IN THE SUPREME COURT OF MISSISSIPPI

ELLIS GRISBY — APPELLANT

VS. — NO. 2008-KA-01915-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following listed persons have an interest in the outcome of this Appeal. These representations are submitted that the Judges of the Court may evaluate possible disqualifications or recusal.

Ellis Grisby, appellant.

Dewayne Richardson, District Attorney.

Respectfully submitted, this the 8 day of January, 2010.

Stephen Nick

Stephen Nick, counsel for the appellant, Ellis Grisby

TABLE OF AUTHORITIES

Hester v. State, Miss 1999 753 So. 2d 463.

Hood v. State, 155 So. 679, 680.

Mickell v. State, 735 So. 2d 1031 1999.

Bester v. State, 55 So. 2d 379.

Holmes v. State, 4 So. 2d 540.

Montgomery v. State, 37 So. 835, 836, 837 1905.

Sanders v. State, 586 So.2d 792, 796. 1991.

Jackson v. Virginia, 443 U.S. 307, 319 (1979).

U.S. v. Garza 118 F. 3d (5th Cir. 1997)

U.S. v. Flores-Chapa 48 F.3d 156 (5th Cir. 1995)

U.S. V Onick, 889 F.2d 1425, (5th Cir. 1989).

Clark v. Procunier 755 F.2d 394 (5th Cir. 1985)

Cosby v. Jones 682 F.2d 1373 (11th Cir. 1982)

Section 97-1-7 of Mississippi Code of 1972 as amended.

Section 97-3-79 of Mississippi Code of 1972 as amended.

Section 99-11-3 (1) of Mississippi Code of 1972 as amended.

Section 99-17-35 of the Mississippi Code of 1972 as amended.

Black's Law Dictionary, Revised Fourth Edition.

STATEMENT OF ISSUES

ISSUE: The trial court committed reversible error when the court denied the appellant's motion for judgment notwithstanding the verdict of the jury or in the alternative a new trial wherein the appellant requested a new trial because the prosecution failed to prove venue/jurisdiction pursuant to section 99-11-3 (1) of the Mississippi Code of 1972 as amended.

ISSUE: The trial court committed reversible error when the court read instruction, D-7, out of sequence to the trial jury subsequent to the reading of the other instructions and closing arguments.

ISSUE: The trial court committed reversible error when the court denied the appellant's motion for judgment notwithstanding the verdict of the jury or in the alternative a new trial. The appellant requested a directed verdict of not guilty or in the alternative a new trial; the appellant asserts the prosecution failed to prove the charge beyond a reasonable doubt.

STATEMENT OF THE CASE

The State of Mississippi indicted Ellis Grisby and Joby Pam for attempted armed robbery,(97-1-7) & (97-3-79).

The defendants were tried together and Joby Pam was found not guilty. Ellis Grisby was found guilty.

The circuit Court sentence Ellis Grisby to a sentence of 13 years with eight years to serve and 5 years of probation.

Ellis Grisby, by and through counsel, appeals said conviction and sentence.

SUMMARY OF ARGUMENT

The appellant submits that the prosecution failed to prove venue/jurisdiction, pursuant to section 99-11-3-(1) of the Mississippi Code of 1972. The trial court improperly instructed the trial jury when the court recalled the jury from deliberations after she was informed by counsel that she neglected to read instruction (D-7) to the jury at the time the other instructions were read to the jury. The appellant contends this was reversible error.

The appellant submits that the trial judge should have set aside the jury's finding of guilt inasmuch as the jury found the co-defendant not guilty after the jury was improperly instructed. Further, the evidence of the charge was of similar weight and character as presented against both defendants. Thus, if Pam was not guilty, then, the appellant contends that he should have been found not guilty. If the evidence was insufficient as same applied to Pam, then, the evidence was insufficient as to the guilt of Grisby.

ISSUE: The trial court committed reversible error when the court denied the appellant's motion for judgment notwithstanding the verdict of the jury or in the alternative a new trial wherein the appellant requested a new trial because the prosecution failed to prove venue/jurisdiction pursuant to section 99-11-3 (1) of the Mississippi Code of 1972 as amended.

Section 99-11-3 (1) provides as follows:

> (1) The local jurisdiction of all offenses, unless otherwise provided by law, shall be the county where committed.

On July 16, 2008, Howard Sanders testified at trial he resides at 614 North Morgan Street; Hollandale, Mississippi. (p.29 TR)

Howard Sanders testified the incident occurred on August 1, 2005. Mr. Sanders did not specifically identify the location of the alleged crime by county and state. On July 16, 2008, he testified the incident happened as he entered the rear door of his house. He does not testify as to the location of his house on the day of the alleged crime. (p.30 TR) The prosecution attempted to establish an inference that the two locations are one and the same. The appellant submits that an inference is not proof beyon reasonable doubt as the law requires.

This Court stated in Hester v. State, (Miss 1999) 753 So. 2d 463 the following:

> Venue is an essential part of a criminal prosecution and the State bears the burden of proving venue beyond a reasonable doubt.
>
> Although the ultimate burden of proving venue that rests upon the state is beyond a reasonable doubt, this is a standard of proof before the jury, not the trial judge.

The appellant submits that Howard Sanders did not provide sufficient information for the jury to accept as proven the location of the alleged crime. The appellant does not admit the location of the alleged crime, thus, the facts are not available to make an inference that satisfies the statutory obligation belonging to the state to prove the county of the offense.

The term, inference, is defined in Black's Law Dictionary, Revised Fourth Edition, page 917, 198.

> INFERENCE. In the law of evidence. A truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. Whitehouse v. Bolster, 95 Me. 458, 50 A. 240; Joske v. Irvine, 91 Tex. 574, 44 S.W.1059.
>
> A deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect. Puget Sound Electric Ry. v. Benson, C.C.A. Wash., 253 F. 710, 714.
>
> A "presumption" and an "inference" are not the same thing, a presumption being a deduction which the law requires a trier of facts to make, an inference being a deduction which the trier may or may not make, according to his own conclusions; a presumption is mandatory, an inference permissible. Cross v. Passumpsic Fiber Leather Co. 90 Vt. 397, 98 A. 1010, 1014; Joyce v. Missouri & Kansas Telephone Co. , Mo. App. 211 S.W. 900, 901.

This Court stated in Hood v. State, 155 So.679, 680, the following:

> "Where a presumption or inference is one of fact merely, the court is not warranted in declaring it to the jury as a presumption authoritatively raised by law.

The appellant submits that an inference is not proof beyond a reasonable doubt. Further, this court cannot declare that venue/jurisdiction was proved to the jury. Consequently, the prosecution failed to establish venue/ jurisdiciton beyond a reasonable doubt, thus, the conviction should be reversed and remanded to the lower court for further proceedings.

ISSUE: The trial court committed reversible error when the court read instruction, D-7, out of sequence to the trial jury subsequent to the reading of the other instructions and closing arguments.

Counsel for defendant, Joby Pam, advised the court that instruction, D-7, was not read to the trial jury when the other instructions were given. The trial judge acknowledging error recalled the jury from deliberations read the forgotten instruction and returned the panel to continue their deliberations. (p. 483 TR)

The discussion of instruction, D-7, can be found in pages, (443-446 TR). Instructions other than D-7 and closing arguments can be found in pages, (447-482 TR).

Defendant, Grisby, submits that the trial judge's mistake; reading instruction, D-7, out of sequence was reversible error. Joby Pam was acquited and Ellis Grisby was found guilty, notwithstanding, the evidence presented in court against the two defendants was of the same character and weight. Grisby asserts that instruction, D-7, constituted an instruction in the nature of a directed verdict as to Joby Pam. Further the timing of the reading of the instruction was a negative influence on the jury as same relates to the deliberations of the charge against Ellis Grisby. It is obvious to this writer that the court's mistake highlighted the evidence against Ellis Grisby, solely.

The instruction's reference to Ellis Grisby appears as nothing more than an afterthought. The instruction standing alone instructed the jury to find Joby Pam not guilty. It would be unwise to argue that the instruction applied to Grisby equally. The entire body of the instruction and the tenor of the instruction applies to Joby Pam. It must be understood and considered that the

instructions had been given, closing arguments had been heard and deliberations had begun in the minds of the jury. The sequence of the court's reading of the instruction must have been curious to the trial jury. The trial jury was recalled and given instruction, D-7, standing alone. The timing of the instruction surely resonated with the jury as a directed verdict of not guilty for Joby Pam. Further, the focus of attention of the jury shifted to Ellis Grisby. Consequently, the focus of deliberations shifted to Ellis Grisby the result a verdict of guilty.

Section 99-17-35 of the Mississippi Code of 1972 as amended provides:

> 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. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement.

In Mickell v. State, 735 So.2d 1031 (1999) the court stated:

> In an armed robbery prosecution, trial court impermissibly commented on testimony and weight of evidence by simply answering, "yes" to the jury's question whether it could "convict a person of armed robbery without the policeman finding the gun or a gun" as answer served to minimize significance that no gun had been found by police, which was issue central to case.

In Rester v. State, 55 So. 2d 379 the court stated:

> An instruction in criminal prosecution which is on weight of evidence or which singles out and gives undue prominence to certain portions of evidence is erroneous.

In Holmes v. State, 4 So.2d 540, the court stated:

Instructions must be taken as a whole as one body, and announce, not the law for the plaintiff or the defendant, but the law of the case.

In Sanders v. State, 586 So.2d 792, 796 (1991) the court stated.

As a general proposition, the trial judge should not give undue prominence to particular portions of the evidence in the instructions.

This prophylatic rule has the salutory purpose of protecting the jury from their natural inclination to put great weight in the judge's statements. To that end, this Court has held that instructions which emphasize any particular part of the testimony in such a manner as to amount to a comment on the weight of that evidence are improper.

It is also well established that instructions should not single out or contain comments on specific evidence.

In Montgomery v. State, 37 So. 835, 836, 837 (1905) the court stated.

We feel sure, however, that the correct practice, under our system, is for the court to pass on all instructions asked on both sides before the argument to the jury begins. This rule should not be deviated from except on rare and emergent occasions in the discretion of the court, and even then with opportunity to the other side to prepare and request any counter charge applicable to its view of the facts; otherwise great injustice might occur to the defendant in favor of the party with the closing argument.

In Hood v. State, 155 So. 679, 680 (1934) the court stated:

The rule is general that a party has the right to have the jury instructed as to any definitely applicable principle of the substantive law; but this rule is subject to the limitation that no instruction shall be given in such manner as that it shall be a charge upon the weight of the evidence, save as those classes of instructions hereafter to be mentioned. It is an established rule in this jurisdiction that although an instruction is correct as a legal proposition, it shall not single out for prominent presentation to the jury certain portions of the testimony, and, by thus drawing the special attention of the jury thereto, give an undue emphasis to the portions so specifically mentioned, unless the portions so singled out are so completely sufficient within themselves that ultimate issue may be determined solely upon them if found to be true.

ISSUE: The trial court committed reversible error when the court denied the appellant's motion for judgment notwithstanding the verdict of the jury or in the alternative a new trial. The appellant requested a directed verdict of not guilty or in the alternative a new trial; the appellant asserts the prosecution failed to prove the charge beyond a reasonable doubt.

The jury verdict and the judgment of conviction is against the overwhelming weight of the evidence in this cause and is insufficient as a matter of law to establsih guilt beyond a reasonable doubt.

The review standard of sufficiency of the evidence is whether viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). To the same effect is judgment for acquittal. U.S. v. Garza, 118 F.3d (5th Cir. 1997); U.S. v.Flores-Chapa, 48 F.3d 156 (5th Cir. 1995).

In order to convict the defendant of the charge of attempted armed robbery as stated in the indictment the prosecution must prove the defendant, Ellis Grisby, and the defendant, Joby Pam, each acting in concert with the other, on or about 1st Day of August, 2005, in Washington County, did unlawfully, wilfully and feloniously make an assault upon Howard R. Sanders and, they, the said Ellis Grisby, and Joby Pam did then and there by the exhibition of a deadly weapon, to-wit: a hand gun, unlawfully, wilfully and feloniously put Howard R. Sanders in fear of immediate injury to his/her person, and did unlawfully, willfully attempted to violently take, steal and carry away the property of Howard R. Sanders, having a total and aggregate value of more than one dollar from the presence or from the person and against the will of said Howard R. Sanders.

The jury found Joby Pam not guilty and Ellis Grisby guilty, p. 197 of the Clerk's papers.

Ellis Grisby submits that the empirical evidence in this case argues that he is not guilty. The character and the weight of the evidence was essentially the same as applied to the defendants, yet, the jury found Pam not guilty and Grisby guilty.

Howard Sanders in direct testimony tesfied that he was robbed by two people, one was about five-eight in height and the other was five-four or five-five in height. He did not see their faces and could not identify the individuals who he says committed this crime. (p. 33 TR)

During cross-examination by Pam's counsel, (p. 46TR), Howard Sanders testified the shorter person was wearing a greenish-type shirt, T-shirt. Yet, the shirt taken from the home of Grisby was never identified as the shirt allegedly worn by the perpetrator.

During direct testimony, Howard Sanders testified that he noticed no other characteristics other than height about the perpetrators other than their height except the shorter one discharged his weapon in the house. (p.33,34 TR)

David Whitehead, a forensic scientist with the Mississippi Crime Laboratory in Jackson, Mississippi testified that he tested two gunshot residue evidence collection kits; one coming from Ellis Grisby and one coming from Joby Pam. Both kits were negative for the presence of gunshot residue. (p. 248-252, TR)

The prosecution offered the testimony of three young people; Jake Winder, Jr., Alfred Seals, and Ken Vallery. (P. 97-181 TR)

These young people testified they were playing football outside Ken Vallery's house on the day of the incident involving Howard Sanders. This house was near was near the house belonging to Howzard Sanders, (Exhibit 1) They testified that they saw Joby Pam and Ellis Grisby, together, immediately before the gunshot was heard.

It is inconceivable that if Joby Pam is not guilty and Ellis Grisby is guilty; one would have to believe that Grisby separated from Pam and was with someone else who fit Pam's description and then committed the robbery. An explanation can be found with the manner the jury was instructed.

It is impossible to separate the proposition that the evidence was insufficient to find Pam not guilty, yet Grisby guilty beyond a reasonable doubt.

In the case U.S.vOnick, 889 F.2d 1425, 2428 (5th Cir. 1989).

> "If a reasonable jury would doubt whether the evidence proves an essential element, we must reverse."

In the case Clark v. Procunier, 755 F.2d 394, 396 (5th Cir. 1985).

> "If the evidence viewed in the light most favorable to the prosecuiton gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of of the crime charged, then, a erasonable jury must necessairly entertain a reasonable doubt."

In the case Cosby v. Jones 682 F.2d 1373, 1379 (11th Cir. 1982).

> "The standard for weighing the constitutional sufficiency of the evidence is set forth in Jackson v. Virginia."

> "The applicant is entitled to habea corpus relief if it is found upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. 443 US at 324, 99S.Ct. at 2791."

> "we are to "view the evidence in the light most favorable to the prosecution," and, "all of the evidence is to be considered." standard Ulster, supra, 442 US at 166, 99 S.Ct. at 2229."

"How much stringent is uncertain, but it is at least clear that if the reviewing court is convinced by the evidence only that the defendant is more likely than not guilty, then the evidence is not sufficient for conviction."

CONCLUSION

The appellant submits the jury was not properly instructed. It was error to instruct the jury (D-7) out of sequence. Thus, the conviction of Ellis Grisby should be reversed.

The contradiction evidenced by the jury's inconsistent verdicts is to troubling to let the conviction of Ellis Grisby stand, thus, his conviction should be reversed.

Respectfully submitted, this the 8 day of January, 2010.

Stephen Nick

Stephen Nick

CERTIFICATE

I, Stephen Nick, do hereby certify that I have this day mailed a true and correct copy of the foregoing, postage prepaid, to the following persons:

Mr. Jim Hood
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Judge Margaret Carey-McCray
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This the 8 day of January, 2010.

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