

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00447 COA**

**KEVIN L. NAYLOR A/K/A KEVIN LAMONT
NAYLOR A/K/A "HEAD"**

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:	02/16/96
TRIAL JUDGE:	HON. LARRY EUGENE ROBERTS
COURT FROM WHICH APPEALED:	LAUDERDALE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DAVID A. STEPHENSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	DAN ANGERO AND LISA HOWELL
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	DELIVERY OF COCAINE: SENTENCED TO 24 YRS TO SERVE IN THE MDOC
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

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

PAYNE, J., FOR THE COURT:

Kevin L. Naylor was tried by a jury in the Lauderdale County Circuit Court and convicted of the crime of selling cocaine. He was sentenced to twenty-four years in the custody of the Mississippi Department of Corrections. Naylor's motion for JNOV and a new trial was denied, and he appeals presenting the following issues:

I. THE STATE OF MISSISSIPPI DID NOT PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF THE CRIME OF SELLING COCAINE.

II. THE COURT ERRED IN ALLOWING THE CONFIDENTIAL INFORMANT, ANTOINE HOPSON, TO MAKE IRRELEVANT AND SELF-SERVING STATEMENTS CONCERNING BUYS HE MADE FOR NARCOTICS AGENTS AFTER HE ALLEGEDLY PURCHASED COCAINE FROM NAYLOR.

We find no reversible error and affirm the decision of the lower court.

FACTS

Naylor was arrested and charged with selling cocaine in Lauderdale County. The arrest stems from an investigation between two separate agencies: the Mississippi Bureau of Narcotics (MBN) and the Naval Criminal Investigative Service (NCIS). The purpose of the investigation was to determine and apprehend alleged drug dealers. The primary agents involved in this case were MBN Agent Danny Knight and NCIS Agent Kirk Griffen. The agents used a confidential informant in hopes of committing a planned drug deal and recording the deal on a transmitter hidden on the informant's person. The informant, Antoine Hopson, and the agents went to Lauderdale, Mississippi to proceed with the operation. This occurred on September 28, 1993. The agents testified that they searched both the vehicle being used by the informant and the informant's person, as standard procedure. The informant was then instructed to drive to the Super Stop store in the area, while the agents waited nearby. This store was known from previous investigations to be a location where drugs could be purchased. Hopson had been given fifty dollars and instructed to attempt to make a drug purchase.

Knight testified that over the transmitter he heard Hopson refer to Naylor by his nickname, "Head." He also heard Hopson talk about a "double up," in which more cocaine is given in an attempt to recoup the money spent on the deal. The idea being that the buyer uses a small amount and turns around and sells the rest of the cocaine. After the buy was completed, Hopson turned the three rocks of cocaine he had purchased over to Knight. Knight took the cocaine to the East Mississippi Crime Lab for testing. Grady Downy testified to testing the cocaine and indicated that the substance was in fact crack cocaine. Knight also testified to listening to the tape made of the cocaine purchase prior to trial. He found that the tape had not been altered in any way. Knight identified Naylor in the courtroom as being the person from whom Hopson had purchased cocaine.

On redirect examination, Knight pointed out that Hopson was not a major drug dealer. He was merely another person involved in drug activity who wished to cooperate with NCIS as an undercover agent in arranging drug purchases. Knight also explained that without undercover agents it would be difficult, if not impossible, to bring drug salesmen and purchasers to justice. Undercover operatives were persons who knew both the people involved in the drug activity as well as the culture, and practices of those involved in these activities.

Kirk Griffen testified to being a special agent with NCIS at the Naval Air Station in Meridian, Mississippi. He was involved in making undercover narcotics cases against perpetrators in September 1993. He testified to working with Hopson, an informant who had provided them with reliable information on drug activity in Lauderdale County.

Testimony shows that no deals were made with the informant other than a commitment to speak favorably to the prosecutor if his cooperation was helpful in getting drug activity in the area stopped.

Hopson was the informant Griffen and Knight were working with at the time of this alleged cocaine sale. Hopson was told to make a purchase in the Super Stop store area in the Lauderdale community. Hopson was told to buy from someone he knew to be involved in selling cocaine.

Griffen corroborated Knight as to the fact that Hopson and his automobile were searched prior to leaving their presence for the Super Stop in Lauderdale County.

Hopson testified that Naylor was a distant cousin, and that Naylor's nickname, "Head," was given to him by Hopson's grandfather. Hopson was in the Navy stationed at Meridian at the time of this alleged drug sale. He admitted that he had possible pending charges against him for the sale of crack cocaine and conspiracy to sell crack cocaine. He had agreed to cooperate with naval investigators by serving as a confidential informant. He testified to being given fifty dollars to purchase cocaine from persons he knew were selling it. He testified to being searched and fitted with a body transmitter. He also testified to having his truck searched. He later testified he could not remember his truck being searched. He identified Naylor as the person from whom he had purchased three rocks of crack cocaine for fifty dollars. He had no doubt that he had purchased three rocks of cocaine from "Head," as Naylor was called.

At the conclusion of the State's case-in-chief, Hopson's attorney requested a directed verdict. It was overruled by the trial court. The court found the State had made a prima facie case through the corroborated testimony of the informant in this case.

Naylor was found guilty by a Lauderdale County Circuit Court jury.

ANALYSIS

I. THE STATE OF MISSISSIPPI DID NOT PROVE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF THE CRIME OF SELLING COCAINE.

Naylor was convicted under Miss. Code Ann. § 41-29-139 (Rev. 1993), which makes it a crime to distribute cocaine. Although Naylor frames this issue as a sufficiency question, his argument challenges both the weight and sufficiency. We will therefore address the issue accordingly. This claim goes to the sufficiency of the evidence.

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 Naylor'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 [Naylor'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.* Considering the elements of the crimes along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Naylor not guilty of selling cocaine. We find that the trial court properly denied Naylor's motion for a directed verdict.

Naylor also complains that the jury verdict was against the overwhelming weight of the evidence, and he requests a new trial. The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *Id.* at 781 (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (stating that witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (stating that witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, the jury heard the witnesses and the evidence as presented by both the State and cross-examined by the defense. The State presented the testimony of the buyer, corroborated by two law enforcement officers. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Naylor. The trial court did not abuse its discretion by refusing to grant Naylor a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that to allow it to stand would be to promote an unconscionable injustice. The trial court properly denied Naylor's motion for a new trial.

II. THE COURT ERRED IN ALLOWING THE CONFIDENTIAL INFORMANT, ANTOINE HOPSON, TO MAKE IRRELEVANT AND SELF-SERVING STATEMENTS CONCERNING BUYS HE MADE FOR NARCOTICS AGENTS AFTER HE ALLEGEDLY PURCHASED COCAINE FROM NAYLOR.

Naylor objects to the testimony of Antoine Hopson in which Hopson stated that he continued to participate in drug operations with the MBN and NCIS after the transaction with Naylor was completed and Naylor was arrested as well as after Hopson's own charges were dropped. Naylor argues that Hopson's testimony served no purpose but to show Hopson "must have been telling the truth since he was permitted to make other buys in other jurisdictions." Hopson objected as to the relevancy of the evidence and argues that Hopson was erroneously permitted to bolster his testimony while on direct examination.

The State responds that Naylor's cross-examination of agents Knight and Griffen regarding Hopson's undercover experience and motivation for cooperating with law enforcement opened the door to Hopson's subsequent testimony regarding the number of drug buys he had participated in after Naylor

was arrested. The State argues that Naylor attacked Hopson's credibility prior to his taking the stand therefore Hopson's testimony on direct examination was permissible to clarify for the jury Hopson's motivation for working undercover.

It is well established that "[a] trial judge has broad discretion as to the admissibility of evidence." *Coleman v. State*, 697 So. 2d 777, 784 (Miss. 1997). It is as equally well established that this Court will not reverse an evidentiary ruling unless the trial judge has so abused his discretion as to be prejudicial to the defendant. *Id.* In the present case, Naylor objected on relevance grounds. Under the Mississippi Rules of Evidence, all evidence that is relevant is admissible. M.R.E. 402. Alternatively, however, relevant evidence may be excluded if its probative value is outweighed by its tendency to mislead, to confuse, or to prejudice the jury. M.R.E. 403. Our task as an appellate court in reviewing Rule 403 determination is to simply determine whether the trial court abused its discretion in weighing the factors and admitting the evidence. *Foster v. State*, 508 So. 2d 1111, 1118 (Miss. 1987). In the present case, having reviewed the testimony of agents Griffen and Knight, we agree that Naylor opened the door to Hopson's testimony regarding his work with the law enforcement agencies. In examining agents Griffen and Knight, Naylor questioned Hopson's experience and motivation for working as a confidential informant. Thus, Hopson's testimony on direct examination was relevant to clear up the issues that Naylor brought out. We find nothing prejudicial in Hopson's testimony and therefore conclude that the trial court did not abuse its discretion in admitting the evidence.

THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT OF CONVICTION OF THE SALE OF COCAINE AND SENTENCE TO SERVE TWENTY- FOUR YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF \$1,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LAUDERDALE COUNTY.

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