

**IN THE COURT OF APPEALS 10/29/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 93-KA-01451 COA**

**DONALD O'BRYANT**

**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. ELZY JONATHAN SMITH, JR.

COURT FROM WHICH APPEALED: BOLIVAR COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GLENN H. WILLIAMS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIDRE MCCRORY

DISTRICT ATTORNEY: CLYDE HILL

NATURE OF THE CASE: FORGERY

TRIAL COURT DISPOSITION: GUILTY OF FORGERY - SENTENCED TO SERVE TEN  
YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND  
MAKE FULL RESTITUTION TO THE VICTIM

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

DIAZ, J., FOR THE COURT:

Donald O'Bryant (Donald) was convicted, in the Bolivar County Circuit Court, of the crime of forgery. He was sentenced to serve a term of ten years and to make restitution to the victim. The Appellant raises three issues to be considered on appeal. After thoroughly reviewing the record and applicable law, we find that there is no basis to reverse the conviction, and we, therefore, affirm.

### FACTS

On May 21, 1993, Johnny O'Bryant (Johnny) entered the Sunburst Bank in Cleveland, Mississippi to purchase a cashier's check for \$20.00. Janine Lee (Lee), a customer service representative, issued to him check number 906899882 in the requested amount. Johnny asked that the check be made payable to Fred Townsend and Lee complied. Johnny received the check and left the bank. Shortly thereafter, Johnny returned to Lee and explained that his wife had already paid the bill that the check was intended for. Thus, Lee returned Johnny's money and voided the check.

The following day, a man came into Sunburst bank claiming to be Larry Jones. He purchased a \$20.00 cashier's check from Edward Herrington, another bank employee. Check number 906809884 was made payable to Frank Kemp, as requested, and presented to "Jones." Herrington later identified Donald O'Bryant as the individual purporting to be Larry Jones. Donald O'Bryant and Johnny O'Bryant are relatives, however, the record does not reveal to what degree. Both transactions were recorded on the bank's video surveillance equipment.

On May 22, 1993, Johnny purchased \$85.00 to \$90.00 worth of merchandise from Cecil's Package Store. Edward Soliz, the manager of the store, testified that Johnny presented a cashier's check in the amount of \$2,020.00 to pay for the liquor. The number on the check was 900809884. According to Soliz, Johnny explained that the check was from State Farm Insurance Company. The check was made payable to, and endorsed by, Lonnie H. Ryant. Soliz cashed the check and gave Johnny the change from his purchase. Later, Soliz noticed that the check appeared to be altered and he telephoned the store owner, Mary Taylor. Taylor gave the check to the Cleveland Police Department.

Two officers from the Cleveland Police Department viewed the video surveillance tape from Sunburst Bank and recognized Donald O'Bryant as the individual who purchased the money order on May 22, 1993. Donald was subsequently arrested, tried and convicted of forgery in the Bolivar County Circuit Court.

### DISCUSSION

1. Did the Court Err in Denying the Motion

for Directed Verdict and the Request for Peremptory

Instruction at the Close of the Defendant's Case?

The standard of review for whether a peremptory instruction should be granted and whether a directed verdict should be granted are the same. *Alford v. State*, 656 So. 2d 1186, 1189 (Miss. 1995), *Wilner v. Miss. Export R.R. Co.*, 546 So. 2d 678, 681 (Miss. 1989).

The trial court must consider the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable inferences that may be drawn therefrom; unless the plaintiff's evidence is so lacking that reasonable jurors could not reach a verdict for the plaintiff, the [instruction] should be [given].

*Wilner*, 546 So. 2d at 681.

Additionally, Mississippi case law clearly holds that a trial court should submit an issue to the jury if the evidence creates a question of fact in which reasonable jurors could disagree. *Vines v. Windham*, 606 So. 2d 128, 131 (Miss. 1992).

Donald argues that his motion for directed verdict and peremptory instruction should have been granted because the State failed to prove that Sunburst Bank was the injured and defrauded party as alleged in the indictment. According to Donald, it was Cecil's Liquor Store that was defrauded, not Sunburst Bank. The State counters that the indictment charged that Donald *intended* to defraud Sunburst Bank and that the evidence is sufficient to prove that Donald's *intent* was such.

The indictment charged in pertinent part that Doanld O'Bryant:

on or about the 22nd day of May, . . . , did unlawfully, wilfully and feloniously with intent to defraud, falsely forge a cashier's check, namely official check number 900809884 on the Sunburst Bank, Cleveland, Mississippi, made payable to Lohnnie H. Ryant in the amount of \$2,020.00, purporting to be the act of Lohnnie H. Ryant with the intent to injure and defraud the said Sunburst Bank, a corporation.

Donald was indicted and convicted under section 97-21-35 of the Mississippi Code which reads as follows:

Every person who, with the intent to injure or defraud, shall falsely make, alter, forge, or counterfeit any instrument or writing being or purporting to be any process issued by any competent court, magistrate, or officer, or being or purporting to be any pleading or proceeding filed or entered in any court of law or equity, or being or purporting to be any certificate, order, or allowance, by any competent court, board, or officer, or being or purporting to be any license or authority authorized by any statute, or any instrument or writing being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be created, increased, discharged, or diminished, or in any

manner affected, by which false making, forging, altering or counterfeiting any person may be affected, bound, or in any way injured in his person or property, shall be guilty of forgery.

Miss. Code Ann. § 97-21-35 (1972).

The crux of the Appellant's argument is that the indictment is at variance with the evidence presented. However, § 97-21-35 provides that an individual may be found guilty of forgery if the State proves an act of forgery along with the intent to defraud. A careful examination of the record and relevant law reveals that the evidence was not at variance with the indictment. The State presented evidence that Donald purchased the cashier's check which was later altered, that Donald O'Bryant was at the home of Johnny O'Bryant the day of the forgery, and that Donald O'Bryant confessed to altering the check. This is sufficient evidence to create a jury issue as to whether Donald's intent was to defraud Sunburst Bank. Thus, the trial court correctly denied Appellant's motion for directed verdict and request for a peremptory instruction.

2. Did the Court Err in Refusing Defendant's

Instruction D-1 and in Granting Instruction C-30?

The Appellant contends that the trial court erroneously "issued a new indictment against the Defendant" by granting instruction C-30. Specifically, Donald alleges that the indictment did not adequately apprise him that he was being charged with altering the cashier's check. Also, Donald argues that the trial judge erred by not granting instruction D-1.

The State argues that the court correctly refused instruction D-1 on the basis that it was "confusing" and "inconsistent." The State further argues that instruction C-30 was proper in that the indictment, which alleged forgery, was not limited to proving that Donald forged the indorsement on the cashier's check, but encompassed the false making or materially altering of a written document.

Donald's first point under this assignment of error is that he was improperly denied instruction D-1 by the trial judge. The record reveals that the trial judge examined the proposed instruction and found it confusing and inconsistent. We agree. Specifically, the instruction indicates "reasonable doubt" while the latter part of the same instruction indicates "every reasonable hypothesis." Confusing and misleading instructions have been consistently condemned by the Mississippi Supreme Court. *See Sudduth v. State*, 562 So. 2d 67, 72 (Miss. 1990); *Holmes v. State*, 483 So. 2d 684, 686 (Miss. 1986)

We note that the record reveals that Donald requested D-1 in an attempt to obtain a circumstantial evidence instruction. However, we find that the trial judge correctly ruled that this was not a purely circumstantial evidence case in that Donald made an out of court admission while being questioned by Detective Serio. An admission constitutes direct evidence, thus, a circumstantial evidence instruction was not required. *Sudduth*, 562 So. 2d at 72 (citation omitted). Furthermore, the Appellant does not cite any authority to support the position that the court erred on this issue.

Turning to the second point addressed by this assignment of error, we find that the lower court did not commit reversible error by granting instruction C-30. A review of the record reveals that instruction C-30 was permissible in that it did not exceed the basis of liability as set forth in the indictment. The indictment charged him with the broad violation of § 97-21-35. This includes materially altering or forging a check with the intent to defraud as described by instruction C-30. As previously discussed herein, Donald was not indicted for a different offense than he was convicted of and the evidence was sufficient to support a finding that he participated in the material altering of the cashier's check at issue. This assignment of error is wholly without merit.

### 3. The Verdict was Against the Overwhelming

#### Weight of the Evidence

Under this assignment of error, Donald is challenging the weight of the State's proof; in effect he is asserting that the State failed to prove the elements of the offense charged, and that his motion for directed verdict, request for peremptory instruction, and motion for J.N.O.V. should have been granted. This argument is without merit.

This court will reverse if a jury verdict is against the overwhelming weight of the evidence or is the result of bias, passion and prejudice. *Clark v. Columbus & Greenville Ry.*, 473 So. 2d 947, 951 (Miss. 1985). Notwithstanding an abuse of discretion by the trial judge in his determination that the verdict was warranted, the judgment of the lower court will stand. *Andrew Jackson Life Insurance Co. v. Williams*, 566 So. 2d 1172, 1177 (Miss. 1990).

When this Court considers whether a jury verdict is against the overwhelming weight of the evidence, it accepts as true all evidence supporting the verdict. *Issac v. State*, 645 So. 2d 903, 907 (Miss. 1994), quoting *Thornhill v. State*, 561 So. 2d 1025, 1030 (Miss. 1989). Additionally, we note that the jury's verdict is afforded great deference because of its position to evaluate and weigh the demeanor and testimony of each witness. *McGill v. Bradley*, 674 So. 2d 11, 14 (Miss. 1996) (citations omitted). The proof in this case supporting the jury's verdict showed that the check which the indictment was based was purchased by Donald O'Bryant and that the bank teller positively identified Donald as the individual who purchased the check. Additionally, Frank Hicks, a forensic scientist from the Mississippi Crime Lab, also testified that the endorsement on the back of the check was prepared by Donald O'Bryant. Thus, the jury verdict was not against the overwhelming weight of the evidence and was sufficient to support a finding that Donald intended to defraud Sunburst Bank as required by the statute. This error is denied.

#### CONCLUSION

The evidence in this case supports Donald O'Bryant's conviction for forgery and the record reveals that he was tried and prosecuted for the indicted offense. The assignments of error are without merit, and the case must be affirmed.

**THE JUDGMENT OF THE CIRCUIT COURT OF BOLIVAR COUNTY OF CONVICTION OF FORGERY AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE**

**MISSISSIPPI DEPARTMENT OF CORRECTIONS AND MAKE FULL RESTITUTION TO THE VICTIM IS HEREBY AFFIRMED. THIS SENTENCE SHALL RUN CONSECUTIVE TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO BOLIVAR COUNTY.**

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