

**IN THE COURT OF APPEALS 12/29/95**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-KA-00569 COA**

**MANUEL TORRES**

**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. LARRY EUGENE ROBERTS

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROGERS J. DRUHET, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: LAURA HOGAN TEDDER

DISTRICT ATTORNEY: BILBO MITCHELL

NATURE OF THE CASE: CRIMINAL: SALE OF COCAINE

TRIAL COURT DISPOSITION: SENTENCED TO SERVE 30 YRS AND FINED \$30,000.00

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

SOUTHWICK, J., FOR THE COURT:

Manuel Torres was convicted of selling cocaine to a confidential informant and sentenced to serve thirty years in the state penitentiary. He appeals his conviction contending that the testimony of the confidential informant should have been stricken because she refused to answer certain questions by virtue of her constitutional right against self-incrimination; that improper character evidence was offered by the prosecution; and that an erroneous instruction was given. We conclude that none of these issues warrant reversal of Torres' conviction and affirm.

#### FACTS

On March 4, 1992, a confidential informant was sent to purchase cocaine from Torres. The informant was equipped with an audio transmitter to record the transaction and was provided with forty dollars to make the purchase. The informant and her vehicle were searched to ensure that she did not already possess cocaine. The informant located Torres and asked him for a "forty," i.e., forty dollars worth of cocaine. In the presence of the informant, Torres called another individual over and had that individual accept the informant's money. Torres then handed the cocaine to the individual, who provided it to the informant. The individual gave Torres the money and the transaction was concluded. In short, Torres employed a "middleman" in an attempt to remove himself from the drug sale.

#### DISCUSSION

##### *1. Informant's Fifth Amendment Rights vs. Torres' Right to Cross-Examination*

During Torres' cross-examination of the confidential informant, the informant was asked how many drug transactions she had participated in during the year preceding the sale for which Torres was arrested. The question apparently was seeking information on the number of times she had assisted the police. The informant refused to answer the question, citing her fifth amendment privilege against self-incrimination. Torres moved to strike the informant's testimony because of her claim to the privilege, but the motion was denied. Torres argues that he was precluded from examining the witness' reliability as an informant. We conclude that the trial court's refusal to strike the informant's testimony in light of her assertion of the fifth amendment privilege was not an abuse of discretion.

The Mississippi Supreme Court has not considered the precise circumstances of this case. However, it has provided ample instruction in cases involving cross-examination of witnesses who refuse to answer questions concerning previous statements made by them that were used to prosecute a defendant. "The general rule is that the prosecution may not use against the defendant the statement of a non-testifying [witness]." *Hansen v. State*, 592 So. 2d 114, 133 (Miss. 1991) (citing confrontation considerations). However, "[t]he fact that a witness for the prosecution 'claims the Fifth' does not *per se* mean the accused's Confrontation rights have been abridged, for the same reason the mere fact of a witness' memory loss does not *per se* offend the Clause." *Id.* at 134.

The general rule is unavailing to Torres for two reasons. First, previous statements of the informant were not being used against Torres and, consequently, confrontation considerations are not directly implicated. *Williamson v. State*, 512 So. 2d 868, 873 (Miss. 1987) (citation omitted) (holding that the confrontation clauses "'are in a sense hearsay rules elevated to constitutional status' designed to

prevent the admission of non-confronted out-of-court statements . . ."). Torres wanted to inquire whether the informant had participated in other cases--not whether she had given prior statements implicating Torres. Second, the witness was not "non-testifying." The confidential informant was strenuously cross-examined by the defense concerning the damning evidence she gave against Torres. *Craft v. State*, 656 So. 2d 1156, 1160-62 (Miss. 1995). She was questioned concerning whether she had drug problems that required her to cooperate with the police to avoid prosecution. She was asked about prior drug sales she might have made. She testified about the payments she would receive from the police for serving as an informant. Accordingly, we conclude that the trial judge did not abuse his discretion in refusing to strike the informant's testimony based upon her invocation of the right against self-incrimination. *See Tillis v. State*, 661 So. 2d 1139, 1142-43 (Miss. 1995).

## 2. Character Evidence

While testifying for the prosecution, the confidential informant revealed that she knew that Torres was a drug dealer because she had on prior occasions taken many individuals to Torres' house to purchase drugs. Torres contends that this testimony constitutes improper character evidence, i.e., that it presents evidence of other crimes. We agree that the testimony presented evidence of other crimes to the jury that is proscribed. *Duplantis v. State*, 644 So. 2d 1235, 1246 (Miss. 1994). However, our review of the record indicates that the trial judge properly took pains to ensure that Torres was not prejudiced by disclosure of this evidence. He sustained Torres' objection to the evidence and, while denying a mistrial, fully admonished the jury to disregard the testimony concerning other crimes. The judge's statement for the record is an excellent example of an admonition ensuring that the defendant has not been prejudiced by the incompetent evidence. The judge stated:

Ladies and Gentlemen, [concerning] the last comment of the witness, I am instructing you to disregard [her testimony] about possible other incidences where she said she may have taken other people to the defendant's house to purchase drugs. Will you disregard that? If you will, would you indicate to me that you will by raising your hands? Let the record show all jurors indicated affirmatively.

Faced with a sustained objection to the other crimes evidence and this admonition, the refusal to grant a mistrial was not erroneous. *See Wetz v. State*, 503 So. 2d 803, 810 (Miss. 1987) (citations omitted) (holding that absent unusual circumstances reviewing court will not find reversible error in other crimes evidence when objection to evidence is sustained and jury is admonished).

## 3. Jury Instruction

Torres objected to the following jury instruction being given following his trial:

The Court instructs the Jury that an accessory before the fact is one who arranges for, or counsels or commands another to commit a felony but is not himself present when the crime is committed. An accessory before the fact is guilty to the same extent as a principal.

An accomplice is someone who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime. An accomplice is guilty to the same extent as the principal.

Persons who join together to commit one or more crimes and actually commit those crimes or more crimes are principals to the crime or crimes.

Torres contends that the instruction is erroneous because it fails to inform the jury that it can only find guilt if the crime is committed and because it fails to inform the jury that it must conclude that the defendant counseled commission of the crime, commanded commission of the crime, or actually joined in the commission of the crime. Even a cursory reading of the instruction reveals that the failures attributed to it by Torres do not exist. The instruction amply describes the appropriate law and, contrary to Torres' contentions, is not confusing.

**THE JUDGMENT OF CONVICTION OF THE CIRCUIT COURT OF LAUDERDALE COUNTY OF DELIVERY OF COCAINE AND SENTENCE OF THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY A FINE OF THIRTY THOUSAND DOLLARS (\$30,000.00) IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LAUDERDALE COUNTY.**

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