

IN THE COURT OF APPEALS 02/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01163 COA

BENJAMIN YANCY A/K/A BENJAMIN YANCEY

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. HENRY ROSS

COURT FROM WHICH APPEALED: MONTGOMERY COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

H. LEE BAILEY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: DOUG EVANS

NATURE OF THE CASE: CRIMINAL: BURGLARY OF BUILDING

TRIAL COURT DISPOSITION: GUILTY- SENTENCED TO SERVE SEVEN YEARS IN MDOC TO BE SERVED CONSECUTIVE TO ANY SENTENCE PREVIOUSLY IMPOSED.

BEFORE BRIDGES, P.J., BARBER, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

Benjamin Yancy (Yancy), the Appellant, was convicted in the Montgomery County Circuit Court of burglary of a building. Yancy was sentenced to serve seven years in the Mississippi Department of Corrections. Aggrieved from the judgment, Yancy appeals to this Court asserting the following issues: (1) whether the trial judge erred in failing to recuse himself; (2) whether the lower court erred in denying Yancy's motion to suppress; (3) whether the lower court erred in overruling Yancy's objection to opinion testimony by a State's witness; (4) whether the lower court erred in refusing to grant jury instruction D-8; and (5) whether the lower court erred in any of its rulings in regard to the sufficiency and weight of the evidence. Finding no reversible error, we affirm.

FACTS

On July 24, 1994, the evening of the incident, Wayne Crouch observed Yancy riding a bicycle in the direction of the Greenleaf Hunting Club. Later on that night, Yancy approached Crouch's house and asked Crouch for a ride to "the project" in exchange for a pair of binoculars. Crouch refused to take Yancy to the project, but agreed to give Yancy a ride to Jimmy Fowler's house. Yancy told Crouch to stop at the end of his driveway so that Yancy could get his things. His things included a sleeping bag and a microwave along with the binoculars.

Soon after, Deputy Sheriff Bill Thornburg of the Montgomery County Sheriff's Department received a call from the Sheriff's Department informing him of a disturbance at the Fowler residence. When he arrived at the Fowler's, several people were gathered in the driveway. The crowd informed Deputy Thornburg that a man who called himself Midnight had a sleeping bag, a pair of binoculars and a microwave in a bag. They claimed that he was trying to sell the binoculars to them. Yancy, also known as Midnight, was among the people in the driveway. Yancy told Deputy Thornburg that he borrowed the items from the Topp twins who lived down the road, but he was unable to tell Deputy Thornburg exactly where the Topp twins lived.

Deputy Thornburg read Yancy his *Miranda* rights and informed him that he would take him to the Sheriff's Department, and investigate the problem before he would be able to release him. Yancy made no statements at that time. It was subsequently discovered that the hunting club had been burglarized, and that the microwave, binoculars, and sleeping bag were from the hunting club. Yancy was charged that night, and later, was read his *Miranda* rights again the next morning. Yancy initially told the police that he had bought the items from someone two weeks earlier, and that he stashed them underneath a cedar tree. However, after some more questioning, Yancy confessed to breaking into the hunting club, and taking the items from the club.

DISCUSSION

I. MOTION TO RECUSE

Yancy argues that the trial judge erred in failing to recuse himself from this case. Yancy claims that Judge Henry Ross had made statements to defense counsel to the effect that he wanted a criminal trial during the term of court so that he could impose a lengthy, or severe sentence upon a defendant.

The judge overruled the motion stating in part:

The court finds that any statements made to Mr. Bailey to the effect that the court had only been here in this county for a total of three years [sic] since assuming office approximately one year ago, and that it was my desire to sit in the role as a judge in the county in trials so that the populace could see me perform . . . in the office. Nothing was said to the court's recollection, of any particular sentencing of this Defendant, or any other defendant.

The standard by which the Court determines if a judge should have disqualified himself is an objective standard under Canon 3. *Neal v. State*, No. 92-KA-00601 SCT, 1996 WL 4444939 *6 (Miss. 1996) (citations omitted); Code of Judicial Conduct, Canon 3. "A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." *Id.* (citing *Collins v. Joshi*, 611 So. 2d 898, 901 (Miss. 1992)). We presume that a judge, sworn to administer justice, is qualified and unbiased. This presumption may only be overcome by evidence showing beyond a reasonable doubt that the judge was biased or not qualified. *Id.*

Based on the record, Judge Ross was clear that Yancy would receive a fair trial. We do not find beyond a reasonable doubt that Judge Ross was biased or unqualified in this case.

II. MOTION TO SUPPRESS

Yancy argues that his confession should not have been admitted into evidence because he was not properly advised of his *Miranda* rights. A suppression hearing was held before trial where the judge found that Yancy's statements were made freely and voluntarily.

Determining whether a confession is admissible is a finding of fact which is not disturbed unless the trial judge applied an incorrect legal standard, committed manifest error, or the decision was contrary to the overwhelming weight of the evidence. *Thorson v. State*, 653 So. 2d 876, 887 (Miss. 1994) (citations omitted). Yancy contends that the warnings which were read to him were incomplete. He argues that the officers did not tell him that he could exercise his rights at any point during the interrogation.

Deputy Thornburg testified that he read Yancy his *Miranda* rights from a card. He read the information on the card into the record at the suppression hearing. The warning on the card that Deputy Thornburg read from specifically states that the defendant has the right to stop answering at any time in order to talk to a lawyer. Nevertheless, the supreme court has addressed this very issue in *Bell v. State*, where the Defendant made the same argument. *Bell*, 443 So. 2d 16, 21 (Miss. 1983). In *Bell*, the Defendant argued that her statements made to police should not have been admitted because she should have been informed that even though she had initially volunteered statements, she could stop talking with the police at any time. *Id.* The court rejected this argument stating, "An individual has a right to stop the interrogation at any time he wishes, but it is not required that he must be so informed." *Id.* (citations omitted). Accordingly, this issue lacks merit.

III. OPINION TESTIMONY

Over Yancy's objections, Deputy Thornburg testified about footprints found at the scene of the

crime. Yancy argues that this was error because Deputy Thornburg was not a qualified expert witness.

Because Deputy Thornburg was not qualified as an expert witness, Rule 701 of the Mississippi Rules of Evidence, the rule concerning lay witness opinions, governs. According to the rule, the testimony in question must be measured by a two-prong test: (1) that the lay opinion be rationally based on first-hand knowledge or observation; and (2) that the witness' opinion must be helpful in resolving the issues. *Seal v. Miller*, 605 So. 2d 240, 243 (Miss. 1992); M.R.E. 701.

Applying Deputy Thornburg's testimony to the two-prong test, we find that it passes muster. When Deputy Thornburg went to the hunting club to investigate the scene, he noticed footprints in the mud beneath a window. He testified that the shoes Yancy had on that day would have been similar to the shoes that made the tracks found in the mud by the hunting club. Since Deputy Thornburg saw both the tracks and the shoes that Yancy had on, he was testifying based on first hand observation.

As to the second prong of the test, whether the witness' opinion is helpful in resolving the issue, we must analyze this by asking the following question, "Does the testimony tell the jury something it does not already know?" *Seal*, 605 So. 2d at 244 (citations omitted). In this instance, we find that it does. Deputy Thornburg's testimony about his observations regarding the footprints found at the scene, and the similarity in the shoes that Yancy had on that could have left the tracks certainly helped them in assessing whether Yancy could have been at the hunting club. We find that this was proper lay testimony.

IV. JURY INSTRUCTION

Yancy also argues that the lower court should have granted proposed jury instruction D-8. Proposed instruction D-8 stated:

Evidence has been presented that the defendant acted in ignorance or on mistake of fact. Ignorance or mistake of fact is a defense to the commission of a crime provided that:

- 1) the mistaken belief is honestly held; and
- 2) the belief is of such a nature that the conduct would have been lawful and proper, had the facts been as they were believed to be; and
- 3) the mistaken belief is not the result of the negligence or fault of the defendant.

If the state has failed to prove from the evidence in this case beyond a reasonable doubt that the defendant acted with knowledge of the true facts, then you shall find the defendant not guilty.

Yancy's argument stems from his defense that he thought the items were abandoned by the side of the road. Since Yancy was charged with burglary of a building, this was not a correct statement of the relevant law. The two essential elements to prove burglary are: (1) breaking and entering of a building, and (2) an intent to steal or commit a felony therein. Miss. Code Ann. §97-17-33 (Supp. 1994). This is clearly an incorrect statement of the law as applied to the charge of burglary.

The trial judge refused this instruction stating that it may have been relevant had Yancy been charged with possession of stolen property or receiving stolen property. We agree and find no merit to this issue.

V. WEIGHT AND SUFFICIENCY OF EVIDENCE

Yancy uses the terms overwhelming weight of evidence interchangeably with the term legal sufficiency of the evidence. Because they are two separate concepts, we will address both points.

This Court follows the well-established standard for reviewing the legal sufficiency of the evidence. Our authority to disrupt the jury's verdict is quite limited. *Carr v. State*, 655 So. 2d 824, 837 (Miss. 1995) (citations omitted). We must consider all the evidence in the light most consistent with the verdict. *Id.* (citations omitted). We give the prosecution the benefit of all favorable inferences from the evidence. *Id.* If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found that he was guilty beyond a reasonable doubt, reversal and discharge are required. *Id.* On the other hand, if there is substantial evidence of such quality and weight that, having in mind the burden of proof, reasonable and fair-minded jurors might have reached different conclusions, the jurors verdict is beyond our authority to disturb. *Id.*

Considering the evidence in the light most consistent with the verdict, we find that the evidence supports that verdict reached by reasonable and fair-minded jurors in the exercise of impartial judgment. Yancy was convicted of burglary of a building. A review of the facts support this verdict. Yancy was in possession of a sleeping bag, a microwave, and a pair of binoculars that were determined to have been stolen from the Greenleaf Hunting Club. Yancy was seen riding a bicycle in the direction of the hunting club. Officers later traced bicycle tracks to the gate of the club. Furthermore, footprints left in the mud around the window of the club were similar to the shoes worn by Yancy.

When we consider whether the jury's verdict is against the overwhelming weight of the evidence, we accept as true all evidence supporting the verdict. *Ellis v. State*, 667 So. 2d 599, 611 (Miss. 1995). Reversal is warranted only if there was an abuse of discretion in the circuit court's denial of a new trial. *Ellis*, 667 So. 2d at 611. Considering the above, we find no abuse of discretion. There is no merit to this issue.

THE JUDGMENT OF CONVICTION IN THE MONTGOMERY COUNTY CIRCUIT COURT OF BURGLARY OF A BUILDING WITH SENTENCE OF SEVEN (7) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. THE SENTENCE IMPOSED SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. COSTS OF THIS APPEAL ARE TAXED TO MONTGOMERY COUNTY.

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

HERRING, J., NOT PARTICIPATING.