

IN THE COURT OF APPEALS 02/13/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00313 COA

KENNETH LAVELLE WILLIAMS

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. JOSEPH H. LOPER, JR.

COURT FROM WHICH APPEALED: GRENADA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM L. MAXEY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: DOUG EVANS

NATURE OF THE CASE: CRIMINAL: GRAND LARCENY

TRIAL COURT DISPOSITION: GUILTY VERDICT; SENTENCED TO SERVE
CONSECUTIVE FIVE YR TERMS ON EACH OF TWO COUNTS OF GRAND LARCENY

BEFORE THOMAS, P.J., COLEMAN, McMILLIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Kenneth Lavelle Williams was convicted of two counts of grand larceny for the theft of two lawnmowers from a Wal-Mart store. He appeals his conviction and sentence contending that the trial court improperly admitted evidence of other crimes, made inappropriate considerations in sentencing, and erroneously corrected an accomplice instruction. Williams also argues that his conviction was contrary to the weight and sufficiency of the evidence. We affirm.

FACTS

Williams was employed by a Grenada Wal-Mart in its garden center. Among other duties, Williams assembled lawn mowers and completed log books that recorded the sale and release of lawn mowers to customers. Through William Booker, his accomplice, Williams falsified entries in the logs to facilitate the delivery of lawn mowers to individuals who would then pay Williams and Booker in cash for their purchases. Williams and Booker pocketed the money from the sales.

In June 1993, as a part of this scheme, Booker picked up a lawn mower from Wal-Mart and delivered it. Later, Booker returned to pick up another lawn mower, but was confronted by a store manager. Booker admitted to falsifying an entry in the log book relating to that mower and led the police to the address where he had earlier delivered the other mower. The purchaser of that mower testified that he paid \$400.00 to Booker for the mower and that Williams had approached him seeking an additional \$100.00. Another purchaser testified that Williams and Booker sold him a mower for \$500.00 cash. Wal-Mart records showed that neither mower had been purchased.

Williams was arrested and charged with two counts of grand larceny—one for each of the two mowers taken on the day that the scheme was discovered. He denied any involvement in the theft of the lawn mowers from Wal-Mart and claimed that Booker had shown him legitimate receipts for both mowers. Williams denied seeking money from the first purchaser or selling him a mower. However, he admitted that he participated in the other sale but contended that he simply passed the money from the sale along to Booker.

DISCUSSION

1. Other Crimes Evidence

Williams contends that the trial court impermissibly allowed the admission of incompetent evidence when it permitted the prosecution to ask a witness about the theft of two other mowers from Wal-Mart. When it appeared that the testimony might be admitted, Williams objected arguing that it was unduly prejudicial and that it amounted to proscribed character evidence. The objection was overruled by the trial court which found that it was offered to show a "common scheme, motive, plan, intent and purpose." However, when the prosecution continued its examination of the witness, the questioning and the testimony given concerned only the two mowers on which charges had been brought. Later during the trial, the prosecution inquired about the theft of other mowers while examining another witness—Williams' alleged accomplice. There was no objection to this testimony by the defense. Nevertheless, the issue is still preserved for our review. *Mack v. State*, 650 So. 2d 1289, 1310 (Miss. 1994) (citations omitted) (renewal of previously overruled objection not necessary to preserve issue for appeal), *cert. denied*, 116 S. Ct. 214 (1995).

We conclude that the evidence developed of the two other thefts was neither improper character evidence nor unduly prejudicial.

Evidence of other crimes is not generally admissible, having been deemed irrelevant by the rules of evidence. *Duplantis v. State*, 644 So. 2d 1235, 1246 (Miss. 1994), *cert. denied*, 115 S. Ct. 1990 (1995); *Ladner v. State*, 584 So. 2d 743, 758 (Miss. 1991), *cert. denied*, 502 U.S. 1015 (1991); *see Ballenger v. State*, No. 93-DP-00081-SCT, slip op. at 12-14 (Miss. Sept. 21, 1995) (en banc) (setting forth the analysis followed here). However, Mississippi Rule of Evidence 404 provides important exceptions to the rule. For purposes of the discussion here, three are relevant—other crimes evidence offered as proof of intent, motive, and plan. *See* M.R.E. 404(b).

Moreover, the evidence explained to the jury exactly how the scheme was intended to work from the start to finish. The supreme court has instructed that where another crime or act is "so interrelated [to the charged crime] as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences," then, "[s]uch proof of another crime is also admissible." *Wheeler v. State*, 536 So. 2d 1347, 1352 (Miss. 1988) (citation omitted). Such proof is also admissible to identify the defendant, to prove motive, or to prove scienter. *Wheeler*, 536 So. 2d at 1352 (citations omitted). In addition, evidence of other crimes is admissible to tell the complete story so as not to confuse the jury. *Brown v. State*, 483 So. 2d 328, 330 (Miss. 1986).

In this case, the two transactions underlying the crimes for which Williams was charged were incomplete. In one transaction, the mower had yet to be delivered. In the other, the mower had been delivered but final payment had not been made. Accordingly, it was necessary for the prosecution to present evidence concerning prior completed illicit sales of mowers to explain to the jury why the two mowers which were the subject of the charges were taken by Williams and his accomplice. The prosecution also advanced the evidence to prove the felonious intent to deprive another of personal property—a required element of the larceny charge. The evidence concerning prior illicit sales made it clear to the jury that Williams had orchestrated a scheme to take mowers from Wal-Mart for the purpose of selling them himself and pocketing the proceeds without any compensation to Wal-Mart. Such evidence falls within the exceptions to the proscription against evidence of other crimes.

As to the prejudice posed by the evidence, it is true that the evidence has a remote tendency to foster the notion that, because Williams has engaged in conduct of the type charged, he committed the crimes charged. However, this prejudicial impact does not outweigh the probative value of the evidence discussed above. The evidence was critical to explaining the nature and purpose of Williams' activities, and it was not introduced to show a propensity for committing larceny. Accordingly, there was no error in permitting its admission. *Smith v. State*, 656 So. 2d 95, 98-99 (Miss. 1995); *see* M.R.E. 403.

2. Sentencing Considerations

Williams contends that in sentencing him the trial court improperly considered Williams' purported involvement in the theft of mowers other than the ones he was formally charged with taking. The record indicates that, while the prosecution urged the court to consider all alleged thefts, the trial court did not expressly consider anything but the charged counts in arriving at a sentence. Accordingly, with respect to the sentences well within statutory limits, the error alleged by Williams does not appear in the record. *Boyd v. State*, 253 Miss. 98, 107, 175 So. 2d 132, 135-36 (1965); *see*

Miss. Code Ann. § 97-17-41(1) (1972) (prescribing sentencing limits). Moreover, the trial court may consider any evidence bearing on the defendant's personal responsibility and moral guilt—including facts other than those narrowly relating to the crimes charged. *See Pinkney v. State*, 538 So. 2d 329, 339-40 (Miss. 1988) (citations omitted) (victim impact statements), *vacated on other grounds*, 494 U.S. 1075 (1990); *see also Valentine v. State*, 415 So. 2d 687, 689 (Miss. 1982) (citations omitted).

3. Accomplice Instruction

Williams contends that the trial court erroneously corrected an accomplice jury instruction which had read in part that "[t]he testimony of an accomplice is to be considered and weighed with great care and caution and suspicion." The trial court gave the instruction but deleted the words "and suspicion." Because Williams did not object to the deletion or to the giving of the corrected instruction, this issue is not preserved for our review. *Lockett v. State*, 656 So. 2d 68, 74 (Miss. 1995), *cert. denied*, 115 S. Ct. 2595 (1995).

4. Weight and Sufficiency of the Evidence

Williams lastly contends that the evidence of his guilt was insufficient to support a charge of grand larceny and that the jury's verdict was contrary to the overwhelming weight of the evidence. We disagree.

Our standard for reviewing challenges to convictions based on sufficiency of the evidence is well-established. As to each element of the offense, we consider all of the evidence in the light most favorable to the verdict. We reverse when, with respect to an element of the offense charged, the evidence 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). As to whether the verdict is contrary to the overwhelming weight of the evidence, a similar standard is employed. We view the evidence in the light most favorable to the verdict. The trial court is given discretion to order a new trial in the face of overwhelming evidence contrary to the jury's verdict in order to prevent an unconscionable injustice. *Id.* at 781 (citation omitted).

On a charge of grand larceny, the prosecution in this case was faced with the burden of proving (1) venue; (2) the taking and carrying away of personal property of another; and (3) felonious intent. Miss. Code Ann. § 97-17-41 (1972). Here, Wal-Mart employees testified that two mowers had been taken from them. Williams' accomplice testified that he and Williams had taken the mowers and sold them to individuals for cash that they kept. The purchasers testified and corroborated the accomplice's testimony. The accomplice was found in possession of one of the mowers. In light of this overwhelming proof of guilt, the charge and the jury's verdict were well-supported.

THE JUDGMENT OF CONVICTION OF THE GRENADA COUNTY CIRCUIT COURT OF COUNT I: GRAND LARCENY AND SENTENCE OF FIVE (5) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND COUNT II: GRAND LARCENY AND SENTENCE OF FIVE (5) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THREE (3) YEARS SUSPENDED TO RUN CONSECUTIVELY WITH THE SENTENCE FOR COUNT I AND ORDER OF RESTITUTION IN THE AMOUNT OF TWO THOUSAND DOLLARS (\$2,000.00) ARE AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO GRENADA

COUNTY.

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