

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2016-KA-01187-COA

MAJOR LEE A/K/A MAJOR LEE JR.

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT:	02/18/2009
TRIAL JUDGE:	HON. JAMES T. KITCHENS JR.
COURT FROM WHICH APPEALED:	LOWNDES COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: W. DANIEL HINCHCLIFF
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ALICIA MARIE AINSWORTH
DISTRICT ATTORNEY:	FORREST ALLGOOD
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED: 01/29/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE GRIFFIS, C.J., WESTBROOKS AND TINDELL, JJ.

TINDELL, J., FOR THE COURT:

¶1. A Lowndes County jury found Major Lee guilty of possession of cocaine with the intent to sell and possession of marijuana. *See* Miss. Code Ann. § 41-29-139 (Rev. 2009). After allowing amendment to the indictment, the Lowndes County Circuit Court found Lee to be a habitual offender within the meaning of Mississippi Code Annotated section 99-19-81 (Rev. 2007) and a prior offender under the Uniform Controlled Substances Law, Mississippi Code Annotated section 41-29-147 (Rev. 2009). The trial court sentenced Lee to concurrent sentences of sixty years and six years and fined him a total of \$2,006,000. Lee filed an

unsuccessful pro se motion for a new trial or, alternatively, for a judgment notwithstanding the verdict (JNOV). Lee now appeals asserting two errors: prosecutorial misconduct and improper amendment to the indictment. Finding no error, we affirm.

FACTS

¶2. On August 10, 2006, a Columbus police officer attempted to lawfully stop a vehicle. The vehicle failed to stop and led police on a chase. Other officers joined in the vehicle pursuit. Upon reaching a dead end, the vehicle stopped, and Officers Brad Ray and Eric Lewis saw Lee run from the vehicle. Both officers saw Lee fleeing with a clear plastic bag on his right side. To Officer Ray, it looked like a bag of marijuana. Lee attempted to climb a fence but was apprehended in the process. The officers grabbed Lee when the upper half of his body was hanging over the fence with his legs on the officers' side of the fence. Upon apprehending Lee, the officers discovered he was no longer carrying the plastic bag.

¶3. After handcuffing Lee, Officer Ray found \$480 in Lee's pocket. The officers also found a bag of marijuana hanging from the fence where they apprehended Lee. A corner of that bag could be seen caught in the slats on the officers' side of the fence. After retrieving the bag of marijuana and looking over the fence, Officer Lewis, a drug agent with the Columbus Police Department's narcotics division, saw and recovered a second smaller bag of what appeared to be cocaine. This second bag was on the ground on the side opposite the officers. The officers testified the second bag was small enough to have been concealed by Lee. Lee was charged with possession of marijuana and possession of cocaine with the intent to sell.

¶4. At trial, Officers Ray and Lewis identified Lee as the man they saw flee the traffic stop with a clear plastic bag before they pulled him off a fence and arrested him. Specifically, on the charge of possession of cocaine with intent to sell, the State presented evidence through police officers, who had experience with drug- and cocaine-related arrests, that the amount of drugs recovered had a street value between \$1,500 to \$2,500 and that the amount recovered was more than that possessed by a typical drug user. A forensic scientist from the Mississippi Crime Lab testified that the off-white, powdery substance in one of the bags was 20.44 grams of cocaine and that the plant material in the other bag was 97.2 grams of marijuana.

¶5. The jury found Lee guilty on both counts. During the sentencing phase of the trial, the trial court allowed amendment of the indictment to reflect Lee's status as a habitual offender under section 99-19-81 and a second or subsequent offender of the Mississippi Uniform Controlled Substance Law, section 41-29-147. On February 18, 2009, the trial court sentenced Lee as a habitual offender and second or subsequent drug offender to sixty years on Count I with a \$2,000,000 fine, and to a concurrent six years on Count II with a \$6,000 fine.

¶6. Lee filed a pro se motion for a new trial or, alternatively, for a JNOV with the circuit clerk on July 27, 2010. A copy of that motion was sent to the district attorney, but a copy was not sent to the circuit court. Consequently, the matter was not set for hearing, and Lee's motion was not ruled upon. In 2016, upon Lee's petition, the Mississippi Supreme Court required a response from the circuit court, the district attorney, and Lee's trial counsel

regarding the absence of an order ruling on Lee's motion. This resulted in the circuit court ruling on Lee's pending motion for a JNOV. The motion was denied. Now on appeal from the circuit court's order, Lee's appellate counsel submitted a brief asserting two issues: (1) prosecutorial misconduct; and (2) untimeliness of the amended indictment for sentencing as a habitual offender. Concerned that an issue regarding this Court's jurisdiction may have existed, we asked for supplemental briefing from the parties on that issue. The parties each filed briefs addressing the potential jurisdiction issue, and the matter is now ripe for determination.

DISCUSSION

I. Jurisdiction

¶7. The record reveals that no motion for a new trial or a motion for a judgment notwithstanding the verdict was timely filed according to the deadlines of the Mississippi Rules of Civil Procedure, Rules 50 and 59. However, the Circuit Court of Lowndes County found excusable neglect for the delay and granted Major Lee leave to appeal out-of-time on August 24, 2016. Lee's notice of appeal was filed with the Supreme Court and the matter was docketed. The Supreme Court did not dismiss the appeal. The matter was assigned to the Court of Appeals with cause number 2016-KA-01187-COA on March 14, 2017. Therefore, we find this Court has jurisdiction to proceed with our determination on the merits of Major Lee's appeal.

II. Prosecutorial Misconduct

¶8. Lee argues that prosecutorial misconduct occurred on five separate occasions during

his trial. On the first occasion, during voir dire, the State asked: “Is there anybody here who thinks we don’t have a drug problem in Lowndes County, Mississippi?” Two further instances occurred in closing arguments as the defense and the State bantered over the jury’s role in the trial:

[Defense:] [T]his is a question not of drugs, but a question of the power of the State, what it can roll – when it can roll over a person, and how a person is protected.

And later in response the State stated:

[State:] It is not the job of the jury to do what you [are] asked to do to protect this defendant. If it’s your job to protect this defendant, then folks it’s also your job to protect society and people in Lowndes County from people who sell drugs.

¶9. In another instance, the State offered its contention of what was required for a conviction for possession of cocaine with intent to sell, asking, “will everybody be able to follow that jury instruction and find this defendant guilty as charged?” In the final and fifth instance, Lee alleges that during closing argument, the State made several negative comments on his constitutional right to trial and his right to counsel.

¶10. On four of the five occasions, Lee failed to object at trial and did not raise these issues in his posttrial motion. Lee waived appeal of those claims by his failure to allege and develop such error in the record or his posttrial motion. *See Porter v. State*, 564 So. 2d 31, 35 (Miss. 1990).

¶11. In Mississippi, the “rule governing preservation for review provides that if an appellant raises an issue not raised in the pleadings, transcript, or rulings, the appellant must have preserved the issue by raising it in a motion for a new trial.” *Ahmad v. State*, 603 So.

2d 843, 847 (Miss. 1992). We adhere to “the policy of giving the trial court, prior to appellate review, the opportunity to consider [any] alleged error.” *Id.* Here, the record clearly reflects no objection by Lee to the remaining prosecutorial remarks noted in his appellate brief. Additionally, Lee’s posttrial motion noted no such objections. Their inclusion in Lee’s posttrial motion would have given the trial court at least one opportunity to review the alleged errors. Lee did not object to any of the now complained of remarks made during trial and the “failure to object contemporaneously at trial waives any claim of error on appeal.” *Gillett v. State*, 56 So. 3d 469, 520 (¶150) (Miss. 2010).

¶12. However, we may “review such a claim if the prosecutor’s statement was so inflammatory that the trial judge should have objected on his own motion.” *O’Connor v. State*, 120 So. 3d 390, 399 (¶26) (Miss. 2013). In the present case, we do not find the prosecutor’s comments, separately or collectively, to be so inflammatory that the trial court should have intervened on its own. Therefore, we find that Lee waived his opportunity for appeal on these newly asserted grounds of prosecutorial misconduct.

¶13. It was only on the first occasion that Lee’s trial counsel objected to the State’s comment. To this, the trial court advised the State to “move along.” Lee argues this comment burdened the jury with the added responsibility to “send a message” and “protect the entire county.” When it is alleged that the State’s remarks rise to the level of prosecutorial misconduct, we must review the record and determine: (1) whether the referenced remarks were improper; and (2) if so, whether the referenced remarks “prejudicially affected the accused’s rights.” *Spicer v. State*, 921 So. 2d 292, 318 (¶55)

(Miss. 2006), abrogated on other grounds by *O'Connor*, 120 So. 3d at 400-01 (¶¶28-29). “It must be clear beyond a reasonable doubt that, absent the prosecutor’s [inappropriate] comments, the jury could have found the defendant guilty.” *Id.*

¶14. Lee asks us to evaluate the prosecutor’s remarks standing alone and out of context. He argues that the referenced remarks sent a message to the jury to consider the drug problem in Lowndes County and protect the county against that problem with a guilty verdict against Lee. As to this remark, defense counsel objected, and the trial court instructed the State to “move along.” Thereafter, Lee made no request that the court instruct the jury to disregard the remark. Lee did not raise this issue for consideration in his posttrial motion.

¶15. “[T]he circuit court is ‘in the best position to determine if an allegedly improper comment had a prejudicial effect; and therefore, absent an abuse of that discretion, its ruling will stand.’” *Stratton v. State*, 132 So. 3d 1074, 1079 (¶22) (Miss. Ct. App. 2014) (quoting *Holliman v. State*, 79 So. 3d 496, 500 (¶17) (Miss. 2011)). The standard requires us to find that absent this comment the jury still would have found Lee guilty. Our review allows consideration of the record as a whole and not only the comment standing alone. We are not necessarily convinced that the prosecutor’s remark regarding a drug problem in Lowndes County was asking the jury to “send a message.” Regardless, even if the State’s remark was improper, we find that based upon the overwhelming weight of the evidence presented at trial, it is clear beyond a reasonable doubt that the jury would have still found Lee guilty absent the remark. We find no prejudice to Lee as a result.

III. Amended Indictment for Sentencing as a Habitual Offender

¶16. Lee’s second claim of error concerns the timeliness of the State’s motion to amend the indictment to sentence him as a habitual offender and prior violator of the Uniform Controlled Substances Law. He maintains the amendment prevented him from making an informed decision to go to trial, which necessitates the vacation of his sentence. On appeal, we apply a broad standard when reviewing a trial court’s decision to allow amendment of an indictment to include habitual-offender status. *Rice v. State*, 172 So. 3d 768, 770 (¶7) (Miss. Ct. App. 2013).

¶17. While the amendment of the indictment occurred at the end of the trial, the State sent a copy of its motion to amend to Lee’s previous counsel prior to trial. The State also reminded Lee and his trial counsel of the motion to amend on the first day of trial. While Lee made a pro se motion for a continuance prior to trial, neither he nor his trial counsel argued that they were unprepared to defend against the amended indictment or that the amendment unfairly surprised them. In fact, prior to trial the trial court explained to Lee that the State filed a motion to show Lee was a “habitual offender and [had a] prior drug convict[ion].” The trial court further explained that, if the jury found Lee guilty as a habitual offender with a prior drug offense, then the trial court would have to sentence Lee to the maximum sentence without eligibility for parole. To this, Lee repeatedly expressed his understanding of the proposed amendment and the enhanced consequences of that amendment. During sentencing, the defense made no objection or response to the State’s motion to amend the indictment. This failure to object procedurally bars our consideration of the issue on appeal. *Johnson v. State*, 194 So. 3d 191, 200 (¶23) (Miss. Ct. App. 2016).

¶18. Mississippi caselaw clearly holds that a trial court may allow amendment of an indictment to charge a defendant as a habitual offender because the amendment does not affect the substance of the charged crime but only the subsequent sentencing. *Adams v. State*, 772 So. 2d 1010, 1020 (¶¶49-50) (Miss. 2000) (citing *Burrell v. State*, 727 So. 2d 761, 766 (¶9) (Miss. Ct. App. 1998)). Here, as in *Burrell*:

[T]he imposition of habitual[-]offender status in this case did not affect any defense [the defendant] could have asserted to the substance of the offense of which he was accused. The substance of the crime did not change at all. Only the sentencing of his crime was affected.

Burrell, 727 So. 2d at 766 (¶9). “Because amendment [to] an indictment to charge habitual[-]offender status does not affect the crimes charged, there is no need to prepare a defense [to the amended indictment] for trial.” *Adams*, 772 So. 2d at 1021 (¶52).

¶19. Further, in 1995, the law regarding amended indictments changed when Rule 7.09 of the Uniform Rules of Circuit and County Court Practice was adopted. URCCC 7.09.¹ Rule 7.09, applicable at the time of Lee’s crime,² during the pendency of his trial, and at the time of his sentencing, explicitly allowed indictments to be amended to charge a defendant as a habitual offender when the “defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.” *Id.* In allowing the amendment after Lee’s conviction yet before

¹ Effective July 1, 2017, the Mississippi Rules of Criminal Procedure replaced the Uniform Rules of Circuit and County Court. However, Lee’s trial preceded this change.

² We note for purposes of completeness that a case was handed down in December 2010 that announced a new rule of law regarding amending indictments to charge defendants as habitual offenders. *Gowdy v. State*, 56 So. 3d 540, 545-546 (¶¶19-22) (Miss. 2010). But *Gowdy* does not apply retroactively. *Carr v. State*, 178 So. 3d 320, 323 (¶14) (Miss. 2015); *Moore v. State*, 207 So. 3d 1260, 1261-62 (¶¶8-9) (Miss. Ct. App. 2016). Lee was sentenced in February 2009, and therefore *Gowdy* does not apply.

his sentencing, the trial court comported with the requirements of the rule: Lee had notice of the State's intent to amend the indictment prior to the start of the trial; and the trial court afforded Lee a fair opportunity to present a defense to the proposed amendment during the sentencing phase.

¶20. On appeal, Lee makes only unsupported allegations. He claims to have been denied an informed determination of whether to go to trial. This directly contrasts the record evidence. Prior to the start of trial testimony, the trial court recounted the indictment amendments sought, their effect on Lee's eligibility for parole, and the resulting enhanced penalties. What the record is devoid of, at any stage of the trial, is any objection by Lee or his trial counsel to the proposed indictment amendments. We therefore find Lee's claim regarding the amended indictment is procedurally barred and lacks merit.

CONCLUSION

¶21. Because we find no error, we affirm Lee's convictions and sentences.

¶22. **AFFIRMED.**

GRIFFIS, C.J., BARNES AND CARLTON, P.JJ., WILSON, GREENLEE AND WESTBROOKS, JJ., CONCUR. McDONALD, LAWRENCE AND McCARTY, JJ., NOT PARTICIPATING.