

IN THE COURT OF APPEALS 3/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01103 COA

SHIRLEY EDWARDS A/K/A SHIRLEY MAE TOOLE EDWARDS

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:

JIMMIE D. MARSHALL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: BILBO MITCHELL

NATURE OF THE CASE: POSSESSION OF COCAINE WITH INTENT TO DELIVER

**TRIAL COURT DISPOSITION: JUDGMENT OF CONVICTION OF POSSESSION OF
COCAINE WITH INTENT TO DELIVER AND SENTENCE OF THIRTY YEARS IN THE
CUSTODY OF THE MDOC AND \$10,000 FINE**

BEFORE THOMAS, P.J., PAYNE, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Edwards was convicted of possession of cocaine with intent to distribute. She appeals, assigning three issues as error:

I. WHETHER HER SENTENCE WAS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE III, SECTION 23 OF THE MISSISSIPPI CONSTITUTION;

II. WHETHER THE TRIAL COURT ERRED IN DENYING HER MOTION FOR NEW TRIAL; and

III. WHETHER THE TRIAL COURT ERRED IN DENYING HER MOTION FOR DIRECTED VERDICT.

Finding no error, we affirm.

FACTS

On July 30, 1993, Meridian Police Department officers went to Edwards' house to serve a homicide warrant on her son. When the officers arrived at the residence, everyone inside the house walked out on the front porch, with the exception of Charles House, who ran through the house and out of the back door. House was apprehended as he ran out of the house, and the officers recovered some rocks of cocaine from the ground around where he was apprehended.

While executing the warrant, Officer Kurt Merchant observed cocaine, a small quantity of marijuana, and tools of the drug trade such as plastic baggies, a pager, scales, police scanners, two shotguns, and a pistol inside the house owned by Edwards.

At trial, six law enforcement officers testified as to the presence of the cocaine in Edwards home. Another witness positively identified the confiscated substance as cocaine. The cocaine had a street value of approximately \$4,800.00.

Edwards' daughter, Barbara, testified for the defense that the cocaine belonged to Charles House and that her mother did not know that the cocaine was in her house because she had just woken up that morning when the police arrived with the warrant. However, Barbara admitted on cross examination that her mother had been awake for at least forty-five minutes before the police arrived. Barbara also admitted that her mother had bought at least one of the guns and that the family left the scanners on and tuned to the police frequency on a coffee table in the dining room. She testified that Charles House was in the dining room that morning, and she asserted that she saw House run through the house with the cocaine in his hand after he heard the police arrive.

Edwards testified at trial that she had been awake, gotten dressed and was prepared to leave the house when the police arrived. She asserted that she did not know anything about the cocaine, pager, pistol, or scales that the police found in her dining room and that she bought the two shotguns for personal protection.

Charles House testified at trial that he spent the night in Edwards' house, as he did every night. He testified that he woke up that morning, fixed breakfast and watched television and that he was looking in a closet for something to clean the tub with when he heard the police arrive at the house. House stated that the police caught him as he tried to run out the back door. House testified that he did not see any cocaine in the house that morning and that he did not know how the drugs got there.

ANALYSIS

I. SENTENCING

Edwards was sentenced to thirty years imprisonment and fined \$30,000.00. She asserts that the sentence was too severe and was disproportionate to the crime, especially in light of the fact that she was a first offender on a drug offense.

Edwards cites this Court to no authority, other than the Eighth Amendment to the United States Constitution and Article Three, Section 28 of the Mississippi Constitution. Although asserting that her sentence was disproportionate to the crime, Edwards fails to identify any comparable cases where the sentence was more lenient. Further, Edwards did not contemporaneously object to the sentence at the sentencing hearing, and she is therefore procedurally barred from raising the issue on appeal. *Hewlett v. State*, 607 So. 2d 1097, 1107 (Miss. 1992); *Smith v. State*, 569 So. 2d 1203, 1206 (Miss. 1990).

Notwithstanding the procedural bar, the sentence imposed by the trial court was within the statutory limits. Sentencing is generally a matter solely within the discretion of the trial court. *Green v. State*, 631 So. 2d 167, 176 (Miss. 1994). This Court will not review a sentence if it is within the statutory limits. *Edwards v. State*, 615 So. 2d 590, 598 (Miss. 1993). Where a sentence does not exceed the statutory limits, it does not constitute cruel and inhuman treatment. *Adams v. State*, 410 So. 2d 1332, 1334 (Miss. 1982). There is no merit to this issue.

II. MOTION FOR NEW TRIAL

Edwards asserts that the trial court erred in denying her motion for new trial based on newly discovered evidence. At the new trial hearing, House contradicted his trial testimony and asserted that the cocaine belonged to him and that Edwards had not known anything about it. Prior to trial, Edwards had a statement from House which indicated that the cocaine belonged to him, but Edwards chose not to use the statement at trial to impeach House.

Edwards mistakenly classifies this evidence as new evidence. New evidence is material evidence which has been discovered since the trial that could not have been discovered prior to trial through the exercise of due diligence. *Ormond v. State*, 599 So. 2d 951, 962 (Miss. 1992). Since Edwards was aware of this evidence prior to her trial, she cannot now assert that the evidence is new simply because she chose not to use it.

A motion for a new trial challenges the weight of the evidence rather than its sufficiency. *Butler v. State*, 544 So. 2d 816, 819 (Miss. 1989). 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. *Morgan*, 681 So. 2d at 93; *Jones v. State*, 635 So. 2d 884, 887 (Miss. 1994); *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). On review we accept as true all evidence favorable to the State, and the State is given the benefit of all reasonable inferences that may reasonably be drawn from the evidence. *Morgan*, 681 So. 2d at 93; *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992). This Court will reverse such a ruling only upon a finding that the trial court abused its discretion. *McClain*, 625 So. 2d at 781. Clearly, the jury's verdict was not against the overwhelming weight of the evidence, and the trial court properly denied Edwards' motion for new trial. This issue is without merit.

III. MOTION FOR JNOV

Edwards asserts that there was insufficient evidence to convict her of possession of cocaine with intent to distribute. A motion for JNOV challenges the sufficiency of the evidence supporting a guilty verdict. *McClain*, 625 So. 2d at 778; *Butler*, 544 So. 2d at 819; *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987). To test the sufficiency of the evidence of a crime, this Court must

[w]ith respect to each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may 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, 503 So. 2d at 808 (citations omitted).

Factual disputes are resolved by the jury, which is the sole judge of a witness and the weight to be given to conflicting testimony. *See Morgan*, 681 So. 2d at 93; *Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993). The jury had more than sufficient evidence to convict Edwards. The trial court properly denied the motion for directed verdict. There is no merit to this issue.

THE JUDGMENT OF THE CIRCUIT COURT OF LAUDERDALE COUNTY OF CONVICTION OF POSSESSION OF COCAINE WITH INTENT TO DELIVER AND SENTENCE TO THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND PAYMENT OF A \$10,000.00 FINE IS AFFIRMED. ALL COSTS ARE ASSESSED TO THE APPELLANT.

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

