

IN THE COURT OF APPEALS 5/6/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00519 COA

TRELLIS JEROME HARVEY

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

TRIAL JUDGE: HON. ROBERT H. WALKER

COURT FROM WHICH APPEALED: HANCOCK COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

RICHARD V. DYMOND

KELLY C. WALKER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: CONO CARRANNA

NATURE OF THE CASE: CRIMINAL - SALE OF COCAINE

TRIAL COURT DISPOSITION: TRANSFER OF A CONTROLLED SUBSTANCE TO-WIT
COCAINE: SENTENCED TO SERVE A TERM OF 60 YRS IN THE MDOC; DEFENDANT
HABITUAL OFFENDER & SHALL NOT BE ELIGIBLE FOR PAROLE, PROBATION OR ANY

FORM OF EARLY RELEASE

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

BRIDGES, C.J., FOR THE COURT:

On March 15, 1995, Trellis Jerome Harvey ("Harvey") was convicted of the sale of cocaine in the Circuit Court of Hancock County. Being a habitual offender, Harvey was sentenced to sixty (60) years in the M.D.O.C. On appeal, he argues 1) that the court erred in not allowing his definition of reasonable doubt, 2) that the court erred in refusing to grant his instruction D-3, 3) that the court erred in allowing instruction S-1, and 4) that the verdict was against the overwhelming weight of the evidence. Finding no merit in the issues raised by Harvey, we affirm.

FACTS

On the evening of January 11, 1994, David Stepro, Chief Investigator for the Waveland Police Department and Director of the Hancock County Narcotics Task Force, and Jeanne Jacobs, officer with the Waveland Police Department, met with Officer Shane Corr, member of the Bay St. Louis Police Department and the Hancock County Narcotics Task Force, and others to prepare to purchase drugs in an effort to curb the illegal drug trade in that area. The plan was for Stepro and Jacobs to drive undercover into an area of Waveland known for drug trafficking. They would attempt to purchase drugs while there.

Stepro and Jacobs were given an unmarked car that was wired for sound. Stepro also wore a microphone and tape recorder on his body. For safety reasons, Corr and other officers maintained audio surveillance of Stepro and Jacobs while remaining hidden nearby. Stepro was given twenty dollars with which to purchase the drugs. In keeping with standard operating procedure, Stepro, Jacobs and the car were searched prior to the operation for the existence of money or drugs.

Stepro and Jacobs' first attempt at purchasing was embarrassingly unsuccessful. Stepro gave the money to the unidentified drug dealer before getting the drugs. Predictably, the drug dealer absconded with the money having not given the officers any drugs. The officers were unsuccessful in their attempts to find the man who had stolen their money. Stepro and Jacobs returned to a pre arranged meeting place to get more money from Corr. After Stepro was subjected good some natured ribbing for improperly "fronting" the drug money, the two officers were given more money and they and their car were again searched for money or drugs.

Upon returning to the same area, the officers attempted to purchase \$20.00 worth of crack cocaine from Harvey. Stepro recognized Harvey at once from "somewhere." In order to get the crack, Harvey asked to be given a ride to the house where he was staying. While the officers waited in the driveway of the house for Harvey to get the drugs, Stepro uttered into his microphone the description of the license plate of a car that was parked in the driveway. The car and the house were later traced to Harvey's mother. Harvey later admitted to staying with his mother at the time of the transaction. After the transaction was completed, Harvey was again driven to another place where he was let off. While riding in the car, Harvey was recorded speaking to the officers. Both officers

would later testify that they got a good look at Harvey during the transaction. Later that night, Corr set up a photographic lineup, and Stepro was able to pick Harvey from the lineup as the one who sold the crack to him.

At trial, both officers recognized and identified Harvey as the man who had sold them crack cocaine. The tape recording of the transaction was admitted into evidence, and Stepro again identified Harvey as the man speaking on the tape. The substance purchased from Harvey was later identified by the Mississippi Crime Laboratory as rock or "crack" cocaine.

ARGUMENT AND DISCUSSION OF LAW

I. WHETHER THE TRIAL COURT ERRED IN PRECLUDING THE DEFENSE FROM VERBALLY INSTRUCTING THE JURY OF ITS DEFINITION OF REASONABLE DOUBT.

Prior to closing argument in this case, counsel for the defendant sought in limine to gain the court's approval of part of his discussion of reasonable doubt. He sought to instruct that in order for the jurors to be convinced beyond a reasonable doubt, they needed to be convinced "with utmost certainty." He also sought to preclude the prosecution from "demeaning" this definition of reasonable doubt. The court refused to allow this request and instructed defense counsel to "stay with the reasonable doubt." We find that the trial judge was not in error in ruling as he did.

"[The supreme] court has held that reasonable doubt defines itself and needs no further definition by the court. *Chase v. State*, 645 So. 2d 829, 850 (Miss. 1994). Furthermore, efforts to enlarge upon this self-explanatory definition have not been allowed by our supreme court. *Barnes v. State*, 532 So. 2d 1231, 1235 (Miss. 1988). We find that counsel for the Defendant was improperly seeking to enlarge the highest burden of proof that can be placed upon the State. The trial judge properly disallowed it. In keeping with the firm precedent in Mississippi, we find no merit in Harvey's first issue.

II. WHETHER THE TRIAL COURT ERRED IN REFUSING DEFENDANT'S INSTRUCTION D-3.

Instruction D-3 read as follows:

The court instructs the jury that the State has the burden of proving the defendant guilty of every element of the crime charged. This burden requires that the State prove each element of the crime charged, beyond a reasonable doubt. Trellis Harvey is not required to prove his innocence. It is as much your duty to acquit if you have a reasonable doubt of guilt as it is your duty to acquit if you are absolutely certain of innocence.

The trial judge refused this instruction because he felt that the jury was adequately instructed about the burden of proof by Instruction C-13, which reads as follows:

The law presumes every person charged with the commission of a crime to be innocent. This presumption places upon the State of Mississippi the burden of proving the Defendant guilty of every element of the crime with which he is charged. Before you can return a verdict of guilty, the State must prove that the Defendant is guilty beyond a

reasonable doubt. The Defendant is not required to prove his innocence.

We agree that C-13 adequately instructs the jury on the issue of reasonable doubt. "It is a familiar rule that all instructions must be considered together, and if the instructions considered as a whole fully instruct as to the state's burden of proof, the refusal of an instruction will not constitute reversible error." *Holden v. State*, 399 So. 2d 1343, 1345 (Miss. 1981). Accordingly, we find no merit in Harvey's second issue.

III. WHETHER THE TRIAL COURT ERRED IN GRANTING THE STATE'S INSTRUCTION S-1

Instruction S-1 reads in pertinent part as follows:

The Court instructs the jury that the defendant, Trellis Jerome Harvey, has been charged by an indictment with the crime of Sale or Transfer of a Controlled Substance, Cocaine If you find from the evidence beyond a reasonable doubt that: . . . then you shall find the defendant, Trellis Jerome Harvey, guilty of Sale or Transfer of a Controlled Substance, Cocaine.

Harvey argues that this instruction improperly raises the presumption that the substance involved in the transaction is cocaine, when, in fact, this is one of the elements that the State has to prove beyond a reasonable doubt.

At the outset, this Court is of the opinion that Harvey's argument is procedurally barred because Harvey disputed this instruction on different grounds at trial. At trial Harvey disputed the use of the word "shall" as opposed to "may." His argument at trial mentioned nothing the presumption he now questions on appeal. A party may not base their appeal on different grounds from the grounds for their objection at trial. *Thornhill v. State*, 561 So. 2d 1025, 1029 (Miss. 1989). Moreover, our review of the record in this case reveals that the State more than carried their burden of proving that this substance was cocaine. The State's witness, Timothy Gross, testified unequivocally that based on his analysis the substance was cocaine. Accordingly, this issue has no merit.

IV. WHETHER THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE

Where the defendant contends that a new trial should have been granted because the jury verdict was against the weight of the evidence, the standard of review is as follows:

The challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. Procedurally such challenge necessarily invokes [Mississippi Uniform Criminal Rule of Circuit Court Practice] 5.16. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

Id. at 781. All matters concerning the weight and credibility of the evidence are resolved by the jury. *Id.*

The Supreme Court of Mississippi eloquently condensed this standard stating:

[O]nce the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part from that [sic] the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty.

Williams v. State, 463 So. 2d 1064, 1068 (Miss. 1985).

Our thorough review of the record in this case reveals that the overwhelming weight of the evidence supports this conviction. Harvey's main theory of defense, misidentification, did not overcome the officers' testimony about their positive identification of Harvey as the one who sold them crack cocaine. Both officers clearly got a good look at Harvey and had no problem identifying him. Harvey has not presented this Court with sufficient reason to overturn his conviction. Accordingly, Harvey's last issue is also without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY OF CONVICTION OF SALE OR TRANSFER OF A CONTROLLED SUBSTANCE TO-WIT: COCAINE AND ENHANCED SENTENCE AS AN HABITUAL OFFENDER TO A TERM OF SIXTY (60) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

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