

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01298 COA

MILTON VINSON A/K/A MILTON LEE VINSON

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. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

H. E. ELLIS, SR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN DISTRICT ATTORNEY: CONO CARANA

NATURE OF THE CASE: CRIMINAL-ARMED ROBBERY AND AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: GUILTY-FOR ARMED ROBBERY SENTENCED TO 8 YRS.
IN MDOC WITHOUT PROBATION OR PAROLE; FOR AGGRAVATED ASSAULT,
SENTENCED TO 7 YRS. TO RUN CONSECUTIVELY

WITH THE SENTENCE FOR ARMED ROBBERY

MANDATE ISSUED: 6/10/97

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

DIAZ, J., FOR THE COURT:

Milton Vinson was convicted in the Circuit Court of Harrison County of armed robbery and aggravated assault. The appellant sets forth several errors that he claims the trial court made. Vinson claims that the trial court abused its discretion in refusing to allow him to recall Officer Thompson on the issue of identification, and that it erred when it ruled inadmissible the testimony of Appellant's bail bondsman, Mark Hollis. The trial court held this testimony to be inadmissible due to its irrelevancy, prejudice toward the State, and the fact that it would be a discovery violation. The appellant also contends that the court's refusal to give jury instruction D-7, a cautionary instruction on eyewitness testimony, was error, denial of Defendant's motion for a new trial was error, and that the cumulative effect of the errors denied the defendant a fair trial. Finding no error, we affirm.

FACTS

Brian Stender was a taxi driver for Yellow Cab in Biloxi, Mississippi. On the night of July 1, 1993, Stender, who drove a four-door taxi with a two-way radio and an overhead manual light, received a dispatch to Elmira Street in Biloxi to pick up a passenger around 11:00 p.m. Stender picked up his fare, who was waiting out by the mailbox, and started toward Father Ryan Street. The fare rode in the front seat of the cab. Once at the Father Ryan Street location, the man got out of the cab, walked behind the house, and came back with a \$20.00 bill. Because Stender did not have change, he and the man drove to several places trying to make change. They also went to several other places to get something to eat. Stender and his passenger then headed back to Father Ryan Street. When they arrived the passenger said to take him back to Pinecrest, the original location where Stender had picked him up. Stender waited for the passenger as he went behind a building. The passenger returned with a knife, stuck it to Stender's belly and said, "This is a hold up." Mr. Stender instinctively grabbed the knife, but the man grabbed it back and stabbed Stender in the leg. The passenger then asked Stender to turn the overhead light off. He also cut the mike cord on the radio. Next, he told Stender to give him all his money. Stender gave the assailant the \$10.00 Stender had, and Stender told the passenger to get out of his cab. The passenger said that he needed to go to Division Street to get some crack cocaine. Stender started toward Division Street, but when he neared the Keesler Air Force gate at White Avenue he turned toward the gate. The man then grabbed the steering wheel with both hands, and Stender turned off the car, put it in neutral, and jumped out of the cab. The passenger also jumped out and ran off. Stender then jumped back in the cab to prevent it from hitting another car, and drove it back to the Keesler gate. The guard at the gate called the police to make a report.

Officer Keith Thompson from the Biloxi Police Department was on patrol the night of July 1, 1993, and responded to the call from Keesler. Thompson was the first officer to arrive at the scene where he made a report and recovered a knife from the front seat of the cab. In the report, Stender stated that the perpetrator was a medium-sized black male of about 150 pounds, muscular, with short hair. Stender said the assailant was about twenty-five or twenty-six and believed he was wearing Levis and a shirt. After the crime scene and the evidence were secured, Stender was told to go to the police station and give a statement, which he did. On the 3rd of July, Stender again went to the police station, this time to make an identification of the suspect. Stender picked Milton Vinson out of the photographic lineup that Detective Grimes showed to him.

TRIAL

At trial, the State put on the testimony evidence of Stender and two police officers. Vinson put on no evidence. However, he proffered the testimony of Mark Hollis, a bail bondsman, whom the trial court did not allow to testify due to the irrelevance of his testimony and Vinson's discovery violation in trying to get the testimony into evidence. The trial court also refused Vinson his request to recall Officer Keith Thompson to ask about inconsistencies between the statement taken on the night of the crime and Stender's testimony at trial. The trial court also denied Vinson's cautionary jury instruction on eyewitnesses.

RESOLUTION OF THE ISSUES

A. Did the trial court abuse its discretion when it refused to allow Vinson to recall Officer Thompson?

Vinson wished to recall Officer Thompson to impeach Stender's statement concerning his identification of Vinson. He wanted to show that Stender's trial testimony and his statement made on the night of the crime about what the assailant was wearing were inconsistent. However, Vinson had already had a chance to cross-examine both Stender and Officer Thompson. When Vinson cross-examined Thompson, he asked Thompson if Stender had given him a description of the robber. Vinson did not ask Thompson specifically about the report.

When Vinson cross-examined Stender, Stender testified to what he believed the assailant was wearing. However, Vinson did not ask Stender if he reported something different on the night of the crime.

After the State rested, Vinson then sought to recall Officer Thompson to have him testify that his report showed Stender's description of the assailant wearing shorts and a shirt, not Levis and a shirt. This was to be offered to impeach Stender's identification of Vinson as his assailant. The trial court correctly refused to allow Vinson to recall Thompson. Stender had already testified to what Vinson was wearing, and the defense did not ask about the inconsistency of his testimony and the prior report so that Stender might explain. Therefore, no proper foundation was laid to allow Vinson to recall Officer Thompson.

This state's supreme court has held many times that the proper foundation must be laid to impeach a witness with prior inconsistent statements. *Whigham v. State*, 611 So. 2d 988 (Miss. 1992) and *Harris v. State*, No. 92-CT-00297-SCT, 1997 WL 45341 (Miss. Feb. 6, 1997). The court held in *Whigham* that if counsel wants to impeach a witness with an out-of-court statement that is inconsistent with his in-court testimony, then counsel must allow the witness, while he is on the stand, to explain or deny the statement. *Whigham*, 611 So. 2d at 994. The Court also stated in *Whigham* that the attorney knew prior to trial about the statements in question, yet did not ask the witness about them. *Id.*

Likewise, counsel here knew of the prior out-of-court statement of the victim; he had the document in his hand while he questioned Thompson, and he knew about it when he cross-examined Stender.

Yet counsel did not question either one about the inconsistencies while they were on the stand. Instead, he waited until the State closed its case in chief and then attempted to recall Thompson. As stated in *Whigham*, it would create manifest unfairness to allow inconsistent, out-of-court statements to be entered into evidence after the witness has been excused. The court went further to say that no court should be faulted for excluding such hearsay statements absent counsel laying the proper predicate. *Id.* Because Vinson chose not to ask Stender about the inconsistency, manifest unfairness would result if Officer Thompson were allowed to be recalled and testify about statements that Stender had not been allowed to explain or deny. Therefore, the trial court did not abuse its discretion when it denied Vinson an opportunity to recall Officer Thompson.

B. Did the trial court err in refusing to allow Mark Hollis to testify for the defense?

Vinson attempted to call Mark Hollis, his bail bondsman, to the stand to testify that Hollis had once mistook a stranger for Vinson. This was offered to prove the defense that Stender misidentified Vinson. However, Vinson did not give the State Hollis' name as a witness, as required by Rule 4.06(I) of the Uniform Criminal Rules of Circuit Court Practice. The rule, in essence, says that if one party does not disclose witnesses to the other in discovery or attempts to produce such witnesses during trial, the judge may:

(1) grant the other party a reasonable time to interview the witness and examine

any new evidence;

(2) if, after the interview and examination of evidence, the party claims unfair

surprise or undue prejudice, the court should exclude the evidence or grant a

continuance for a period of time reasonably necessary for the party or grant a

mistrial. This is to be done in the interest of justice and absent any unusual cir-

cumstances;

(3) if the party seeking to introduce such evidence wishes later to withdraw such,

then the court should not be required to grant a continuance or a mistrial for the

discovery violation.

Skaggs v. State, 676 So. 2d 897, 903 (Miss. 1996) and *Houston v. State*, 531 So.2d 598, 611-12

Miss. 1988).

The trial court in the case at bar followed this procedure correctly. The judge first gave the State adequate time to interview the surprise witness, and upon the claims of unfair surprise and undue prejudice by the State, the judge excluded the evidence. The trial judge chose to exclude the evidence not only because it was offered under a discovery violation that would unduly prejudice the State, but also due to its irrelevance.

Vinson contends that he did not have to disclose this witness to the State because he had not

requested any discovery from the State. Although Vinson did not request any discovery from the State, the trial court ordered the State to produce discovery to Vinson by a certain date. The record also indicates that Vinson's attorney signed an acknowledgment that states, "I understand that the District Attorney's office hereby requests reciprocal discovery according to rule 4.06(c)." Therefore, the defense attorney knew that the State expected discovery, had knowledge of the witness and what his testimony would be, and planned to call Hollis without providing proper discovery.

Houston, 531 So. 2d at 612, holds that to exclude a defense witness is a radical sanction which should rarely be used. It is generally only used when the defense has significantly participated in some deliberate, cynical scheme to gain a substantial tactical advantage. *Taylor v. Illinois*, 484 U.S. 400, 414-15 (1988). In the case at bar, the defendant has willfully withheld this discovery information from the State. Vinson had two months from the time Hollis had seen the look-alike until trial to give this information to the State. He decided to withhold the information until trial. If the trial judge had allowed this testimony, it would have caused the State undue prejudice by granting the defense a tactical advantage.

The trial court found, in addition to the discovery violation and the prejudice to the State, that the testimony was irrelevant. The mere fact that Mark Hollis mistook a stranger for Vinson one time, is not relevant to the issue of whether Stender identified Vinson correctly as the man who robbed and assaulted him. The look-alike was never found, or even looked for, and the assertion by Hollis that he saw someone who looked like Vinson two months before trial was totally irrelevant. We affirm the trial court's exclusion of the testimony on all grounds.

C. Did the trial court err in its denial of a cautionary jury instruction on eyewitness testimony?

Vinson argues that the trial court erred when it refused to give an instruction to the jury on eyewitness testimony. He quotes several cases in his brief to this Court which discuss the inherently suspicious nature of eyewitness identification. *United States v. Wade*, 388 U. S. 218 (1967) and *Manson v. Brathwaite*, 432 U.S. 98 (1977). Both cases point out that eyewitness identification can be easily swayed, and as such, is of suspicious nature. *Brathwaite*, 432 U.S. at 112 and *Wade*, 388 U.S. at 228-29. What Vinson fails to inform us is that these cases refer to instances where the police have made improper or unnecessary suggestions in conjunction with the pretrial identification procedure. *Id.* See also, *Hansen v. State*, 592 So. 2d 114, 137 (Miss. 1991). In the case at hand, there has been no evidence or any claim that the officer conducting the identification did anything improper or suggestive. The identification took place within a reasonable time after the crime and was conducted by the proper procedures.

The above cited cases along with *Neil v. Biggers*, 409 U.S. 188 (1972), which Vinson also cited, all speak to the admissibility of the eyewitness identification testimony itself, not to a cautionary jury instruction regarding the testimony. The identification testimony was admissible here. Vinson is arguing for new rule of law which would require a cautionary jury instruction be given any time there is eyewitness identification testimony. The jury instruction in question here is identical to the one which was refused in *Hansen*, 592 So. 2d at 141. The Mississippi Supreme Court has held several times that similar instruction should also not be given. *Hines v. State*, 339 So. 2d 56, 58 (Miss. 1976); *Clubb v. State*, 350 So. 2d 693, 697 (Miss. 1977); *Ragan v. State*, 318 So. 2d 879, 882 (Miss. 1975).

In *Holmes v. State*, 483 So. 2d 684, 687 (Miss. 1986), the Mississippi Supreme Court held that there was no rule of law or evidence which required that eyewitness identification testimony be viewed with caution or that juries be instructed to do so. We hold, as we have in the past, that the trial court properly refused such instruction.

D. Was the verdict against the overwhelming weight of the evidence and contrary to law?

In reviewing this claim, the Court should first distinguish between the sufficiency and the weight of the evidence. A challenge to the legal sufficiency of the evidence springs from the denial of a defendant's motion for directed verdict at the end of the state's case and from a motion for JNOV after the jury verdict, *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); whereas a challenge to the weight of the evidence is based on a denial of a motion for a new trial. *Jones v. State*, 635 So. 2d 884, 887 (Miss. 1994).

A challenge to the sufficiency of the evidence requires an analysis of the evidence by the trial judge to determine whether a hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty. *May v. State*, 460 So. 2d 778, 781 (Miss. 1985). If the judge finds in the affirmative, then he must deny the motion. *Id.* If he finds that no reasonable juror could find the defendant guilty beyond a reasonable doubt, then he must grant the motion. *Id.* We must examine the trial judge's overruling of the last motion in which the sufficiency of the evidence was called into question. *Jones v. State*, 635 So. 2d 884, 887 (Miss. 1994). Here that would be when the trial judge denied Defendant's motion for a directed verdict made after the State had presented its case. However, because Vinson proceeded with his case after the motion for directed verdict was overruled, then that directed verdict is waived and is "out of the case for all time". *Patrick v. Michigan National Bank*, 220 So. 2d 273, 275-76 (Miss. 1969). Vinson neither renewed the motion for a directed verdict at the end of all the evidence, nor did he move for a JNOV. Because the original motion for directed verdict made at the end of the State's case was waived and Vinson made no new motion, the argument set forth by Vinson as to the sufficiency of the evidence is beyond the scope of this review.

The decision of whether or not to grant a motion for a new trial rests in the sound discretion of the trial judge; it should be granted only where the judge is convinced that the verdict is so contrary to the overwhelming weight of the evidence that failure to grant the motion would result in an unconscionable injustice. *Id.* In determining whether a verdict is against the overwhelming weight of the evidence or not, this Court must view all evidence in the light most consistent with the jury verdict and should not overturn the verdict unless we find that the lower court abused its discretion when it denied the motion. *Blanks v. State*, 542 So. 2d 222, 228 (Miss. 1989). The proper function of the jury is to decide the outcome in this type of case, and the court should not substitute its own view of the evidence for that of the jury's. *Id.* at 226. Likewise, the reviewing court may not reverse unless it finds that there was an abuse of discretion by the lower court in denying the defendant's motion for a new trial. *Veal v. State*, 585 So. 2d 693, 695 (Miss. 1991).

In the present case, the State has proved that Stender positively identified Vinson as his assailant at a pretrial photo identification and again at trial. The State proved that Stender had sufficient time and opportunity to observe Vinson while the robbery and assault were taking place and that he saw him from different angles and in different lighting.

This Court finds, upon reviewing all of the evidence presented in the light most consistent with the

verdict, that the verdict was not against the overwhelming weight of the evidence and that the trial judge did not abuse his discretion in his denial of Defendant's motion for a new trial.

E. Did the cumulative effect of the errors deny the defendant a fair trial?

Vinson argues that whether any of the above asserted errors were reversible or not, that taken cumulatively, they require reversal. The defense cites *Jenkins v. State*, 607 So. 2d 1171, 1183 (Miss. 1992) as its source for this argument. However, this case and its predecessors speak to a defendant being denied a fair trial because of numerous prosecutorial errors not because of any error which the trial judge might have committed. This is in no way the situation in the case at bar. According to the record, the prosecution made no errors which denied Vinson of a fundamentally fair and impartial trial. Likewise, we have held that the trial judge committed no error whatsoever in the lower court, reversible or otherwise. Therefore, as stated in *McFee v. State*, where there is "no reversible error in any part, . . . there is no reversible error to the whole." *McFee v. State*, 511 So. 2d 130, 136 (Miss. 1987). We hold that there was no cumulative effect of errors which denied Vinson a fair trial.

CONCLUSION

Due to the above-stated reasons, this court finds that there was no reversible error committed by the trial court. We therefore affirm the lower court's ruling on all the issues presented.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF ARMED ROBBERY AND AGGRAVATED ASSAULT WITH A SENTENCE OF EIGHT YEARS WITHOUT PROBATION OR PAROLE FOR ARMED ROBBERY, AND SEVEN YEARS FOR AGGRAVATED ASSAULT TO RUN CONSECUTIVELY WITH THE ARMED ROBBERY SENTENCE IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

BRIDGES, C.J., AND McMILLIN, P.J., COLEMAN, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

THOMAS, P.J., AND HINKEBEIN, J., NOT PARTICIPATING.