

IN THE COURT OF APPEALS 06/04/96
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00193 COA

AARON CARAY TRAVIS

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. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT:

EDWARD BLACKMON, JR.

ATTORNEY(S) FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY(S): EDWARD J. PETERS; PATRICIA BENNETT

NATURE OF THE CASE: ARMED ROBBERY

TRIAL COURT DISPOSITION: CONVICTION AND SENTENCED TO SERVE A TERM OF
LIFE IN THE CUSTODY OF THE MDOC

BEFORE THOMAS, P.J., BARBER, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Aaron Caray Travis was indicted and convicted of armed robbery. The jury sentenced him to serve a life sentence in the custody of the Mississippi Department of Corrections. The court denied Travis's motion for JNOV or, in the alternative, a new trial. We find that none of Travis's issues on appeal has merit and therefore affirm.

FACTS

On December 10, 1993, the Westland Plaza branch of Trustmark National Bank was robbed of \$9,782.00. Michael Henderson and Travis were charged with and indicted for armed robbery of the bank. Evidence at trial indicated that Travis was a passenger in the getaway car but never entered the bank itself. Henderson and Travis apparently fled the scene in the former's automobile before becoming involved in an automobile accident near Metrocenter Mall. Trial evidence showed that Travis had fired shots at pursuing police officers during the automobile getaway attempt, and he also had shot at officers after exiting the wrecked automobile. He was subsequently stopped when one of the officers' bullets hit him in the back of the head. Officers followed a trail of money to Travis and found the money bag used in the robbery near him. Travis was eventually tried and convicted of aggravated assault on a law enforcement officer. The next trial, upon which this appeal is based, concerned the charge of armed robbery.

Travis contended at trial that he had no idea that Henderson went into the bank to commit an armed robbery. He testified that Henderson and he drove to Westland Plaza in Henderson's car. Travis stated that he went into a store to get some potato chips and a soft drink and that, when he returned to the car, Henderson was gone. Travis said that, soon after he returned to the car, Henderson came running toward the car wearing a ski mask, jumped inside, threw a bag on his side of the car, and laid a gun down between them. He stated that, as they sped away, he never knew that Henderson had robbed a bank. He said that red smoke soon filled the car, and that he could not breathe or see because of it. He denied ever shooting at any police officers.

The State contended that, although Travis never entered the bank, he clearly aided, assisted, and participated in the armed robbery as an accomplice such that he was a principal in its commission and as guilty by law as Henderson.

Travis moved for a directed verdict both at the end of the State's case and at the end of his own case. The court denied both motions. The jury found Travis guilty of armed robbery and sentenced him to life imprisonment. The court later denied Travis's motion for JNOV or, in the alternative, a new trial. Travis now appeals the jury's verdict and sentence.

ANALYSIS

I. DID THE INDICTMENT OF ARMED ROBBERY GIVE TRAVIS NOTICE OF THE STATE'S CASE, AND DID THE INDICTMENT CONFORM TO THE PROOF PRESENTED BY THE STATE AT TRIAL?

Travis contends that there was substantial variance between the indictment and the proof presented by the State. He argues that the indictment failed to notify him that he could be convicted as an accessory to armed robbery since it only concerned the charge as a principal to the crime. He contends that the proof showed that he was not involved in the actual robbery because he never entered the bank with a gun or demanded money. The essence of his argument is that the indictment against him was for armed robbery, but the proof at trial showed at most that he was an accessory after the fact.

Mississippi statutory law states that "[e]very person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such" Miss. Code Ann. § 97-1-3 (1972). Additionally, statutory law terms an accessory after the fact as one who "concealed, received, or relieved any felon, or having aided or assisted any felon, knowing that such person had committed a felony, with intent to enable such felon to escape or to avoid arrest, trial, conviction or punishment, after the commission of such felony. . . ." *Id.* § 97-1-5.

The Mississippi Supreme Court has held that a defendant is procedurally barred from raising issues on appeal if he either cites support for his arguments that is different from the support cited at trial or fails to raise the issue at trial. *Holland v. State*, 587 So. 2d 848, 868 n.18 (Miss. 1991). "A trial judge cannot be put in error on a matter which was not presented to him for decision." *Id.* (citations omitted).

In the present case, Travis's arguments regarding this issue are procedurally barred. His arguments on this issue were not raised at trial, nor were they raised in his motion for JNOV or new trial. Additionally, Travis's arguments are invalid on their merits. Trial evidence clearly showed that Travis was intimately involved with the robbery both before and after the fact. The jury was clearly within its power to infer from the evidence that Travis was involved as an accessory before the crime. Therefore under the statute, Travis could be indicted, tried, and punished as a principal to the crime, regardless of whether or not he entered the bank and wielded a gun at anyone. The indictment in this case was accurate--Travis had clear notice that he was being indicted as a principal along with Henderson. Moreover, Travis failed to request a jury instruction of guilt as an accessory after the fact, which should have been given if requested. *See Gangl v. State*, 539 So. 2d 132, 135-37 (Miss. 1989). However, Travis's argument that the evidence, at most, showed that he was an accessory after the fact is irrelevant in light of the evidence of his involvement before the fact and as a principal. This issue fails both procedurally and upon its merits.

II. DID THE TRIAL COURT ERR BY REFUSING TRAVIS'S MOTIONS FOR DIRECTED VERDICT?

Travis frames this issue in terms of a lack of the sufficiency of the evidence against him, but argues in his appeal both a lack of the sufficiency and the weight of the evidence. He argues that no evidence existed to prove that he planned or participated in the actual armed robbery. He believes that he should have been granted a directed verdict because the evidence was insufficient to convict him of armed robbery. He also believes that the jury verdict was against the overwhelming weight of the evidence so that he deserves a new trial.

Travis's arguments regarding the denial of his motion for directed verdict and the denial of the JNOV both challenge the legal sufficiency of the evidence against him. These challenges require consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled Travis's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Travis's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to 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. (citations omitted).

Here the evidence was legally sufficient to find that Travis participated in, and was intimately involved with, the armed robbery. Travis, as a passenger in the getaway car, fired a gun at pursuing police officers. After the getaway car wrecked into another vehicle near the Metrocenter Mall, Travis again fired shots at police officers in his attempt to flee the scene. A trail of cash led to Travis himself, and police officers found the money bag containing red dye packs and remaining cash near the spot where Travis was eventually apprehended. Although no evidence shows that Travis himself entered the bank, the evidence of this armed robbery indicates that Travis clearly acted in conjunction with Henderson. The evidence consistent with the guilty verdict must be accepted as true. *Id.* Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Travis not guilty. Here the evidence was legally sufficient to support the conclusion, both directly and by inference, that Travis was an accessory before and after the fact even though he did not enter the bank and take the money from the teller. Evidence showed that Travis shot at police officers and fled from the getaway car with the money bag. He was undeniably involved in the crime. Mississippi statutory law clearly provides that an accessory before the fact shall be considered and punished as a principal of the felony as well. The evidence was sufficient to support the jury verdict that Travis should be deemed a principal in the armed robbery. The evidence was also amply sufficient to support the trial court's denial of Travis's motions for directed verdict and of his post-trial motion for JNOV.

Travis also argues that the jury verdict was against the overwhelming weight of the evidence and requests a new trial. The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain*, 625 So. 2d at 781 (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989)

(witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, the jury heard the witnesses for and the evidence presented by both the State and the defense. The State's evidence showed that, although Travis never entered the bank itself, he was inextricably connected to the armed robbery. He was a passenger in the getaway car, and he shot at pursuing police officers. Officers recovered the bank's money bag, containing red dye packs and remaining cash, near the location at which Travis was eventually apprehended. Travis testified in his own defense that he was a passenger in the car but was completely unaware that any bank had been robbed. He stated that he went into a store for potato chips and a drink and subsequently went back to the car to find that Henderson was gone. He testified that, soon after he got back into the car, Henderson appeared with a ski mask, jumped into the car, and threw a bag over on his side of the car. Finally he stated that he never, at any time, fired shots at police officers.

Travis's testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Travis. The trial court did not abuse its discretion by refusing to grant Travis a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to promote an unconscionable injustice. The trial court properly denied Travis's motion for a new trial.

III. DID THE TRIAL COURT ERR IN DENYING TRAVIS'S REQUEST TO EXHIBIT HIS HEAD WOUND TO STATE'S WITNESS OFFICER LANCASTER?

Travis contends that the trial court erred in refusing his request to exhibit his head wound to the officer who shot him. Travis argues that he wished to refresh Officer Lancaster's recollection since the latter had testified that he did not remember where he had shot Travis. Travis believes that displaying his head to Lancaster would have refreshed his recollection or allowed him to explain why and how Travis had been shot from behind. He argues that evidence of a shot striking him from behind and observation of the testimony of the officer who fired the shot may have convinced the jury that he was not involved in the armed robbery, but simply a passenger in the getaway car. In essence, Travis believes the trial court erred in sustaining the State's objection to his trial request.

The Mississippi Supreme Court has stated that when the State objects to defense counsel's questions, the court's sustaining the objection is subject to the abuse of discretion standard on appeal. *Barnes v. State*, 532 So. 2d 1231, 1234 (Miss. 1988). Moreover, the Mississippi Rules of Evidence state that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401. The rules also state that trial court error "may not be predicated

upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context" M.R. E. 103(a)(2).

In the present case, Travis's counsel asked Officer Lancaster on cross-examination to look at Travis's head and identify the place where Travis had been shot. The State objected to this request and based its objection on Lancaster's previous testimony that he could not tell exactly where the bullet had grazed Travis but only that it had hit him in the head. The State's objection was sustained, to which Travis's counsel replied that he only wanted to show Travis's head to Lancaster to make certain of the spot where the bullet hit him.

Travis failed to explain both at trial and in his motion for JNOV or new trial how he was harmed or prejudiced by the court's sustaining the State's objection. In his appeal brief, Travis seems to say that evidence of the bullet striking him from behind, in conjunction with Lancaster's testimony, would have shown that he was merely a passenger in the getaway car and not involved in the armed robbery itself. Under Mississippi Rule of Evidence 103, no technical requirement exists to make an offer of proof upon the court's sustaining an objection on cross-examination. M.R.E. 103(a)(2) cmt. However the rule does require that, before an error can be based upon an adverse evidentiary ruling, a substantial right of the complaining party must have been affected. M.R.E. 103(a).

Here, Travis makes no claim and offers no proof that he was prejudiced by the court's exclusion or that a substantial right was affected. We believe that Travis suffered no harm from not being allowed to show Officer Lancaster the location of his head wound. Lancaster stated that he hit Travis in the head and that there was blood all over, including all over Travis's head. Travis testified that he was in fact shot in the back of the head, and he showed the location of his wound to the jury. While the trial court could have allowed Travis to show *Lancaster* his wound, we cannot say that the court abused its discretion in sustaining the State's objection and preventing him from doing it. Although we believe the testimonial display would have been irrelevant, the relevancy question is not at issue because Travis: (1) failed to prove that a substantial right belonging to him was adversely affected and (2) failed to show prejudice to his case. No error can be based upon the trial court's evidentiary ruling because the record reveals that no substantial right was affected. We do not find that the trial court abused its discretion in sustaining the State's objection.

CONCLUSION

Finding no error in the trial below, we affirm the jury's verdict and sentence.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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