

IN THE COURT OF APPEALS 4/9/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01331 COA

BRYANT MILES

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 C. WEBSTER

COURT FROM WHICH APPEALED: COAHOMA COUNTY COURT

ATTORNEY FOR APPELLANT:

TOM T. ROSS, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART

DISTRICT ATTORNEY: LAURENCE MELLEN

NATURE OF THE CASE: CRIMINAL: POSSESSION OF A CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: CONVICTION: SENTENCED AS A HABITUAL OFFENDER
TO A TERM OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF
CORRECTIONS

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

KING, J., FOR THE COURT:

Miles was convicted of possessing a controlled substance in the Coahoma County Court and sentenced to serve a term of life in the custody of the Mississippi Department of Corrections pursuant to the habitual offender statute. Miles appeals the conviction and sentence and assigns the following as errors of the trial court:

I. The trial court erred in overruling the defendant's motion for a mistrial when State's witness, Gary Watson, testified that absent witness John Reed, stated, "I didn't throw it" while referring to the pill bottle allegedly thrown out of the car by Bryant Miles;

II. The trial court erred in refusing Defendant's Instruction D-3 and D-6;

III. The trial court erred in sentencing the Defendant to life without parole pursuant to Miss. Code Ann. § 99-19-83 because the indictment charged the defendant as an habitual offender under Miss. Code Ann. § 99-19-81 and 99-19-83;

IV. The sentence was disproportionate to the crime charged and thus, violated the Eighth Amendment to the Constitution.

Because we find that the trial court committed reversible error when it allowed the State to introduce prejudicial hearsay testimony, we do not consider the merits of the errors assigned in II, III, and IV.

FACTS

On September 27, 1992, Miles and several passengers were traveling on Highway 61 in Coahoma County, Mississippi, when Miles noticed that an officer of the Mississippi Highway Patrol was policing the area for violators. Miles did not have a driver's license; therefore, Miles pulled his vehicle over to the side of the road and asked the passengers riding with him if any of them had a valid driver's license. Because none of the passengers had a valid license, Miles resumed travel.

Officer Hudson saw that Miles was reluctant to approach and therefore, signaled Miles to stop the vehicle. Miles eventually brought his vehicle to rest on the side of the road. John Reed, who was not present at the trial, occupied the front passenger seat of the vehicle. Gary Watson, Rodney Cohen, and Michael Morris were passengers in the rear seat. Shortly thereafter, another vehicle driven by Miles' girlfriend, Sylvia Fiser, arrived and stopped in front of Miles' vehicle.

When Officer Hudson began to approach Miles' vehicle, he saw someone throw an object from the front passenger window. Hudson approached the vehicle and asked John Reed to exit the vehicle.

Then, Reed and Hudson walked to the location where Hudson had seen the object thrown from the window. Hudson discovered a bottle containing six rock substances. The bottle had been labeled "Sylvia Fiser". Officer Hudson arrested Miles and the other occupants of the vehicle for possession of cocaine.

ANALYSIS OF THE ISSUES AND LAW

Miles argues that he was prejudiced when Gary Watson was allowed to testify that an absent witness, John Reed, denied throwing the bottle from the front passenger window. Specifically, Miles states that Watson's hearsay testimony contributed to the conviction because it proved a major trial issue-- who threw the bottle from the window. We agree.

During the trial, the court denied Miles' counsel's motion to strike the following testimony elicited by the district attorney on direct examination of Gary Watson:

DA: All right, after it got thrown out the window what happened?

WATSON: Well after it got thrown out the window Officer Hudson asked what we threw out the window.

DA: Who was he asking that of first?

WATSON: He asked John at first.

DA: Okay, what side of the car was Officer Hudson on?

WATSON: He was on the left side of the car.

DA: Was that the driver's or the passenger's side?

WATSON: The driver's side.

DA: All right, what kind of response did he get to that question about something being thrown out the window?

WATSON: John told him he didn't throw anything out the window.

The State argues that Gary Watson's testimony was not hearsay because it was not offered to prove the truth of the matter asserted but to describe the investigation which occurred. Because Officer Hudson had previously given testimony regarding the stop and ensuing investigation, we are not inclined to find that Watson's testimony was offered for any other purpose than to prove the truth of the matter asserted--Reed did not throw the bottle out of the window. Indeed, the district attorney's examination of Watson prior to introduction of the hearsay testimony supports our finding:

DA: Did John Reed throw anything out the front window?

WATSON: No sir.

DA: Do you remember whether the back windows were up or down?

WATSON: They was up.

DA: The thing that got thrown out of the front window, who threw it?

WATSON: Well I really don't know

DA: Well all right, who was sitting in the front seat?

WATSON: There was Bryant and Little John.

DA: Little John/ What's Little John's name?

WATSON: John Reed.

DA: Were you sitting where you could see John Reed?

WATSON: Yes sir.

DA: Did John Reed throw anything out the front window?

WATSON: No sir.

The introduction of the hearsay testimony, which implicated Miles as the perpetrator of the crime, was error because it deprived Miles of the constitutional right to confront and cross-examine the witness against him. U.S. Const. amend. VI; Miss. Const. art. III, § 26; *see also Miller v. State*, 473 So. 2d 945, 947 (Miss. 1985) (explaining that the admission of a police officer's testimony regarding statements made by a party not present in the courtroom and not available to be confronted and cross-examined by defendant denied defendant valuable constitutional rights). Not surprisingly, the State argues that the error was harmless.

In *Delaware v. Van Arsdall*, the United States Supreme Court stated that violations of the Confrontation Clause are subject to "harmless error" analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). An error is constitutionally harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). In order to state that the Confrontation Clause violation did not contribute to the verdict, we must find that the violation was unimportant in relation to everything else the jury considered on the issue in question. *Yates v. Evatt*, 500 U.S. 391, 403 (1991). The following evidence was considered by the jury in determining the identity of the individual responsible for throwing the object:

1. Officer Hudson's testimony that an object was thrown from the front passenger window of the vehicle; however, he was not able to determine whether the driver of the vehicle threw the object because his view was obstructed by the rear seat passengers;

2. Officer Hudson's testimony that only the front windows of the vehicle were rolled down;
3. Officer Hudson's testimony that the object was thrown three or four feet from the door on the passenger's side;
4. Officer Hudson's testimony that the bottle was labeled with the name of Miles' girlfriend, Sylvia Fiser;
5. Officer Hudson's testimony that when he approached Miles' vehicle, he asked Miles what did he throw out the window, and Miles denied throwing anything out the window;
6. Officer Hudson's testimony that Sylvia Fiser arrived while he was questioning Miles about the object thrown from the window;
7. Rodney Cohen's testimony that both the driver and passenger windows were down, and Bryant Miles threw an object from the window, but the location where the bottle was retrieved was not the same location where the object was thrown;
8. Rodney Cohen's testimony that his friend, John Reed exited the car and walked over to Officer Hudson. Then, Officer Hudson retrieved the bottle in Reed's presence;
9. Watson's testimony that an object was thrown from the right front window, but he did not know who threw the object;
10. Watson's testimony that he did not see Reed throw anything out the front window;
11. Watson's testimony that Officer Hudson asked Reed if he had thrown anything from

the window, and Reed told him that he did not throw anything out the window;

12. Watson's testimony that Reed, Cohen, and Morrison were his friends;

13. Watson's testimony that he along with Reed, Cohen, and Morrison were arrested and detained in the same jail cell for several hours and released when they had been interviewed two or three times.

Because Officer Hudson was unable to identify the person responsible for throwing the object from the passenger window or corroborate Watson's testimony that Reed denied throwing the object, the testimonies of Cohen, Watson, and the hearsay declarant, Reed were the "smoking guns" of the prosecution's case. Therefore, we cannot find beyond a reasonable doubt that the error did not contribute to the verdict. Our finding is consistent with the rationale that statements which tend to "serve, not prejudice . . ." the declarant's interests are unreliable and untrustworthy. *Ponthieux v. State*, 532 So. 2d 1239, 1246 (Miss. 1988). Accordingly, we reverse and remand the case for a new trial on the merits.

THE JUDGMENT OF THE COUNTY COURT OF COAHOMA COUNTY MISSISSIPPI IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THE OPINION. COSTS OF THIS APPEAL ARE TAXED TO COAHOMA COUNTY.

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