

IN THE COURT OF APPEALS 10/29/96
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00712 COA

LEONARD C. HOWARD

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. WILLIAM F. COLEMAN

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HINDS COUNTY

ATTORNEY FOR APPELLANT:

SANFORD KNOTT

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: ED PETERS

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO TWENTY YEARS IN
THE CUSTODY OF THE MDOC

BEFORE FRAISER, C.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Leonard C. Howard was convicted in the Circuit Court of Hinds County of aggravated assault and sentenced to twenty years in the custody of the Mississippi Department of Corrections. Howard appeals arguing: (1) there was reversible plain error committed when the prosecutor commented on Howard's silence after he invoked his *Miranda* rights; (2) the trial court erred in not granting Howard's motion for mistrial when the prosecutor asked Howard about his criminal record; (3) the trial court erred in taking judicial notice that the crime occurred in the first judicial district of Hinds County; (4) the trial court erred in submitting a jury instruction which allowed "intelligence" to be considered in weighing the credibility of evidence; (5) the trial court erred in allowing the prosecutor to bolster the credibility of a witness during closing arguments when that witness had earlier lied under oath. Finding no error, we affirm Howard's conviction and sentence.

STATEMENT OF THE FACTS

Howard was a frequent customer of the Quick Stop grocery store which was owned and operated by Willie Evans. On July 18, 1990, Howard visited the store several times purchasing beer and other items. Upon one visit, Howard also played a video poker machine located in the store. An incident occurred between the two men during which Evans struck Howard. According to Evans and an employee, Billy Wash, Howard left the store threatening to return with his gun and threatening to kill Evans. Later that same day, Howard returned and shot Evans twice, once in the stomach and once in the shoulder area.

ARGUMENT AND DISCUSSION OF THE LAW

I. THERE WAS REVERSIBLE PLAIN ERROR COMMITTED WHEN THE PROSECUTOR COMMENTED ON HOWARD'S SILENCE AFTER HE INVOKED HIS MIRANDA RIGHTS

Howard attacks the prosecutor's cross-examination of him regarding his refusal to talk with police after being arrested. Howard argues that the questioning allowed the prosecutor to violate his right to remain silent and wait for the assistance of counsel before answering questions by the police. Howard states that the accused does not have to explain why he did not make protest at the time of his arrest or give his version of the facts to the interrogating or arresting officer. Howard argues that the prosecutor's comment was plain error and the failure of his counsel to object does not bar our consideration of the issue as plain error.

The State argues that this issue is procedurally barred because Howard failed to make a timely objection or to mention this in his motion for a new trial. The State further argues that Howard was read his *Miranda* rights, waived his rights to silence and to counsel, and gave a statement to police which was properly used to impeach his direct testimony at trial.

Clearly, Howard's failure to object at trial and give the trial court the opportunity to address the issue procedurally bars this assignment of error. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995). However, this Court may consider this matter as plain error. *See* M.R.A.P. 28 (a)(3); M.R.E. 103 (d). Because

we are able to address this issue on its merits, we shall do so in the interest of fairness. *See* M.R.E. 103(d) cmt.

In *Crawford v. State*, the Mississippi Supreme Court affirmed when Crawford appealed arguing that the prosecution improperly introduced evidence of his post-*Miranda* silence. The court noted that "the appellant made no objection to the question or answer before the lower court and the matter is not preserved for review by this Court. Furthermore, we see no harm or prejudice sustained by the defendant from the question and answer, particularly, since the appellant testified in his own behalf and relied upon self-defense." *Crawford v. State*, 515 So. 2d 936, 939 (Miss. 1987).

The Mississippi Supreme Court has held that ordinarily cross-examination to impeach the credibility of a defendant because he exercised his constitutional right to remain silent is prejudicial error. *Brock v. State*, 483 So. 2d 358, 361 (Miss. 1986). As pointed out by the court in *Brock*, the United States Supreme Court held that even when a confession may be inadmissible "because of a technical failure to fully comply with the *Miranda* warning, it could nevertheless be used on cross-examination to impeach a defendant who has testified contrary to facts he related in his confession." *Brock*, 483 So. 2d at 361.

In the present case, the prosecution cross-examined Howard regarding his version of the events of July 18, 1990, to which he testified on direct examination. Howard testified on direct examination that he invoked his right to an attorney and did not give a statement to the police. On cross-examination, Howard identified his signed waiver. We are not presented with a case in which the defendant remained silent, and the prosecution was allowed to question him as to his silence. To the contrary, Officer Moseley testified in rebuttal that Howard was given his *Miranda* warnings, Howard signed a written waiver as well as verbally waiving his right to remain silent, and Howard proceeded to give a statement to the police which attested to Howard's lack of involvement or knowledge of the shooting incident. The prosecution, in cross-examining Howard, merely sought to impeach his credibility because of the detailed, apparent self-defense account Howard was telling at trial differed from his post-arrest statement in which Howard indicated that he knew nothing of the incident. We find that this line of questioning was permissible, and this issue is without merit.

II. THE TRIAL COURT ERRED IN NOT GRANTING HOWARD'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED HOWARD ABOUT HIS CRIMINAL RECORD.

Howard argues that the trial court should have granted his motion for mistrial. Under cross-examination, the prosecutor asked Howard about his past arrest for public drunkenness. Howard argues that this questioning merely served to prejudice the jury against him and contributed to his conviction. Howard asserts that the questioning was improper character evidence under the Mississippi Rules of Evidence 608 and 609. Howard's objection was sustained by the trial court.

The State argues that the trial court sustained Howard's objection, and counsel for Howard failed to request that the jury be instructed or admonished. Consequently, there was no error. The State also points out that Howard first testified that he wanted to hide his drinking in public.

The trial court is in the best position to measure the prejudicial effect, if any, to determine if a mistrial is necessary. *See Gossett v. State*, 660 So. 2d 1285, 1290-91 (Miss. 1995). The trial court is given

great discretion in evaluating the necessity of a mistrial. *Id.* Additionally, "[i]t is the rule in this State that where an objection is sustained, and no request is made that the jury be told to disregard the objectionable matter, there is no error." *Marks. v. State*, 532 So. 2d 976, 981 (Miss. 1988). The Mississippi Supreme Court has held that "where the objection to a question is sustained and no request is made that the jury be instructed to disregard the question, there is no error." *See Simpson v. State*, 497 So. 2d 424, 431 (Miss. 1986); *Gardner v. State*, 455 So. 2d 796, 800 (Miss. 1984). Thus, when the trial court sustained Howard's objection to the State's question and denied his motion for a mistrial, it was incumbent upon Howard to request that the trial court admonish the jury to disregard the question. Howard made no such request. Accordingly, we find that this issue is without merit.

III. THE TRIAL COURT ERRED IN TAKING JUDICIAL NOTICE THAT THE CRIME OCCURRED IN THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY.

Howard challenges the venue of the trial. He argues that the trial court did not have the necessary information before it to take judicial notice of the fact that the crime occurred within the first judicial district of Hinds County, which Howard argues was not generally known and was subject to reasonable dispute. Howard specifically points to the testimony of Officer Moseley who was unable on cross-examination to testify as to the exact boundaries of the first judicial district of Hind County. Howard concludes that the State did not properly establish venue as it is required to do.

The State argues that evidence regarding venue was established. The State points to Officer Moseley's testimony on direct examination when he stated the specific location of the crime, and that location was in the first judicial district. The State also argues that it is proper for the trial court to take judicial notice of venue under the rules.

The record indicates that Officer Moseley clearly testified that the location of the Quick Stop was within the first judicial district and his testimony alone was sufficient to establish venue. However, on cross-examination, Officer Moseley was not able to testify as to the precise borders of the first judicial district. Simply because the officer was not able to precisely define the perimeters of the first judicial district of Hinds County does not prohibit him from testifying to *his knowledge* that the location of the incident was inside the first judicial district of Hinds County. Furthermore, in order to simplify matters, the trial court took judicial notice of the location so as to establish venue. The Mississippi Supreme Court has allowed a trial court to take judicial notice for the purpose of establishing venue. *See Jackson v. State*, 556 So. 2d 335, 337 (Miss. 1990) (trial court took judicial notice that city was located within specified county). We find this assignment of error to be without merit.

IV. THE TRIAL COURT ERRED IN SUBMITTING A JURY INSTRUCTION WHICH ALLOWED "INTELLIGENCE" TO BE CONSIDERED IN WEIGHING THE CREDIBILITY OF EVIDENCE.

Howard points to the jury instruction which included intelligence as a factor to be considered by the jury in evaluating the testimony of witnesses. Howard relies on *Sumrall v. State* arguing that this instruction unfairly singled him out since he was the only witness of the defense. *Sumrall v. State*, 343 So.2d 481, 482 (Miss. 1977) The instruction, C-6, reads in relevant part:

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, and demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters, the extent to which it is contradicted by other evidence in the case

The State did not address this issue in its brief. However, we find Howard's reliance upon *Sumrall* is misplaced. In *Sumrall*, the trial court instructed the jury that "the motives and the interest of any witnesses" could be considered in evaluating credibility. *Id.* at 482. The Mississippi Supreme Court reversed determining that such an instruction diminished the right of the accused to testify because he was the only witness with a vital interest in the outcome. *Id.* Howard parallels *Sumrall* concluding that because he was the only defense witness, he was unfairly singled out by the "intelligence" portion instruction. We fail to see that the present case rises to the level presented in *Sumrall*. Howard has failed to establish how this instruction unfairly singled his testimony out from that of other witnesses.

We are, nonetheless, troubled by a jury instruction which includes intelligence as a factor in evaluating credibility. An instruction of this type is argumentative and misleading to the jury. In the present case, however, we believe the error complained of was not of such a nature to require reversal, but we caution trial courts that we do not approve of such an instruction.

Additionally, in evaluating this issue we find that the jury was correctly instructed that the jury was the exclusive judge of the weight and credibility of the testimony of each witness. Thus, there could not have been any confusion or prejudice. Accordingly, we find this issue to be without merit.

V. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO BOLSTER THE CREDIBILITY OF A WITNESS DURING CLOSING ARGUMENTS WHEN THAT WITNESS HAD EARLIER LIED UNDER OATH.

Howard argues that the prosecutor improperly bolstered the testimony of one of the State's witnesses. Howard asserts that the bolstering was not proper under state law, and that it occurred during the prosecution's rebuttal closing argument. Howard contends that he was never given the opportunity to rebut the impermissible bolstering. The comment Howard attacks includes:

I believe that Billy Wash believed or knew that there was gambling going on in there. But he's now employed as a security guard over in Newton, and he doesn't want to lose his job

Billy Wash, a former employee of Evans, was a witness for the State who testified that he did not know how the video poker machines operated, nor did he know whether Evans paid off the winners on the machines.

The State argues that the prosecutor did not bolster the testimony of a witness but merely commented on the testimony and evidence presented at trial. We agree. The Mississippi Supreme Court has recognized:

Generally, attorneys on both sides in a criminal prosecution are given broad latitude during closing arguments. This Court has explained that not only should the State and defense counsel be given wide latitude in their arguments to the jury, but the court should also be very careful in limiting free play of ideas, imagery, and personalities of counsel in their argument to jury. Given the latitude afforded an attorney during closing argument, any allegedly improper prosecutorial comment must be considered in context, considering the circumstances of the case, when deciding on their propriety.

Ballenger v. State, 667 So. 2d 1242, 1270 (Miss. 1995) (quoting *Ahmad v. State*, 603 So. 2d 843, 846 (Miss. 1992)). After evaluating the comment, we find that the prosecutor's comments do not bolster the testimony of Wash, but merely fall within the wide scope of closing argument. Thus, this issue is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE TO TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.

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