

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JERRY MOSES

APPELLANT

VS.

NO. 2008-KA-1285-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Washington County, Mississippi, wherein a jury convicted Jerry Moses of carjacking. Moses received fifteen years in the custody of the Mississippi Department of Correction, a \$2,500 fine, and assessments. Moses appealed, basically raising three issues.

ISSUES

- I. Whether the trial court erred in refusing Moses's motion for a directed verdict, motion for a judgment notwithstanding the verdict and a new trial;
- II. Whether Moses was entitled to a circumstantial evidence jury instruction; and
- III. Whether the trial court erred in admitting certain evidence.

FACTS

On the afternoon of April 7, 2007, Verna Thomas (Thomas) parked in the Jubilee Casino parking lot in Greenville. As she exited her car, two unknown men approached her. Thomas testified she dropped her keys and was knocked to the ground. (T. 62). One of the men grabbed her keys; and the two assailants got in her 2000 Lincoln LS automobile and drove off. (T. 62-63). Thomas testified she did not see the assailants' faces and could not pick them out of a line up. (Tr. 73). Thomas testified one of her assailants was carrying a sack and told her "I'll kill you." but she did not see a gun. (T. 72-73).

Several weeks later, Thomas's car was recovered in Arlington, Texas. After the car was returned to her, she found a photograph and a piece of paper with some telephone numbers in the back seat. (T. 66; Exhibit S-1) Thomas recognized the woman in the photograph as Linda Gatewood, someone Thomas grew up with in Eudora, Arkansas. (T. 69-71). Gatewood was later identified Moses's mother.

Ken Trader, the security director at the casino, testified as to a video of the casino parking lot, that shows the incident, and as to the casino's investigation. (Exhibit S-2; T. 85-93). Trader testified as to their investigation of the suspicious white car in the video and in the parking lot after the incident. The car had luggage and shoes on the back seat. (T. 88- 91).

Hattie Wilson, an officer with the Greenville Police Department, testified to responding to the incident and her subsequent investigation. Wilson and Investigator Robert Gibson talked with Linda Gatewood, Moses's mother. (T. 122). Officers learned from Gatewood that Moses left her house the morning of April 7, 2007 in a white vehicle with his friends Corderro Kennedy and Charlie Stevenson. (T. 115, 116). Charlie Stevenson told officers the three men were at his house on the day prior to the incident trying to come up with a way to get money. (T. 118). Corderro

Kennedy and Moses spent the night of April 6, 2007 at his house but were gone in the morning when he got up.(T. 117-119). The officers learned from interviewing the Millers, Corderro Kennedy's parents, that Kennedy possessed a white Mercury. (T. 119-120). Officer Louis White testified to his response to the incident and his interview with the victim. (T. 122-24).

Investigator Robert Gibson testified to running the license plate of a suspicious white vehicle found by authorities in the casino parking lot. (T. 128). Casino personnel advised Gibson a surveillance video showed the car pull in the parking lot just prior to the incident and the two assailants exiting the vehicle. (T. 128). It was later determined the white vehicle was titled to Thelma Miller. (T. 128-29). An inventory of the car revealed a suitcase with clothes, shoes and a piece of paper containing a social security number, later identified as belonging to Moses. (T. 129-30). Gibson admitted on cross examination that no fingerprints were recovered from the stolen vehicle and the piece of paper containing Moses's social security number was misplaced. (T. 130). On cross examination, Gibson testified that Corderro Kennedy told him "that on the morning of the incident, he and Mr. Moses were at the city front casino." (T. 165).

Thelma Miller, Corderro Kennedy's mother, testified Corderro had her white Mercury Tracer on the day of the car jacking. Further, Miller identified her car as being in the car in the casino video. T. 172. Miller testified that Corderro was being treated for schizophrenia. (T. 177-78).

Charlie Stevenson testified that Kennedy and Moses were at his house on the night before the incident. (T. 188). Kennedy arrived at his house in a white car. (T. 189). Stevenson went to sleep with them at his house and woke up with them gone. (T 189). Stevenson testified although he wrote in a statement for police that Kennedy and Moses had a gun he never saw them with a gun. According to Stevenson, when he told police that they had a gun he only meant they had access to a gun. (T. 193-95).

Linda Gatewood, Moses's mother, testified that Moses had lived with her but on the day prior to the incident she kicked him out of her house. (T. 224). Moses packed his clothes and left in a car with Corderro Kennedy. (T. 224-26). Gatewood testified she did not see her son from the day he left in April until just before turning himself into authorities in October. (T. 229-30). According to Gatewood, her brother in Louisville, Kentucky told her he picked up Moses in Greenville on the day of the incident and took him to Kentucky. (T. 239-40).

When questioned about the photograph Verna Thomas found in her stolen car after it was recovered from Texas, Gatewood testified the photograph did not belong to her. (T. 236). According to Gatewood, she had not seen the photograph in years. (*Id.*). Gatewood identified her ex-husband (Moses's father), old friends and herself in the photograph. (Exhibit S-1; T. 233-36). Gatewood's ex-husband's siblings lived in Texas, where the stolen car was recovered. (T. 236). Gatewood testified the daughter of the friend in the photograph also lived in Texas and could have had access to the photograph. (T. 240-41).

Corderro Kennedy testified before the trial judge that there were no pending criminal charges against him in Mississippi or in Texas. Kennedy testified he had never possessed a shotgun nor did he have access to a shotgun. (T. 214). Kennedy also denied having ever driven his mother's white car. (T. 216). Kennedy claimed he could not remember the events of August 7, 2007. (*Id.*).

At the close of the State's case, Moses moved for a directed verdict. In response the State conceded there was insufficient evidence that the assailants were armed during the carjacking. The court denied Moses's motion. (T. 252-54). The defense rested without putting on any evidence and renewed its motion for a directed verdict, which the court again denied. (T. 257). After receiving instructions from the judge and hearing closing argument by counsel, the jury convicted Moses of carjacking. The trial court sentenced Moses to fifteen (15) years incarceration; fined him \$2,500.00; and assessed restitution, attorney's fees and court costs. (T. 314-515). Moses appeals.

SUMMARY OF THE ARGUMENT

Moses failed to properly support his argument on appeal that the court erred in denying his motion for a directed verdict, JNOV or new trial. Moses's claim that the evidence was insufficient to support a conviction is without merit. The record was sufficient to support a finding of guilt and the trial court properly denied Moses's motion for a directed verdict and judgement notwithstanding the verdict.

Defense counsel "opened the door" to the submission of Corderro Kennedy's statement to police. Therefore, Moses is barred from complaining on appeal that the trial judge should not have permitted Detective Gibson to testify to part of the statement. Moses is also barred from objecting for the first time on appeal to questions asked and answered by Charlie Stevenson regarding Moses's possession of a gun. The State asserts that this issue was waived for failure to make a contemporaneous objection at trial.

Also, Moses failed to support his argument that he was entitled to a circumstantial jury instruction, as required by M.R.A.P. 28(a)(6).

ARGUMENT

ISSUE I. WHETHER THE TRIAL COURT ERRED IN DENYING MOSES’S MOTION FOR A DIRECTED VERDICT, MOTION FOR A JNOV AND A NEW TRIAL?

a. Sufficiency of the evidence.

Moses cites and quotes the correct law regarding a motion for a directed verdict, judgment notwithstanding the verdict and a new trial. However, Moses’s entire argument in support of this issue is “the evidence was insufficient to support the verdict of the jury and the verdict was against the overwhelming weight of the evidence; therefore the [l]ower [c]ourt erred by failing to sustain Defendant’s motion for directed verdict and Defendant’s motion for [judgment] notwithstanding the verdict of the jury, [sic], or in the alternative, a new trial.” (Appellant’s brief at 9).

Pursuant to the Mississippi Rules of Appellate Procedure, an appellant's argument “shall contain the contentions of [the] appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on.” M.R.A.P. 28(a)(6)). Moses completely failed to elaborate on why he contends the evidence was insufficient to convict him. His generalized and conclusory argument is insufficient to satisfy the requirements of Rule 28(a)(6). Accordingly, under the ruling in *Robinson v. State*, 2 So.3d 708 (Miss.App.,2008) this issue is procedurally barred.

For the sake of argument, the State contends there is sufficient credible evidence to warrant a conviction for carjacking. A directed verdict and a motion for JNOV both challenge the sufficiency of the evidence presented to the jury. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993). This Court’s standard of review is the same for both; the evidence is considered in the light most favorable to the State, giving the State “the benefit of all favorable inferences that may reasonably be drawn from the evidence.” *Collier v. State*, 711 so.2d 458, 461 (Miss.1998). An appellate court asks whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Bush v. State*, 895 So.2d 836, 843 (Miss.2005). All creditable evidence supporting the verdict will be accepted as true. *McRee v. State*, 732

So.2d 246 (Miss.1999).

In order to convict Jerry Moses of carjacking, the State was required to prove beyond a reasonable doubt that Moses unlawfully, feloniously and knowingly or recklessly took a motor vehicle from the immediate possession of Verna Thomas by the use of force. *Miss.Code Ann.*

§ 97-3-117(1)(Revised 2006). Although no one was able to identify Moses as one of the assailants, a jury could infer from the testimony of Charlie Stevenson, Thelma Miller and Linda Gatewood that Jerry Moses was in the white car with Corredo Kennedy when he drove it into the casino parking lot minutes before the incident. Items belonging to Moses were found in the white car after it was abandoned in the casino parking lot. The casino surveillance video shows two assailants get out of the white car and walk over to Thomas's car. The video corroborates Thomas's testimony that two males took her car by force. A reasonable inference could be drawn that Moses was in Texas with the stolen vehicle after the car jacking because the photograph of Moses's parents found in the car's backseat would have been in possession of Moses's relatives in Texas, where the car was recovered.

Viewing the record in the light most favorable to the State, there was more than sufficient evidence to support the jury's conviction for carjacking.

b. Weight of the evidence.

Moses asserts, without any specificity, that the court erred when it denied his motion for a new trial. An appellate court will only reverse a trial court's denial of a motion for new trial when it amounts to an abuse of discretion. *Ivy v. State*, 949 So.2d 748, 753(¶ 21) (Miss.2007). The supreme court held that:

[w]hen reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. However, the evidence should be weighed in the light most favorable to the verdict.

Id. (quoting *Bush v. State*, 895 So.2d 836, 844(¶ 18) (Miss.2005)).

Considering the testimony already discussed, no new trial is warranted, as the jury's verdict is consistent with the weight of the evidence. Sitting as the "thirteenth juror," the evidence, when weighed in the light most favorable to the verdict, supports the jury's decision to convict Moses of carjacking. Accordingly, the trial court did not err in denying Moses's motion for a new trial.

ISSUE II. WHETHER THE TRIAL JUDGE IMPROPERLY ADMITTED CERTAIN EVIDENCE?

a. Corderro Kennedy's statement.

Moses first contends the trial court erred by allowing Detective Robert Gibson, the investigating officer, to testify to part of Corderro [Kennedy's] statement to police. Moses argues the statement was admitted to prove the elements of the crime for which Jerry Moses was charged and in violation of the Confrontation Clause of the Sixth Amendment. (Appellant's brief at 12).

During their investigation the police conducted an interview with Corderro Kennedy. Kennedy told police that Moses participated in the carjacking and went into detail about the incident. Subsequently, Kennedy pleaded guilty to the carjacking and was serving his sentence during Moses's trial. The prosecution subpoenaed Corderro Kennedy to testify during its case in chief. In anticipation of having to impeach Kennedy with his own statement to police, the prosecution had one of the investigating officers authenticate Kennedy's statement during his testimony. (T. 151-52). The video and transcription of Kennedy's statement to police was marked for identification purposes only; the defense made no objection. (T. 144; S-4; S-5). The record shows the trial judge was acutely aware of the potentially prejudicial character of Kennedy's statement and was careful not to allow the statement in evidence to prove the elements of the crime. (T. 144-153; 161-66). The prosecutor instructed the witness not to read or repeat Kennedy's statement. However, on cross examination defense counsel asked the investigating officer "You have no evidence whatsoever where Jerry Moses was on the morning of April 7th, direct evidence, correct?" (T. 162). After argument of

counsel, the trial judge instructed the witness to only answer the question defense counsel asked. (T. 163-64). The witness responded that Kennedy stated that on the morning of the incident, he and Moses were at the city front casino. (T. 165).

Moses asked the question that elicited this answer. A defendant cannot complain on appeal about errors he invited. *Caston v. State*, 823 So.2d 473, 502 (Miss.2002) (citing *Singleton v. State*, 518 So.2d 653, 655 (Miss.1988)). Moses opened the door, and he cannot now claim error.

b. Charlie Stevenson testimony.

Moses also argues on appeal that the trial court erred when it allowed the State to question Charlie Stevenson about “Jerry Moses possessing a shotgun on the evening of April 6, 2007.” (Appellant’s brief at page 10). A review of the record shows defense counsel never objected to the line of questioning at trial. (T. 191-94). The law is well settled in this state that a defendant is procedurally barred from raising an issue on appeal when he failed to make a contemporaneous objection to the testimony at trial. *Rubinstein v. State*, 941 So.2d 735 (Miss.,2006). This issue is without merit.

ISSUE III: WHETHER MOSES WAS ENTITLED TO A CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION?

Moses contends the lower court erred in refusing his proffered circumstantial evidence jury instruction, D-3A. Moses contends the trial court found this was a circumstantial case and committed error when it denied Moses’s proffered circumstantial evidence jury instruction. According to Moses, the trial judge based his denial of the instruction on the erroneously admitted statement of Corderro Kennedy and the viewing of the casino video. (Appellant’s brief at 13). This is the full extent of Mason's argument on this issue. The State counters that Moses's argument is in reality no argument at all and cannot form the basis for reversal. “[I]t is the duty of counsel to make more than an assertion; they should state reasons for their propositions, and cite authorities in their support.” *Johnson v. State*, 154 Miss. 512, 513, 122 So. 529, 529 (1929).

The State contends Moses fails to cite to any case or statutory authority and fails to support his assertions with any kind of argument or logic or reason, he merely makes allegations of error. Under the holding in *Britt v. State*, 844 So.2d 1180 (Miss.App.,2003,) the issue is barred for failure to support the argument with “citations to the authorities . . . and statutes relied upon.” as required in M.R.A.P. 28(a)(6).

Procedural bar notwithstanding, “[A circumstantial-evidence] instruction must be given only where the prosecution is without a confession and wholly without eye witnesses to the gravamen of the offense charged.” *Price v. State*, 749 So.2d 1188, 1193(¶ 15) (Miss.Ct.App.1999) “Where the evidence is partly direct and partly circumstantial, an accused is not entitled to an instruction that the evidence must exclude from their minds every other reasonable theory than that of guilt because that standard is not applicable to the testimony of eye-witnesses.” *Id.* at 1194(¶ 17) (internal quotations omitted). “Direct evidence is eyewitness account.” *Id.* at (¶ 16).

In the case at bar, Thomas testified as to the taking of the vehicle by force. Her eyewitness testimony and the casino video negate Moses’s entitlement to a circumstantial evidence instruction.


CONCLUSION

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 conviction of Jerry Moses for car jacking.

Respectfully submitted,

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CERTIFICATE OF SERVICE

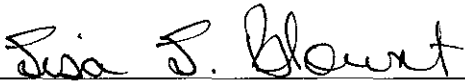
I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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