IN THE SUPREME COURT OF MISSISSIPPI

RIXXIE HARRIS
APPELLANT

VS. **CASE NO. 2005-KA-02159-COA**

STATE OF MISSISSIPPI
APPELLEE

BRIEF FOR APPELLANT

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ON APPEAL FROM THE CIRCUIT COURT OF
SUNFLOWER COUNTY, MISSISSIPPI

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that this court may evaluate possible disqualification or refusal:

1. Rixxie Harris, Appellant
2. Honorable Aelicia L. Thomas, Attorney for Appellant, Rixxie Harris
3. Honorable Hallie Gail Bridges, Attorney for Appellee
6. Honorable Jim Hood, Attorney General for the State

THIS, the 31st day of ~~April~~ August, 2007.

Aelicia L. Thomas, MSB [redacted]
Attorney for Appellant for Rixxie Harris

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STATEMENT OF ISSUE ON APPEAL

1. Whether the verdict was against the overwhelming weight of the evidence?

2. Whether the trial court erred in accepting the jury's verdict as it was not written on a separate sheet of paper?

3. Whether the verdict was against the sufficiency of the evidence?

STATEMENT OF THE CASE[1]

A. Nature of the Case, Course of Proceedings and Disposition Below

This is an appeal by Appellant Rixxie Harris (hereinafter "Rixxie") from the conviction and sentence of thirty (30) years to serve under the control and supervision of the Mississippi State Penitentiary. The Appellant was convicted in Count II of being in possession of marihuana w/intent. On December 10, 2003, Rixxie was indicted by the Sunflower County, Grand Jury in a two count indictment of Possession of Cocaine in Count I and Possession of Marijuana w/intent in Count II. (c.p. p.9).

Rixxie pled not guilty at arraignments and proceeded to trial on February 22, 2005 before Circuit Court Judge Margaret Carey-McCray and at the end of said trial, the jury returned a verdict finding the Appellant, Rixxie Harris guilty as to count 2 of the indictment. (c.p., p. 33). Rixxie was sentenced on March 9, 2005 to serve thirty (30) years in Count 2 as a habitual offender. Appellant filed his Motion for Judgment Notwithstanding the Verdict or in the Alternative, New Trial was never filed after trial counsel was ordered to do so on December 30, 2005. Finally, Rixxie filed his Notion for Appeal to this Court on November 15, 2005. (c.p. p. 56).

B. Facts

On June 15, 2003 at approximately 6:00 p.m., the Appellant was in his vehicle at the Double Quick in Moorhead, MS. According to Joe Drisdell, he approached the vehicle Mr. Harris was in and was asked by Mr. Harris to ride with him to Sunflower (T., v.2, p. 100).

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[1] The appeal record in this cause consists of the clerk's papers (c.p.__), the transcript of the February 23-25, 2005 (although the trial transcript has the trial beginning on the 22nd) trial before the Honorable Margaret Carey-McCray (T.__) {volumes will be identified as v.}, and the record excepts filed pursuant to M.R.A.P. 30 (r.e.__).

While on their way to Sunflower, Highway Patrol Officer Jacob Lott ("Trooper Lott), noticed Mr. Harris' vehicle reach the stop sign at highway 3 and 49 and when he was unable to see inside the vehicle because the tint was too dark, Trooper Lott activated his blue lights and pulled the vehicle over. (T., v.2, p.65).

When Trooper Lott exited his vehicle, he was met by Mr. Harris between the back of Mr. Harris' vehicle and the front of Trooper Lott's vehicle. Upon approaching Mr. Harris, Trooper Lott noticed two occupants in the vehicle. Trooper Lott testified that he noticed the smell of marijuana coming from Mr. Harris' person. (Id.) While speaking with Mr. Harris, Trooper Lott decided to go to Mr. Harris' vehicle to check on the actions of the passenger. After opening the driver's door, Trooper Lott noticed the passenger smoking a blunt. (T., v.2, p.66-67). After checking on the passenger, Trooper Lott returned to Mr. Harris and asked him if he had been smoking marijuana. Trooper Lott testified that Mr. Harris responded that he had earlier that day. Mr. Harris was then placed under arrest and placed handcuffs on him. (T., v.2, p.67).

Trooper Lott returned to Mr. Harris' vehicle and opened the passenger's door and asked the passenger to give him the marijuana blunt he was smoking. He then removed the passenger from the vehicle and placed him under arrest. Trooper Lott began to search the vehicle and noticed a Crown Royal bag laying down on the floorboard on the passenger's side. (T., v.2, p.68). After locating the Crown Royal bag, Trooper Lott opened the bag and saw what appeared to be marijuana in small bags and a pill bottle, with what appeared to be crack cocaine in it. At that time, Trooper Lott returned to his vehicle and advised Mr. Harris and Mr. Drisdell of their rights. (Id.).

SUMMARY OF ARGUMENT

In the present case, there is no way a reasonable minded jury could have found the Appellant guilty of possession of marijuana with intent. The sole evidence of the State rests with the testimony of two witnesses, Trooper Jacob Lott and co-defendant Joe Drisdell. Trooper Lott testified that he stopped Mr. Harris' vehicle after he was unable to see inside the vehicle due to the dark tint. After exiting his vehicle, Mr. Harris exited his vehicle and they met at the back of Mr. Harris' vehicle at which time Trooper Lott states that he was able to detect the smell of marijuana coming from his person. This testimony does not support a conviction for intent. (T., v.2, p.65).

This Court has found evidence to be sufficient for a conviction when the defendant did not own the premises but was in control of the premises where the controlled substance was found and due to the circumstances at the time, knew or should have known that the substance was on the premises. See *Blissett v. State*, 754 So.2d 1242, 1244 (Miss. 2000) (finding constructive possession when the defendant was driving the car where marijuana was found and the car smelled strongly of unburned marijuana). Dixon v. State, 953 So. 2d 1108, 1114 (Miss. 2007). The Appellant was driving the vehicle, but there was no testimony that established the Appellant as being the owner. Nonetheless, proof that the Appellant possessed the marijuana is not enough to support the charge of possession with intent.

Additionally, the failure of the trial court to receive the verdict of the jury on a separate sheet of paper renders the verdict null and void. There may not be an established rule that the verdict of the jury must be written on a separate sheet of paper, but there

should be and now is the time to clarify that rule. The reason why there aren't as many cases on this particular issue is simply because no one has made the argument. *Bowen* is the only case in this district Appellant was able to find. As the Court stated in *Bowen*, judges began this practice to eliminate errors concerning the jury verdicts. *Bowen*, at 718-719. Judges instructing the juries to write their verdict on a separate sheet of paper has been in effect for so long across this nation that it has become an established principle. Everybody waits for the jury foreman to hand the clerk or the Judge the paper. The Appellant and others like him have come to expect it. This Court should not forget that the trial court's jury instructions direct the jury to write their verdict on a separate sheet of paper. The trial court's instructions are ***the law*** given to the jury at the end of the trial. These instructions are not given for mere consideration or suggestion, but they are to be strictly adhered to.

ARGUMENT

I.

THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

Standard of Review on Appeal

When making this review, this Court has held that it will reverse only if Rixxie's conviction is "so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Dilworth v. State*, 909 So.2d 731, 737 (Miss. 2005) (quoting *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005)). We will weigh the evidence "in the light most favorable to the verdict." *Bush*, 895 So.2d at 844. In order for us to reverse, the trial court must have "abused its discretion in denying a motion for new trial."

Dilworth, 909 So.2d at 737. "Only in 'exceptional cases in which the evidence preponderates heavily against the verdict should the trial court invade the province of the jury and grant a new trial." Id. (quoting *Amiker v. Drugs for Less*, Inc., 796 So.2d 942, 947 (Miss. 2000)). *Gray v. State*, 926 So.2d 961, 967 (Miss. Ct. App. 2006).

In the present case, there is no way a reasonable minded jury could have found the Appellant guilty of possession of marijuana with intent. The sole evidence of the State rests with the testimony of two witnesses, Trooper Jacob Lott and co-defendant Joe Drisdell. Trooper Lott testified that he stopped Mr. Harris' vehicle after he was unable to see inside the vehicle due to the dark tint. After exiting his vehicle, Mr. Harris exited his vehicle and they met at the back of Mr. Harris' vehicle at which time Trooper Lott states that he was able to detect the smell of marijuana coming from his person. This testimony does not support a conviction for intent. (T., v.2, p.65).

This Court has found evidence to be sufficient for a conviction when the defendant did not own the premises but was in control of the premises where the controlled substance was found and due to the circumstances at the time, knew or should have known that the substance was on the premises. See *Blissett v. State*, 754 So.2d 1242, 1244 (Miss. 2000) (finding constructive possession when the defendant was driving the car where marijuana was found and the car smelled strongly of unburned marijuana). Dixon v. State, 953 So. 2d 1108, 1114 (Miss. 2007). The Appellant was driving the vehicle, but there was no testimony that established the Appellant as being the owner. Nonetheless, proof that the Appellant possessed the marijuana is not enough to support the charge of possession with intent.

According to this Court, "There is no magic number as to quantity with

respect to evidence of intent to distribute. This Court has upheld a conviction where there was less than eight ounces of marijuana. *Alexander v. State*, 503 So. 2d 235 (Miss. 1987) (Although defendant made no claim of insufficiency of evidence, the evidence before the jury was such that Court concluded that the defendant was indeed in possession of more than an ounce of marijuana with intent to sell; defendant was found with thirty-nine sealed envelopes of marijuana consisting of aggregate of 1.722 ounces, and $500 in cash on his person). When the quantity is such that an individual could use it alone, then that quantity is not in and of itself sufficient to create an inference of intent. Where the amount is greater than what one might ordinarily have for personal consumption, it does create an inference of intent to distribute. In either case, this Court must view the surrounding circumstances in determining the sufficiency of the evidence of intent." *Taylor v. State*, 656 So. 2d 104, 108 (Miss. 1995); *Stringfield v. State*, 588 So. 2d 438, 441 (Miss. 1991).

Fox v. State, 756 So. 2d 753, 759 (Miss. 2000). In the present case, the only evidence is that the Appellant was in possession of approximately 1.56 ounces of marijuana.

This Court has stated, "to prove a transfer there is no need to show an intent to sell, as is necessary under an indictment for possession with intent to sell. (Slip op. at 9). We find that the only intent necessary is an intent to relinquish possession and control. The intent of the recipient is immaterial." Meek v. State, 806 So. 2d 236, 240 (Miss. 2001). But you only get to this argument if the Court believes the testimony of Mr. Drisdell that the Appellant threw the sack of drugs to him. His testimony is not reliable or credible. The Court's ruling in *Meek* clearly establishes the point that there is a level of proof necessary to support a

conviction for "intent to sell" from "intent to transfer". Unfortunately, the Appellant was indicted for having an intent to ". . . . sell, barter, transfer or deliver . . ." Applying the Court's reasoning to the present case, a conflict is created and as such, prevented the Appellant from having a fair and impartial trial. There is no way to determine which set of facts the jury gave weight to in order to determine which offense – to sell, barter, transfer or deliver – the Appellant committed.

Trooper Lott testified that the Appellant admitted that the marijuana was his and that he wrote a statement admitting that Mr. Drisdell wanted to go to Sunflower to get some marijuana, but he told him that he had a little. See Exhibit S-4. (T., v.2, p.72, 75). The State had Trooper Lott read the scratched out portion of the statement which seems to say that the Appellant and Mr. Drisdell were headed to Sunflower to sell some marijuana. (T., v.2, p.75). We know that this can't be used as sufficient evidence to support the charge of intent, because the speculated statement was redacted from the statement by being scratched out. Because the word look like sell, doesn't mean that it was the word sell and even if it was, it is clearly made known by the Appellant that the statement was in error so he crossed it out and wrote the correct statement. There was no testimony given to contradict that the portion redacted was not in error.

Yes, yes, yes, I hear the Court saying, "But, we have the testimony of the co-defendant". Well, the Court should remember that although, "[T]he uncorroborated testimony of an accomplice may be sufficient to convict an accused. Where there is slight corroborative evidence, the accomplice's testimony is likewise sufficient to sustain the verdict. However, the general rule is inapplicable in those cases where the testimony is

unreasonable, self contradictory or substantially impeached." *Ballenger v. State*, 667 So. 2d 1242, 1253 (Miss. 1995) (quoting *Flanagan v. State*, 605 So. 2d 753, 757-58 (Miss. 1992)). Swington v. State, 742 So. 2d 1106, 1111 (Miss. 1999). The only testimony the co-defendant gave was that the Appellant asked him to go ride with him to visit a cousin in Sunflower. (T., v.2, p.100). Further, it was brought out during the cross examination of Mr. Drisdell that he not only will lie under oath, but admitted to during so in this cause. (T., v.2, pgs.109-111). With this being the only scintilla of evidence, this is certainly not overwhelming to support a conviction of possession with intent. For this Court to affirm this conviction, would clearly be allowing a manifest injustice to continue. Therefore the conviction of possession of marijuana with intent should be reversed.

II.

THE COURT ERRED IN ACCEPTING THE JURY'S VERDICT BECAUSE IT WAS NOT WRITTEN ON A SEPARATE SHEET OF PAPER

Although the law does not require verdicts to be written upon a separate piece of paper, in this case it should. Bowen v. State, 177 Miss. 715, 718 (Miss. 1937). At the end of the trial, the jury had a question that was addressed in chambers. (T., v.3, p.161). They asked if they could be unanimous on one count and not unanimous on another count? See Exhibit C-1. (Id.). Then the court met again in chambers with another note from the jury that said, "We did not reach a unanimous decision on both counts. Count 1 not reached." It even confused the court. See Exhibit C-2. (T., v.3, p.162). Then, they returned to chambers a third time with another note from the jury that said, "We voted again on Count 1 and do not believe that additional time will be helpful . . . nine not guilty and three guilty. That's on Count 1. We want this to be our final decision. See Exhibit C-3. (T., v.3, p.164). Finally,

the trial court returned to the open court room and assembled the jury. After the court questioned the jury about their note, then the "trial court" said, "Okay. As to Count 2: We, the jury, find the defendant guilty as charged as to count 2, possession of marijuana with intent". (T., v.3, p.165). There is nothing in the record that shows where this verdict came from.

There may not be an established rule that the verdict of the jury must be written on a separate sheet of paper, but there should be and now is the time to clarify that rule. The reason why there aren't as many cases on this particular issue is simply because no one has made the argument. *Bowen* is the only case in this district Appellant was able to find. As the Court stated in *Bowen*, judges began this practice to eliminate errors concerning the jury verdicts. *Bowen*, at 718-719. Judges instructing the juries to write their verdict on a separate sheet of paper has been in effect for so long across this nation that it has become an established principle. Everybody waits for the jury foreman to hand the clerk or the Judge the paper. The Appellant and others like him have come to expect it. This Court should not forget that the trial court's jury instructions direct the jury to write their verdict on a separate sheet of paper. The trial court's instructions are ***the law*** given to the jury at the end of the trial. These instructions are not given for mere consideration or suggestion, but they are to be strictly adhered to.

The Court should remember its ruling in *Prestage Farms, Inc. v. Norman*, "In doing so, we find that there is a common pattern of behavior among the various defendants which satisfies the requirements of Rule 20." Prestage Farms, Inc. v. Norman, 813 So. 2d 732, 736 (Miss. 2002). If common patterns of behavior can work against the Defendant, why

shouldn't the same legal theory and ruling be used in favor of the Defendant. Not clearly knowing what the jury's verdict was can not be treated as simple harmless error. And as such, the Appellant's conviction should be reversed. Not to do so, would clearly be error and would further this manifest injustice.

III.

THE VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE

In deciding whether the prosecution has presented sufficient evidence to sustain the verdict, the Court should accept as true all credible evidence consistent with the defendant's guilt and the State must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. A reviewing court should only reverse where, with respect to one or more of the elements of the offense charged, the evidence is such that reasonable and fair-minded jurors could only find the accused not guilty. *George v. State*, 812 So. 2d 1103 (Miss. Ct. App. 2001) (citation omitted). It is within the discretion of the jury to accept or reject testimony by a witness, and the jury "may give consideration to all inferences flowing from the testimony." *Mangum v. State*, 762 So. 2d 337 (Miss. 2000) (quoting *Grooms v. State*, 357 So. 2d 292, 295 (Miss. 1978)).

Martin v. State, 834 So. 2d 727, 729 (Miss. Ct. App. 2003).

The standard of review for a post-trial motion is abuse of discretion. *Howell v. State*, 860 So.2d 704, 764 (Miss. 2003). In the recent case of *Bush v. State*, 895 So.2d 836, 843 (Miss. 2005), we discussed the standard which applies in a challenge to a verdict based on the sufficiency of the evidence:

> In *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968), we stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.' However, this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 315, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (citations omitted) (emphasis in original). Should the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render[, i.e. reverse and discharge]. *Edwards v. State*, 469 So. 2d 68, 70 (Miss. 1985) (citing May v. State, 460 So. 2d 778, 781 (Miss. 1984); see also *Dycus v. State*, 875 So. 2d 140, 164 (Miss. 2004). However, if a review of the evidence reveals that it is of such quality and weight that, 'having in mind the beyond a reasonable doubt burden of proof standard,

reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense, the evidence will be deemed to have been sufficient. *Dilworth v. State*, 909 So. 2d 731, 736 (Miss. 2005).

There is no way reasonable minded jurors could find the Appellant guilty of the indicted charge. As such, the convictions against the Appellant should be dismissed. There are no reasonable inferences to give to the State. The only evidence presented by the State that the Appellant was in possession was that he admitted to the Trooper that the marijuana was his and/or that the Appellant passed the Crown Royal bag to Mr. Drisdell. If believed, this only and solely supports a conviction for possession of marijuana, but not possession with intent. If the Court wants to say this is sufficient evidence, it can, but such a decision would not be founded in the law with all due respect to the Court.

CONCLUSION

Although this Court may find that each error standing alone is insufficient to establish manifest error to award a new trial, when reviewing each error cumulative this Court has no choice but to reverse the conviction of Rixxie Harris and dismiss the charge against him or in the alternative, grant him a new trial. Not to do so, would be allowing a manifest injustice to continue.

SO BRIEFED, this the 31st day of August, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Aelicia L. Thomas, do hereby certify that I have this day mailed, by U.S. mail, postage prepaid, a true and correct copy of the Appellant's Appeal Brief to the following:

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THIS, the 31st day of August, 2007.

Aelicia L. Thomas