

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00357-COA**

OSCAR GOMEZ

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:	03/15/96
TRIAL JUDGE:	HON. ROBERT LOUIS GOZA JR.
COURT FROM WHICH APPEALED:	RANKIN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	CHRISTOPHER A. TABB
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEWITT ALLRED III
DISTRICT ATTORNEY:	REBECCA WOOTEN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF THE POSSESSION OF MORE THAN ONE KILOGRAM OF MARIJUANA WITH INTENT TO DISTRIBUTE.
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

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

HINKEBEIN, J., FOR THE COURT:

Oscar Gomez [hereinafter Gomez] was convicted in the Rankin County Circuit Court of the possession of more than one kilogram of marijuana with intent to distribute. Gomez was sentenced to fifteen years in the custody of the Mississippi Department of Corrections, with ten years of that

sentence suspended pending good behavior. Aggrieved by his conviction Gomez assigns the

following points of error to the circuit court's judgment:

I. THE TRIAL COURT ERRED IN FAILING TO SUSTAIN DEFENDANT'S OBJECTION TO OFFICER TOWNSEND'S TESTIMONY ABOUT DRUG CARTELS.

A. THE EVIDENCE WAS IMPROPER "GUILT BY ASSOCIATION" EVIDENCE.

B. THE EVIDENCE WAS ALSO IMPROPER BECAUSE OFFICER TOWNSEND WAS ALLOWED TO TESTIFY AS AN EXPERT EVEN THOUGH HE WAS NOT OFFERED OR QUALIFIED AS ONE.

II. THE CONVICTION SHOULD BE REVERSED BECAUSE OF MISCONDUCT BY THE PROSECUTOR IN ARGUING MATTERS NOT IN EVIDENCE.

III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT HIS CONVICTION.

Holding Gomez's assignments to be without merit, we affirm the judgment of the circuit court.

FACTS

On March 13, 1994 Gomez was traveling west on U.S. Interstate Twenty in Rankin County, Mississippi driving a pickup truck and trailer loaded with used diesel engines and parts. Gomez was stopped by City of Pearl, Mississippi police officer Elmo Townsend [hereinafter officer Townsend] when the radar unit in officer Townsend's patrol car recorded Gomez traveling fifty-four miles per hour in a forty-five mile per hour zone. In response to officer Townsend's request to see his drivers' license, Gomez produced a New Mexico drivers' license. Gomez explained to officer Townsend that he was sorry for speeding and that he was lost. Gomez told officer Townsend that he was traveling from El Paso, Texas to Birmingham, Alabama to deliver used diesel engines to a repair shop. Officer Townsend then asked Gomez several questions including the name, address, or telephone number of the repair shop, how much Gomez was being paid to haul the engines, on whose behalf Gomez was transporting the engines, etc. Gomez's alleged response to all of officer Townsend's questions was that he "didn't know." Gomez's inability to provide this information caused officer Townsend to become suspicious, prompting him to ask Gomez for his consent to a search of the vehicle and cargo. Gomez gave both oral and written consent to the search.

Officer Townsend called for and received assistance from other Pearl Police Department officers before beginning the search of Gomez's truck and trailer. Observing that the used engines Gomez was hauling appeared to have been taken apart recently, officer Townsend used tools he found in Gomez's tool box to remove the oil pan from one of the engines. Upon removal of the oil pan officer Townsend observed several plastic-wrapped packages inside the engine. Officer Townsend pierced one of the packages with a screwdriver, revealing the package to be filled with a "green leafy substance" which he believed was contraband. Officer Townsend then placed Gomez under arrest for the possession of marijuana with intent to deliver.

Gomez and his truck/trailer were transported to the Pearl Police Department. While Gomez was

being processed into custody Pearl police officers conducted a detailed search of the engines. The officers' inspection revealed that each engine contained several plastic-wrapped packages full of the same green leafy substance. The officers observed that many of the engines' internal components had been removed so as to maximize the space available in which to conceal the plastic-wrapped packages. The packages recovered from the engines contained a total of approximately 315 pounds of a green leafy substance which laboratory analysis later identified as marijuana. Gomez was subsequently indicted and convicted of the possession of more than one kilogram of marijuana with intent to distribute. It is from this conviction that the instant appeal is taken.

ANALYSIS

I. THE TRIAL COURT ERRED IN FAILING TO SUSTAIN DEFENDANT'S OBJECTION TO OFFICER TOWNSEND'S TESTIMONY ABOUT DRUG CARTELS.

A. THE EVIDENCE WAS IMPROPER "GUILT BY ASSOCIATION" EVIDENCE.

B. THE EVIDENCE WAS ALSO IMPROPER BECAUSE OFFICER TOWNSEND WAS ALLOWED TO TESTIFY AS AN EXPERT EVEN THOUGH HE WAS NOT OFFERED OR QUALIFIED AS ONE.

With this assignment of error Gomez claims that the trial court committed reversible error in failing to grant his motion for a mistrial, which was based exclusively upon a portion of officer Townsend's testimony. Gomez offers a bifurcated explanation as to why the trial court should have granted his motion. First, Gomez contends that the trial court should not have allowed officer Townsend to testify that the letter "M," found on the plastic-wrapped packages, was placed on the packages by a drug cartel for the purpose of identifying the contents of the package. It is Gomez's position that officer Townsend's explanation of the "M" marking, coupled with his statement that drug cartels smuggle quantities of cocaine and marijuana into the United States, amounted to an impermissible "guilt by association" type of argument. Gomez contends that Townsend's testimony "was a blatant attempt by the prosecution to inflame the prejudices [of the jury] against the defendant so that they would convict him, not on the evidence, but rather because his ethnic background was similar to that of persons associated with large drug cartels." In the second prong of Gomez's argument he contends that officer Townsend's explanation of the "M" marking on the plastic-wrapped packages amounted to expert testimony from a witness who had not been tendered or accepted as an expert witness.

The State responds to both of Gomez's points by noting that he bases this assignment of error on grounds that he did not argue before the trial court. The State takes the position that because Gomez never made these arguments below, so as to give the lower court an opportunity to address his concerns, Gomez is barred from raising these grounds for the first time on appeal. In the alternative, the State contends that even were Gomez's arguments not barred from appellate review they would fail on their merits. Additionally, the State contends that if it were assumed that officer Townsend's

testimony was a "guilt by association" type argument and/or expert testimony from a non-expert, because Gomez failed to link the alleged errors with any prejudice to his case any error by the trial court would be harmless.

The portion of officer Townsend's testimony upon which Gomez based his motion for a mistrial was as follows:

STATE: And I notice some writing on some of the packages, what was that?

TOWNSEND: Yes mam. It was marked with an "M" I guess to state that it was marijuana whenever they . . .

DEFENSE COUNSEL: Object to what he guesses.

COURT: You may state your impression at the time, Mr. Townsend, but the use of the word "guess" is a poor choice. State what you thought.

TOWNSEND: Yes sir. The reason a lot of times they mark it with an "M" is . . .

DEFENSE COUNSEL: Objection to the reason they mark it with an "M," judge.

COURT: I think he can explain what the jury is looking at. He will be subject to cross examination Mr. [defense counsel].

STATE: [G]o ahead.

TOWNSEND: The reason some of the marijuana is marked, the cartels', some of them, they love to see their work. You will see it with scorpions on it, you will see it with golden rams on it, they will have little markings on it. A lot of time they are smuggling so much dope into the country, they are smuggling both the marijuana and cocaine in the United States . . .

DEFENSE COUNSEL: Your honor, objection.

COURT: Not a lecture now, Mr. Townsend. Explain what is on that picture very briefly. Don't remark on it. We are talking about this case, not what goes on anywhere else.

STATE: Give your impression at the time you saw the "M" on the package.

TOWNSEND: Yes mam. I believed it was marijuana so that they would know it was marijuana in the packages.

STATE: Versus some other substance?

TOWNSEND: Yes mam.

Gomez's motion for a mistrial was as follows:

Your Honor, when officer Townsend starts making statements to the jury, not even prompted from questions by [the State] concerning the cartels and this is how they bring dope into the country, and they bring so much dope in they mark it because they are proud of their work and put all these marks on it, and they bring so much dope in they've go to be sure whether it is marijuana or whether it is some other substance. I think that testimony is so clearly inflammatory I don't see how this [c]ourt can instruct this jury to disregard it. Therefore, I move for a mistrial.

We agree with the State's contention that Gomez is attempting to argue his assignment of error on grounds raised for the first time on appeal. It is well settled that "an objection to evidence may not be made upon one ground in the lower court and be presented upon an entirely different theory [on appeal]." *Sims v. State*, 512 So. 2d 1256, 1259 (Miss. 1987). Because "[i]t is fundamental to the principles of appellate review that a trial judge may not be put in error on a matter which was not presented to him for his consideration," we must reject as procedurally barred Gomez's argument that officer Townsend's testimony constituted a "guilt by association" type argument and/or expert testimony from a non-expert. *Holland v. State*, 587 So. 2d 848, 868 n.18 (Miss. 1991); *see also Read v. State*, 430 So. 2d 832, 838 (Miss. 1983) (holding that "before an issue may be assigned and argued [on appeal], it must first have been presented to the trial court").

Regarding the argument that Gomez actually presented to the trial court, we hold that the trial court's decision to deny Gomez's mistrial motion was not an abuse of discretion. *See Johnson v. State*, 666 So. 2d 784, 794 (Miss. 1995) (stating that appellate courts subject trial courts' denial of motions for mistrial to abuse of discretion standard of review). The only basis for a mistrial Gomez offered to the trial court was his conclusion "that [the] testimony is so clearly inflammatory I don't see how this [c]ourt can instruct this jury to disregard it. Therefore, I move for a mistrial." As can be seen from the record of Gomez's argument on the motion, *supra*, he presented the trial court virtually no basis upon which to grant his request. The essence of Gomez's argument was that he wanted a mistrial so he asked for one, without articulating any legal basis for such action by the trial court. After reviewing the portion of officer Townsend's testimony brought into question by Gomez's mistrial motion, *supra*, and the trial court's disposition of the contemporaneous objections Gomez made to that testimony, we find nothing in the record to indicate that the trial court abused its discretion in denying Gomez's motion. This assignment of error is without merit.

II. THE CONVICTION SHOULD BE REVERSED BECAUSE OF MISCONDUCT BY THE PROSECUTOR IN ARGUING MATTERS NOT IN EVIDENCE.

Gomez contends that the State's reference in closing argument to matters not in evidence amounted to an "insinuat[ion]" that Gomez knew that withholding his consent to the search would be useless since [o]fficer Townsend would have gotten a drug dog to sniff out contraband. There was no such

testimony about a drug dog." Gomez states that "by the time [his] objection was sustained, the suggestion that [he] realized that his refusal to allow a search would have been futile had already been firmly implanted in the minds of the jurors." Gomez concludes that "[b]ecause the prosecutor erroneously argued facts not in evidence and because this argument was of a very prejudicial nature and occurred at a time the defense could not rebut, the comments require that this case be reversed." The State argues that because Gomez's objection to the prosecutor's error was sustained and the jury admonished to ignore the State's remarks, the trial court committed no error. The remarks Gomez objected to were as follows:

STATE: [Defense counsel] wants you to think that no reasonable person would ever let you search their vehicle if they had contraband in it. You heard [o]fficer Townsend. He said if this man had said no I would have gone and gotten the dog then. He didn't have the dog . . .

DEFENSE COUNSEL: Objection. Facts not in evidence, have not been testified to.

COURT: It will be noted and overruled.

DEFENSE COUNSEL: Your Honor, may I approach the bench for a second?

COURT: You may. (off record) Ladies and gentlemen. I have reversed myself and sustained [defense counsel's] objection and motion to strike these last remarks that unintentionally referred to some matters that have not been subject to proof here today. That is not permissible. Neither attorney may argue things outside the record. Sometimes that unintentionally happens and it is my duty to call it to their attention and yours as well. So please disregard all statements made by [the prosecutor] about the dog. A dog was not involved in this case and has nothing to do with it.

STATE: I apologize.

As evidenced by the trial transcript, during the State's closing argument the prosecutor referred to matters (i.e. the use of a drug sniffing dog to search Gomez's truck) that had not been introduced into evidence. Gomez objected and was sustained by the trial court. In sustaining Gomez's objection the trial court instructed the jury to disregard the erroneous statements made by the State. The State then resumed its closing argument, never again referring to a drug sniffing dog. Gomez made no further objections or motions after the trial court admonished the jury to disregard the State's erroneous remarks.

We hold Gomez's assignment of error to be without merit because he failed to make a motion for mistrial. Mississippi law presumes "that the sustaining of an objection causes the jury to disregard the objected-to material." *Lanier v. State*, 533 So. 2d 473, 482 (Miss. 1988). Under the facts at bar not only did the trial court sustain Gomez's objection, it instructed the jury to disregard the erroneous comments and even went so far as to explain why the State's erroneous remarks must be disregarded. It is the opinion of this Court that if Gomez felt the trial court's corrective actions were insufficient to prevent his defense from being prejudiced by the erroneous remarks he should have made a motion for mistrial. *See Johnson v. State*, 477 So. 2d 196, 210 (Miss. 1985), *rev'd on other grounds*, *Johnson v. Mississippi*, 484 U.S. 1003 (1988) (holding that "[i]f the argument is improper, and the objection is sustained, it is the further duty of trial counsel to move for a mistrial."); *Saucier v. State*,

328 So. 2d 355, 358 (Miss. 1976) (holding that if defendant regarded sustaining of his objection as insufficient to remove "any supposed harmful effect which may have resulted from the district attorney's remark to the court," it was necessary that he immediately move for mistrial). This assignment of error is without merit.

III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT HIS CONVICTION.

With this assignment of error Gomez alleges that the State's evidence at trial "was insufficient to connect [him] with the contraband found in the vehicle he was driving." Gomez concedes that "[a]lthough the marijuana was found within engines being hauled by [him], the evidence at trial was insufficient to prove beyond a reasonable doubt that [he] had actual knowledge of the presence of marijuana in the engines." Gomez concludes that "[b]ecause [he] did not own the vehicle or engines in which the marijuana was found, the prosecution had to put on additional evidence to prove beyond a reasonable doubt that [he] had knowledge of the marijuana in the engines. This the prosecution failed to do." The State's response to Gomez's argument assumes that he is challenging the trial court's denial of his motion for a directed verdict. The State contends that the trial court did not abuse its discretion in denying Gomez's motion because "there was a jury question made out as to Gomez's guilt."

It is unclear what action(s) of the trial court Gomez is challenging as reversible error with this assignment of error. Because Gomez claims that the evidence was insufficient to support the jury's verdict, we interpret him to be attacking the trial court's denial of his motion for a directed verdict and his subsequent renewal of "all motions previously made." *See McClain v. State*, **625 So. 2d 774, 778 (Miss. 1993)** (holding that directed verdict and JNOV motions challenge legal sufficiency of evidence). 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. *Brooks v. State*, **695 So. 2d 593, 594** (quoting *Carr v. State*, 655 So. 2d 824, 837 (Miss. 1995)). With regard to the legal sufficiency of the evidence, all credible evidence consistent with the defendant's guilt must be accepted as true and the prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *McClain*, **625 So. 2d at 778**. This Court is authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair minded jurors could only find the accused not guilty. *Wetz v. State*, **503 So. 2d 803, 808 (Miss. 1987)**. If there is in the record substantial evidence of such quality that, having in mind the beyond a reasonable doubt standard, reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is beyond our authority to disturb. *Brooks*, **695 So. 2d at 594** (quoting *Carr*, 655 So. 2d at 837).

It is the conclusion of this Court that the jury had before it sufficient evidence to support its finding of Gomez's guilt so that we cannot hold that reasonable and fair minded jurors could only find the accused not guilty. This evidence included Gomez's inability to answer officer Townsend's innocuous questions regarding the destination of the cargo, the owner of the truck and cargo, the amount Gomez was being paid for his work, etc. Furthermore, the motel/fuel receipts and road map with cities circled on it (found in Gomez's truck) show that Gomez's path from Texas to Alabama was not the most direct one available on the U.S. interstate highway system. Rather than traveling on the interstate system and going straight to his alleged destination, Gomez made several unexplained

detours into areas that were well "off the beaten path." It seems reasonable that the jury could find these unexplained detours to be a delivery route for making drop offs of the illicit cargo Gomez was transporting. Gomez's activities were also brought into question by the fact that the used engines he was transporting had little intrinsic value and there were other repair shops much closer to his point of origin that could have rebuilt the engines. Additionally, the engines appeared to have recently been taken apart, and Gomez just happened to have the necessary disassembly tools in the truck. Accordingly, this assignment of error is without merit.

THE JUDGMENT OF THE RANKIN COUNTY CIRCUIT COURT OF CONVICTION OF THE POSSESSION OF MORE THAN ONE KILOGRAM OF MARIJUANA WITH THE INTENT TO DISTRIBUTE AND SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH TEN YEARS SUSPENDED UNDER CERTAIN CONDITIONS, IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO RANKIN COUNTY.

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