

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01193 COA**

FELIX GUZMAN GALVAN

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:	03/14/95
TRIAL JUDGE:	HON. HENRY LAFAYETTE LACKEY
COURT FROM WHICH APPEALED:	UNION COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	STEPHEN P. LIVINGSTON STEPHEN P. LIVINGSTON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS
DISTRICT ATTORNEY:	JAMES HOOD, III
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I ARMED ROBBERY: CT II AGGRAVATED ASSAULT:CT I SENTENCED TO SERVE A TERM OF LIFE IN THE MDOC CT II SENTENCED TO SERVE 10 YRS IN THE MDOC, WITH SAID SENTENCE TO RUN CONSECUTIVE WITH CT I
DISPOSITION:	AFFIRMED - 10/7/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/28/97

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

DIAZ, J., FOR THE COURT:

Felix Galvan was convicted of armed robbery and aggravated assault. He appeals arguing (1) that the

trial court committed error by refusing to grant a mistrial after the State made its opening statements, (2) that the weight and sufficiency of the evidence was insufficient to sustain a guilty verdict, and (3) that the trial court erred in refusing to grant Galvan's "reasonable doubt" and "accomplice testimony" jury instructions.

FACTS

On the night of October 23-24, 1993, Susan Henson, a clerk at Barb and Gene's Grocery in Union County, was preparing to close the store for the night when a shot was fired through the door of the grocery. A man wearing a mask and carrying a gun came through the door and demanded that Henson give him money. Although Henson was unable to see the man's face, she recognized his voice as that of Felix Galvan, a "regular" at the grocery. After robbing the store, Galvan forced Henson into her own vehicle and prepared to leave with her. Galvan then saw Henson's husband, James, standing in the doorway of the grocery. Thereupon, Galvan fired his gun through the windshield and seriously injured Mr. Henson. Galvan then fled to Texas, where he was found and brought back to Union County to face charges in connection with the robbery.

DISCUSSION

1. Did the trial court commit reversible error by refusing to grant a mistrial after the State made its opening statements?

In his initial assignment of error, Galvan asserts that the trial court committed reversible error in denying his motion for a mistrial. Specifically, the State commented during opening statements that had the victim, Mr. Henson, died from the gunshot wound, then Galvan would have been on trial for capital murder. Galvan argues that the statement was prejudicial and denied him a fair trial. A conviction may be reversed based on the prosecutor's improper comments only if the comments cast serious doubt on the accuracy of the jury's verdict. *United States v. Andrews*, 22 F.3d 1328, 1341 (5th Cir. 1994). Furthermore, the trial judge, in exercising his discretion, is in the best position to determine if prejudice has in fact occurred. *Reynolds v. State*, 585 So. 2d 753, 755 (Miss. 1991). In the case at bar, the trial judge rejected Galvan's assertion that he was prejudiced by the State's comments and thus, refused to grant Galvan's motion for a mistrial. We agree with the trial judge's finding that Galvan was neither prejudiced by the State's comments nor was denied a fair trial. The prosecutor was merely presenting the jury with a factual scenario of what the evidence would show at trial along with the severity of the crime with which Galvan had been charged. Such comments fall far short of reversible error.

2. Did the trial court err in refusing to grant Galvan's motion for a directed verdict based on the weight and sufficiency of the evidence?

In determining whether the evidence presented at trial was sufficient to support a guilty verdict, the supreme court has held that "[m]atters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury." *Fisher v. State*, 481 So. 2d 203, 212 (Miss. 1985). "We give

the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Hart v. State*, 637 So. 2d 1329, 1341 (Miss. 1994). "We may reverse only where with respect to one or more elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty." *Fisher*, 481 So. 2d at 212 (citations omitted). In the case at bar, the jury heard testimony from Susan Henson that she was familiar with Galvan's voice and that she recognized his voice during the robbery. The jury also heard Debbie Price, Galvan's girlfriend, testify that Galvan told her of his plans to rob the grocery and then told her afterwards that he robbed the store, shot Mr. Henson, and then left in the Hensons' vehicle. Based on this and all other evidence presented at trial, the jury was justified in concluding that Galvan was guilty beyond a reasonable doubt of armed robbery and aggravated assault. Since reasonable and fair-minded jurors might have reached the same conclusion, we refrain from disturbing the verdict and find that the evidence is more than sufficient to support Galvan's conviction.

3. Did the trial court err in refusing to grant Galvan's "reasonable doubt" and "accomplice testimony" jury instructions?

Galvan's next assertion of error is that he was entitled to have the jury instructed on reasonable doubt and accomplice testimony and that the trial court's refusal to do so constituted reversible error. However, the State's instructions repeatedly informed the jury that the evidence had to be proven beyond a reasonable doubt, and the trial court also granted the State's instruction which informed the jury on how to view the testimony of an accomplice. This Court does not examine jury instructions in isolation. Instead, "we read all instructions as a whole to determine whether the jury has been correctly instructed." *Malone v. State*, 486 So. 2d 360, 365 (Miss. 1986). Furthermore, "trial judges are not required to grant repetitious instructions." *Davis v. State*, 568 So. 2d 277, 280 (Miss. 1990). A combined reading of the jury instructions presented at the trial in this case shows that the jurors were appropriately provided with the direction they needed in order to render a fair and just verdict. Accordingly, the trial judge committed no error in refusing to grant Galvan's "reasonable doubt" and "accomplice testimony" jury instructions.

THE JUDGMENT OF THE UNION COUNTY CIRCUIT COURT OF CONVICTION ON COUNT I OF ARMED ROBBERY AND SENTENCE TO LIFE IMPRISONMENT AND COUNT II OF AGGRAVATED ASSAULT AND SENTENCE TO TEN (10) YEARS, WITH SENTENCES TO RUN CONSECUTIVELY, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO UNION COUNTY.

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