Rev. 1994). In this case, the jury found that Winters was present and that he participated in shooting Crowley. Thus, Winters was a principal, regardless of whether he or one of his cohorts fired the fatal shot. Consequently, the State's jury instruction correctly explained the law as to Winters's culpability.

Furthermore, 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 error in allowing the State to present Instruction S-3.

6. Was the evidence presented at trial sufficient to sustain 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, the jury heard testimony that Winters was one of three people, acting in concert, who shot and killed Crowley. Based on this and all other evidence presented at trial, the jury was justified in concluding that Winters was guilty beyond a reasonable doubt of murdering Gary Crowley. 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 Winters's conviction.

7. Was Winters correctly sentenced as an habitual offender?

After the jury convicted Winters of murder, the trial court sentenced him to life imprisonment as an habitual offender. Winters failed to object to his status as an habitual offender at the sentencing hearing and is precluded from now doing so on appeal. *Reed v. State*, 536 So. 2d 1336, 1339 (Miss. 1988). Yet, Winters claims that his sentencing violated Miss. Code Ann. § 99-19-83 (Rev. 1994), which requires that prior convictions used to enhance the defendant's sentence in a subsequent crime

arise out of "separate incidents at different times" Winters maintains that his previous crimes of rape and kidnapping occurred on the same day and thus did not arise out of "separate incidents at different times." Although the two crimes did take place on the same day, they were in fact two separate crimes with two separate victims. The supreme court has held that prior convictions "arising out of incidents occurring on the same date may nevertheless be 'separate incidents at different times'" *Pittman v. State*, 570 So. 2d 1205, 1207 (Miss. 1990). Thus, it is well-settled that the statute's language refers to the incidents giving rise to the prior convictions not to the date of the crimes. *Rushing v. State*, 461 So. 2d 710, 713 (Miss. 1984). Accordingly, the trial judge committed no error in sentencing Winters to life imprisonment as an habitual offender.

THE JUDGMENT OF THE GRENADA COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS AN HABITUAL OFFENDER IS AFFIRMED. SENTENCE IMPOSED SHALL RUN CONSECUTIVELY TO ANY SENTENCE PREVIOUSLY IMPOSED. COSTS ARE ASSESSED TO GRENADA COUNTY.

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

McMILLIN, P.J., NOT PARTICIPATING.