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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JUN 23 2008

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SUPREME COURT
COURT OF APPEALS**

**CHRIS MILLER and JOHNNY L. MILLER
A/K/A SNAPPER**

APPELLANT

VS.

NO. 2007-KA-2019-COA

STATE OF MISSISSIPPI

APPELLEE

**BRIEF FOR THE APPELLEE
IN REFERENCE TO CHRIS MILLER**

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS.

NO. 2007-KA-2019-COA

STATE OF MISSISSIPPI

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BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This is an appeal of a judgment from the Circuit Court of Winston County, Mississippi in which Chris Miller and Johnny L. “Snapper” Miller, were indicted, convicted and sentenced for the felony of sale, transfer, delivery or distribution of Cocaine, a schedule II controlled substance. (C.P. 4-5; 124-125; 127; RE 32-3; 37). The Circuit Court, Honorable Joseph H. Loper, Jr. presiding, sentenced Chris Miller to ten (10) years in the custody of the Mississippi Department of Corrections and fined him \$5000.00. After denial of his post-trial motions, Chris Miller appealed.

STATEMENT OF FACTS

On June 14, 2005, Wes Stapp and Barry McWhirter, two agents from the Mississippi Bureau of Narcotics (MBN), met with confidential informant Bobby Wayne Goodin to prepare for an undercover drug buy in Winston County. Agent Stapp testified that pursuant to MBN policy, the agents searched Goodin and his vehicle for anything that might compromise the undercover operation. The MBN agents equipped Goodin with audio and video equipment, as well as an audio transmitter, and issued him \$100 in official state funds to purchase crack cocaine. (T 44). Goodin then drove to Miller Avenue in Louisville, Winston County to purchase cocaine. Agent Stapp testified the MBN agents followed in a separate vehicle, staying close enough to hear what was going on over Goodin's body wire, but so not close as to compromise the undercover operation. When Goodin reached his destination, the agents parked their vehicle and listened to what transpired. .

Goodin pulled up to the home of Jimmy C. Miller, exited his truck and asked three men standing in the yard, Johnny "Snapper" Miller (Snapper), Chris Miller, and a third man known as "Funk" about purchasing cocaine. Goodin was informed that no drugs were available at that time, but the "dope man" was on his way with more. (T58). Goodin was told to move his vehicle next door to Snapper's house while waiting for the "dope man's" arrival. According to Goodin, they did not want the "dope man" to see Goodin's vehicle when he showed up or he might not stop. (T 58; 63-64). Goodin testified that after the drugs arrived, he gave Chris Miller \$100.00 and then watched Chris take the money to the "dope man" and make the deal. (T 58-60; 76). Goodin testified, Snapper brought the drugs to him. (T. 58) Before leaving the location, another individual, who Goodin said was nicknamed "Prude" but later identified as Lee Earl, asked Goodin for some of the cocaine. (T 59; 73-74; 83;102). Goodin refused, got in his vehicle and departed Snapper's house. Goodin drove

to a predetermined location for a post-buy meeting with the MBN agents. Goodin gave the cocaine to the MBN agents. The agents searched Goodin and his vehicle and retrieved the video and audio equipment. (T 59). Goodin authenticated the video tape of the undercover transaction and gave a statement of the event to the agents. (T 61). At trial, Goodin identified the surveillance tape that was played for the jury and identified the cocaine he purchased on June 14, 2005. (T 61 ; Exhibit 1, 2). Agent Stapp testified they paid Goodin \$100.00 for the undercover purchase, which was standard MBN procedure. (T64-65).

At trial a forensic examiner from the Mississippi Crime Laboratory identified the substance purchased by Goodin as containing 1 gram of cocaine base commonly referred to as crack. (T85-86; Exhibit 2).

Investigator Gerald Hayes, a 20 year veteran of the Louisville police department, testified that he knew Chris Miller and Snapper. (T 90). He was asked to watch the video tape of the June 14, 2005, undercover purchase to identify the persons who sold the cocaine to Goodin. Hayes identified Chris Miller and Snapper on the tape. (T 92).

After the Stated rested, Snapper exercised his right to testify in his own defense. (T 95-96). Snapper's testimony was very confusing. He admitted he was a crack head like Goodin. (T 98).

Snapper testified that Goodin tried to give him money for drugs, but he refused to take it because he did not sell drugs, he only used them. Snapper claimed "dope boy" arrived and put the cocaine in an old truck. "Dope boy" told Snapper to take the cocaine to Goodin and take a piece for himself as payment. (T 99-101). Snapper denied selling the drugs but admitted transferring cocaine to Lee Earl who he claimed took the drugs to Goodin. (T 101; 110-111). Snapper testified he never saw Goodin give any money to Chris or anyone else. (T 106-07).

STATEMENT OF ISSUES

- 1. DID THE TRIAL JUDGE ERR IN NOT GRANTING CHRIS MILLER A SEVERANCE FROM CO-DEFENDANT JOHNNY “SNAPPER” MILLER?**
- 2. IS THE VERDICT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?**

SUMMARY OF ARGUMENT

The trial judge did not abuse his discretion in refusing to sever Chris Miller's trial from that of his co-defendant, Johnny L. "Snapper" Miller. At trial, Chris Miller rested without calling any witnesses or taking the stand but Snapper chose to testify in his own defense. Even though Snapper's testimony was confusing at times, he clearly admitted to using cocaine and to transferring at the time of the subject sale. However, he did not testify to Chris Miller participating in the sale of cocaine to the Mississippi Bureau of Narcotics confidential informant.

The verdict is not against the overwhelming weight of the evidence. The trial judge properly denied Miller a new trial.

ARGUMENT

I. THE TRIAL JUDGE PROPERLY DENIED CHRIS MILLER A SEVERANCE OF TRIAL FROM CO-DEFENDANT JOHNNY "SNAPPER" MILLER.

Chris Miller contends as his first assignment of error that the trial judge abused his discretion in refusing to sever Miller's trial from that of his co-defendant, Johnny "Snappy" Miller. The standard of review for the denial of a motion for severance is abuse of discretion. There is none to be found in the case before us.

Chris Miller filed a pre-trial motion for a severance of trial from his co-defendant, Johnny "Snapper" Miller, which the judge denied. (CP 98-9; RE 15-6; CP 100; RE17). Miller raised the issue again in a motion for new trial, which again the judge denied. (CP 136-37; RE 21-22; CP 138; RE 23). Miller contends that he was prejudiced by being tried along with Snapper. Snapper took the stand and testified that he transferred cocaine in the hope of getting a piece for himself. (T 100-01). This testimony corroborated, in part, the Goodin's testimony because Goodin testified Snapper brought him the cocaine. (T 59). Miller claims this testimony incriminated him along with Snapper and therefore he was prejudiced.

Whether to grant a severance depends on whether the severance is necessary to promote a fair determination of the defendant's guilt or innocence." *Carter v. State*, 799 So.2d 40, 44(¶ 13) (Miss.2001). "Where the testimony of one defendant did not tend to exculpate himself at the expense of another and there does not appear to be a conflict of interest among the co-defendants, severance is not required." *Id.* at 45. Severance is also proper where the evidence points more to the guilt of one co-defendant than the other. *Payton v. State*, 785 So.2d 267, 269 (Miss.1999). Court rules place the decision whether to grant or deny a severance in non-death penalty cases within

the discretion of the trial court. URCCC 9.03. Unless one can show actual prejudice, a trial court cannot be found to have abused its discretion. *Payton*, 785 So.2d at 269. Defendants jointly indicted for a felony are not entitled to separate trials as a matter of right. *Price v. State*, 336 So.2d 1311, 1312 (Miss.1976).

Scarborough v. State, 893 So.2d 265 (Miss.App.,2004).

Snapper testified that he transferred cocaine to Lee Earl in hopes of getting a piece for himself. Snapper never implicated Chris Miller in his testimony. In fact, Snapper testified he never saw Goodin give Chris Miller any money, so even if Snapper implicated himself in the crime he did not prejudice Chris Miller.

Q. Did you see Wayne Goodin give Chris Miller any money?

A. Wayne Goodin ain't gave nobody no money out of the three of us. He didn't give nobody no money. 'Cause he said I ain't give no money up. (T 107).

Miller's first assignment of error is without merit.

II. THE VERDICT IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The case at bar is a routine "controlled buy" of cocaine. An informant was given a sum of money with which to buy cocaine, fitted with an audio and video transmitter, and then bought cocaine. The trip to the Miller residence, the purchase of cocaine and the trip to the "post buy" meeting were recorded. The substance purchased proved to contain cocaine.

The second issue presented by this appeal is whether the trial court erred in overruling Miller's motion for a new trial, or in the alternative a JNOV, on the ground that the verdict is against the overwhelming weight of the evidence. (C.P.34, 37). In order for Miller to prevail on this point,

he must satisfy the rigorous standard set out below:

The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. “[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial.” *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given “the benefit of all favorable inferences that may reasonably be drawn from the evidence.” *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). “Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal.” *Dudley*, 719 So.2d at 182 . “This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible.” *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss. Ct. App. 2001). *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss. App. 2004).

In *Ford v. State*, 737 So.2d 424, 425 (Miss. App. 1999) the court opined:

The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). "It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of *belief v. State*, 427 So.2d 100, 104 (Miss.)

It has been “held in numerous cases that the jury is the sole judge of the credibility of the

witnesses and the weight to be attached to their testimony.” *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). The Mississippi Supreme Court held in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed “where there is a straight issue of fact, or a conflict in the facts...” [citations omitted] Rather, “juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. ” [citations omitted].

Miller argues that because Goodin’s testimony was untrustworthy and unreliable, and the video did not show the money being exchanged no reasonable jury could infer that Miller received the money as alleged in the indictment. The state respectfully submits that Miller’s challenge to the weight of the evidence presented is an attempt to re-litigate factual issues, including credibility of the witnesses, properly resolved by the jury. Incorporating by reference the facts set out under the Statement of Facts, the State asserts the trial court did not abuse its discretion in overruling the motion for new trial. The evidence is not such that allowing the verdict to stand would be to sanction an unconscionable injustice.

Specifically, the state points out that Goodin testified unequivocally that he gave Miller \$100 for the cocaine; he watched Miller take the \$100 to the “dope man” and make the deal. (T.54). After departing Miller Avenue, Goodin returned immediately to the predetermined location, with the cocaine, and without the state funds. This evidence was adequate to establish a sale, whether or not the videotape depicted the actual transfer of money.

In *Steen v. State*, 873 So.2d 155, 159 (Miss. App. 2004) this Court rejected an argument similar to the one presented by Miller:

Steen directs our attention to deficiencies in the videotape. Specifically, Steen argues that the tape does not depict the exchange of cocaine and money.

We agree with Steen's assertion that there is no video footage of the actual transaction of drugs and money. However, this fact alone does not lessen the effect of Kimble's testimony explicitly describing the illicit transaction. In *Wilks v. State*, 811 So.2d 440, 445 (¶ 17) (Miss. Ct. App. 2001), this Court declined to accept a similar argument. As in this case, *Wilks* involved a controlled buy where audio and video equipment were used. Like Steen, Wilkes also challenged the weight of evidence because the videotape “[did] not show the two exchanging money or crack cocaine.” We held that “[w]hile the videotape may not be conclusive proof as to what transaction took place, it certainly is not contrary to the State's case, which was corroborated by [the confidential informant's testimony.” *Id.* at (¶ 19). We find no error. *Steen v. State*, 873 So.2d 155, 159 (Miss. App. 2004).

Evaluation of Goodin's credibility was within the sole province of the jury. No basis exists for disturbing the jury's verdict. A reasonable jury most certainly could have put faith in his testimony. There is no ground for this Court to disturb the jury's verdict because the State's lead witness has a criminal record.

Chris Miller's actions as shown in the tape are wholly consistent with a sale of cocaine. Miller's complaint was a matter for the jury to consider. It is no ground here to set aside the verdict. There is no basis for this Court to find that the verdict is an unconscionable injustice.

CONCLUSION

Based upon the arguments presented herein as supported by 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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