

IN THE COURT OF APPEALS 04/08/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00811 COA

JOHNNY BALDWIN, SR. A/K/A JOHNNY LEE BALDWIN, SR.

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. FRANK G. VOLLOR

COURT FROM WHICH APPEALED: WARREN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

FRANK J. CAMPBELL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: GILMORE G. MARTIN

NATURE OF THE CASE: CRIMINAL - SALE OF COCAINE

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE A TERM OF 30
YRS IN THE MDOC, 10 YRS SUSPENDED FOR 5 YRS SUPERVISED PROBATION TO RUN
CONSECUTIVE TO ANY OTHER SENTENCE

MANDATE ISSUED: 6/24/97

EN BANC

COLEMAN, J., FOR THE COURT:

Johnny Baldwin was indicted and convicted in the Warren County Circuit Court for the sale of cocaine. He was sentenced to serve a term of thirty years in the custody of the Mississippi Department of Corrections, ten years of which would be suspended in exchange for five years of supervised probation. Feeling aggrieved of the judgment against him, Baldwin appeals raising the following assignments of error:

I. THE FAILURE OF THE INDICTMENT TO NAME THE ALLEGED PURCHASER COUPLED WITH THE STATE'S FAILURE TO TIMELY DISCOVER THE NAME OF THE ALLEGED PURCHASER RESULTED IN A DENIAL OF BALDWIN'S RIGHT TO A FAIR TRIAL.

II. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL AFTER THE PROSECUTOR MADE INFLAMMATORY STATEMENTS DURING HIS CLOSING ARGUMENT.

We find that the issues raised by the appellant are without merit and therefore affirm the judgment of the trial court.

FACTS AND PROCEEDINGS BELOW

Johnny Baldwin was indicted on March 22, 1994 for a sale of cocaine allegedly occurring July 22, 1993. The indictment did not name the purchaser of the cocaine but only referred to the purchaser as a "cooperating individual working undercover."

On June 10, 1994, a notice of trial setting was filed, setting the trial for July 11, 1994. Informal discovery was completed in early June by the State. However, the State did not furnish the name of the "cooperating individual working undercover." On June 13, 1994, the court ordered the State to provide the name of the "cooperating individual" by July 5, 1994. The State did furnish the name by July 5.

The State's confidential informant, Tommy Rawlings, testified that he purchased cocaine from Johnny Baldwin on July 22, 1993. There were no other eyewitnesses to this sale. Rawlings was, however, fitted with a transmitter and officers who heard the transmission testified the voice of the seller was in fact Baldwin's. Baldwin testified that he barely knew Rawlings, that the voice of the seller on the taped conversation was not his, and that he was in no way involved in this sale. After a two day trial, Baldwin was found guilty of the charge against him.

ANALYSIS

I. THE FAILURE OF THE INDICTMENT TO NAME THE ALLEGED PURCHASER COUPLED WITH THE STATE'S FAILURE TO TIMELY DISCOVER THE NAME OF THE ALLEGED PURCHASER RESULTED IN A DENIAL OF BALDWIN'S RIGHT TO A FAIR TRIAL.

Baldwin contends that the indictment was fatally defective because it did not include the name of the alleged purchaser; therefore, he was not fully apprised of the charge against him. Baldwin claims that the lack of the name of the alleged purchaser makes it impossible to formulate a defense. He submits that it is possible for a defendant to be guilty of selling cocaine to one particular individual on a particular day but not guilty of selling to an infinite number of other possible individuals on the same day. Thus, the name of the particular individual to whom the drugs are sold is indispensable to identify the crime in a "sale" case. In support of the foregoing proposition, Baldwin cites *Umphress v. State*, 295 So.2d 735 (Miss.1974).

We find that Baldwin's reliance on *Umphress* is misplaced. The indictment returned against Baldwin charged in pertinent part the following:

INDICTMENT

SALE OF A CONTROLLED SUBSTANCE

. . . Johnny Lee Baldwin, Sr. on or about July 22, 1993 with force and arms, in the County aforesaid, and within the jurisdiction of this Court did willfully, unlawfully, feloniously and without authority of law sell and deliver a certain controlled substance, to wit: cocaine to a cooperating individual working undercover for the sum of \$100.00 in money, United States Currency in violation of Miss. Code 1972 Ann. Sec. 41-29-139 (a), . . .

In *Umphress*, the defendant was indicted for **delivery**, not sale, of a controlled substance. Therefore, the case is inapposite to the one at bar. Furthermore, noting the statutory requirements for delivery, the court held that "transfer from one person to another is a necessary essential to the completion of an unlawful delivery by the terms of the statute." *Umphress*, however did not require the identification of the individual to whom the delivery was made, only that the delivery was made to a person. In fact the court specifically stated that "the identity of a person to whom contraband is delivered is not essential to an indictment." *Id.* at 737. Thus, Baldwin has misapplied *Umphress* in two ways.

Instead, the case before us is controlled by the precedent established in *Jenkins v. State*, 308 So. 2d 95 (Miss. 1975). The court in *Jenkins* rejected the appellant's reliance on *Umphress*, stating that:

The statutory definition of "sale" . . . does not require that there be a transfer from one

person to another as is required in the delivery statute . . . referred to in *Umphress* Proof of the offense of "sale" under the definition before us requires a showing that a transfer or delivery for remuneration [sic] occurred. Upon the record before us, and absent any multiplicity of charges against the appellant, we hold that the identity of a person to whom contraband is delivered is not essential to an indictment for a "sale,"

Jenkins, 308 So. 2d at 96.

Baldwin next complains that he was prejudiced by the State's failure to provide the name of the "cooperating individual" until six days prior to trial. Baldwin, however, never complained to the trial court about this alleged discovery violation. Thus, he is barred from doing so on appeal. *Nathan v. State*, 552 So. 2d 99, 108 (Miss. 1989). *Accord, Hart v. State*, 639 So. 2d 1313, 1317 (Miss. 1994). We find this assignment of error is without merit.

II. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL AFTER THE PROSECUTOR MADE INFLAMMATORY STATEMENTS DURING HIS CLOSING ARGUMENT.

Baldwin's second assertion of error is in reference to the following statements made during the State's closing argument:

By Mr. Martin: This case does not boil down to Johnny Baldwin and Tommy Rawlings. This case isn't brought in the name of Tommy Rawlings. It's brought in the name of the State of Mississippi and the name of all the people in the State of Mississippi. All the decent people in the State of Mississippi who want to do something about drugs in our community. Who want to put away drug dealers like this. Men who will sell drugs to your children or anybody else for money, and that is all its about. It's about money and that's what his name is. His nickname is Money Baldwin. It's all about money and it's about drugs, and you can't separate the two. Defense paints a picture of Mr. Baldwin as a hardworking family man. I'll agree with that. He works hard at selling cocaine and he's got his whole family involved in the business.

Mr. Sanders: To which we object.

The Court: Be sustained.

Mr. Sanders: Your Honor, may we approach the bench?

The Court: Yes.

(Bench Conference)

Mr. Sanders: Your Honor, that is one of the most inflammatory remarks that could be made by this man in this case. Saying that he has his whole family involved in drug dealing. He, alone, is charged with the sale of cocaine and I [sic] that's proof for a mistrial basis and I would ask the court to instruct the jury to disregard that statement.

Mr. Martin: Your Honor, the testimony is that the C.I. bought drugs from the daughter and also that the son, Lavelle, was brought back on a drug charge.

The Court: Also there's testimony Tony answered the phone.

Mr. Martin: Tony answered the phone.

The Court: I'm going to overrule the motion for a mistrial.

Mr. Sanders: Yes, sir. Your Honor, would you instruct the jury to disregard the talk about his having his whole family involved in it?

(Bench Conference Concluded)

The Court: The jury is instructed to disregard the remark about the whole family being involved.

In his brief, Baldwin complains that the court failed to order a mistrial and failed to fully admonish the jury concerning the above remarks. Baldwin urges us to find that the court erred in not admonishing the jury to further disregard statements made by the State that Baldwin would sell drugs to children and, that his nickname "Money" was associated with drug trafficking.

It is apparent from the record that Baldwin failed to request that the court admonish the jury regarding these statements. Additionally, he failed to object to that language during the State's closing argument. Consequently, the issue of the propriety of those comments is not properly before this court. *Foster v. State*, 639 So. 2d 1263, 1288-89 (Miss. 1994).

Baldwin requested, and the trial court agreed to admonish the jury concerning the closing remarks made by the State that Baldwin's entire family was involved in selling drugs. The trial court, however, refused to grant a mistrial on this basis. Baldwin maintains that this is reversible error. We do not agree. It has long been recognized that "where the trial court acts in such a matter, it is presumed that the jurors follow the instructions of the court so as to dissipate any prejudice." *Crenshaw v. State*, 520 So. 2d 131, 134 (Miss. 1988). Not even the case law cited by Baldwin

supports his position as to this issue. As cited in Baldwin's brief, the court in *Swindle v. State*, 502 So.2d 652 (Miss. 1987) found that improper remarks by the State did not constitute reversible error in light of the trial court's admonishing the jury to disregard the statements. Thus, Baldwin has failed to show that the trial court's ruling to deny the mistrial was error. Hence, Baldwin's second assignment of error is also without merit.

THE JUDGMENT OF THE WARREN COUNTY CIRCUIT COURT OF CONVICTION OF SALE OF COCAINE AND SENTENCE OF THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH TEN YEARS SUSPENDED WITH FIVE OF SUPERVISED PROBATION AND SENTENCE TO RUN CONSECUTIVE WITH ANY OTHER IMPOSED AND A SUSPENDED FINE OF \$1,000.00 IS AFFIRMED. COSTS ARE ASSESSED TO WARREN COUNTY.

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