

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANTHONY CROFT

APPELLANT

VS.

FILED

NO. 2007-KA-1331-SCT

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SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE PROCEDURAL HISTORY

On March 22, 2006, the Grand Jury of Bolivar County, Mississippi indicted Anthony Croft, Larry Hogan and Michael Warren, individually or while aiding and abetting and/or acting in concert with each other, on five counts of Armed Robbery. (Re at 1). On June 6, 2007, a jury convicted Anthony Croft of the armed robbery of Sylvester Fipps, Larry McKnight and Eddie Johnson, three counts, (Re at 68-72). The Bolivar County Circuit Court, Honourable Charles E. Webster presiding, sentenced Croft to 25 years on each count, said sentences to run concurrently. (Re at 73). Feeling aggrieved, Croft appealed.

STATEMENT OF THE FACTS

Anthony Croft testified that on September 15, 2005, he lost approximately \$175 shooting dice at Mac's Place (hereinafter called M.C.'s). (T at 185). M.C.'s is a place where they serve beer, shoot pool, play dominoes, watch television and bet on sporting events. (T at 64). Croft testified there were also illegal dice games. Croft left M.C.'s, went home to his sister's house, and got more money and a gun. Croft believed Larry McKnight cheated him out of his money by using bogus dice. (T at 184). According to Croft, Larry McKnight owned M.C.'s. (T at 190). Michael Warren and Larry Hogan were with Croft when he got the gun from his sister's live-in boyfriend Benjamin Fields. Croft returned to M.C.'s in a vehicle with Louise Fipps and Randall James. Larry Hogan and Michael Warren were following in another vehicle. (T at 186-87).

Croft testified that he returned to M.C.'s with \$225 and started shooting dice again. (T at 187-88). After losing \$75, Croft confronted Larry McKnight about using bogus dice. (T at 189). Croft claims McKnight pushed him so he pulled out his gun with the intent of getting out of M.C.'s without any problems (*Id.*) Croft demand his money back from McKnight. (*Id.*). Randall James and Louise Fipps grabbed money off a table. Croft admitted that he took \$75 off the table claiming it was his money. (*Id.*).

Croft left M.C.'s with Louise Fipps, Larry Hogan, Randall James and Mike Warren. Croft testified they dropped off Randall James and Louise Fipps prior to being arrested outside of his grandmother's house and charged with armed robbery. (T at 192). It was uncontested that Croft had \$174 on his person when arrested. (T at 193).

The prosecution put on eight witnesses to the robbery at M.C.'s who testified to a slightly different version of events. There was conflicting testimony on whether there was an illegal dice game at M.C.'s or simply a game of dominos.

The first prosecution witness was Kelvin Fipps, Croft's cousin. Fipps testified he was outside M.C.'s Place the night of the robbery. Looking through the window he saw Croft holding a gun and a pool cue; he heard Croft telling the people inside to throw their money on the table. In an attempt to stop Croft from committing the robbery, Fipps tried to enter the building only to find Larry Hogan holding the door closed. Mike Warren told Fipps to "leave it alone, let him handle his business." (T at 36, 37). He saw Croft arrive and leave M.C.'s with Randall James and Larry Hogan. (T at 46).

Robert Lee Fields was outside M.C.'s Place also. Field's testimony corroborated Kelvin Fipps' testimony. Fields further testified when Croft arrived at M.C.'s, he saw Croft walk over to Michael Warren's car and get a gun. (T at 149-50).

Sylvester Fipps, a victim and another of Croft's cousins, testified while he was in M.C.'s, Croft pulled out a gun and demanded they put their money on the table. Fipps put approximately \$80 on the table and witnessed others putting money on the table. Fipps also testified that he was scared after Croft pulled out the gun. (T at 47-51).

Larry McKnight, a victim of the robbery, testified that M.C.'s belonged to his girlfriend and that he only worked there. (T at 64). McKnight denied there was an illegal dice game. (T 73). McKnight testified Croft pulled a gun on the crowd in M.C.'s. Croft then told them to put their money on the table. He had \$200 to \$300 in \$5 bills in his pocket and placed it on the table. (T at 77). Randall James and others grabbed some money off the table and stuffed it in their pockets. Louise Fipps picked up the remaining money from the table and took it to Croft at the bar, as directed by Croft. (T at 78). Larry Hogan was holding the front door closed during the robbery. (T at 70). Croft took the money from the bar and left with Randall James and Larry Hogan. (T at 78).

Eddie Johnson testified Croft had a pool cue in one hand and a gun in the other; he was scared and believed Croft would use the gun. Johnson had \$600.00 that he put on the table when Croft demanded the money. However, Johnson was able to pick the money back up and hide it in his pocket when Croft was not looking. Johnson witnessed Livingston Jones, Larry McKnight and Sylvester Fipps give up money to Croft. Croft told Louise to get the money off the table. He heard Croft tell a young man to hold the door after he confronted McKnight. (T at 92-96). Johnson testified he had on a previous occasion been falsely accused and arrested for gambling at M.C.'s (T at 102).

Louise Fipps, Croft's aunt, testified she went into M.C.'s to drink a beer and saw her nephew . (T at 138). She saw Croft with a gun and was scared. Louise Fipps took money off the table and put it on the counter, as directed by Croft. Fipps heard Croft say, "It's a stickup." She saw Larry Hogan holding the door. Fipps testified she (T at 133-140).

Paulette Hunter, who testified she went in M.C.'s to use the restroom, saw Croft pull a gun and demand their money. She heard Croft tell Larry Hogan to lock the door. She saw Louise Fipps pick up money from the table and heard Croft tell Randall James to get the money. She saw Croft going through the money and heard him asking where the \$100 bills were.(T at 142-144).

Livingston Jones, bartender at M.C.'s Place, testified Croft pointed a gun on him and believed Croft would use it. Croft then told people it was a stick up and directed everyone to put their money on the table. Jones did as Croft directed and put \$50.00 from his pocket on the table. He witnessed Larry McKnight and Sylvester Fipps give Croft money. Croft instructed Louise Fipps to pick up the money. He further testified "Bugeye", being Croft, left with the money. (T at 161-170).

SUMMARY OF THE ARGUMENT

Croft's claim that he was prejudiced by the exclusion of Investigator Joe Smith's testimony is without merit. Parts of the proffered testimony were inadmissible under Mississippi Rules of Evidence 402 as being irrelevant and parts were properly excluded by the trial court under Mississippi Rules of Evidence 608 and 609.

Croft's argument that the State failed to prove the essential elements of armed robbery is contrary to the record. Croft contends he lacked the element of intent to commit armed robbery because he was only recovering money he lost. Intent is a fact question for the jury to decide and this jury decided there was sufficient evidence to convict Anthony Croft of armed robbery.

ARGUMENT

I. THE TRIAL COURT PROPERLY REJECTED INVESTIGATOR JOE SMITH'S TESTIMONY.

Croft contends that he was prejudiced by the trial court's failure to admit the testimony of Investigator Joe Smith, a narcotics investigator with the Bolivar County Sheriff's Department. Croft proffered Smith's testimony in a hearing preliminary to the trial. (T at 2). Croft offered Smith's testimony to show that M.C.'s was being investigated for drug activity and gambling. Croft contends those two facts could be used to attack the credibility of the witnesses to the robbery. (T at 15). The trial judge ruled the testimony inadmissible under Mississippi Rules of Evidence 608 and 609. (T at 24).

Croft argues that the testimony was admissible under Rule 616, which allows evidence of bias, prejudice, or interest of a witness for the purpose of attacking the credibility of a witness. Croft cited *Johnson v. State*, 655 So.2d 37 (Miss.1995) for the proposition that you can impeach a witness' credibility by showing bias or prejudice, as long as the impeaching material is relevant to the issue at hand. That is one of the problems with the proffered testimony, it is not relevant to whether Croft committed armed robbery on September 15, 2005. Evidence of a collateral fact is relevant if the collateral fact has a tendency to prove or disprove an issue of the case. *American Potash & Chemical Corp. v. Nevins*, 153 So.2d 224 (1964).

A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling. *Fisher v. State*, 690 So.2d 268, 274 (Miss.1996) citing *Shearer v. State*, 423 So.2d 824, 826 (Miss.1982). Even if Smith had been allowed to testify the substance of his testimony was irrelevant.

A review of Smith's proffer indicates no abuse on the part of the trial judge in excluding this

testimony. Smith was without knowledge and unable to testify to some of the information the defense attorney attempted to solicit. Other facts offered in Smith's testimony were insignificant and irrelevant or elicited in the testimony of other witnesses. The proffered testimony revealed that Smith knew Larry McKnight; that Smith investigated McKnight in the past for drug activity; that the location of the business previously known as M.C.'s Place, was under investigation for drug activity; that Chicken Gordon was convicted of a felony in Bolivar County but he wasn't sure of the charge or the date of conviction; and that Croft offered information on the subject robbery to Smith. Smith also testified that he believed McKnight served federal time for drug activity but he was not sure of a conviction. Smith lacked knowledge of any illegal gambling activities at M.C.'s Place or any investigation thereof. (T at 3-5).

Relevant evidence "is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mississippi Rules of Evidence 401. Smith's testimony had no tendency to prove a consequential fact, rendering it irrelevant. There was no abuse of discretion in the trial court's failure to allow Smith to testify.

Refusal to allow Investigator Smith to testify about Larry McKnight's drug conviction was not an abuse of discretion. The trial court properly excluded this testimony based on Mississippi Rules of Evidence 608 and 609. Also, McKnight testified on cross examination that he served time in a federal penitentiary for a 1994 drug trafficking conviction. (T at 83). Smith's proffered testimony regarding McKnight would not have provided the jury with any additional evidence or revealed any potential bias on the part of McKnight.

Croft's argument that he was prejudiced by the court when it refused to allow Smith to testify about alleged criminal investigations of M.C.'s is without merit. On proffer, Smith testified there

was a current drug investigation of the place formerly called M.C.'s Place. When asked by the court when the criminal investigation occurred, Smith testified that there was "... an ongoing investigation of basically gathering information, trying to get enough intelligence to do something about it." The robbery occurred September 2006 and the trial occurred June 2007. The testimony of a drug investigation occurring after the date of the robbery was irrelevant and therefore properly excluded under Mississippi Rules of Evidence 401. Smith had no knowledge of any gambling activities or investigations of gambling activities occurring at M.C.'s Place. (T at 4, 7). Smith's testimony, if admitted, would not have bolstered Croft's theory that he was threatened prior to pulling the gun and that McKnight was not being honest with the court

In support of his position, Croft cites the cases of *Tillis v. State*, 661 So.2d 1139, 1142 (Miss. 1995) and *Johnson v. State*, 655 So.2d 37, 41 (Miss.1995) which hold that a trial judge is allowed wide discretion concerning the admission of evidence suggesting bias on the part of a witness against the defendant. Such evidence should be relevant to the issue at hand before the court rules it admissible. These cases are of greater benefit to the State than to Croft. The only facts of Smith's proffer that were not elicited by other witnesses were that Chicken Gordon was convicted of a felony (however, Chicken Gordon didn't testify) and that the site of the business previously known as M.C.'s Place was currently being investigated for drug activity. These facts, along with the rest of the proffer, are irrelevant to the issue of whether Croft is guilty of armed robbery.

The standard of review for either the admission or exclusion of evidence is abuse of discretion. *Harrison v. McMillan*, 828 So.2d 756, 765 (Miss.2002). Pursuant to Mississippi Rule of Evidence 103, a decision to admit or exclude evidence is not error "unless a substantial right of the party is affected." If the appellate court finds the trial court erroneously excluded evidence, the appellate court will not reverse unless the error adversely affects a substantial right of a party.

Gibson v. Wright, 870 So.2d 1250, 1258 (Miss.Ct.App. 2004). In the case at bar there was no substantial right adversely affected by the trial court's decision to exclude Smith's testimony, therefore the trial court did not abuse its discretion.

II. THE TRIAL COURT PROPERLY DENIED CROFT'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT.

At the close of the State's case-in-chief, Croft moved for a directed verdict based upon the failure of the State to prove beyond a reasonable doubt the essential elements of armed robbery. Croft also made a post-trial motion for a judgment not withstanding the verdict. (Re at 78-83). Judge Webster, applying the correct legal standard, overruled the motions. (T at 171, Re at 84).

The question before this court is whether there is sufficient evidence, as a matter of law, from which a rational trier of fact could find Croft guilty beyond a reasonable doubt. Evidence is legally sufficient to support a jury's verdict when the State has proven that the defendant committed every element of the crime charged. *Bush v. State*, 895 So.2d 836, 843(&16) (Miss. 2005).

On review, all evidence supporting the verdict must be accepted as true, and the State must be given the benefit of all reasonable inferences that could be drawn from the evidence. *Bell v. State*, 910 So.2d 640, 646 (Miss.App.2005). If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict or JNOV should be overruled. *Brown v. State*, 556 So.2d 338 (Miss. 1990), *Davis v. State*, 530 So2d 694 (Miss. 1988). A finding that evidence is insufficient results in a discharge of the defendant. *May v. State*, 460 So.2d 778, 781 (Miss.1984).

The appellate court will reverse only when reasonable and fair-minded jurors could only find the accused not guilty. *Wetz v. State*, 503 So.2d 803, 808 (Miss.1987). It is the jury's duty to resolve any conflicts in testimony. *Grosecloae v. State*, 440 So.2d 297, 300 (Miss. 1983).

The heart of Croft's defense is that he did not have the specific intent to commit the crime of armed robbery because he was merely taking back his own property, the \$75 he claims he lost in an illegal dice game. The three essential elements of robbery are: felonious intent, force or putting in fear as a means of effectuating the intent, and by that means a taking and carrying away of the property of another from his person or in his presence. *Williams v. State*, 317 So.2d 425, 427 (Miss.1975) citing *Sykes v. State*, 291 So.2d 697 (Miss.1974). Croft asserts the evidence proved he took his own money that he lost in an illegal game and therefore the State failed to prove he had the necessary intent to commit the crime. Croft testified the only money he grabbed off the table was the \$75 that he claimed he just lost in a rigged game of dice. "I didn't touch nothing but \$75." (T at 195). However, Croft also testified that when he returned to M.C.'s Place he had \$225. (T at 188). If Croft lost \$75 and then took it back, as testified, he should have had \$225 on his person when arrested, not \$174 as was the case. Also, if Croft was retaking money he lost in an illegal dice game, why didn't he take the \$175 he claims he lost in his first visit to M.C.'s in a rigged game earlier in the evening.

In the case of *Williams v. State*, 317 So.2d 425, (Miss.1975), the Mississippi Supreme Court addressed the issue of whether a defendant possessed the necessary intent to commit armed robbery when the defendant took money, which he claimed was rightfully his, by force. The Court thought it was of no controlling significance that Williams took only a sum of money equal to what he thought was his. *Williams at 427*. The Court cited Am.Jur.2d Robbery section 61 at 63 (1973) on the issue of intent in a robbery prosecution:

The issue of felonious intent is one of fact, and its determination is therefore within the exclusive province of the jury, under appropriate instructions from the court. Consequently the jury may find, if the facts justify it, that a defendant's expressed intent to retake money lost in an illegal

game, or to collect a debt, was a mere pretext resorted to as a cover for an attempt to steal.

The *Williams* court citing *Herron v. State*, 176 Miss. 795 (1936) which quoted from *Fanin v. State*, 51 Tex.Cr.R. 41, 45, 100 S.W. 916, 918, 10 L.R.A.(N.S.) 744, 748, 123 Am.St.Rep. 874, 879-80 (1907) went on to say: "We are not willing to lay down the proposition that if a man collects a debt by force and threats, and putting in fear, he will not be guilty of robbery." Williams pointed a gun on a shoe store employee, demanded and took the exact sum to which he paid for a pair of shoes which he previously attempted to return for a refund. "The record shows that the appellant brazenly entered the store, cocked his pistol, disturbed the peace, harassed the store employees, aimed the loaded pistol at Reynolds, called him a son-of-a-bitch and in 'wild-west' fashion took at gun point money-the property of another. Such violent self-help as a means of obtaining redress for grievances concerning property rights is inimical to order and the appropriate administration of justice. It would be most unjudicious to accept his argument that such a caper was done in good faith without animus furandi, and that, therefore, the case should not have gone to the jury."

Even if we accept Croft's argument that he only intended to recover the money he lost in the illegal dice game, under the ruling in *Williams*, the trial court properly dismissed the motion for directed verdict and submitted the case to the jury.

Croft contends that he pulled the gun in response to Larry McKnight pushing him. Nine of the State's witnesses who were present either inside or outside M.C.'s Place at the time of the robbery, testified they saw Croft with a gun and heard Croft tell everyone it was a stickup or to put the money on the table. Croft would ask us to believe that he pulled the gun in self-defense after Larry McKnight pushed him. However, not a single witness testified to seeing McKnight push Croft or threaten him in any manner. They all testified that Croft had a gun in one hand and a pool cue in the other.

The prosecution established that Croft demanded they put their money on the table, directed Louise Fipps to get the money from the table and then took the money from Louise Fipps. It is uncontradicted that Randall James took money off the table after Croft pulled out the gun. The prosecution also established that Larry Hogan held the door closed while the robbery was taking place. It is uncontradicted that Croft and Randall James left with some of the money taken from the table. It is uncontradicted that Croft arrived and departed M.C.'s with Michael Warren, Larry Hogan and Randall James. Croft argues that the evidence presented at trial was legally insufficient to prove beyond a reasonable doubt that an armed robbery occurred. There was sufficient evidence presented to prove the elements of armed robbery beyond a reasonable doubt. When there is conflicting testimony, it is the province of the jury to decide which witnesses are credible.

If this Court should rule that Croft lacked intent because he was retaking his own money lost in an illegal game of dice, Croft would still be guilty because he acted in concert with others. By indictment, the State charged Croft with acting in concert with Larry Hogan and Michael Warren. Hogan and Warren were with Croft when he got the gun from Benjamin Fields. The two were with Croft when he returned to M.C.'s and were present when the incident occurred at M.C.'s. There were several witnesses that testified Warren and Hogan were involved in the robbery. The court properly instructed the jury on aiding and abetting in Jury Instruction C-9 (Re at 65)

Questions regarding the credibility of the witnesses, the weight to be given the evidence, and any factual issues raised by the evidence are resolved by the jury. In the case sub judice, the jury resolved the facts against Croft and concluded Croft entered M.C.'s Place armed and with the intent of taking property from others and did so.

Judging these facts most favorable to the State, a reasonable juror could infer that Croft was

guilty of armed robbery beyond a reasonable doubt. Croft's testimony was the only evidence offered to contradict the State's witnesses. The weight of the evidence against Croft demonstrates that sufficient proof was offered by the State for the jury to find Croft possessed the intent, either individually or acting in concert with others, to rob Larry McKnight, Sylvester Fipps and Eddie Johnson and therefore was guilty of three counts of armed robbery.

CONCLUSION

The trial court properly excluded the testimony of Investigator Smith. The evidence was sufficient for the jury to find that Croft entered M.C.'s Place armed with a gun, and with felonious intent, robbed Larry McKnight, Sylvester Fipps and Eddie Johnson of their money. Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's verdict and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa L. Blount, 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:

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