IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00401 COA

JIMMY TAYLOR a/k/a "FOX" a/k/a JIMMY LEE TAYLOR

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 JONATHAN SMITH, JR.

COURT FROM WHICH APPEALED: BOLIVAR COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DANIEL J. GRIFFITH

ATTORNEY FOR APPELLEE:

ATTORNEY GENERAL MIKE MOORE, BY: PAT FLYNN

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTED OF ROBBERY AND SENTENCED TO SERVE 15 YEARS IN MDOC PLUS PAY RESTITUTION

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

THOMAS, P.J. FOR THE COURT:

Jimmy Taylor was convicted of robbery in the Bolivar County Circuit Court. Feeling aggrieved he appeals to this Court assigning two alleged errors: first, that the verdict was against the overwhelming weight of the evidence, and secondly, that the trial judge abused his discretion in failing to grant an identification instruction. Finding no error, we affirm.

FACTS

Oliver Richardson was walking to his car early one morning when a man ran toward him from the bushes. As the man got close, he sprayed mace in Richardson's face and knocked him down. While Richardson was down, the man cut the pocket out of his pants and removed his wallet, then ran away.

Richardson made a report to the police giving a description of his attacker. Richardson was told by the police to "sit on the street and eventually the person's going to show up again." For the next two weeks, Richardson would ride around town looking for his assailant. Sometimes while Richardson was riding around town, his friend, Deputy Ed Anderson, would accompany him. After hearing Richardson's description of his attacker, Anderson replied that it sounded like a man known as "Fox."

One night as Richardson and Anderson were riding around town, Richardson saw his assailant walking down the street. Both Richardson and Anderson testified that immediately upon seeing Taylor, Richardson stated, "That's him." After Richardson identified Taylor as his attacker, Anderson stated "Yes, that's Mr. Fox." At trial, Richardson positively identified Taylor as his attacker. Furthermore, the state produced a witness who testified that Taylor had admitted to committing the crime.

DISCUSSION

Taylor argues that the verdict was against the weight of the evidence. Our scope of review on appeal as to the weight of the evidence is limited, has been stated many times before, and need not be restated here. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *McFee v. State*, 511 So. 2d 130, 133-34 (Miss. 1987); *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987). Suffice to say that there was more than sufficient evidence before the jury to convict Taylor on all the elements of robbery.

Taylor argues that the trial judge abused his discretion in excluding an identification instruction. The instruction in question is almost verbatim to an instruction tendered in *Davis v. State*, 568 So. 2d 277, 280 (Miss. 1990). In *Davis* our supreme court found that such an instruction *could* be granted. *Id.* However, our supreme court did not mandate that such instruction has to be given if requested *Id.* In *Hansen v. State*, 592 So. 2d 114, 141 n. 14 (Miss. 1991), our supreme court again addressed the instruction given in *Davis*, and again did not mandate that such instructions be given, but rather, stated that the granting of such instruction was within the circuit court's discretionary authority. In the case *sub judice* the trial judge found that the instruction in question would confuse the jury by

leaving out other testimony, such as Taylor's admission of the crime. The jury was properly instructed as to its duty to carefully scrutinize the testimony of all the witnesses, and was also properly instructed on the prosecution's burden to prove Taylor guilty beyond a reasonable doubt. If the instructions read together accurately instruct the jury as to the law of this state, then the refusal to grant one instruction would not be error. *See Roberts v. State*, 458 So. 2d 719, 721 (Miss. 1984); *Hickombottom v. State*, 409 So. 2d 1337 (Miss. 1982); *Anderson v. State*, 397 So. 2d 81 (Miss. 1981); *Norman v. State*, 385 So. 2d 1298 (Miss. 1980). We do not find that the trial judge abused his discretion in refusing the proffered instruction.

THE BOLIVAR COUNTY CIRCUIT COURT CONVICTION OF ROBBERY AND SENTENCE TO 15 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVELY TO ANY SENTENCE ALREADY IMPOSED, PLUS PAYMENT OF RESTITUTION ARE AFFIRMED. COSTS ARE TAXED TO BOLIVAR COUNTY.

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