IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00923 COA

GEORGE RAY, A/K/A BUDDY RAY, AND GARY RAY **APPELLANTS**

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:	7/10/95
TRIAL JUDGE:	HON. JOSEPH H. LOPER JR.
COURT FROM WHICH APPEALED:	WEBSTER COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANTS:	J. NILES MCNEEL
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	DOUG EVANS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF AGGRAVATED ASSAULT, SENTENCED TO 12 YEARS , 5 SUSPENDED WITH MDOC.
DISPOSITION:	AFFIRMED -12/2/97
MOTION FOR REHEARING FILED: 12/15/1997	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

KING, J., FOR THE COURT:

George Ray, a/k/a Buddy Ray, and Gary Ray were each convicted of aggravated assault in the Webster County Circuit Court and sentenced to serve twelve years, with five years suspended, in the custody of the Mississippi Department of Corrections. Both Buddy and Gary assign the following errors on appeal: (1) the court erred in failing to grant jury instruction no. D-1, a concealed weapon instruction and (2) the court erred in failing to grant a new trial after being notified of the failure of a juror to disclose all relevant information about a previous conviction. Finding no error, we affirm Buddy's and Gary's convictions and sentences.

FACTS

On August 19, 1994, a family dispute arose between Barbara Ray, James Leland Goins, Barbara's brother, Buddy Ray, Barbara's husband, and Gary Ray, Barbara and Buddy's son. The dispute started as Barbara and Buddy were gardening in their yard. Leland, who lived next door to Buddy and Barbara, walked down his driveway and into the road. Barbara walked to the road also where she and Leland argued. Barbara alleged that at some point in the argument, Leland struck her in the head with a pistol. As Leland ran to his house, he was shot several times by Buddy. Buddy contends that these shots were fired in defense of himself and Barbara. Gary came home in the midst of this dispute and shot at Leland, who returned fire with his weapon. Leland finally collapsed inside his house, ultimately suffering several gunshot wounds.

A trial was held and a jury found both Buddy and Gary guilty of aggravated assault. Buddy and Gary filed a Motion for a New Trial, which was denied. Buddy and Gary now appeal their convictions and sentences.

ISSUES

I. WHETHER THE COURT ERRED IN FAILING TO GRANT JURY INSTRUCTION NO. D-1.

Buddy and Gary contend that Instruction D-1, a concealed weapon instruction, was proper because some of the jurors might have believed that Buddy was wrong in having a pistol in his back pocket and find him guilty of aggravated assault for that reason. We disagree with this contention for two reasons.

First, the fact that Buddy carried a concealed weapon was not an issue in the trial court because he was not indicted with illegally carrying a concealed weapon. However, the fact that Buddy allegedly acted in defense against Leland's assault on Barbara was unquestionably an issue in the trial court. The trial court properly granted a State instruction which stated that Buddy had a right to carry a pistol if he felt he had "reasonable grounds to apprehend an unlawful design on the part of James Leland Goines to kill [Buddy, Barbara, or Gary] or to do one of them some great bodily harm, and in addition to this, [he had] reasonable grounds to apprehend that there [was] imminent danger of such design being accomplished", rather than a concealed weapon instruction.

Second, it is not necessarily reversible error for the circuit court to refuse a concealed weapon instruction in cases where the State makes no reference or intimation that the defendant did not have a right to carry the weapon; the circuit judge may see no need for it. ***Duvall v. State,*** **634 So.2d 524, 526 (Miss.1994).** Buddy and Gary contend that during the cross-examination of Buddy the district attorney raised an inference that Buddy had no right to carry a concealed weapon. The following cross-examination took place in the record:

> Q. Did you carry a gun on you?
>
> A. Just pistols went with me for a number of years.

Q. So isn't it fair then to say we have already established that Mr. Goins sat right there in that chair yesterday and testified that he carried that little .25 like he would carry a pocket knife. He carried it with him a lot of places?

A. I'm not saying that everywhere I went, but every time I went in that pasture I had protection.

Q. So you carried a gun fairly often?

A. I didn't go in the pasture very much.

Q. When you went there, you would carry a gun for snakes?

A. Probably twice, twice, two times or three a year. When I would have it bushhogged, I would clip along my pasture fence.

We find that the State merely questioned whether Buddy carried a weapon and how often he carried it, rather than suggesting through its inquiry that Buddy had no right to carry a concealed weapon. In conclusion, we find that the evidence in this case does not support Instruction D-7 and agree with the trial judge's finding that Instruction D-7 was not necessary.

II. WHETHER THE COURT ERRED IN FAILING TO GRANT A NEW TRIAL AFTER BEING NOTIFIED OF THE FAILURE OF A JUROR TO DISCLOSE ALL RELEVANT INFORMATION ABOUT PREVIOUS CONVICTION OF THE JUROR.

Where, "a prospective juror in a criminal case fails to respond to a relevant, direct, and unambiguous question presented by defense counsel on voir dire, although having knowledge of the information sought to be elicited, the trial court should, upon motion for a new trial, determine whether the question propounded to the juror was (1) relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the juror had substantial knowledge of the information sought to be elicited. If the trial court's determination of these inquiries is in the affirmative, the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond. If prejudice reasonably could be inferred, then a new trial should be ordered." ***Odom v. State*, 355 So.2d 1381, 1383 (Miss.1978).**

In the instant case, the district attorney asked the following question of the prospective jurors during voir dire:

"Have you, any of you potential jurors, ever been charged with assault or convicted of assault; that is, have you ever assaulted anyone or been convicted of it, or have any of your family been convicted of assault or charged with assault?"

Juror Number 23, Ms. Cummings, did not answer this question at the time it was asked. Yet, it later came to the attention of the district attorney that Ms. Cummings had a prior aggravated assault

charge that was reduced to simple assault. Ms. Cummings indicated to the judge in chambers that she hit a horse ten years ago and the charge had been reduced to a misdemeanor. Notwithstanding these charges, she indicated an ability to be fair and impartial. The district attorney and the defense attorney asked no further questions of Ms. Cummings; both lawyers accepted her as a juror.

Subsequently, on a Motion for a New Trial, the defense attorney argued that although Ms. Cummings acknowledged conviction of a misdemeanor, she failed to reveal that no time was served for this crime. The court ruled that this was not grounds for reversal. The court stated that had the question been asked of her, Ms. Cummings might have responded that this conviction did not result in a jail sentence. Giving deference to the trial judge's statement in the record that he "didn't believe there was any pressure on Ms. Cummings," we find no prejudice to Buddy and Gary as a result of Ms. Cummings participation as a juror. We find that the trial judge did not abuse his discretion by denying the Motion for a New Trial. Finding no error, we affirm the circuit court's judgments.

THE JUDGMENT OF THE WEBSTER COUNTY CIRCUIT COURT OF CONVICTION OF GEORGE RAY, A/K/A BUDDY RAY, AND GARY RAY OF AGGRAVATED ASSAULT AND EACH SENTENCED TO TWELVE YEARS WITH SAID TWELVE YEARS SUSPENDED FOR FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCES IMPOSED SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. APPELLANTS PLACED UNDER SUPERVISION FOR FIVE YEARS. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

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