

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01224 COA**

SHERMAN LAMAR TURNER

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:	11/02/95
TRIAL JUDGE:	HON. GEORGE C. CARLSON JR.
COURT FROM WHICH APPEALED:	YALOBUSHA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WILLIAMS R. SANDERS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	ROBERT L. WILLIAMS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	SALE OF A CONTROLLED SUBSTANCE, TO-WIT COCAINE: SENTENCED TO SERVE 7 YRS; PAY \$1,000 FINE SAID FINE BEING SUSPENDED; PAY \$125 TO MS CRIME LAB; PAY \$20 RESTITUTION TO MS BUREAU OF NARCOTICS WITHIN 1 YR OF RELEASE; PAY ALL COSTS OF COURT
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

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

KING, J., FOR THE COURT:

Sherman Lamar Turner was convicted of the sale of a controlled substance in the Circuit Court of Yalobusha County and sentenced to serve seven years in the custody of the Mississippi Department of Corrections. Turner was fined \$1000 and ordered to pay court costs, crime lab fees and restitution

to the Mississippi Bureau of Narcotics. Aggrieved by the conviction and sentence, Turner has appealed and assigned the following as error:

- 1. The trial court erred in overruling Turner's motion for a directed verdict at the close of the State's case in chief;**
- 2. The trial court erred in denying Jury Instructions D-1 and D-3;**
- 3. The trial court erred in striking venire panel members for cause; and,**
- 4. The trial court erred in allowing "drug courier profile" testimony over Turner's objection.**

Finding no reversible error, we affirm.

Facts

On April 22, 1994, Mississippi Bureau of Narcotics Agents Kevin Bell, Allen Castle, Randy Corbin, Kathleen Hoyt, and Leon Williams met with confidential informant Jackie Logan in Yalobusha County to initiate a buy of crack cocaine from a Calvin Moore, a/k/a Heavy D. Agent Williams and Logan went to Heavy D's residence where they encountered Sherman Turner. When Turner approached their vehicle, Agent Williams asked for Heavy D. Turner responded that he was taking care of Heavy D's business. Agent Williams then asked Turner to sell him "a 20." Turner instructed Agent Williams and Logan to drive around the block. When they returned, Turner sold Agent Williams a rock of cocaine. Turner was arrested and charged with the sale of a controlled substance pursuant to § 41-29-139(a)(1) of the Mississippi Code Annotated (Supp. 1997). The Yalobusha County Grand Jury indicted Turner on November 21, 1994. On November 15, 1995, a jury convicted Turner of the offense as charged in the indictment.

I.

DID THE TRIAL COURT ERR IN (A) OVERRULING TURNER'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND (B) DENYING HIS POST TRIAL MOTIONS?

A.

This Court's review of the denial of directed verdicts and judgments notwithstanding the verdict was recently outlined in *Coleman v. State*, **697 So. 2d 777, 787-8. (Miss. 1997)** as follows:

[T]his Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference [sic] that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required. . . .

Turner contends that the evidence in this case does not support the jury's verdict. In the case at bar, the State offered the audio recording of the buy, Agent Williams's eyewitness account of the drug sale, testimony that the substance in question was crack cocaine, and Williams's in-court identification of Turner as the person who sold him the crack. Turner testified on his own behalf that he did not sell drugs. This evidence was sufficient for a reasonable jury to convict Turner of the sale of a controlled substance.

The trial judge did not err in denying Turner's motions for directed verdict and judgment notwithstanding the verdict.

B.

This Court will not reverse a trial judge's denial of a request for a new trial unless the judge abused his discretion in not granting the motion. *Coleman*, 697 So. 2d at 788; *Shields v. Easterling*, 676 So. 2d 293, 298 (Miss. 1996) (quoting *Bobby Kitchens, Inc. v. Miss. Ins. Guar. Ass'n.*, 560 So. 2d 129, 132 (Miss. 1989)). Turner asserts that the State's witnesses committed perjury, were not credible, and therefore, the State could not prove him guilty beyond a reasonable doubt. The jury, as the sole judge of the weight and credibility of the testimony, found the State's witnesses to be credible and reached the unanimous conclusion that Turner was guilty of the crime charged. The trial judge should set aside a jury's verdict only when the verdict is contrary to the substantial weight of the evidence. *Pharr v. State*, 465 So. 2d 294, 302 (Miss. 1984); *May v. State*, 460 So. 2d 778, 781 (Miss. 1984); *Pearson v. State*, 428 So. 2d 1361, 1364 (Miss. 1983). Finding that the jury's verdict was supported by the evidence, we affirm.

II.

DID THE TRIAL COURT ERR IN DENYING JURY INSTRUCTIONS D-1 AND D-3?

Jury instruction D-1:

Instruction D-1, a peremptory instruction, read as follows:

"The Court hereby instructs the jury to find for the defendant, SHERMAN TURNER."

The applicable standard of review of the denial of a peremptory instruction is the same as our review of the denial of directed verdicts and judgments notwithstanding the verdict, discussed *supra*. With a view of the evidence in the light most favorable to the State, we find that the verdict was supported by the evidence and that the trial judge did not abuse his discretion in denying the peremptory instruction Turner requested.

Jury Instruction D-3:

It is a function of the jury to weigh the evidence and determine the credibility of witnesses. *Pharr*, 465 So. 2d at 302. As such, a judge is obligated to avoid statements which single out the testimony of any witness, or class of witnesses, or comment on the weight of that testimony. Jury Instruction D-3 was properly denied as a comment on evidence and because it singled out the testimony of a class of witnesses. Instruction D-3 read as follows:

The testimony of a law enforcement officer should be considered by you just as any other evidence in the case. In evaluating his or her credibility you should use the same guidelines which you apply to the testimony of any witnesses merely because he or she is a law enforcement officer. [sic]

This assignment of error is without merit.

III.

DID THE TRIAL COURT ERR IN REMOVING POTENTIAL JURORS FOR CAUSE?

It is well settled that the trial judge, being present in the courtroom, is better able to observe the overall demeanor of potential jurors and is given great discretion in his decision to excuse a juror. *See Lester v. State*, 692 So. 2d 755, 791 (Miss. 1997); *Scott v. Ball*, 595 So. 2d 848, 849 (Miss. 1992). The trial court's determination of whether a juror can be fair and impartial will be reversed only if clearly in error. *Carr v. State*, 555 So. 2d 59, 60 (Miss. 1989); *King v. State*, 421 So. 2d 1009, 1016 (Miss. 1982). In the case *sub judice*, Turner raised objections to the removal of veniremen 22, 47, 62, 86, 88, and 94. Finding no error in the trial judge's decision to excuse these potential jurors for cause, we affirm.

Veniremen 62, 88, and 94:

During voir dire, Stanley Bland (62), Barbara Ann Logan (88), and Sherry Dean Moore (94) all responded that they went to high school with Turner and considered him to be a friend. This Court was not provided with a transcription of the voir dire and must rely on the record developed during the jury selection process. There is no indication that any of these potential jurors, other than Mr. Bland, responded that they could be fair and impartial in spite of their relationship with Turner. The trial judge described Mr. Bland as being "a questionable juror at best." It cannot be said that the trial judge's determination that the aforementioned potential jurors's relationship with Turner could affect their impartiality at trial was in error. *See Walker v. State*, 671 So. 2d 581, 623 (Miss. 1995); *Woodward v. State*, 533 So. 2d 418, 424 (Miss. 1988); *Billiot v. State*, 454 So. 2d 445, 457 (Miss. 1984).

Venireman 22:

Ruthie Mae Ellis responded that she knew Turner and his mother and one of her sons had been convicted on a drug charge. Ms. Ellis also stated she could be fair and impartial and was not upset about what happened to her son. The State observed that she hesitated when asked whether she could be fair and impartial and seemed to not fully understand the questions as asked. The trial judge granted the challenge for cause, citing his observation of her responses to the questions and her demeanor in support of his decision. The trial judge's observation of Ms. Ellis is to be afforded great deference by this Court.

Venireman 47:

Juror No. 47, Mary Lee Jenkins, responded during voir dire that she lived in the same neighborhood as Turner, knew his mother well, had been represented by defense counsel, and had a brother that had been prosecuted in another drug case. Ms. Jenkins stated that she could be fair and impartial. The

trial judge agreed to excuse her for cause, stating that there was "too much there" to accept her response at face value. There appear to be several independent grounds which support the trial judge's removal of Ms. Jenkins from the jury panel, and as such, we will not disturb the trial court's ruling.

Venireman 86:

William Royce Price failed to respond to the question concerning connections with law enforcement. This omission left both Perkins and the State unable to make an informed decision to peremptorily strike or challenge for cause. His failure to respond to a clearly worded question renders him "unqualified" within the context of § 13-5-69 of the Mississippi Code Annotated (Supp. 1997) to serve as a juror. *See Collins v. State*, 691 So. 2d 918 (Miss. 1997); *Lewis v. State*, 580 So. 2d 1279, 1283 (Miss. 1991); *Myers v. State*, 565 So. 2d 554, 557 (Miss. 1990). Additionally, Turner may not assign as error on appeal the removal of a juror for cause that he himself asked to be stricken.

The trial judge's perception of a potential juror's capacity to be fair and impartial based on his observance of the juror is due great deference, and as such, we find no reversible error.

IV.

DID THE TRIAL COURT ERR IN ALLOWING "DRUG COURIER PROFILE" TESTIMONY OVER TURNER'S OBJECTION?

Agent Williams testified regarding the street lingo associated with the drug culture and Turner's actions on the day the buy took place. Williams testified that Turner's actions were those of a runner for a drug dealer. Turner argues that this testimony was tantamount to "drug courier profile" testimony. A trial judge has broad discretion as to the admissibility of evidence. Unless this discretion is so abused as to be prejudicial to the accused this Court will not reverse the lower court's ruling. *Dye v. State*, 498 So. 2d 343, 344 (Miss. 1986) (quoting *Shearer v. State*, 423 So. 2d 824 (Miss. 1982)).

Turner argues that this so called "drug courier profile" testimony was legally insufficient as proof of his guilt beyond a reasonable doubt. While it may be true that the testimony elicited from Williams that Turner was acting like a drug runner is circumstantial at best, it was also unnecessary to secure his conviction. Williams's eyewitness account of the sale was certainly legally sufficient for a reasonable, fair minded jury to convict Turner.

Given the nature of the charge and the eyewitness testimony of Agent Williams, any error committed was harmless. Finding no merit in this argument, we affirm.

THE JUDGMENT OF THE YALOBUSHA COUNTY CIRCUIT COURT OF CONVICTION OF SHERMAN LAMAR TURNER OF SALE OF A CONTROLLED SUBSTANCE, TO-WIT COCAINE AND SENTENCE AS A HABITUAL OFFENDER OF SEVEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, \$1000 SUSPENDED FINE AND ORDER TO PAY \$125 TO THE MISSISSIPPI CRIME LAB, AND \$20

RESTITUTION TO THE MISSISSIPPI BUREAU OF NARCOTICS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO YALOBUSHA COUNTY.

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