

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00874 COA

DOUGLAS WAYNE WINTERS

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. HENRY LAFAYETTE LACKEY

COURT FROM WHICH APPEALED: CIRCUIT COURT OF BENTON COUNTY

ATTORNEY FOR APPELLANT:

JAMES W. PANNELL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: DAVID ROBINSON

NATURE OF THE CASE: CRIMINAL: POSSESSION OF MARIJUANA WITH INTENT TO
SELL, TRANSFER OF DISTRIBUTE

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO 15 YEARS IN THE
CUSTODY OF THE MDOC

BEFORE McMILLIN, P.J., KING AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This is a criminal appeal from the Circuit Court of Benton County wherein Douglas Wayne Winters was convicted of possession of a controlled substance with intent to sell, transfer or distribute. The trial court sentenced Winters to fifteen years in the custody of the Mississippi Department of Corrections. Feeling aggrieved, Winters appeals arguing: (1) that the trial court erred in failing to grant a mistrial, and (2) that the jury's verdict is against the overwhelming weight of the evidence. Winters asks this Court to reverse his conviction and remand the cause for a new trial or, in the alternative, to render on a conviction of simple possession and remand the cause for re-sentencing. Finding no reversible error, we affirm.

STATEMENT OF THE FACTS

On May 7, 1992, Douglas Wayne Winters was stopped by Chief Deputy Willie Ed Thompson of the Benton County Sheriff's Department after crossing over the white line. Thompson reported the vehicle's license plate and determined that it belonged to a vehicle other than the vehicle Winters was driving.

Thompson testified that as he approached Winters' car, he smelled the strong and distinct odor of marijuana. Thompson viewed a burned marijuana cigarette butt on the car's ashtray. Thompson also observed a plastic bag with a green leafy substance protruding from an overnight bag located in the backseat. Portable weighing scales were also contained in the bag. Winters admitted the bag containing the green leafy substance belonged to him and was arrested.

Winters and his passenger, Danny Barkley, were transported to the sheriff's office. Winters was questioned by Thompson and Sheriff McMullen after reading Winters his *Miranda* rights. Winters indicated he understood his rights and he waived them, signing a written waiver. Winters next gave a statement in which he admitted that he obtained the marijuana from a friend, that he intended to smoke some of the marijuana, and he intended to sell some of it. Winters also admitted that he knew some scales were in the bag. These admissions were written down by Sheriff McMullen, and Winters signed the written statement.

The green leafy substance in the bag was tested and determined to be .43 pounds of marijuana.

Deputy Thompson, Sheriff McMullen, and Deputy Gregg Hopper all indicated that at the time of his statement, Winters was not impaired in any way.

Winters testified as the only defense witness. According to Winters, he was drunk at the time of the questioning having consumed some seven beers and having shared two marijuana cigarettes prior to being stopped. Winters testified that he never intended to sell the marijuana. Winters testified that the marijuana belonged to his brother-in-law who was a passenger in his vehicle at the time he was stopped. Winters testified that he told the police that the marijuana was his because his brother-in-law asked him to in order to avoid trouble for himself. Winters also testified about his 1986 conviction of possession of one-quarter pound of marijuana with intent to deliver. Winters stated that he was lying at the time of his arrest, but was testifying to the truth at trial.

ARGUMENT AND DISCUSSION OF THE LAW

I. THE TRIAL COURT ERRED IN REFUSING TO DECLARE A MISTRIAL AFTER THE PROSECUTION USED ABUSIVE LANGUAGE AND DENIGRATED WINTERS DURING CLOSING ARGUMENT.

Winters argues that the trial court committed reversible error in failing to grant his motion for a mistrial upon his objection during the State's closing argument. Winters objected to the prosecutor's referencing him as "creep" and "dope dealer." He characterizes the prosecutor's references as abusive and argues that such appealed to the passion and prejudice of the jury and so inflamed the jury that it viewed him as an immediate threat to themselves and their community. Winters also points out that the trial court did not instruct the jury to disregard the abusive language. Winters argues that the prosecutor overstepped the bounds of fundamental fairness causing the jury to regard Winters as someone unworthy of credibility and belief. Winters concludes that absent such abuse by the prosecutor, the jury may have believed Winters' testimony that he had no intent to sell, transfer, or distribute the marijuana and found him guilty of simple possession.

The State responds by arguing that the record contains Winters' signed statement in which he indicated that he intended to smoke some of the marijuana, and also that he intended to sell some marijuana. The State contends that the use of the term "dope dealer" is supported by the record in that Winters admitted to pleading guilty in Arkansas in 1986 to possession of marijuana with intent to deliver charge. Finally, the State asserts that a single reference to Winters as "creep" is not grounds for a mistrial nor reversible error on appeal particularly in light of the overwhelming evidence supporting his conviction.

The prosecutor's comment about which Winters complains is:

And I really get mad when people like this creep come into the courtroom and try and tell a jury such as yourself that Arnie's lying on him and that Willie Ed is lying on him. Willie Ed and Arnie aren't paid enough to take this kind of abuse from dope dealers.

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, 1269-70 (Miss. 1995) (citations omitted) (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 it 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, Winters did not object at the time the argument was made by the prosecutor, but waited until after the State had completed its closing argument to move for a mistrial. Winters made no request to the trial court that it admonish the jury to disregard the improper argument. In reviewing the "creep" reference, we find that it was sufficiently insignificant when considered in context of the entire case. The "dope dealer" reference is supported by Winters own admission of his previous conviction. We are reminded that under this assignment of error Winters argues that a mistrial should have been granted. We 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 such references to the accused are not proper and should be avoided. This assignment of error is without merit.

II. THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Winters asserts that the jury's verdict is against the overwhelming weight of the evidence. Specifically, Winters argues that the evidence only supports a verdict of guilty of simple possession of marijuana. Winters contends that the proof of intent to sell, distribute or transfer rests solely on his statement to the police.

The State responds by arguing that there was direct evidence that Winters intended to sell some of the marijuana found in his possession including his statement and the testimony about the scales found in Winters' possession at the time of his arrest.

The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993) (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

The jury heard the evidence presented by both the State and by Winters in his own defense. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the Winters' testimony and to convict him. We do not find that the jury's verdict was so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to promote an unconscionable injustice. Accordingly, we find Winters' assignment of error to be without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF BENTON COUNTY OF CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO SELL, TRANSFER OR DISTRIBUTE AND SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.