

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JERMORRIS PILCHER

APPELLANT

VS.

NO. 2008-KA-1434-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

- I. A MISTRIAL WAS NOT WARRANTED BASED ON COMMENTS MADE BY THE STATE DURING OPENING STATEMENTS.
- II. A MISTRIAL WAS NOT WARRANTED BASED ON PREVIOUSLY UNDISCLOSED TESTIMONY WHICH WAS UNKNOWN TO BOTH THE STATE AND DEFENSE.

STATEMENT OF FACTS

On the evening of June 14, 2006, Michael Taylor, who had been released from prison just two weeks prior, was staying at the home of his sister, Christine Taylor, who lived in building 12 of Delta Apartments in Greenwood. T. 291. Michael borrowed Christine's red Mustang to go to the store to buy cigarettes. T. 295. Ten minutes later, Christine and her boyfriend heard gunshots. T. 295, 302. Christine ran outside and found her brother lying on the ground near a stairwell. T. 296. Michael, who had been shot in the back, was still alive when paramedics arrived, but died shortly thereafter. T. 297, 302, 476.

When sheriff's deputies arrived on the scene that night, no one was willing to come forward

with information regarding the shooting. T. 310. Eventually, three witnesses, Deon Prayer, Cordell Phams, and Dontay Williams, came forward and gave consistent statements which implicated Jermorris Pilcher as Michael's murderer. T. 327. Phams testified that moments before the shooting, Pilcher had rifle and told Phams that he was "fixing to knock somebody off." T. 388. Phams then saw Pilcher aim the rifle at Michael who was walking up the stairs. T. 342. Phams acknowledged that he did not actually see Pilcher pull the trigger, but saw him immediately before and after he shot Michael. T. 343. Phams testified that after the shooting, Pilcher ran off. T. 345. When Phams saw Pilcher moments later, Pilcher advised Phams to not tell anyone what he had seen. T. 350.

Deon Prayer testified that he was standing outside Delta Apartments when he saw and heard Pilcher, Phams, and Zanquel McKinney talking about a recent shooting at the Amoco. T. 422. Prayer then heard Pilcher ask McKinney for a tone, which Prayer stated is slang term for gun. T. 425. Prayer then saw Pilcher and McKinney walk off, and when Pilcher returned, he walked toward building 12 with a rifle in hand. T. 426. Prayer saw Phams approach Pilcher, and saw Pilcher tell Phams to move back. T. 428. Prayer then saw Pilcher walk toward Christine Taylor's apartment. T. 428. At this point, Prayer turned to go back in his apartment and heard a gunshot. T. 429. Prayer testified that he did not come forward until five days after the shooting because he feared that he would be shot if he "snitched." T. 430.

Dontay Williams testified to the following. Williams was outside his apartment smoking a cigarette when he saw Michael, Christine, and Christine's boyfriend arrive at the apartment complex. T. 501-502. A few minutes later, Michael left the apartment complex and Pilcher, Phams, McKinney, and Cortez Freeman entered an abandoned apartment in building 12. T. 499-500, 502. When Michael came back, he was walking up the stairs talking on the phone when Pilcher shot him in the back. T. 502.

The State's theory regarding Pilcher's motive for shooting Michael to death involved an ongoing rivalry between the residents of Delta Apartments and Broad Street and a recent shooting in which someone from Broad Street had been accused of shooting one of Pilcher's friends. Carldearl Taylor testified that prior to the murder, he had been involved in an altercation with Pilcher at a gas station. T. 562-564. During the altercation, someone shot at Pilcher's friend, Cortez Freeman. T. 564. Carldearl testified that he had been accused of being the person who shot at Freeman. T. 568. Carldearl testified that Pilcher and Freeman were from Delta Apartments, while he and Michael were from Broad street. T. 568-69. There was an ongoing rivalry between the residents of Delta Apartments and Broad street, which escalated after the Freeman shooting. T. 464-467.

The defense put on three witnesses. Katrina Cole testified that Williams, her boyfriend at the time of the murder, could not have witnessed the shooting because he was in the bathtub. T. 576. However, Cole admitted that she was asleep on the couch at the time of the murder, and awoke only after hearing the shots.¹ T. 576. She was also forced to admit that she was friends with Pilcher's mother. T. 582-584. Cole could not explain how she knew to seek out defense counsel to give a statement to discredit Williams four months after the murder. T. 588-592. Jackie Robertson and Sheila Givens testified that they were watching television with Pilcher and Phams at the time of the shooting. T. 599, 613-614. The State then called a rebuttal witness, Nathaniel Anderson, who testified that he, Robertson, and Givens were drinking and smoking weed at Givens' apartment at the time of the murder, and Pilcher and Phams were not present. T. 627-631.

¹Although Cole begrudgingly admitted that she could not see with her eyes closed, she was adamant that Williams could not have walked past her to go outside as she slept on the couch because she does not "sleep hard." T. 581, 585.

A Leflore County Circuit Court jury found Pilcher guilty of Taylor's murder.

SUMMARY OF ARGUMENT

Pilcher was not entitled to a mistrial simply because the State asked the jury during voir dire whether it would automatically exclude a witness's testimony simply because that witness had a prior felony conviction. The comment was not improper, and the natural and probable effect of the comment did not prejudice Pilcher. Additionally, the trial court properly instructed the jury that it could take such information into consideration in assessing witness credibility.

Pilcher was also not entitled to a mistrial based on Phams' statement at trial that he saw someone give someone a gun. In fact, it is doubtful that Pilcher was entitled to have that portion of Phams' testimony excluded, as no discovery violation occurred. However, the trial court did exclude the testimony and instructed the jury to disregard it. Because there is a presumption that the jury follows the trial court's instruction, no error occurred even if the jury was able to decipher what Phams was talking about.

ARGUMENT

I. A MISTRIAL WAS NOT WARRANTED BASED ON COMMENTS MADE BY THE STATE DURING OPENING STATEMENTS.

During voir dire, the prosecutor asked the jurors if they would still be able consider a guilty verdict if the State proved that Pilcher murdered Taylor, but could not provide the murder weapon.

T. 85. The State then proceeded with the following.

MR. SANDERS: The State has several eyewitnesses to this crime. Some of them may have criminal records. Is there anybody that is going to hold that against the State or the witnesses because of their prior criminal record, to say that because they have a prior conviction, regardless of what it's for, that they will lie, that they would come up in here and you would believe that more likely than not they are lying because they are a prior convicted felon? Anybody think that because they are a

convicted felon, regardless of what crime, you can't believe their testimony?

T. 86. At this point, the trial court asked counsel to approach, where the following exchange occurred.

THE COURT: Counsel, approach. I was giving a little bit of latitude, but they can decide that because there is not a gun, that's something they want to consider. There is nothing that stops them from doing that.

MR. SANDERS: I'm saying because they don't have a gun, is that going to absolutely bar them from –

THE COURT: Well, and you need to talk in absolutes. You need to talk, you know, would that stop them from considering the rest of the evidence, or something like that. Because the only thing that you mentioned, they could consider.

MR. SANDERS: Yes, ma'am.

THE COURT: And I'm not going to instruct them that they can't consider evidence that they can consider.

MR. SANDERS: Yes, ma'am.

THE COURT: Okay.

T. 86-87. Upon the conclusion of the bench conference, the prosecutor told the jury that they were to decide what weight to attach to any evidence or lack of evidence, and again asked if no gun equaled no guilty verdict in their minds. T. 87.

Later, during opening statements, the State stated the following regarding witness Dontay Williams.

Mr. Williams is not the perfect guy. He is a criminal, he is a convicted criminal, and he is currently on probation. Well, he's in jail right now on a probation violation, not a violent crime, but he is in jail right now. And I think I asked you yesterday during voir dire if we had a felon come in and give statements about this case, would you hold that against him, and none of you raised your hand.

T. 271. There was no objection, and the prosecutor went on to state what the State believed Williams' testimony would show. The prosecutor then went on to discuss other evidence that the State would present. When the State mentioned that the victim was from Broad street, defense counsel objected and the attorney's approached the bench. T. 273. The objection related to defense counsel's perception that the State was referencing gang activity. T. 273. After ensuring that the State had evidence to present regarding the motive for the murder, the trial court took the opportunity to express displeasure with the State's earlier reference to Williams' status and inquiry as to whether the jury would automatically disbelieve his testimony simply because of that status.

THE COURT: And I cautioned you about this in voir dire, this thing about them promising that they are not going to hold the fact that the guy is a convicted felon against him. They can consider that, along with anything else. What you want is to make sure they wouldn't automatically disregard his testimony because of it.

MR. SANDERS: Yes, ma'am.

THE COURT: And I think I have to say something about that, and I don't want you to keep doing that.

MR. SANDERS: Well, Your Honor, I think defense counsel is going to make it a big issue, so I have to address it on the front end.

THE COURT: But I can't allow you to say, basically, you promised me that that wouldn't make a difference.

MR. SANDERS: Your Honor, that's not what I said.

THE COURT: I sat hear and heard what you said. I'm just trying to save the trial.

MR. SANDERS: Yes, ma'am. With all due respect to the Court, I think that I made the statement pretty much in consistence with what the law allows. I stated that -- I asked a question.

THE COURT: Okay.

MR. SANDERS: And none of them said –

THE COURT: All right. All I can do is -- all I can tell you is keep doing it, okay? That's all I can tell you, since I can't give you a suggestion to be careful about it.

MR. SANDERS: I just don't understand how I can say my witness is a convicted felon without saying "I stated that he's a convicted felon, are you going to hold that against him?" I'm not saying is that going to be an absolute, I'm just saying is that going to be -- but I understand the Court's ruling.

THE COURT: Okay. Go ahead. Just keep on.

MR. RICHARDSON: I couldn't understand, judge. What was it that he said during opening statement?

THE COURT: He said during opening statement, you know, he's a convicted felon, and during voir dire I asked you would you not hold that against him, basically, and nobody raised their hand. Is there anybody who would hold that against him, and nobody raised their hand. Well, the issue is not whether they would hold it against him, they can consider that just like they consider anything else, the issue is that they can't automatically disregard the testimony.

MR. HOLLY: Your Honor, I think since it's been raised at least twice, I think I have to, at this point in time, ask the Court for a mistrial.

THE COURT: I'm not going to grant a mistrial.

MR. HOLLY: I understand, Your Honor, but I think I'm just required to –

THE COURT: It's like: Would you hold it against us if we don't bring the gun? Would you hold it against us if we don't have fingerprints? Well, yeah, they can hold all those things, they can consider them, but would you automatically find? That was the distinction I was trying to get him to make in voir dire, and what was said just now came back to the thing I was trying to correct.

T. 273-276.

On appeal, Pilcher claims that the State's aforementioned comments were "improper

statements of law” which required a mistrial. The State would first note that defense counsel failed to make a contemporaneous objection, and the present issue should be deemed procedurally barred. *Cooper v. State*, 977 So. 2d 1220, 1226 (¶23) (Miss. Ct. App. 2007). Should the Court address the merits of Pilcher’s claim, the State would offer the following argument to prove that Pilcher’s claim is without merit.

The trial court’s denial of a motion for mistrial is reviewed for abuse of discretion. *Jordan v. State*, 995 So. 2d 94 (¶21) (Miss. Ct. App. 2008). In order to reverse based on alleged prosecutorial misconduct, this Court must determine that the prosecutor’s statements in question were in fact improper and that the improper statements prejudicially effected the defendant’s rights. *Spicer v. State*, 921 So.2d 292, 318(¶ 55) (Miss. 2006). The prosecutor’s statements were not improper when viewed in context. It seems clear that the State was not instructing the jury, and of course it could not, that it must not consider the fact that Williams was a convicted felon. Rather, the State was asking the jury would it automatically disregard Williams’ testimony because of his status. During opening statements, the State referenced its questioning during voir dire. Again, during voir dire, the State asked, “Anybody think that because they are a convicted felon, regardless of what crime, you can't believe their testimony?” T. 86. When read in context, it is clear that the prosecutor’s statements were not improper. Additionally, Pilcher was not prejudiced by the State’s comments, because the jury was properly instructed regarding its exclusive duty to weigh the evidence presented.

Pilcher’s claim that the trial court abused its discretion in failing to properly instruct the jury regarding their exclusive duty of determining the weight of the evidence is contrary to the record. At the close of the evidence, the trial court instructed the jury, through instruction number 1, that the applicable law is provided only through the court’s instructions to the jury. C.P. 122. Instruction

number 1 went on to state that the jury would have to determine the weight to attach to each witness's testimony. C.P. 122. Instruction number 9 was more explicit. It informed the jury that it was the sole judge in determining witness credibility and in assessing the weight to attach to witness testimony. C.P. 126. The instruction went on to state that the jury could consider a witness's motive and interest as well as any evidence relating to that witness in determining that witness's credibility. C.P. 126. Because juries are presumed to follow the instructions of the trial court, it is clear that the jury understood that it could consider Williams' felony conviction against him in determining his credibility and what weight to ascribe to his testimony. *Walton v. State*, 998 So.2d 971, 977 (¶17) (Miss. 2008).

The prosecutor's statements were not improper. Even if, for the sake of argument only, the statements had been improper, Pilcher was not prejudiced because the trial court properly instructed the jury that it could consider Williams' felony conviction in assessing his credibility. For the foregoing reasons, Pilcher's first assignment of error must fail.

II. A MISTRIAL WAS NOT WARRANTED BASED ON PREVIOUSLY UNDISCLOSED TESTIMONY WHICH WAS UNKNOWN TO BOTH THE STATE AND DEFENSE.

State witness Cordell Phams testified that moments before the shooting, Pilcher had rifle and told Phams that he was "fixing to knock somebody off." T. 388. Phams then saw Pilcher aim the rifle at Michael who was walking up the stairs. T. 342. Phams acknowledged that he did not actually see Pilcher pull the trigger, but saw him immediately before and after he shot Michael. T. 343. Phams testified that after the shooting, Pilcher ran off. T. 345. When Phams saw Pilcher moments later, Pilcher advised Phams to not tell anyone what he had seen. T. 350. Phams also testified that he could identify the gun he saw Pilcher with as a 30.06 because Phams and his father hunt with that type of gun. T. 336. It is undisputed that the State provided Pham's statement to

police and summary of expected testimony which would have included the aforementioned information. On cross, Phams was questioned about the lighting conditions when he witnessed the murder, and whether he was certain that the gun he saw Pilcher with was a 30.06. T. 356-358. Then on redirect, the State asked how Phams knew that the gun he saw was a 30.06, to which Phams replied, "Because that's -- the boy that gave him the gun" T. 383. At this point, the prosecutor cut Phams off by attempting to ask another question, when defense counsel interjected that he was unable to hear Pham's answer to the previous question. T. 384. Phams then states, "I said that's the -- the boy gave him the gun, because they had" T. 384. Defense counsel objects and both parties approach the bench.

At the bench conference, it became clear that neither the State or defense knew what Pilcher was referencing. The prosecutor made clear that he was not attempting to elicit the response given, and the trial court acknowledged that the partial answer was non-responsive to the question asked. T. 385. Before the state resumed its questioning of Phams, the court stated in front of the jury, "Let's strike the beginning response. You want to either reask the question or rephrase the question?" T. 385. The State then continues questioning Phams about what he saw that night. Phams is asked about an individual named "Fella", and where everyone was at the exact moment that Pilcher shot Taylor. Phams replies as follows.

Like, this tree -- this the tree he was sitting up under (indicating). I'm way over by the truck (indicating). So, where the truck parked at, on the side of it, you could see it from right here when he was passing the dude with the gun. And when I was coming from downstairs, that's when he was passing the dude the gun.

T. 390. The prosecutor moved to strike that portion of Pilcher's testimony, and defense counsel asked to approach the bench. T. 390. Defense counsel asks for a mistrial, but then asked to be allowed to voir dire Phams outside the presence of the jury. T. 391-392. During the voir dire

examination, Phams stated that he saw an individual known as “Fella” give Pilcher the gun prior to the murder. T. 395. Phams also stated that he had never told anyone, including the police or anyone from the prosecutor’s office, that prior to trial because no one had specifically asked him if he saw where Pilcher got the gun. T. 396-398. The trial court ultimately ruled that it would exclude the new evidence about Fella giving Pilcher the gun. T. 401. Back in the presence of the jury, redirect continued. At the conclusion of the State’s redirect examination of Phams, the trial court stated, “Before we took the last recess, Mr. Phams was asked a question, and I want you to disregard the response, the question and response before we went on recess.” T. 407.

On appeal, Pilcher argues that he was entitled to a mistrial based on Pham’s nondescript and incomplete statements that “the boy gave him the gun,” and “he was passing the dude the gun.” The State would first note that the appellant acknowledges in his brief that this new information was not within the State’s knowledge, and could therefore not be a discovery violation. T. 10. Therefore, it appears that Pilcher received more than which he was entitled to when the trial court excluded the new evidence.² Furthermore, the trial court did instruct the jury to disregard Pham’s statement. As previously stated, the jury is presumed to have followed the trial court’s instruction. As such, no error occurred.

Even if, for the sake of argument only, the foregoing was error, it would no doubt be harmless error. Phams had already permissibly testified that he saw Pilcher with a gun, saw him aim that gun at the victim, and then heard the shot which killed Taylor. Deon Prayer also testified that in addition to seeing Pilcher with a rifle immediately before the murder, he heard Pilcher ask Fella for a gun. T. 425. Prayer testified that Pilcher and Fella then walked off and Pilcher returned with

²Because there was no finding, nor even an allegation, of a discovery violation, it is unclear what authority the trial court relied upon in excluding the evidence in question.

a rifle. T. 426. Dontay Williams described witnessing the entire murder. Accordingly, if any error arose from the jury hearing Pham's new testimony, such error was harmless in light of the aforementioned testimony.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Pilcher's conviction and sentence.

Respectfully submitted,

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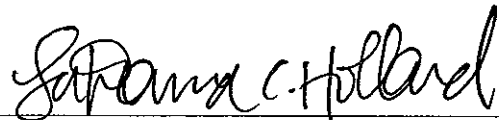
I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 24th day of November, 2009.



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