

IN THE COURT OF APPEALS 10/03/95

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00090 COA

CHARLES ERVIN KIRK a/k/a MOTOWN SLIM a/k/a DUDY-WOP a/k/a DOOLY-WOP

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. ANDREW CLEVELAND BAKER

COURT FROM WHICH APPEALED: TALLAHATCHIE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID CLAY VANDERBURG

ATTORNEY FOR APPELLEE:

W. GLENN WATTS

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: CRIMINAL-SALE OF CONTROLLED SUBSTANCE-COCAINE

TRIAL COURT DISPOSITION: SENTENCED TO SERVE THIRTY YEARS IN THE
CUSTODY OF THE MDOC WITH LAST TEN YEARS SUSPENDED PENDING GOOD
BEHAVIOR, SAID SENTENCE TO RUN CONSECUTIVE TO SENTENCE IMPOSED IN
CAUSE NO. 4665

BEFORE FRAISER, C.J., BARBER AND SOUTHWICK, JJ.

FRAISER, C.J., FOR THE COURT:

Charles Ervin Kirk (Kirk), a/k/a "Motown Slim", "Dooly-Wop" and "Dud-Wop", was tried and convicted by a jury in the Tallahatchie County Circuit Court of the crime of sale of a controlled substance in violation of Mississippi Code section 41-29-139 (a)(1) (Rev.1993). Specifically, the indictment charged Kirk with knowingly and intentionally selling a controlled substance, cocaine, to a confidential informant, Lane Gentry, for \$100.00. Kirk was sentenced to 30 years in the custody of the Mississippi Department of Corrections, with 10 years suspended pending good behavior, to run consecutively with another sentence. He was also ordered to pay all court costs. Kirk appeals presenting the following issues:

I. The court erred in denying Kirk's Motions for Directed Verdict, JNOV, request for peremptory instruction and alternatively his motion for a new trial.

II. The court erred in allowing testimony of state's witness Officer Doyle Morrow because the state did not lay the proper predicate for the testimony.

III. The court erred in denying Kirk's Motion for Mistrial after the state improperly cross-examined Kirk.

The asserted errors are without merit, and we affirm the judgment of the Tallahatchie County Circuit Court.

FACTS

On May 5, 1994, Charleston Police Chief Jerry Wayne Williams (Williams) and Officer Doyle Morrow (Morrow) outfitted confidential informant Lane Gentry (Gentry) with a body transmitter, antenna and microphone, all of which were taped to Gentry's body and concealed under his shirt. Williams and Morrow searched Gentry's person and automobile and found him clean, gave him five twenty-dollar bills which had been photocopied for serial number identification, and sent Gentry to Kirk's trailer home to purchase cocaine. Williams and Morrow had a functioning receiver and tape recorder in the back of their vehicle. The two officers parked in a nearby cemetery and simultaneously listened to and recorded the conversation that took place between Kirk and Gentry. Gentry testified that the following occurred on May 5, 1994, shortly after 9:30 p.m.

I parked in front of the trailer. And I got out to knock on the door, and I heard the back door open. And the guy came out, and I told him what I needed [a hundred dollars worth of rock cocaine]. Well, I first asked him, I told him I needed to see Dooly-Wop. He said Dooly-Wop don't live here. He said my name is Motown Slim. So I told him what I

needed. He said he didn't have it. He said he could get it.

* * *

I left and went back to Jerry Wayne to see Jerry Wayne and Doyle.

* * *

They told me to go back and make the buy.

Q. And what happened this second time you were at the trailer with the defendant?

A. He met me out front and sold it to me.

Q. And what did he sell to you?

A. Five rocks of cocaine.

Q. Did you give him any money?

A. A hundred dollars.

Morrow arrested Kirk on May 9, 1994. At the time of the arrest, Kirk had \$392 in his pockets. The twenty dollar bills that Gentry used to buy the cocaine from Kirk were among the \$392.

Kirk claimed that on May 5, 1994 he was not even home at his trailer until after midnight. Martha Wren, Kirk's sometime girlfriend and mother of his children, testified that Kirk had spent the entire afternoon at her house working on her car. Wren testified that Kirk left her house at midnight the night of May 5, 1994.

Kirk claimed that he had been harassed by Officer Morrow in the past, and that the drug charge was a set up by Officer Morrow. The following testimony was elicited from Kirk at trial:

Q. Prior to May 5, 1994, had you had any conversations with Jerry Wayne Williams?

* * *

A. I went to him three times.

* * *

A. I went to him because Officer Doyle Morrow was harassing me, and I asked him to have a talk with Officer Doyle Morrow. And he told me he would. Later on I was still being harassed by Officer Morrow, and I went out there to Bumpers and called him out from eating one night and asked him again to have a talk with him. And he said he would, but I don't guess he never did.

So the third time I met him over here in his own office. And I began to talk to him about Officer Morrow, and he changed the conversation.

Chief Jerry Wayne Williams testified that, while Kirk had come to him to complain about people threatening to burn down his home, Kirk had never mentioned or alluded to Officer Morrow. The trial court jury convicted Kirk of sale of a controlled substance.

I.

SUFFICIENCY AND WEIGHT OF THE EVIDENCE

Kirk requested a directed verdict at the close of the state's evidence, a peremptory instruction upon completion of the evidence, and a judgment notwithstanding the verdict (JNOV) or in the alternative, a new trial, after the jury returned a verdict of guilty. Each challenge is considered by the trial court when made, and this Court reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the circuit court overruled Kirk's motions for JNOV and a new trial. *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987). Appellate consideration of these challenges is discussed in *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993) as follows:

In appeals from an overruled motion for JNOV the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. *Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; *Harveston v. State*, 493 So. 2d 365, 370 (Miss. 1986); *May v. State*, 460 So. 2d 778, 780-81 (Miss. 1984); *Callahan v. State*, 419 So. 2d 165, 174 (Miss. 1982). The credible evidence consistent with McClain's guilt must be accepted as true. *Spikes v. State*, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz* at 808, *Hammond v. State*, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. *Neal v. State*, 451 So. 2d 743, 758 (Miss. 1984); *Gathright v. State*, 380 So. 2d 1276, 1278 (Miss. 1980). We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; *Fisher v. State*, 481 So. 2d 203, 212 (Miss. 1985).

McClain, 625 So. 2d at 778.

Moreover, the challenge to the weight of the evidence via the motion for a new trial implicates the trial court's sound discretion. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

Id. at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)).

Kirk first contends the evidence is insufficient as a matter of law to prove that he sold the cocaine to Gentry. He contends the law enforcement officials conspired to frame him, and in so doing, lied and committed perjury on the stand. It is obvious to this Court that the state proved all the elements of the crime of sale of a controlled substance. Through the testimony of the eyewitness and confidential informant, Gentry, Police Chief Williams, and Officer Morrow, the state proved that Kirk intentionally sold crack cocaine for \$100. Additionally, Kirk had on his person when he was arrested all five of the marked twenty dollar bills that Gentry used to purchase the cocaine. The evidence considered by the jury was sufficient to sustain its verdict.

Kirk makes a final weak, conclusory argument that the jury verdict was against the overwhelming weight of the evidence. He fails to set forth the factual basis of his assertions, and we are left to search the record for support of his position. After careful review of the record, we are unable to say that the jury verdict is not sufficiently undergirded with credible evidence of his guilt. We hold that the trial judge did not abuse his discretion in denying Kirk's motion for a new trial.

These issues are without merit.

II.

HEARSAY TESTIMONY OF OFFICER DOYLE MORROW

At trial, the state examined Officer Morrow about the conversation he heard between Gentry and Kirk. Morrow was able to hear the conversation as it was being recorded because Gentry was wired for sound:

Q. And on May 5, 1994, were you and Chief Williams able to overhear Lane Gentry as he was approaching and at the home of Charles Kirk?

A. Yes, sir, we could hear him.

Q. And did you have the tape recorder working?

A. Yes, sir, we did.

Q. The first time that Lane Gentry went to the defendant's home what did you hear?

* * *

A. Lane Gentry, on the tape as far as what we could hear, went to the back door.

MR. VANDERBURG: Judge, we're going to object to the hearsay at this time. Objection to hearsay.

MR. KELLY: Your Honor, the State claims this is part of an admission against penal interest that is an exception to the hearsay rule because it involves then defendant in criminal activity.

THE COURT: I'll let it come in. I overrule the objection.

On appeal, Kirk asserts that it was error to admit Morrow's testimony as to what he heard on the tape because it was hearsay. Additionally, and for the first time, Kirk also objects to the admission of Morrow's testimony on the ground that the state did not lay the proper predicate. The Mississippi Supreme Court has held that issues not contemporaneously objected to at trial are procedurally barred from being raised on appeal. *Foster v. State*, 639 So. 2d 1263, 1289-90 (Miss. 1994), *cert. denied*, 115 S. Ct. 1365 (1995). If a question is not raised in the trial court, then it will not be reviewed on appeal. *Patterson v. State*, 594 So. 2d 606, 609 (Miss. 1992). Therefore, this Court is under no obligation to address the issue of the proper predicate for Morrow's testimony.

As to Kirk's contention that the testimony was inadmissible hearsay, we disagree. In *McDavid v. State*, 594 So. 2d 12, 15 (Miss. 1992), the Mississippi Supreme Court held that two police officers' "testimony of what they heard over the short wave radio was not hearsay. They . . . were giving a first-hand account of what was said by the parties involved in the sale of cocaine. This conversation was an ingredient of the crime." *Id.* *McDavid* goes on to discuss the importance of laying the proper predicate for such testimony. *Id.* Although it is not necessary for this Court to address that issue because Kirk failed to raise it at trial, we nonetheless note the importance of distinguishing the *McDavid* case from this case.

In *McDavid*, an undercover police officer, Harris, together with a confidential informant that had been wired for sound, successfully bought cocaine from defendant, McDavid. *Id.* at 13. Two other police officers, Carter and Clowers, listened to, but did not record the conversation that ensued between Harris, the confidential informant, and McDavid. *Id.*

On appeal, the testimony of Harris, Carter and Clowers regarding the conversation between Harris and McDavid was deemed non-hearsay as an element of the crime. *Id.* at 15. However, the testimony of Carter and Clowers was ruled inadmissible by the supreme court because the state failed to lay the proper predicate. *Id.* Kirk mistakenly relies on this point.

What distinguishes *McDavid* from this case is that the officers in *McDavid* did not know the defendant; they had never heard his voice before; and therefore they had no basis upon which to form their opinion that it was actually McDavid they heard over their short wave radio. In this case, however, Officers Morrow and Williams knew Kirk, had talked with him in person, and were very familiar with his voice. The state laid the proper predicate in Kirk's trial by having the officers testify as to how they knew him, and when, where, and under what circumstances they heard his voice prior and subsequent to the drug deal. Kirk's second issue has no merit.

III.

DENIAL OF MOTION FOR MISTRIAL

Lastly, Kirk contends the trial court committed reversible error in failing to grant a mistrial after the state elicited testimony from the defendant about his driving without a license and the prosecutor made an improper statement mocking defense counsel. The record reveals the following:

(IN CHAMBERS)-MR. VANDERBURG: Your Honor, may I get on the record? Your Honor, during the cross-examination of the defendant, I objected to Mr. Kelly questioning the defendant about him driving without a driver's license and that he was not even supposed to be driving. It's my understanding the Court did sustain my objection.

And at this time I would like to make a motion for a mistrial. I think it's improper for Mr. Kelly to bring this up during the cross-examination. . . .

Now, on cross-examination they're trying to bring out other crimes or offenses he may or may not have committed, and we think it's improper.

I'd also like to point out to the Court. . . that Mr. Kelly when I approached the bench to move this, Mr. Kelly stated to me that this was ridiculous in front of the jury and said let's get on with it, that this is ridiculous. I think that's additional grounds to move for a mistrial. . . .

The court sustained Kirk's objection to the questioning about his driver's license and instructed the jury to disregard the testimony. As to the comments made by the prosecutor, the court ruled that they were made out of the hearing range of the jury and were not grounds for a mistrial. Kirk relies on *Jenkins v. State*, 607 So. 2d 1171 (Miss. 1992), which addresses prosecutorial misconduct. In *Jenkins*, the court reversed only after finding an accumulation of prosecutorial errors including discovery violations and disrespectful conduct towards the judge. *Id.* at 1184.

The decision to declare a mistrial is within the sound discretion of the trial judge. *See Arizona v. Washington*, 434 U.S. 497, 512, 98 S. Ct. 824, 834, 54 L. Ed.2d 717 (1978);

Grandberry v. Bonner, 653 F.2d 1010 (5th Cir. 1981). To find error from a trial judge's failure to declare a mistrial, there must have been an abuse of discretion. *Jones v. State*, 398 So. 2d 1312, 1318 (Miss. 1981); *Schwarzauer v. State*, 339 So. 2d 980, 982 (Miss. 1976). Trial judges in this state are further guided by Uniform Rules of Circuit Court Practice 5.15, Mistrial, concerning when a mistrial is required:

The court shall declare a mistrial upon the defendant's motion if there occurs during trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

Brent v. State, 632 So. 2d 936, 941-42 (Miss. 1994). The trial judge did not abuse his discretion in refusing to grant a mistrial. Nothing so grievous occurred during Kirk's trial as to warrant such action. This last issue is without merit.

Finding no merit in any of the asserted errors, we affirm.

THE JUDGMENT OF THE TALLAHATCHIE CIRCUIT COURT OF CONVICTION OF SALE OF A CONTROLLED SUBSTANCE AND SENTENCE OF THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH TEN YEARS SUSPENDED PENDING GOOD BEHAVIOR, TO RUN CONSECUTIVELY WITH SENTENCE IN CAUSE NO. 4665 AND ORDER TO PAY ALL COURT COSTS IS AFFIRMED. COSTS ARE ASSESSED AGAINST TALLAHATCHIE COUNTY.

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