IN THE COURT OF APPEALS 04/22/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00094 COA

L. T. MAGIC

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

TRIAL JUDGE: HON. GRAY EVANS

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

LELAND H. JONES III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: BILLY L. GORE

DISTRICT ATTORNEY: CARLTON, FRANK

NATURE OF THE CASE: CRIMINAL - ARMED ROBBERY

TRIAL COURT DISPOSITION: ARMED ROBBERY: SENTENCED TO SERVE A TERM OF HIS NATURAL LIFE IN THE CUSTODY OF THE MDOC

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

L.T. Magic was convicted of armed robbery by a Leflore County jury. On appeal he argues that there was improper redirect of a State witness, that the verdict was against the overwhelming weight of the evidence, that he should not have been required to give race-neutral reasons for exercising his peremptory juror strikes, and that the jury was not properly instructed on the meaning of imposing a life sentence. None of these issues justify reversal, and we affirm.

FACTS

Jeremy Brown was attacked and shot several times in the stomach with a .22 pistol. At the time of the attack, Jeremy had over $3,000 he had just received from a car accident settlement. The attacker approached Jeremy and told him to "break yourself," which is current slang for what in simpler times was "this is a stick-up." Jeremy's older brother, Jeremiah, was walking eight or nine feet ahead of Jeremy when he heard shots being fired. Jeremiah ran to his brother's side and struggled with the attacker. Although Jeremy and Jeremiah had not seen the attacker before this incident, they testified that the lighting at the scene of the attack was good and that there was no doubt that Magic was the attacker. Magic was chosen out of a line-up the day after the attack. Magic gave a written statement that a man named "Kojak" did the shooting. Another witness, however, testified that Kojak was on the front porch with him while both men observed Magic and Jeremy on the ground struggling with one another.

DISCUSSION

1. Improper Re-direct Examination

Magic argues that the court improperly permitted redirect examination on the subject of physical injuries to the victim. The victim was asked about the number and location of gun shot wounds that he suffered. Magic alleges that this evidence being elicited on redirect "precluded defense counsel from addressing the matter."

The supreme court has said that "[g]enerally, the scope and extent of re-direct examination is within the discretion of the court." *Evans v. State*, 499 So.2d 781, 782 (Miss. 1986). "Thus, rulings of the trial court pertaining to redirect will not be disturbed unless there has been a clear abuse of discretion." *Evans v. State*, 499 So. 2d at 782. However, the court has further noted that "[a]lthough the scope of re-direct is largely within the discretion of the court," court rules provide that "[r]edirect examination is limited to matters brought out on cross-examination." Miss. Unif. Crim. R. Cir. Ct. P. 5.08.

The following is the relevant re-direct examination:

> Q. Mr. Brown, you testified that you heard at least six continuous shots; how many of those shots actually struck you?

BY MR. JONES:

Your Honor, I'm going to object as improper re-direct. That should have been on direct examination.

BY THE COURT:

Overruled.

A. Well I have -- Well, according to the doctor, six shots hit me because I have eight bullet holes.

Q. And two of those holes would be exit, wouldn't actually be entry wounds?

A. Yes.

Q. Could you stand up and show to the members of the jury places direct where you were hit, if you can recall?

A. I was --

BY MR. JONES:

Once again . . . again, Your Honor, I object.

BY THE COURT:

Overruled.

BY MR. JONES:

As being improper direct, re-direct.

Q. Just point to the places, please.

A. I was hit once here, once here, once here, once here and once here.

Q. Thank you.

There was no abuse of discretion in allowing this testimony. On cross-examination, the defense counsel had asked Jeremy about the number of pistol shots and also requested that Jeremy sound the shots off. This line of questioning revealed that at least six continuous shots had been fired by the attacker as he struggled with Jeremy. The prosecution then inquired on re-direct as to where these shots hit Jeremy. This was a continuation of the questions brought out on cross-examination.

2. Overwhelming Weight of the Evidence

The supreme court has stated that it "will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice." *Groseclose v. State,* 440 So. 2d 297, 300 (Miss. 1983). Magic claims that "when the likelihood of misidentification of Defendant, L. T. Magic, by the victim's brother is

combined with the undisputed fact L.T. Magic at the time of his arrest, less than 24 hours after the robbery, was in ‘good physical condition,’" there is enough to warrant a new trial. Magic argues that there was no proof of a struggle between him and Jeremiah, who was allegedly considerably larger than Magic. Jeremiah testified that he struggled with Magic for "a good five to six . . . maybe ten minutes. . ." During this altercation Magic’s head allegedly struck the concrete, but Jeremiah did not know the extent of the injuries Magic suffered. Magic contends that his appearance as shown in a photograph taken of him less than 24 hours later was inconsistent with such a struggle.

The jury was presented with all of this evidence and had an opportunity to see the physical build of both Magic and Jeremiah. The supreme court has repeatedly stated its view of the role of the jury. "It is the function of the jury to pass upon the credibility of the evidence." *Groseclose v. State*, 440 So. 2d at 300. The also has held:

> Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into finding of fact sufficient to support their verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution.

Gandy v. State, 373 So. 2d 1042, (Miss.1979). There is no conflicting testimony here because the defense offered no witnesses. The State presented five witnesses. Jeremy and Jeremiah identified Magic in court and in a line-up as Jeremy’s attacker. They testified that there was no doubt that Magic was the attacker. They both fought with Magic face to face and in well-lighted conditions. On the other hand, the voluntary statement given by Magic that a man named "Kojak" did the shooting was refuted by testimony of Astrontis Willis, who testified that Kojak was with him at the time of the shooting and that Willis saw the struggle between Magic and Jeremy. The jury was presented with sufficient evidence to support its verdict and we will not disturb it.

3. Requiring Race-Neutral Reason be Given for Striking Prospective Jurors

Magic argues that the court improperly required him to give a race neutral reason when exercising his challenges of veniremen. He refers to this exchange at trial:

BY MR. JONES:

Acceptable. Scales would be D-1.

BY THE COURT:

For the reason given, D-1.

BY MR. JONES:

Her son worked at Parchman. She’s familiar with the system.

BY THE COURT:

Ms. . . . Ms. Chiles, Hawkins?

BY MS. CHILES:

Acceptable.

BY THE COURT:

Mr. Jones?

BY MR. JONES:

Judge, likewise her . . . she would be D-2. Her husband worked for the Department of Corrections.

BY THE COURT:

Ms. Chiles, Payne? No, wait, wait, wait, wait, wait. Ellet.

BY MR. JONES:

Mr. Elliott (sic).

BY MS. CHILES:

Acceptable.

BY THE COURT:

Defendant, Ellett, Virginia Hammons Ellett?

BY MR. JONES:

Judge, she will be D-3. I didn't ask any questions but I've known Ms. Ellett for a number of years. Her husband works at the bank. She's employed at the school where my wife used to work and just being in the school system and the age of my client.

Magic contends that because there was no claim by the prosecution of discrimination, there should have been no requirement that he give race-neutral reasons for exercising his challenges. We find no explicit compulsion in the transcript just quoted, though certainly defense counsel gave reasons. The supreme court has stated that " when the defense provides a race neutral reason, the prosecution has the ultimate burden to establish a case of racial discrimination." *Stewart v. State*, 662 So. 2d 552, 559 (Miss. 1995). "The defendant must articulate a racially neutral explanation only if the State demonstrates a prima facie case of racial discrimination by the defendants." *Id*.

Magic's argument seems to be simply that since he should not have been required to give race neutral

reasons, the case must be reversed. Even were we to agree that the record supports that Magic was compelled to give race-neutral reasons prior to any prima facie case of discrimination being made, Magic was unharmed by such a requirement. The three witnesses Magic sought to have excluded from the jury were excluded. The issue became moot.

4. Instruction on Imposition of Life Sentence

Magic was sentenced by a jury to life imprisonment in this case. He argues that the trial court erred in not giving an instruction regarding the meaning of "life" when one is convicted of robbery committed with a firearm. He claims that the jury should have been informed that such a sentence really meant life. This is because a statute that became effective after the date of the crime, but before the day of the trial, provides that no person shall be eligible for parole if convicted of robbery through the display of a firearm. Miss. Code Ann. § 47-7-3(d)(ii). The State points out that Magic never requested that such an instruction be given to the jury. It is of more than passing significance that the supreme court has ruled that another statute that required felons to serve 85% of their sentences could not be applied to a crime committed prior to the statute's passage. *Puckett v. Abels,* 684 So. 2d 671, 678 (Miss. 1996) [interpreting Miss. Code Ann. §47-5-138 (Supp. 1996)]. Thus it is doubtful that the new statute applies to Magic, but that is a matter that can be addressed in another proceeding when parole issues become relevant.

The jury was given an instruction that allowed them to return a verdict of (1) guilty and impose life, (2) guilty and unable to agree upon punishment, and (3) not guilty. Although the judge may use his discretion in giving instructions in addition to those submitted by the parties, no further instruction was needed in this case.

THE JUDGMENT OF THE CIRCUIT COURT OF LEFLORE COUNTY OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LEFLORE COUNTY.

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

HINKEBEIN, J., NOT PARTICIPATING.