

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00293 COA**

JACK MAYE A/K/A JACKSON MAY

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:	02/10/95
TRIAL JUDGE:	HON. MICHAEL RAY EUBANKS
COURT FROM WHICH APPEALED:	LAWRENCE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	HENRIETTA SWEENEY
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: WAYNE SNUGGS
DISTRICT ATTORNEY:	RICHARD L. DOUGLASS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	SALE OF CRACK COCAINE; 15 YEARS
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

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

HERRING, J., FOR THE COURT:

Jack Maye appeals to this Court from his conviction on the charge of selling cocaine to an undercover narcotics agent on loan to the Sheriff's office of Lawrence County, Mississippi, in violation of Section 41-29-139(a)(1) of the Mississippi Code of 1972, as amended. The Appellant claims that the evidence presented against him was not sufficient to warrant a conviction of the offense. He also contends that the trial court committed reversible error when it allowed the jury to listen to an audio taped recording of conversations between Maye, the undercover agent, and others. We affirm the judgment of the trial court.

A. THE FACTS

Duane R. Bradford, the Sheriff of Lawrence County, Mississippi, decided to organize an undercover narcotics unit of law enforcement officers at some point during the month of February, 1993. To this end, the Sheriff contacted representatives of the Jackson, Mississippi, Police Department and secured the services of two police officers, Preston Carter and Steven Tharpe. Carter and Tharpe were loaned to Sheriff Bradford to act as undercover narcotics agents and were actually sworn in as Lawrence County deputies by the chancery clerk. Officers from the Mississippi Bureau of Narcotics provided surveillance assistance for the operation.

On the night of February 26, 1996, Officers Carter and Tharpe went to the residence of Hubert Daggins for the purpose of purchasing marijuana and cocaine. Carter was wired with a body transmitter, and a surveillance team, including Sheriff Bradford, was nearby for the purpose of listening to the conversation that was to take place at the Daggins' home in Carter's presence and also to be available in case of trouble. Both Carter and Tharpe had purchased marijuana and cocaine on the previous evening from Cedric Maye, purportedly Jack Maye's cousin, and Hubert Daggins. Carter and Tharpe were returning to the Daggins' home on the night of February 26 in order to complete a pre-arranged purchase of marijuana which had been discussed on the previous evening. Carter testified that it was his intent to also attempt to make another purchase of cocaine.

Cedric Maye met Carter and Tharpe at the front door of the Daggins' home. Upon their arrival, Cedric informed Carter that he had not been able to locate any marijuana and that Daggins was out. As Carter spoke with Cedric Maye, Jack Maye drove into the Daggins' carport in a white Toyota automobile. Cedric then asked Carter to wait while he talked to Jack Maye. A few moments later, after talking with Cedric Maye, the Appellant approached Carter and asked, "How much are you looking for?" Carter replied that he wanted to purchase \$100 worth of cocaine, or five or six good "rocks," whereupon Cedric Maye and Jack Maye engaged in another private conversation. Shortly thereafter, Cedric whispered to Carter "He's got it; he don't want to deal in front of you." Jack Maye then informed Carter that he could locate the cocaine for him. Carter gave Cedric Maye the sum of \$100 to take with him when he left with Jack Maye to locate the cocaine, and Cedric left \$200 worth of marijuana with Carter as "collateral" until they returned.

Cedric and Jack Maye then left the Daggins' home in Jack Maye's vehicle in an effort to obtain the cocaine. Jack Maye drove the vehicle and the two men were gone for approximately twenty minutes. When Cedric and Jack Maye returned, the Appellant walked into the house without speaking to Carter and Tharpe. Cedric Maye then gave Carter five rocks of crack cocaine. Carter also purchased four bags of marijuana from Cedric at that time for the sum of \$40. Carter and Tharpe took the cocaine and marijuana which Carter had purchased and left the premises to meet with the surveillance officers. Jack Maye was ultimately charged with participating in an illegal sale of crack cocaine. Cedric Maye and others were charged with the illegal sale of marijuana.

B. THE ISSUES

The Appellant raises three issues on appeal which are taken verbatim from his brief:

I. WHETHER THE STATE OF MISSISSIPPI PROVED WITHIN A REASONABLE DOUBT THAT JACK MAYE SOLD CRACK COCAINE IN VIOLATION OF SECTION 41-29-139(a)(1) AND PUNISHABLE UNDER SECTION 41-29-139(b) OF THE MISSISSIPPI

CODE?

II. WHETHER IT WAS PROVEN WITHIN A REASONABLE DOUBT THAT JACK MAYE AIDED AND ABETTED OR WHETHER HE HELPED FACILITATE THE SALE OF CRACK COCAINE?

III. WHETHER THE JUDGE COMMITTED REVERSIBLE ERROR WHEN HE ALLOWED THE JURY TO HEAR HEARSAY TESTIMONY ON ANAUDIOTAPE WHICH HE HAD DENIED AND DECLARED INADMISSIBLE IN A PRIOR RULING IN THE CASE?

C. ANALYSIS

I. DID THE STATE OF MISSISSIPPI PROVE BEYOND A REASONABLE DOUBT THAT JACK MAYE SOLD CRACK COCAINE IN VIOLATION OF SECTION 41-29-139(a)(1) AND PUNISHABLE UNDER SECTION 41-29-139(b) OF THE MISSISSIPPI CODE?

II. DID THE STATE PROVE BEYOND A REASONABLE DOUBT THAT JACK MAYE AIDED AND ABETTED OR HELPED FACILITATE THE SALE OF CRACK COCAINE?

Jack Maye's first two issues require a similar analysis in that they both challenge the sufficiency and the weight of the evidence presented in the case *sub judice*. Thus, the two issues will be discussed together. Specifically, Maye claims that there was insufficient evidence to prove beyond a reasonable doubt that he was guilty of the crimes charged. As our Mississippi Supreme Court has recently held:

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 inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered points 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 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 v. State*, 695 So. 2d 593, 594 (Miss. 1997)**. We find that there was substantial evidence in the record in this case from which a jury could have found the Appellant guilty as charged. Thus, we find that Maye's challenge to the sufficiency of the evidence against him is without merit.

In regard to Maye's claim that the jury's verdict was against the overwhelming weight of the evidence, the Mississippi Supreme Court has ruled that in determining "whether or not 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 it is convinced that the circuit court has abused its discretion in failing to grant a new trial.'" ***Nicolaou v. State*, 612 So. 2d 1080, 1083 (Miss. 1992)** (quoting *Thornhill v. State*, 561 So. 2d 1025, 1030 (Miss.1989)). Jack Maye does not deny that he

was at the scene of the crime. He claims that he was simply at the wrong place at the wrong time and had nothing to do with the sale of drugs. However, Agent Carter testified that Maye clearly knew what was going on because he asked Carter, "How much do you want?" When Carter told him that he wanted five or six good rocks of cocaine, Maye informed Carter he knew where he could find the cocaine. Immediately after making this statement, Jack Maye, accompanied by Cedric Maye, left in Jack Maye's automobile and returned a few minutes later with the cocaine. Jack Maye admitted that he left with Cedric but claimed that he only gave Cedric a ride to purchase some chicken for Cedric's children, although he was aware that Cedric had been given \$100 by Carter to purchase cocaine. The State argued that Jack Maye knew exactly what Cedric was up to and where the two men were going when they left the Daggins' home. 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 Jack Maye's explanation of the events that took place on February 26, 1996, and believed the testimony of Agent Carter. We will not overturn the findings of the jury acting in the capacity of a fact finder unless those findings are clearly erroneous. *Herrington v. Spell*, 692 So. 2d 93, 104 (Miss. 1997). We cannot say that the jury's verdict was clearly erroneous in this case.

In reviewing the record under both the overwhelming weight of the evidence standard and the sufficiency of the evidence standard, we find that neither of the assignments of error raised by the Appellant on these issues have merit.

III. DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR WHEN HE ALLOWED THE JURY TO HEAR CONVERSATIONS ON AN AUDIOTAPE WHICH HE HAD DENIED AND DECLARED INADMISSIBLE IN A PRIOR RULING IN THE CASE?

On this issue, Maye argues that the trial court erred in allowing an audio recording of conversations that took place during a drug sale to be admitted into evidence. Maye claims that the conversations heard on the audiotape consisted of inadmissible hearsay. At trial, Jack Maye objected to the admission of the audiotape into evidence on the ground that it contained statements made by Cedric Maye to agent Carter that were previously ruled to be inadmissible by the trial court.

At an earlier stage in the trial, the prosecutor questioned agent Carter concerning certain statements made to him by Cedric Maye as follows:

Q. Now, what is it that Cedric said to you?

A. He said, "He has the stuff, he don't want to deal in front of you." He, at that time, told me that he needed the money, and what he would do is he and Jack would leave - - he'd obtain the drugs - -

MR. EVANS: Object again, Your Honor, on hearsay.

THE COURT: Was this said in the presence of the defendant? Was he able to hear this conversation you're referring to now?

THE WITNESS: Possibly, Your Honor. I'm not sure; possibly.

THE COURT: I'll sustain the objection, then.

As shown by the testimony, the statement of Cedric Maye was excluded, apparently because the trial court concluded that the statements by Cedric Maye to Carter were made outside the presence of Jack Maye. However, when the audiotape was played for the trial judge outside the presence of the jury, he basically heard the same statements made by Cedric Maye as previously testified to by Agent Carter. At this point, the trial court reversed its earlier ruling and allowed the audiotape and the statements of Cedric Maye into evidence, apparently because the judge concluded that Cedric's statements were made in the presence of Jack Maye after all, or because, as urged by the Appellee, the audiotapes were sufficiently trustworthy and reliable, pursuant to Mississippi Rule of Evidence 803(24). Carter maintained throughout his testimony that Jack Maye was only a few feet away when Cedric whispered to Carter that Jack Maye did not want to deal with Carter directly. However, the court stated no specific reason for allowing the audiotape into evidence except that it would be difficult or impossible to sort out hearsay statements on the tape from statements made by Jack Maye, himself. Thus, the entire tape recording was admitted into evidence.

It is noteworthy that the audiotaped conversations recorded through devices which were installed on Carter's body during the transaction in question, admittedly included conversations between Carter and Cedric Maye, and also included conversations between Carter and Jack Maye. Carter also testified that Jack Maye was only three to four feet from Cedric during Carter's conversations with Cedric Maye. Moreover, apart from the audiotapes, the trial court had already admitted into evidence Jack Maye's statements to Carter in which the Appellant asked Carter how much cocaine he wanted to buy, and a further statement by the Appellant that he could locate the cocaine for Carter. The admissibility of these statements by Jack Maye were not challenged by the Appellant, nor was the fact that his voice appears on the audiotape during the course of the drug transaction. As stated above, Jack Maye admits that he was present at the Daggins' home and that he took Cedric Maye uptown in his automobile. He only denies being involved in the drug transaction itself. Thus, we must decide whether the trial court committed reversible error when it allowed the audiotape into evidence, which contained some statements by Cedric Maye which may have been made out of Jack Maye's presence or hearing.

Mississippi Rule of Evidence 803(24) states as follows:

(24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact: (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts: and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

There is no challenge on appeal by Jack Maye to the authenticity of the audiotape and no claim that the Appellant did not receive adequate advance notice of the audiotape in compliance with Rule

803(24) which is substantially identical to Federal Rule of Evidence 807. The official comment to Rule 803(24) states:

The rule reflects the realization that the law is not stagnant. As the FRE Advisory Committee's Note indicates, it would be presumptuous to assume that the contemporary legal community has enumerated every single hearsay exception which possibly could exist. The exceptions are not a closed system, and Rule 803(24) and its counterpart Rule 804(b)(5) allow for the future development of the law when the guarantees of reliability and trustworthiness can be found. While these two rules allow for judicial discretion, they do not permit an unfettered discretion which could ultimately devour the hearsay rule. Before admitting statements under this rule, the judge must make a finding that the statements being offered are sufficiently trustworthy and reliable. *See Cummins v. State*, 515 So. 2d 869 (Miss. 1987). One of the clearest examples of the circumstances meeting the criteria of Rule 803(24) is found in *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961).

***Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961)**, cited in the official comment to Rule 803(24), deals with the admissibility of a newspaper article written fifty-eight years prior to trial. In *Dallas County*, the United States Court of Appeals for the Fifth Circuit emphasized that while our courts will not normally admit evidence unless its accuracy and trustworthiness is tested by cross-examination, this rule is "replete with exceptions." ***Id.* at 392**. Furthermore, the court cites Wigmore's analysis that "the requisites of an exception to the hearsay rule are necessity, and circumstantial guaranty of trustworthiness." ***See Wigmore on Evidence*, § § 1421, 1422, 1690 (1st ed. 1913)**. "Necessity" was defined by Wigmore to exist, not by a showing of total "inaccessibility of firsthand evidence as a condition precedent to the acceptance of a particular piece of hearsay," but "where otherwise great practical inconvenience would be experienced in making the desired proof." ***Dallas County*, 286 F.2d at 396** (citing Wigmore, 3rd ed. vol.V, sec. 1421; vol VI, sec. 1702). "Trustworthiness," according to Wigmore, sufficient to be a substitute for cross-examination, exists in three sets of circumstances:

Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed; where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection on [sic] the fear of punishment, would probably counteract its force; where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

5 Wigmore, Evidence, § 1422 (3rd ed.). In the case *sub judice*, Jack Maye testified in his own defense, and in addition to admitting that he was present at the Daggins' home on the evening of February 26, 1993, he also admitted that he saw agent Carter receive several bags of marijuana as collateral until his cocaine purchase was delivered to him. Jack Maye also testified that he observed Carter pay the sum of \$100 for cocaine. Furthermore, he acknowledged that his voice was recorded and appeared on the audiotape which the trial court allowed into evidence. Thus, it is apparent that the contents of the audiotape were sufficiently trustworthy to circumvent the hearsay rule pursuant to Mississippi Rule of Evidence 803(24), given the testimony of Agent Carter that his body was "wired" to record the conversations at the Daggins' home and considering the fact that no challenge was made to the authenticity of the audiotape. We are aware that in ***Cummins v. State*, 515 So. 2d 869, 875**

(Miss. 1987) the Mississippi Supreme Court held that the trial court is required to make a finding on the record that hearsay statements are sufficiently trustworthy and reliable prior to their admission pursuant to Rule 803(24). However, in the case *sub judice*, the defendant himself testified to the reliability of the contents of the audiotape by admitting that his own statements as well as the statements by Cedric Maye were on the tapes (who he referred to at the trial as "Fredric Magee"). Under such circumstances, where a defendant testifies as to the authenticity of the so-called hearsay evidence, we hold that it is not necessary for the trial court to simply recite that the evidence is trustworthy and reliable prior to its admission. Under such circumstances, the basis for the ruling of the trial court allowing the audiotape into evidence was obvious. **5 Weinstein's Federal Evidence, § 803.30[3][a] (2d ed. 1997).**

On the issue of necessity, the only party, other than Agent Carter and Jack Maye, who could have testified as to what Cedric Maye said to Carter, as shown on the audiotape, was Cedric Maye himself. Cedric was charged with other crimes as a result of his encounter with Agent Carter on the night of February 26, 1993. Thus, we rule that while it is possible that the testimony of Cedric might have been obtained through some plea-bargain arrangement, his testimony against Jack Maye would have been unreasonably inconvenient to obtain as a practical matter, given all of the circumstances involved. Moreover, we hold (1) that the statements on the audiotape were relevant and material to the issues before the trial court, (2) that the statements were more probative on the issues raised in the tape than any other evidence that could have been procured through reasonable efforts, and (3) the interests of justice were served by the admission of the audiotape into evidence. Thus, since the authenticity of the audiotape was not an issue and because the tape had been provided to the Appellant prior to trial in compliance with Rule 803(24), we hold that the audiotape and its contents were properly admitted into evidence as an exception to the hearsay rule.

Generally, "[a] trial judge has broad discretion as to the admissibility of evidence. Unless this discretion is so abused as to be prejudicial to the accused this Court will not reverse the lower court's ruling." *Coleman v. State*, 697 So. 2d 777, 784 (Miss. 1997). We rule that the trial judge did not abuse his discretion in this case.

THE JUDGMENT OF THE CIRCUIT COURT OF LAWRENCE COUNTY OF CONVICTION OF THE SALE OF COCAINE AND SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LAWRENCE COUNTY.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR. SOUTHWICK, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, P.J.

SOUTHWICK, J., CONCURRING

I concur in the result only, as I do not find that M.R.E. 803(24) addresses admissibility of the hearsay

discussed in Section III of the court's opinion. I find the admission to be harmless error.

MCMILLIN, P.J., JOINS THIS SEPARATE OPINION.