

IN THE COURT OF APPEALS 04/22/97
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-01157 COA

AUNDRA MONROE MAGEE A/K/A ANDRE MONROE MAGEE

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. JERRY O. TERRY

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HARRISON COUNTY

ATTORNEY FOR APPELLANT:

F. HOLT MONTGOMERY, JR

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL - AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED OF AGGRAVATED ASSAULT AND
SENTENCED TO 15 YEARS IN CUSTODY OF MDOC

EN BANC

COLEMAN, J., FOR THE COURT:

Aundra M. Magee was tried and convicted in the Harrison County Circuit Court of aggravated assault. For his offense Magee was sentenced to fifteen years in the custody of the Mississippi Department of Corrections. Magee appeals his conviction on the following grounds:

I. DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION TO ADMIT INTO EVIDENCE AN AFFIDAVIT EXECUTED BY THE VICTIM DENYING DEFENDANT'S CULPABILITY?

II. DID THE TRIAL COURT ERR IN FAILING TO GRANT JUDGMENT NOTWITHSTANDING THE VERDICT, SINCE THE WEIGHT OF THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION?

Holding Magee's assignments of error to be without merit, we affirm the judgment of the circuit court.

FACTS

On February 18, 1993 Devon Williams was "hanging out" on or near the premises of the Boys and Girls Club in Forrest Heights, an area north of the City of Gulfport, Mississippi. Around three or four o'clock in the afternoon a white Ford Mustang automobile driven by Roy Moody pulled up beside Williams and stopped. According to Williams's testimony, as he looked into the car through the passenger window he noticed that the passenger, Aundra Magee, had a handgun in his lap. Williams testified that at this point he became frightened and began to back away from the car. Williams testified that as he began to turn and run, Magee opened the car's passenger door and fired approximately six shots at him. Williams was struck in the right shoulder by one of the projectiles. Despite being wounded, Williams was able to run away from the crime scene and thereby avoid further injury. After the shooting ceased the car sped away. This incident was witnessed by Edwina Agee, an employee of the Boys and Girls club, who is also Williams's aunt.

After the shooting Williams was taken to a local hospital where he received medical treatment. While in the hospital Williams was interviewed by an officer of the Harrison County Sheriff's Office. Williams related his version of the events to the officer and stated that he was certain that his assailant was Magee. Both Moody and Magee were subsequently arrested and indicted together for aggravated assault. After his motion for severance was granted, Magee was tried separately from Moody. It is from this conviction that Magee raises the instant appeal.

ANALYSIS

I. DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION TO ADMIT INTO EVIDENCE AN AFFIDAVIT EXECUTED BY THE VICTIM DENYING DEFENDANT'S CULPABILITY?

Magee argues that the trial court committed reversible error in not admitting into evidence a sworn affidavit executed by Williams. Magee contends that the affidavit should have been admitted pursuant to Mississippi Rule of Evidence 613(b), for the purpose of impeaching Williams's testimony. Magee further contends that admission of the affidavit was "mandatory" pursuant to Rule 1002. The State responds by pointing out that in his testimony at trial Williams admitted, rather than denied, that he knowingly made the false statements contained in the affidavit. Accordingly, the State argues that in light of Williams's admissions, there remained no inconsistent testimony for the affidavit to impeach. The State also notes that because of Williams's admissions, the contents of the affidavit were not at issue and therefore Rule 1002 was not implicated. The State contends that even had the trial court been in error for excluding the affidavit from evidence, Magee suffered no prejudice as a result.

The affidavit in question was executed by Williams in February of 1994, approximately one year from the date of the shooting and Williams's statement to law enforcement officers that Magee was the assailant. In his affidavit Williams swears that Magee was not the individual who shot him. This affidavit was drafted by Warren Conway, attorney at law, who was then (prior to Magee's motion for severance) serving as defense counsel for both Moody and Magee. The affidavit was executed in Conway's law office and was attested to by Angela Moody, a notary public who is also the mother of Magee's co-defendant, Roy Moody. At trial Williams testified that he executed the affidavit at Roy Moody's request, after Roy told him to go to Conway's law office and "tell him that you don't know who shot you." Williams stated that although he "didn't agree" with Moody's suggestion, he complied with the demand because he "didn't want them to go to jail." Williams stated that Magee's lawyer told him that if he signed the affidavit, it "would end the matter." Williams testified that his original statement to the officer at the hospital emergency room was the truth, and that he was positive that Aundra Magee was the person who shot him.

Under the Mississippi Supreme Court's standard of review, the admissibility of evidence rests within the discretion of the trial court. *Baine v. State*, 606 So. 2d 1076, 1078 (Miss. 1992). Unless the trial judge has abused his judicial discretion so as to result in prejudice to the accused, this Court will not reverse his ruling. *Shearer v. State*, 423 So. 2d 824, 826 (Miss. 1983). In disposing of this assignment of error this Court is guided by our supreme court's decision in *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), a case involving the same issue now raised by Magee.

In *Conner* the court held that under Mississippi Rule of Evidence 613(b), "once a witness 'explains' a prior inconsistent statement by **admitting** it, the statement cannot be admitted into evidence." *Conner*, 632 So. 2d at 1260 (quoting *Marcum v. Mississippi Valley Gas Co.*, 587 So. 2d 223, 226-27 (Miss. 1991), *overruled on other grounds*, *Whigham v. State*, 611 So. 2d 988, 994 (Miss. 1992)). *Conner*, like the case at bar, involved a witness who admitted to having made a prior inconsistent statement, and one party then attempted to introduce the prior statement into evidence under Rule 613(b). Following earlier Mississippi cases on the same issue, the *Conner* court held that "[i]f the witness confesses or admits having made prior inconsistent statements, ordinarily there is no necessity for further proof, as by the admission of the prior inconsistent written statement." *Conner*, 632 So. 2d at 1260 (quoting *Davis v. State*, 431 So. 2d 468, 473 (Miss. 1983)). The *Conner* court further held that "where the witness admits making past statements which contradict his trial testimony, the witness stands impeached without introducing the writing into evidence." *Conner*, 632 So. 2d at 1260 (quoting *Moffett v. State*, 456 So. 2d 714, 719-20. (Miss. 1984)). The *Conner* court held that the trial judge committed error in admitting the prior written statement into evidence, because the

witness acknowledged that his testimony at trial conflicted with his prior statements. *Conner*, 632 So. 2d at 1260.

The purpose of Rule 613(b) is to allow the impeachment of witnesses who deny that their testimony at trial is inconsistent with their prior statements on the same subject. Under the facts at bar, like those in *Conner*, Magee gave testimony at trial that was inconsistent with his prior statements. Magee, however, admitted to making the prior inconsistent statements and was allowed to explain why they were inconsistent with his trial testimony. Accordingly, Magee's testimony at trial regarding the identity of his attacker presented nothing to impeach. By admitting that his earlier statements on the subject were untrue, Magee eliminated the need for extrinsic proof to demonstrate the inconsistency.

Regarding Magee's argument that Rule 1002 made the admission of the affidavit "mandatory," we hold that such an assertion is without any basis in law or fact. Rule 1002 applies when the contents of a writing are in dispute. In the case at bar there was no dispute as to the contents of the affidavit. Accordingly, the circuit judge did not abuse his discretion in rejecting the affidavit from evidence. This assignment of error is without merit.

II. DID THE TRIAL COURT ERR IN FAILING TO GRANT JUDGMENT NOTWITHSTANDING THE VERDICT, SINCE THE WEIGHT OF THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION?

Magee's final assignment of error complains that the circuit court was in error for not granting his post-trial motion for JNOV. Magee, however, in his argument also seems to challenge the weight of the evidence, which, of course, would be an objection to the denial of his motion for a new trial. Because Magee's assignment of error is unclear as to exactly which of the denied motions he is aggrieved by, in the interest of justice this Court will address both issues.

Directed verdict and JNOV motions challenge the legal sufficiency of the evidence. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). With regard to the legal sufficiency of the evidence, all credible evidence consistent with the defendant's guilt must be accepted as true and the prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *McClain*, 625 So. 2d at 778. This Court is 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. *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987).

Motions for a new trial challenge the weight of the evidence and "[implicate] the trial court's sound discretion." *McClain*, 625 So. 2d at 781. New trial decisions rest within the discretion of the trial court. *Id.* A new trial motion should only be granted when the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. *Wetz*, 503 So. 2d at 812. This Court, on appeal, will reverse and order a new trial only upon a determination that the trial court abused its discretion, accepting as true all evidence favorable to the State. *McClain*, 625 So. 2d at 781.

In his argument Magee asserts that his conviction should be reversed because of the "insufficiency" of the testimony of Devon Williams and Edwina Agee. Magee argues that because Williams's testimony

was impeached by his prior inconsistent statements, Williams's testimony was not sufficient to demonstrate Magee's guilt beyond a reasonable doubt. Magee also argues that because Agee had only a few seconds in which to view the gunman, her testimony was likewise insufficient to "properly identify" Magee as the triggerman. Magee concludes that the testimony of Williams and Agee "cannot amount to proof beyond a reasonable doubt." We have analyzed the record and conclude that, under the appropriate standard of review as outlined above, the trial court's verdict can not be reversed on either the weight or the sufficiency of the evidence.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF FIFTEEN YEARS (15) IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST HARRISON COUNTY.

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