

IN THE COURT OF APPEALS 02/11/97
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00089 COA

STEVIE KEYES A/K/A STEVIE KEYS

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 LEWIS GIBBS

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GEORGE T. HOLMES

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: EDWARD J. PETERS

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: AGGRAVATED ASSAULT: SENTENCED TO SERVE A
TERM OF 20 YRS IN THE MDOC AS A HABITUAL OFFENDER

BEFORE THOMAS, P.J., MCMILLIN, P.J., KING AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Stevie Keyes was convicted in the Circuit Court of Hinds County of aggravated assault and sentenced to twenty years in the custody of the Mississippi Department of Corrections. Feeling aggrieved, Keyes appeals arguing: (1) that the trial court erred in allowing the State to discuss with the venire the actions of jurors in other cases; (2) that Keyes was irreparably prejudiced by the State's attempt to impeach him with collateral matters, his alleged other wrongs, and inflammatory

character evidence; and (3) that the trial court erred by not granting a mistrial following the State's plea for sympathy and "Golden Rule" argument during closing argument. We find no merit in Keyes' assignments of error and affirm.

STATEMENT OF THE FACTS

Ellen Faye Harris was shot in the neck on February 13, 1993, an injury which left her paralyzed from the shoulders down. At trial, Harris testified that she and Stevie Keyes were romantically involved from October 1992 through February 1993, just prior to the shooting. Harris testified that as she was driving her car on Medgar Evers Drive, she passed Keyes driving in the opposite direction. Harris viewed Keyes turning around after their cars passed. Harris continued in route to her cousin's apartment, a location she and Keyes had visited during their relationship. When Harris arrived at the apartment complex, she saw Keyes in the parking lot in a car along with another person she did not know. Harris testified that as she entered the parking lot, Keyes pointed his gun at her and with an angry expression appeared to be speaking, although Harris could not hear his words. Harris testified that Keyes then shot her. Harris was not able to stop her car and testified that Keyes approached her car, opened the door, and stopped the car. Harris testified that during her stay in the hospital, Keyes contacted her stating that he "didn't mean to do it" and that "it was an accident." Harris testified that from her observations, the shooting could not have been an accident.

Officer McArthur White testified that he responded to a dispatch at 2:30 P.M. on February 13, 1993, to the Wilcher apartments. Office White testified to finding the injured Harris and her damaged car.

Nicole Russell testified that as she sat in the parking lot atop her mother's car, she heard a gunshot as the two cars met. She next saw the driver of one of the cars get out of his car, open the

door of the other car, and stop the vehicle. Russell testified that she heard the passenger of the brown car ask the driver, "Why did you shoot her?" She then saw the two men get back into their car and leave the parking lot.

Juanita Keyes, Keyes' mother, testified that she visited Harris in the hospital, and that Harris had indicated that she could not remember what had happened, but thought the shooting was an accident. Annette Keyes, Keyes' sister, testified that Harris indicated to her that Harris did not believe that Keyes was trying to shoot her.

Stevie Keyes testified in his own defense. According to Keyes, he was talking to Rodney Vaughn

(who Keyes testified was deceased at the time of trial) in the parking lot of the Wilcher Apartments. Vaughn "stood beside the car as [Keyes] sat in on the driver's side." Keyes' passenger was Bo, a crack smoker and the owner of the car who permitted Keyes to use his car for \$20. As Keyes and Vaughn were talking, Harris attempted to enter the parking lot only to be blocked by Keyes' car. Keyes testified that as Bo reached for the gun which was located in the sun visor, Keyes also reached for the gun when it discharged. Keyes stated that he went to Harris' car, realized that there was blood on her neck, opened her car door, put the stopped car into park, and cut off the car's engine. Keyes next laid Harris on the ground and went to call for help. Keyes testified that he called 911, giving the police his name and describing what had occurred.

Keyes was arrested on February 16, 1993. Two of the officers who were present at the time of Keyes arrest testified as to the events which surrounded the arrest. Both officers testified that gunfire was exchanged and three individuals were involved, one being Keyes. At the time of his arrest, Keyes had a handgun in his possession.

The jury returned a verdict of guilty of aggravated assault against Keyes.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO DISCUSS WITH THE VENIRE THE ACTIONS OF JURORS IN OTHER CASES.

Keyes argues that the State attempted to interject improper comments during voir dire. Keyes specifically points to comments about the performance and deliberations of jurors in previous cases. Keyes maintains that the trial court correctly sustained his initial objection, but that the trial court erred in overruling his subsequent objection. Keyes asserts that the State's comments were suggesting that the jurors need only think that Keyes was guilty regardless of the evidence. Keyes further contends that the jurors were led to believe that they would have to explain their deliberations to the court or the prosecutor, possibly subjecting them to future embarrassment or ridicule by the State, if used for examples in future trials. Keyes argues it was a request for commitment on a verdict during voir dire. In his reply brief, Keyes asserts that no jury instruction would overcome the implication. The State responds by arguing that the trial court has broad discretion during voir dire, and its remarks would not leave a juror with any misunderstanding as Keyes asserts.

"Voir dire 'is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.'" *Ballenger v. State*, 667 So. 2d 1242, 1250 (Miss. 1995) (citations omitted); *Foster v. State*, 639 So. 2d 1263, 1274 (Miss. 1994) (citations omitted); *see also Berry v. State*, 575 So. 2d 1, 8 (Miss. 1990) (citation omitted) ("The standard used in examining the conduct of the voir dire is abuse of discretion."); *Corley v. State*, 536 So. 2d 1314, 1316 (Miss. 1988) (citations omitted) ("As for the prosecutor's remarks, this Court has held that a trial court has considerable discretion in regard to the questions permitted on voir dire examination.")

In the present case, we have reviewed the portion of the voir dire of which Keyes complains and do not find that the trial court abused its discretion. Accordingly, this assignment of error is without merit.

II. WHETHER KEYES WAS IRREPARABLY PREJUDICED BY THE STATE'S ATTEMPT TO IMPEACH HIM WITH COLLATERAL MATTERS, ALLEGED OTHER WRONGS, AND INFLAMMATORY CHARACTER EVIDENCE?

Keyes asks this Court to review several occurrences from the State's cross-examination of him and consider their singular and combined effects on the jury. Keyes points to the State's references to Bo as "crack head Bo" as prejudicial attempts to impeach Keyes on collateral matters and were made only to inflame the jury. Keyes maintains that the State used collateral matters involving criminal conduct for which Keyes was not on trial and which Keyes argues were prejudicial to him. Keyes points to the State's eliciting of testimony that he denied having possession of a gun when he was arrested and the rebuttal testimony of the arresting officers regarding the events surrounding his arrest. Keyes also asserts that the State improperly questioned him regarding his knowledge of police procedures.

We will first address the "crack head Bo" references and questioning by the State during cross-examination of Keyes. The record reveals that the trial court sustained Keyes first objection and further clarified its ruling upon Keyes second objection. The record also reveals that Keyes failed to ask the trial court to admonish the jury to disregard the questions. The Mississippi Supreme Court has held that "where an objection to a question is sustained and no request is made that the

jury be instructed to disregard the question, there is no error." *See Simpson v. State*, 497 So. 2d 424, 431 (Miss. 1986); *Gardner v. State*, 455 So. 2d 796, 800 (Miss. 1984). We cannot find the trial court in error when Keyes failed to request an admonishment of the jury.

Second, as to Keyes' assignment of error regarding his alleged possession of a gun at the time of this arrest, we find that the testimony resulted from Keyes' own attempt to explain the discrepancy between his statement to police at the time of his arrest and his testimony at trial. Keyes testified on direct examination that he did not know who shot the gun and that both he and "Bo" had their hands on the gun. The State, on cross-examination, presented the prior statement that Keyes had given police which contained the statement that "the gun was in my hand when it went off," which was inconsistent with his testimony at trial. To resolve his inconsistency, Keyes attempted to explain that the written statement was incorrect because he was "shook up" at the time he gave the statement and was afraid the police were trying to shoot him at the time of his arrest. The State was allowed to present as rebuttal evidence the testimony of two of the arresting officers who confirmed Keyes' possession of a gun at the time of his arrest and also clarified the events surrounding his arrest, specifically of being presented with a barrage of gunfire at the time they sought to arrest Keyes. We find, upon careful examination of the record, that Keyes essentially opened the door to the testimony to which he now objects. A specific portion of the record entered outside the presence of the jury makes it clear that the trial court and the State were careful not to have the officers testify as to other charges pending against Keyes. We find no error.

Finally, we find no reversible error in regard to questioning of Keyes about his knowledge of police procedures. The State questioned Keyes about his waiver and statement to police. Keyes testified that he signed his statement without reading it or realizing the effect of its contents. Keyes

objected to the State's questions of his familiarity with police procedures. The trial court heard arguments out of the presence of the jury in which it ruled Keyes had opened the door by his

response to questions of the details surrounding his signing of his waiver and statement. The trial court determined that a mistrial was not proper because no question had been asked which would prejudice the jury. We note, as did the trial court, that no details regarding the nature or basis for any prior contact between the police and Keyes was established. In fact, no question was presented about any prior offenses or criminal convictions. The trial court is in the best position to measure the prejudicial effect, if any, to determine if a mistrial is necessary. *See Gossett v. State*, 660 So. 2d 1285, 1290-91 (Miss. 1995). The trial court is given great discretion in evaluating the necessity of a mistrial. *Id.* The trial court determined that a mistrial was unnecessary as no prejudicial question was asked. While this Court strongly discourages questions of the type about which Keyes complains, we cannot say that the trial court abused its discretion in determining a mistrial was not warranted on these particular questions.

III. WHETHER THE TRIAL COURT ERRED BY NOT GRANTING A MISTRIAL FOLLOWING THE STATE'S PLEA FOR SYMPATHY AND "GOLDEN RULE" ARGUMENTS DURING CLOSING ARGUMENT?

Keyes argues that the State improperly asserted the "Golden Rule" argument during its closing argument. The State's "Golden Rule" argument of which Keyes complains was as follows:

That someone who cannot move from the shoulders down will need every single day. Think about it. Think about what you have to do to get from here to the jury room.

The trial court sustained Keyes' objection and overruled his motion for a mistrial. Keyes argues the trial court erred in failing to grant a mistrial.

A "Golden Rule" argument asks the jurors to put themselves in the place of one of the parties. *See Chisolm v. State*, 529 So. 2d 635, 639 (Miss 1988). In *Chisolm v. State*, the court extended its prohibition of "Golden Rule" arguments to criminal cases. *Chisolm*, 529 So. 2d at 640 (citations omitted). However, in *Chisolm*, the court also held that an argument that is sufficiently insignificant when considered in the overall context of the case was harmless error. *Id.*

The Mississippi Supreme Court has recognized:

Generally, attorneys on both sides in a criminal prosecution are given broad latitude during closing arguments. This Court has explained that not only should the State and defense counsel be given wide latitude in their arguments to the jury, but the court should also be very careful in limiting free play of ideas, imagery, and personalities of counsel in their argument to jury. Given the latitude afforded an attorney during closing argument, any allegedly improper prosecutorial comment must be considered in context, considering the circumstances of the case, when deciding on their propriety.

Ballenger v. State, 667 So. 2d 1242, 1270 (Miss. 1995) (quoting *Ahmad v. State*, 603 So. 2d 843, 846 (Miss. 1992)); *see also Davis v. State*, 660 So. 2d 1228, 1248 (Miss. 1995). "Our well-worn test for determining if improper argument by the prosecutor to the jury requires reversal is: 'whether the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created.'" *Davis*, 660 So. 2d at 1248 (quoting *Davis v. State*, 530 So. 2d 694, 701 (Miss. 1988)). In *Davis*, the

trial court overruled Davis' objection, and Davis did not request that the trial court admonish the jury that closing argument is not evidence. *Davis*, 660 So. 2d at 1248-49. The trial court did, however, instruct the jury during jury instructions that the closing arguments are not evidence, and that they should disregard any part which has no basis in the evidence. *Davis*, 660 So. 2d at 1249. On appeal, the court held that "[b]ecause the jury was instructed that closing argument was not evidence and was therefore instructed to disregard comments not supported by the evidence, this Court presumes that the jury followed the lower court's instructions and disregarded the

prosecutor's argument that was not supported by the evidence." *Id.* (citing *Ormond v. State*, 599 So. 2d 951, 961 (Miss. 1992)). In the present case, the trial court included in its instructions to the jury the following:

Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark.

Like the court in *Davis*, we presume that the jury followed the trial court's instructions and disregarded any argument, statement, or remark not supported by the evidence. Furthermore, the Mississippi Supreme Court has stated that the same rationale in the principle that "where an objection to a question is sustained, and no request is made that the jury be instructed to disregard the question, there is no error" also applies to objections during closing argument unless a fundamental right is clearly involved. *Brock v. State*, 530 So. 2d 146, 155 (Miss. 1988) (citation omitted).

In the present case, Keyes objected at the time the argument was made by the prosecutor, yet he made no request to the trial court that it admonish the jury to disregard the improper argument. In reviewing the argument, we find that it was sufficiently insignificant when considered in context of the entire case. We are reminded that under this assignment of error Keyes argues that a mistrial should have been granted. We again recognize that the trial court is in the best position to measure the prejudicial effect, if any, to determine if a mistrial is necessary. *See Gossett v. State*, 660 So. 2d 1285, 1290-91 (Miss. 1995). We find no abuse of discretion by the trial court and affirm on this assignment of error. While we do not find the trial court in error, we take this opportunity to remind the State that "Golden Rule" arguments are not proper and should be avoided.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS AS A HABITUAL OFFENDER IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.

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