IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00186 COA

MICHAEL SYKES A/K/A MICHAEL JEROME SYKES **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:	2/15/96
TRIAL JUDGE:	HON. GEORGE CARLSON
COURT FROM WHICH APPEALED:	PANOLA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	DAVID L. WALKER
	JOHN D. WEDDLE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: WAYNE SNUGGS
DISTRICT ATTORNEY:	ROBERT J. KELLY, ASSISTANT
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF SALE OF CONTROLLED SUBSTANCE; SENTENCED TO 25 YEARS IN CUSTODY OF MDOC TO RUN CONCURRENTLY WITH CR9553CP2
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

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

HERRING, J., FOR THE COURT:

This is an appeal from the conviction in the Circuit Court of Panola County, Mississippi, of Michael Sykes for the sale of a controlled substance. Sykes was thereafter sentenced to serve twenty-five years in the custody of the Mississippi Department of Corrections and to pay $1,000 in restitution and costs. It is from this conviction that Sykes now appeals, citing the following points of error, which are taken verbatim from his brief:

I. THAT THE COURT ERRED IN ALLOWING INTO EVIDENCE TESTIMONY REGARDING CLAY BRADSHAW'S MEDICAL CONDITION WHICH ALLOWED THE APPELLEE TO IMPROPERLY COMMENT ON THAT CONDITION IN

CLOSING ARGUMENT CAUSING PREJUDICE.

II. THAT THE COURT ERRED IN DENYING JURY INSTRUCTION D-2.

III. THAT THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

After a careful review of the record and relevant law, we find no reversible error. Thus, we affirm the conviction of Michael Sykes.

THE FACTS

Michael Sykes was arrested on September 19, 1994, for selling a controlled substance, namely, crack cocaine, to a confidential informant. The events that led up to this arrest were orchestrated by law enforcement officers in an attempt to determine if Sykes was, in fact, a drug dealer. Prior to the arrest, the police were alerted by an informant, Clay Bradshaw, that Sykes was in the business of selling crack cocaine. Based on this information, Davey Kirkland, an agent with the Panola-Tate Narcotics Task Force, and Franco Altieri, an agent with the Mississippi Bureau of Narcotics, arranged for Bradshaw to conduct a drug transaction with Sykes. To accomplish this end, Bradshaw paged Sykes on his beeper and left a telephone number where he could be reached. Some time later, Sykes returned the call and the following recorded conversation took place:

Sykes: What's up man?

Bradshaw: Fifty.

Sykes: Hey, where you at?

Bradshaw: I'm down here at Jaudon's.

Sykes: Jaudon's.

Bradshaw: Yeah.

. . .

Sykes: A, what's up?

Bradshaw: Fifty, Where at?

Sykes: I'm at, I'm with my girl right now man. A, give me bout, bout a, know what I'm saying. It'll be around a 8:30, I on a, still on a lunch break, known [sic] what I'm saying?

Bradshaw: About 8:30?

Sykes: Yeah. I probably have to go get it then.

Bradshaw: Where you want to meet me at?

Sykes: Just call me back about 8, by 8, by 8:35 or 40.

Bradshaw: 8:35 or 40?

Sykes: Yeah.

Bradshaw: Got ya.

Bradshaw later called Sykes back, and Sykes instructed Bradshaw to meet him at the "Jiffy." Bradshaw asked which one, and Sykes replied, "you know." Bradshaw then asked if he meant "the usual," and Sykes replied in the affirmative.

Agents Kirkland and Altieri then traveled with Bradshaw to the Jiffy. The agents supplied Bradshaw with fifty dollars, the serial numbers of which had been previously recorded. The agents also searched Bradshaw and his vehicle to verify that he had no cocaine in his possession before he approached Sykes. Satisfied that all precautions had been taken, the agents allowed Bradshaw, who was wearing an electronic transmitter, to proceed with the transaction. Bradshaw then approached Sykes with the money and the following conversation took place:

Bradshaw: What up Top? [Sykes is also known as High Top]

Sykes: What's going on? What's going on man?

Bradshaw: Not damn, man. You being slow.

Sykes: Say what?

Bradshaw: You being slow?

Sykes: Yeah. I'll holler at ya?

Bradshaw: Okay. Maybe you . . . .

Sykes: I left my phone back here, you know what I'm saying? I'll holler at ya.

Bradshaw: Alright. Well you could of done me a little bit better than that.

Sykes: Huh?

Bradshaw: Count it and make sure that's right.

Sykes: Do what?

Bradshaw: That's all I had. That's it.

Sykes: Hey. I'll get ya back right next time.

Bradshaw: Alright.

Sykes: Alright, hook you later. When do you want me to get it?

Bradshaw: Oh probably about an hour, something like that.

Sykes: Talk to you later.

Bradshaw: Alright bubba.

Immediately thereafter, Bradshaw returned to the agents with three rocks of crack cocaine. He no longer had in his possession the fifty dollars the agents had given him. Sykes was arrested immediately following the transaction, and the fifty dollars supplied by the agents was found in his possession. At trial, the State presented as evidence the recorded conversations between Sykes and Bradshaw, as well as the crack cocaine and the fifty dollars used in the transaction. The State also presented the testimony of Agents Altieri and Kirkland, as well as that of Bradshaw and Teresia Hickmon, a forensic scientist who verified that the substance received by Bradshaw was cocaine. The defense consisted solely of the testimony of Michael Sykes, who testified that the transaction was an innocent transfer of money. Sykes claimed that Bradshaw owed him fifty dollars and that Bradshaw was merely repaying that debt on the night of the arrest. Bradshaw had earlier testified that he gave Sykes the money in exchange for drugs, not on account of a debt. At trial, Sykes made great import of the fact that the word cocaine or crack was never used in any of the conversations recorded by law enforcement personnel. However, the jury chose to accept the State's version of the facts and accordingly convicted Sykes of the sale of cocaine.

ANALYSIS

I. THAT THE COURT ERRED IN ALLOWING INTO EVIDENCE TESTIMONY REGARDING CLAY BRADSHAW'S MEDICAL CONDITION WHICH ALLOWED THE APPELLEE TO IMPROPERLY COMMENT ON THAT CONDITION IN CLOSING ARGUMENT CAUSING PREJUDICE.

As stated previously, Clay Bradshaw took the stand on behalf of the State. Bradshaw suffers from lung cancer and had recently undergone surgery in which a significant portion of his lungs were removed. The record reflects that Bradshaw appeared to the jury to be sickly and in obvious pain. In response to this, the State immediately asked Bradshaw if he had any physical ailments. He then informed the jury of his problems. The defense objected to this testimony as being irrelevant. The trial judge overruled this objection, holding that the testimony was valid as background information necessary to inform to jury as to why Bradshaw was behaving as he was. Furthermore, during the State's closing argument, the assistant district attorney again pointed to the fact that Bradshaw had cancer. The ensuing objection by the defense was sustained, and the trial judge instructed the jurors that they were to disregard that information.

Sykes now claims that he was prejudiced by this information, in that the jury was improperly placed in a position of sympathy with Bradshaw.

Rule 611(a) of the Mississippi Rules of Evidence provides that the trial judge "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . . ." According to the official comments to the rule, its purpose is to provide for "effectiveness in determining the issues, avoidance of needless waste of time, and protection of the witness from harassment and embarrassment." In light of this principle, we hold that the trial judge in the case *sub judice* acted within his discretion in allowing the brief background information explaining Bradshaw's condition.

We also agree with the trial judge that the State's actions in mentioning Bradshaw's lung cancer in closing argument were improper. However, we hold that the trial court cured any prejudice by instructing the jury to disregard that information brought out in closing arguments. In response to Sykes's argument that the State was attempting to illicit sympathy from the jury, the trial judge stated:

[T]he jury is told very clearly in jury instructions that they are not--that their decision is to be based on the evidence and they are to decide the case clear from any type of sympathy or bias or prejudice on their part. They're told specifically in jury instruction 1 . . . that "You are to apply the law to the facts and this way decide the case. You should not be influenced by bias, sympathy or prejudice."

The judge went on to hold that he was "satisfied that certainly this comment about the fact that Clay Bradshaw had cancer had no effect whatsoever on this jury verdict, based on the evidence, credible evidence the jury had before it." We agree. In cases involving improper closing argument, we will only reverse if the defendant has been substantially deprived of the right to a fair trial. ***Hickson v. State,* 472 So. 2d 379, 385 (Miss. 1985).** Based on the facts of the case before us, we cannot say that Sykes was deprived of a fair trial. This assignment of error has no merit.

II. THAT THE COURT ERRED IN DENYING JURY INSTRUCTION D-2.

As stated by the Mississippi Supreme Court, "[a] court's jury instructions 'will not warrant reversal if the jury was fully and fairly instructed by other instructions.'" ***Peterson v. State,* 671 So.2d 647, 659 (Miss. 1996)** (quoting *Collins v. State*, 594 So. 2d 29, 35 (Miss. 1992)). Further, a denial of a repetitive instruction is proper. ***Hull v. State,* 687 So.2d 708, 722 (Miss. 1996).**

In the case *sub judice*, Sykes submitted the following jury instruction labeled "D-2" for the judge's approval:

The verdict of the jury must represent the considered judgment of each juror. In order to return a verdict, it will be necessary that each juror agree. In other words, all twelve jurors must agree before returning a verdict in this case. It is your sworn duty as jurors to consult with one another and to deliberate in view of reaching an agreement, if you can do so without violence to your individual judgement. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion, if convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of

returning a verdict.

If there is any juror who is not convinced beyond a reasonable doubt of the defendant's guilt, it is his or her duty to vote "Not Guilty", even though it may cause a mistrial of this case.

The trial court denied this instruction, stating that it was repetitive of information contained in instructions C-4, C-5, and C-6. Instruction C-4, instructed the jury that if they had a reasonable doubt as to Sykes's guilt, then it was their duty to find him not guilty. Instruction C-5 instructed the jury that, *inter alia,* it had a duty to "turn an innocent person loose." And finally, Instruction C-6 instructed the jury that every member was to decide the issues for himself and not to be swayed by the decisions of the other members. Sykes now claims that instruction D-2 was not repetitive in that it stressed to the jury importance of the individual juror rather than the jury as a whole.

We hold that the trial court did not abuse its discretion in finding that Instruction D-2 was repetitive. When viewing the instructions as a whole, we find that the jury was properly instructed as to their duties under the law. Thus, this issue has no merit.

III. THAT THE VERDICT OF THE JURY WAS AGAINST 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, 103-04 (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.

(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 a totally different version of the events that occurred on the evening of September 19, 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 Sykes's version of the events that took place on September 19, 1994, and believed the testimony of Agents Kirkland and Altieri, as well as that of Clay Bradshaw. 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 PANOLA COUNTY OF CONVICTION OF THE SALE OF A CONTROLLED SUBSTANCE, COCAINE, AND SENTENCE OF TWENTY FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONCURRENTLY WITH CR9553CP2 AND ORDER TO PAY FINE OF $1,000 AND RESTITUTION OF $50 AND $100 TO THE CRIME VICTIM'S COMPENSATION FUND IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

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