

IN THE COURT OF APPEALS 03/12/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00770 COA

JEROME JOSEPH GALLOWAY

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. JERRY OWEN TERRY, SR.

COURT FROM WHICH APPEALED: HANCOCK COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES G. TUCKER, III

ASSISTANT PUBLIC DEFENDER

ATTORNEYS FOR APPELLEE:

MIKE MOORE, ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS, SPECIAL ASSISTANT ATTORNEY GENERAL

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL-SALE OF COCAINE

TRIAL COURT DISPOSITION: GALLOWAY CONVICTED OF TRANSFER OF A
CONTROLLED SUBSTANCE AND SENTENCED TO SERVE A TERM OF TWELVE YEARS
IN THE MDOC

BEFORE BRIDGES, P.J., COLEMAN, McMILLIN, AND PAYNE, JJ.

McMILLIN, J., FOR THE COURT:

Jerome Joseph Galloway was convicted of the crime of transferring a controlled substance by a jury in the Circuit Court of Hancock County. He appeals his conviction, raising two issues for consideration. Firstly, he claims that he was improperly limited in his cross-examination of a prosecution witness regarding the circumstances surrounding a photographic line-up wherein the witness identified Galloway as the person who sold the witness the drugs. Secondly, he alleges that certain remarks made by the prosecution in closing argument constituted an improper attempt to lower the burden of proof standard in the eyes of the jury. We find neither issue to be of sufficient gravity to merit reversal, and we hereby affirm Galloway's conviction and judgment of sentence.

I.

FACTS

Gordon Parker was working as an undercover agent for the Hancock County Sheriff's Department during the summer months of 1991. The operative plan was for Parker to spend several months in the area at locations suspected of drug trafficking and become familiar with the people who frequented the area, but without initially attempting to engage in drug-related activities. There was testimony that this method was used rather than having the agent "sponsored" by a local confidential informant because drug traffickers in the area were becoming suspicious of local persons who introduced strangers into the drug culture.

After a number of weeks of simply attempting to ingratiate himself into the area, Parker was fitted out with a body transmitter designed to transmit his conversation to a tape-recorder, given twenty dollars, and instructed to attempt to make a drug buy from a known suspect. Parker testified that, upon locating the target and attempting to make a drug purchase, the target indicated that he would have to go to another location to retrieve the desired drug. While waiting for the target to return, Parker was approached by Galloway, who offered to sell Parker a rock of crack cocaine for twenty dollars. Parker testified that, over the weeks preceding the incident, he had become quite familiar with Galloway, to the extent that he called him by his nickname, "Juice."

Upon establishing contact with the supervising police officer after the purchase, Parker informed him that he had made the purchase from Galloway rather than the intended target. Apparently, in an attempt to ensure that Parker had, in fact, made the purchase from Galloway, the supervising officer prepared a photographic line-up of six males of similar build, hair-style and complexion, including Galloway. Parker identified Galloway as the person from whom he had purchased the drug. The tape of the transaction was not introduced at trial. There was testimony that the tape was inaudible or distorted to the extent that it was of no use.

II.

LIMITS ON CROSS-EXAMINATION

The photographic lineup was introduced by the State at trial. Galloway's counsel attempted to cross-examine Parker regarding his ability to identify other persons whose photographs appeared in the lineup. The trial court permitted some initial questioning and then sustained a prosecution objection that Parker's ability to identify other members of the line-up was irrelevant. Galloway now complains that this improperly restricted his right to cross-examine Parker concerning the trustworthiness of his identification of Galloway as the perpetrator.

Given the unquestioned wide latitude given to an accused to confront those witnesses who appear against him by a thorough cross-examination, we must respectfully disagree with the trial court that a witness's prior familiarity with other lineup members is irrelevant. Certainly, when the issue of the proper identification of an accused by a person previously unfamiliar with the accused is at stake, evidence that police authorities had packed the lineup with close personal friends or family members of the witness, with the sole exception being the accused, would tend to seriously undermine the credibility of any identification based upon such a lineup. Such issues would appear to be proper inquiry on cross-examination once the State introduces the fact of the identification from the lineup.

Nevertheless, in this case, we must conclude that the limiting of cross-examination on this single point did not so unduly prejudice Galloway as to deny him a fundamentally fair trial. *See, e.g., Banks v. State*, 631 So. 2d 748, 750 (Miss. 1994). The photographic lineup was not conducted for the purpose of attempting to determine the identity of an unknown person, but was for the purpose of merely verifying that the person known to Parker as "Juice" Galloway was one and the same person known to local authorities as Jerome Joseph Galloway. The defense did not advance the theory that Parker had misidentified Galloway. The defense theory was that Parker had perjured himself by claiming to have purchased drugs from Galloway simply to ingratiate himself with local authorities because he knew that Galloway had recently been acquitted in a drug-trafficking trial. The issue for the jury was, therefore, the credibility of Parker, and not a question of misidentification in a lineup improperly slanted to produce the desired result.

The jury elected to believe Parker's testimony. His testimony of weeks of personal acquaintance and familiarity with Galloway prior to the purchase incident and his ability to positively identify Galloway at trial was more than sufficient to sustain a conviction without regard to the circumstances of his being able to pick Galloway out of a photographic lineup that may have contained other persons personally known to Parker.

III.

PROSECUTOR'S REMARKS IN CLOSING ARGUMENT

Galloway complains of the following remark made by the prosecutor in the State's final summation:

We've heard some talk about the burden of proof in this case, and as you've been instructed numerous times, the State is required to prove that this defendant is guilty beyond a reasonable doubt; and as I told you in voir dire the other day, I can't define

reasonable doubt for you. Nobody can. *What I can tell you is that the burden of proof, beyond a reasonable doubt, is a burden of proof that's met in courtrooms all over this state and all over this country every day.* (emphasis supplied).

His suggestion on appeal is that this argument is an attempt to improperly lower the historically high standard required to convict in a criminal trial by suggesting it to be a routine matter. Galloway's counsel entered a timely objection at trial level, but advanced a somewhat different basis for the objection. At trial, counsel suggested that this was a "guilt by association" argument, somehow attempting to place the defendant in the same class with all other criminal defendants. He cited the trial court to the United States Supreme Court case of *Taylor v. Kentucky*, 436 U.S. 478 (1978). That case actually dealt with the trial court's refusal to give a requested defense instruction proclaiming the defendant's presumption of innocence. *Id.* at 481. The Court reversed Taylor's conviction on that ground, and in its discussion, suggested that the prejudicial impact of the failure to give the instruction was heightened by a number of suspect comments advanced by the prosecution, including a declaration that the defendant, "like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until proved guilty beyond a reasonable doubt." The Court suggested that this comment "linked petitioner to every defendant who turned out to be guilty. . . ." *Id.* at 486-87. Nevertheless, the Court specifically noted that it did not "suggest that such prosecutorial comments, standing alone, would rise to the level of reversible error, an issue not raised in this case." *Id.* at 487 n.14.

We conclude that the defendant is procedurally barred from raising the issue of dilution of the burden of proof on appeal because that issue was not presented for consideration by the trial court by a contemporaneous objection. The ground on which the objection was entered at trial is not the same one raised on appeal, and such new alternate grounds are procedurally barred. *See Conner v. State*, 632 So. 2d 1239, 1255 (Miss. 1993), *cert. denied*, 115 S. Ct. 314 (1994).

Aside from the procedural ground to deny relief on this issue, we note that another court considering the same issue on the merits determined such argument to be simply a proper response to the defendant's attempt to impress upon the jury the high standard required to convict so as to suggest that the burden is almost impossibly high. *See State v. Ash*, 526 N.W.2d 473 (N.D. 1995). In that case, we find the following:

The prosecutor discussed the burden of proof this way:

Remember this, this burden of proof, this concept of reasonable doubt is the same burden, it's the same standard that has been applied in every criminal case for decades. There isn't a single inmate at the North Dakota State Penitentiary who didn't have that same burden of proof, that same standard of reasonable doubt applied in his or her case.

Ash claims this argument was inappropriate and prejudicial. The argument was one method of undercutting defense arguments about the enormity of the State's burden of proving guilt beyond a reasonable doubt. The argument was calculated to tell the jury that

finding guilt beyond a reasonable doubt was a frequent event, not an extraordinary one. In the circumstances of this case, this argument did not create reversible error.

Ash, 526 N.W.2d at 482.

We note that Galloway's counsel, in closing argument that preceded the prosecutor's comments, repeatedly stressed the high burden placed upon the State. The rejoinder by the State, not unlike that in *State v. Ash*, could be viewed, even if improper, as "invited error" under such cases as *Booker v. State*, 511 So. 2d 1329, 1331-32 (Miss. 1987), *cert. denied*, 485 U.S. 982 (1988), and *reh'g denied*, 486 U.S. 1027 (1988). On balance, we simply do not conclude that the remark was sufficiently egregious or so violative of the rights of Galloway as to deny him a fair trial, and we decline to consider the issue on the basis of plain error, finding the procedural objection raised by the State in its brief sufficient to dispose of the issue.

Having done so, it should be understood that this Court, unlike the North Dakota Supreme Court, has grave reservations regarding the propriety of the argument advanced by the State. Though all litigants are given wide latitude in framing closing argument, the State should properly limit its comments to "the facts introduced in evidence, deductions and conclusions . . . reasonably draw therefrom, and the application of the law to the facts." *Ivy v. State*, 589 So. 2d 1263, 1266 (Miss. 1991) (citing *Davis v. State*, 530 So. 2d 694, 701-02 (Miss. 1988)). The fact that other defendants in other trials have been convicted by the same standard has no relevance whatsoever. By the same theory, the defense could be heard to argue for acquittal on the basis that other juries acquitted defendants in the face of evidence seemingly stronger than that presented at trial. Such arguments introduce extraneous matter that is not pertinent nor helpful to the jury in its deliberations. They encourage a jury to act in one way or another, not based upon the evidence or the law, but upon what other juries have done in other cases. Such arguments, even though not requiring reversal in all cases, should, in all cases, be discouraged.

THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY FINDING JEROME JOSEPH GALLOWAY GUILTY OF THE CRIME OF TRANSFER OF A CONTROLLED SUBSTANCE AND SENTENCING HIM TO TWELVE (12) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. THE COSTS OF THIS APPEAL ARE ASSESSED TO HANCOCK COUNTY.

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