

IN THE COURT OF APPEALS 03/12/96
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-01058 COA

EDWARD FAIRLEY

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. RICHARD WAYNE MCKENZIE

COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JEFF E. BRADLEY

ATTORNEYS FOR APPELLEE:

MIKE MOORE, ATTORNEY GENERAL

BY: SCOTT STUART, SPECIAL ASSISTANT ATTORNEY GENERAL

DISTRICT ATTORNEY: GLENN WHITE

NATURE OF THE CASE: CRIMINAL-ARMED ROBBERY

TRIAL COURT DISPOSITION: EDWARD FAIRLEY CONVICTED OF ARMED ROBBERY
AND SENTENCED AS AN HABITUAL OFFENDER TO SERVE A TERM OF LIFE
IMPRISONMENT.

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

McMILLIN, J., FOR THE COURT:

Edward Fairley was convicted of the crime of armed robbery by a jury in the Circuit Court of Forrest County and sentenced to serve a life term without parole in the custody of the Mississippi Department of Corrections. Fairley appeals this conviction, raising two issues for consideration. First, he argues that the jury verdict was against the overwhelming weight of the evidence. Second, he asserts that certain statements made by the prosecution during closing arguments were comments on his indigency, and were thereby reversible error.

We find no merit to either of Fairley's contentions sufficient to warrant reversal and, therefore, affirm his conviction.

I.

STATEMENT OF THE FACTS

During the early morning hours of December 13, 1992, Clay Woods and Matthew Bourgeois were leaving an after-hours club known as the Galley in downtown Hattiesburg. In the parking lot, Woods and Bourgeois were approached by a black male, later identified as Edward Fairley, who was seeking a ride home. Although Woods repeatedly refused to give him a ride, Fairley continued to follow them, persistently requesting that they take him home.

Woods and Bourgeois hurried across the parking lot where Wood's Ford Explorer was parked. Woods turned to unlock the driver side door when suddenly, Fairley turned him around and pushed him against the vehicle. As the two men began to struggle, Fairley grabbed Woods, tore his shirt, and ripped the gold chain from his neck. At that point, Bourgeois, who had become fearful for their safety, ran back inside to call for help.

When Bourgeois returned just moments later, Woods was insistently requesting Fairley to return his gold chain, and Fairley was unrelenting in his assertion that he did not have the chain in his possession. Both Woods and Bourgeois testified that when Fairley reached into his pockets to display the contents in order to prove his innocence, he emerged holding an open pocket knife, threatening the two men to leave him alone.

At some point during the argument, Fairley dropped the knife, and Woods kicked it across the parking lot. Fairley then produced a can of mace from his vest pocket and again threatened Woods and Bourgeois to leave him alone. However, two other patrons leaving the Galley noticed the commotion and joined Woods and Bourgeois in the parking lot, causing Fairley to become frightened and flee the scene.

The two boys immediately jumped in the car and drove around the block looking for Fairley, stopping only for a moment to alert Brian Black, a driver at the cab company nearby, of the situation

and give a description of Fairley. Shortly after they drove away, a man fitting Fairley's description approached Black for a ride. Black noted that Fairley was unsure of where he wanted to go and repeatedly requested that Black not inform anyone of his destination. When Black radioed the company to notify them of his present location, Fairley immediately jumped from the moving vehicle and took off running down the street.

When the police officers arrived in the area, they spotted Fairley and commanded him to come forward to the front of the car. Officer McAlpin and Officer Davis testified that they observed Fairley throw something in a ditch near the point where he was walking, and Officer Davis later retrieved the gold chain belonging to Woods from that ditch. Officer Davis also recovered the can of mace from Fairley's vest, which he shed as he broke and ran from the police. Fairley was apprehended and arrested, but the knife which Fairley allegedly used in the robbery was never recovered from his person or the scene.

I.

THE JURY VERDICT

Fairley argues that the jury verdict finding him guilty of armed robbery is against the overwhelming weight of the evidence. Fairley urges this Court to make an in-depth analysis, based on the standard of review for overturning a jury verdict, and find that there was not "substantial" evidence to support the verdict of armed robbery. *McFee v. State*, 511 So. 2d 130 (Miss. 1987). Fairley contends that the prosecution failed to present sufficient proof that the robbery was committed with a deadly weapon, because no knife nor any other weapon was recovered from the scene or from his person.

The Mississippi Supreme Court has held that the limited scope of review of findings of facts made by a jury, who are the sole judges of the credibility of the witnesses and conflicts in evidence, requires that this Court not set aside the jury's decision "where there is substantial and believable evidence supporting the verdict." *Wash v. State*, 521 So. 2d 890, 896 (Miss. 1988) (citations omitted). In ruling on whether the verdict is against the overwhelming weight of the evidence, as presented in Fairley's motion for a new trial, the trial judge should only grant the motion to set aside a jury verdict that he determines, in his discretion, to be contrary to the substantial weight of the evidence. *See Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987); *Burt v. State*, 493 So. 2d 1325, 1328 (Miss. 1986) (citations omitted). On review, this Court must accept all the evidence as true, taken in the light most favorable to the State, and not reverse the trial judge's ruling absent a finding of an abuse of his discretion. *Smith v. State*, 646 So. 2d 538, 542 (Miss. 1994).

Accepting as true the evidence presented at trial in the light most favorable to the State, we do not find that the trial court abused its discretion in denying Fairley's motion for a new trial. The State presented the testimony of both Clay Woods and Matthew Bourgeois, who stated that Fairley grabbed the chain from Woods' neck and pulled a knife from his pocket in the process.

In addition, the State presented the testimony of the cab driver, Brian Black, who picked up Fairley

at a cab company located near the Galley. Black testified that Fairley repeatedly directed him not to disclose his destination. Black further stated that Fairley jumped from the moving cab when Black radioed his location to the cab company.

The jury was also presented with the testimony of the two policemen who responded to the scene shortly after Fairley jumped from the cab. Officers Davis and McAlpin both testified that they observed Fairley drop something from his hand into the ditch nearby, and Davis recovered a gold chain from the area where Fairley had been walking. Officer Davis also recovered a can of mace from Fairley's vest, which he dropped at the scene when he fled from the police.

Although the jury was presented with the conflicting testimony of Fairley surrounding the events of the evening, the determination of the credibility of the witnesses and the evidence was well within their province. *Odom v. Roberts*, 606 So. 2d 114, 118 (Miss. 1992). Based on our standard of review of jury verdicts, we find that there was sufficient testimony from eyewitnesses at the scene, to establish that Fairley took the gold chain from Woods against his will via use of a pocket knife, *i.e.*, a deadly weapon, thereby supporting the jury verdict finding Edward Fairley guilty of the crime of armed robbery. Accordingly, we find that the lower court did not abuse its discretion in denying Fairley's motion for new trial, and Fairley's first assignment of error is, therefore, without merit.

III.

STATEMENTS IN CLOSING ARGUMENT

Fairley contends that the prosecution committed reversible error by making the following statements in the presence of the jury:

Well, I wouldn't have it any other way. we give them everything there is to have. They are entitled to an attorney, they are entitled to all these trial procedures, which you've observed, all these rules of evidence. Everything is done to protect the rights of that defendant sitting over there, to protect him. And, he's been protected. He's had the benefit of an attorney. He's had the benefit of a trial---

. . . As I said this defendant over here has had the benefit of all the rights that our criminal justice system affords him. And not the least of which is the benefit of having this jury sit here to present his case to you. He's had all these rights.

It is Fairley's contention that these statements constituted an identification of his counsel as a court-appointed attorney, a practice which has been condemned by the Mississippi Supreme Court in such cases as *Sanders v. State*, 429 So. 2d 245 (Miss. 1983) and *Compton v. State*, 460 So. 2d 847 (Miss. 1984). Fairley argues that the prosecutor's statements placed him in a "derisive light, [and] identified him as an indigent and/or impoverished person" and that such comments affected his Constitutional guarantees.

It is settled jurisprudence in this State that prosecuting attorneys are afforded wide latitude in closing arguments, barring certain impermissible statements. *See, e.g., Williams v. State*, 595 So. 2d 1299, 1309 (Miss. 1992). Fairley correctly points out that a reference to the fact that counsel is court-appointed has been condemned by the Mississippi Supreme Court. *Sanders v. State*, 429 So. 2d 245, 252 (Miss. 1983). However, we do not agree with Fairley that the statements made by the prosecution were an attempt to inform the jury that Fairley's counsel was court-appointed or that such comments placed him in a disparaging light. Further, assuming *arguendo* that the statements made by the prosecution were taken as a reference to Fairley's indigence or the fact that he received court-appointed assistance, the trial judge was in the best position to determine whether these comments were so prejudicial that a mistrial should have been declared. *McFee v. State*, 511 So. 2d 130, 135 (Miss. 1987). On review, we cannot find that the trial judge abused his discretion in refusing to grant a mistrial in this case, nor can we find that these comments constituted reversible error. *See, e.g., Compton v. State*, 460 So. 2d 847, 848 (Miss. 1984); *United States v. Naylor*, 566 F.2d 942, 942-43 (5th Cir. 1978). Therefore, we find no merit to the second assignment of error raised by Fairley.

Based on a review of the record and evidence contained therein, we find that neither of the alleged errors advanced by Fairley on appeal are of sufficient merit to warrant reversal, and we affirm his conviction of armed robbery.

THE JUDGMENT OF THE FORREST COUNTY CIRCUIT COURT FINDING EDWARD FAIRLEY GUILTY OF THE CRIME OF ARMED ROBBERY AND SENTENCING HIM AS AN HABITUAL OFFENDER TO LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO FORREST COUNTY.

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