

8/26/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01251 COA

DEAREALL YOUNG 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. GEORGE B. READY

COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: DAVID CLAY VANDERBURG

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: ROBERT KELLY

NATURE OF THE CASE: CRIMINAL - FELONY - ARMED ROBBERY - HABITUAL OFFENDER

TRIAL COURT DISPOSITION: ROBBERY BY THE EXHIBITION OF A DEADLY WEAPON, HABITUAL OFFENDER: SENTENCED TO SERVE A TERM OF 30 YRS IN THE MDOC, SENTENCE SHALL NOT BE REDUCED OR SUSPENDED, NOR ELIGIBLE FOR PAROLE, PROBATION, EARNED TIME, GOOD TIME; PAY ALL COST

MANDATE ISSUED: 9/16/97

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

HINKEBEIN, J., FOR THE COURT:

Deareall Young was convicted in the DeSoto County Circuit Court of armed robbery. Young was sentenced as a habitual offender to a term of thirty years imprisonment in the custody of the Mississippi Department of Corrections. Aggrieved by this conviction, Young appeals to this Court on the following grounds:

I. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER CRIMES COMMITTED BY THE DEFENDANT.

II. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO CROSS EXAMINE THE DEFENDANT CONCERNING AN ALLEGED PLEA BARGAIN AS WELL AS THE PENALTIES FOR ROBBERY AND ARMED ROBBERY.

Holding these assignments of error to be without merit, we affirm the judgment of the Circuit Court.

FACTS

During the latter part of July 1994, Deareall Young purchased a battery charger from Absco Cellular, a retail electronics store in Walls, Mississippi. He presented Tanya Williford, the sole employee on duty, a check in the amount of \$52.00. The check was later returned to Ms. Williford unpaid as the account had been closed.

Two months later, on the afternoon of September 23, 1994, Mr. Young returned to Absco Cellular. He had been smoking a mixture of marijuana and crack cocaine. He had just lost a week's pay at a

nearby casino. Again, Ms. Williford was alone inside the store. She was preparing the store's daily bank deposit when Young arrived. Williford placed the checks, cash and deposit slips underneath a newspaper and stepped from her desk. Young meandered the length of the store's display counter asking Williford questions regarding cellular telephone service. He then inquired as to whether Absco operated surveillance cameras on the premises. Upon Williford's negative response, he drew a pistol from the pocket of his trousers and ordered Williford to face the wall. He then snatched the bank bag from Williford's desk and fled.

Ms. Williford subsequently selected Deareall Young's likeness from an array of photographs shown her by police officers. Upon hearing an officer utter his name, Ms. Williford recalled her previous contact with Mr. Young. Deareall Young was thereafter arrested.

PROCEEDINGS BELOW

Following his arrest, Young was indicted by the DeSoto County Grand Jury and charged with the crime of armed robbery. At trial, Mr. Young testified in his own behalf. He essentially corroborated Ms. Williford's account of the robbery. He claimed to have been returning the previously purchased battery charger, only resolving to steal the money upon his arrival. However, he denied using a gun. In fact, Young denied having ever owned a firearm. The jury accepted Williford's version of the facts, returning a guilty verdict. It is from this conviction that Young brings this appeal.

ANALYSIS

I. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER CRIMES COMMITTED BY THE DEFENDANT.

Young contends that the trial court erred in allowing introduction of evidence of other crimes and wrongful acts. He first contests the admission of the worthless check that he presented to Ms. Williford upon his first visit to Absco Cellular. The State argues that the previous contact between the two merely served to bolster Williford's in-court identification of Young. We agree with the State's conclusion.

Generally, evidence of a crime other than the one for which the accused is being tried is not admissible. *Ballenger v. State*, 667 So. 2d 1242, 1256 (Miss. 1995) (citing *Duplantis v. State*, 644 So. 2d 1235, 1246 (Miss. 1994)); *Ladner v. State*, 584 So. 2d 743, 758 (Miss. 1991). Prior

convictions or wrongful acts may not imply that the defendant is the type of person likely to commit the crime charged. *Jenkins v. State*, 507 So. 2d 89, 92 (Miss. 1987). However, such evidence may be admitted for other evidentiary purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident pursuant to Mississippi Rule of Evidence 404(b).

"[T]he state has a legitimate interest in putting together the pieces of this puzzle before the jury." *Mackbee v. State*, 575 So. 2d 16, 28 (Miss. 1990). Therefore, where necessary to present to the jury "the complete story of the crime" evidence or testimony may be given although it may reveal or suggest other crimes. *Ballenger*, 667 So. 2d at 1257 (citing *Brown v. State*, 483 So. 2d 328, 330 (Miss. 1986)). In other words, evidence is admissible as showing *res gestae* of crime if evidence tends to show part of the entire transaction. *Wade v. State*, 583 So. 2d 965, 967 (Miss. 1991). Such was the overriding purpose for which the prosecution offered the check and the basis for its admission. As the State argues on appeal, bolstering Williford's identification was a factor. However, identity was not the sole basis for the trial court's decision, since Young confessed to all but the use of a firearm.

In response to Young's motion in limine, the prosecution offered this theory: Young's initial visit to Absco may have been in preparation for the heist or at least the origin of the idea. The State characterized the two events as interrelated. On that basis the trial court stated "I think that I'm going to allow the use of the check . . . specifically for the purpose to show that the defendant had been in the business establishment before and would be familiar with the interior of the store." The prosecution subsequently followed through with the theory. Assistant District Attorney Robert Kelly interrogated Young regarding his decision to rob the establishment. Mr. Kelly asked whether Young's knowledge that only one employee would likely be on duty prompted him to return to Absco. Young's denial of a connection between the two incidents may not retroactively make the trial court's decision unreasonable. Admission of such relevant evidence is within the broad discretion of the trial court, requiring a reversal only on a demonstrable abuse of that discretion. *Wade*, 583 So. 2d at 967. In fact, we do not believe the trial court's decision in this regard can be characterized as deviating from such a deferential standard.

Even where evidence of other crimes is admissible under Rule 404(b), the risk of undue prejudice must not substantially outweigh its probative value as required by Rule 403. *Ballenger*, 667 So. 2d at 1257; *Duplantis v. State*, 644 So. 2d at 1246-47 (Miss. 1994). As Young indicates on appeal, Rule 403 functions as an "ultimate filter" through which all otherwise admissible evidence must pass. *See Watts v. State*, 635 So. 2d 1364, 1368 (Miss. 1994) (quoting *Jenkins*, 507 So. 2d at 93). Young fails to notice, however, that the trial court clearly conducted the required balancing test. The trial court remarked, "I've done the balancing test . . . I do not feel that it is more prejudicial than probative simply because of the fact that it's not a similar crime at all." The court recognized that this is not an instance where a jury hearing about another similar act would likely find a defendant guilty because he had done it before. The trial court's determination was reasonable -- one worthless check does not logically indicate a predisposition toward armed robbery.

In addition, the State minimized the check's prejudicial impact by de-emphasizing its worthless character. Assistant District Attorney Kelly never implied that Young acted with a fraudulent intent rather than innocently with the mistaken belief that the account was still open. Moreover, the lower court eliminated any unfairness through the giving of a limiting instruction. *See Townsend v. State*,

681 So. 2d 497, 507 (Miss. 1996) (stating that jury instructions can cure defects in admitting evidence of crimes not charged).

Next, Young argues that the trial court erroneously admitted evidence of his prior convictions pursuant to Rule 404(b). The State cites case law interpreting Mississippi Rule of Evidence 609(a)(1) in contending that the introduction of *one prior guilty plea* properly served to impeach Young's testimony on direct. We agree with the State.

Before trial, Young filed a motion in limine to exclude evidence of his numerous prior convictions for aggravated robbery and aggravated burglary. The court ruled initially that the State would be precluded from presenting Young's convictions. Therein the court cited the similarity of the crime charged and the crimes of which Young had been convicted as well as the timing of the convictions (some as recently as three years). However, the court warned that if the defendant were to open the door or make material misstatements to the jury, the ruling would be reconsidered.

At trial, Ms. Williford testified that Young had held her at gunpoint. Subsequently, he testified on his own behalf. He admitted taking money from Absco Cellular but denied the use of a firearm. On *direct* Young stated, "I didn't have a gun. I've never owned a gun, and I don't possess a gun, sir." In response, Assistant District Attorney Robert Kelly sought to introduce Mr. Young's (then unconvicted) guilty plea to one armed robbery occurring in Arkansas during 1994. The trial judge then revisited his earlier decision.

With his sweeping denial of gun ownership, Young raised questions regarding his credibility. In effect he asked the jury to find that he would not have threatened Williford but would only have stolen from her. The court's ultimate resolution rested on this reasoning: the prosecution was entitled to rebut Young's protestations when he opened the door stating that he had never owned a gun. Nevertheless, the prosecution was also required to introduce evidence of the prior incident as an exception under Rule 404(b). *Hunt v. State*, 538 So. 2d 422, 426 (Miss. 1989) (stating that evidence of other offenses was admissible where defendant "open[ed] the door" to such evidence and where it was relevant to show intent, scheme, plan or absence of mistake); *Fisher v. State*, 532 So. 2d 992, 999-1000 (Miss. 1988) (holding that evidence of prior incidents similar to one for which defendant is charged were admissible pursuant to M.R.E. 404(b) to show plan).

The trial judge clearly determined that the probative value of the prior guilty plea outweighed any prejudicial effect as required by *Peterson v. State*, 518 So. 2d 632, 636 (Miss. 1987). The court considered potential prejudice to Young resulting from similarity of the crimes and the date of the guilty plea. The court also determined that the probative value of the evidence increased the moment Young denied having ever owned a gun. The record clearly reflects the balancing of the two, complete with citations to Rule 403 and *Peterson* by name.

The prosecution then stayed within the boundaries of Young's invitation. Mr. Kelly revealed no details of the prior incident. *Cf. Stewart v. State*, 596 So. 2d 851, 853 (Miss. 1992) (reversed and remanded due to extensive rebuttal as to "collateral issues."); *Blanks v. State*, 547 So. 2d 29, 37 (Miss. 1989). The court merely informed the jury of Young's participation in one of several prior crimes.

Additionally, the court cautioned the jury as to its proper use of the information. First, the court

admonished the jury before admitting the evidence. Perhaps most important, the trial judge then granted a limiting instruction as has been suggested by the Mississippi Supreme Court in cases where the crime charged and prior conviction are similar. See *Peterson*, 518 So. 2d at 638; *Pugh v. State*, 584 So. 2d 781, 785-86 (Miss. 1991). This assignment of error is without merit.

II. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO CROSS EXAMINE THE DEFENDANT CONCERNING AN ALLEGED PLEA BARGAIN AS WELL AS THE PENALTIES FOR ROBBERY AND ARMED ROBBERY.

Young's final point of error asserts the trial court erred in allowing the State to question him regarding pretrial plea negotiations and the alternative penalties discussed therein. The State fails to respond to this contention directly, presumably because Young's so-called "assignment" of error presents no question for review. The questioned discourse began:

Kelly: Is it because the penalty for robbery by the use and exhibition of a deadly weapon is greater than robbery without the use and exhibition of a deadly weapon that you are admitting to a lesser charge?

Young: No, sir.

Kelly: [I]f you were convicted of robbery by the use of a deadly weapon, when would you get out?

Young: Never, I guess. But I'd like to let you know that you offered me a 15 year deal, and I turned that down because the facts of this case are not true. So I knew what I was facing. I could have copped out to 15 years and you were going to let me go with that but the facts are not true here.

Young, in essence, claimed to have been offered fifteen years in exchange for pleading guilty to simple robbery. In fact, he was offered fifteen years with habitual offender status (that is, with no possibility of parole) plus fifteen years suspended to be served consecutively for an additional charge. As such, we do not find plain error in allowing subsequent remarks by Mr. Kelly. However, Young's failure to cite any authority in support of his claim of error renders moot this Court's obligation to analyze his claim. The Mississippi Supreme Court has time and again reaffirmed the rule that an appeals court "is under no duty to consider assignments of error when no authority is cited." *Hoops v. State*, 681 So. 2d 521, 526 (Miss. 1996) (citing *Hewlett v. State*, 607 So. 2d 1097, 1106 (Miss. 1992)); see also *Kelly v. State*, 553 So. 2d 517, 520 (Miss. 1989) (holding that "[t]his [c]ourt has repeatedly said that we are under no obligation to consider assignments of error when no authority is cited."). Clearly "it is the duty of an appellant to provide authority and support of an assignment [of error]," a duty that Young has failed to fulfill. *Hoops*, 681 So. 2d at 526. Since Young neither argues this issue nor cites any authority in support thereof, we decline to consider this issue on appeal.

THE JUDGMENT OF THE DESOTO COUNTY CIRCUIT COURT OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITHOUT THE POSSIBILITY OF PAROLE IS AFFIRMED. SENTENCE TO RUN CONSECUTIVELY TO SENTENCES IMPOSED IN ARKANSAS CASE. COSTS ARE ASSESSED AGAINST DESOTO COUNTY.

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING,
PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., CONCURS IN RESULT ONLY.**