

**IN THE COURT OF APPEALS 12/17/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-KA-01206 COA**

**MIKE GRAHAM A/K/A MICHAEL ALEXANDER GRAHAM**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

**PER CURIAM AFFIRMANCE MEMORANDUM OPINION**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MARCUS D. GORDON

COURT FROM WHICH APPEALED: NESHOPA COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

DONALD L. KILGORE

J. MAX KILPATRICK

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: BILLY L. GORE

DISTRICT ATTORNEY: KEN TURNER

NATURE OF THE CASE: FELONY: SALE OF CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: SALE OF COCAINE: SENTENCED TO SERVE A TERM OF 8  
YRS IN THE MDOC

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

PER CURIAM:

Mike Graham (Graham) was convicted of selling cocaine and sentenced to eight years in the custody of the Mississippi Department of Corrections. Feeling aggrieved, he appeals his sentence and conviction citing the following errors: (1) the trial court erred in refusing to admit into evidence a tape recording made by the Mississippi Bureau of Narcotics of the alleged cocaine sale, and (2) the trial court erred in overruling the Appellant's motion to set aside the jury verdict. Finding no reversible error, we affirm.

FACTS

On December 28, 1992, agent Stanley Wash of the Mississippi Bureau of Narcotics was conducting an undercover operation in Neshoba County in an attempt to purchase controlled substances from suspected violators. He used a confidential informant, Jerry Sanders, to introduce him to the suspected dealers.

Wash testified that on the day in question he and Sanders went to Neshoba County Properties (Properties) in Philadelphia, Mississippi to attempt to purchase controlled substances. At all relevant times, Wash was wearing a "body mike" to record the transaction. Upon arriving at the Properties, Sanders engaged in conversation with a black female to arrange a purchase. The female took the men into an apartment and had them go into the bathroom. After a few minutes, Mike Graham and Randy Gibson came into the bathroom area. Graham asked Wash what he wanted, and Wash responded that he wanted a hundred. Graham received eight rocks of cocaine from Gibson and gave them to Wash. Wash paid Graham \$100.00, and he and Sanders left the premises and met with the other surveillance officers.

The jury returned a verdict of guilty and Graham was sentenced to serve eight years. Unknown to the court, a complete set of the Mississippi Code Annotated (1972 ) was in the jury room during deliberations. The Appellant filed a motion to set aside the verdict based on this discovery. The motion was denied by the trial court.

DISCUSSION

1. The Trial Court Erred in Refusing to

Admit into Evidence the Tape Recording

Made by the Mississippi Bureau of Narcotics

Concerning the Alleged Sale of Cocaine

The Appellant argues that the trial court erred in refusing to admit into evidence a recording of the alleged transaction. According to Graham, he was not present at the transaction, and this denial by the lower court was highly prejudicial. The State counters that the trial court ruled correctly because the recording was not authenticated, the voices on the tape were not identified, and there was inadequate evidence admitted concerning the circumstances surrounding the making of the recording.

The standard of review concerning the admissibility of evidence is well established. Generally, it is within the trial court's discretion to determine the admissibility of evidence, and absent an abuse of discretion, this Court will not reverse his ruling. *Lewis v. State*, 573 So. 2d 719, 722 (Miss. 1990). Prior to being admitted at trial, the proffered evidence must satisfy the relevancy test embodied in Mississippi Rule of Evidence 401. Evidence is relevant if it has a 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. Unquestionably a tape recording of the alleged drug sale is relevant. Once relevancy is determined, the recording must then be properly authenticated and identified pursuant to Rule 901. Rule 901 reads as follows:

Rule 901. Requirement of Authentication or Identification

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

M.R.E. 901. The Appellant could have employed several means to authenticate the tape recording. The rule provides that voice identification and/or testimony from a witness with knowledge would suffice. Based on a review of the record, it is clear that the Appellant did not elicit sufficient testimony to authenticate the tape recording. This decision was within the discretion of the trial judge. Thus, the trial judge did not err in refusing to admit the recording into evidence.

## 2. The Trial Court Erred in Overruling

### the Appellant's Motion to Set Aside the Verdict

The Appellant next contends that he was denied a fair trial because a set of the Mississippi Code was left in the jury room. Thus, his motion to set aside the verdict should have been granted. The State counters that there was no evidence that the presence of the extraneous materials influenced the jury's verdict in any way. Additionally, the State argues that the Appellant failed to call any juror to testify to what influence, if any, the materials had in reaching the verdict. Therefore, the Appellant did not meet his burden of proof, and the motion was properly denied.

In the case before us, there is evidence that a set of the Code was, in fact, in the jury room during deliberations. However, Graham has introduced no evidence that the jury was aware of the books, read the books, or was influenced in its decision by the books. In a 1981 case, the Mississippi Supreme Court held that a jury verdict will not be set aside on the grounds that the jury consulted law books unless there is evidence of prejudice. *Annaratone v. State*, 399 So. 2d 825, 827 (Miss. 1981); *see also; Ex Parte Anderson*, 457 So. 2d 446, 447 (Ala. 1984) (motion for mistrial denied on

the grounds that law books were in jury room during deliberations); *State v. Hamilton*, 574 So. 2d 124, 125-27 (Fla. 1991) (magazines brought into the jury room did not materially prejudice defendant); *Willis v. State*, 512 N.E.2d 871, 876-77 (Ind. Ct. App. 1987) (jury's access to law books held harmless error without evidence of prejudice). Thus, there is no indication of any prejudice to the Appellant based on the accessibility of the Code. Consequently, this assignment of error is without merit.

**THE JUDGMENT OF THE NESHOPA COUNTY CIRCUIT COURT OF CONVICTION OF SALE OF COCAINE AND SENTENCE OF EIGHT YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

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