

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01263 COA**

**CEDRIC THOMPSON A/K/A CEDRIC CONRAD
THOMPSON A/K/A JOHNNY LEE THOMPSON**

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

DATE OF JUDGMENT:	10/18/95
TRIAL JUDGE:	HON. WILLIAM F. COLEMAN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	THOMAS M. FORTNER
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	EDWARD J. PETERS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	BURGLARY-HOUSE: SENTENCED TO SERVE A TERM OF 10 YRS IN THE MDOC
DISPOSITION:	AFFIRMED - 10/7/97
MOTION FOR REHEARING FILED:	10/27/97
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

Cedric Thompson appeals his conviction of burglary, raising the following issues as error:

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE PROSECUTOR TO INTRODUCE EVIDENCE OF FLIGHT TO BE HEARD AND CONSIDERED BY THE TRIAL JURY AS ANY SUCH EVIDENCE WAS NOT RELEVANT AND/OR PROBATIVE TO ANY MATERIAL ISSUE AT THE TRIAL OF THE OFFENSE CHARGED, AND FURTHER, SUCH EVIDENCE WAS UNFAIRLY PREJUDICIAL AND RESULTED IN

THOMPSON'S BEING DENIED A FUNDAMENTALLY FAIR TRIAL.

II. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INTRODUCE EVIDENCE SUGGESTING AND TENDING TO SHOW THAT THOMPSON HAD COMMITTED OTHER UNRELATED CRIMES AND THE ADMISSION OF THE OTHER CRIMES EVIDENCE WAS VIOLATIVE OF RULE 404, M.R.E., AND RESULTED IN THOMPSON'S BEING DENIED A FUNDAMENTALLY FAIR TRIAL.

III. THE TRIAL COURT COMMITTED PLAIN ERROR BY UNFAIRLY RESTRICTING THOMPSON'S ATTEMPTS TO PRESENT HIS THEORY OF THE CASE TO THE TRIAL JURY, IN VIOLATION OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS TO COMPEL THE ATTENDANCE OF WITNESSES, CONFRONT THE WITNESSES OFFERED AGAINST HIM AND EXAMINE WITNESSES TESTIFYING AT TRIAL CONTRARY TO THE RELEVANT PROVISIONS OF THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS.

Finding no error, we affirm.

FACTS

On October 17, 1994, the dwelling of Robert and Reginald Harrison was burglarized. A portable radio was stolen, and a television set was moved from its original location and placed next to the front door. Charles Ray Gordon, a neighbor of Robert and Reginald Harrison, testified that he observed a Pontiac 6000, occupied by two black males, pull into the Harrison driveway. Cedric Thompson was driving the vehicle and Roshea Stewart was sitting in the passenger seat. Gordon got into his vehicle and drove toward the Harrison house. At this time, he noticed that the passenger (Stewart) was at the Harrison's door. He noticed that the driver of the vehicle (Thompson) was still sitting in the driver's seat of the car. Upon becoming suspicious, Gordon drove around the block and phoned the Jackson Police Department on his cellular phone. After phoning the police, Gordon proceeded back to the Harrison residence and noticed that Thompson was no longer sitting in the car. Gordon pulled into the Harrison driveway and stated at trial that both men came out of the house at that particular time. Gordon tried to stall the two men by having a conversation with them. Gordon testified that Thompson was the only person with whom Gordon talked, and then Gordon positively identified Thompson in court as the driver of the car.

Thompson and Stewart drove away before the police could arrive. At this point, Reginald Harrison was returning home, and Gordon motioned to him that something was wrong. Harrison followed Gordon and noticed that the front door to his home was open. Harrison drove around the block and observed a car and decided to follow it. Harrison wrote down the tag number of a brown Pontiac 6000. The tag number was titled in the name of Hazel Thompson, the mother of Cedric Thompson. Harrison also made eye contact with the driver of the car while he was following the car and identified Cedric Thompson in court as the driver of the car.

In court Thompson admitted borrowing his mother's car on October 17, 1994. He stated he was going to the employment office when Stewart flagged him down and asked for a ride to his uncle's house. The two arrived at the Harrison household a few minutes later. Harrison is not the uncle of Stewart. Thompson stated that Stewart went into the house, while he sat in the car and read the newspaper. Thompson testified that he never had a conversation with Gordon. Thompson stated that Stewart came out of the house with the portable radio, and that Stewart was the individual with whom Gordon talked.

Thompson became the prime suspect and a warrant was issued for his arrest. Police detectives went to the home of Hazel Thompson to question her about the use of her car in the burglary. Thompson was not home at the time, and Hazel Thompson described her son to the detectives. At that point, Hazel Thompson was aware that the police were looking for her son in connection with the October 17 burglary. However, Thompson's arrest did not come until November 3, 1994. On that date, Officer David Horton of the Jackson Police Department was working with a FBI fugitive task force, and he had set out for a particular address to apprehend an individual in connection with an outstanding felony charge. When Horton and the task force arrived at the house, Thompson, who was leaving the house, hurriedly ran back inside and proceeded to get stuck in a bathroom window as he attempted to escape. Thompson identified himself to the officers as Johnny Lee Thompson, the name of his brother. Thompson was then arrested for carrying a concealed weapon. Officer Horton identified Thompson as the man arrested on that date.

ANALYSIS

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE PROSECUTOR TO INTRODUCE EVIDENCE OF FLIGHT TO BE HEARD AND CONSIDERED BY THE TRIAL JURY AS ANY SUCH EVIDENCE WAS NOT RELEVANT AND/OR PROBATIVE TO ANY MATERIAL ISSUE AT THE TRIAL OF THE OFFENSE CHARGED, AND FURTHER, SUCH EVIDENCE WAS UNFAIRLY PREJUDICIAL AND RESULTED IN THOMPSON'S BEING DENIED A FUNDAMENTALLY FAIR TRIAL.

II.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INTRODUCE EVIDENCE SUGGESTING AND TENDING TO SHOW THAT THOMPSON HAD COMMITTED OTHER UNRELATED CRIMES AND THE ADMISSION OF THE OTHER CRIMES EVIDENCE WAS VIOLATIVE OF RULE 404, M.R.E., AND RESULTED IN THOMPSON'S BEING DENIED A FUNDAMENTALLY FAIR TRIAL.

Thompson argues that the evidence of his flight from Officer Horton and the FBI fugitive task force was improper and unfairly prejudicial to him. Thompson contends that any and all matters surrounding his arrest on November 3, 1994 were totally irrelevant to his proceedings. Further, Thompson argues that the trial court erred by allowing testimony that Thompson was arrested

following his flight. Thompson contends that this is evidence of other crimes, wrongs, or acts under Rule 404(b) of the Mississippi Rules of Evidence.

The State contends that there was sufficient evidence for allowing the issue of flight to be placed before the jury. The State also argues that the trial court did not err in admitting evidence of any other crime that Thompson had committed. The State contends that Thompson himself put evidence of other crimes before the jury during his non-responsive testimony.

Thompson chose to testify on his own behalf at trial about his arrest on November 3, 1994. Thompson stated that he did not know who the men approaching the house were. Thompson testified that he saw two men approaching the house with pistols and thought they were going to rob him. He stated that he did not hear the men say that they were police officers, even though there had been testimony to the contrary from one of the officers. During the cross-examination of Thompson, he admitted he saw that the men were dressed in distinctive black fatigues with brown vests like what police officers wear. He also volunteered to the jury that he had been shot on a date after the house burglary and his eventual arrest and implied to the jury that he had additional charges pending against him.

The trial court allowed testimony as to Thompson's flight when he ran from the FBI fugitive task force and eventually tried to escape by jumping through a bathroom window. However, a flight instruction was neither requested by either side nor granted by the trial court. The trial court also allowed testimony as to Thompson using his brother's name when he was arrested. The trial court would not allow testimony as to why Thompson was arrested or on what charge. The trial court clearly instructed Thompson and the State that they should not ask about or reveal anything about any concealed weapon charge.

"The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Parker v. State*, 606 So. 2d 1132, 1136 (Miss. 1992) (quoting *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990)). This Court will not reverse the trial judge unless the judge's discretion is so abused as to be prejudicial to the accused. *Parker*, 606 So. 2d at 1136. Evidence of flight is appropriate only where it is probative of guilt or guilty knowledge of the crime charged and where there are no independent reasons for flight. *Mack v. State*, 650 So. 2d 1289, 1308-09 (Miss. 1994).

In our opinion, the evidence of Thompson's flight had little probative value; nonetheless, since no evidence was presented to the jury as to why Thompson was arrested, the prejudicial impact was negligible. If we were to hold the same to be error, we would hold it harmless under the circumstances for two reasons. First, Thompson was identified by two strong eyewitnesses as the driver of the car leaving the Harrison home. Thompson was even seen coming out of the house by one eyewitness. Second, Thompson admitted being present at the scene of the crime. Thompson denied being involved in the burglary, but admitted being at the Harrison household. The evidence of Thompson's flight pales in comparison to the convincing evidence of his guilt. *See Mack v. State*, 650 So. 2d 1289, 1310 (1994). Therefore, Thompson's first assignment of error must fail.

Thompson's second assignment of error also fails. The trial court specifically instructed the State and Thompson that they should not ask about or reveal anything with regard to any concealed weapon charge or other charges pending against Thompson. The State followed the trial court's instructions,

while Thompson admitted to the jury that he had been shot in an unrelated incident, and he also implied that other charges existed against him. At this point, Thompson became "fair game" to State questioning, but the State still did not delve into his arrest or the other charges pending against him. Thompson's arrest on November 3, 1994 on a concealed weapons charge was never brought to the attention of the jury. The only evidence of other crimes, wrongs, or acts on the part of Thompson came from the testimony of Thompson himself. This issue has no merit.

III.

THE TRIAL COURT COMMITTED PLAIN ERROR BY UNFAIRLY RESTRICTING THOMPSON'S ATTEMPTS TO PRESENT HIS THEORY OF THE CASE TO THE TRIAL JURY, IN VIOLATION OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS TO COMPEL THE ATTENDANCE OF WITNESSES, CONFRONT THE WITNESSES OFFERED AGAINST HIM AND EXAMINE WITNESSES TESTIFYING AT TRIAL CONTRARY TO THE RELEVANT PROVISIONS OF THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS.

During the direct testimony of Detective Walter Ainsworth, the following questions were asked of him by Thompson:

Q. Did you--were you at the scene of the burglary?

A. At the time, no. The original call, no.

Q. Okay. But did you ever talk to the owners of the home that was burglarized?

A. Yes.

Q. Did you talk with the next door neighbor?

A. Yes, sir, I did.

Q. Did you investigate this case thoroughly?

A. Yes, sir, I did.

Q. Have you read your offense report recently?

A. Yes.

Q. Does your report anywhere indicate that the driver of the vehicle got out of the car?

By Mr. Peters: Please the Court, if this is going to get into hearsay, we are going to object to it and again object to the defense attorney testifying.

By The Court: Sustained on the basis of hearsay.

By Mr. Rehfeldt: Your Honor, may I show him a copy of his police report?

By The Court: The objection is going to be the same. You may show it to him, if you would like.

Q. Did you interview the witnesses?

A. Yes.

Q. And was the report made by the Jackson Police Department?

A. Yes, it was.

Q. Is that report a business record of the Jackson Police Department?

A. Yes.

Q. And is that report kept at Jackson Police Department at all times?

A. It has been there since October 17th.

Q. Did the Jackson Police Department ever recover a tire iron from the scene?

A. No, we didn't.

Q. Did the crime lab ever go out to the scene to take fingerprints?

A. No.

Q. Was there any indication a 25-inch TV was on the floor of the house?

A. Not to my knowledge at that time. But as far as the report goes--but in talking to the witnesses afterwards, that information was learned.

By Mr. Rehfeldt: I am going to ask that that be stricken, Your Honor, as hearsay. If I can't ask it and get an answer, I can't believe the witness should be able to give hearsay without me asking.

By The Court: It wasn't responsive. The jury will disregard the last statement.

By Mr. Rehfeldt: Thank you, Your Honor.

By Mr. Peters: Let's strike it all then, if what he is going on is what's in the report. Let's strike everything he's asked. We object to the entire thing as hearsay, Your Honor.

By The Court: Sustained.

Q. Did you put the statements of the witnesses in your report?

A. Yes, sir.

Q. And, again, did your investigation indicate that the driver ever got out of the car?

By Mr. Peters: Please the Court, we again object to that entire line of testimony.

By The Court: Sustained.

...

Q. Has anyone shown a photograph of Roshea Stewart to any of the witnesses?

A. No, sir. As far as that name goes, I wasn't aware of him until this trial began.

Q. Are you now aware of his name?

A. Just his name, yes.

Q. Have you shown a photograph of Roshea Stewart to any of the witnesses?

A. No. As I say, I didn't know who he was, so, no, I haven't shown one.

On cross-examination by the State, Detective Ainsworth was asked the following:

Q. Has anyone ever told you that Roshea Stewart was involved in this crime?

By Mr. Rehfeldt: Your Honor, I am going to object to that as to hearsay.

By The Court: Overruled.

A. No.

Q. Has anyone ever told you that Roshea Stewart was involved in this crime?

A. No.

Thompson argues that the trial court erred in limiting Thompson's ability to present his theory of the case to the jury. Thompson contends that the trial court imposed a double standard by allowing the State to elicit testimony from Detective Ainsworth about the police report Detective Ainsworth transcribed immediately following the burglary. Thompson professes that he was unable to properly question Detective Ainsworth because of the trial court's rulings. The State argues that the record, when taken into context, indicates that the trial court was not lacking in fairness. The State points out that the police report was never admitted into evidence, and therefore no testimony could be admitted from that report.

The police report on which Detective Ainsworth based his testimony was never introduced into

evidence. Also, Thompson asked two state witnesses, Reginald Harrison and Hazel Thompson, on cross-examination if they were familiar with Roshea Stewart. Thompson also referred to Stewart during his testimony. Thompson was trying to get the point to the jury that Stewart was the individual who robbed the Harrison household.

Rule 801(c) of the Mississippi Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Thompson never sought to introduce the police report into evidence as a public record or report of a business pursuant to Mississippi Rule of Evidence 803(6). Parts of the report may have been admissible under Mississippi case law precedent. *See Fisher v. State*, 690 So. 2d 268, 273 (Miss. 1996); *Lentz v. State*, 604 So. 2d 243, 248 (Miss. 1992); *Copeland v. City of Jackson*, 548 So. 2d 970, 975 (Miss. 1989). However, the portion of the report which Thompson was seeking to extract from Detective Ainsworth was clearly hearsay because Thompson wanted to introduce the statements of witnesses through the testimony of Detective Ainsworth.

The questions asked Detective Ainsworth regarding Roshea Stewart by the State were inadmissible and should have been ruled such. However, we do not feel that this warrants a reversal and find this to be harmless error for two reasons. First, Detective Ainsworth testified that he was not aware of Stewart until the trial began. The prosecution's question to Detective Ainsworth was in direct response to the defense inquiries about Stewart. This particular question neither implicated nor exonerated Thompson because he admitted to being at the Harrison household at the time of the burglary, and he admitted he was there with Stewart. Second, Thompson, during his testimony, stated that he told Detective Ainsworth about Stewart's involvement in the case. Thompson's testimony cured any defect as to Detective Ainsworth's statement about Stewart because it would have been proper impeachment testimony for the State. *See White v. State*, 616 So. 2d 304, 308 (Miss. 1993) (stating that premature references and testimony that is ultimately cured cannot be deemed error sufficient to warrant reversal). The assignment is meritless.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY OF A DWELLING AND SENTENCE OF TEN (10) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO HINDS COUNTY.

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