

IN THE COURT OF APPEALS 03/26/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00308 COA

ROBERT LEE GRANT

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MICHAEL R. EUBANKS

COURT FROM WHICH APPEALED: LAMAR COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM L. DUCKER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: CLAIBORNE McDONALD AND MANYA CREEL

NATURE OF THE CASE: CRIMINAL -SALE OF A CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: SENTENCED TO 25 YEARS ON COUNT I AND 25 YEARS
ON COUNT II, 20 YEARS TO RUN CONCURRENTLY WITH THE SENTENCE IN COUNT I
IN THE CUSTODY OF MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE THOMAS, P.J., DIAZ, KING, AND PAYNE, JJ.

PER CURIAM:

Robert Lee Grant was convicted of two counts of the sale of cocaine. Feeling aggrieved, Grant appeals charging that the lower court erred in not granting his motion to exclude evidence of prior convictions, erred in allowing in-court identification of the defendant by a witness who was not sure of the defendant's name, erred in admitting the cocaine in evidence when he questioned the chain of custody, and erred in not granting defendant's instruction which was taken verbatim from an approved model instruction book. Finding no merit in any of these issues, we affirm.

DISCUSSION

Two different times on December 30, 1992, Grant sold crack cocaine to Joey Turnage, a narcotics agent employed by the Pearl River Basin Narcotics Task Force.

Three days prior to Grant's trial, he moved to exclude any evidence of prior convictions pursuant to Mississippi Rule of Evidence 609. The State said that it was not going to introduce evidence about any prior drug convictions, but that if the defendant testified, it would use the burglary conviction on cross-examination to impeach the defendant's testimony. The judge reserved his ruling on this matter until he heard the State's evidence to determine whether or not credibility was going to be an issue. Instead of waiting for the judge's ruling on his motion to exclude evidence about a prior burglary conviction, the defendant in opening statement admitted the burglary to "soften the blow" on cross-examination. In *Wright v. State*, 540 So. 2d 1, 4 (Miss. 1989), the court held that the failure of a movant to obtain a ruling on a motion constituted a waiver. Grant chose not to follow the court's proposal and, therefore, waived objection to the Rule 609 issue and cannot raise it here.

During the trial, Grant objected to the Turnage's in-court identification of Grant since Turnage had gone looking for "Little Robert" (whose real name turned out to be Corey) from whom to purchase cocaine, but instead he had purchased it from Robert, the defendant. Turnage identified the face of the defendant as the seller, by whatever name he went. There is no error in allowing a witness who personally purchased cocaine from the individual who was seated next to the defense attorney, from identifying the defendant as the seller, whether or not he may have been confused about his correct name. Even if the purchaser was looking for the defendant's brother, there is no denying that the purchaser bought the cocaine from that particular person. Grant's citation of cases involving confidential informants has no application where the person making the buy is the person identifying the defendant.

The sealed, marked container housing the cocaine was introduced by testimony of each person in the chain of custody, but no one was able to remember whose handwriting was on the container. Grant objected to the introduction. An objection to the chain of custody is implicated when there is some "indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." *Grady v. State*, 274 So. 2d 141, 143 (Miss. 1973). Furthermore, this court has often stated that issues involving the chain of custody of evidence are left to the sound discretion of the trial court, *Doby v. State*, 532 So. 2d 584, 588 (Miss. 1988), and that this court "will not reverse the

trial court's ruling except where this discretion has been 'so abused as to be prejudicial to the defendant.'" *Lambert v. State*, 462 So. 2d 308, 312 (Miss. 1984). Furthermore, in regard to chain of custody questions, "the presumption of regularity supports the official acts of public officers." *Barnette v. State*, 478 So. 2d 800, 804 (Miss. 1985). In the present case, there is no indication or reasonable inference of probable tampering with the evidence, and the trial court did not abuse its discretion in allowing the cocaine into evidence. The record shows an unbroken chain of custody, with each person in the chain testifying that the seals were in place, and the evidence appeared as it should. There is no error here.

Grant complains that the court had no right to refuse his instruction in which there were no errors of law. Failure to grant an otherwise correct instruction does not constitute error when the totality of the instructions, read together, adequately covers the subject matter. *Griffin v. State*, 610 So. 2d 354, 356 (Miss. 1992).

Finding no merit in any of the errors claimed, the conviction is affirmed.

THE JUDGMENT OF THE LAMAR COUNTY CIRCUIT COURT OF CONVICTION ON COUNT I AND II OF SALE OF A CONTROLLED SUBSTANCE AND SENTENCE OF 25 YEARS ON COUNT I AND 25 YEARS ON COUNT II, WITH 20 YEARS OF SENTENCE IN COUNT II TO RUN CONCURRENTLY WITH SENTENCE IN COUNT I, TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LAMAR COUNTY.

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