IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00006 COA

YERBY L. HUGHES, III

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. ROBERT W. BAILEY

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CHARLES W. WRIGHT, JR

ATTORNEYS FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY KLINGFUSS

DISTRICT ATTORNEY: E.J. MITCHELL

NATURE OF THE CASE: CRIMINAL: ROBBERY WITH A DEADLY WEAPON

TRIAL COURT DISPOSITION: SENTENCED TO TWO FIFTEEN (15) YEARS TERMS TO RUN CONCURRENTLY; DRUG, ALCOHOL, AND MENTAL TREATMENT

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

BRIDGES, P.J., FOR THE COURT:

Yerby L. Hughes (Hughes) was convicted of robbery by use of a deadly weapon, Count I, and attempted robbery by use of a deadly weapon, Count II. He received a fifteen (15) year sentence on each count, to run concurrently, in the custody of the Mississippi Department of Corrections, required to receive drug, alcohol and mental treatment, and required to pay costs of $184.50. He appeals these convictions arguing that the lower court erred in failing to grant his motion to suppress his statements to the police, in failing to grant a requested lesser included offense jury instruction, and in failing to grant a mistrial during closing arguments. We disagree and affirm the decision of the lower court.

STATEMENT OF THE FACTS

In the early morning hours of March 14, 1994, a clerk at the Minit Mart called police and reported that a man with a knife robbed the store. She testified that the man took a pack of cigarettes and a dollar from the store, then drove away in a black truck. Officers viewed the tape from the store's security camera and identified Yerby Hughes as the perpetrator. One of the officers had known Hughes for several years.

Shortly thereafter, a night auditor in the lobby at the Hampton Inn called the police after a man with a knife demanded $40.00 from her. After the man demanded the money again, she ran to a back office. When the police arrived, they showed the victim four photographs and asked her to identify the man. The victim unequivocally identified Yerby Hughes.

After identifying Hughes in the first robbery, officers responded to his residence. Hughes was arrested, read his *Miranda* rights, and taken to the police station. At the station, Hughes was again read his *Miranda* rights. He was then questioned about the incidents and admitted to both. He further told an officer that he needed help for his cocaine problem and that he would cooperate with the investigation if his name would be kept out of the papers. Before obtaining a written statement, however, Officer Karl Merchant was directed by Captain Jeff Lewis to process the Hampton Inn crime scene, while the Captain processed the Minit Mart robbery. During this time, Hughes' father arrived at the station and requested that no one talk to his son until he had procured an attorney. When Officer Merchant arrived back at the police department, he was told by the captain that the Defendant could not be interviewed any further.

After Hughes' arrest, Officer Merchant received permission from Hughes' parents to search their home, specifically their son's room, to look for clothing. A blue sweatshirt was found in the room, which appeared to match the shirt on the man depicted in the videotape. A knife and a pack of cigarettes were also found on the dresser in the room, but were not taken as evidence at that time. Hughes' father, however, brought the knife to the police station later and turned it over to the captain. Another knife was retrieved from the truck which was also searched after receiving permission from Hughes' parents.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT HUGHES' MOTION TO SUPPRESS HIS STATEMENTS TO THE POLICE.

The Defendant contends that based on the facts elicited during his motion to suppress hearing, he was not Mirandized at the time the statements were made, and therefore did not give a statement freely and voluntarily. The standard of review this Court applies in reviewing the findings of the trial court on the question of admissibility of a confession is:

> [W]hen the circuit court expressly or implicitly resolves the issue of admissibility of a confession against a defendant, this Court's scope of review is limited: This is essentially a fact-finding function. So long as the court applies the correct legal standards, "we will not overturn a finding of fact made by a trial judge unless it be clearly erroneous." Where, on conflicting evidence, the court makes such findings, this Court generally must affirm.

Lesley v. State, 606 So. 2d 1084, 1091 (Miss. 1992) (citations omitted). Thus, a trial judge's finding that the defendant's statement was voluntarily given is a finding of fact which cannot be reversed unless the court applied an incorrect legal standard and his order is clearly erroneous. *Id.*

The State has the burden of proving the voluntariness, and consequent admissibility of the

confession beyond a reasonable doubt. *Haymer v. State*, 613 So. 2d 837, 839 (Miss. 1993). This burden is met and the State has made a prima facie case through "testimony of an officer, or other persons having knowledge of the facts, that the confession was voluntarily made without any threats, coercion, or offer of reward." *Cox v. State*, 586 So. 2d 761, 763 (Miss. 1991). After the State has made its prima facie case, if a defendant testifies to:

> [V]iolence, threats of violence, or offers of reward induced the confession, the State must offer all the officers who were present when the accused was questioned and when the confession was signed, or give an adequate reason for the absence of any such witness.

Agee v. State, 185 So. 2d 671, 673 (Miss. 1966). Hughes claims that since Officer Fowler did not testify, the trial court should be reversed. However, under *Abram v. State*, only those persons who are claimed to have induced a confession through some means of coercion are required to be offered by the State under *Agee*. *Abram v. State*, 606 So. 2d 1015, 1030 (Miss. 1992). Here, there is no claim that Officer Fowler induced a confession or was present for the confession. Clearly, Judge Bailey complied with the legal standard for determining whether the Defendant's statement was voluntarily given. The court conducted a full hearing on this question alone satisfying the *Agee* requirement. Several law enforcement personnel present at the time of Hughes' statement testified that Hughes was read his *Miranda* warnings and gave his statements freely and voluntarily. Additionally, the trial judge found that the confessions were free and voluntary since the Defendant himself testified that he understood *Miranda* rights, but only argued that in this instance, he was not given the warnings. Finally, where there is conflicting evidence, this Court must affirm the lower court. *Lesley*, 606 So. 2d at 1091. Accordingly, this issue is without merit.

II. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S REQUESTED LESSER INCLUDED OFFENSE JURY INSTRUCTION AND THEORY OF THE CASE.

Hughes next argues that the trial court's failure to include instructions to the jury on the offense of disturbing the peace and/or simple assault is so prejudicial as to require reversal. We disagree.

A trial court is required to grant a lesser included offense instruction only when a reasonable jury could find from the evidence that the defendant was not guilty of the principal charge, but guilty of the lesser included offense. *Haddox v. State*, 636 So. 2d 1229, 1238 (Miss. 1994). The test used by this Court in deciding whether a lesser included offense instruction should have been granted by the trial court is set out in *Griffin v. State*, 533 So. 2d 444, 447 (Miss. 1988):

> A lesser-included offense instruction should only be granted if there is an evidentiary basis therefor in the record. The test has been fleshed out in *Harper v. State*, 478 So. 2d 1017 (Miss. 1985):
>
> > [A] lesser included offense instruction should be granted unless the trial judge--and ultimately this Court--can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge).

Here, the trial judge instructed the jury on the lesser included offense of simple robbery as to Count I, the Minit Mart robbery. The court included this instruction because Hughes argued that there was no knife used in the robbery of the Minit Mart. As discussed by the trial judge, there was no conflicting evidence presented regarding the Hampton Inn robbery, and therefore a lesser offense instruction would not be warranted. Further, the testimony of both victims, together with the video tape, without question demonstrate that Hughes was guilty of armed robbery, or at least simple robbery. From the evidence presented at trial, no rational or reasonable juror could have convicted Hughes of disturbing the peace or simple assault. There was no evidentiary basis to support a lesser included instruction, and the trial court was correct in denying the same.

III. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL

DURING CLOSING ARGUMENT OF THE PROSECUTOR.

In his final assignment of error, Hughes maintains that the prosecutor impermissibly commented on his failure to testify and his right to counsel. The following statement is assigned as error:

> Then the defense attorney attacks the police for not getting a written statement of what Yerby Hughes said. And I know you are sitting there, you were sitting there in the trial thinking, why is he complaining about not getting a written statement, when I was the one that kept them from getting a written statement, talking about him [the defendant]. He called down there. They have got the oral statement [objection interposed by defense counsel].

Since Hughes testified at trial, the only issue remaining is whether the prosecutor impermissibly commented on Hughes pre-arrest silence.

In *Davis v. State,* 530 So. 2d 694, 701-02 (Miss. 1988), our supreme court held:

> As set forth in *Craft v. State*, 226 Miss. 426, 84 So. 2d 531 (1956), the test to determine whether an improper argument by a prosecutor requires reversal is whether the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created.
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> According to *Clemons v. State*, 320 So. 2d 368, 371 (Miss. 1975) there are certain well-established limits beyond which counsel is forbidden to go; he must confine himself to the facts introduced in evidence and to the fair and reasonable deductions and conclusions to be drawn therefrom, and to the application of the law, as given by the court, to the facts. The court, in *Clemons*, further stated:
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> > So long as counsel in his address to the jury keeps fairly within the evidence and the issues involved, wide latitude of discussion is allowed, but, when he departs entirely from the evidence in his argument, or makes statements intended solely to excite the passions or prejudices of the jury, or makes inflammatory and damaging statements of fact not found in the evidence, the trial judge should intervene to prevent an unfair argument. . . .

There is evidence in the record to support the fact that Hughes voluntarily talked with the police. The prosecutor confined his comment to facts introduced into evidence and to the fair and reasonable deductions and conclusions to be drawn therefrom. As such, this issue is without merit.

THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT OF

CONVICTION ON COUNT I OF ROBBERY WITH A DEADLY WEAPON, AND SENTENCE OF FIFTEEN (15) YEARS, AND CONVICTION ON COUNT II OF ROBBERY WITH A DEADLY WEAPON, AND SENTENCE OF FIFTEEN (15) YEARS TO RUN CONCURRENTLY WITH SENTENCE IN COUNT I, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. FRAISER, C.J., CONCURS IN RESULT ONLY.