IN THE COURT OF APPEALS 08/20/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00470 COA

LLOYD BRADLEY A/K/A LLOYD JAMES BRADLEY A/K/A FLOYD JAMES BRADLEY A/K/A "KILOS" A/K/A LLOYD JAMES TALLY

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. JAMES THOMAS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF STONE COUNTY

ATTORNEY FOR APPELLANT:

JAMES G. TUCKER, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: BILLY G. GORE

NATURE OF THE CASE: CRIMINAL-AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: SENTENCED TO 20 YEARS IN CUSTODY OF MDOC

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT:

Lloyd Bradley was convicted of aggravated assault in violation of section 97-3-7(2)(b) of the Mississippi Code and sentenced to twenty years incarceration in the custody of the Mississippi Department of Corrections. On appeal, Bradley raises the following issues:

> I. WHETHER THE TRIAL COURT ERRED BY INTERROGATING THREE OF THE PROSECUTION'S WITNESSES
>
> II. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR ALTERNATIVE MOTION FOR NEW TRIAL
>
> III. WHETHER THE INDICTMENT FAILED TO ALLEGE SUFFICIENTLY AN OVERT ACT

Finding no error in the proceedings below, we affirm the decision of the trial court.

FACTS

Bradley was convicted of aggravated assault for firing several shots from a semi-automatic pistol at a group of persons congregated in the front yard of a residence in Wiggins, Mississippi. At trial, the State produced several witnesses who testified that they observed Bradley discharge the pistol at the other men and then flee the area. Additionally, several of the State's witnesses testified that they observed Bradley run into a nearby wooded area with a semi-automatic pistol and then quickly emerge without the firearm.

ANALYSIS

> I. WHETHER THE TRIAL COURT ERRED BY INTERROGATING THREE OF THE PROSECUTION'S WITNESSES

Bradley asserts that the trial judge's questioning of the State's witnesses in the presence of the jury constitutes reversible error. On three occasions during the course of the trial the judge asked the State's witnesses questions concerning their observations made on the day of the shooting incident. In each of these instances the trial judge questioned the witness after the parties had concluded their direct and cross examination.

Under the Mississippi Rules of Evidence, judges are given authority to both call and question witnesses. Mississippi Rule of Evidence 614(b) clearly states that "[t]he court may interrogate witnesses, whether called by itself or by a party." Miss. R. Evid. 614(b); *see also Lanier v. State*, 533 So. 2d 473, 486 (Miss. 1988) (holding that Rule 614 reflects trial judge's traditional power to question witnesses); *Hannah v. State*, 336 So. 2d 1317, 1322 (Miss. 1976) (stating that it is generally

within trial judge's discretion to interrogate witnesses); *Jones v. State*, 79 So. 2d 273, 276 (Miss. 1955) (holding that trial judge may question witness in order to clarify testimony and further develop facts).

Despite the relatively broad power to call and question witnesses which is conferred on judges by Rule 614(b), the Mississippi Supreme Court has held that "where the trial judge displays partiality, becomes an advocate, or in any significant way, conveys to the jury the impression that he has sided with the prosecution," it will "not hesitate to reverse." *Layne v. State*, 542 So. 2d 237, 242 (Miss. 1989) (citing *West v. State*, 519 So. 2d 418, 422-24 (Miss. 1988)). In *West*, the Court held that the trial judge "improperly, or unnecessarily, interjected himself into the proceedings" on thirty occasions, twenty of which involved "coaching" the district attorney and nine instances of asking additional questions of witnesses where the district attorney's questions were "ineffective." *West*, 519 So. 2d at 421. After careful consideration of the record, the court held that the trial court's questioning witnesses was reversible error because "the questions by the trial judge generally served to strengthen the prosecution's case." *Id.* Accordingly, the key to Bradley's assertion of error is whether or not the trial court abused its discretion in questioning the witnesses so as to have shown partiality to one of the litigants. *See Johnson v. State*, 626 So. 2d 631, 634 (Miss. 1993) (subjecting propriety of judge's questioning of witnesses to abuse of judicial discretion standard of review).

Review of the transcript indicates that the trial judge's questions were limited to inquiring as to the location of the intended victims at the time of the shooting, questioning whether one of the witnesses could positively identify the weapon offered into evidence as being the one fired during the incident at issue, and inquiring as to the disposition of another firearm not used in the shooting incident. The transcript clearly indicates that all of the questions posed by the trial judge were designed to clarify the testimony provided by the witnesses, rather than evincing a bias in favor of one party, as was the case in *West*. *See Layne*, 542 So. 2d at 242 (holding trial judge's questioning of witnesses in order to "expedite the trial" and "rule intelligently" on objections was not abuse of discretion when done "in an impartial, albeit terse, manner"). Accordingly, because the trial judge acted within his judicial discretion this issue is without merit.

II. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR ALTERNATIVE MOTION FOR NEW TRIAL

Bradley primarily bases his argument that the trial court acted erroneously in denying his motion for JNOV on the ground of a lack of physical evidence linking the Ingram M-11 semi-automatic pistol found in the wooded area to him. Bradley repeatedly objects to the fact that no fingerprints were taken from the weapon, and that no ballistics tests were performed to determine if the spent shell casings found at the scene of the shooting were fired from the weapon in question. Additionally, Bradley complains that several witnesses incorrectly identified the precise manufacturer's designation of the weapon.

In reviewing Bradley's assignment of error we are guided by the familiar standard repeated by the Mississippi Supreme Court in *Fleming v. State*, 604 So. 2d 280, 286 (Miss. 1992). As stated in *Fleming*, "[a] trial court may properly set aside the verdict of a jury only where, viewing the evidence

in the light most favorable to the verdict, no reasonable, hypothetical juror could have found that the defendant was guilty beyond a reasonable doubt." *Fleming*, 604 So. 2d at 286 (citing *Lanier v. State*, 533 So. 2d 473, 479 (Miss. 1988)). In determining how a reasonable, hypothetical juror would have perceived the evidence offered at trial, the State must be given the benefit of "all reasonable inferences that could be drawn from the evidence." *Glass v. State*, 278 So. 2d 384, 386 (Miss. 1973). Additionally, all evidence "which is consistent with the verdict must be accepted as true." *Williams v. State*, 463 So. 2d 1064, 1067 (Miss. 1985). The court has held that a jury verdict is only to be set aside when "reasonable men could not have found beyond a reasonable doubt that the defendant was guilty." *May v. State*, 460 So. 2d 778, 781 (Miss. 1984). However, this standard does not require that all "reasonable" men would draw the same conclusions from the evidence considered. Even where "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions the motion should be denied," and the jury's verdict should be allowed to stand, where "there is substantial evidence opposed to the motion." *May*, 460 So. 2d at 781. The decision as to setting aside a jury verdict is committed to the "sound discretion" of the trial court. *See Leflore v. State*, 535 So. 2d 68, 70 (Miss. 1988) (holding that trial judge should set aside jury verdict "only when, in the exercise of his sound discretion, he is convinced the verdict is contrary to the substantial weight of the evidence").

Although the State did not put on scientific evidence physically linking the pistol to Bradley, it did present four witnesses who testified that they observed Bradley firing this or a similar pistol at a group of men on July 26, 1991. The trial judge characterized these witnesses' statements as "positive direct testimony that [Bradley] was the perpetrator of an assault." Additionally, the State put on evidence that the pistol recovered from the wooded area had a capacity of twenty rounds of ammunition, eight of which were missing from the pistol's magazine. Precisely eight empty shell casings were found at the scene of the shooting. Considering the eight rounds missing from the pistol's magazine, the eight empty shell casings found at the scene of the shooting, the testimony from multiple witnesses placing Bradley both at the crime scene as the shooter and observing him enter the wooded area with this or a similar pistol and then quickly return without the pistol, all serve to support the trial court's conclusion that substantial evidence existed in opposition to the motion. Accordingly this assignment of error is without merit.

In considering Bradley's assignment of error for the trial court's failure to grant his motion for a new trial, the appropriate standard of review as pronounced by the Mississippi Supreme Court is found in *Johnson v. State*, 642 So. 2d 924, 928 (Miss. 1994). In *Johnson*, the court stated that "[a] motion for new trial is discretionary with the trial judge and this Court will not order a new trial unless it is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Johnson*, 642 So. 2d at 928. In determining whether a jury verdict is "against the overwhelming weight of the evidence," the appellate 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) (citing *Thornhill v. State*, 561 So. 2d 1025, 1030 (Miss. 1989)). Additionally, "factual disputes are properly resolved by the jury and do not mandate a new trial." *McNeal v. State*, 617 So. 2d 999, 1009; *see also Veal v. State*, 585 So. 2d 693, 695 (Miss. 1991) (stating that appellate courts do not second guess jury's assessment of evidence or its verdict on disputed points of fact).

Applying this standard to the witnesses' testimony received at trial, Bradley's assertion of error in the trial court's failure to grant his motion for a new trial is clearly without merit. At trial the State produced four witnesses identifying Bradley as the assailant who fired the Ingram M-11 semi-automatic pistol. These witnesses also stated that the pistol introduced into evidence was the same or similar to the one they observed Bradley firing on the day in question. The witnesses further stated that they saw Bradley flee the crime scene with a pistol in hand. The State then produced a witness (located a few blocks from the crime scene) who both heard the eight shots being fired and observed Bradley pull up in a car, get out with a pistol in hand, run into a wooded area, and then quickly emerge without the pistol. A Wiggins police officer testified that he recovered the pistol in question from the wooded area described by the State's witness.

From this testimony it is apparent that there was sufficient evidence to support the jury's verdict, and the trial judge was correct in denying Bradley's motion for a new trial. Accordingly this assignment of error is without merit. As stated concisely by our supreme court in *Veal*, "our law of appellate review provides that this testimony was first and foremost for the jury to hear and evaluate and to believe, if the jury found it worthy of belief." *Veal*, 585 So. 2d at 697.

III. WHETHER THE INDICTMENT FAILED TO ALLEGE SUFFICIENTLY AN OVERT ACT

Bradley's final assignment of error concerns whether the indictment under which he was prosecuted failed to allege an "overt act" and was therefore not legally sufficient so as to properly inform him of the charges leveled against him. Bradley is absolutely correct in arguing that a criminal defendant must be properly informed of the charges for which he is to be tried. *See Lambert v. State*, 462 So. 2d 308, 311 (Miss. 1984) (stating that Sixth Amendment of United States Constitution guarantees the accused a right "to be informed of the nature and cause of the accusation"); *see also* Miss. Const. art. III, § 26 (stating that "[i]n all criminal prosecutions the accused shall have a right . . . to demand the nature and cause of the accusation . . . .").

In addressing Bradley's claim we are fortunate to have guidance from our supreme court in a case interpreting an indictment made under the very statute that Bradley was found guilty of violating. In *Harbin v. State*, 478 So. 2d 796, 798 (Miss. 1985), the defendant was prosecuted for aggravated assault under an indictment containing language copied directly from section 97-3-7(2)(a) of the Mississippi Code, our aggravated assault statute. In *Harbin*, the court held that the indictment "need not (though it may) charge in the exact language of the statute said to have been offended." *Harbin*, 478 So. 2d at 799. However, the court observed that the indictment did in fact use substantially the same language as the statute in reciting the necessary elements of the charged offense, in addition to carrying the label of "AGGRAVATED ASSAULT" and citation to the relevant section of the Mississippi Code at the top of the indictment, therefore ensuring its legal sufficiency. *Id.* at 798-99. Despite the appellant's claims in *Harbin* and the instant case, it is settled law in Mississippi that when the defendant is prosecuted for a crime under an indictment where "the offense is fully and clearly defined in the statute, an indictment in the language of the statute is sufficient . . . ." *Jackson v. State*, 420 So. 2d 1045, 1046 (Miss. 1982); *see also Hickombottom v. State*, 409 So. 2d 1337, 1338 (Miss. 1982) (holding that where indictment tracks language of statute it is sufficient to inform accused of

charge against him).

The indictment under which Bradley was prosecuted accused him of "attempt[ing] to cause serious bodily injury . . . ." This language is copied almost verbatim from section 97-3-7(2)(a) of the Mississippi Code and correctly identifies the essential elements of an aggravated assault charge. Additionally, the indictment alleges that the attempt to cause serious bodily injury was done "with a deadly weapon, to-wit: a gun . . . ." According to Uniform Criminal Rule of Circuit Court Practice 2.05, "[t]he indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation against him." Unif. Crim. R. Cir. Ct. Prac. 2.05. Additionally, Rule 2.05 provides that "[f]ormal and technical words are not necessary in an indictment, if the offense can be substantially described without them." *Id.* Considering the form and content of the indictment as a whole, it is readily apparent that Bradley was being charged with the crime of aggravated assault for the overt act of "attempting" to use a gun to cause serious bodily injury to another, fully satisfying both the constitutional and statutory mandates. Accordingly, this issue is without merit. Given the foregoing reasons, the judgment of the trial court is affirmed.

THE JUDGMENT OF THE CIRCUIT COURT OF STONE COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST STONE COUNTY.

FRAISER, C.J., BRIDGES, P.J., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.