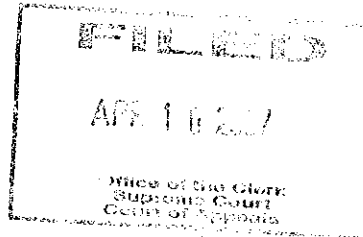


GO/DPW
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SANDRA DEAR

APPELLANT

VS.



NO. 2006-KA-1560

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUE

The trial court properly refused proposed Jury Instruction D-7.

STATEMENT OF THE FACTS

Confidential informant, Larry Gardner, purchased crack cocaine from the Defendant Sandra Dear [hereinafter "Dear"]. (Transcript p.p. 58 - 59). Prior to the buy, Mr. Gardner met with Clay McCombs, a Narcotics Investigator for the Leake County Sheriff's Department and Investigator Mark Wilcher of the Leake County Sheriff's Department for a Pre-Buy meeting. (Transcript p. 74). During the meeting, Mr. Gardner was searched, his vehicle was searched, and he was equipped with a wire and camera. (Transcript p.p. 75 - 76).

Mr. Gardner then drove to Sandra Dear's house and knocked on the door. (Transcript p. 57). He was greeted at the door by a man named Lester Windham. (Transcript p. 57). Mr. Gardner went inside and asked Dear for a "dub," which is \$20 worth of crack cocaine. (Transcript p. 58). Mr. Gardner gave Dear the \$20 and she gave him the crack cocaine. (Transcript p. 59). Mr. Gardner then left Dear's house and returned the crack cocaine to the investigators. (Transcript p. 59).

SUMMARY OF THE ARGUMENT

The trial court properly refused proposed Jury Instruction D-7 as it had no foundation in the evidence.

ARGUMENT

Jury instructions are within the sound discretion of the trial court. *Shumpert v. State*, 935 So.2d 962 (Miss. 2006) (citing *Goodin v. State*, 787 So.2d 639, 657 (Miss. 2001)). Further, it has been held with regard to jury instructions:

The standard of review is “whether an issue should be submitted to the jury is determined by whether there is evidence, which, if believed by the jury, could result in resolution of the issue in favor of the party requesting the instruction.” Conversely, only where the evidence is so one-sided that no reasonable juror could find for the requesting party on the issue at hand may the trial court deny an instruction on a material issue.”

Gill v. State, 924 So.2d 554, 556 (Miss Ct. App. 2005) (quoting *Walls v. State*, 672 So.2d 1227, 1230 (Miss. 1996)) (*emphasis added*).

Dear contends that it was error for the trial court to refuse a jury instruction instructing the jury that if they “believe that the State has failed to satisfactorily identify Sandra D. Dear, beyond a reasonable doubt, as the individual who committed the crimes of sale of cocaine” that it was their duty to find Dear “not guilty.” (Transcript p. 3). Dear argues that by refusing this instruction, the trial court caused her to be unable “to place before the jury the issue of whether she was the source of the cocaine.” (Appellant’s Brief p. 4). The trial court, however, correctly ruled that there was no basis in the evidence for the instruction as Mr. Gardner positively identified Dear as the person from whom he bought crack cocaine. (Transcript p. 90)

Mr. Gardner testified as follows regarding the sale:

Q: Now, this transaction, did you make a deal with Sandra Dean there that day?

A: I made a deal. I just asked her for the \$20.00 rock and she gave it to me and I left.

Q: Did you give her the \$20.00?

A: Yes sir.

(Transcript p.p. 58 - 59). Moreover, Mr. Gardner identified Dear in the court room and testified that he had known her for fifteen years. (Transcript p. 60). He further testified that on the day of the sale he knew who she was. (Transcript p. 60). He also identified Dear as the person on the video tape of the transaction and again confirmed that he bought the crack cocaine from Dear. (Transcript p. 63).

Dear further argues that the testimony of Mr. Gardner was “the only evidence that [Dear] was the source of the cocaine.” (Appellant’s Brief p. 4). However, it is well settled that the “jury is the sole judge of the weight and credibility of the witnesses.” *Thomas v. State*, 754 So.2d 579, 582 (Miss. Ct. App.2000) (citing *Miller v. State*, 634 So.2d 127, 129 (Miss.1994)). Further, there was no evidence of anyone else being the source of the crack cocaine other than Dear’s speculation. As such, the trial court correctly held that there was no basis in the evidence for Jury Instruction D-7.


CONCLUSION

The trial court properly refused proposed Jury Instruction D-7 as it had no foundation in the evidence. Accordingly, the State of Mississippi respectfully requests that the trial court's conviction and sentenced be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

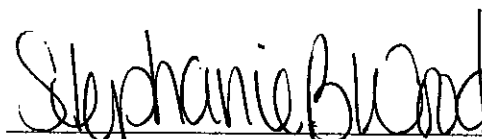
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Marcus D. Gordon
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This the 10th day of April, 2007.



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