IN THE COURT OF APPEALS 06/18/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00194 COA

OLIVER PATTON, JR. A/K/A WALTER PATTON A/K/A ARTHUR PATTON A/K/A JOHNNY HAROLD MCFARLAND A/K/A WILLIE HENDERSON A/K/A ALBERT JACKSON

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. KATHY KING JACKSON

COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES L. FARRIOR

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JEAN SMITH VAUGHAN

DISTRICT ATTORNEY: DALE HARKEY

NATURE OF THE CASE: CRIMINAL: ARMED ROBBERY

TRIAL COURT DISPOSITION: SENTENCED AS HABITUAL OFFENDER TO TWENTY-FIVE (25) YEARS IN MDOC

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

BRIDGES, P.J., FOR THE COURT:

This is an out-of-time criminal appeal from the Jackson County Circuit Court which found the Defendant, Oliver Patton, guilty of armed robbery. Patton was sentenced as a habitual offender to a term of twenty-five (25) years in the Mississippi Department of Corrections. Due to severe medical problems, Patton was unable to file his appeal in a timely manner. Accordingly, the lower court granted his motion to file an out-of-time appeal and granted him ample time to review the record. He now files this appeal, arguing that the lower court erred in denying his motion for a directed verdict and by allowing expert testimony into evidence. We disagree, and affirm the decision of the lower court.

STATEMENT OF THE FACTS

On June 25, 1985, Oliver Patton entered the Gautier branch of the Pascagoula Moss Point Bank wearing a stocking and tee shirt on his head and carrying a gun. He demanded money from the tellers and was promptly given twenty-eight thousand dollars ($28,000). The entire robbery was recorded on the bank surveillance camera. Because Patton did not have eye holes in the stocking and tee shirt over his head, he had to raise them to see where he was going, revealing his face to the two tellers and to the cameras. He was readily identified by the victims in court and full-faced photos of the crime were published in the newspaper leading to his arrest. He now argues on appeal that the trial court erred in denying his motion for a directed verdict. Patton further assigns as error the admission of testimony concerning the potential deadliness of the pellet gun he used to rob the bank. We disagree and affirm the lower court.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE TRIAL COURT ERRED IN ITS DENIAL OF PATTON'S MOTION FOR A DIRECTED VERDICT.

Patton contends that the State failed to prove that he used a deadly weapon when he robbed the bank, and therefore he should have been granted a directed verdict. In *Noe v. State*, 616 So. 2d 298, 302 (Miss. 1993), the Mississippi Supreme Court held:

> In judging the sufficiency of the evidence . . . the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant.

It is well settled that the jury is charged with the responsibility of weighing and considering conflicting evidence, the credibility of the witnesses, and determining whose testimony should be believed. *McClain v. State,* 625 So. 2d 774, 781 (Miss. 1993). Further, in *Williams v. State*, 427 So. 2d 100, 104 (Miss. 1983), our supreme court held that jurors may accept or refuse testimony of witnesses stating, "It is not for this Court to pass upon the credibility of witnesses and where the

evidence justifies the verdict it must be accepted as having been found worthy of belief." Here, the jury weighed the evidence, believed the State's witnesses, and convicted Patton of armed robbery.

Viewing this evidence in a light most favorable to the State, we cannot say that the trial court was in error by refusing to grant Patton a directed verdict. Under the appropriate standard, the evidence favorable to the State's theory that Patton committed armed robbery with the pellet gun, and that the pellet gun was used as a deadly weapon is as follows: (1) both tellers testified that they were put in fear when Patton pointed the pellet gun at them and told them to do as he said; (2) both tellers complied with the verbal order; and (3) both tellers believed that Patton would inflict serious bodily harm against them with a deadly weapon.

In *Duckworth v. State,* 477 So. 2d 935, 938 (Miss. 1985), the court held that whether a weapon was deadly could be determined by the jury as the finders of fact. Here, the jury found that Patton was guilty of robbery with a deadly weapon. This was supported by the credible testimony of the two tellers. Further, the Mississippi Supreme Court has held that a pellet gun is a deadly weapon within the meaning of section 97-3-79 in *Saucier v. State,* 562 So. 2d 1238, 1246 (Miss. 1990). In *Saucier,* the court held that even though the pellet gun was not loaded at the time of the robbery, it could have been used as a deadly weapon to strike the victim and cause serious bodily harm. *Id.* As such, this argument is without merit.

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING LT. RICHARD CUSHMAN TO GIVE TESTIMONY ON HIS EXPERIENCE WITH A .177 CALIBER PELLET GUN.

Patton next argues that the trial court erred in allowing Lt. Richard Cushman to testify as an expert on weapons. In particular, Patton argues that Lt. Cushman's opinions could have been reached by an average layman. After reviewing the record, we find this argument to be without merit.

Lt. Cushman's testimony was limited by the judge to the realm of his knowledge and experience with the particular type of pellet gun involved in this case. Specifically, the trial judge found:

> I don't think he is an expert insofar as he can testify regarding velocity or pellet speed, or anything of that nature. On the other hand, this witness has considerable experience as a police officer, also has considerable, apparently, considerable training with weapons and has practical experience with .177 caliber weapons. And I think he has peculiar knowledge regarding whether or not this is a dangerous weapon, and I'll certainly allow him to testify in that regard.

This finding followed Lt. Cushman's testimony that he had experience from his investigations with that particular type of pellet gun, and that the gun was a dangerous weapon.

Great deference will be accorded by this Court to the trial judge's findings of fact, and his findings will not be overturned unless clearly erroneous. "This court must give effect to all reasonable presumptions in favor of the ruling of the court below." *Woodward v. State*, 533 So. 2d 418, 426-27 (Miss. 1988). This ruling "will not be reversed unless it clearly appears that the witness was not qualified." *Grinnell v. State*, 230 So. 2d 555, 557 (Miss. 1970).

Lt. Cushman testified that he had fired a .177 caliber pellet gun, had investigated cases which involved this type of weapon, and that he was trained in weapons as a police officer. By virtue of this training, Lt. Cushman had knowledge and experience that the ordinary person did not. *See* M.R.E. 702. As such, we cannot say that the trial court erred in allowing Lt. Cushman to testify that the pellet gun was a deadly weapon.

THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF TWENTY-FIVE (25) YEARS AS AN HABITUAL OFFENDER IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. THE APPELLANT IS TAXED WITH ALL COSTS OF THIS APPEAL.

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