

IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00434 COA

JERRY LYNN DOSS A/K/A JERRY LEE DOSS A/K/A "LYNN" 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. LAMAR PICKARD

COURT FROM WHICH APPEALED: JEFFERSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: ANITA STAMPS

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: ALEXANDER MARTIN

NATURE OF THE CASE: FELONY: UNLAWFUL SALE AND DELIVERY OF CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: CONVICTED OF SALE OF COCAINE; SENTENCE OF 30 YEARS WITH MDOC

MOTION FOR REHEARING FILED: 9/19/97

MANDATE ISSUED: 11/25/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

KING, J., FOR THE COURT:

A Jefferson County jury convicted Appellant Doss of the sale of cocaine, and the court sentenced him to serve a term of 30 years in the custody of the Mississippi Department of Corrections. Aggrieved, the Appellant appeals and assigns the following issues for review by this Court:

I. Whether the court erred by failing to declare a mistrial or admonish the jury after a witness gave prejudicial testimony;

II. Whether Appellant received the effective assistance of counsel;

III. Whether the trial court committed reversible error by allowing inadmissible evidence to be introduced.

We find no error and affirm the conviction and sentence.

### **FACTS**

On or about August 11, 1993, Eli Trunell, a confidential informant, drove James Cotton, an agent of the Mississippi Bureau of Narcotics, to the home of Doss for the purpose of making an undercover drug buy. Another agent of the narcotics bureau, Kim Sterling, performed surveillance of the activity from a distance.

When Trunell and Cotton arrived, Doss approached the vehicle and conversed with Cotton briefly. Then, Cotton told Doss that he wanted to purchase a \$100 piece. Doss responded by advising Cotton that he could get an extra one for \$100. Doss left the vehicle and went inside the house. Upon

returning, Doss gave Cotton five rock-like substances, later determined to be crack cocaine. Cotton proceeded to pay Doss \$100 in official state funds for the substance, but prior to doing so, Cotton inquired about the extra rock Doss stated that he would receive. Again, Doss left the vehicle and went inside the house. Doss returned with another rock-like substance and delivered it to Cotton. Thereafter, Trunell and Cotton left.

At trial, Doss admitted that Agent Cotton and Trunell visited his home on August 11, 1993, but denied selling the cocaine to Cotton. Specifically, Doss testified that he told Trunell and Cotton to leave his yard when Trunell inquired about a \$100 piece. Two witnesses testified that they were present on the day in question and overheard Doss ask Trunell and Cotton to leave when they inquired about the \$100 piece.

## **ANALYSIS OF THE ISSUES AND DISCUSSION OF THE LAW**

### **I.**

**DID THE TRIAL COURT ERR WHEN IT FAILED TO DECLARE A MISTRIAL OR ADMONISH THE JURY AFTER A WITNESS MADE A PREJUDICIAL STATEMENT?**

During the trial, defense counsel timely objected to the following testimony elicited by the State during its direct examination of Agent Cotton:

Prosecution: When you say you were going to try to make a buy, what does that detail?

Cotton: That details me being introduced to someone who we have information on that's allegedly selling drugs, illicit drugs.

Prosecution: Okay. And what information did you have on that particular day?

Cotton: Well, I talked -- before that day, several months before that day, I received numerous complaints from the sheriff from--

Upon inquiry from the court, defense counsel indicated that the basis of the objection was that the agent was being non-responsive to questions and also the agent was testifying to matter occurring prior to the date in question. After defense counsel had stated the basis for the objection, the court asked the attorneys to approach the bench. After an off-the-record bench conference, the State proceeded with direct examination of Officer Cotton. Doss contends that Officer Cotton's remark was prejudicial, and the court failed to satisfactorily cure the error either by declaring a mistrial or admonishing the jury.

Initially, we note that the record fails to indicate the trial judge's ruling upon Doss's objection. We assume that the objection was sustained because the State abandoned the line of questioning and commenced examining Officer Cotton on the events transpiring on August 11, 1993. Absent our

assumption that the objection was sustained, counsel for Doss failed to request a mistrial. It was incumbent upon defense counsel to move for a mistrial if he considered the trial judge's admonition inadequate. *Whitlock v. State*, 419 So. 2d 200, 202 (Miss. 1982). Moreover, because Officer Cotton failed to identify Doss as the subject of the complaints, the remarks were not irreparably prejudicial. This assignment of error lacks merit.

## II.

### DID DOSS RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL?

Doss states that he was deprived of the effective assistance of counsel because trial counsel (a) failed to make an opening statement, (b) failed to seek production of the audio taped recording of the transaction, (c) failed to object to Agent Cotton's use of notes without establishing the proper predicate, and (d) failed to challenge the in-court identification. A defendant desirous of obtaining a new trial on the basis of the denial of the effective assistance of counsel must prove that (1) counsel's performance was deficient and (2) under the totality of the circumstances, prejudice resulted from counsel's deficient performance. *Ahmad v. State*, 603 So. 2d, 843, 848 (Miss. 1992). In other words, the defendant must show that but for the unprofessional errors of counsel, there is a reasonable probability that the result would have been different. *Id.*

Trial counsel's decision not to make an opening statement was possibly strategic. *Cabello v. State*, 524 So. 2d 313, 318 (Miss. 1988). Therefore, we find no deficiency by the want of the opening statement. Even if we were to find counsel's performance in this arena deficient, Doss has failed to show that an opening statement would have changed the outcome.

In addition, we find no deficiency in trial counsel's failure to object to Agent Cotton's in-court identification testimony. It would have been futile to object to Agent Cotton's in-court identification testimony when trial counsel anticipated that Doss would testify to meeting Agent Cotton at his residence on the date in question.

Regarding Agent Cotton's use of notes while testifying, the record indicates that trial counsel made the following objection, but failed to obtain a ruling upon the objection:

Your Honor, we're going to object to that. Your Honor, he has indicated what his notes--in fact, I even objected to reading from his notes. He indicated what what his notes have indicated, and again, I have a problem with the generality of the questions and that's my objection.

Subsequently, trial counsel cross-examined Agent Cotton on the contents of his notes. Trial counsel may have erred by failing to obtain a ruling upon the objection and by subsequently cross-examining Agent Cotton on the content of his notes; however, the error was not of reversible magnitude. From

the notes, Agent Cotton described Doss's house and the clothing worn by Doss on the day in question. Because Doss admitted to meeting Agent Cotton on the day in question, the only issue to be resolved by the jury was whether Doss sold Agent Cotton crack cocaine at the meeting. This issue is not resolved by testimony describing Doss's clothing and house; therefore, no prejudice resulted from the testimony.

Lastly, perhaps defense counsel erred by failing to seek production of the audiotape recording, but the record indicates that trial counsel cured the potential damaging effects of the evidence by objecting to Agent Sterling's testimony concerning the transmission he received during surveillance activities. The audio recording was not introduced into evidence, and Agent Sterling was precluded from testifying concerning its contents. Thus, defense counsel's failure to request production of the audiotape was not detrimental to the defense, and Doss has failed to show how production of the audiotape would have changed the outcome of the trial. Because Doss has failed to show that he was prejudiced by the deficient performance of trial counsel, we find no merit in this assignment of error.

### III.

#### DID THE TRIAL COURT ERR BY ALLOWING INADMISSIBLE EVIDENCE TO BE INTRODUCED?

Doss argues that the trial court erred by allowing inadmissible evidence to be introduced. Specifically, Doss finds objectionable Agent Cotton's testimony from notes and Agent Sterling's reference to an audiotape recording during testimony. As we previously discussed, the record indicates that trial counsel objected to Agent Cotton's use of notes while testifying, but failed to obtain a ruling upon the objection. However, no harm resulted because Agent Cotton used the notes to describe Doss's clothing and house. Likewise, trial counsel objected to Agent Sterling's reference to the audiotape recording. The objection was sustained. The audiotape recording was not introduced into evidence, and Agent Cotton was not permitted to testify about the contents of the recording. Because the audiotape was not introduced into evidence and because the court precluded Agent Sterling from testifying about the audiotape, no prejudice resulted from Agent Sterling's reference to the audiotape.

In conclusion, we find no error of reversible magnitude. Therefore, we affirm the conviction and sentence.

**THE JUDGMENT OF CONVICTION OF THE CIRCUIT COURT OF JEFFERSON COUNTY OF UNLAWFUL SALE OF COCAINE AND SENTENCE OF 30 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**