

IN THE COURT OF APPEALS 03/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00972 COA

ROBERT BANKS A\K\A ROBERT L. BANKS A\K\A "FAT CAT"

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. HOWARD Q. DAVIS JR.

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROBERT E. BUCK

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: FRANK CARLTON

NATURE OF THE CASE: CRIMINAL: POSSESSION OF COCAINE AND MARIJUANA

**TRIAL COURT DISPOSITION: SIMPLE POSSESSION OF COCAINE: POSSESSION OF
MARIJUANA: SENTENCED TO 6 YRS IN THE MDOC AS A HABITUAL OFFENDER
WITHOUT THE POSSIBILITY OF PAROLE & PAY A FINE OF \$10,000.00 AS TO
POSSESSION OF COCAINE & \$250.00 FINE TO MARIJUANA**

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

PAYNE, J., FOR THE COURT:

Robert Banks was convicted of simple possession of cocaine and possession of marijuana. The trial court sentenced Banks as a habitual offender to serve a term of six (6) years in the custody of the Mississippi Department of Corrections and ordered Banks to pay a fine of ten thousand dollars (\$10,000.00) as to the possession of cocaine and a fine of two hundred and fifty dollars (\$250.00) as to the possession of marijuana. Feeling aggrieved, Banks appeals. We find that none of Banks's issues on appeal have merit and therefore affirm.

FACTS

On July 29, 1993, officers working with the Central Delta Task Force, pursuant to a search warrant, entered and searched what they believed to be the residence of Robert Banks. Upon entry into the residence, the officers observed four adult males, three in the living room area and one in the kitchen. Once inside, the officers discovered one rock of crack cocaine on a couch cushion beside which Banks was standing. Under the same cushion, the officers found a plastic bag containing twenty-four additional rocks of crack cocaine. The testimony indicated that, when the officers first entered the residence, Banks was standing back up from a bent-over position right next to the rock on the cushion. On the floor, at Banks's feet, the officers discovered one twenty dollar (\$20.00) bill and one five dollar (\$5.00) bill. Shortly after the officers entered, Banks voluntarily stated that "the only drugs in this house that I know of are some marijuana." The testimony indicates that Banks told the officers that the marijuana was in *his* bedroom. The officers subsequently found the marijuana in the bedroom.

Banks chose not to put on any defense in his behalf. The jury subsequently returned a verdict of guilty of simple possession of cocaine and possession of marijuana. Banks was sentenced as a habitual offender. He now appeals challenging the weight and sufficiency of the evidence and alleging that he was denied the right to a fair trial due to an improper and prejudicial closing argument by the State.

ANALYSIS

I. WAS THE VERDICT OF THE JURY CONTRARY TO THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE?

Banks contends that the evidence was both insufficient to warrant consideration by the jury, and that the verdict was against the overwhelming weight of the evidence. Banks argues that the State failed to establish that the appellant was in constructive possession of the crack cocaine found both on and under the couch cushion. Banks contends that his proximity to the cocaine was not sufficient to establish possession in light of the fact that three other individuals were on the premises at the time of the raid and in light of the fact that Banks was not the record owner of the house.

In *Roberson v. State*, 595 So. 2d 1310, 1319 (Miss. 1992), the Mississippi Supreme Court discussed constructive possession:

Constructive possession allows the prosecution to establish possession of contraband when evidence of actual possession is absent. Constructive possession is established by evidence showing that the contraband was under the dominion and control of the defendant. *Vickery v. State*, 535 So. 2d 1371, 1379 (Miss. 1988).

In *Arnett v. State*, the Mississippi Supreme Court stated:

What constitutes a sufficient external relationship between the defendant and the narcotic property to complete the concept of "possession" is a question which is not susceptible of a specific rule. However, there must be sufficient fact to warrant a finding that defendant was aware of the precedence and character of the particular substance and was intentionally and consciously in possession of it. It need not be actual physical possession. Constructive possession may be shown establishing that the drug involved was subject to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances.

Arnett v. State, 532 So. 2d 1003, 1011-12 (Miss. 1988) (quoting *Curry v. State*, 249 So. 2d 414, 416 (Miss. 1971)); *see also* *Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992). Recent Mississippi cases have held defendants to be in constructive possession of drugs even though drugs were not found on the defendant. *See* *Boyd v. State*, 634 So. 2d 113, 116 (Miss. 1994) (defendant ran when he saw police and threw something over side of bed; cocaine was found in that spot); *Miller v. State*, 634 So. 2d 127, 130 (Miss. 1994) (officer felt matchbox in patdown of defendant, but none was found on his person at the jail; yet a matchbox was found in the back seat of the patrol car where defendant had been sitting).

In *Boches v. State*, 506 So. 2d 254, 259 (Miss. 1987), the court upheld a defendant's drug conviction by finding constructive possession of contraband based on various incriminating factors. Among these factors were Boches's lack of knowledge as to the owner of the car in which marijuana was found, Boches's conduct when he encountered a roadblock, and contraband that was found in the trunk of the car. *Id.* There was no evidence that any contraband was found on Boches's person or within his sight or reach, but these and other incriminating factors were enough to show dominion and control over the contraband. *Id.* Likewise, in *Fultz v. State*, 573 So. 2d 689, 691 (Miss. 1990), the court reversed a defendant's drug conviction since the State failed to show additional incriminating circumstances justifying constructive possession. The court used the *Boches* rule that additional circumstances must be found for constructive possession when the defendant is not the owner of the premises. *Id.* at 690. The fact that the defendant had a small amount of marijuana on his person when arrested, standing alone, was insufficient to prove connection between the defendant and the contraband. *Id.* at 691. The defendant's admission that he smoked marijuana and that he had

made several unexplained stops on the trip were also both not enough to link him with the contraband. *Id.* The court stated that the existing evidence failed to connect the defendant to the trunk, its contents, or the drugs. *Id.*

The Mississippi Supreme Court recently reversed the drug possession conviction of a defendant who had been stopped for speeding with a suspended driver's license. *Ferrell v. State*, 649 So. 2d 831, 832-33 (Miss. 1995). After taking Ferrell to the patrol car, the officer returned to Ferrell's car to get the car keys and found a matchbox containing cocaine between the seats. *Id.* The *Ferrell* court stated that Ferrell, as the operator of the car, had dominion and control over the contraband discovered within the car. *Id.* at 835. Because he was not the owner, additional incriminating circumstances had to be shown to prove constructive possession of the contraband. *Id.* at 834. The court said that the location of the matchbox next to the driver's seat, and the defendant's possession of the car for only fifteen hours were both insufficient to show Ferrell had constructive possession of the contraband. *Id.* at 835. The State failed to prove additional actual incriminating circumstances to establish constructive possession. *Id.*

In the present case, in addition to Banks's proximity to the cocaine, the State also established constructive possession through proof of additional incriminating factors. When the police entered the residence, Banks was seen arising from a bent-over position right next to the couch on which the rock of crack was lying. Banks immediately made an unsolicited comment that the only drugs in the house that he knew of was marijuana which was located in *his* bedroom. A search of the bedroom not only revealed the presence of marijuana but also confirmed that the bedroom did belong to Banks as the police testified that the closets and drawers were filled with men's clothes which appeared to be of a size appropriate for Banks to wear. The police also recovered twenty-five dollars (\$25.00) in cash at Banks's feet which indicated that he was in the process of selling the rock of cocaine when the police entered. The testimony indicated that one rock of crack cocaine generally has a street value of \$25.00. In light of the above factors, we find that the proof was sufficient to establish that Banks had constructive possession of the crack cocaine and therefore find that Banks's sufficiency argument is without merit.

A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion when the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled Banks's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Banks's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. 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.

Id. (citations omitted).

The evidence consistent with the guilty verdict must be accepted as true. *Id.* Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Banks not guilty of possession of cocaine and marijuana. We find that the trial court properly denied Banks's motion for a directed verdict.

Banks also complains that the jury verdict was against the overwhelming weight of the evidence, and he requests a new trial. The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *Id.* at 781 (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, the jury heard the witnesses and the evidence as presented by the State. Banks chose to rest his case following the State's case in chief and therefore presented no evidence to the jury on his behalf. The testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its province. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Banks. The trial court did not abuse its discretion by refusing to grant Banks a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that to allow it to stand would be to promote an unconscionable injustice. The trial court properly denied Banks's motion for a new trial.

II. DID THE TRIAL COURT DENY BANKS'S RIGHT TO A FAIR TRIAL BY PERMITTING THE STATE TO MAKE IMPROPER COMMENTS DURING CLOSING ARGUMENT?

Banks argues that the trial court, after having suppressed the affidavit which was attached to the search warrant of Banks's residence, allowed the State, during its closing argument, to make references to the affidavit, the facts set forth in the affidavit, and to the justice court judge's reliance thereon in issuing the search warrant. Banks contends that the State's "dogged determination to get the prohibited evidence before the jury" was clearly prosecutorial misconduct and resulted in prejudice to his case.

The State argues that the prosecutor's references to the affidavit was nothing more than a reiteration of the testimony of State's witness, Officer David Sullivan, that he had given a justice court judge information on which to base a search warrant. The State contends that Banks's allegation that the

prosecutor was allowed to go into great detail regarding the underlying circumstances that were used to justify the issuance of the search warrant is ludicrous. The State argues that the prosecutor went into no detail whatsoever and was merely noting that a lawful search warrant was sought and received before police officers went bursting into Banks's house.

A review of the record indicates the following argument by the prosecutor:

The search warrant was testified to by David Sullivan. "Whereas, David Sullivan, known to me to be credible person have this day made complaint on oath before me as follows" -- it's all in legal jargon. David Sullivan went to Judge Bernadine Young. He told her under oath reasons why he thought they were going to find drugs at this residence, and he read it to you. "Wood framed house at 626 Cross Street" -- and he gave the big description of tan with green trim, north side of Cross Street having the older model maroon station -- vehicle there as if the vehicle was not being used." David Sullivan was aware of this residence. It's obvious he had been by there. He had seen it. He gives a very accurate pinpointed description of the residence and he read it to you yesterday. What he tells Judge Young we're going to find, he says, this place he just described belonged to Robert Banks, also known as Fat Cat, and person or other persons unknown. Girlfriend, maybe, or children. But the person that lived there and who he anticipated finding drugs on was Robert Banks, and sure enough, that said things are particularly described cocaine and any drug related items or monies. That's what he was looking for. He was looking [sic] drugs and money from Robert Banks at 626 Cross Street. He had enough information that Judge Young issued him a search warrant.

At this point, defense counsel interjects an objection and states that the prosecutor is getting into a prohibited area. The prosecutor responds: "Information -- Judge, this was all testified to yesterday." The trial judge overrules the objection and the prosecutor continues: "Judge signed this, and defense counsel is right. We weren't allowed to get into the information that was used, but --" Defense counsel then objects and moves for a mistrial. The trial court overruled the objection and the prosecutor completed this line of argument with "-- but what information was used led to a search warrant. Judge Young signed it after hearing this testimony from David Sullivan."

The Mississippi Supreme Court has indicated that a prosecuting attorney is entitled to great latitude in framing his closing argument. *Dunaway v. State*, 551 So. 2d 162, 163 (Miss. 1989). In *Taylor v. State*, the court held:

The right of argument contemplates liberal freedom of speech and range of discussion confined only to bounds of logic and reason; and if counsel's argument is within the limits of proper debate it is immaterial whether it is sound or unsound, or whether he employs wit, invective and illustration therein. Moreover, figurative speech is legitimate if there is evidence on which it may be founded. Exaggerated statements and hasty observations are often made in the heat of debate, which, although not legitimate, are generally disregarded by the court, because in its opinion they are harmless.

Taylor v. State, 672 So. 2d 1246, 1270 (Miss. 1996) (quoting *Monk v. State*, 532 So. 2d 592, 601 (Miss. 1988)).

The test to determine if an improper argument by a prosecutor requires reversal is "whether the natural and probable effect of the prosecuting attorney's improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice." *Id.* (citations omitted). The Mississippi Supreme Court has also held that the circuit judge is in the best position to determine whether an objectionable argument may result in a decision influenced by prejudice. *Dunaway*, 551 So. 2d at 164. In the present case, we must agree with the trial judge that the above argument did not prejudice the jury against Banks. Although the defense counsel had reason to believe that the prosecutor was leading into an argument that had been prohibited, we find that the prosecutor, in fact, did not go into evidence which had previously been suppressed. A review of Officer Sullivan's testimony indicates that the prosecutor was correct in his statement that he was merely reiterating a witness's testimony. We therefore find Banks's argument to be without merit.

We note that accompanying the appellant's brief and appellant's reply brief, each of which was prepared by Banks's attorney, is a *pro se* supplemental brief which raises additional issues not formerly raised in the appellant's brief. Because this practice does not conform with the requirements of MRAP 28(a)(3) and 31(b), we will not consider these new assignments of error contained in the supplemental brief.

THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY OF CONVICTION OF SIMPLE POSSESSION OF COCAINE AND POSSESSION OF MARIJUANA AND SENTENCE AS A HABITUAL OFFENDER TO A TERM OF SIX (6) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF TEN THOUSAND DOLLARS (\$10,000.00) FOR POSSESSION OF COCAINE AND TWO HUNDRED AND FIFTY DOLLARS (\$250.00) FOR POSSESSION OF MARIJUANA IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO WASHINGTON COUNTY.

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