

IN THE COURT OF APPEALS 04/08/97
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00327 COA

MICHAEL DAVID DILLON A/K/A

MIKE DILLON

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. ANDREW C. BAKER

COURT FROM WHICH APPEALED: CIRCUIT COURT OF DESOTO COUNTY

ATTORNEY FOR APPELLANT:

DAVID CLAY VANDERBURG

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

NATURE OF THE CASE: CRIMINAL - BURGLARY & GRAND LARCENY

TRIAL COURT DISPOSITION: FOUND GUILTY OF BOTH COUNTS. SENTENCED AS
HABITUAL OFFENDER - 7 YEARS WITHOUT PAROLE ON COUNT I AND 5 YEARS ON
COUNT 2; TO RUN CONSECUTIVELY.

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Michael Dillon was found guilty of burglary and grand larceny. He appeals arguing that the trial court erred in denying his motions regarding the insufficiency of the evidence, and that the verdict was against the overwhelming weight of the evidence. He also argues that the trial court erred in giving one instruction and in permitting testimony concerning cocaine. Finding these arguments without merit, we affirm.

FACTS

On July 28, 1993, Mrs. Irene Bland had been at her home in DeSoto County until about 11:00 a.m. Her husband Robert Bland returned home from work at about 5:00 p.m. and discovered that his work shed had been broken into. A chain saw was missing. The saw was later found by the Memphis police department. It had been pawned by Michael Dillon at 12:03 p.m. on the same day as the tool shed was broken into. Dillon was arrested. He waived his rights and gave the arresting officer, Randy Doss, a statement admitting that he signed the pawn shop ticket, but that he could not remember where he got the items except that he "traded" them with a guy named Michael.

DISCUSSION

Dillon argues that his motions for a directed verdict, peremptory instruction, new trial, and judgment notwithstanding the verdict were erroneously denied by the trial judge. He contends that because he was never seen at the victims' dwelling nor in the state of Mississippi, the most he could be found guilty of is receiving stolen property. He bases his argument on the fact that the only evidence found was his signature on a pawn shop ticket and the property recovered from the pawn shop.

Dillon's motions for a directed verdict, peremptory instruction, and J.N.O.V. all test the sufficiency of the evidence. *Wetz v. State*, 503 So. 2d 803, 807n. 31 (Miss. 1987). We examine the sufficiency at the time of the last such motion to be made, which here was the J.N.O.V. *Wetz*, 503 So. 2d at 807n. 31. "The appeal of an overruled peremptory instruction or motion for J.N.O.V. . . . tests the sufficiency of the evidence as a matter of law, viewing the evidence in a light favorable to the verdict." *Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992). Furthermore, "[t]he Supreme Court will reverse the lower court's denial of a motion for new trial only if, by denying, the court abused its discretion." *Esparaza*, 595 So. 2d at 426. On the other hand, a motion for a new trial "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." *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983).

In order to prove burglary, two elements must be shown. "The state must prove both the burglarious breaking and entering of a dwelling house and the felonious intent to commit some crime therein." *Course v. State*, 469 So. 2d 80, 82 (Miss. 1985). The proof showed that the Bland work shed had been broken into and that the stolen property had been pawned by Dillon the same day the burglary occurred. "It has long been the law in this state that the unexplained possession of recently stolen property is prima facie, although by no means conclusive, evidence of the guilt of the defendant." *Weaver v. State*, 481 So. 2d 832, 834 (Miss. 1985). The supreme court has recognized that

sometimes possession of recently stolen property is the only way of ascertaining guilt:

Thieves do not ordinarily burglarize and steal in open view of spectators. Such crimes are committed in stealth and when no eyewitnesses are present. Proving the possession of recently stolen property is frequently the only proof available of the accused's guilt. A person in possession of property recently stolen may have acquired it in a completely innocent manner. If so, presumably he will have no hesitancy, indeed be eager, to acquaint the authorities precisely how he acquired it. On the other hand, if he stole it, he will just as understandably be reluctant to acquaint the authorities how he got it. Hence, the reason for the rule.

Weaver, 481 So. 2d at 834.

The court emphasized that "in order for an inference of guilt to arise from possession of stolen property, the theft must have been recent." *Id.* The evidence in this case showed that the theft probably occurred some time after 11:00 a.m. The stolen property was pawned at 12:03 p.m. the same day. This short time frame certainly meets the "recent" requirement.

When all of the evidence is considered in the light most favorable to the state, together with the reasonable inferences that flow therefrom, there was sufficient evidence to support the verdict of guilt. The verdict was not against the great weight of the evidence.

2. *Instruction S-3*

Dillon argues that one instruction should not have been given because it erroneously shifts the burden from the state to the accused. The instruction, S-3, reads:

The court instructs the jury that the possession of property recently stolen is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury may infer guilt.

This instruction is precisely the same as that approved in *Robinson v. State*, 418 So. 2d 749, 756 (Miss. 1982). The instruction allows the jury to infer guilt when considering the possession of recently stolen property in absence of a reasonable explanation. The supreme court in *Weaver v. State*, 481 So. 2d at 835 approved the use of such an instruction. In that case, the court disallowed a jury instruction that was similar to the instruction given in *Robinson*, but which stated that a "presumption of guilt" arose from the possession of recently stolen property. We are not faced with such an instruction in this case. The court went on to approve the instruction given in *Robinson* by stating that "[u]pon remand, if an instruction of this nature is justified, it should follow the language [of *Robinson*]. Although this type of instruction was criticized in a dissenting opinion in *Robinson*, supra, this Court is committed to its soundness in appropriate cases." *Weaver*, 481 So. 2d at 835. We reject Dillon's argument that the instruction shifted the burden from the State.

3. *Statement given to law enforcement officers.*

Dillon argues that his statement to law enforcement officers dealing with "trading" the stolen items for cocaine should not have been admissible. Dillon gave a statement to Deputy Doss. That statement was read by the assistant district attorney and Deputy Doss into the record at trial. In the statement,

Dillon said that he had gotten the property by "trading." Doss had asked Dillon if he traded for cocaine. Dillon did not answer this question. In a hearing in chambers prior to the statement's being read, Dillon's counsel argued that this part of the statement was inadmissible "other crimes" evidence under Rule 404(b). M.R.E. 404(b). The State argued that under Rule 404(b), evidence of other "bad acts" was admissible to show motive. The trial judge noted that Doss's question was simply a question and was not an admission on his part of trading in drugs. Since it was in Dillon's statement, the court decided it should be admitted at trial.

It was error to read that part of the statement, unless the court found that such evidence was admissible under the exceptions of Rule 404(b). No such determination was made, and in fact, this part of the statement could not show motive. An unanswered question from an investigator about a possible motive is certainly not evidence of what the motive was.

However, we find no reversible error. In *Miller v. State*, 636 So. 2d 391 (Miss. 1994), the court was faced with a similar problem. The defendant was charged with one sexual crime, but at trial was questioned about another sex crime involving a different person. The supreme court held that "[t]he questions should not have been allowed. Because they were answered in the negative, we cannot say that the error in permitting the questions warrants reversal." *Miller v. State*, 636 So. 2d at 397. Here, the question was not answered at all. No *evidence* of other criminal activity was admitted, and we find the question itself to have been harmless error.

THE JUDGMENT OF THE DESOTO COUNTY CIRCUIT COURT OF CONVICTION OF COUNT I, BURGLARY OF A BUILDING, AND COUNT II, GRAND LARCENY, AND SENTENCE AS A HABITUAL OFFENDER OF 7 YEARS ON COUNT I AND 5 YEARS ON COUNT II WITHOUT PAROLE, TO RUN CONSECUTIVELY, IS AFFIRMED. COSTS TAXED TO DESOTO COUNTY.

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