

IN THE COURT OF APPEALS 02/27/96
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00533 COA

HARRY P. TEASLEY

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

COURT FROM WHICH APPEALED: MONTGOMERY COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

V. W. CARMODY, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: LANE GREENLEE

NATURE OF THE CASE: CRIMINAL: DRIVING UNDER THE INFLUENCE

TRIAL COURT DISPOSITION: GUILTY OF DRIVING UNDER THE INFLUENCE

BEFORE FRAISER, C.J., BARBER, AND McMILLIN, JJ.

FRAISER, C.J., FOR THE COURT:

Harry P. Teasley was convicted of driving under the influence by the Montgomery County Circuit Court. On appeal Teasley raises issues regarding: (1) an alleged lack of evidence that the requisite time period was observed before testing his blood alcohol level; (2) an alleged violation of the sequestration rule; (3) an alleged lack of probable cause; (4) an alleged lack of subject matter jurisdiction; (5) an alleged failure by the trial court to grant a mistrial for the admission of testimony previously ruled inadmissible; and (6) an alleged error in the trial court's admission of intoxilyzer test results without an adequate evidentiary foundation. Because there is no reversible error, we affirm.

I. FACTS

On January 25, 1992, Mississippi Highway Patrolman Billy Brister received a radio dispatch from the Winona Police Department that there was a suspicious, bloody individual near the General Deli located on Highway 82. Already in the immediate vicinity of the General Deli, Officer Brister witnessed an automobile leaving the General Deli's parking lot. Observing no one else and assuming the blood-covered individual to be inside, Officer Brister signaled the automobile to pull over. The bloody person was inside the automobile. The person was Teasley. Officer Brister asked Teasley to exit the car and proceed to the rear of the vehicle. Shortly thereafter, Officer Jerry Bridges of the Montgomery County Sheriff's Department arrived.

Because Teasley had the aroma of liquor about him, demonstrated impaired speech, and a lack of self-control, Officer Brister decided to administer a field intoxilyzer test. This test indicated Teasley's blood alcohol level was in excess of the legal limit of .10 %. He was then taken to the Montgomery County jail where a second intoxilyzer test was administered by Officer Bridges. The intoxilyzer indicated that Teasley's blood alcohol content was .21%. Accordingly, he was given a traffic ticket charging him with violation of section 63-11-30(1)(c) of the Mississippi Code driving under the influence, a first offense.

The ticket was signed by Officer Brister and sworn before Linda Crostwaite; however, Crostwaite neglected to note her title of office below her signature on the traffic ticket. On its face the ticket shows that the offense was committed in the "State of Mississippi, County of Montgomery." The location of the violation is listed as "82 + 55" in District 2 at Highway 55.

A jury found Teasley guilty of driving under the influence of an intoxicating liquor. The Montgomery County Circuit Court sentenced him to pay a fine of \$300.00 plus court costs.

II. DISCUSSION

A. THE DIRECTED VERDICT

First, Teasley contends that the trial court "erred when it failed to grant appellant's request for a directed verdict at the close of the State's case because the State failed to provide sufficient evidence that the requisite time period was observed before testing the appellant." The State argues that Teasley is barred from asserting this error. The State is partially correct.

Although Teasley moved for a directed verdict at the close of the State's case, he proceeded to

introduce evidence after the State had rested its case. Such action waives his right to appeal that ruling and bars this Court from considering the directed verdict issue on appeal. *Harris v. State*, 576 So. 2d 1262, 1263 (Miss. 1991) (holding appeals court barred from considering directed verdict motion made at close of State's case where criminal defendant introduced evidence after close of State's case); *see also Stringer v. State*, 557 So. 2d 796, 797 (Miss. 1990); *Lambert v. State*, 462 So. 2d 308, 313 (Miss. 1984); *Rainer v. State*, 438 So. 2d 290, 292 (Miss. 1983); *Robinson v. State*, 418 So. 2d 749, 750-51 (Miss. 1982); *Tubbs v. State*, 402 So. 2d 830, 835 (Miss. 1981). Further, examination of this rule reveals the boundaries of the waiver. A request for a directed verdict challenges the legal sufficiency of the evidence placed before the court at the time the request is made. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). The procedural limitation of the rule is articulated in *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987). In *Wetz*, the Mississippi Supreme Court stated:

We have, of course, stated this waiver rule on numerous occasions, generally without bothering to explain its limited procedural meaning. Because the point is often misunderstood an explanation may be helpful. . . .

By offering evidence of his own, the defendant in no way waives the right to challenge the sufficiency or weight of the evidence in the event of an adverse jury verdict. What the waiver rule means is that the defendant must proceed on the basis of the evidence before the court at the time the challenge is made and not in the limited state of the record which may have existed back when the motion for a directed verdict was originally made.

Put otherwise, all of these motions--the motion for directed verdict made at the end of the case for the prosecution, the request for a peremptory instruction at the end of all of the evidence or the motion for a directed verdict at that point, or, finally, a motion for judgment of acquittal notwithstanding the verdict--are procedural vehicles for challenging the sufficiency of the case for the prosecution. Each requires that the court consider all of the evidence before it at the time the motion is considered. *When the sufficiency of the evidence is challenged on appeal, this Court properly should review the Circuit Court's ruling on the last occasion when the sufficiency of the evidence was challenged before the trial court.*

Wetz, 503 So. 2d at 807-08 n.3 (emphasis added) (citations omitted).

In this case, Teasley challenges the sufficiency of the evidence regarding the time period elapsed before the intoxilyzer blood alcohol test was administered. Because the last occasion on which the trial court ruled on the challenge to the sufficiency of the evidence was in response to Teasley's motion for a JNOV, we consider the issue based upon the record before the court at that time.

The standard of review of the legal sufficiency of the evidence is as follows:

[W]e must, with respect to each element of the offense, consider all of the evidence -- not

just the evidence which supports the case for the prosecution -- in the light most favorable to the verdict. The credible evidence which is consistent with the guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Id. at 808 (citations omitted).

Teasley's assertion of error is narrowly cast. He questions the sufficiency of the evidence regarding the time period prior to administration of the intoxilyzer test. Mississippi law requires that "[n]o such [intoxilyzer] test shall be given by an officer or any agency to any person within fifteen (15) minutes of consumption of any substance by mouth." Miss. Code Ann. § 63-11-5 (Rev. 1993). Considering the evidence in the light most favorable to the verdict, we find sufficient evidence in the record establishing that there was at least a fifteen-minute time period before the intoxilyzer test was administered to Teasley during which he consumed nothing by mouth. Officer Bridges testified that Teasley was in custody fifteen to twenty minutes before he was tested. Officer Brister testified that Teasley was in custody approximately twenty minutes before the test was administered. Teasley was observed by one of the two officers the entire time he was in custody prior to testing. Neither officer observed him consume anything. Moreover, Teasley testified that he consumed nothing after he was stopped by the police.

We cannot say that the evidence is such that reasonable and fair-minded jurors could only find that the fifteen-minute period was not observed. The evidence was sufficient.

B. THE SEQUESTRATION RULE

Second, Teasley argues that the trial court committed reversible error in allowing the State to recall Officer Billy Brister as a rebuttal witness after he had been finally excused. Teasley claims Brister's testimony violated the sequestration rule. We disagree.

The Mississippi Supreme Court has recognized that the witness sequestration rule serves to discourage a witness from tailoring testimony in accord to what the witness has heard from the stand and to facilitate in exposing false testimony. *Powell v. State*, 662 So. 2d 1095, 1098 (Miss. 1995); *see also Baine v. State*, 606 So. 2d 1076, 1083 (Miss. 1992); *Moffett v. State*, 540 So. 2d 1313, 1317 (Miss. 1989); *Doby v. State*, 532 So. 2d 584, 589 (Miss. 1988). The sequestration rule is violated when a witness is informed, either directly or indirectly, of what another witness has said on the witness stand. *Powell*, 662 So. 2d at 1097. In the case at bar, Officer Brister did not hear any testimony. Teasley alleges that the prosecuting attorney must have told Officer Brister what was said on the stand. Indeed, when an attorney informs a witness of another witness's statement on the witness stand, the sequestration rule is violated. *Doby*, 532 So. 2d at 589. However, Teasley's assertions alone are not proof that the sequestration rule was violated. The record is devoid of proof that the prosecutor communicated the testimony of any other witness to Officer Brister; therefore, we cannot hold that the sequestration rule was violated. The Mississippi Supreme Court has recognized

"that attorneys need to consult with their witnesses in order to prepare them to testify." *Douglas v State*, 525 So. 2d 1312, 1319 (Miss. 1988). Teasley proved only that the prosecutor determined that Officer Brister had the information he needed for rebuttal; he did not prove that the prosecutor related the testimony of any other witness to Officer Brister. Absent proof that the prosecutor related testimony to a witness, we will not find a violation of the sequestration rule.

Assuming, *arguendo*, that the sequestration rule was contravened, the violation would not constitute reversible error on the facts of this case. When a sequestration rule violation is assigned as error on appeal, the failure of the judge to order a mistrial or to exclude testimony will not justify reversal absent a showing of prejudice sufficient to constitute an abuse of discretion. *Powell*, 662 So. 2d at 1098. At best, Officer Brister's testimony was cumulative. Officer Bridges had previously testified to the same facts. Even if the sequestration rule had been violated, Teasley was not prejudiced to the extent necessary for reversal.

C. PROBABLE CAUSE

Third, Teasley maintains that Officer Brister did not have sufficient cause to justify his stop and arrest. At the outset, we distinguish between the initial stop and the arrest. The validity of an officer's stop is not judged on whether he had grounds for an arrest, but whether he had grounds for a stop. "It is elemental that probable cause is not a prerequisite to a brief investigatory stop, where the officer has reasonable suspicion based on articulable facts that criminal activity is afoot." *Neely v. State ex rel. Tate County*, 628 So. 2d 1376, 1379 (Miss. 1993). Based upon the radio dispatch, Officer Brister's proximity to the General Deli, and Teasley being the only person sighted in the area, Officer Brister had a reasonable and articulable basis for stopping Teasley for non-intrusive investigatory activities.

We next examine the issue of whether the officer had probable cause to arrest Teasley. "Probable cause exists where the arresting officer has facts and circumstances within his knowledge which are sufficient within themselves to warrant a man of reasonable caution to believe that a person has committed an offense. Probable cause for arrest is something stronger than bare suspicion or belief of the officer." *Seales v. State*, 495 So. 2d 475, 477-78 (Miss. 1986).

The record shows that after Officer Brister stopped Teasley's car and verified that Teasley was the suspicious blood-covered person described in the radio bulletin. The officer described Teasley as reeking of liquor, having trouble walking, being uncoordinated, and having impaired speech. Upon recognizing what he thought to be an intoxicated driver, the officer administered a field sobriety test with a portable intoxilyzer, which Teasley failed. Teasley was then taken to the Montgomery County jail for a second intoxilyzer test administered by Officer Bridges. Upon failing this test, Teasley was arrested. Under the facts and circumstances reflected in the record, the officer's belief that Teasley had committed the offense of driving under the influence was reasonable. We therefore find the assertion of error regarding Teasley's stop and arrest without merit.

D. SUBJECT MATTER JURISDICTION

Next, Teasley asserts that the trial court and this Court lack subject-matter jurisdiction because the charging document, a traffic ticket, (1) was not sworn to before a court clerk or deputy clerk; (2) failed to state that the offense was against the peace and dignity of the State; and (3) was not taken

before a court clerk or deputy clerk.

Teasley claims first that the charging instrument was not properly sworn to because Linda Crostwaite "neglected to put the or her title of office" below her signature on the traffic ticket; thus, the trial court and this Court lack subject-matter jurisdiction. We disagree.

Mississippi law dictates that a traffic ticket charging a violation of the law of this State must be duly sworn. Miss. Code Ann. § 63-9-21(3) (1972). The Mississippi Supreme Court has recently held that when a traffic ticket is signed by the arresting officer and witnessed by a county clerk or deputy clerk, the ticket constitutes a validly sworn charging instrument. *Bearden v. State*, 662 So. 2d 620, 625 (Miss. 1995). Crostwaite's failure to note her office below her name is not a fatal defect in the charging instrument. The Mississippi Supreme Court has held that the failure of "an officer authorized to administer oaths" to place his jurat on the document which he notarized is not a fatal defect to the validity of the sworn instrument. *State v. Allen*, 200 Miss. 494, 485, 27 So. 2d 695, 695 (1946) (en banc). In this case, it was not the complete jurat that was missing, but only Ms. Crostwaite's title of office. Hence, the ticket is on its face a valid charging document. While it is preferable that a county clerk or deputy clerk note her position below her signature on sworn documents, the omission of Ms. Crostwaite's office is not a fatal defect to this charging instrument.

Teasley next maintains that the charging instrument failed to establish that the violation took place on a public street or highway in Montgomery County. This allegation is unfounded. The Mississippi Supreme Court recently decided this question in *Bearden v. State*, 662 So. 2d 620, 625 (Miss. 1995). In *Bearden*, the Mississippi Supreme Court held:

Finally, *Bearden* claims that although the top of the affidavit reads 'State of Mississippi, County of Sunflower,' it is insufficient because the body of the affidavit does not contain the location of the offense. Again the citation shows on its face that the location was listed as 'Inverness' in District 2, on Highway 49. In the first place, the caption of the citation informs *Bearden* that Sunflower County is the place of the offense. Even if it did not, the fact that the body of the citation shows the offense to have occurred in Inverness, District 2 on Highway 49 sufficiently states venue as this Court will take judicial notice that a certain town is in a given county. *Clark v. State*, 230 Miss. 143, 146, 92 So. 2d 452, 453 (1957); *Tillman v. State*, 213 Miss. 136, 139, 56 So. 2d 91, 92 (1952); see also 22 C.J.S. Criminal Law § 332 (1989).

Bearden, 662 So. 2d at 625. Similarly, the ticket in the present case reflects that the offense was committed in the "State of Mississippi, County of Montgomery." The location is listed as "82 + 55" in District 2 at Highway 55. The ticket clearly states that the offense occurred in the State of Mississippi in Montgomery County. Further, we take judicial notice that Highway 82 and Interstate 55 are public highways. *Stewart v. Davis*, 571 So. 2d 926, 929 (Miss. 1990). The charging document in this case sufficiently establishes that the violation occurred on a public highway in Montgomery County, Mississippi.

Teasley finally alleges that the traffic ticket lacks the phrase "against the peace and dignity of the State of Mississippi." This is simply not true. The phrase plainly appears on the document.

Teasley's challenges to the trial court's jurisdiction are without merit. Subject-matter jurisdiction was properly established by the traffic ticket.

E. MOTION FOR MISTRIAL

Teasley next argues that Officer Brister's testimony that he had conducted a field sobriety test on Teasley was inadmissible. During trial, Officer Brister testified that he had conducted a field intoxilyzer test. Teasley's counsel objected and was heard outside the presence of the jury. The court then ordered Officer Brister not to discuss the field sobriety test because it was inadmissible and instructed the jury to disregard the test.

Later in the trial, Teasley's counsel and Officer Bridges engaged in the following exchange:

BY MR. CARMODY: "And you were parked behind the highway patrol car?"

BY OFFICER BRIDGES: "Yes sir."

BY MR. CARMODY: "At what point did you get out of your vehicle?"

BY OFFICER BRIDGES: "As soon as I arrived."

BY MR. CARMODY: "And what did you do then?"

BY OFFICER BRIDGES: "I approached the front of the highway patrol vehicle."

BY MR. CARMODY: "And what if anything, did the highway patrol officer say to you?"

BY OFFICER BRIDGES: "If I remember correctly he mentioned that the glove box contained a weapon; that he was going to remove it, and that the -- was going to administer a portable alcohol test."

After this exchange, Teasley's counsel then moved for a mistrial.

The trial court denied the motion. The trial judge said, "I'm going to overrule the motion for a mistrial, because I think it can be, but I don't think the jury has heard enough about this test to have any thoughts on it one way or the other." The trial judge instructed the jury to disregard any mention of the field alcohol test.

Rule 5.15 of the Mississippi Uniform Criminal Rules of Circuit Court Practice provides that the trial court shall declare a mistrial on the motion of the defendant if there occurs an "error or legal defect in the proceeding, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." Unif. Crim. R. Cir. Ct. Prac. 5.15. In accordance with the rule, the Mississippi Supreme Court has held that an occurrence of any prejudicially inadmissible matter, the damaging effect of which cannot be removed by admonition or instructions, necessitates a mistrial. *See Reynolds v. State*, 585 So. 2d 753, 755 (Miss. 1991); *Davis v. State*, 530 So. 2d 694, 697 (Miss. 1988).

The trial judge is in the best position to determine if a remark is truly prejudicial; therefore, considerable discretion is given to the trial judge to determine whether a remark creates irreparable prejudice necessitating a mistrial. Where the remark creates no irreparable prejudice, then the trial court should admonish the jury to disregard the improper remark. *Reynolds*, 530 So. 2d at 694; *Roundtree v. State*, 568 So. 2d 1173, 1177 (Miss. 1990). Such remedial acts of the trial court are usually deemed sufficient to remove any prejudicial effect from the minds of the jurors. The jury is presumed to have followed the instructions of the trial court. *Reynolds*, 530 So. 2d at 694; *Davis*, 530 So. 2d at 697.

The trial judge correctly found Officer Bridges' reference to the field intoxilyzer caused no prejudice to Teasley. Since the results of the field alcohol test were never mentioned, no prejudice resulted from the fact that the jury knew that a field alcohol test was administered. The trial judge properly admonished the jury to disregard the reference to the field alcohol test each time it was mentioned. We presume that the jury followed these instructions. Moreover, Officer Brister's testimony was elicited by Teasley's counsel. The trial court did not err in refusing to grant the motion for a mistrial.

F. ADMISSIBILITY OF THE INTOXILYZER TEST RESULTS

Finally, Teasley contends that the results of the intoxilyzer test were inadmissible. Before intoxilyzer test results may be admitted, the test must be performed according to approved methods, by a person certified to do so, and on a machine certified as accurate. *Johnston v. State*, 567 So. 2d 237, 237 (Miss. 1990). On appeal, Teasley does not dispute that the test was performed according to approved methods or that the machine was certified as accurate. Teasley claims that Officer Bridges was not a person approved to administer the intoxilyzer to Teasley, despite Officer Bridges' certification for this purpose.

Teasley maintains that the administrator of an intoxilyzer test must show that he is both certified to administer the test and that he is an educationally certified officer. He bases this contention on his interpretation of section 63-11-19 of the Mississippi Code which reads as follows:

Tests to be performed according to approved methods;
certification of administrators.

A chemical analysis of the person's breath, blood or urine, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Crime Laboratory created pursuant to Section 45-1-17 and the Commissioner of Public Safety and performed by an individual possessing a valid permit issued by the State Crime Laboratory for making such analysis. The State Crime Laboratory and the Commissioner of Public Safety are authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Crime Laboratory. The State Crime Laboratory shall not approve the permit required herein for any law enforcement officer other than a member of the State Highway Patrol, a sheriff or his deputies, [or] a city policeman

Miss. Code Ann. § 63-11-19 (1972).

We do not agree with Teasley's interpretation of the statute. The statute does not require a police officer to be educationally certified prior or as a prerequisite to admitting intoxilyzer test results. The statute allows the Commissioner of Public Safety to "approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses." *Id.* The statute also grants to the State Crime Laboratory discretionary authority to terminate or revoke permits and restrict permit approval to certain law enforcement officers, including city policemen. The statute does not mandate specific educational requirements for one obtaining a permit. Thus, every police officer who holds a certificate issued pursuant to the statute is authorized to administer intoxilyzer tests as a certified police officer, and no additional proof is required. Officer Bridges was certified to administer the intoxilyzer test to Teasley; hence, the intoxilyzer test results were admissible. Teasley's assertion of error is without merit.

For the foregoing reasons the judgment of the Montgomery Circuit Court is affirmed.

THE JUDGMENT OF THE MONTGOMERY COUNTY CIRCUIT COURT OF CONVICTION OF DRIVING UNDER THE INFLUENCE AND FINES OF \$300.00 AND ASSESSMENTS REQUIRED BY LAW IS AFFIRMED. COSTS ARE ASSESSED AGAINST THE APPELLANT.

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