

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01270 COA

FELIX WILSON 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. KOSTA VLAHOS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HARRISON COUNTY

ATTORNEY FOR APPELLANT: STEPHEN J. MAGGIO

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: ARMED ROBBERY

TRIAL COURT DISPOSITION: CONVICTION AND SENTENCE OF 15 YEARS IN THE MDOC

MANDATE ISSUED: 6/24/97

BEFORE BRIDGES, C.J., HERRING AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

On March 2, 1994, Felix Wilson was convicted of the crime of armed robbery in the Circuit Court of the First Judicial District of Harrison County, Mississippi. On that same day, he was sentenced to a term of fifteen years in the custody of the Mississippi Department of Corrections. In its final judgment, the trial court further ruled: "Defendant is to serve day for day without hope of probation or parole pursuant to section 97-3-79 and section 47-7-3 of the Mississippi Code of 1972 as

amended." Wilson now appeals to this Court and assigns the following errors which, he contends, entitle him to a new trial:

I. THAT THE PROSECUTOR MADE AN IMPROPER STATEMENT DURING CLOSING ARGUMENT IMPLYING THAT THE DEFENDANT HAD IMPROPERLY ATTEMPTED TO EXCLUDE EVIDENCE FROM THE JURY.

II. THAT THE PROSECUTOR MADE AN IMPROPER STATEMENT TO MATTERS WHICH WERE EXCLUDED FROM THE PURVIEW OF THE JURY AND WHICH WERE NOT IN THE RECORD.

Finding no reversible error, we affirm the conviction of the Appellant. However, we remand this action to the trial court for sentencing in compliance with the provisions of section 47-7-3 of the Mississippi Code of 1972 as amended which were in force and therefore legally binding at the time of Wilson's conviction on March 2, 1994.

### I. THE FACTS

On the evening of March 22, 1993, Nancy Powers was the victim of an armed robbery while serving as the attendant of a convenience store and gasoline station located on Beach Boulevard in Gulfport, Mississippi. On the evening in question at approximately 8:00 p.m., Felix Wilson entered the convenience store and placed a note demanding money on the counter in front of Powers who was working behind the cash register. No customers were in the store at the time, and Powers was the only attendant.

Powers recognized Wilson when he entered the convenience store because he had been in the store to make purchases on two prior occasions during daylight hours with his co-workers. Powers also knew that Wilson worked for a carnival which was on tour and temporarily in Gulfport. While Powers was trying to read the note, Wilson said, "Hurry up," and threatened to kill Powers. She believed him, not only because he seemed "very aggravated" and "anxious," but also because she observed that he held a pistol in his right hand which was partially drawn from the pocket of his jacket. After Powers hurriedly gave Wilson all of the cash money she had in her cash register, Wilson said, "Don't call the police" and "I will kill you." Wilson then left the store through the front door and moved towards the back of the building, which was located near the ocean. Powers called the police two or three minutes later and gave them a statement as to what had just transpired.

Wilson was apprehended within a short period of time after the robbery. Wilson was first observed by a security guard working near the convenience store who had been alerted by law enforcement officials that a robbery had occurred nearby. At the time, the guard observed Wilson running in a southerly direction in order to stop a taxicab. Wilson then got in the taxicab but later bolted from the vehicle at the corner of 14th Street and Highway 49 after he heard the radio dispatcher advise the cab driver that a search was being conducted regarding the convenience store robbery. Thereafter, upon being advised that Wilson had left the taxicab on foot, Gulfport police officials went to the area and promptly observed Wilson running along 14th Street. Wilson was subsequently found in an alley underneath an abandoned vehicle and arrested.

According to police officials, Wilson had \$77.00 in cash on him at the time of his arrest. He was subsequently identified by Powers as the assailant who robbed her. Powers also made a positive identification of a blue and white jacket which Wilson was wearing at the time of the robbery, but was not wearing at the time of his arrest. This jacket was apparently returned by other carnival workers or "carneys" after they heard about the robbery. Clarence Vance, Jr., a detective with the Gulfport Police Department, testified that Wilson acknowledged that the blue and white jacket belonged to him and that he stated "[Y]ou found my jacket. Good. I'm cold. If you found the jacket, you found the gun."

The single witness presented by the defense was Felix Wilson, himself. He testified that he had been employed by Mississippi Delta Shows for two weeks but was "turned around" and sent home by his employer when he went to work on the morning of the robbery because he had been drinking. Wilson stated that when he later returned to the carnival that evening, he was told that

there had been a robbery and that the police were looking for him. At this point, according to Wilson, he panicked and ran, because he had a prior conviction of burglary. He acknowledged flagging down the taxicab and leaving the vehicle when he heard on the taxicab radio that a search for him was being conducted, and further acknowledged that he was hiding under an abandoned vehicle at the time of his arrest.

According to Wilson, he was residing at Salvation Army facilities while in Gulfport and had returned there for a lunch after being sent away by his employer because he was intoxicated. He stated that he later went to a local plasma center where he sold some of his blood, thus apparently accounting for a portion of the \$77.00 he was carrying at the time of his arrest. Wilson emphatically denied that he committed the robbery and denied that he identified the blue and white jacket as his own while under arrest.

## II. ANALYSIS

### A. WAS THE PROSECUTOR'S STATEMENT DURING CLOSING ARGUMENT IMPLYING THAT THE APPELLANT HAD IMPROPERLY ATTEMPTED TO EXCLUDE EVIDENCE FROM THE JURY, SO PREJUDICIAL AS TO JUSTIFY A REVERSAL OF THE APPELLANT'S CONVICTION IN THIS CASE?

During the State's closing argument, the prosecutor made the following statements:

What is left for you to decide rather simply is do you believe his story that he's just an innocent victim in the wrong place at the wrong time. That everybody is prejudiced against and looking to pin something on him or do you believe Nancy Powers who in the state that she was in, the emotional state that she was in when they brought him back, said, "I'm positive that's him." In the emotional state that she was in at the robbery, within two or three minutes the police responded. She gave a description of Felix Wilson. Facial hair . . . appeared to be dirty, sweaty, unclean, a little unshaven, the beard and mustache, the blue and white jacket. *A lot to do was to keep you from seeing this jacket. You will be able to --*

(emphasis added). At this point, Wilson's counsel objected and the following exchange took place:

BY THE COURT: Sustained.

BY MR. MAGGIO: I ask that it be stricken, Your Honor.

BY THE COURT: I sustain the objection.

Thereupon, the prosecutor continued his closing argument.

BY MR. SIMPSON: You will be allowed to take this back with you. Take a look at this blue and white jacket. Nancy Powers told you, "I knew for sure it was blue and white. I think I told them it may have had white cuffs and appeared to be satiny at that time, but I know it was blue and white. And it was brought back to me and I positively identified it as the jacket that Felix Wilson wore that night, and I gave it to the police."

Wilson contends that the improper statement of the prosecutor concerning Wilson's previous effort to exclude the jacket from evidence was prejudicial to Wilson and warranted reversal of his conviction and a new trial. Our supreme court has repeatedly held that the trial judge "is in the best position for determining the prejudicial effect of an objectionable comment." *Alexander v. State*, 602 So. 2d 1180, 1182 ( Miss. 1992). Thus, the trial court is given discretion to determine whether or not an improper statement made during closing argument should result in a mistrial. In the case *sub judice*, Wilson did not request a mistrial. *Alexander*, 602 So. 2d at 1182. Moreover, the test which we must follow for determining if an improper argument by a prosecutor to a jury requires reversal is:

[W]hether 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.

*Davis v. State*, 660 So. 2d 1228, 1248 (Miss. 1995). *See also Taylor v. State*, 672 So. 2d 1246, 1269 (Miss. 1996). In applying this test, an appellate court must look to the context of the whole record to determine if the improper statement was of "such a character or of such substance as to have been capable of prejudicing the right of the appellant to a fair trial." *Taylor*, 672 So. 2d at 1269.

In support of his position that he was entitled to a reversal of his conviction and a new trial, Wilson cites *White's Mkt. & Grocery v. John*, 153 Miss. 860, 121 So. 825 (1929). In *White's Mkt. & Grocery*, the prosecutor persisted in appealing to the jury to consider evidence which the trial court had excluded and admonished the jury to disregard. Thereafter, the trial court committed reversible error by refusing to grant a mistrial. *White's Mkt. & Grocery*, 153 Miss. at 865, 121 So. at 826. In the case *sub judice*, the prosecutor did not argue with the trial court concerning his improper statement but immediately complied with the court's ruling and moved on to discuss the fact that the jacket allegedly belonging to the accused had been admitted into evidence and had been identified by the victim of the robbery as belonging to Wilson.

It is noteworthy that when Wilson, through counsel, objected to the prosecutor's improper remarks concerning the alleged effort by Wilson to prevent the jury from seeing the jacket, there was no request by Wilson for the trial court to admonish the jury to disregard the prosecutor's remarks. Furthermore, there was no request for a mistrial. The Mississippi Supreme Court has stated on a number of occasions that where an objection is sustained and "no request is made that the jury be told

to disregard the objectionable matter, there is no error." *Marks v. State*, 532 So. 2d 976, 981 (Miss. 1988). See also *Wetz v. State*, 503 So. 2d 803, 810 (Miss. 1987); and *Foster v. State*, 639 So. 2d 1263, 1282 (Miss. 1994), where the supreme court observed, as here, that the State did not linger on the objectionable subject matter but properly moved on to relevant matters. Moreover, while improper statements made by a prosecutor in a closing argument to the jury have constituted reversible error in some close cases, See *Griffin v. State*, 504 So. 2d 186, 193-94 (Miss. 1987); *Collins v. State*, 408 So. 2d 1376, 1380 (Miss. 1982). an appellate court has the right in determining whether an improper remark constitutes harmless error, to take into consideration whether the evidence against a defendant is substantial and overwhelming. *Brock v. State*, 530 So. 2d 146, 154-55 (Miss. 1988).

In this case, the evidence presented against Wilson was substantial and compelling. Not only was he positively identified as the assailant who robbed the convenience store attendant, but he was also seen running from the scene and was ultimately found hiding under an abandoned vehicle. Wilson's jacket was also identified by the attendant, and he acknowledged its ownership in a spontaneous statement to a police officer. Thus, we hold that the statement of the prosecutor concerning Wilson's effort to prevent the jury from considering the jacket, while improper, did not constitute reversible error. This assignment of error has no merit.

**B. WAS THE PROSECUTOR'S IMPROPER STATEMENT IN REGARD TO MATTERS WHICH WERE EXCLUDED FROM THE PURVIEW OF THE JURY, AND WHICH WERE NOT IN THE RECORD, SO PREJUDICIAL AS TO JUSTIFY A REVERSAL OF THE APPELLANT'S CONVICTION?**

Wilson's second assignment of error concerns another statement made by the prosecutor during closing argument as follows:

BY MR. SIMPSON:

But you know Ms. Powers said something interesting when I was showing her the jacket. She said, 'Yeah. I know the jacket. It's got the right front pocket --

After these statements were made by the prosecutor to the jury, the following exchange took place between the defense counsel and the trial court:

BY MR. MAGGIO:

Your Honor, I object to that. That was stated outside the presence of the jury.

BY THE COURT:

The jury is the finder as to what was presented in the record. And if it wasn't in the record they have to disregard it. I can't make that determination for them. I can't sustain a fact objection.

BY MR. MAGGIO:

I'm objecting to counsel is trying to introduce matters which were heard outside the presence of the jury, Your Honor.

BY THE COURT:

If it were outside the presence of the jury and the jury knows that they didn't hear it, they will discount it. They will not consider it.

Thereafter, the prosecutor continued his argument as follows:

BY MR. SIMPSON:

. . . . When you look at this piece of evidence it will be equally apparent to you that the right front pocket is torn and the seam is coming apart here. Okay.

Wilson is correct that any testimony given by Nancy Powers concerning the fact that the jacket of Wilson had a torn pocket was given outside the presence of the jury and that it is improper for a party to attempt to introduce testimony in closing argument which was not previously presented through admissible evidence to the jury. *Gulf, Mobile & N. R. Co. v. Weldy*, 195 Miss. 345, 14 So. 2d 340, 342-43 (Miss. 1943). Thus, we must again determine if the improper statement created unjust prejudice against Wilson resulting in a verdict influenced by that prejudice. *Davis v. State*, 660 So. 2d 1228, 1248 (Miss. 1995). We hold that it did not, especially since any prejudice created by the improper remarks were corrected by the trial court's instructions to the jury as follows:

#### INSTRUCTION C-1

Both the State of Mississippi and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case and that you will reach a true verdict regardless of what the consequences of such a verdict may be.

It is your duty to determine the facts and to determine them from the evidence produced in open Court. You are to apply the law to the facts and in this way decide the case.

You should not be influenced by bias, sympathy or prejudice. Your verdict should be based on the evidence and not upon speculation, guesswork or conjecture.

As sole judges of the facts in this case, your exclusive province is to determine what weight and what credibility will be assigned the testimony and supporting evidence of each witness in this case. You are required and expected to use your good common sense and sound honest judgment in considering and weighing the testimony of each witness who has testified in this case.

The evidence which you are to consider consists of the testimony and statements of the witnesses and the exhibits offered and received. You are also permitted to draw such reasonable inferences from the evidence as seem justified in the light of your own experience.

Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. *If any argument, statement or remark has no basis in the evidence, then you should disregard that argument statement or remark.*

The production of evidence in Court is governed by rules of law. From time to time during the trial, it

has been my duty as Judge to rule on the admissibility of evidence. You must not concern yourself with the reasons for the Court's rulings since they are controlled and governed by rules of law. You should not infer from any rulings by the court on these motions or objections to the evidence that the Court has any opinion on the merits favoring one side or another.

You should not speculate as to possible answers to questions which the Court did not require to be answered. Further, you should not draw any inference from the content of those questions. *You are to disregard all evidence which was excluded by the Court from consideration during the course of the trial*

### INSTRUCTION C-6

If in stating the law to you, I repeat any rule, direction or idea or if I state the same in varying ways, no emphasis is intended, and you must not draw any inference therefrom. You are not to single out any certain witness or individual point or instruction and ignore the others. The order in which these instructions are given has no significance as to their relative importance.

Counsel for both parties will now have an opportunity to address you and make their closing or final arguments.

The prosecuting Attorney will have the opening argument. Counsel for the Defendant will then have opportunity for argument. Then, in conclusion, the Prosecuting Attorney will have opportunity to reply to the arguments of counsel for the Defendant. The attorneys, in making these arguments to you will be commenting upon the testimony that you have heard and the evidence that has been presented in this case. They, as you, will be recalling the evidence that has been presented. They should not intentionally try to mislead you. However, if their recollection of the evidence differs from what your recollection is, you must follow your own recollection.

(emphasis added). As in *Blue v. State*, 674 So. 2d 1184, 1215 (Miss. 1996), we hold that these jury instructions "effectively eradicated" any prejudice that may have been caused by the prosecutor's inadvertent remarks. It is generally presumed that jurors will obey and apply the instructions of the Court. *Blue*, 674 So. 2d at 1215. *See also Johnson v. Gargo*, 604 So. 2d 306, 311 (Miss. 1992). Thus, we hold that Wilson's second and final assignment of error has no merit.

### III. CONCLUSION

Although we affirm the conviction of the Appellant, we note *sua sponte* that Wilson was sentenced by judgment of the trial court to serve a term of fifteen years within the custody of the Mississippi Department of Corrections, without hope of pardon or parole. As shown by the provisions of section 47-7-3(1)(d) of the Mississippi Code of 1972, as amended, which was in effect at the time of the trial court's judgment on March 2, 1994, Wilson would be eligible for parole after ten years. We also note that in the transcript of the trial court proceedings, the trial court correctly advised Wilson with the concurrence of the State, that he would be eligible for parole after serving a term of ten years. Thus, we remand this action to the trial court to reflect that the Appellant shall be eligible for parole in

accordance with the provisions of section 47-7-3(1)(d) which was in effect at the time of the trial court's judgment, dated March 2, 1994. *See Gardner v. State*, 514 So. 2d 292, 294 (Miss. 1987), which states that the language of section 47-7-3 is a mandate to the State Parole Board, rather than a mandate to the trial courts.

**THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF ARMED ROBBERY IS AFFIRMED. THE CASE IS REMANDED FOR SENTENCING CONSISTENT WITH THE TERMS OF THIS OPINION AND PURSUANT TO SECTION 47-7-3(1)(d) OF THE MISSISSIPPI CODE OF 1972 AS AMENDED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.**

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.**