IN THE COURT OF APPEALS 12/3/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KP-00723 COA

CORRELL HARDY

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. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT

FOR APPELLANT:

CORRELL HARDY (PRO SE)

JOHN T. HALTOM (WITHDRAWN)

ATTORNEYS FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS

DISTRICT ATTORNEY: FRANK CARLTON

NATURE OF THE CASE: POSSESSION OF COCAINE WITH INTENT TO SELL, BARTER, OR DELIVER.

TRIAL COURT DISPOSITION: CT II POSSESSION OF COCAINE WITH INTENT: SENTENCED TO 10 YRS IN MDOC, AND PAY 1,000.00 FINE.

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

THOMAS, P.J., FOR THE COURT:

Correll Hardy appeals his conviction of possession of cocaine with the intent to sell, barter, or deliver, raising the following issues as error:

I. DID THE TRIAL COURT ERR IN FAILING TO MAKE AN ON-THE-RECORD DETERMINATION OF THE PROBATIVE VALUE VERSUS THE PREJUDICIAL EFFECTS OF USING OTHER CRIMES, WRONGS OR ACTS IN THE TRIAL IN VIOLATION OF RULE 403, 404(b) AND 609 OF THE MRE?

II. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A LESSER INCLUDED OFFENSE INSTRUCTION AND ALSO MIS-INSTRUCTED THE JURY BY ALLOWING INSTRUCTION S-1 TO BE ADMITTED?

III. WAS HARDY DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

IV. WAS THE JURY'S VERDICT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

Finding no error, we affirm.

FACTS

On August 21, 1993, Officers Marvin Flowers and William Cobb, Jr., with the Indianola Police Department, were involved in an undercover drug operation in Indianola, Mississippi. The officers were working with a confidential informant named Kelvin Plain. Before the drug operation, the officers wired Plain and also gave him a marked twenty-dollar bill that they had photocopied before the transaction took place. Plain, Flowers, and Cobb had determined that once Plain said the code words "big time" then the officers were to close in upon Plain and the suspect.

Plain went to the neighborhood of Lincoln and Clay streets in Indianola, Mississippi. Flowers and Cobb were out of sight, but could hear the transaction taking place over the transmitter. Once Plain gave the code words "big time," the officers closed in, but upon arrival the suspect ran away. Officer Flowers apprehended the suspect, who was later identified as Correll Hardy.

They took Hardy to the police headquarters. There they read him his *Miranda* rights and arrested him. They searched Hardy and found a match box containing what looked like three small crack cocaine rocks along with the marked twenty-dollar bill. The State introduced the crack cocaine into evidence as State's Exhibit 1.

ANALYSIS

I.

DID THE TRIAL COURT ERR IN FAILING TO MAKE AN ON-THE-RECORD DETERMINATION OF THE PROBATIVE VALUE VERSUS THE PREJUDICIAL EFFECTS OF USING OTHER CRIMES, WRONGS OR ACTS IN THE TRIAL IN VIOLATION OF RULE 403, 404(b) AND 609 OF THE MRE?

Hardy was originally indicted for the sale of cocaine and possession with intent to distribute cocaine. However, the State proceeded to try Hardy only on the possession with intent to distribute cocaine, charge because the confidential informant, Kelvin Plain, could not be located. Hardy protests that the trial court erroneously allowed the State to use evidence of the alleged sale of cocaine.

Hardy argues that the trial court erred in failing to make an on-the-record determination of the probative value of using other crimes, wrongs, or acts in contravention of Mississippi Rules of Evidence 403, 404(b), and 609. Mississippi Rule of Evidence 609(a) allows evidence of a conviction of a prior crime for the impeachment purpose of a witness. However, before the trial court is allowed to admit the prior crime for impeachment purposes, an on-the-record determination of the probative value versus the prejudicial effect must take place. *Johnson v. State*, 666 So. 2d 499, 503 (Miss. 1995). This on-the-record determination did not take place at Hardy's trial. The State asserts that Rule 609 is inapplicable in this instance and that the proper rule is Rule 404(b), in which an on-the-record determination is not required. Mississippi Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The State is correct. "Evidence of another offense is admissible when the offense is so clearly interrelated to the crime charged as to form a single transaction or closely related series of transactions." *Mackbee v. State*, 575 So. 2d 16, 27 (Miss. 1990) (citations omitted). "[T]he State has a 'legitimate interest in telling a rational and coherent story of what happened. . . .' Where substantially necessary to present to the jury 'the complete story of the crime' evidence or testimony may be given even though it may reveal or suggest other crimes." *Mackbee*, 575 So. 2d at 28 (quoting *Brown v. State*, 483 So. 2d 328, 330 (Miss. 1986)).

In this case Hardy was found with rock cocaine pieces on his person along with a marked twenty-dollar bill. The references made during trial to the alleged sale of cocaine connected Hardy to the scene of the crime and provided a motive for his actions.

Additionally, the significance of Hardy's other misconduct was relevant for showing his intent, as contended by the State at trial. The State charged him with possession with intent to transfer. By pleading not guilty, the State had the burden of establishing that not only did Hardy possess the cocaine but that he also possessed it at the time and place described by witnesses with the intent to transfer. Because the alleged sale of cocaine was integrally related by time and place to the possession with intent charge, Hardy's first assignment of error is without merit.

II.

DID THE TRIAL COURT ERR IN REFUSING TO GRANT A LESSER INCLUDED OFFENSE INSTRUCTION AND ALSO MIS-INSTRUCTED THE JURY BY ALLOWING INSTRUCTION S-1 TO BE ADMITTED?

Hardy first argues that the trial court erred in refusing to grant the lesser included offense instruction of simple possession. However, the record shows that Hardy's counsel had not prepared a lesser included offense instruction before or during the trial. "The case law does not impose upon a trial court a duty to instruct the jury *sua sponte*, nor is a court required to suggest instructions in addition to those which the parties tender." *Conner v. State*, 632 So. 2d 1239, 1253 (Miss. 1993). Hardy's objection to the failure to include a lesser included offense is waived. Notwithstanding procedural bar, even if Hardy had offered a lesser-included offense instruction the record does not support such an instruction. "A defendant is only entitled to an instruction when there is evidence in the record which reflects the need for the instruction." *Mackbee*, 575 So. 2d at 22 (citing *Mease v. State*, 539 So. 2d 1324, 1329-30 (Miss. 1989); *Swanier v. State*, 473 So. 2d 180, 188 (Miss. 1985)).

> [A] lesser included offense instruction should be granted unless the trial judge--and ultimately this Court--can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense . . . .

Harper v. State, 478 So. 2d 1017, 1021 (Miss. 1985).

Officer Cobb caught Hardy after running away from the scene of an alleged drug purchase. He was found with three rocks of cocaine in a match box on his person. He also had a marked twenty-dollar bill given to a confidential informant to purchase drugs a few minutes earlier. Hardy stated after *Miranda* warnings were given "You've got me," when confronted with the photocopy of the twenty-dollar bill, and stated that he had sold cocaine because he was "tight" for money. There was no evidentiary basis to support a lesser included instruction.

In the second part of Hardy's second issue he argues that the trial court erred in giving Instruction S-1 which originally contained both counts of the indictment. However, the State proceeded to prosecute Hardy only for count two--possession with intent to distribute. Hardy's counsel properly objected to the instruction when it contained both counts. Thereafter, the trial court amended the instruction to delete the first count. Hardy's counsel did not object to the amended Instruction S-1. In *Davis v. State*, 568 So. 2d 277, 279 (Miss. 1990), the court stated that failure to object to an amended instruction waives complaints about that instruction on appeal. In *Davis*, Davis' counsel objected to an instruction which the trial judge amended by striking out certain portions thereof. *Davis*, 568 So. 2d at 279. Davis did not object to the amended instruction. *Id.* The State contended that Davis' failure to object to the amended version constituted a waiver. *Id.* The Mississippi Supreme Court agreed and held that "failure to object to a jury instruction constitutes a waiver." *Id.* (citing *Barnett v. State*, 563 So. 2d 1377, 1380 (Miss. 1990); *Watson v. State*, 483 So. 2d 1326,

1329 (Miss. 1989)). Since Hardy's counsel failed to object at the trial court level to the amended version of the instruction he is now procedurally barred from raising this issue on appeal. Notwithstanding procedural bar the amended instruction correctly stated the law and an objection would have been futile.

III.

WAS HARDY DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

Hardy cites numerous reasons why his counsel was ineffective. The Mississippi Supreme Court adopted the *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984), standard for evaluating ineffective assistance of counsel claims. *Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995). A defendant has to show that his attorney's performance was deficient, and that the deficiency was so substantial as to deprive the defendant of a fair trial. *Eakes*, 665 So. 2d at 872. It is required that the defendant prove both elements. *Brown v. State*, 626 So. 2d 114, 115 (Miss. 1993); *Wilcher v. State*, 479 So. 2d 710, 713 (Miss. 1985), *cert. denied*, 475 U.S. 1098 (1986). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689.

> [T]here is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Schmitt v. State, 560 So. 2d 148, 154 (Miss. 1990) (quoting *Strickland*, 466 U.S. at 691).

Hardy complains that he was denied effective assistance of counsel for ten separate transgressions. First, he argues that his attorney, Mr. John T. Haltom, was deficient in not calling certain key witnesses. At trial, Officer Flowers stated that when they took Hardy to the headquarters, Hardy's mother and one of his mother's friends met them. During trial, Officer Flowers testified that Hardy's mother asked him what he had done and that Hardy responded that he had sold some crack. Mr. Haltom did not call Hardy's mother to contradict Flower's testimony. Hardy submitted affidavits of both his mother and his mother's friend. Both witnesses stated that Hardy had not told them that he had sold cocaine. However, these affidavits miss the point. Officer Flowers later testified that Hardy explained to him that he had sold cocaine because he was in a "tight," outside the presence of his mother and her friend. Therefore, while the two witnesses might have contradicted the first statement of Flowers, they could not have contradicted the second statement of Flowers.

Hardy also complains that his attorney should have called Kelvin Plain, the confidential informant. However, the record shows that Kelvin Plain was not available. Both the defense and the prosecution stated during the trial that they wanted to examine Kelvin Plain but that he had not been found. Since the confidential informant in the actual sale could not be found, the State agreed to proceed to trial only on count two, which was the possession with intent to charge. Thus, neither the State nor the defense used information dealing directly with the actual sale of cocaine. The evidence used at trial was as to the events that took place before and after the sale of the cocaine. Hardy is rather lucky

that Kelvin Plain was unavailable because had he been present the State would have presumptively tried Hardy on the sale of cocaine charge rather than just possession with intent to transfer.

Next, Hardy complains that his counsel failed to make proper objections to the use of certain testimony and during improper opening and closing arguments. However, repeated objections were made by Hardy's counsel to any references to other crimes being made by the prosecution and during opening arguments by the State. The record is replete with the objections made by Hardy's counsel. In fact, during opening arguments the trial judge reprimanded Mr. Haltom for making too many objections.

Hardy states that his counsel was ineffective because he failed to make a proffer so that the determination of the probative value versus the prejudicial effect of allowing the prosecution to use other crimes, wrongs, or acts to convict could be met. However, as stated in the first issue of this opinion, the information of the other acts was proper because the acts were so closely interrelated to the crime charged and was allowable under Rule 404(b) of Mississippi Evidence. Under Rule 404(b) of the Mississippi Rules of Evidence a balancing of the probative value versus the prejudicial effect is not required, thus Hardy fails to show how his counsel was ineffective in this instance.

Hardy argues that his counsel erred in not getting him a lesser included offense instruction for possession. However, there was no evidentiary basis for granting such an instruction as stated in Issue II.

Hardy postures that his counsel created a conflict of interest by being a municipal judge and his criminal counsel. There is no such proof that such a conflict occurred. During voir dire the trial judge asked the jury if Mr. Haltom had been a judge before them or their family and no panel member answered positively. Mr. Haltom also asked the panel "Is there anything you would hold against me, the City Judge, that would reflect your decision as to whether or not my client is guilty or not guilty? " None of the panel answered in the affirmative. It is clear from the record that Mr. Haltom's position as city judge did not create a conflict of interest.

Next, Hardy complains that his counsel was ineffective for failing to make sure that he was present at all of the critical stages of the criminal process. Hardy cites to one incident when the lawyers and the judge went into chambers, without him, to discuss whether the defense could issue a subpoena after the State had rested. The meeting outside the presence of Hardy was uneventful. In fact it lasted only a matter of minutes, and certainly was not a critical stage of the proceedings. Hardy has failed to establish how his counsel was ineffective in this instance.

Hardy's next complaint is that he was denied the right to testify. The record reveals that Hardy and Mr. Haltom conferred and afterwards Mr. Haltom announced that Hardy would not testify. Although Hardy claims that had it not been for the ineffectiveness of his counsel he would have testified at trial. However, there is no tangible proof that his attorney failed to advise Hardy of his right to testify.

There is no proof that John T. Haltom was deficient in his representation of Hardy. Absent any evidence of deficiency or misrepresentation, this entire argument must fail.

IV.

WAS THE JURY'S VERDICT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

Hardy argues that the jury's verdict was against the overwhelming weight of the evidence and contrary to the law.

> When reviewing a jury verdict of guilty we are required to accept as true all the evidence favorable to the State, together with reasonable inferences arising therefrom, to disregard the evidence favorable to the defendant, and if such will support a verdict of guilty beyond reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence, then the jury verdict shall not be disturbed.

Montgomery v. State, 515 So. 2d 845, 848 (Miss. 1987) (citing *Hester v. State*, 463 So. 2d 1087, 1091 (Miss. 1985); *Carroll v. State*, 396 So. 2d 1033, 1035 (Miss. 1981)).

A new trial will not be ordered unless this Court is 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." *Noe v. State*, 628 So. 2d 1368, 1369 (Miss. 1993) (quoting *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987)).

Looking at the trial, the State produced evidence of Hardy's being apprehended at the scene of an alleged drug sale. Corroborated testimony supported the fact that Hardy had run from the scene. He was found with a box containing crack cocaine and a marked twenty-dollar bill. When they confronted him with this marked twenty-dollar bill in his pocket, Hardy stopped denying that he had been involved in a drug sale and stated, "You've got me."

Under the facts in this case the jury's verdict was clearly not against the overwhelming weight of the evidence. We find this issue to be without merit.

THE JUDGMENT OF THE SUNFLOWER COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF COCAINE WITH INTENT TO SELL, BARTER, OR DELIVER AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND FINE OF $1,000.00 IS AFFIRMED. ALL COSTS ARE ASSESSED TO SUNFLOWER COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.