

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01335 COA**

**LUCAS ROMERO JONES A/K/A LUCAS ROMARO
JONES A/K/A MELVIN JONES**

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:	03/09/95
TRIAL JUDGE:	HON. JERRY OWEN TERRY, SR.
COURT FROM WHICH APPEALED:	CIRCUIT COURT OF HARRISON COUNTY
ATTORNEY FOR APPELLANT:	THOMAS A. PRITCHARD
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	RUFUS ALLDREDGE
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTION OF CT.1 BURGLARY, CT.II AGGRAVATED ASSAULT AND SENTENCES OF FIVE AND SEVENTEEN YEARS TO RUN CONCURRENTLY AND TO BE SERVED IN THE CUSTODY OF MDOC AND TO PAY RESTITUTION IN THE AMOUNT OF \$5,000
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/9/97

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

PAYNE, J., FOR THE COURT:

Lucas Romero Jones was convicted of count I burglary and count II aggravated assault. The trial court sentenced Jones to serve a term of five years for burglary and a term of seventeen years for

aggravated assault in the custody of the Mississippi Department of Corrections with the sentences to run concurrently. Additionally, Jones was ordered to pay \$5,000 in restitution. Jones's motion for JNOV or, in the alternative, a new trial was denied. We find that none of Jones's issues on appeal has merit and therefore affirm.

FACTS

On August 2, 1993, Wade Dickerson, the victim, went to his girlfriend's apartment. Upon arrival, Dickerson noticed that the front door jam was broken, and he smelled marijuana. Shortly thereafter, a black man exited the apartment. Dickerson testified that Jones and another black man then began to chase him and that Jones fired three shots at Dickerson who was struck in his hand, thigh, and head. Dickerson testified that he recognized Jones as the man from whom he purchased a pendant a few days earlier. Dickerson also testified that he picked Jones's picture out of a photo line-up provided by the police. At trial, Dickerson unequivocally identified Jones as the same man who shot him on August 2.

Detective Grimes of the Biloxi Police Department corroborated Dickerson's testimony regarding the photo line-up. Detective Grimes testified further that he investigated the scene of the shooting and found several .22 caliber shell casings. At a later date, Grimes arrested Jones who was in possession of a Jennings .22 caliber handgun. The shell casings and the gun were sent to the crime lab for comparison. Steve Byrd, a forensic scientist, testified that the casings and the gun matched.

Jones testified in his own behalf. Jones indicated that he did not know Dickerson and that he had never sold any jewelry to Dickerson. Jones testified further that the gun found on his person when he was arrested was a gun that he had purchased on or about August 23, 1993. Jones stated that he had never fired the gun. Jones was subsequently convicted by a jury for burglary and aggravated assault. Feeling aggrieved, Jones filed this appeal asserting two issues.

ANALYSIS

I. WHETHER THE TRIAL COURT MATERIALLY ERRED WHEN IT REFUSED TO GRANT DEFENSE INSTRUCTION NUMBER D-8.

Instruction D-8 reads as follows:

The Court instructs the jury that if you find from the evidence that the defendant, Lucas Romero Jones, did not on August 2, 1994 [sic], break and enter a certain apartment building in Biloxi, Harrison County, Mississippi and leased to Raquel Welch but was apprehended by law enforcement authorities being in possession of such weapon after buying it from another individual several months before the incident, then you shall find the defendant not guilty of burglary.

Jones argues that Instruction D-8 was the only instruction that contained his theory of the case and that failure to give the instruction deprived the jury from being instructed as to that theory. Jones contends that none of the other instructions addressed his contention that he had purchased the gun at a point in time and under circumstances unrelated to the burglary.

The State argues that Instruction D-8 contradicts Jones's testimony that he bought the gun several

weeks *after* the shooting. Thus, the State argues, that the trial court correctly refused the instruction as an improper and inaccurate comment on the evidence. The State contends that the jury, through other instructions, was adequately instructed on the law.

The standard for reviewing jury instructions is well established. Mississippi law allows the trial judge to instruct the jury upon principles of law applicable to the case either at the request of a party, **Miss. Code Ann. § 99-17-35 (Rev. 1994)**, or on the court's own motion, *Newell v. State*, **308 So. 2d 71, 78 (Miss. 1975)**. *See also URCCCP 3.07*. The Mississippi Supreme Court has held that the failure of a court to give a requested instruction is not grounds for reversal if the jury was "fairly, fully and accurately instructed on the law governing the case." *Smith v. State*, **572 So. 2d 847, 849 (Miss. 1990)**; *see also Murphy v. State*, **566 So. 2d 1201, 1206 (Miss. 1990)** (holding that the trial court may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions); *Calhoun v. State*, **526 So. 2d 531, 533 (Miss. 1988)** (holding that a trial court is not required to instruct a jury over and over on the same point of law even though some variations are used in different instructions). The standard for reviewing jury instructions is to read all instructions together, not in isolation. *Townsend v. State*, **681 So. 2d 497, 509 (Miss. 1996)**. Brown cites to *Murphy v. State*, **566 So. 2d 1201, 1206 (Miss. 1990)** for the proposition that a defendant is entitled to have the jury instructed on his theory of the case. While we agree that *Murphy* sets forth this proposition, we note that it also states that instructions must have a sufficient foundation in the evidence. *Id.* In the present case, the State is correct that Instruction D-8 is a direct contradiction to Jones's testimony. The instruction indicates that Jones bought the gun prior to the shooting of Dickerson while Jones's testimony indicated that he bought the gun several weeks after the shooting.

We have reviewed all of the instructions and find that the jury was adequately instructed on the law in this case. The jury was instructed on the elements of aggravated assault and burglary as well as being instructed on eyewitness identification evidence. Instruction D-8 merely gives the jury an avenue by which to find Jones not guilty of burglary, i.e., that Jones's possession of the gun that was used in the shooting is in no way connected with the events that occurred on August 2. This instruction was not necessary as the jury could have found Jones not guilty by determining that the State did not prove the elements of the crimes charged. Clearly, the State proved the elements of both crimes through Dickerson's identification of Jones as the man coming out of his girlfriend's apartment on the evening in question and Dickerson's identification of Jones as the shooter. In addition, the evidence from the crime lab proved that the gun in Jones's possession at the time of his arrest was the weapon that was used to shoot Dickerson. We therefore find Jones's arguments regarding the instruction of the jury on the applicable law to be without merit.

II. WHETHER THE TRIAL COURT ERRED WHEN IT PERMITTED INTO EVIDENCE INFLAMMATORY AND PREJUDICIAL TESTIMONY OF JONES'S INVOLVEMENT WITH OTHER UNRELATED CRIMINAL ACTIVITY.

During the direct examination of Detective Grimes, the prosecution asked, "As pertains to the issue of identification only, did Mr. Dickerson tell you whether he had seen this man that shot him on a later date?" Following an objection by the defense, Grimes answered as follows: "Said he [Dickerson] saw him [Jones] again on the 18th of September near Tyrone's Barber Shop on Main Street during another incident." Jones argues that Grimes's testimony was an attempt to connect Jones with another

crime of shooting at Dickerson following the initial shooting on August 2. Jones contends that the testimony was prejudicial and thus warrants a new trial.

The State argues that the trial court was correct in allowing the testimony under Mississippi Rule of Evidence 404(b) for identification purposes. The State contends further that the limiting instruction given by the judge cures any prejudice the testimony might have created.

We agree. Rule 404(b) provides as follows:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Clearly, Rule 404(b) permits evidence of other crimes for identification purposes. At trial, Detective Grimes's testimony revealed that Dickerson told him that he had seen Jones after the shooting in connection with another incident. The type of incident was not revealed during Grimes's testimony. A review of the record indicates that the judge was careful to limit the amount of information he was going to allow the prosecution to bring out during direct examination. The same information was brought out during Dickerson's testimony. Again, the judge was careful to limit the scope of the questioning regarding a second shooting incident, and as with Grimes's testimony, Dickerson also did not reveal what the other "incident" involved. It was not until the judge gave a limiting instruction pertaining to Dickerson's identification testimony that the incident is described as the "alleged shooting incident." This instruction was accepted without objection by Jones, and Jones does not complain about the instruction in this appeal.

We can find nothing prejudicial about the testimony of which Jones complains. The trial court did not err in ruling that Grimes's testimony was admissible per Rule 404(b). Furthermore, the jury was instructed on how to consider the testimony. The only legitimate complaint Jones could have had did not arise until the instructions were reviewed. If anything (not to imply that an objection would have warranted reversal), Jones should have objected to the wording of Instruction S-6 which put the jury on notice that the other "incident" was an "alleged shooting incident." Obviously, Jones did not find the limiting instruction to be prejudicial to his case as no objection was made nor was the issue of the limiting instruction raised on appeal.

Therefore, for the reasons stated above, we find Jones's argument to be without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION ON COUNT I OF BURGLARY OF A DWELLING AND SENTENCE OF FIVE YEARS; COUNT II OF AGGRAVATED ASSAULT AND SENTENCE OF SEVENTEEN YEARS, WITH SENTENCES TO RUN CONCURRENTLY AND TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY RESTITUTION OF \$5,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING,
AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.**