

IN THE COURT OF APPEALS 3/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00884 COA

CLEVE WHITLEY A/K/A CLEVE WHITLEY JR.

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. ROBERT L. GIBBS

COURT FROM WHICH APPEALED: YAZOO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

HENRY C. CLAY III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: ED PETERS

NATURE OF THE CASE: CRIMINAL-FELONY BUSINESS BURGLARY

**TRIAL COURT DISPOSITION: CONVICTED OF BUSINESS BURGLARY AND SENTENCED
TO SERVE A TERM OF SEVEN YEARS IN THE CUSTODY OF THE MDOC AS AN
HABITUAL OFFENDER.**

BEFORE BRIDGES, C.J., DIAZ, AND KING, JJ.

BRIDGES, C.J., FOR THE COURT:

Cleve Whitley (Whitley) was indicted, tried and convicted of the crime of business burglary in the Yazoo County Circuit Court. He was sentenced to serve a term of seven years as a habitual offender in the custody of the Mississippi Department of Corrections. He presents the following issues on appeal:

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S PEREMPTORY INSTRUCTION AND SUBSEQUENT MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR ALTERNATIVELY FOR A MOTION FOR A NEW TRIAL BECAUSE THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.

II. THE TRIAL COURT ERRED WHEN IT FAILED TO DECLARE A MISTRIAL WHEN A LAW ENFORCEMENT OFFICER IMPROPERLY TOLD THE JURY ABOUT EVIDENCE OF ANOTHER CRIME.

III. THE TRIAL COURT ERRED IN IMPROPERLY RESTRICTING APPELLANT'S OPENING STATEMENT.

IV. THE TRIAL COURT IMPROPERLY ALLOWED THE PROSECUTING ATTORNEY TO AMEND THE INDICTMENT TO SENTENCE UNDER SECTION 99-19-81.

Finding no error, we affirm.

FACTS

Robert Gainwell (Gainwell) owns a convenience store in Yazoo City, Mississippi known as the Broadway One Stop. Early in the morning of May 9, 1993, someone broke into Gainwell's store by crashing through the front window. Newport brand cigarettes which Gainwell offered for sale were stolen from the store. Robert Partee (Partee) testified that he was sitting behind a store near Gainwell's store when he heard a loud noise that sounded like a shotgun blast. Five or so minutes later, Partee saw Whitley walking towards him. Whitley sat down beside Partee and asked if Partee had seen any policemen in the area. Partee noticed that Whitley had something hidden underneath his shirt that was making a bulge in his clothing. When Whitley got up from the bench, Partee noticed that there was blood where Whitley had been sitting.

Charles Phillips (Phillips), a security guard at Fannie's Cafe at the time of the burglary, was walking to his job when he saw Whitley coming out of the Broadway One Stop through the broken front window with something underneath his shirt. Shortly thereafter, Whitley showed up at Fannie's Cafe selling dollar packs of Newport brand cigarettes out of a bag.

Officer John Abel (Abel) of the Yazoo City Police Department testified that the burglarized store was

dusted for fingerprints, but none of sufficient value were obtained. Abel found a piece of broken glass at the bottom of the broken front window with fresh blood on it. However, there was not enough blood for testing. Abel continued, stating that when Whitley was arrested, he had to be taken to the hospital for stitches to a laceration on his leg. According to Abel, the wound on Whitley's leg was consistent with a cut by a sharp object like broken glass. Whitley did not testify in his own defense. The jury found him guilty of the crime of business burglary, and he was sentenced as a habitual offender to serve a term of seven years in the custody of the Mississippi Department of Corrections.

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S PEREMPTORY INSTRUCTION AND SUBSEQUENT MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR ALTERNATIVELY FOR A MOTION FOR A NEW TRIAL BECAUSE THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.

Whitley's first issue challenges the sufficiency and weight of the evidence. We first examine the issue of sufficiency of the evidence. Whitley contends the trial court erred in overruling his motion for peremptory instruction at the close of the State's evidence and his motion JNOV at the close of the trial. The standard of review for challenges to the sufficiency of the evidence is set forth in *McClain v. State*:

The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. In appeals from an overruled motion for JNOV the 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 McClain'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.

McClain v. State, 625 So. 2d 774, 778 (Miss. 1993). We review the ruling on the last occasion the challenge was made: Whitley's motion for judgment notwithstanding the verdict. There was eyewitness testimony that Whitley exited the burglarized store through the broken front window with something underneath his shirt. Other testimony revealed that Newport brand cigarettes were stolen from the store, and Whitley was seen shortly after the burglary selling Newport brand cigarettes out of a bag. Broken glass found at the scene had blood on it, and Whitley had a recent laceration on his leg consistent with being cut by a piece of glass. This credible evidence must be accepted as true, and is viewed in a light most favorable to the State. The evidence being sufficient, the trial court did not err in overruling Whitley's motion for judgment notwithstanding the verdict.

Additionally, Whitley claims that the verdict was against the overwhelming weight of the evidence. Our standard of review is dictated by *McClain*:

[T]he challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. . . . 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. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

. . . .

The 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.

McClain v. State, 625 So. 2d 774, 780 (Miss. 1993). There was direct testimony from Phillips and Partee about Whitley's actions the night of the burglary. Partee encountered Whitley while sitting nearby the burglarized store soon after hearing a sound like a shotgun blast. Whitley approached Partee and asked about the presence of any policemen. Partee noticed that Whitley had something stuffed under his shirt, and when he rose to leave, there was blood where Whitley had been sitting. Phillips saw Whitley climbing out of the broken front window of the burglarized store and subsequently saw him selling cigarettes out of a bag. The jury was provided ample testimony, and it was the province of the jury to weigh the credibility of the witnesses. The trial court did not abuse its discretion in overruling Whitley's motion for a new trial.

II. THE TRIAL COURT ERRED WHEN IT FAILED TO DECLARE A MISTRIAL WHEN A LAW ENFORCEMENT OFFICER IMPROPERLY TOLD THE JURY ABOUT EVIDENCE OF ANOTHER CRIME.

During the prosecutor's cross-examination of Officer David Lloyd, he asked the officer what Whitley had in his possession at the time of his arrest. The officer replied, "Approximately two packs of Newport cigarettes and a crack pipe." At that point Whitley asked for a mistrial, stating the officer's mention of the crack pipe was evidence of another crime and therefore inadmissible. The State argued that it was not their intent to elicit such testimony and the prosecutor stated that he had tried to cut the officer off when he realized what he was about to say. Moreover, the State argued that the jury most likely did not hear the comment. The trial judge overruled Whitley's motion for mistrial, but stated that he would instruct the jury to disregard the remark about the crack pipe. However, Whitley asked the trial judge not to so instruct the jury. "Evidence of past crimes not resulting in conviction is generally inadmissible and a mistrial in such a case is proper unless it can be said with confidence that the inflammatory material had no harmful effect on the jury." *McNeal v. State*, 658 So. 2d 1345, 1348 (Miss. 1995) (citations omitted). "However, where an objection to such impermissible testimony is sustained and the jury is admonished by the trial court to disregard the statement, this Court has repeatedly held that refusal to grant a mistrial is proper." *Id.* In Whitley's case, there is a question as to whether the jury even heard the statement about the crack pipe. Moreover, if Whitley was concerned about the possible prejudicial effect, he had the opportunity to

cure it by having the judge admonish the jury to disregard the statement. Having told the trial judge not to instruct the jury, Whitley cannot now complain about the prejudicial effect of the comment. The trial judge did not abuse his discretion in overruling Whitley's motion for mistrial.

III. THE TRIAL COURT ERRED IN IMPROPERLY RESTRICTING APPELLANT'S OPENING STATEMENT.

Whitley argues that he was restricted in his opening statement, therefore keeping him from advancing his theory of the case. That being the entire basis of his argument, he asks that the lower court be reversed. During his opening statement, defense counsel while attacking the credibility of the State's witnesses went into the actions of Gitter Partee at a prior hearing and a prior conviction of Partee's for conviction of cocaine. The State objected as to improper opening statement and the trial judge sustained the objection, stating that Whitley could not go into prior convictions, but could certainly advance the theory that Partee was not worthy of belief. During his cross-examination of Partee, Whitley questioned him about his actions at a prior hearing as well as prior convictions for the sale of cocaine. Additionally, Whitley asked Partee about his omission in his statement to the police about Whitley leaving blood on the bench where he was sitting. Partee explained that he was not sure when he told the police about the blood, but that he knew he had told them. In closing statement, Whitley again pointed out Partee's prior conviction. Whitley's argument that the trial court erred in sustaining the State's objection to his opening argument is not only unsupported by authority, but is without merit. Whitley has not shown any prejudicial effect, and the record is clear that he was certainly able to advance his theory that the State's witnesses were unreliable.

IV. THE TRIAL COURT IMPROPERLY ALLOWED THE PROSECUTING ATTORNEY TO AMEND THE INDICTMENT TO SENTENCE UNDER SECTION 99-19-81.

Whitley was originally indicted under Miss. Code section 99-19-83, a habitual offender sentencing statute under which one of the previous convictions must be a violent crime, therefore allowing a sentence of life imprisonment. At Whitley's sentencing hearing, defense counsel pointed out that none of Whitley's prior convictions had been for violent crimes and therefore section 99-19-83 was the wrong statute under which to sentence him. The State asked to amend the indictment to sentence Whitley under section 99-19-81, a habitual offender sentencing statute that does not involve violent crimes and does not allow for life imprisonment. Whitley objected to the amendment, stating that it was a change of substance, not form and therefore impermissible. In *Nathan v. State*, 552 So. 2d 99, 107 (Miss. 1989), the Mississippi Supreme Court stated:

It is well settled in this state, . . . that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case.

Id. In *Nathan*, the supreme court allowed an amendment to the indictment changing section 99-19-83 to section 99-19-81. Their reasoning was that the original indictment was sufficient to apprise Nathan

that he would be sentenced as a habitual offender, and that the change imposed a lesser sentence, not a greater. *Nathan*, 552 So. 2d at 106-07. The same is true in Whitley's case. He had notice that he would be sentenced as a habitual offender and the amendment did not affect his defense. This issue is without merit. Finding no error, we affirm.

THE JUDGMENT OF THE YAZOO COUNTY CIRCUIT COURT OF CONVICTION OF BUSINESS BURGLARY AND SENTENCE AS A HABITUAL OFFENDER TO SERVE A TERM OF SEVEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS CONSECUTIVE TO ANY OTHER SENTENCE, IS AFFIRMED. COSTS ARE TAXED TO YAZOO COUNTY.

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