

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00533 COA**

R. L. SUMMERVILLE

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:	01/31/91
TRIAL JUDGE:	HON. GRAY EVANS
COURT FROM WHICH APPEALED:	LEFLORE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WHITMAN D. MOUNGER
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	FRANK CARLTON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I SALE OF COCAINE: CT II CONSPIRACY: CT I SENTENCED TO 30 YRS IN THE MDOC; CT II SENTENCED TO 5 YRS IN THE MDOC & THAT THE 5 YRS IN CT II RUN CONCURRENT WITH 30 YRS IN CT I
DISPOSITION:	AFFIRMED IN PART AND REVERSED AND RENDERED IN PART - 1/27/98
MOTION FOR REHEARING FILED:	2/9/98
CERTIORARI FILED:	
MANDATE ISSUED:	4/28/98

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

THOMAS, P.J., FOR THE COURT:

R. L. Summerville appeals his conviction for the sale of cocaine and conspiracy to sell cocaine raising the following issues as error:

I. THE TRIAL COURT ERRED IN REFUSING TO GRANT A DIRECTED VERDICT OF ACQUITTAL AND A REQUESTED PEREMPTORY INSTRUCTION (D-2), WITH REGARD TO A CHARGE OF CONSPIRACY TO SELL COCAINE CONTAINED IN COUNT II OF THE INDICTMENT AND, LIKEWISE, ERRED IN OVERRULING DEFENDANT'S MOTION FOR A NEW TRIAL OR FOR A JUDGEMENT NOTWITHSTANDING THE VERDICT WITH REGARD TO SAID CHARGE.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO GO BEYOND THE LEGALLY ACCEPTABLE SCOPE OF CROSS-EXAMINATION AND REBUTTAL IN ITS ATTEMPT TO IMPEACH THE DEFENDANT.

III. THE TRIAL COURT ERRED IN UNDULY RESTRICTING DEFENSE COUNSEL'S CROSS-EXAMINATION OF THE PRINCIPAL PROSECUTION WITNESS CONCERNING HIS PRIOR INCONSISTENT STATEMENTS MADE UNDER OATH AT PREVIOUS HEARINGS AND IN LIMITING INQUIRY INTO THE WITNESS'S INVOLVEMENT IN CRIMINAL ACTIVITY, INTENDED TO SHOW HIS INTEREST IN TESTIFYING.

Finding error, we affirm in part and reverse in part.

FACTS

On May 15, 1990, Kary Ellington, an agent for the North Central Narcotics Task Force, arranged and attended a meeting with Sterling Gates, a confidential informant employed by the Task Force. This meeting took place in Greenwood, Mississippi at Gates's residence. The two men left Gates's residence at which time Gates informed Ellington that he knew someone who could get them some drugs. They proceeded to drive to the home of Donald Lucas. Gates went up to Lucas's apartment while Ellington remained in the car. Lucas eventually went out to the car where he was asked by Ellington if he knew where drugs could be obtained. Lucas informed Ellington that he did and that he would come with both Ellington and Gates to show them where drugs could be purchased.

The three men then proceeded to drive around looking for the opportunity to purchase drugs. They first went down McLaurin Street in Greenwood but were unable to purchase any drugs in that area. Next, they went down Broad Street in Greenwood where Lucas observed a man standing next to a poolroom known as the Grand Ball Room. Lucas had Ellington stop the car since it was his opinion they could purchase drugs from this man. At trial both Ellington and Gates identified the man next to the Grand Ball Room as R. L. Summerville.

Ellington gave Lucas \$25 with which to make a purchase of crack cocaine. Lucas took the money and went up to Summerville. Ellington and Gates observed Lucas engage in a brief conversation with Summerville and then hand him some money. In return Summerville reached down inside a brown paper bag next to him and retrieved a piece of aluminum foil which he gave to Lucas. Lucas took the aluminum foil and gave it to Ellington. The aluminum foil contained a piece of crack cocaine as was determined by the Mississippi State Crime Lab. Ellington and Gates then drove Lucas back to his

home.

Both Lucas and Summerville were charged with selling cocaine and conspiracy to sell cocaine. Following deliberations, the jury returned a verdict of guilty for both men on both counts.

ANALYSIS

I. THE TRIAL COURT ERRED IN REFUSING TO GRANT A DIRECTED VERDICT OF ACQUITTAL AND A REQUESTED PEREMPTORY INSTRUCTION (D-2), WITH REGARD TO A CHARGE OF CONSPIRACY TO SELL COCAINE CONTAINED IN COUNT II OF THE INDICTMENT AND, LIKEWISE, ERRED IN OVERRULING DEFENDANT'S MOTION FOR A NEW TRIAL OR FOR A JUDGMENT NOTWITHSTANDING THE VERDICT WITH REGARD TO SAID CHARGE.

Summerville's motions for directed verdict, request for peremptory instructions, and for a judgment notwithstanding the verdict all test the legal sufficiency of the evidence. *Johnson v. State*, 642 So. 2d 924, 927 (Miss. 1994) (citing *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993)). Summerville argues that the evidence presented at trial was insufficient to support a guilty verdict by the jury on Count II of the indictment, conspiracy to sell cocaine, and as such the charge should be reversed.

When the legal sufficiency of the evidence is challenged we will not retry the facts but must take the view of the evidence most favorable to the State and must assume that the fact-finder believed the State's witnesses and disbelieved any contradictory evidence. *McClain*, 625 So. 2d at 778; *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992). On review, we accept as true all evidence favorable to the State, and the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin*, 607 So. 2d at 1201 (citations omitted). We will reverse such a ruling only where "reasonable and fairminded jurors could only find the accused not guilty." *McClain*, 625 So. 2d at 778 (citing *Wetz*, 503 So. 2d 803, 808 (Miss. 1987); *Harveston v. State*, 493 So. 2d 365, 370 (Miss. 1986); *Fisher v. State*, 481 So. 2d 203, 212 (Miss. 1985)).

Miss. Code Ann. § 97-1-1 (Supp. 1993) states that the crime of conspiracy is committed when two or more persons conspire to commit a crime or to accomplish any unlawful purpose. Furthermore, the Mississippi Supreme Court has stated:

For there to be a conspiracy, "there must be recognition on the part of the conspirators that they are entering into a common plan and knowingly intend to further its common purpose." The conspiracy agreement need not be formal or express, but may be inferred from the circumstances, particularly by declarations, acts, and conduct of the alleged conspirators. Furthermore, the existence of a conspiracy, and a defendant's membership in it, may be proved entirely by circumstantial evidence.

Franklin v. State, 676 So. 2d 287, 288 (Miss. 1996) (quoting *Nixon v. State*, 533 So. 2d 1078, 1092 (Miss. 1987)).

The Mississippi Supreme Court later in the same opinion stated:

By its very nature, conspiracy is a joint or group offense requiring a concert of free will. The union of the minds of at least two persons is a prerequisite to the commission of the offense, or,

stated differently, at least two persons must agree for a conspiracy to exist.

***Flanagan v. State*, 605 So. 2d 753, 757 (Miss. 1992).**

Summerville was charged and convicted of conspiring with Lucas to sell cocaine to Ellington. The only evidence that supports this conviction is the fact both Ellington and Gates testified that Lucas went up to Summerville, purchased cocaine and brought it back to Ellington. There is no evidence that Summerville knew that Lucas was to bring Ellington to him to purchase drugs. There is no evidence that Summerville knew the cocaine would be given to a third party. There is no evidence that Summerville even knew Lucas. Viewing the evidence in the light most favorable to the State, there is simply no reasonable inference that can be drawn that Summerville and Lucas conspired to sell cocaine to Ellington.

The evidence is insufficient to show that Summerville and Lucas entered into a common plan and knowingly intended to further its common purpose. ***Johnson*, 642 So.2d at 928**. Therefore, we will reverse on this issue.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO GO BEYOND THE LEGALLY ACCEPTABLE SCOPE OF CROSS-EXAMINATION AND REBUTTAL IN ITS ATTEMPT TO IMPEACH THE DEFENDANT.

The Mississippi Supreme Court has stated that "where an accused, on direct examination, seeks to exculpate himself, such testimony is subject to normal impeachment via cross-examination, and this is so though it would bring out that the accused may have committed another crime." ***Johnson v. State*, 666 So. 2d 499, 503 (Miss. 1995)** (quoting *Stewart v. State*, 596 So. 2d 851, 853 (Miss. 1992)). Normal impeachment applies when the defendant, on direct examination, makes blanket statements which open the door for impeachment. ***Id.*** (citing *Quinn v. State*, 479 So. 2d 706, 708-709 (Miss. 1985); *Pierce v. State*, 401 So. 2d 730 (Miss. 1981)). Once this door to the defendant/witness's criminal record has been opened, the evidence used by the State in response is more like rebuttal evidence than impeachment. ***Id.*** (citing *Settles v. State*, 584 So. 2d 1260, 1264 (Miss. 1991)).

However, the evidence which the State may admit is to be used for impeaching credibility only and not allowed to establish its truth. ***Quinn*, 479 So. 2d at 708**. Furthermore, the State is limited in such impeachment in that it, "may not exceed the invitation extended." ***Stewart*, 596 So. 2d at 853** (citing *Blanks v. State*, 547 So. 2d 29 (Miss. 1989)). In this instance, Summerville himself "opened the door" when he sought to exculpate himself on direct examination by his lawyer. Both the cross-examination evidence and the rebuttal evidence offered by the prosecution was normal impeachment evidence and properly admitted to impeach Summerville's claims.

During direct examination Summerville testified that he had never sold drugs and had never been to the location of Broad Street where the Grand Ball Room is located. Later on cross-examination Summerville again reiterated both these claims. It was therefore proper of the prosecution to put on rebuttal testimony of both Ellington and Gates that they had seen Summerville on Broad Street at times other than the night in question. Also, it was proper for Gates to testify in rebuttal that he had seen Summerville at various times involved in the same type of transaction that had been witnessed on the night in question. The prosecution engaged in normal impeachment and stayed within the

bounds provided by the invitation provided by Summerville. Therefore, this assignment of error is without merit.

Summerville also argues that rebuttal evidence such as this should have to meet the requirements of admissibility as called for under M.R.E. 609(a)(1), which deals with convictions per se. As the Mississippi Supreme Court has said:

Rule 609(a)(1) requires the trial judge to make an on-the-record determination that the probative value of the prior conviction outweighs its prejudicial effect before admitting any evidence of a prior conviction.

***Peterson v. State*, 518 So.2d 632, 636 (Miss. 1987).**

Summerville urges this Court to apply these principles not only to convictions as the rule requires but to purported crimes or criminal activity for which a defendant has not been indicted. Suffice it to say that we are not required to weigh these factors when a conviction is not involved.

Finally, Summerville argues that the jury should have been informed by a limiting instruction from the court as to the limited purpose of the rebuttal evidence before it was allowed to consider such evidence. However, M.R.E. 105 provides that when evidence is admissible for one purpose but not for another, a request by the affected party is necessary before the judge is required to give a limiting instruction. In this case no limiting instruction was requested by Summerville. Therefore, no reversible error occurred. Also, since this evidence was allowed in as normal impeachment, and not offered pursuant to M.R.E. 609, there was no error when the trial court failed to offer a limiting instruction, *sua sponte*, as required by case law. ***Peterson*, 518 So. 2d at 638. See *Pugh v. State*, 584 So. 2d 781, 785-86 (Miss. 1991)** (trial court should, *sua sponte*, provide limiting instruction that prior convictions are to be considered only for purpose of attacking defendant's credibility where prior convictions offered are identical to charge on which defendant is currently being tried).

III. THE TRIAL COURT ERRED IN UNDULY RESTRICTING DEFENSE COUNSEL'S CROSS-EXAMINATION OF THE PRINCIPAL PROSECUTION WITNESS CONCERNING HIS PRIOR INCONSISTENT STATEMENTS MADE UNDER OATH AT PREVIOUS HEARINGS AND IN LIMITING INQUIRY INTO THE WITNESS' S INVOLVEMENT IN CRIMINAL ACTIVITY, INTENDED TO SHOW HIS INTEREST IN TESTIFYING.

Summerville argues that he was unduly prejudiced when the trial court denied defense counsel's proposal to introduce a certified copy of an indictment of the Circuit Court of Panola County, Mississippi, wherein Sterling Gates, one the State's principal witnesses in the instant case, was charged with grand larceny. This charge was eventually dismissed by the Circuit Court of Panola County some two weeks before trial of the instant case. The proposed introduction of the indictment was to serve a dual purpose. First, it was to impeach and test the credibility of Gates, who had previously testified at two preliminary hearings that he had, "never been in trouble with the law." Second, it was to be used to show the potential for interest and bias on part of the witness in testifying since the charge was never prosecuted.

Summerville asserts that the copy of the indictment should have been allowed in under M.R.E. 613(a)

(b), M.R.E. 607, or M.R.E. 404(b). Furthermore, he maintains that failure to allow the evidence in was in violation of his right to confrontation and examination of a witness appearing against him in violation of § 13-1-11 of the Mississippi Code of 1972, as amended, as well as Amendment VI of the United States Constitution and § 26 of the Mississippi Constitution of 1890. While we recognize that these arguments are not totally devoid of merit, we will not address them at this time since the exclusion of this evidence was proper because it was the consequence of an inadequate proffer of proposed testimony.

Summerville's defense counsel attempted to proffer the copy of the indictment before cross-examination of Gates had even begun. No predicate was laid for impeachment under the rules of evidence. **M.R.E. 103(a)** says: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected;" and under M.R.E. 103(a)(2), "in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

During cross-examination no questions were asked of Gates about his indictment or the reasons why it was dismissed. If this had been done, there is little doubt that the trial court most likely would have allowed the extrinsic evidence in of the indictment.

In the final analysis, Summerville's defense counsel failed to properly convey to the trial judge the substance and purpose of this evidence and then failed to properly question Gates during cross-examination. This assignment of error is without merit.

THE JUDGMENT OF THE LEFLORE COUNTY CIRCUIT COURT OF CONVICTION OF SALE OF COCAINE AND CONSPIRACY TO SELL COCAINE IS AFFIRMED IN PART AND REVERSED AND RENDERED IN PART. COUNT I, SALE OF COCAINE, SENTENCE TO SERVE THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. COUNT II, CONSPIRACY TO SELL COCAINE , IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LEFLORE COUNTY.

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