IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00203 COA

MARLON LEVY

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. MARCUS D. GORDON

COURT FROM WHICH APPEALED: SCOTT COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES PATTERSON DONALD

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: J. KENNEDY TURNER

NATURE OF THE CASE: ARMED ROBBERY

TRIAL COURT DISPOSITION: SENTENCED TO SERVE A TERM OF FORTY (40) YEARS IN THE CUSTODY OF MDOC

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Marlon Levy was indicted and convicted of armed robbery. The trial court sentenced him to serve a term of forty (40) years in the custody of the Mississippi Department of Corrections. The court denied Levy's motion for JNOV, or in the alternative, a new trial. We find that none of Levy's issues on appeal have merit and therefore affirm.

FACTS

On December 29, 1993, Monica White was working as the cashier at the 35 Quick Stop on Highway 35 in Scott County, Mississippi. Mrs. White testified that at approximately 6:30 P.M., Marlon Levy entered the store waving a handgun and ordered White to empty the cash register. Also present in the store were three customers: Paul White, Chuck Beckham, and Willie Coleman. Levy ordered all three to leave the store to which they complied. Mrs. White testified that she emptied the cash register as instructed, gave the money to Levy, and Levy ran out of the store. Paul White testified that Levy got into a black Chrysler and left the scene. All of the witnesses testified that Levy was not wearing anything to cover his face, and that they each got a close look at him during the robbery. Each of the witnesses identified Levy as being the individual that robbed the store on December 29, 1993. The witnesses also testified that Levy was wearing a blue baseball cap, and the gun he was waving appeared to be a nickel-plated .25 automatic handgun.

Leake County Deputy Sheriff John Wayne Smith testified that on January 2, 1994, Scott county law enforcement officers delivered an arrest warrant for Marlon Levy and two other subjects, Travis Levy and Linda Gardner, also charged with armed robbery. Deputy Smith stated that he knew Marlon Levy and assisted the Scott county officers in looking for the suspects. Deputy Smith indicated that they failed to locate the suspects that morning, and that the Scott county officers left the arrest warrant with him. Later that afternoon, Deputy Smith testified that he spotted Marlon Levy and two other subjects riding in a black Chrysler. Deputy Smith testified that he stopped the car, identified the subjects as being the same as listed on the arrest warrant, and then placed Marlon Levy, Travis Levy, and Linda Gardner under arrest. Incident to the arrest, Deputy Smith confiscated a blue baseball cap being worn by Marlon Levy and an automatic handgun from the purse of Linda Gardner.

During the suppression hearing concerning the cap and the handgun, the State presented Deputy Smith with an arrest warrant and asked him if it was the authority on which he based the arrest of Marlon Levy on January 2, 1994. Deputy Smith answered in the affirmative. The arrest warrant was dated January 4, 1994. Later in the hearing, the State submitted an arrest warrant for Levy dated January 2, 1994, for the charge of armed robbery. Deputy Smith then testified that he was not sure what date was on the warrant he had when he arrested Levy. The State explained that two warrants existed because Levy was a suspect in two separate armed robberies in Scott county. The State

offered the testimony of Scott County Sheriff William Richardson who stated that he delivered an arrest warrant dated January 2, 1994, to Deputy Smith on January 2, 1994. Levy challenged the State to produce a supporting affidavit for the January 2nd warrant, and it failed to do so without explanation. The trial judge, deeming the situation concerning the dates of the warrants to be hopelessly confused, sustained Levy's motion to suppress the handgun and the cap. At this point, Levy moved for a mistrial because the cap and the gun had already been presented before the jury for identification purposes, and the eyewitnesses had testified that the cap Levy was wearing, and the gun he possessed on the day of the robbery were similar to the cap and gun the State had marked for identification. The trial court overruled Levy's motion for a mistrial. Later, during the trial, the State continued to ask questions about the cap and gun and subsequently offered the gun into evidence pursuant to the testimony of Linda Gardner who stated that the gun was in her purse when she was arrested. Gardner stated further that Marlon Levy had given her the gun, and that a few days earlier she overheard Marlon tell Travis Levy about running people out of a store that he had robbed. Levy objected on the grounds that the prosecutor was wilfully ignoring th e judge's order to suppress the cap and gun. Levy again moved for a mistrial, and the court overruled.

Levy rested without putting on any evidence in support of his case. The jury found Levy guilty of armed robbery, and he was sentenced to serve forty years in the custody of the Mississippi Department of Corrections. The trial court subsequently denied Levy's motion for JNOV/new trial, and Levy now appeals.

ANALYSIS

I. DID THE TRIAL COURT ERR IN FAILING TO GRANT LEVY A MISTRIAL BASED ON THE STATE'S REFUSAL TO ABIDE BY THE COURT'S ORDER TO SUPPRESS A BASEBALL CAP AND HANDGUN OBTAINED INCIDENT TO LEVY'S ARREST?

Levy argues that the trial judge erred when he allowed testimony about the cap and gun. Levy contends that the testimony regarding the similarity of the gun and the cap marked for identification, and the cap and gun allegedly possessed by Levy during the robbery was improper because the items were obtained incident to an illegal arrest. Levy argues that Deputy Smith illegally arrested him based on an arrest warrant dated January 4, 1994, two days subsequent to his actual arrest. Levy also contends that the trial judge's failure to enforce his own suppression order pertaining to the cap and gun further prejudiced his case and prevented him from getting a fair trial. The State responds that the gun belonged to Linda Gardner, and that Levy had no standing to object to its admission into evidence. The State contends that the trial judge properly modified his prior ruling to exclude the gun and was not in error when he allowed the gun to be admitted into evidence. The State further argues that if the testimony regarding the cap was improper, it amounted to harmless error. The State contends that four eyewitnesses were able to identify Levy as being the robber, and that their identification was based on much more than the cap Levy wore at the time of the robbery. The State did not address Levy's allegation that the arrest itself was illegal.

Although we find the conduct of the police, the prosecutor, and the trial judge in this case to be disturbing, we do not find grounds for reversal. If we were to determine that the arrest of Marlon

Levy was in fact invalid, our order would be to reverse the conviction and remand for retrial should the State be able to make a case against Levy by evidence other than the baseball cap and the handgun. *Rome v. State*, 348 So. 2d 1026, 1029 (Miss. 1977) (reversed and remanded based on an illegal arrest and improper admission into evidence of items taken from Rome's person and car). We find such decision to be unnecessary because it is clear from the record that the State possessed evidence beyond the gun and the cap which we believe would be sufficient to sustain a conviction for armed robbery. Therefore, we will decline to determine the validity of Levy's arrest and subsequent search and therefore address this issue from the standpoint that the State's reference to the cap and admission of the gun into evidence was harmless error if error at all.

Rule 103(a) of the Mississippi Rules of Evidence states "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." M.R.E. 103(a) (1972); *Jackson v. State*, 594 So. 2d 20, 24 (Miss. 1992) (citation omitted). In other words, "the admission or exclusion of evidence must result in prejudice and harm, if a cause is to be reversed on that account." *Jackson*, 594 So. 2d at 25 (quoting *Knight v. State*, 248 Miss. 850, 161 So. 2d 521, 522 (Miss. 1964)). Normally, we could base our analysis of harmless error on the aforementioned state law; however, in the present case, the question of error revolves around an alleged constitutional violation, and we must therefore go a step further in determining whether the violation of a constitutionally protected right can be harmless error. The United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 22 (1967), concluded that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." The *Chapman* Court, drawing on its decision in *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), set forth the following test: "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 23-24; *see Fahy*, 375 U.S. at 86-87 ("The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.") *see also Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (applied *Chapman* test to determine that admission at trial of ammunition seized in course of search of accused's house was harmless error if error at all). More recently, the United States Supreme Court applied the *Chapman* test to a South Carolina case involving unconstitutional presumptions. *See Yates v. Evatt*, 500 U.S. 391, 402 (1991). In *Yates*, the court stated that "[t]o say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Id.* at 403. The *Yates* Court determined that before reaching a judgment that a constitutional violation is harmless, a court must do two things: (1) Ask what evidence the jury actually considered in reaching its verdict, and (2) Weigh the probative force of that evidence against the probative force of the inadmissible evidence standing alone. *Yates*, 500 U.S. at 403-04; *see also Hansen v. State*, 592 So. 2d 114, 135-37 (Miss. 1991) (followed *Yates* in determining that violation of confrontation clause was harmless error); *Taylor v. State*, 672 So. 2d 1246, 1267-68 (Miss. 1996) (improper reference to accused's failure to take the stand was held to be harmless error in light of the overwhelming amount of evidence against him).

In the present case, the evidence before the jury was the testimony of four eyewitnesses that Levy was the person who robbed the 35 Quick Stop on December 29, 1993, that Levy was not wearing anything over his face, and that each eyewitness was able to get a close look at the Appellant before

he left the scene. The State also presented testimony that Levy was wearing a blue baseball cap and carrying a gun similar to the cap and gun that the State offered at trial for identification purposes. Finally, the jury had before it the testimony of Linda Gardner that a gun was found in her purse on the day she was arrested, that the gun had been given to her by Levy, and that the gun presented at trial was the gun taken from her purse. Levy argues that the cap and gun should not have been shown to the jury, and because the items were shown to the jury, he is entitled to a new trial. However, if we apply the *Chapman* test and the two-pronged approach of *Yates*, we find that if the cap and gun had been excluded, the jury would have had before it the testimony of four eyewitnesses that Levy was, in fact, the same individual that robbed the 35 Quick Stop. Levy had the opportunity to present evidence to contradict the testimony of the eyewitnesses but chose not to do so. Weighing the probative force of the eyewitnesses against the probative force of the cap and gun, we find that the eyewitness testimony far outweighs the other evidence. We, therefore, conclude that the admission of the cap and gun was harmless beyond a reasonable doubt and that Levy is not entitled to a new trial.

> II. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A MISTRIAL DURING CLOSING ARGUMENT?

Levy argues that the district attorney's comments during closing argument constitute reversible error. Levy contends that certain comments by the district attorney were made for the sole purpose of inflaming the jury, and that the comments had specifically that effect. In closing arguments, the following occurred:

> BY MR. TURNER: You know, that brings to my mind something I wanted to bring across to you. An armed robber, in my opinion, is one of the most dangerous --

MR. DONALD: Object.

> MR. TURNER: -- criminals that exist.

> MR. DONALD: Object, Your Honor. That is improper argument, and he knows it is.

> THE COURT: Overruled.

> MR. TURNER: Because what is an armed robber doing, essentially? He is telling his victim, "Your money, or what you have in your possession, means more to me than your life does, and I am willing to kill you, if necessary, with the weapon I am holding on you, if you don't give me what you --

MR. DONALD: Can I have a continuing objection to that line of argument?

THE COURT: Yes, you may.

MR. TURNER: You know, that sounds like what the Defendant was going to do when he said, "I would have shot, but my gun was on safety." Fortunately, nobody was killed or injured this time.

MR. DONALD: Object to that, Your Honor.

THE COURT: Yes, I am going to sustain that last statement.

MR. TURNER: But, thank goodness, he was caught.

MR. DONALD: I'm sorry. I would ask the Court to instruct the jury to disregard that.

THE COURT: The jury will disregard the last statement.

MR. DONALD: And Your Honor, we would ask for a mistrial on that statement.

THE COURT: Overruled.

MR. TURNER: Thank goodness, he was caught. Don't make the mistake of letting him loose after he has been caught. To keep the Defendant out of circulation --

MR. DONALD: Your Honor, I object. Counsel knows that is improper argument. That is not a jury's function.

THE COURT: Overruled.

In *Ormond v. State*, 599 So. 2d 951, 961 (Miss. 1992), the Mississippi Supreme Court, citing *Craft v. State*, 226 Miss. 426, 84 So. 2d 531, 535 (1956), set forth the test to be used when determining if an improper argument by a prosecutor to the jury requires reversal. The test is whether "the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused and to secure a decision influenced by the prejudice so created." *Ormond*, 599 So.2d at 961. While we believe that the prosecutor could have chosen his words more carefully, and the judge should have exercised more control over the exchanges and rulings that took place throughout this trial, we do not find the closing argument by the State to be so prejudicial and inflammatory as to warrant a mistrial. The Mississippi Supreme Court has held that a trial judge has the discretion to determine if a closing comment is so prejudicial that a mistrial should be granted. *Alexander v. State*, 602 So. 2d 1180, 1182 (Miss. 1992) (citation omitted). Where serious and irreparable damage has not occurred, a judge should remedy the situation by admonishing the jury to disregard any impropriety. *Id.* at 1182-1183 (citations omitted). In the present case, the judge sustained those statements he believed to be improper and admonished the jury accordingly. We believe that the judge properly exercised his discretion when he determined that irreparable damage had not occurred and remedied the situation as he saw fit. The trial court committed no error, and this issue therefore has no merit.

THE JUDGMENT OF THE CIRCUIT COURT OF SCOTT COUNTY OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF FORTY (40) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO SCOTT COUNTY.

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