

**IN THE COURT OF APPEALS 04/23/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-01241 COA**

**GEORGE NIXON A/K/A GEORGE NIXON, JR.**

**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. R.I. PRICHARD III

COURT FROM WHICH APPEALED: PEARL RIVER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM L. DUCKER

ATTORNEYS FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: RICHARD DOUGLASS

NATURE OF THE CASE: CRIMINAL (FELONY)-SALE OF A CONTROLLED SUBSTANCE  
WITHIN 1500 FEET OF A SCHOOL

TRIAL COURT DISPOSITION: DEFENDANT NIXON CONVICTED OF SALE OF A  
CONTROLLED SUBSTANCE WITHIN 1500 FEET OF A SCHOOL AND SENTENCED TO A  
TERM OF 25 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF

## CORRECTIONS.

BEFORE BRIDGES, P.J., BARBER, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

George Nixon, Jr. was convicted by a Pearl River County Circuit Court jury for the sale of cocaine within 1,500 feet of Southside Elementary School in Picayune, Mississippi and sentenced to serve a term of twenty-five years in the custody of the Mississippi Department of Corrections. From that conviction and resulting sentence, Nixon brings this appeal, asserting (1) that the jury verdict was against the overwhelming weight of the evidence and (2) that the trial court erred in refusing a proffered defense instruction, D-6.

We conclude that the reasons advanced by Nixon for reversal of his conviction are without merit, and we affirm.

I.

### FACTS

On December 17, 1992, Officer Jeff Wheat and Officer James Jones of the Picayune Police Department were involved in an undercover narcotics investigation in the area of Beech Street in Picayune. While the officers were stopped at an intersection, Aaron Taylor approached the driver's side window of the vehicle, and Officer Wheat informed Taylor that he needed a "twenty," the street name for a rock of cocaine valued at twenty dollars. Taylor's companion across the street, later identified as George Nixon, informed Taylor that "he had it." Taylor crossed the street, and retrieved the rock from Nixon, who reached into his jacket pocket and placed the rock in Taylor's hand. Taylor then closed his hand, without reaching into his own pockets, and immediately returned to the truck with a white rock-like substance, later identified as cocaine. Officer Wheat paid Taylor the twenty dollars, and Taylor then ran back across the street.

As the officers drove away from the scene, they radioed Sergeant Brenda Varnado and Officer Ricky Frierson, who were operating surveillance in the area. The officers furnished Varnado and Frierson with a description of the person who furnished the drug as being a black male wearing a tan jacket, blue pants, and a blue hooded shirt. By the time these officers arrived, the suspects had left the corner where the transaction took place, but Nixon was seen sitting in a car about one block away. Based on the description given by Officers Wheat and Jones, and because there were no other suspects in the area, Sergeant Varnado was able to identify Nixon within approximately two minutes. Officers Wheat and Jones then returned to the area and verified that the suspect in custody was the same man who supplied the drugs to Taylor. The officers indicated they were able to make a positive identification of Nixon as the seller on their return based on the fact that he had remained in their view in the truck headlights throughout the transaction. Nixon was arrested and charged with the sale of a controlled substance.

Officer Varnado and Officer Jones testified that they later returned to the scene to measure the exact distance from the school to the point of the sale, which turned out to be 623 feet. Nixon was indicted for the sale of a controlled substance within 1,500 feet of a school.

II.

## THE JURY VERDICT

Nixon argues that the trial judge erred in refusing to grant a new trial because the jury verdict was against the overwhelming weight of the evidence. It is Nixon's contention that his testimony, corroborated by that of Aaron Taylor, contradicted the officers' testimony, and that no reasonable jury, in weighing that testimony, could have reached a verdict of guilty.

It is the responsibility of the jury to weigh and consider the conflicting evidence presented at trial and return a verdict accordingly. *Harris v. State*, 527 So. 2d 647, 649 (Miss. 1988) (citations omitted). "A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution." *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983) (quoting *Gandy v. State*, 373 So. 2d 1042, 1045 (Miss. 1979)).

On appeal, this Court may grant a motion for new trial only when the verdict of the jury is "so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice." *Hiter v. State*, 660 So. 2d 961, 964 (Miss. 1995). The evidence which supports the verdict must be accepted as true, and the appellate court may not reverse if it concludes, based upon an examination of the evidence in that light, that a "reasonable hypothetical juror could find beyond a reasonable doubt that the defendant was guilty." *Harris*, 527 So. 2d at 649 (citations omitted).

The jury was presented with the four officers' testimony that strongly indicated that Nixon supplied Taylor with the cocaine sold to Officer Wheat. Officers Wheat and Jones both testified that they observed Nixon in plain view in the truck headlights and identified him as the supplier of the crack. Both officers also testified that the streets in the area of Beech Street were empty and deserted on that particular night, and that Nixon and Taylor were the only two people around at the time of the sale.

Officers Varnado and Frierson testified that, upon receiving the radio dispatch describing the suspect as a black male wearing dark pants, a blue hooded shirt and tan jacket, they immediately proceeded to Beech Street and found an individual that fit the description given to them in a car about one block from where the transaction took place just minutes before. This individual was Nixon. Officer Frierson testified that when he and Varnado pulled in behind the car, Nixon and another man exited the vehicle. Frierson identified the other occupant of the car at the time of Nixon's arrest as Kharee Johns. Nixon argues that this creates some doubt regarding his identification, since no explanation was offered as to what became of Taylor or where Johns came from in such a short interval of time if the streets were, in fact, deserted. While this may be somewhat puzzling, it remains a fact that Nixon was positively identified by the officers involved in the buy. Nixon's claim regarding the implausibility

of his rapid change of companions may have been ammunition for impeachment of the officers' testimony before the jury; however, the jury resolved to believe the officers, and this Court is not at liberty to disturb that conclusion. *Burnham v. Tabb*, 508 So. 2d 1072, 1077 (Miss. 1987) (citations omitted).

Nixon testified that he was merely walking down the street in the area on the night in question. He further testified that he was not wearing dark pants, a tan jacket, or a blue hooded shirt, but, was wearing a grey jacket with jeans and black sneakers. He also refuted the officers' testimony that the area was deserted that night, stating that there were at least thirteen other people on the street at the time.

Aaron Taylor, testifying for Nixon, corroborated Nixon's statement that there were several people on the street that night. In addition, Taylor testified that he did not receive the dope from Nixon but merely walked across the street where Nixon and a group of people were standing to satisfy his curiosity about the two men wishing to purchase crack from him. Taylor stated that the crack he sold to Wheat was in his possession the entire time.

After hearing the testimony presented by both sides, the jury returned a verdict finding George Nixon guilty of the sale of cocaine within 1,500 feet of a school. After an examination of the evidence under the required standard of review, we cannot find that the verdict of guilty is so unsubstantiated that to allow it to stand would "sanction an unconscionable injustice." *Hiter*, 660 So. 2d at 964.

III.

#### JURY INSTRUCTION D-6

Nixon also alleges that the trial court erred in refusing to grant proffered jury instruction D-6, which stated as follows:

The court instructs the Jury that the Defendant, George Nixon, Jr., is competent to testify as a witness in his own behalf and that the testimony of the defendant should be considered as that of any other witness you have heard in this case and given such weight, faith and credit as you think proper.

In refusing the instruction, the trial judge, basing his decision on an unpublished opinion of the Mississippi Supreme Court, stated that the instruction constituted an improper comment on the weight to be assigned to the testimony of a particular witness, which, in this case, happened to be the testimony of the Defendant.

The Mississippi Supreme Court has stated on numerous occasions that, under these circumstances, a criminal defendant is not entitled to an instruction that singles out his testimony, giving it unjustified prominence in the eyes of the jury. Recently, in *McClain v. State*, the Court reiterated that proposition, stating that "[d]efendants are not entitled to an instruction which informs the jury that the defendant is a competent witness in his own behalf." *McClain v. State*, 625 So. 2d 774, 780 (Miss. 1993) (citations omitted); *see also Baker v. State*, 391 So. 2d 1010, 1011-12 (Miss. 1980); *Walters v. State*, 391 So. 2d 645, 651-52 (Miss. 1980).

The trial judge was correct in refusing to grant defense instruction D-6, and Nixon's conviction for

the sale of cocaine within 1,500 feet of a school is affirmed.

**THE JUDGMENT OF THE PEARL RIVER COUNTY CIRCUIT COURT FINDING GEORGE NIXON, JR. GUILTY OF THE SALE OF A CONTROLLED SUBSTANCE WITHIN 1500 FEET OF A SCHOOL AND SENTENCING HIM TO SERVE TWENTY-FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. THIS SENTENCE IS TO RUN CONSECUTIVELY WITH NIXON'S SENTENCE IN CASE NUMBER 7694-1. COSTS OF THIS APPEAL ARE ASSESSED TO PEARL RIVER COUNTY.**

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