

IN THE COURT OF APPEALS 4/22/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01146 COA

LARRY COLLIER A/K/A LARRY ISHMALL COLLIER

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. JOHN B. TONEY

COURT FROM WHICH APPEALED: CIRCUIT COURT OF RANKIN COUNTY

ATTORNEY FOR APPELLANT:

WILLIAM O. TOWNSEND

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: JOHN T. KITCHENS

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: APPELLANT CONVICTED OF THE SALE OF A
CONTROLLED SUBSTANCE AND SENTENCED TO SERVE 15 YEARS IN THE CUSTODY
OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

MANDATE ISSUED: 7/8/97

BEFORE THOMAS, P.J., COLEMAN, AND KING, JJ.

KING, J., FOR THE COURT:

Larry Collier was convicted of the sale of a controlled substance in the Circuit Court of Rankin County and sentenced to serve 15 years in the custody of the Mississippi Department of Corrections. Aggrieved, Collier appeals alleging the following points of error: (1) the trial court erred in allowing the State to reopen its case; (2) the trial court erred in not granting the motion for a new trial; and (3) the jury's verdict was contrary to the overwhelming weight of the evidence. Finding no merit to Collier's arguments, we affirm the circuit court's judgment.

FACTS

On August 6, 1992, pursuant to an undercover narcotics investigation, confidential informant, Earnest L. Rankin, Jr., purchased four rocks of crack cocaine for \$40.00 from Defendant Larry Collier. Prior to the sale Detective Johnny Dewitt, of the Pearl Police Department, had equipped Rankin with a body transmitter in order to monitor and record the transaction between Rankin and Collier. The taped recording of the transaction revealed that Rankin asked Collier to sell him a \$40.00 "double-up." Collier agreed to make the sale, which subsequently led to his arrest.

During trial, Detective Dewitt testified that he equipped Rankin with a body transmitter and gave him \$40.00 to make a drug buy. Dewitt also testified that he monitored the conversation between Rankin and Collier and heard Collier agree to sell Rankin the crack cocaine. Rankin testified that he purchased the cocaine from Collier in exchange for the \$40.00 previously given to him by Dewitt. Dewitt testified that he met Rankin after the transaction at a predetermined location and received four rocks of crack cocaine from Rankin. According to Dewitt, he placed the cocaine in an evidence bag and marked it for identification. During Dewitt's testimony, the State asked the court to mark the substance for identification, and the court did so mark the packet. Kevin Cole, a forensic scientist specializing in drug analysis, testified that the substance did in fact contain cocaine. The State rested its case without having introduced into evidence the substance identified as crack cocaine.

The defense moved the court for a directed verdict asserting that the State had failed to introduce the substance alleged as cocaine into evidence. The State moved the court to reopen its case in chief. After a hearing on the motions, the court denied the Defendant's motion and granted the State's motion to reopen its case. The defense then moved the court for a mistrial alleging that Detective Dewitt had discussed his testimony with Rankin and the prosecutors during lunch recess. The court denied this motion as well. The defense did not go forward with its case. The jury unanimously convicted Collier of the sale of cocaine.

I.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO REOPEN ITS CASE.

Collier alleges that the trial court committed reversible error when it allowed the State to reopen its case after having rested. Specifically, Collier alleges that the trial court erred by allowing the State to

reopen its case to admit the substance identified as cocaine into evidence. The State contends that because it had laid the predicate for the introduction of the cocaine it was neither a surprise nor prejudicial for the court to allow the case to be reopened and the cocaine placed into evidence. Therefore, the State contends that the trial judge did not commit an abuse of discretion that would allow this court to find reversible error. We agree.

In granting the State's motion to reopen its case, the trial judge stated:

I'm going to allow them to reopen their case and do this for this reason: You know, obviously they put all the other packages together to establish a prima facie case, but there was a matter of mere human error and inadvertence.

They marked the document for identification, had not marked it, though, and had not offered it as an exhibit to the testimony by the witness who was here and who could establish both chain of custody and the quality and character of the contraband.

Normally, you know, we'd be in a tougher situation about allowing the State to reopen once they had finally rested; but when it's not a surprise and when it results just from human error and inadvertence and when there is no substantial prejudice to the Defendant, I think that it ought to be done.

Reopening a case is within the discretion of the trial judge. *Nash v. State*, 278 So. 2d 779, 780 (Miss. 1973). In the present case, the State had already established through testimony that a controlled drug purchase had occurred and that the purchase was made from the Defendant. The State also established that the substance purchased and marked for identification was cocaine. However, the State did not ask the court to admit the cocaine into evidence. The State rested, the Defendant moved for a directed verdict, and the State moved to reopen its case. The trial judge denied the motion for directed verdict and granted the State's motion.

It was within the trial judge's discretion to allow the State to reopen its case and offer the cocaine into evidence. Following the sequence of events, we find there was no other testimony or evidence introduced by the State that could have created either surprise or prejudice to the Defendant. The State simply offered the cocaine into evidence based on the preceding testimony. Therefore, we find no abuse of discretion by the trial judge in allowing the State to reopen its case.

II.

THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION FOR A MISTRIAL.

During cross-examination of Detective Dewitt, Collier moved the court for a mistrial alleging that Dewitt created an appearance of impropriety by having lunch with Rankin and by talking with prosecutors during lunch recess of the trial. Collier contends that the State violated M.R.E. 615 and that the trial judge's denial of the motion for mistrial is reversible error.

M.R.E 615 provides in pertinent part that, at the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. M.R.E 615. If this rule is violated the court may prohibit the witness from testifying, strike the witness' testimony, cite him for

contempt, or allow a "full-bore" cross-examination. *Gerrard v. State*, 619 So. 2d 212, 217 (Miss. 1993). It is within the trial judge's discretion to determine the appropriate remedy. *Baine v. State*, 606 So. 2d 1076, 1083 (Miss. 1992).

In this case, the court recessed for lunch after the direct examination of Detective Dewitt. The defense contends that during lunch, Detective Dewitt had lunch with another witness for the State, Earnest Rankin, the confidential informant. The defense also contends that Detective Dewitt met with prosecutors and discussed the case during the lunch recess. The defense questioned Dewitt about his communications with Rankin and prosecutors in an effort to expose the violation of the rule. Dewitt testified that he did not discuss the case or his testimony with Rankin, and nor did he discuss his testimony with prosecutors. However, Dewitt testified that the prosecutors asked him about leaving the cocaine evidence in his car during the morning half of the trial. The defense moved the court for a mistrial but did not allege prejudice, collusion, or false testimony. The defense asserts that Dewitt's communications with these parties created an appearance of impropriety, which should have resulted in a mistrial.

On the other hand, the State contends that Dewitt's action does not rise to the level necessary to show a violation of the rule. The State argues that the purpose of the rule is to discourage and expose falsification, inaccuracy and collusion in the witness' testimony. *Baine v. State* 606 So. 2d 1076, 1083 (Miss. 1992); *Moffett v. State*, 540 So. 2d 1313, 1317 (Miss. 1989).

"When violation of the sequestration rule is assigned as error on appeal, the failure of the judge to order a mistrial or to exclude testimony will not justify reversal on appeal . . . absent a showing of prejudice sufficient to constitute an abuse of discretion." *Douglas v. State*, 525 So. 2d 1312, 1318 (Miss. 1988). In this case, Collier asserts that communication took place between witnesses and counsel; however, he failed to bring forth any evidence of prejudice, collusion, or false testimony as a result of this communication. An allegation of an appearance of impropriety without more does not meet the threshold necessary to compel this Court to reverse the trial court's denial a mistrial.

III.

THE VERDICT OF THE JURY WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Finally, Collier alleges that the jury's verdict was contrary to the overwhelming weight of the evidence. Specifically, Collier challenges the trial court's denial of a motion for a new trial. "In determining whether or not a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when it is convinced that the circuit court has abused its discretion in failing to grant a new trial." *Thornhill v. State*, 561 So. 2d 1025, 1030 (Miss. 1989).

In this case, the State presented testimony from Detective Dewitt and confidential informant Rankin that Collier sold Rankin cocaine for \$40.00. To substantiate the testimony, the State offered the taped recording of the transaction between Rankin and Collier. The State also introduced expert testimony that the substance was in fact cocaine. Accepting as true the evidence which supports the verdict, we do not find that the circuit court abused its discretion in failing to grant a new trial. Therefore, finding no merit in Collier's arguments, we affirm the circuit court's judgment.

THE JUDGMENT OF THE CIRCUIT COURT OF RANKIN COUNTY OF CONVICTION OF THE SALE OF A CONTROLLED SUBSTANCE AND SENTENCE OF 15 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO RANKIN COUNTY.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

BRIDGES, C.J., AND HINKEBEIN, J., NOT PARTICIPATING.