IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HERBERT ERNEST GRAYSON — APPELLANT

VS. — NO. 2008-KA-1014-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

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STATEMENT OF THE CASE

The denial of jury instruction D-3 instructing the jury to, *inter alia*, disregard the defendant's confession unless it found the confession truthful and not the result of any hope of re[w]ard or leniency, forms the centerpiece of this appeal from a conviction of cocaine possession with intent to transfer or distribute that substance to others.

D-3 was properly refused because it was an improper comment on specific evidence and the weight of that evidence. *See* Miss.Code Ann. §99-17-35.

HERBERT ERNEST GRAYSON prosecutes a criminal appeal from the Circuit Court of Harrison County, Mississippi, Stephen B. Simpson, former Circuit Judge, presiding.

Grayson, in the wake of an indictment returned on August 27, 2007, was convicted of the sale of cocaine with intent to distribute in violation of Miss.Code Ann. §41-29-139(a)(1). He was thereafter sentenced to serve a term of twenty-five (25) years in the custody of the MDOC. (C.P. at 25)

The indictment for the offense, omitting its formal parts, alleged

> "[t]hat . . . HERBERT ERNEST GRAYSON . . . on or about February 12th, 2007[,] did knowingly, wilfully, unlawfully, and feloniously possess COCAINE, a SCHEDULE II Controlled Substance, with the intent to transfer or distribute the said controlled substance, contrary to the form of the statute in such cases made and provided . . ." (C.P. at 4)

Following trial by jury conducted on February 19, 2008, the jury returned a verdict of, "We the jury, find the defendant, Herbert Ernest Grayson, guilty of possession of [a] controlled substance with intent." (R. 137; C.P. at 23) Judge Simpson thereafter sentenced Grayson to serve twenty-five (25) years in the custody of the MDOC. (R. 240; C.P. at 24-25)

One issue, articulated as follows, is raised on appeal to this Court: "Although the trial judge is the finder of fact with respect to admissibility of statements, do the Mississippi and U.S. Constitutions allow the defendant to have the jury instructed that they should disregard the statement unless it was free, voluntary and not obtained through improper inducements?"

STATEMENT OF FACTS

On February 12, 2007, a search warrant was issued for a dwelling house in Gulfport belonging to Herbert Grayson. (R. 123) Living with Grayson were his two children; his girlfriend, Ashley Adams, and a man name Ray "Alfy Adams, no relation to Ashley. (R. 171, 185)

During direct examination of Gulfport police officer Windell Johnson, the following colloquy took place:

> Q. [BY PROSECUTOR:] Sir, can you tell the ladies and gentlemen of the jury what was found during the search of the residence.
>
> A. [BY OFFICER JOHNSON:] During the course of the search, Detective Kirkland discovered approximately 190 grams of cocaine, three clear bags of white powder, substance inside a closet in the kitchen. I found a digital scale in the kitchen counter drawer. We just found miscellaneous paperwork in the bedroom, in the master bedroom. We recovered a Motorola phone, as well as currency in the amount of $14,000. That was discovered inside the master bedroom. That was underneath the dresser next to the bed. (R. 124)

Johnson later conducted a station house interview with Grayson which was audio taped. (R. 128-29) According to Johnson no promises or threats were made at any time. (R. 130) Grayson told Johnson he had been selling cocaine since Hurricane Katrina. (R. 131) The amount of cocaine found inside the house was 187 grams which is consistent with an amount one intends to sell. (R. 133-34)

Ashley Adams, Grayson's girlfriend living with him in the house that was searched, was also taken into custody and transported to the Gulfport police department in handcuffs. (R. 77, 131, 152-53) After Grayson gave his statement, she was released with no charge. (R. 76)

Prior to trial on the merits, Grayson moved to suppress his confession based upon an alleged promise by Johnson to release Johnson's girlfriend, Ashley, if he accepted responsibility for the cocaine. (R. 61-62)

During a suppression hearing (R. 63-111), Officer Johnson denied he had a discussion with Grayson whereby Johnson would drop the charges against Ashley Adams if Grayson would accept responsibility for the cocaine. (R. 71, 81-82)

Grayson, on the other hand, testified during the suppression hearing that Johnson told him that if he confessed ownership of the dope Johnson would release Ashley Adams and no charges against her would be filed. (R. 85-86)

In the end, Judge Simpson, having heard conflicting testimony, found the statement "... admissible to the extent that it is a knowing, freely, voluntary, intelligently made statement without any forces or threats or coercion or offers of reward." (R. 101)

Two (2) witnesses testified on behalf of the State during its case-in-chief, including **Windell Johnson**, a member of the narcotics division of the Gulfport Police Department, who testified that Grayson confessed ownership of the cocaine in an audio taped station house confession.

> Q. [BY PROSECUTOR:] Your interview with the defendant, was it, in fact, taped?

A. [BY JOHNSON:] Yes, sir, it was.

Q. During the course of his interview with you, did he say who the cocaine belonged to?

A. Yes, he did.

Q. Did he admit to you that he was selling cocaine?

A. Yes, he did.

Q. And how long did he say he'd been selling cocaine?

A. Since Hurricane Katrina. (R. 131)

Tammy Henderson, a forensic scientist and specialist in drug identification employed by the Mississippi State Crime Laboratory, Gulfport regional branch, was called to the witness stand but stepped down after the defendant stipulated the drug in question was tested by Henderson and found to be cocaine. (R. 166)

At the close of the State's case-in-chief, the defendant moved for a directed verdict of acquittal on the general ground " . . . the state has failed to meet with credible evidence it's burden, and that's the essence of my motion." (R. 167)

This motion was overruled with the following observations:

THE COURT: All right. The state has introduced that on the date in question, February 12 of 2007, a search warrant was executed on the residence which was identified as the defendant's, Mr. Grayson's, and that substances believed to be a controlled substance, cocaine, was seized in evidence, among other items, including digital scales and a large amount of currency.

There was a stipulation that that substance was submitted to the state crime laboratory, tested, and identified as cocaine, a Schedule II controlled substance.

The officer also testified as to venue, the location being in the First Judicial District of Harrison County, Mississippi. That, taken along with the taped statement of the defendant wherein he admits that the cocaine was his,

> along with Alfy Adams, is sufficient to make out a *prima facie* case. The motion for a directed verdict is overruled. (R. 165-66)

After being personally advised of his right to testify or not (R. 168-69), Grayson elected to testify and present his side of the story to the jury. (R. 170)

According to Grayson, Officer Johnson promised to release Grayson's girlfriend if Grayson would confess to ownership of the cocaine. (R. 174-75, 188-89, 193) Grayson told the jury neither the cocaine, the scales, nor the book bag containing the dope belonged to him. It all belonged to Ray "Alfy" Adams. (R. 183-84)

The $14,000, on the other hand, belonged to Grayson. (R. 184) It was allegedly the product of an insurance settlement with Allstate. (R. 173, 177, 185)

According to Grayson, Officer Johnson

> "directly told me personally, he said if I say this for me, he will cut her loose after he had got a written statement from Alfy Adams saying it was for him. He told me. He shook my hand, and he said, I give you my word. If you give me a statement saying the drugs are also for you, I'll cut her loose. And that's what he did." (R. 174)

Officer Windell Johnson testified for the State in rebuttal and denied any inducement in the form of favors for Grayson's girlfriend. (R. 197-98)

Peremptory instruction was subsequently denied. (R. 211; C.P. at 20)

Following closing arguments (R. 214-31), the jury retired to deliberate at 5:20 p.m. (R. 232) One (1) hour later, at 6:20 p.m., it returned with a verdict of, "We, the jury, find the defendant, Herbert Ernest Grayson, guilty of possession of a controlled substance with intent." (R. 234)

A poll of the jury, individually by name, reflected the verdict returned was unanimous. (R. 234)

Judge Simpson thereafter sentenced Grayson to serve a term of twenty-five (25) years in the custody of the MDOC. (R. 240)

On February 29, 2008, Grayson filed a motion for a new trial claiming, *inter alia*, the verdict was against the overwhelming weight of the evidence. (C.P. at 28-29)

Following a hearing conducted on April 29, 2008, this motion was denied. (R. 243-53; C.P. at 32)

Michael W. Crosby, a practicing attorney in Gulfport well known to this office for his expertise in criminal appeals, represented Grayson exceptionally well during the trial of this cause. His representation and assistance to Grayson on appeal have been equally effective.

SUMMARY OF THE ARGUMENT

Jury instruction D-3 was properly refused because it was an impermissible comment on specific evidence and the weight of the evidence in violation of Miss.Code Ann. §99-17-35.

ARGUMENT

THE TRIAL JUDGE PROPERLY DENIED JURY INSTRUCTION D-3. NEITHER THE MISSISSIPPI CONSTITUTION NOR THE CONSTITUTION OF THE UNITED STATES WAS AN IMPEDIMENT TO THE DENIAL OF D-3.

Grayson claims he was entitled to jury instruction D-3 which reads, in its entirety, as follows:

> You are the sole judges of the facts in this case. You may consider the alleged confession in light of the manner in which it was obtained and give it such weight and credibility as you think it is entitled. Unless you believe from the evidence beyond a reasonable doubt that the alleged confession was made by the Defendant both truthfully and of his own free will and was not the result of any hope of regard [sic] or leniency, then you must disregard the alleged confession to the extent that these facts tend to discredit it. (C.P. at 21)

Judge Simpson denied this instruction with the following rhetoric:

> THE COURT: All right. My problem is not that we're restating the obvious, that they [the jurors] are the sole judges of the facts. My problem is is [sic] that it essentially sets forth several tests for weighing or assigning what weight or credibility the jury chooses to the statement given by the defendant in this case.
>
> It says, unless you believe from the evidence beyond a reasonable

> doubt the alleged confession was made by the defendant both truthfully, and I have no objection to them determining whether or not it was truthful, but then it goes on to say, and of his own free will and not the result of any hope of regard or leniency.
>
> Those are matters as to admissibility on a suppression hearing which this Court has already ruled. They are not matters of the weight and credibility, and they should not be submitted to the jury in the form of an instruction. That's a question of law for the Court to decide, which it did decide, and should not be given back to the jury as to weight. So for that reason the instruction is refused. (R. 213)

Had this instruction ended after the recitation of the first two sentences, Grayson would have submitted to the court for consideration a correct jury instruction. *See* **Rhone v. State,** 254 So.2d 750, 754 (Miss. 1971), where we observe the following oft quoted language:

> * * * * * * It has long been the law of this state, that before a confession can be received in evidence, it must be shown to be competent in that it was freely and voluntarily given. This is a legal question to be determined by the court on a preliminary investigation out of the presence of the jury. If, after hearing all the testimony pertinent to the inquiry, the court is satisfied beyond a reasonable doubt that the confession was freely and voluntarily given, it becomes competent evidence. However, **after a confession has been held by the court to be competent evidence either party has a right to introduce before the jury the same evidence which was submitted on the preliminary inquiry** ***as well as any other evidence relative to the weight and credibility of the confession.*** **The jury does not pass upon the competency of the confession, but the jury does pass upon the weight and credibility of the confession.** The jury has the same freedom of action in relation to confessions which they have in regard to other testimony. * * * * * * 254 So.2d at 754 [emphasis ours]

Regrettably, the D-3 instruction goes further and tells the jury to completely disregard the confession if it finds it to be untruthful or impermissibly induced by hope of re[w]ard or leniency. (C.P. at 21)

D-3 was properly refused as a comment on the weight of the evidence in violation of Miss.Code Ann. §99-17-35 which reads, in part, as follows:

> The judge in any criminal cause, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable

to the case. * * * * * *

"A jury instruction that emphasizes any particular part of the testimony given at trial in a manner as to amount to a comment on the weight of the evidence, is improper." **Montgomery v. State,** 891 So.2d 170, 184 (¶16) (Miss. 2004), reh denied.

In **Hancock v. State,** 964 So.2d 1167, 1172 (¶12) (Ct.App.Miss. 2007), we find the following language applicable to the issue before the Court:

> * * * * * * Generally, the trial court should not comment on specific evidence, or the weight of said evidence, in the instructions given to the jury. Miss.Code Ann. §99-17-35 (Rev.2000). Additionally, it is well settled that "[a]n instruction which is on the weight of the evidence or which singles out and gives undue prominence to certain portions of the evidence is erroneous." *Bester v. State,* 212 Miss. 641, 647, 55 So.2d 379, 381 (1951); *see also Duckworth v. State,* 477 So.2d 935, 938 (Miss. 1985) (stating that jury instructions should not comment on or single out specific evidence.).

The following language contained in **Sherron v. State,** 959 So.2d 30, 41 (¶50) (Ct.App.Miss. 2006), is also *apropos*:

> A defendant is entitled to submit instructions that present her theory of the case. *Henry v. State,* 816 So.2d 443, 447 (Miss.Ct.App. 2002). An instruction should not single out certain parts of the evidence to the point that it amounts to a comment on the evidence. *Manuel v. State,* 667 So.2d 590, 592 (Miss. 1995). "[W]here there is serious doubt as to whether a requested instruction should be given, doubt should ordinarily be resolved in favor of the accused." *Lenard v. State,* 552 So.2d 93, 96 (Miss. 1989). We will not reverse based on the denial of an instruction if "the jury has been properly, fully, and fairly instructed by other instructions." *Henry,* 816 So.2d at 447.

See also **Ford v. State,** 975 So.2d 859, 864 (Miss. 2008) ["We will not find reversible error where the instructions actually given, when read together as a whole, fairly announce the law of the case and create no injustice."]; **Lamar v. State,** 983 So.2d 364, 369 (Ct.App.Miss. 2008) ["A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in another

instruction, or is without foundation in the evidence."].

Grayson very candidly points out that a nearly identical instruction was properly refused in **Moore v. State,** 822 So.2d 1100, 1107-08 (¶¶ 21-22) (Ct.App.Miss. 2002), reh denied, cert denied, where we find the following:

> Moore argues that the court erred in denying a proposed jury instruction on his confessions to Owens and Pickett. He argues that the denial of the instruction denied him the opportunity to present an instruction on his theory of the case. The trial judge denied the instruction finding that it would be an improper comment on the weight the jury should give on a particular piece of evidence.
>
> The proposed instruction stated:
>
> > You may consider the alleged confession in the light of the manner by which you find it was obtained and give it such weight and credibility as you think it is entitled. Unless you believe from the evidence beyond a reasonable doubt that the alleged confession was made by the Defendant, was truthful, was accurately recorded, the Defendant understood what was said, and such confession was made by the Defendant of his own free will and was not extorted by threat of harm or promise of benefit, then you must disregard the alleged confession to the extent that these facts tend to discredit it.
>
> Moore argues that he is entitled to have an instruction on his theory of his defense. Although Moore is correct that he is entitled to an instruction on his theory of the case, he is not entitled to an instruction that singles out particular pieces of evidence. *Manuel v. State,* 667 So.2d 590, 592 (Miss. 1995). This instruction singles out the confession improperly. The jury had already been instructed on their duty to weigh all the evidence which would necessarily include the two statements Moore made to his jail mates. Moreover, "[t]he voluntariness of a statement and its admissibility in evidence is a question for the court to determine and not a question for the jury." *Ratliff v. State,* 317 So.2d 403, 404 (Miss. 1975). Therefore, this assignment of error is without merit.

Rehearing, *as well as certiorari,* was denied in **Moore.** This observation has got to stand for something.

It was true in the **Moore** case, and it is equally true here, the jury had already been instructed that it was its " . . . exclusive province to determine the facts in this case and to consider and weigh the evidence for that purpose." (C.P. at 8) On several occasions the jury, also via the C-1 charge, was told it was to consider and weigh the evidence and "determine what weight and credibility will be assigned the testimony and supporting evidence." (C.P. at 9)

Grayson attempts to distinguish **Moore** by stating that " . . . the [c]onstitutionality of the instruction's language was not argued for this Court's consideration; instead, the argument was whether the appellant was entitled to an instruction of his theory of the case . . ."

(Brief of Appellant at 7)

This, in our opinion, is no distinction at all. The fact the constitutionality of the instruction's language was a nonissue is immaterial. The instruction singled out and gave undue prominence to Grayson's confession as well as told the jury what weight to give the confession in the event it found the confession untruthful and involuntary. As such, D-3 was forbidden fruit by virtue of Miss.Code Ann. §99-17-35.

Grayson was allowed to contest before the jury the voluntariness of his confession by fully showing the circumstances surrounding the giving of his confession.

Grayson testified in his on behalf and told the jury on several occasions he did not confess his ownership of the dope until after Officer Johnson told him he would release Grayson's girlfriend, i.e., "cut her loose," if Grayson would give Johnson a statement saying the drugs were also for him. (R. 174-75, 180, 188-89)

During cross-examination by the State, Grayson stated: "[Officer Johnson] wanted to hear me say the drugs was from me so he could let my girlfriend loose, and that's what I told him." (R. 189)

Thus, the alleged promises and inducement were submitted to the jury in the form of Grayson's own testimony. It would have been improper and a violation of state law to submit them to the jury in the form

of a jury instruction like D-3.

Grayson argues that without D-3, " . . . the jury was not allowed to consider whether the confession was 'free, voluntary and not obtained through improper inducements.' " (Brief of Appellant at 9)

We disagree.

The jury was entitled under the instructions given, particularly the C-1 charge, to find that promises and inducements were made by Officer Johnson and, consequently, Grayson's confession was untrue. The judge had previously heard the same testimony and found that the confession was voluntary and competent and admissible evidence. The jury could still find the confession to be involuntary and untrue, i.e., incredible under the circumstances, and give it little weight.

Stated differently, "voluntariness" of a confession within the context of competency and admissibility in evidence is a question of law for the trial court to determine.

"Voluntariness" within the context of how much weight and the degree of credibility to attach to a confession is a factual matter for the jury to consider.

At least that's the way we see it.

In the case at bar, the jury was told that the evidence which it was to consider consisted of the testimony and statements of the witnesses and the exhibits offered and received. This, of course, included Grayson's station house confession which had been held by the court to have been given freely and voluntarily without unlawful inducements.

The same evidence submitted to the judge on preliminary inquiry was introduced before the jury which was free to assess both its weight and credibility. Perhaps the trial judge over spoke when he stated in his ruling that voluntariness, i.e., hopes of reward or leniency, are not matters of weight and credibility. He was right on target, however, when he said in the next sentence that these matters " . . . should not be submitted to the jury in the form of an instruction." (R. 213)

As stated in the **Rhome** case, "[t]he jury does not pass upon the competency of the confession, but the jury does pass upon the weight and credibility of the confession. The jury has the same freedom of action in relation to confessions which they have in regard to other testimony." 254 So.2d at 754.

D-3 would have allowed the jury to completely disregard the confession as if it had never been given in the first place. In the absence of D-3, the jury was free to find there was a confession given, but it was untrue and entitled to little weight if influenced by threats or improper inducements.

The case of **United States v. Booker**, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), cited and relied upon by Grayson, is of little comfort to him. According to Grayson, in the **Booker** case

> " . . . federal judges were resolving factually disputed evidence which dramatically impacted a defendant's sentence (freedom). Booker held that such matters must be submitted to a jury by virtue of the Sixth Amendment to the U.S. Constitution." (Brief of Appellant at 8)

Grayson's analogy to **Booker** is not well taken because in Grayson's case the jury did hear conflicting facts, i.e., "factually disputed evidence" in the form of an inducement, and was free to give Grayson's confession whatever weight and degree of credibility the jury felt it was entitled.

We are aware that the identical instruction was granted in **Wiley v. State,** 465 So.2d 318, 320 (Miss. 1985). However, the integrity, correctness, and propriety of granting that instruction were not issues in **Wiley;** rather, the Court mentioned the giving of this instruction in finding " . . . that there was an intelligent waiver of the [defendant's] right to counsel" prior to his confessing to a shooting.

We are also aware that a similar instruction was the subject of appellate scrutiny in **Greer v. State,** 818 So.2d 352, 358 (¶20)(Ct.App.Miss. 2002), where Greer asserted the trial judge erred in denying instruction D-2 because it denied him the defense that his taped confession was involuntary and, therefore, should not be given any weight. Once again the integrity and correctness of that instruction was not an issue; rather, this Court held D-2 was properly denied because

> ". . . no evidence was presented to the jury regarding the fact that the confession might have been obtained in an improper manner. If the instruction had been granted, the second paragraph of the instruction would have given a statement of facts for consideration by the jury which had not been placed before them. * * * " 818 So.2d at 358.

This was reason enough for the denial of D-2 in **Greer**. The Court did not have to adjudicate any further by deciding the correctness of the D-2 instruction. It was properly denied for other reasons.

We note that the **Greer** case was decided by the Court of Appeals on February 26, 2002, seven (7) weeks prior to the April 16th decision in **Moore**, *supra*, disapproving the instruction.

Finally, the D-3 instruction has a grammatical defect which had the potential of misleading the jury. The phrase in the sixth sentence reading "any hope of *regard* or leniency" probably should have read "any hope of *reward* or leniency." D-3 was properly refused for this reason, if for no other.

CONCLUSION

Appellee respectfully submits no reversible error took place during the trial of this cause. Accordingly, the judgment of conviction and twenty-five (25) year sentence imposed by the trial court should be forthwith affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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