

IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 96-KA-00484 COA

J. W. "JAKE" BOLES 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 C. CARLSON, JR.

COURT FROM WHICH APPEALED: YALOBUSHA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: DAVID CLAY VANDERBURG

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: CRIMINAL: ARMED ROBBERY

TRIAL COURT DISPOSITION: ARMED ROBBERY: SENTENCED AS A HABITUAL TO 30 YRS WITH THE LAST 15 YRS SUSPENDED PENDING GOOD BEHAVIOR; THE 15 YRS SENTENCE SERVED SHALL NOT BE REDUCED OR SUSPENDED, NOR ELIGIBLE FOR PAROLE, PROBATION, EARNED TIME OR ANY OTHER REDUCTION

MANDATE ISSUED: 9/30/97

BEFORE McMILLIN, P.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

J. W. Boles was convicted of armed robbery and sentenced as a habitual offender to serve thirty years in the custody of the Mississippi Department of Corrections with the last fifteen years being suspended pending the future good behavior of Boles upon his release from the Mississippi Department of Corrections. Boles's motion for JNOV or, in the alternative, a new trial was denied by the trial court. Finding no error, we affirm the judgment of the trial court.

#### FACTS

The victim, George Lambert, alleged that in October of 1994, he was robbed at his home in Water Valley, Mississippi by the Appellant, J. W. Boles. Lambert testified that during the week prior to the robbery Boles had borrowed \$20 from Lambert on two occasions, promising to repay Lambert on the following Friday. Lambert testified that Boles did not come back until Saturday at which time Boles asked to borrow \$20. Lambert stated that he refused and that Boles put a knife to Lambert's throat and demanded his wallet. Lambert indicated that he told Boles to go ahead and take the wallet.

Boles denies that he robbed Lambert. Boles contends that he went to Lambert's house to engage in one of his frequent cocaine transactions with Lambert. Boles contends that he had supplied Lambert with crack cocaine on five or six occasions. Boles testified that Lambert was making up the robbery because on the date in question, Boles had taken Lambert's money and had failed to return with the cocaine.

At trial, Police Chief Mike King testified that Boles made a statement upon his arrest in which Boles indicated that he had been at home with friends on the night of the robbery and that he knew nothing about it. While testifying in his own behalf, Boles denied making this statement to Chief King and maintained that Lambert had filed the robbery charge against Boles only because Boles failed to return with the cocaine for which Lambert had paid \$150.

The jury subsequently returned a verdict of guilty against Boles for armed robbery. Feeling aggrieved, Boles filed this appeal asserting two issues.

#### ANALYSIS

## I. DID THE TRIAL COURT ERR IN DENYING BOLES'S MOTION FOR A DIRECTED VERDICT/JNOV?

Boles challenges the sufficiency of the evidence on the ground that the only eyewitness, the victim George Lambert, was not a credible witness. The State responds that the testimony of a single eyewitness, even if it is uncorroborated and opposed by other testimony, is sufficient to make out a jury issue. *Williams v. State*, 512 So. 2d 666, 670 (Miss. 1987).

We agree. Our scope of review when dealing with a challenge to the sufficiency of the evidence is limited. A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion when the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled Boles's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Boles's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

*Id.* (citations omitted).

The evidence consistent with the guilty verdict must be accepted as true. *Id.* at 778. Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Boles not guilty of armed robbery.

Boles argument that Lambert's testimony was not credible and therefore not sufficient to support the guilty verdict is without merit. The jury was presented with two different stories, and it was their duty to weigh the testimony and choose which story to believe. *Id.* We therefore find that the trial court properly denied Boles's motion for a JNOV.

## II. DID THE TRIAL COURT ERR IN DENYING BOLES'S MOTIONS FOR MISTRIAL?

Boles complains about the testimony by Chief King in which King stated that he asked Boles some questions about a missing lawn mower. The record indicates that Boles was initially brought to the police station because a complaint had been filed against him alleging that he stole a lawn mower. Boles, however, was arrested upon his arrival at the station for armed robbery. Boles was then questioned by Chief King. Boles's objection arises from Chief King's testimony concerning the questioning of Boles at the police station. Boles's objection was sustained, and Boles then moved for

a mistrial. The judge denied the mistrial but did admonish the jury.

Boles also complains about a comment Chief King made during cross examination by the defense regarding the fact that King knew Boles could read because King had taken statements from him on prior occasions. Boles argues that King's testimony prejudiced him because it indicated to the jury that Boles had been in trouble with the police in the past. Boles did not object at the time this statement was made but waited until the trial was recessed and raised the objection in the judge's chambers. The judge overruled the objection stating that the jury had already been recessed for the rest of the day. However, even after overruling this objection, the judge gave a cautionary instruction to the jury regarding Chief King's testimony.

The Mississippi Supreme Court has held that a "trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case." *Gossett v. State*, 660 So. 2d 1285, 1290 (Miss. 1995) (citing the Uniform Criminal Rules of Circuit Court Practice 5.15).<sup>(1)</sup> "The trial judge is permitted considerable discretion in determining whether a mistrial is warranted since the judge is best positioned for measuring the prejudicial effect." *Id.* In the present case, we find that the judge acted appropriately in dealing with the allegedly prejudicial statements. Any prejudice that might have resulted was cured by the judge's admonishment. *See Williams v. State*, 512 So. 2d 1206, 1209 (Miss. 1990) (stating that our law presumes that the jury does what it is told); *Shoemaker v. State*, 502 So. 2d 1193, 1195 (Miss. 1987) (holding that jurors are presumed to follow the trial judge's instructions, and it would show insufficient confidence in the good sense and discretion of trial judges to hold otherwise). We therefore find no error on the part of the trial court.

**THE JUDGMENT OF THE YALOBUSHA COUNTY CIRCUIT COURT OF CONVICTION OF ARMED ROBBERY AND SENTENCE AS A HABITUAL OFFENDER TO SERVE A TERM OF THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THE LAST FIFTEEN YEARS BEING SUSPENDED IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO YALOBUSHA COUNTY.**

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

1. UCRCCP 5.15 has been replaced with Uniform Circuit and County Court Rule 3.12 as of May 1, 1995.