

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00464 COA

MARQUETT D. SACKS

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. ELZY J. SMITH

COURT FROM WHICH APPEALED: CIRCUIT COURT OF COAHOMA COUNTY

ATTORNEY FOR APPELLANT:

AZKI SHAH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUARTDISTRICT ATTORNEY: PHILLIP S. WEINBERG

NATURE OF THE CASE: CRIMINAL-FELONY

TRIAL COURT DISPOSITION: CONVICTED OF ARMED ROBBERY AND TWO COUNTS
OF AGGRAVATED ASSAULT AND SENTENCED TO 30 YEARS

MANDATE ISSUED: 6/10/97

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

SOUTHWICK, J., FOR THE COURT:

Marquett D. Sacks was convicted of armed robbery and two counts of aggravated assault by a jury in the Circuit Court of Coahoma County. He appeals, arguing the evidence was insufficient to support the verdict of armed robbery and the court erred in admitting a witness's statement that was not responsive to the question. We find no reversible error and affirm.

FACTS

A group of five young males were riding in a car when they pulled up behind two walking men. Defendant Sacks and Mario Brunt got out of the car carrying a pistol, a sawed off shotgun, and wearing bandanas over their faces. They approached Chris Delaney ("Little Chris") who was walking with Martin Gibson, and grabbed Delaney. Sacks told Delaney to "break yourself" or "break down," which is street language for robbery. Both Sacks and Brunt searched Delaney and one said to the other that Delaney did not have any money in his pockets. Delaney confirmed that he did not have anything. Sacks shot Delaney with the pistol, then Brunt shot him with the shotgun. Sacks and Brunt got back into the car and started to leave the scene. The car stopped, and Sacks shot Gibson in the abdomen before they left. Fortunately, the victims lived.

The grand jury indicted both Sacks and Brunt on a four count indictment for armed robbery and aggravated assault in the Circuit Court of Coahoma County. Sacks was convicted by a jury for armed robbery and two counts of aggravated assault.

DISCUSSION

I. Sufficiency of evidence

Sacks argues the evidence was insufficient to prove that he intended to rob Delaney. He testified at trial that when he got out of the vehicle with the gun, his purpose was not to rob Delaney, but to shoot him. He argues that although there were witnesses who heard him say, "break yourself," there was no evidence that Delaney understood what the term meant. Sacks testified that he said "brace yourself," not "break yourself," and one witness corroborated this testimony. Sacks testified that they searched Delaney's pockets to determine whether he was armed and not for the purpose of robbing him.

The standard of review in challenges to the sufficiency of the evidence is this:

The evidence is viewed in the light most favorable to the State. All credible evidence supporting the conviction is taken as true; the State receives the benefit of all favorable inference reasonably drawn from the evidence. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). Issues regarding weight and credibility of the evidence are for the jury to resolve. *Id.* Only where the evidence, as to at least one of the elements of the crime charged, is such that a reasonable and fair minded juror could only find the accused not guilty will this Court reverse.

Holloman v. State, 656 So. 2d 1134, 1142 (Miss. 1995). The evidence showed that Sacks and Brunt went through Delaney's pockets and announced that he had no money in his pockets. There was credible if disputed evidence that Sacks told the victim to "break yourself," which was street language

for robbing someone. After reviewing the evidence, we find the jury had substantial credible evidence to support its verdict.

II. A witness's unresponsive answer

Sacks also argues that the court erred in allowing evidence that Delaney stated that he did not have anything, implying that Delaney believed that he was being robbed. The witness whose testimony is in question was Duprece Tribble, a prosecution witness who was in the car in which Sacks and Brunt were riding. He testified on cross examination:

Q. You didn't see anyone search "Little Chris"; is that correct?

A. That's correct.

Q. That didn't occur.

A. No. But "Little Chris" made the statement saying

An objection was here made that the answer was not responsive to the question. The objection was overruled. The witness then answered the remainder of the question.

A. . . . that he didn't have anything.

Sacks argues that an answer of a witness must be responsive to the question, and if the answer is not responsive, then it may be stricken from the record. He cites 98 C.J.S. *Witnesses*, Section 353 (1957) at 74-76. Sacks argues that allowing the jury to hear the testimony was unduly prejudicial in that the evidence led directly to his conviction, and based on this error, his conviction should be reversed and he should be discharged.

The admissibility of evidence is largely within the discretion of the trial court, and we cannot reverse unless we find that the discretion has been abused. *Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992). A witness is ordinarily permitted to explain his answer when asked a question calling for an answer of yes or no. *Krebs v. McNeal*, 76 So. 2d 693, 701 (Miss. 1955).

We find that the judge did not abuse his discretion in allowing the witness to explain his answer and in allowing this evidence. In addition to this evidence, there was substantial other evidence on which the jury could have based its finding that Sacks intended to rob Delaney. Indeed, it would have been difficult for the jury to have concluded that was not Sacks's intent.

THE JUDGMENT OF THE COAHOMA COUNTY CIRCUIT COURT OF CONVICTION OF ONE COUNT OF ARMED ROBBERY AND SENTENCE OF TEN YEARS AND CONVICTION OF TWO COUNTS OF AGGRAVATED ASSAULT AND SENTENCE OF TEN YEARS FOR EACH COUNT, WITH SENTENCES TO RUN CONSECUTIVELY, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, TO MAKE RESTITUTION TO THE VICTIM, IS AFFIRMED. SENTENCE IN COUNT OF ARMED ROBBERY TO RUN CONSECUTIVELY TO ANY AND ALL OTHER SENTENCES PREVIOUSLY IMPOSED AND SACKS SHALL NOT BE ELIGIBLE FOR PAROLE DURING TERM OF SAID SENTENCE. ALL COSTS OF THIS APPEAL ARE

ASSESSED TO COAHOMA COUNTY.

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING,
HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.**