

**IN THE COURT OF APPEALS 03/25/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-01086 COA**

**WILL ANTONIO WADE**

**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. BILL JONES

COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GEORGE S. SHADDOCK

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: DALE HARKEY

NATURE OF THE CASE: CRIMINAL: TRANSFER OF A CONTROLLED SUBSTANCE,  
COCAINE

TRIAL COURT DISPOSITION: SENTENCED AS A HABITUAL OFFENDER TO SERVE 20  
YEARS IN MDOC

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

PAYNE, J., FOR THE COURT:

Will Antonio Wade was convicted for transfer of a controlled substance in violation of Mississippi Code Section 41-29-139(A)(1). Wade was convicted as a habitual offender pursuant to Mississippi Code Section 99-19-81 and sentenced to serve a term of twenty (20) years in the custody of the Mississippi Department of Corrections and to pay all court costs. Feeling aggrieved, Appellant appeals. We find Appellant's arguments to be without merit and therefore affirm the judgment of the circuit court.

### FACTS

On June 10, 1993, Will Antonio Wade became the focus of a sting operation being conducted by the Mississippi Bureau of Narcotics. Narcotics agents, David Jackson and Kenny Anderson, along with a confidential informant met at a pre-buy meeting on June 10, 1993, to set up the drug transaction that would take place with Wade later that day. Following this pre-buy meeting Officer Anderson and the confidential informant met Wade at Wade's mother's house where they made a deal for the sale of crack cocaine. According to Officer Anderson's testimony, Wade made arrangements to meet them shortly thereafter on a nearby street. According to the testimony of co-defendant, Raymond Mitchell, Wade called him and asked Mitchell to pick him up at his mother's house. Mitchell testified that he picked Wade up and took him to a nearby residence where Wade retrieved a "cookie" of cocaine. Mitchell testified that he then drove Wade to meet with Officer Anderson. At this meeting, according to the testimony of both Officer Anderson and Mitchell, Wade provided Officer Anderson with one "cookie" of crack cocaine in exchange for \$1,100.00 in cash. Following the transaction, Officer Anderson and his confidential informant met with Officers Jackson and Shepard at a post-buy meeting where Officers Anderson surrendered the "cookie" of crack cocaine to Officer Jackson.

At trial, Mitchell testified that the entire transaction was Wade's and that his only involvement was to give Wade a ride. Wade put on no defense and the case was submitted to the jury. The jury returned a verdict of guilty of the transfer of cocaine, and Wade was sentenced as an habitual offender. Wade now appeals the judgment of the trial court.

### ANALYSIS

#### I. DID THE TRIAL COURT ERR IN FAILING TO SUSTAIN WADE'S MOTION FOR A MISTRIAL FOLLOWING THE STATE'S CALLING THE DEFENDANT A "DRUG DEALER" IN THE PRESENCE OF THE JURY, TO THE EXTREME PREJUDICE OF THE DEFENDANT?

Wade contends that the State's repeated references to him as a targeted individual and a drug dealer prejudiced the jury against him to such an extent as to deny him a fair trial. While Wade takes issue with the tone of the entire trial, he specifically argues that his motion for a mistrial, which was made following an exchange between his attorney, Mr. Shaddock, and the prosecutor, Mr. Harkey, was erroneously denied. The exchange took place during the cross-examination of the State's witness, Raymond Mitchell, and is as follows:

QUESTION TO MITCHELL: Prefer to do. Now, you came in here, you are such a good citizen, and pled guilty to this charge. Is that right?

BY MR. HARKEY: Judge, does counsel have to insult this witness? I think that's--

BY MR. SHADDOCK: --I want to insult him real good, yes. He's a drug dealer.

BY MR. HARKEY: Well, so is the guy on trial, Mr. Shaddock.

BY MR. SHADDOCK: You have got to prove that.

BY MR. HARKEY: I'm doing it.

BY MR. SHADDOCK: You ain't doing anything.

BY THE COURT: Objection sustained.

BY MR. SHADDOCK: We move for a mistrial on the basis of what the District Attorney just said, Your Honor.

BY THE COURT: Motion denied.

It would be instructive to note that this exchange between counsel seems to violate Miss. Unif. R. Crim. Ct. Prac. 5.12, then in force at the time of the trial of the case *sub judice*, and now a part of the Uniform Rules of Circuit and County Court Practice 3.02, which states:

[a]ttorneys should manifest an attitude of professional respect toward the judge, the opposing attorney, witnesses, defendants, jurors, and others in the courtroom. In the courtroom attorneys should not engage in behavior or tactics purposely calculated to irritate or annoy the opposing attorney and *shall address the court, not the opposing attorney on all matters relating to the case . . . .*

(Emphasis added).

Nevertheless, the Mississippi Supreme Court has held that a "trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case." *Gossett v. State*, 660 So. 2d 1285, 1290 (Miss. 1995) (citing Miss. Unif. Crim. R. Cir. Ct. Prac. 5.15). "The trial judge is permitted considerable discretion in determining whether a mistrial is warranted since the judge is best positioned for measuring the prejudicial effect." *Id.*

In the present case, it was established early in the trial that Wade was in fact "targeted" by the Mississippi Bureau of Narcotics for the drug transaction which brought him to trial. Throughout the trial, both the State and the defense made reference, on numerous occasions, without objection, to Wade's being "targeted." We note with interest that Wade objected only twice to the use of the term target/drug dealer: once when he moved for a mistrial and once during closing argument. Such being the case, we find nothing prejudicial about the use of the terms throughout the trial. Furthermore, we find that the trial judge did not abuse his discretion in denying Wade's motion for a mistrial.

## II. DID THE TRIAL COURT ERR IN FAILING TO SUSTAIN WADE'S OBJECTIONS TO TESTIMONY INDICATING THAT THE DEFENDANT WAS GUILTY OF "OTHER CRIMES" FOR WHICH THE DEFENDANT HAD NOT BEEN CHARGED, AND THE STATE'S REFERENCE TO THE DEFENDANT AS A "TARGETED DEFENDANT" DUE TO THESE CRIMES?

In addition to his renewed complaint of the term "targeted" being used throughout the trial, Wade contends that charges of capital rape and sale of cocaine also got in, over objection, with the jury present. Wade argues that the State was allowed to introduce evidence of other crimes in violation of the Mississippi Rules of Evidence and therefore warrants reversal and a new trial.

In response, the State argues that review of this issue is procedurally barred on the basis that Wade failed to support his allegations with citations to the record indicating specifically what was said, when it was said, and by whom. The State contends that a review of the record did not reveal the whereabouts of Wade's complaint. The State argues further that "it is not the role of the State to comb the record and glean the necessary cite to the transcript to support defendant's argument."

We agree. The Mississippi Supreme Court has clearly stated that it is the duty of the appellant to furnish the Court with a record of the trial proceedings in which he claims that an error was committed. *Smith v. State*, 572 So. 2d 847, 849 (Miss. 1990). "This Court can act only on the basis of the contents of the official record, as filed after approval by counsel for both parties. It may not act upon statements in briefs or arguments of counsel which are not reflected by the record." *Saucier v. State*, 328 So. 2d 355, 357 (Miss. 1976).

In reviewing the record of the trial, we failed to find the errors of which Wade complains. During the trial itself, there was no mention of other crimes as Wade contends. It is true that the term "targeted" was used throughout the trial; however, as we stated in the previous issue, we find no prejudice in its use. We find further that Wade's argument that the jury was prejudiced by the introduction of Wade's alleged past crimes of capital rape and sale of cocaine is without merit. The only mention of past crimes that we were able to find was during the sentencing hearing in which the judge was determining whether an enhanced sentence would be appropriate in this case. During the sentencing hearing, there was no jury present. We therefore find no error in this assignment.

## III. DID THE TRIAL COURT ERR IN PERMITTING THE STATE TO COMMENT DURING CLOSING ARGUMENTS ON WADE'S FAILURE TO TESTIFY?

It is well-settled law that a prosecutor may not, by direct comment, or by innuendo, or insinuation, make reference to a defendant's failure to testify on his own behalf. *Taylor v. State*, 672 So. 2d 1246, 1266 (Miss. 1996). The Mississippi Supreme Court has stated that "although a direct reference to the defendant's failure to testify is strictly prohibited, all other statements must necessarily be looked at on a case by case basis." *Id.* (citation omitted). Thus, when confronted with this issue, the question becomes "whether the comment of the prosecutor can reasonably be construed as a comment on a failure to take the stand." *Id.* The Mississippi Supreme Court has held:

Statements made by the prosecution must also be considered in light of this Court's

observation that "counsel should be given wide latitude in their arguments to a jury . . . Courts should be very careful in limiting the free play of ideas, imagery and the personalities of counsel in their argument to a jury."

*Id.* (quoting *Johnson v. State*, 477 So. 2d 196, 209 (Miss. 1985)). The court has also stated that "[t] here is a difference, however, between a comment on the defendant's failure to testify and a comment on the failure to put on a successful defense." *Jones v. State*, 669 So. 2d 1383, 1390 (Miss. 1995) (citation omitted). "Moreover, the State is entitled to comment on the lack of any defense, and such comment will not be construed as a reference to a defendant's failure to testify 'by innuendo and insinuation.'" *Id.* (citations omitted).

In the case at hand, none of the prosecutor's statements were direct comments on Wade's failure to testify. Thus, the particular circumstances in this case must be considered. Wade contends that the prosecutor, Mr. Harkey, on two separate occasions, during closing arguments, improperly commented on Wade's failure to testify. Mr. Harkey, in reference to the testimony of co-defendant, Raymond Mitchell, stated:

It's y'all's recollection of the testimony. So, eliminate Mitchell from this altogether. Eliminate this guy Mitchell, just forget about his testimony if you want to. If you don't think it's worthy of belief, don't believe it. Just eliminate it, *and you are stuck with a police officer and somebody who doesn't even tell you where he was*. They don't deny the transaction. (emphasis added).

Later during the State's closing argument, the following statements were made:

We bring Raymond Mitchell, his co-defendant, the guy who is also involved in this because he is there and involved in the transaction and talking about it. He pled guilty to it, gave it up. And he comes in and talks about it. You know, eighteen years old, ladies and gentlemen. He has a thousand dollars under the seat of his BMW. Makes you sick, don't it. Well, here's the guy who was in it with him, right there. I believe it. You believe it, and you know it. You know it. *It's not been denied*. It's just-- (emphasis added).

At this point, Wade's attorney objected, stating, "We wouldn't be here if he hadn't denied it." He then stated, "He entered a plea of not guilty. We object to your making a comment on his failure to testify and move for a mistrial." The trial judge sustained the objection and denied the motion for a mistrial. In response the attorney for the State commented, "Your Honor, I have wrote down where he talked about on his closing the Defendant didn't testify. And he didn't." The State then continued with its closing argument.

The prosecution's comments in this case seem to be comments on the lack of defense generally and not the defendant's failure to testify specifically. A review of the record indicates that the defense attorney, during his closing argument, had already commented specifically on Wade's failure to testify and then, once again, brought it to the jury's attention with his motion for a mistrial. The defense attorney also discussed, during his closing, that he did not have to put on any witnesses to support his case. While we recognize that the defense cannot "open the door" for the prosecution to violate his client's constitutional rights, *Jones*, 669 So. 2d at 1391, we cannot ignore the fact that the defense attorney invited a response with his "I don't have to prove anything" argument. We believe

the prosecution's comments were geared more toward a lack of any defense than toward Wade's failure to take the stand. Therefore, we do not find the prosecution's comments to be such that would warrant a reversal on constitutional grounds. We find Wade's argument to be without merit.

#### IV. DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO QUESTION, DURING CLOSING ARGUMENTS, THE VERACITY OF DEFENSE COUNSEL?

Wade objects to two statements that were made by the State during its closing argument: (1) "What do we have? We have a lawyer giving you tricks, as opposed to law enforcement officers testifying in this case, and a co-defendant." (2) "Who do you believe, a cop or a defense lawyer, because that's all that we have in this case." Wade argues that the above statements are indicative of the acrimonious atmosphere of the entire trial. He urges this Court to find that the prosecution's overall attitude deprived him of his right to a fair trial.

It is well settled that a prosecutor is allowed considerable latitude within which he may argue:

The right of argument contemplates liberal freedom of speech and range of discussion confined only to bounds of logic and reason; and if counsel's argument is within the limits of proper debate it is immaterial whether it is sound or unsound, or whether he employs wit, invective and illustration therein. Moreover, figurative speech is legitimate if there is evidence on which it may be founded. Exaggerated statements and hasty observations are often made in the heat of debate, which, although not legitimate are generally disregarded by the court, because in its opinion they are harmless.

*Taylor*, 672 So. 2d at 1269 (quoting *Monk v. State*, 532 So. 2d 592, 601 (Miss. 1988)). "The test to determine if an improper argument by the prosecutor requires reversal is whether the natural and probable effect of the prosecuting attorney's improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice." *Id.* at 1270 (citation omitted). We find nothing in the State's argument that would tend to prejudice the Appellant or improperly influence the jury. We therefore find Wade's argument to be without merit.

#### V. DID THE TRIAL COURT ERR IN ITS DETERMINATION THAT WADE WAS AN HABITUAL OFFENDER AND WAS HIS SENTENCE DISPROPORTIONATE?

Wade argues that the trial court erred in sentencing him as an habitual offender while, at the same time, conceding that he has more than the requisite number of prior felonies needed to constitute sentencing under the habitual offender statute. Wade points out that he pled guilty to the felonies in one plea hearing. Wade's attorney testified at the sentencing hearing that he advised Wade to plead guilty because he thought it would be in Wade's best interest to dispose of all of the charges against him and not risk going to trial. Wade's attorney testified that had he known that the guilty pleas would be held against him at a later date, he would have thought better about allowing him to plead guilty to all of the charges. Wade argues that his plea arrangement saved the State time and money and therefore should not be held against him.

Wade argues further that the trial court erred in not conducting a proportionality review of his sentence under the habitual offender statute. We find that Wade's assignments of error are without merit.

The Mississippi Code provides that the maximum term of imprisonment for the sale of cocaine is thirty (30) years. Miss. Code Ann. § 41-29-139(b)(1) (Rev. 1993). Additionally, the Mississippi Code contains a habitual offender statute which provides that any person charged with a felony who has been convicted twice before of felonies shall be subject to the maximum term of imprisonment prescribed for such felony. Miss. Code Ann. § 99-19-81 (Supp. 1994). The Mississippi Supreme Court has long held that "a trial court will not be held in error or held to have abused its discretion if the sentence imposed is within the limits fixed by statute." *Edwards v. State*, 615 So. 2d 590, 597 (Miss. 1993) (citing *Johnson v. State*, 461 So.2d 1288, 1292 (Miss.1984)). *See also Barnwell v. State*, 567 So. 2d 215, 221 (Miss.1990) (save for instances where the sentence is "manifestly disproportionate" to the crime committed, extended proportionality analysis is not required by the Eighth Amendment); *Corley v. State*, 536 So. 2d 1314, 1319 (Miss.1988); *Reed v. State*, 536 So. 2d 1336, 1339 (Miss.1988).

However, where a sentence is "grossly disproportionate" to the crime committed, the sentence is subject to attack on the ground it violates the Eighth Amendment prohibition of cruel and unusual punishment. *Edwards*, 615 So. 2d at 598 (citing *Wallace v. State*, 607 So. 2d 1184, 1188 (Miss. 1992); *Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992)). In determining proportionality, the Mississippi Supreme Court has followed the three-prong test set forth in *Solem v. Helm*, 463 U.S. 277 (1983). *See Edwards v. State*, 615 So. 2d 590, 598 (Miss. 1993). "The elements are: (1) the gravity of the offense and the harshness of the penalty; (2) comparison of the sentence with sentences imposed on other criminals in the same jurisdiction; and (3) comparison of sentences imposed in other jurisdictions for commission of the same crime with the sentence imposed in this case." *Id.* In the present case, Wade was convicted of four previous felonies. Clearly, he falls under the provisions of the habitual offender statute and should have been sentenced to thirty years. Either through Wade's good fortune and/or sentencing error, Wade was sentenced to twenty (20) years instead of the mandatory thirty (30) years as prescribed by statute. In light of this sentence, we are hard pressed to find that the sentence imposed on Wade was so "manifestly" or "grossly" disproportionate as to require a proportionality analysis. Even if we had concluded that Wade's sentence required further analysis, Wade has made no argument nor produced any facts either in this Court or in the lower court which address the elements of the *Solem* test. The Mississippi Supreme Court has held that "[i]n the complete absence of facts showing that [the appellant's] sentence exceeds others imposed for the same crime in either the same or other jurisdictions, it is impossible for this Court to hold the second and third prongs of the *Solem* test favor reversal of [the appellant's] sentence." *Id.* (quoting *Wallace v. State*, 607 So. 2d 1184, 1189 (Miss. 1992)).

We conclude that the trial court was not in error and did not abuse its discretion because the sentence imposed was within the limits fixed by statute and not so grossly disproportionate nor shockingly excessive as to warrant its reversal.

## VI. WHETHER THE CUMULATIVE ERROR IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION?

Wade correctly states the law in that the Mississippi Supreme Court has held that "the cumulative effect of errors in the trial court may warrant reversal even when the instances taken separately do not." *Ballenger v. State*, 667 So. 2d 1242, 1273 (Miss. 1995) (citations omitted); *see also Stringer v. State*, 500 So. 2d 928, 946 (Miss. 1986) (vacating a death sentence in view of numerous "near

errors" which violated a defendant's right to a fair trial). However, in the present case, the assignments of error, taken alone or cumulatively, do not warrant a reversal of Wade's conviction and sentence. "Where there is no reversible error in any part, . . . there is no reversible error to the whole." *McFee v. State*, 511 So. 2d 130, 136 (Miss. 1987). We find Wade's argument to be without merit and therefore affirm the judgment of the trial court.

**THE JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY OF CONVICTION OF TRANSFER OF A CONTROLLED SUBSTANCE (COCAINE) AND SENTENCE AS A HABITUAL OFFENDER TO TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

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