IN THE COURT OF APPEALS 02/11/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00075 COA

JOSE LUIS DELTORO A/K/A JOSE LOUIS DELTORO

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. RICHARD T. WATSON

COURT FROM WHICH APPEALED: CIRCUIT COURT OF FRANKLIN COUNTY

ATTORNEYS FOR APPELLANT:

RICHARD REHFELDT

A. RANDALL HARRIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: FORREST A. JOHNSON, JR

NATURE OF THE CASE: CRIMINAL - POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO 30 YEARS IN CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE BRIDGES, P.J., BARBER, AND DIAZ, JJ.

BARBER, J., FOR THE COURT:

Jose Louis DelToro was convicted in the Franklin County Circuit Court of the possession with intent to sell in excess of one kilogram of marijuana. DelToro was sentenced to thirty years in the custody of the Mississippi Department of Corrections. On appeal, DelToro raises the following issues:

> I. WHETHER THE LOWER COURT ERRED IN DENYING MOTIONS FOR DIRECTED VERDICT AND JNOV WHEN THE FINDING OF GUILT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?
>
> II. DID THE USE OF OTHER CRIMES EVIDENCE RELATING TO A CO-INDICTEE PREJUDICE APPELLANT AND DENY HIM A FAIR TRIAL?
>
> III. WAS DELTORO SUBJECTED TO INEFFECTIVE ASSISTANCE OF COUNSEL?
>
> IV. DOES INCARCERATION OF THIRTY YEARS EVIDENCE A DISPARITY OF SENTENCING WITHIN THE DICTATES OF *SOLEM V. HELM* AND REPRESENT PUNISHMENT FOR APPELLANT'S EXERCISING HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL?

FACTS

Jose Louis DelToro was arrested in May of 1993 after a truck he was riding in was found to contain approximately twenty-five pounds of marijuana. At the time of his arrest, DelToro and Robert Carmona were making a delivery of marijuana to the home of Chris and James Perkins. Unknown to DelToro and Carmona, the Perkins were working in cooperation with the local sheriff's office. Upon arriving at the Perkins' residence, DelToro informed the Perkins that the load of marijuana being delivered that night belonged to him and that although Carmona had been acting as his agent for past sales, they could deal with DelToro directly for future purchases. James Perkins was "wired" with an electronic recording device which recorded DelToro's statements that the drugs belonged to him. As DelToro and Carmona began to unload the drugs from a false gas tank on the truck, law enforcement personnel moved in and arrested them. After obtaining a search warrant, the law enforcement officers found approximately twenty-five pounds of marijuana hidden in the truck.

ANALYSIS

> I. WHETHER THE LOWER COURT ERRED IN DENYING MOTIONS FOR

DIRECTED VERDICT AND JNOV WHEN THE FINDING OF GUILT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

DelToro contends that the trial court erred in denying his motion for directed verdict/JNOV and his motion for a new trial. 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).

DelToro alleges that the evidence produced by the State was not sufficient to prove beyond a reasonable doubt that he was in possession of or exercised dominion/control over the marijuana with the intent to distribute it. DelToro, however, completely ignores the testimony of the State's witnesses who testified as to his statements regarding the ownership of the marijuana. The witnesses testified that DelToro told them that the load of marijuana being delivered on the night in question belonged to him, and that although Carmona had been acting as his agent for past sales, the buyers could deal with DelToro directly for future purchases. Additionally, DelToro ignores the fact that his statements regarding his ownership of the drugs were recorded on a tape that was admitted into evidence and played for the jury. Considering this substantial, credible evidence that was before the jury, this Court can not hold that reasonable and fair-minded jurors could only find the accused not guilty.

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. As detailed above, the jury was presented with substantial, credible evidence to consider in arriving at its verdict. Particularly considering the eyewitness testimony regarding DelToro's statements of ownership of the drugs, this Court holds that the jury's verdict was most certainly not against the overwhelming weight of the evidence. Accordingly, this assignment of error is without merit.

II. DID THE USE OF OTHER CRIMES EVIDENCE RELATING TO A CO-INDICTEE PREJUDICE APPELLANT AND DENY HIM A FAIR TRIAL?

DelToro contends that the State's evidence regarding prior drug deals by some of the other individuals who were arrested with him amounts to "other crimes" evidence that should have been excluded by Mississippi Rule of Evidence 404(b). However, no contemporaneous objection was made to this alleged error, thereby waiving the issue. *See King v. State*, 615 So. 2d 1202, 1205 (Miss. 1993) (holding that where no contemporaneous objection was made, any error is waived).

Furthermore, DelToro's premise that evidence of past crimes, wrongs or acts committed by persons *other than* himself should have been excluded pursuant to Rule 404(b) is unsupported by any authority. Rule 404(b) clearly refers to prior acts committed by the person whose conduct is at issue, not the acts of other parties. *See Townsend v. State*, 681 So. 2d 497, 507 (Miss. 1996) (holding purpose of Rule 404(b) exclusion of evidence of past crimes is because jury might believe that defendant acted in conformity with *his* past crimes); *see also Sayre v. State*, 533 So. 2d 464, 471 (Miss. 1986) (stating that rule of excluding evidence of other crimes is because when defendant is on trial for particular crime which he denies committing, it is highly prejudicial to inject *his* other crimes or criminal behavior). Not only has DelToro failed to cite any authority to this Court in support of his interpretation of Rule 404(b), he has actually quoted authority in his brief that is contradictory to his position. *See Sumrall v. State*, 257 So. 2d 853, 854 (Miss. 1972) (holding that "the prosecution should not be allowed to aid the proof against the defendant by showing that *he* committed other offenses . . . .") (emphasis added). This assertion of error is totally lacking in merit.

III. WAS DELTORO SUBJECTED TO INEFFECTIVE ASSISTANCE OF COUNSEL?

DelToro claims that his Sixth Amendment rights were violated when his attorney allegedly rendered ineffective assistance at trial. In support of his contention, DelToro alleges numerous points of error or omission supposedly made by his trial counsel. To rebut these allegations, the State argues that each point raised by DelToro was a matter within his lawyer's discretion as to trial strategy and that such error, if any, was not prejudicial to DelToro.

The test to be applied in cases involving the alleged ineffectiveness of counsel is whether or not counsel's overall performance was (1) deficient and (2) whether or not the deficient performance, if any, prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh'g denied*, 467 U.S. 1267 (1984). The burden is on the defendant to demonstrate both prongs. *Edwards v. State*, 615 So. 2d 590, 596 (Miss. 1993). The determination of whether counsel's performance was both deficient and prejudicial must be made from the "totality of the circumstances." *Frierson v. State*, 606 So. 2d 604, 608 (Miss. 1992). The target of appellate scrutiny in evaluating the deficiency and prejudice prongs of *Strickland* is counsel's "over-all" performance. *Nicolaou v. State*, 612 So. 2d 1080, 1086 (Miss. 1992). There is a strong, yet rebuttable, presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Frierson*, 606 So. 2d at 608. There is, likewise, a presumption that decisions made by defense counsel are strategic. *Leatherwood v. State*, 473 So. 2d 964, 969 (Miss. 1985).

Under the second, or prejudice prong, the movant must show that there is a "reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988) (emphasis added) (quoting *Strickland*, 466 U.S. at 694).

DelToro asserts the following points as demonstrating that his counsel failed to render reasonable professional assistance:

1. Absence of a motion for discovery

2. Failure to interview the State's witnesses prior to trial

3. Brevity of opening statement

4. Failure to request an accomplice instruction

5. Failure to make a proffer of testimony

6. Incorrectly styled motion

7. Remarks made during closing argument

According to DelToro, his attorney did not file a motion for discovery. This assertion appears to be accurate, as no discovery motion is included among the clerk's papers that are before this Court on appeal. However, the Mississippi Supreme Court has held that the failure of an attorney to file a discovery motion is within the bounds of trial strategy and, therefore, not evidence that the attorney's representation was ineffective. *See Ivy v. State*, 589 So. 2d 1263, 1265 (Miss. 1991) (holding that failure to file discovery motion was within bounds of trial strategy).

Regarding the defense attorney's alleged failure to interview the State's witnesses before they testified, such behavior would indicate a lack of thorough investigation by defense counsel. In looking at these actions in the context of reviewing a claim of ineffective assistance of counsel, "a common thread of the fabric of the reviewing courts' deference to tactical considerations is thorough investigation." *State v. Tokman*, 564 So. 2d 1339, 1343 (Miss. 1990). However, based on the record before this Court, we are unable to ascertain whether or not DelToro's attorney interviewed the State's witnesses prior to trial.

DelToro also assigns error to the fact that his counsel's opening remarks at trial were extremely brief. Since our supreme court has held that the decision of whether or not to make an opening statement is a matter of trial strategy, the length of any opening remarks an attorney may choose to make should likewise be considered trial strategy. *See Cabello v. State*, 524 So. 2d 313, 318 (Miss. 1988) (holding decision of whether or not to make opening statement is strategic one).

Also among DelToro's asserted deficiencies is his attorney's failure to request an accomplice instruction regarding two of the State's witnesses. DelToro argues that his counsel should have motioned the court to instruct the jury that the testimony of Chris and James Perkins should be viewed with great care and suspicion. This Court, however, finds no merit in this argument, based on our supreme court's holding in *Martin v. State.* In *Martin*, a defense lawyer's failure to request the same type of limiting instruction was held to not constitute ineffective assistance. *See Martin v. State*, 609 So. 2d 435, 440 (Miss. 1992) (holding defense counsel's failure to request instruction that certain testimony be viewed with caution and suspicion did not rise to level of ineffective assistance of counsel).

DelToro further argues that his counsel's failure to make a proffer of testimony from a proposed witness was erroneous. However, the record before this Court does not reveal whether DelToro's counsel failed to make the proffer in question, or simply decided the proffer was unnecessary. We feel that the absence of this proffer was a matter within the defense counsel's discretion as to trial strategy.

Regarding the incorrectly styled motion for dismissal, DelToro's attorney explained the error to the trial court and was allowed to orally amend the motion. DelToro's attorney stated that the error was due to the loss of a legal secretary in his office. While errors such as mislabeling a motion and incorrectly identifying his client may have caused DelToro's attorney to be embarrassed, they are certainly not of such magnitude as to cause his representation of his client to be ineffective.

DelToro's final assignment of error for his ineffective assistance of counsel claim is that his counsel made remarks in his closing statement that "were deficiencies unparalleled in the annals of Mississippi jurisprudence." DelToro complains of a single sentence in his counsel's closing remarks, where his lawyer stated that "I'm not saying that Mr. DelToro did not know there was marijuana in that truck." DelToro, however, is not specific as to what context the remarks were made in or exactly how/why these remarks amounted to ineffective assistance of counsel. This Court is of the opinion that DelToro's counsel was to be afforded wide latitude making his closing remarks. Accordingly, the remarks complained of were within defense counsel's discretion as to trial strategy. *See Edwards v. State*, 615 So. 2d 590, 596 (Miss. 1993) (holding attorneys are permitted wide latitude in their choice and employment of defense strategy).

Although DelToro has found no shortage of acts or omissions by his trial counsel that he considers to be deficient, he has failed to present any evidence of how these alleged deficiencies were prejudicial to him under the *Strickland* test. *See Strickland*, 466 U.S. at 687 (holding that test to be applied in cases involving alleged ineffectiveness of counsel is whether or not counsel's overall performance was (1) deficient and (2) whether or not the deficient performance, if any, prejudiced the defense). As the Mississippi Supreme Court stated in *Cabello v. State*, the defendant must demonstrate that there is a "reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceedings would have been *different*. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Cabello*, 524 So. 2d at 315 (emphasis added). Even assuming that all of the points of error alleged by DelToro were held to be of merit (which, as detailed, *supra*, is not the case), he would still have to show that there is a reasonable likelihood that "but for" these errors the outcome of his trial would have been different. We have reviewed the record and looking at the totality of the circumstances, we cannot say that the assistance provided by DelToro's counsel rises to the level of unprofessional conduct necessary for a finding of ineffective assistance of counsel under the *Strickland* standard. This assignment of error is without merit.

IV. DOES INCARCERATION OF THIRTY YEARS EVIDENCE A DISPARITY OF SENTENCING WITHIN THE DICTATES OF *SOLEM V. HELM* AND REPRESENT PUNISHMENT FOR APPELLANT'S EXERCISING HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL?

DelToro complains that his sentence to serve the statutory maximum penalty for the drug possession charge he was convicted of is unconstitutionally severe, amounting to cruel and unusual punishment as prohibited by the Eight Amendment to the Constitution of the United States. As a general rule, sentencing is purely a matter of trial court discretion so long as the sentence imposed lies within the statutory limits. *Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992); *Barnwell v. State*, 567 So. 2d 215, 222 (Miss. 1990) (holding sentence within prescribed limits of statute will generally be upheld and not regarded as cruel and unusual). Where a sentence is "grossly disproportionate" to the crime committed, however, the sentence is subject to attack on grounds that it violates the Eight

Amendment prohibition against cruel and unusual punishment. *Fleming*, 604 So. 2d at 302; *see also Barnwell*, 567 So. 2d at 221 (holding that extended proportionality analysis is not required by Eight Amendment unless sentence is "manifestly disproportionate" to crime committed). In *Solem v. Helm*, 463 U.S. 277, 292 (1983), the Supreme Court articulated a three-prong test for evaluating proportionality. The elements include: (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. *Solem*, 463 U.S. at 292. This Court has adopted the *Solem* criteria. *See, e.g., Fleming*, 604 So. 2d at 302-03. When reviewing a claim that a sentence is unconstitutionally severe, this Court is mindful that "outside the context of capital punishment, successful challenges to the proportionality of a particular sentence will be exceedingly rare." *Clowers v. State*, 522 So. 2d 762, 765 (Miss. 1988) (quoting *Solem*, 463 So. 2d at 289-90) .

Regarding the severity of the sentence imposed on DelToro, he states in his brief that he "acknowledges . . . the gravity of the offense . . . . " DelToro, however, goes on to complain of the harshness of the penalty assessed against him, pointing out that his co-indictees received lesser sentences than he did, despite their extensive involvement in the trafficking of illegal drugs. Concerning the differences in sentencing, it must be kept in mind that each of DelToro's co-indictees pled guilty as part of their respective "plea bargain" agreements with the State. Additionally, several of the co-indictees were actively cooperating with law enforcement officers, aiding them in the pursuit of "higher ups" in the drug smuggling operation that DelToro was conducting. DelToro, to the contrary, provided no assistance to the law enforcement personnel.

It is readily apparent from the facts that all of the persons who were indicted as a result of this incident bore varying degrees of culpability, thus accounting for the different sentences. Considering the gravity of the offense for which DelToro was convicted, his sentence is not "grossly disproportionate to the crime committed." Therefore, it is unnecessary for this Court to conduct an extended proportionality analysis as outlined in *Solem*. See *Barnwell*, 567 So. 2d at 222 (holding sentence within prescribed limits of statute will generally be upheld and not regarded as cruel and unusual). Furthermore, DelToro has produced no facts either here or before the lower court concerning sentences imposed in other jurisdictions. In the complete absence of facts showing that DelToro's sentence exceeds others imposed for the same crime in either this or other jurisdictions, it would be impossible for this Court to hold that the second and third prongs of the *Solem* test favor reversal of DelToro's sentence. This assignment of error is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF FRANKLIN COUNTY OF CONVICTION OF THE POSSESSION OF MORE THAN ONE KILOGRAM OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DISTRIBUTE AND SENTENCE OF THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST FRANKLIN COUNTY.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. MCMILLIN, P.J., CONCURS IN RESULT ONLY. HERRING, J., NOT

PARTICIPATING.