

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01014 COA**

**MARION G. JACKSON A/K/A MARION GLENN
JACKSON**

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

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| DATE OF JUDGMENT: | 09/15/95 |
| TRIAL JUDGE: | HON. ROBERT H. WALKER |
| COURT FROM WHICH APPEALED: | HARRISON COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | JAMES L. DAVIS III |
| ATTORNEY FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY |
| DISTRICT ATTORNEY: | CONO CARANNA |
| NATURE OF THE CASE: | CRIMINAL - FELONY |
| TRIAL COURT DISPOSITION: | POSSESSION OF A CONTROLLED SUBSTANCE COCAINE, A SCHEDULE II CONTROLLED SUBSTANCE, WITH THE INTENT TO TRANSFER OR DISTRIBUTE THE SAID CONTROLLED SUBSTANCE (HABITUAL & ENHANCED): SENTENCED TO 60 YRS IN MDOC WITHOUT HOPE OF PAROLE OR PROBATION |
| DISPOSITION: | AFFIRMED - 12/2/97 |
| MOTION FOR REHEARING FILED: | 12/5/97 |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | 2/27/98 |

BEFORE McMILLIN, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Marion G. Jackson was convicted of possession of cocaine with the intent to transfer or distribute

and was sentenced as an habitual offender to a term of sixty years to be served in the custody of the Mississippi Department of Corrections. Jackson's motion for JNOV or, in the alternative, a new trial was denied. Finding Jackson's assignments of error to be without merit, we affirm.

FACTS

Sheriff's investigator James Render received a phone call from a reliable source informing him that Marion Jackson was in possession of a large quantity of cocaine and was traveling in a blue van. The caller indicated that Jackson was at the 28th Street Apartments. Render and another investigator immediately went to the apartments where they saw Jackson leaving in the van. The investigators followed the van, and a third investigator maneuvered his car in front of the van. A high speed chase ensued, ending with Jackson's stopping the van, getting out, dropping a bag, and running. The bag was recovered and was found to contain thirty individually wrapped packets of cocaine with a street value of \$13,000 to \$18,000.

Shortly after this incident, Jackson turned himself into the Gulfport Police Department. Render was then contacted and subsequently arrested Jackson and transported him to the Narcotics Task Force office. The testimony indicated that Jackson was informed of his rights and then signed a waiver of those rights just prior to admitting that he had been in possession of cocaine. Jackson presented no evidence at trial. The jury convicted Jackson of possession of cocaine with intent to distribute, and the court sentenced him as a habitual offender to sixty years in prison. Feeling aggrieved, Jackson filed this appeal asserting six issues.

ANALYSIS

I. WHETHER JACKSON'S TRIAL COUNSEL WAS INEFFECTIVE.

The standard of review for an ineffective assistance of counsel argument is a two-prong test: (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The Mississippi Supreme Court adopted the *Strickland* standard for an ineffective assistance of counsel argument in *Stringer v. State*, 454 So. 2d 468, 476-77 (Miss. 1984). See *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). "The burden is on the defendant to demonstrate both prongs." *McQuarter*, 574 So. 2d at 687 (citing *Leatherwood v. State*, 473 So. 2d 964, 968-69 (Miss. 1985)). This standard is based upon the totality of the circumstances surrounding each case. *Id.* (citing *Waldrop v. State*, 506 So. 2d 273, 275 (Miss. 1987)).

Mississippi "recognizes a strong but rebuttable presumption that counsel's conduct falls within a broad range of reasonable professional assistance." *Id.* (citing *Gilliard v. State*, 462 So. 2d 710, 714 (Miss. 1985)). The court recognized "[t]o overcome this presumption, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Schmitt v. State*, 560 So. 2d 148, 154 (Miss. 1990) (quoting

Strickland, 466 U.S. at 694). There is also a presumption that counsel's decisions are strategic. *See Handley v. State*, 574 So. 2d 671, 684 (Miss. 1990); *Leatherwood*, 473 So. 2d at 968-69 (Miss. 1985)).

Jackson argues that his trial counsel was deficient in four areas:

1. Failing to request a lesser-included offense instruction.

Jackson argues that his attorney should have offered a lesser-included offense instruction for the offense of possession of cocaine. Jackson contends that reasonable jurors could have found him not guilty of possession with intent to distribute yet guilty of simple possession. Jackson argues that the difference in the sentences of the two crimes is significant and the jury should have been given the option of choosing the lesser offense.

2. Failing to submit an instruction advising the jury to view the expert testimony with caution.

Jackson argues that because Detective Render, the State's primary witness, also testified as a "narcotics distribution" expert, the jury should have been instructed that an expert's opinion is not binding and that each juror should assess the weight to be given to the expert opinion in light of all of the evidence in the case. Jackson contends that Render's testimony was detrimental to his case because it was the only evidence presented that Jackson intended to distribute the cocaine.

3. Failing to present mitigating psychological evidence during sentencing.

Jackson argues that his attorney had a duty to obtain his prior mental records and reports and present them to the judge at sentencing. Jackson maintains that his medical records would have shown that he had undergone counseling for oppositional disorder and had been evaluated for emotional/mental disability by the Social Security Administration. Jackson contends that his medical records would have reduced the damage caused by the State's evidence that he was a habitual offender and by Detective Render's testimony that Jackson had been in trouble for the majority of his life and that previous incarceration had not impacted his behavior at all.

4. Failing to present an expert witness to rebut Detective Render's expert testimony regarding the amount of drugs that it takes to raise a presumption that the offender had the intent to distribute.

At trial, Detective Render, relying on his experience in the narcotics field, testified that the amount of cocaine found as well as the way it was packaged indicated to him that Jackson intended to distribute the cocaine. The cocaine was packaged in thirty individually wrapped packets. Render's testimony was treated as expert testimony in the field of narcotics distribution. Jackson argues that his attorney should have hired an expert to rebut Render's testimony as Render's testimony was the only proof the State had that the cocaine was meant for distribution. Jackson claims that the cocaine was not for distribution and that an expert could have testified that the amount of cocaine recovered could have been for personal use only.

In response, the State argues that Jackson has not satisfied the two-prong test of *Strickland*, therefore, his argument must fail. We agree. In the present case, Jackson has failed to show this Court that his trial counsel was deficient nor has he demonstrated that his trial counsel's actions or inactions

prejudiced him. Jackson relies on personal opinion and speculation of what *could have* happened if his counsel had taken certain actions. We have reviewed the record and looking at the totality of the circumstances, we cannot say that the assistance provided by Jackson's counsel rises to the level required under *Strickland*. Thus, we are compelled to affirm on this issue.

II. WHETHER THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS JACKSON'S STATEMENT.

Jackson contends that law enforcement officials violated his Sixth Amendment right to counsel by questioning him upon his arrest in the absence of his attorney, who had been appointed to represent him on unrelated charges. Prior to Jackson's arrest on the charge before the Court, he was out on bond for two other charges and had been assigned counsel to represent him on those charges. Jackson contends that his statement made after his arrest on this third charge cannot be used against him because his Sixth Amendment right to counsel had already attached. In other words, Jackson claims that because the police knew he was represented by counsel on the other charges, they should not have questioned him without his counsel present. Jackson makes this argument while conceding that he was read his *Miranda* rights. Jackson now argues that his waiver of those rights was not made knowingly and intelligently.

As the State correctly points out, *Mack v. State*, 650 So. 2d 1289, 1316 (Miss. 1994), controls in this instance. *Mack* clearly states that a defendant's Sixth Amendment right to counsel is offense specific. *Id.* Here, as in *Mack*, Jackson's Sixth Amendment right to counsel on the two unrelated charges did not extend to the possession of cocaine charge. *Id.* When Jackson was arrested on the cocaine charge, he had the opportunity to remain silent and invoke his right to counsel. Jackson concedes that he was made aware of his rights and that he chose to waive them. He cannot now claim that his waiver of rights was done unknowingly or unintelligently simply because he was represented by an attorney on unrelated charges. We therefore find Jackson's argument to be without merit.

III. WHETHER THE CLOSING ARGUMENT OF THE STATE WAS IMPROPER AND PREJUDICIAL TO JACKSON.

During closing arguments, Jackson objected to the following statements by the prosecutor: "I remember defense said, well, this isn't a majority vote because the majority voted to nail Christ to the cross. Well, I also remember Christ was sold up by Judas for 30 pieces of silver." The trial judge sustained the objection and instructed the prosecutor to move on. At the end of closing arguments and after the jury had retired to deliberate, Jackson moved for a mistrial. The trial judge denied the mistrial. Jackson now assigns error to this denial and argues that the comments were both inflammatory and prejudicial as the statements served to paint Jackson as the betrayer of Jesus Christ.

The Mississippi Supreme Court has repeatedly held that the trial judge "is in the best position for determining the prejudicial effect of an objectionable comment." *Alexander v. State*, 602 So. 2d 1180, 1182 (Miss. 1992). Thus, the trial court is given discretion to determine whether or not an improper statement made during closing argument should result in a mistrial. *Id.* Moreover, the test which we must follow for determining if an improper argument by a prosecutor to a jury requires reversal is: "[W]hether the natural and probable effect of the improper argument of the prosecuting

attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created." *Davis v. State*, 660 So. 2d 1228, 1248 (Miss. 1995). Furthermore, it is noteworthy that when Jackson, through counsel, objected to the prosecutor's improper remarks, there was no request by Jackson for the trial court to admonish the jury to disregard the prosecutor's remarks. The supreme court has stated on a number of occasions that where an objection is sustained and "no request is made that the jury be told to disregard the objectionable matter, there is no error." *Marks v. State*, 532 So. 2d 976, 981 (Miss. 1988). A conviction will not be reversed due to an improper remark during closing argument unless this Court is convinced that the remark influenced the jury and contributed to the verdict. In the present case, we are not convinced that the comments by the prosecutor served to prejudice the jury and influence the verdict. We therefore find that the trial judge was well within his discretion in denying Jackson's request for a mistrial.

IV. WHETHER THE TRIAL COURT ERRED IN DENYING JACKSON'S MOTION FOR A DIRECTED VERDICT.

V. WHETHER THE EVIDENCE AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION.

VI. WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In three separate issues, Jackson challenges both the sufficiency and the weight of the evidence. In the interest of clarity, we will address these issues together.

Jackson argues that the evidence was insufficient to establish that he possessed cocaine with the *intent to distribute*. In addressing sufficiency issues, the law is quite clear:

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fairminded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.

Taylor v. State, 656 So. 2d 104, 107-08 (Miss. 1995).

The question here is whether the evidence sufficiently established that Jackson possessed cocaine with the intent to distribute it. Jackson relies on *Stringfield v. State*, 588 So.2d 438, 440 (Miss.1991), in support of his contention that the evidence was insufficient. In *Stringfield*, the supreme court held that proof of possession with an intent to distribute or sell should not be based solely upon surmise or suspicion. *Id.* The *Stringfield* court also stated that:

There must be evidentiary facts which will rationally produce in the minds of jurors a certainty, a conviction beyond reasonable doubt that the defendant did in actual fact intend to distribute or sell the cocaine, not that he *might* have such intent. It must be evidence in which a reasonable jury can sink its teeth.

Id. Jackson argues further that quantity alone is not enough to establish intent to distribute. *See Jones v. State*, 635 So. 2d 884, 888 (Miss. 1994).

While Jackson is correct that the supreme court has held in some cases that quantity alone is not enough to establish intent to distribute, the supreme court, in other cases, has held that the quantity and nature of the drug may be enough to establish intent. *Taylor*, 656 So. 2d at 108. In *Taylor*, the court held:

Indeed, a jury may reasonably conclude that a defendant intended to unlawfully distribute a controlled substance, if the quantity or nature of the seized substance evidences an intent to distribute--as opposed to an intent to merely possess for personal use. Where the quantity or nature is such that it merely reflects possession for personal use as an intent to distribute, then only a suspicion of intent is raised.

Id. (citations omitted).

In the present case, we must determine whether possession of 12.8 ounces of crack cocaine is a large enough quantity to conclude that Jackson intended to distribute the drug. We think that it is. At trial, the State offered expert testimony by Detective Render regarding drug distribution. Detective Render indicated that the quantity, value, and packaging of the cocaine found in Jackson's possession indicated that the substance was for distribution and not for personal use. Render testified that the cocaine had a street value between \$13,000 and \$18,000 and that most users did not have the funds to purchase so much cocaine at one time. Render stated that the packaging of the thirty individually wrapped squares of cocaine was consistent with the way dealers acquired and maintained their supplies. Render stated further that the squares would most likely be cut into rock size pieces for resale on the street. Render was asked by both the State and the prosecution if it was possible that one would possess such a large quantity of cocaine for personal use. Render indicated that it was possible that one could smoke 12.8 ounces of cocaine if done slowly over a ten year period but that it was more probable that an individual hoping to smoke 12.8 ounces of crack would die before exhausting the supply. In summary, Render stated that he had no doubt that the large quantity possessed by Jackson was intended for distribution and not for personal use.

Based on the amount of cocaine found in Jackson's possession and the undisputed testimony by Detective Render, we find that there was sufficient evidence for the jury to determine that Jackson intended to distribute the cocaine.

Jackson also complains that the jury verdict was against the overwhelming weight of the evidence, and he requests a new trial. The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (stating that witness credibility

and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (stating that witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, the jury heard the witnesses and the evidence as presented by the State. The State presented the testimony of the detectives directly involved with Jackson's arrest, expert testimony regarding drug distribution, and evidence from the drug lab indicating that the substance found in Jackson's possession was in fact cocaine. Jackson exercised his right not to testify or present any evidence. Thus, the testimony by the State's witnesses was undisputed. The testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Jackson. The trial court did not abuse its discretion by refusing to grant Jackson a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to promote an unconscionable injustice. The trial court properly denied Jackson's motion for a new trial.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF POSSESSION OF A SCHEDULE II CONTROLLED SUBSTANCE, COCAINE, WITH THE INTENT TO TRANSFER OR DISTRIBUTE AND ENHANCED SENTENCE AS A HABITUAL OFFENDER OF SIXTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

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