

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-KA-00273 COA**

**JAMES WESTLEY JACKSON A/K/A JAMES  
WESLEY JACKSON**

**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:	01/25/96
TRIAL JUDGE:	HON. JANNIE M. LEWIS
COURT FROM WHICH APPEALED:	YAZOO COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	GUY N. ROGERS, JR. GEORGE T. HOLMES
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT S. FLYNN
DISTRICT ATTORNEY:	NOEL D. CROOK
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CAPITAL MURDER: SENTENCED TO SERVE A TERM OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MDOC WITHOUT THE POSSIBILITY OF PAROLE
DISPOSITION:	AFFIRMED - 03/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/8/98

BEFORE BRIDGES, C.J., COLEMAN, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

James Jackson was convicted of capital murder in the Yazoo County Circuit Court and sentenced as an habitual offender to life without parole in the MDOC. Jackson now appeals to this Court alleging five errors. Finding no error, we affirm the lower court's ruling.

## FACTS

Hargon's Grocery, a small store in Vaughn, Mississippi was robbed by three men. Two men entered the store, while one man stayed in the car awaiting the getaway. The owner of the store, Dan Hargon, was shot and killed during the robbery.

An eyewitness, Charles Nichols, drove up to the store while the robbery was in progress, and although he could not identify the men, he described the getaway car as a light green Lincoln with a dark green top. Officers later discovered that the car was owned by Forest Branch. After being arrested, Branch gave a statement claiming that Jackson and Ronnie Wright planned the robbery, and they went in the store while Branch waited in the getaway car. In this initial statement, Branch said that after the robbery Wright said, "Damn, I killed a man for \$117." Later, Branch changed his story and said that it was Jackson not Wright who made that statement.

Madison County Sheriff's officers arrested Wright and Jackson. Branch plead guilty to armed robbery. Wright stood trial for capital murder, was found guilty, and sentenced to life imprisonment. Prior to trial, Jackson moved for a change of venue. The motion was denied, renewed after voir dire, and again denied. Jackson stood trial and was convicted. He now appeals stating the following issues:

**I. DID THE TRIAL COURT ERR BY NOT GRANTING A CHANGE OF VENUE?**

**II. SHOULD THE COURT HAVE DECLARED A MISTRIAL WHEN A SHERIFF'S DEPUTY TESTIFIED THAT THE DEFENDANT DID NOT MAKE A STATEMENT WHEN ARRESTED?**

**III. DID THE TRIAL COURT IMPROPERLY LIMIT THE CROSS EXAMINATION OF BERNICE BRANCH?**

**IV. DID THE TRIAL COURT ERR IN LIMITING THE TESTIMONY OF DEFENSE WITNESS KEN MAYBERRY?**

**V. WAS THE VERDICT OF GUILTY CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?**

## ISSUES

**I. DID THE TRIAL COURT ERR BY NOT GRANTING A CHANGE OF VENUE?**

Jackson argues that because of negative newspaper articles and community talk, the judge should have granted his motion for change of venue. Jackson discusses four newspaper articles which he contends were very damaging to his case. The articles discussed facts, some of which were inadmissible at trial. The judge denied Jackson's motion. Jackson renewed his motion after voir dire, which was likewise denied by the judge.

The first motion was made prior to trial with attached affidavits signed by two local citizens as is required by Mississippi Code Annotated Section 99-15-35 (Rev. 1994). A rebuttable presumption arises, once the affidavits are presented, that a fair trial is impossible without a change of venue. *Lutes v. State* 517 So. 2d. 541, 545 (Miss. 1987). The State then presented four witnesses to rebut

the presumption. The trial judge denied the motion.

The motion was made a second time after the voir dire of the venire. The judge again denied the motion stating that although there were a number of people who had read one or two articles on the subject, they all said they barely remembered what the articles said. They all said that the articles would have no effect on them, and that they would be able to sit as fair and impartial jurors.

When reviewing the trial court in a denial of a change of venue motion, "we look to the completed trial, particularly including the voir dire examination of prospective jurors, to determine whether the accused received a fair trial." *Winters v. State*, 473 So. 2d 452, 457 (Miss. 1985). We must also look to certain factors which may cause the presumption which is created by the filing of the affidavit by the defense to become an irrebuttable presumption. These factors include:

1. Capital cases based on considerations of a heightened standard of reviews;
2. Crowds threatening violence toward the accused;
3. An inordinate amount of media coverage, particularly in cases of
  - a. serious crimes against influential families;
  - b. serious crimes against public officials;
  - c. serial crimes;
  - d. crimes committed by a black defendant upon a white victim;
  - e. where there is an inexperienced trial counsel

***White v. State*, 495 So. 2d. 1346, 1349 (Miss. 1986).**

If any of the above factors are present in the case, it may cause the presumption to become irrebuttable. Here, there were thirty-nine of the total seventy-five potential jurors who had, in some form or fashion, heard about the case. Also, of the factors listed that can cause the defense's presumption to be irrebuttable, the only one which really applies is the fact that the defendant is black and the victim was white. This factor may have been determinative had the jury been all white, but the blacks on the jury, as well as the whites, all voted to convict Jackson. This was a capital murder trial, but the jury did not vote for the death penalty. Although there were several articles written on the case, there was certainly not an inordinate amount of pretrial publicity. None of the other factors apply here.

In a recent Mississippi case, the supreme court held that where there is discussion by the jury during deliberations as to the articles that had been previously read by the jurors, then there can also be reason to believe the defendant did not receive a fair trial. *Hickson v. State*, No. 92-CT-00976-SCT, 1997 WL 765701, at \*8 (Miss. Dec. 15, 1997). In *Hickson*, the Court held that there were improper discussions during deliberations which were highly prejudicial to the defendant. *Id.* The jurors had all stated during voir dire that they could remain impartial and unbiased, but the improper discussions made it evident that this was not the case. *Id.* In the case at hand, the jurors who served all stated during voir dire that they could remain impartial and unbiased, and we must presume, absent evidence

to the contrary, that they were fair and followed the court's instructions.

*Lutes* held that where the evidence is such that no reasonable jury could have reached a different verdict, then it cannot be said that the defendant did not receive a fair trial. *Lutes*, 517 So. 2d at 547. *Lutes* also holds that when the verdict is life imprisonment instead of the death penalty, then there is a much weaker argument that there was bias or prejudice. *Id.*

The evidence against Jackson in this case was overwhelming, and a reasonable jury anywhere in the state of Mississippi would have found the defendant guilty based on the evidence available. The jury also returned a verdict of life imprisonment instead of the death penalty. These facts along with the previously discussed items lead this Court to find that the trial judge did not abuse her discretion when she denied Jackson's motion for a change of venue.

## **II. SHOULD THE COURT HAVE DECLARED A MISTRIAL WHEN A SHERIFF'S DEPUTY TESTIFIED THAT THE DEFENDANT DID NOT MAKE A STATEMENT WHEN ARRESTED?**

Deputy Roberts, the officer who arrested Jackson for the robbery, was asked whether the defendant made any statement after he was read his rights. The deputy answered that Jackson did not make any statement. Jackson objected at trial and made a motion for a mistrial. The judge overruled the objection and denied the motion.

Jackson relies on a case where the U.S. Supreme Court ruled that a criminal defendant's post-arrest silence was a constitutionally improper subject for impeachment, and the offering of such information into a trial may constitute reversible error. *Doyle v. Ohio*, 426 U. S. 610, 617 (1976). However, *Doyle* went on to say that the conviction should be overturned where the error was not harmless. *Id.* at 619. A subsequent case, *Austin v. State*, 384 So. 2d 600, 601 n.1 (Miss. 1980), was distinguished from *Doyle* because the appellee in *Doyle* did not contend that the error was harmless, while the State made that argument in *Austin*. The Court in *Austin* held that "in view of the overwhelming evidence of appellant's guilt beyond a reasonable doubt, we hold the error was harmless." *Id.* at 601.

Following precedent, we find that, although there was error in allowing the State to ask and Deputy Roberts to answer the question regarding post-arrest silence, the error was harmless due to the overwhelming evidence against Jackson.

## **III. DID THE TRIAL COURT IMPROPERLY LIMIT THE CROSS EXAMINATION OF BERNICE BRANCH?**

Jackson sought to question Mrs. Branch while she was on the stand as to her mental capacity or intoxication level on the day that she was questioned by the defense attorney. Apparently, Branch told the investigating officer one story and then could not remember what she told him when Jackson's attorney questioned her. The court ruled that Branch's sobriety on the day she was questioned by Jackson's attorney was not relevant to the case. After the proffer was made by Jackson, the State as well as the trial judge allowed Jackson to continue his questioning about Branch changing her story as long as there were no questions about her sobriety. Jackson chose not to ask any more questions along those lines altogether. Therefore, Jackson was not improperly limited in his

cross of Branch, and we affirm the trial court's ruling on the matter.

#### **IV. DID THE TRIAL COURT ERR IN LIMITING THE TESTIMONY OF DEFENSE WITNESS KEN MAYBERRY?**

During Jackson's case-in-chief, Jackson asked Mayberry about an earlier conversation he had with Branch where Branch supposedly told Mayberry that Jackson had nothing to do with the murder. Jackson was seeking to impeach Branch by admitting this testimony from Mayberry. The State objected stating that a proper foundation had not been laid to impeach Branch with this statement. Branch was not asked about the conversation with Mayberry when he was cross-examined by Jackson, and therefore was not given a chance to explain or deny it.

Jackson mistakenly relies on *Marcum v. Mississippi Valley Gas*, 587 So. 2d 223 (Miss. 1991), arguing that it holds that a prior inconsistent statement of a witness could be allowed, even where no foundation was laid, if a proffer of the testimony was made, and if the trial court determines that the witness is available for recall. Jackson is correct in his argument as to what *Marcum* held, however, *Marcum* was overruled by *Whigham*. *Whigham v. State*, 611 So. 2d 988, 994 (Miss. 1992). *Whigham*, in essence, overruled *Marcum*, except in the specific instance where the impeachment statement was not known until after the witness to be impeached had finished testifying.

In such an instance a trial judge in the interest of justice may permit the introduction of such statement, but only after making sure that the witness is available for recall and is given an opportunity to explain or deny the statement. Even here, however, it would be better procedure to permit the witness to be recalled for further examination and asked about the statement, and given an opportunity to explain or deny it, rather than introducing the statement and then recalling the witness.

. . . We adhere to our holding in *Marcum* that there may be instances, as above noted, in which a trial court in the interest of justice has the discretion of admitting a pretrial inconsistent statement of a witness into evidence for which no predicate was laid of the witness, but only after the court has seen to it that the witness is available for recall and is given an opportunity to deny. *Marcum*, however, is overruled insofar as it is contrary to our holding today.

#### ***Id.***

It is evident that the only time the testimony of an inconsistent statement of a witness may be admitted when the proper foundation has not been laid is when the defense did not know of the prior inconsistent statement until after the witness had completed his testimony. Here, Jackson surely knew of this inconsistent statement while in jail and certainly Jackson's attorney knew of it while Branch was testifying or else Mayberry would never have been called as a witness. Jackson's sole purpose in calling Mayberry was to impeach Branch's testimony, and Jackson should have laid a proper foundation while Branch was on the stand. We hold that the trial judge was correct in limiting the testimony of Mayberry.

#### **V. WAS THE VERDICT OF GUILTY CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?**

Jackson made a motion for a new trial after the jury returned the verdict. A motion for a new trial

goes to the weight of the evidence and not its sufficiency. In reviewing this claim, this Court must examine the trial judge's denial of Jackson's motion for a new trial. *Jones v. State*, 635 So. 2d 884, 887 (Miss. 1994). The decision of whether or not to grant a motion for a new trial rests in the sound discretion of the trial judge and should only be granted when the trial judge is certain that the verdict is so contrary to the overwhelming weight of the evidence that failure to grant the motion would result in an unconscionable injustice. *May*, 460 So. 2d at 781. In making the determination of whether a verdict is against the overwhelming weight of the evidence, this Court must view all evidence in the light most consistent with the jury verdict, and we should not overturn the verdict unless we find that the lower court abused its discretion when it denied the motion. *Blanks*, 542 So. 2d at 228. The proper function of the jury is to decide the outcome in this type of case, and the court should not substitute its own view of the evidence for that of the jury's. *Id.* at 226. Likewise, the reviewing court may not reverse unless it finds there was an abuse of discretion by the lower court in denying the defendant's motion for a new trial. *Veal v. State*, 585 So. 2d 693, 695 (Miss. 1991). Upon reviewing all of the evidence presented in the light most consistent with the verdict, we find that the trial judge did not abuse his discretion in denying Jackson's motion for a new trial.

The judge, correctly finding that the State had made out a prima facie case of capital murder, allowed the case to go to the jury. The jury properly performed its function by drawing reasonable inferences from the evidence presented and rendering a verdict which was supported by the evidence. Therefore, we affirm the lower court's denial of Jackson's motion for a new trial.

**THE JUDGMENT OF THE YAZOO COUNTY CIRCUIT COURT OF CONVICTION OF CAPITAL MURDER AND SENTENCE TO LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITHOUT POSSIBILITY OF PAROLE IS AFFIRMED. COSTS ARE ASSESSED TO YAZOO COUNTY.**

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