

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIE L. WILLIAMS, JR.

APPELLANT

VS.

NO. 2009-KA-0080-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On November 12-14, 2008, Willie L. Williams, Jr. "Williams," was tried before a Sunflower County jury for attempted armed robbery. Williams was represented by Mr. Rosharwin Williams. R. 1. Williams was found guilty and given a sentence of fifteen years with ten years suspended in the custody of the Mississippi Department of Corrections. R. 193.

From that conviction and sentence, Williams appealed to the Mississippi Supreme Court. C.P. 144-145.

ISSUES ON APPEAL

I.

WAS THE JURY PROPERLY INSTRUCTED?

II.

WAS CLOSING ARGUMENT PROPERLY CONDUCTED?

STATEMENT OF FACTS

On August 21, 2007 , Mr. Williams, Mr. Montreal Veal and Mr. Terrance Young were indicted by a Sunflower County Grand jury for attempted armed robbery of Stephanie's Discount Store on March 22, 2007. C.P. 10.

On November 12-14, 2008, Williams was tried before a Sunflower County Circuit Court jury for attempted armed robbery, the Honorable Richard A. Smith presiding. Williams was represented by Mr. Rosharwin Williams. R. 1.

Prior to trial, Williams gave notice of an alibi defense. R. 3. Alleged accomplices Veal and Young admitted to law enforcement their involvement in the alleged attempted armed robbery, and agreed to testify for the prosecution.

Pre-trial jury instructions were filed by the prosecution and defense. Among these instructions was jury instruction D-9. This was an instruction on the jury's responsibility to evaluate for credibility "of a witness or witnesses" who had any testimonial inconsistencies. This would be inconsistencies between their testimony with any prior statements about the facts at issue. C.P. 98.

Ms. Stephanie Canon testified that she was the owner of Stephanie's Discount Store. She had been in business in Ruleville for some nine years. R. 47. On March 22, 2007, she was at her store using her computer. At that time a young man entered and asked about some specific clothing sizes. Shortly after he entered, Ms. Canon saw a masked man with a gun enter through the front door. His face was covered with a white t-shirt. The gun was pointed at Ms. Canon. R. 47.

Ms. Stephanie Canon responded quickly. She "grabbed" her gun which was on standby. R. 48. She fired shots in the gunman's direction. He fled. Stephanie noticed the gunman dropped his gun. When she went to retrieve it, someone came back inside her shop. She "shot him." R. 49. This young man ran across the street bleeding. R. 50. She then called 911.

Mr. Montreal Veal testified that he was seventeen at the time of trial. R. 67. Veal identified "Little Mac," Williams, as the person to whom he was referring to in his testimony. R. 68. On March 22, 2007, Veal testified that Williams called him to his house. Mr. Terrance Young was also present. Williams wanted "to hit this lick." R. 70.

Veal identified S-1 as the hand gun that Williams took with him when he entered the store. R. 72-73. He saw Williams drop the gun when the store owner fired her hand gun in his direction. R. 73-74. He saw Young attempt to retrieve it. R. 74. Veal then saw Young run behind a house and fall down. He was "losing a a lot of blood." R. 74.

Alleged accomplice Mr. Terrance Young also testified for the prosecution. Young identified Williams as the person to whom he was referring in his testimony. R. 84. Young testified that Williams borrowed his hand gun. He did so because "he knew a lick we could hit." R. 86. Young testified that Veal was also present when Williams proposed this robbery. Young identified S-1 as his hand gun. It was dropped by Williams when the store owner shot at him. Young testified that when he went back to get his hand gun, he was shot in the stomach. R. 91.

Captain Amos Mitchner with the Ruleville Police Department testified that he received a call about an attempted robbery. He went to the scene, Stephanie's Discount Store. There he retrieved two hand guns. State's exhibit 1 was identified as the hand gun found on the floor at Stephanie's Discount Store. R. 56.

Officer Mitchner also testified to finding Mr. Young. He was near the store. He was bleeding from a bullet wound in his stomach. After talking to Young, Mitchner determined that there were three suspects in the case, Williams, Young and Veal. R. 59.

The trial court denied a motion for a directed verdict. R. 107.

Mr. Williams testified in his own behalf. R. 109-121. Williams testified that he was at his

home at the time of the attempted robbery. He was outside his home with Ms. Cherokee Cox. R. 121. He testified that Young and Veal had come to his house looking for money so they could use their car.

Williams testified that he was not at the scene of the crime, and had no involvement in it.

During closing argument, the prosecution argued that the accomplices had accepted responsibility for their involvement in the armed robbery. R. 128-134. Their testimony provided corroboration for the prosecution's account of what happened at the scene of the attempted armed robbery. On the other hand, Williams had no corroboration for his alibi testimony. There was no testimony from Cox who he was allegedly with Williams at the time of the attempted robbery, and shooting. R. 133.

There was no objection during closing argument to the prosecutor's mentioning of Cox as a possible witness. R. 133.

The trial court granted jury instruction D-9. C.P. 132. This was an instruction about the jury's responsibility to evaluate the believability of accomplice Veal's testimony. Any inconsistencies with his prior statements about his and Williams' involvement in the crime were for the jury to evaluate along with the testimony of all the other witnesses.

The trial court modified Williams' own pre-filed jury instruction, D-9. C.P. 98. It was modified by substituting accomplice's Montreal Veal's name for the words, "witness or witnesses," in that original instruction. R. 126.

The trial court also granted a general instruction on the jury's responsibility to evaluate the credibility of all witnesses who testified, which included Williams and accomplice Veal and Young. C.P. 119-122.. They were also given a separate instructions on criteria for evaluating identification testimony. C.P. 125-126.

Williams was found guilty. R. 142. He was given a separate sentencing hearing.

The trial court heard testimony from the victim, as well as Williams, and his family. R. 147-195.

After the hearing, Williams was given a fifteen years with ten years suspended sentence in the custody of the MDOC. R. 193.

From that conviction, Williams appealed to the Mississippi Supreme Court.

C.P. 144-145.

SUMMARY OF ARGUMENT

I.

THE ISSUE WAS WAIVED. AND THE JURY WAS PROPERLY INSTRUCTED.

The record reflects that this issue was waived for failure to object. R. 125-127. **Davis v. State**, 568 So. 2d 277, 279 (Miss. 1990). In addition, the jury was properly instructed. Jury instructions need not be redundant. The jury was given an instruction on their responsibility to evaluate the credibility of accomplice's Veal's testimony. C.P. 132. They were also given other instructions on their responsibility to evaluate the credibility of all witnesses, and to determine the facts as instructed by the trial court. C.P. 119-122.

The appellee would submit that this issue was not only waived but was also lacking in merit.

II.
THIS ISSUE WAS WAIVED. AND CLOSING ARGUMENT WAS PROPERLY CONDUCTED.

This issue was waived for failure to make a contemporary objection. R. 126-127. **Whigham v. State**, 611 So. 2d 988, 995 (Miss. 1995). The record also reflects that closing argument was properly received. R. 128-139. Williams provided notice of an alibi defense. R. 3. Williams testified that he was not at Stephanie's discount store. He was not involved in any armed robbery. He was supposedly at his home with a friend named Cherokee Cox. R. 121.

The prosecution argued that the alleged accomplices Veal and Young had admitted their responsibility for the crime. Their testimony provided partial corroboration based upon other testimony and exhibits in the record. They provided support for Williams' conviction based on the role he played in the attempted robbery. However, Williams' defense provided no evidence in support of his supposedly being with Ms. Cox at the time of the crime.

Arguments about the failure of a defendant to put on a successful defense is appropriate is where there is support in the record. **Shook v. State**, 552 So. 2d 841, 851 (Miss. 1989).

And the appellee would submit that Ms. Cox was more accessible to Williams than she was to the prosecution. **Ross v. State**, 603 So.2d 857, 864 -865 (Miss. 1992).

ARGUMENT

PROPOSITION I

THIS ISSUE WAS WAIVED. AND THE JURY WAS PROPERLY INSTRUCTED.

Williams argues that the trial court erred in not granting him an accomplice instruction. Williams's appeal counsel believes the testimony of accomplice Montreal Veal was contradictory and inconsistent over time, and there was no other evidence against Williams. The victim did not identify him. He argues that Williams should have been given a jury instruction informing the jury that Veal's testimony should be viewed with "great caution and suspicion." Appellant's brief page 5-9.

To the contrary, the appellee would submit that this issue was waived for failure to object to the relevant instructions that were granted. R. 125-127. **Barnett v. State**, 563 So. 2d 1377, 1380 (Miss. 1990).

The record reflects that not only was this issue waived, but that it is also lacking in merit. The record reflects that Williams' proposed jury instruction D-9 was given as modified. It specifically dealt with the jury's responsibility to evaluate any inconsistencies in accomplice Mr. Veal's testimony. C.P. 132. As stated in that instruction:

The testimony of Montreal Veal may be discredited or impeached by showing that on a prior occasion he made a statement which is inconsistent with or contradictory to his testimony in this case. In order to have this effect, the inconsistent or contradictory prior statement must involve a matter which is material to the issues in this case. The prior statement of Montreal Veal can be considered by you only for the purpose of determining the weight or believability that you give to the testimony of Montreal Veal. You may not consider the prior statement as proving the guilt of innocence of the defendant. C.P. 132.

In addition, the record indicates that other jury instructions were given that dealt with the jury's responsibility to evaluate the credibility of any witnesses that testified in this case. C. 1. C.P.

119-123. The jury was given a separate instruction on their responsibility to evaluate identification testimony indicating that Williams was the person who was involved in the attempted robbery at Stephanie's Discount Store on March 22, 2007. C.P. 125-126.

In **Davis v. State**, 568 So. 2d 277, 279 (Miss. 1990), the Supreme Court stated that the trial court is not required to grant several instructions on the same issue.

This Court has repeatedly held that failure to object to a jury instruction constitutes a waiver. See, e.g., **Barnett v. State**, 563 So. 2d 1377, 1380 (Miss. 1990); **Watson v. State**, 483 So. 2d 1326, 1329 (Miss. 1989).... see, e.g. **Ragan v State**, 318 So. 2d 879, 882 (Miss. 1975)(“The trial court is not required to grant several instructions on the same question in a different verbiage.”)

In **Clemons v. State**, 952 So.2d 314, 318 (Miss. App.2007), the court found that the trial court did not abuse its discretion in denying an accomplice's instruction. The Court stated that under certain circumstances a trial court could be found to have abused its discretion in denying such an instruction. This would be in situations where the evidence rested solely on the testimony of the accomplice and it was unreasonable, impeached and/or inconsistent.

Clemons argues that Welch was an accomplice in the murder. The granting of a cautionary instruction regarding the testimony of an accomplice witness is discretionary with the trial court. **Burke v. State**, 576 So.2d 1239, 1242 (Miss.1991). There is a two-part test to determine whether a trial judge abused his discretion in these situations. *Id.* at 1242. First, it must be determined if the witness was in fact an accomplice and, second, if the testimony was without corroboration. *Id.* A cautionary instruction is warranted when the testimony of an accomplice is “unreasonable, self contradictory or substantially impeached.” **Ballenger v. State**, 667 So.2d 1242, 1253 (Miss.1995). The trial court abuses its discretion when the State's evidence rests solely upon the testimony of an accomplice and there is some question as to the reasonableness and consistency of the testimony, or the defendant's guilt is not clearly proven. **Green v. State**, 456 So.2d 757, 758 (Miss.1984).

In **Ballenger v. State** , 667 So.2d 1242, 1253 (Miss. 1995), the Mississippi Supreme Court affirmed Ballenger's conviction where “the only real incriminating evidence against Ballenger” was the testimony of his two accomplices, Mac and Ritter.

While it is true that the only real incriminating evidence against Ballenger is the testimony of Mac and Ritter, that is enough to sustain a conviction. In **Flanagan v. State**, 605 So.2d 753 (Miss.1992), this Court discussed the weight of a co-conspirator's testimony as follows:

Generally, the law in Mississippi is that a co-conspirator's testimony is enough to sustain a conviction, **Doby v. State**, 532 So.2d 584, 591 (Miss.1988); **Ragland v. State**, 403 So.2d 146, 147 (Miss.1981); **Jones v. State**, 381 So.2d 983 (Miss.1980) citing **Lifer v. State**, 189 Miss. 754, 199 So. 107 (1940). See also **Mason v. State**, 429 So.2d 569, 571 (Miss.1983) where this Court held:

[T]he uncorroborated testimony of an accomplice may be sufficient to convict an accused. Where there is slight corroborative evidence, the accomplice's testimony is likewise sufficient to sustain the verdict. 429 So.2d at 571.

However, the general rule is inapplicable in those cases where the testimony is unreasonable, self contradictory or substantially impeached. **Mason**, at 571. **Flanagan**, 605 So.2d at 757-58.

The appellee would submit that the accomplices' testimony in the instant cause was not "unreasonable, self contradictory or substantially impeached." Rather, there was independent corroboration from law enforcement and the victim about certain relevant and material facts. There was independent testimony indicating that a hand gun and two t-shirts were left at scene. R. 55; 64. Likewise, there was independent testimony indicating that Mr. Young was found near the scene bleeding from a gunshot wound, and incapacitated by a shot to his stomach. R. 58.

There was corroboration from Ms. Canon that the person she shot had returned to her front door. He returned to her surprise after she had fired at the masked person who entered her door with a handgun pointed at her. R. 49-50. This independently corroborated Young's testimony that he was shot when he went to get his gun-the same gun Williams dropped on the floor. R. 91.

Mr. Young corroborated that the hand gun recovered by law enforcement was his hand gun. R. 86. This was the gun he allegedly loaned to Williams prior to the attempted robbery.

Therefore, there was independent corroboration of some basic crucial facts. This was without the testimony of Young and Veal. When their testimony was added, it provided a basis for finding, consistent with their testimony, that Williams was the gunmen. He dropped the gun when

Cannon fired in his direction with her hand gun.

The record also reflects that Young admitted in his testimony that he initially provided an account of what occurred that was inconsistent with his testimony. R. 76-81. He did so out of fear and an attempt to avoid responsibility for the role he played in the attempted robbery. R. 79. However, in his testimony, he admitted more fully and comprehensively the role he played in supplying the gun to Williams and then assisting him as a diversion at the targeted store. R. 67-82.

Therefore, the appellee would submit that there is a lack of evidence that Veal's testimony was unreasonable, self contradictory or substantially impeached. There was no need for the cautionary instruction warning jurors to view his testimony "with great caution and suspicion."

The appellee would submit that this issue was not only waived, it was also lacking in merit.

PROPOSITION II

THIS ISSUE WAS WAIVED. AND CLOSING ARGUMENT WAS PROPERLY RECEIVED.

Williams argues that the trial court erred in failing to grant a mistrial sua sponte during closing argument. Even though there was no objection, Williams argues that the prosecution's commenting on the failure of Williams to call Cherokee Cox to testify in his own behalf denied him a fair trial. He believes this was "plain error." Since Williams presented an alibi defense about his being at home allegedly with Ms. Cox, he believes the prosecutors' comments distracted the jury from his defense. Appellant's brief page 9-11.

To the contrary, the record reflects that this issue was waived for failure to make an objection. R. 133. This issue was also not raised in William's motion for a new trial. C.P. 140-142.

In **Whigham v. State**, 611 So. 2d 988, 995 (Miss. 1995), this Court stated that where there is no contemporaneous objection to the state's closing argument, the issue is waived.

Counsel for the first time on appeal complains that the closing argument of the State commented upon Whigham's failure to testify. It is, of course, incumbent upon counsel at trial to make a contemporary argument, and also in his motion for a new trial, failing in which the error is waived. **Dennis v. State**, 555 So. 2d 679 (Miss. 1989); **Dunaway v. State**, 551 So. 2d 162 (Miss. 1989)...

The record reflects that this issue was not only waived but was also lacking in merit. During closing argument, the prosecution argued that accomplices Veal and Young had supported the prosecution's account of what had occurred. R. 129-133; 137-139. They had both decided to accept responsibility for their involvement in the attempted armed robbery.

Williams had testified that he was not involved in any way in the attempted armed robbery. R. 109-121. He also testified that he was with Ms. Cherokee Cox at the time of the crime. The prosecution pointed out that while there was some corroboration in support of the prosecution

witnesses' testimony, there was no corroboration of Williams' alibi in evidence. R. 133.

On cross examination, Williams testified that he was not at the scene of the crime, and had no involvement in it. He was allegedly at home. He remembered being outside and seeing Cherokee Cox at the time. R. 109-122.

Q. Did you participate in this armed robbery of Stephanie's Discount Store?

A. No, sir, I did not.

Q. Were you present?

A. No, sir. R. 114.

...

Q. What were you wearing that day, Mr. Williams?

A. As I recall I had on some shorts and some socks and no shirt.

Q. So, it is your testimony that you weren't there and you could see Cherokee Cox.?

A. Yes, sir, because I was outside. R. 121. (Emphasis by appellee).

In addition, the record reflects that the alleged two accomplices admitted to being involved in the attempted robbery. R. 67-104. They both admitted to having told law enforcement what happened. They corroborated each other in testifying that Williams left the hand gun he used at the scene of the attempted robbery. R. 72; 86. Williams dropped it when Stephanie Canon, the store owner, shot in his direction. Accomplice Young admitted that he was shot in the lower stomach. Young corroborated Ms. Canon's testimony in admitting that he was shot when he reentered the store to retrieve his handgun. R. 49; 91.

Both Young and Veal testified under oath that they were asked by "Little Mac," Williams, to aid him in an armed robbery. They learned that he wanted to rob Stephanie's Discount Store. R. 70; 86. Williams asked to borrow Young's gun in order to rob the store. R. 86. Both Young and

Veal identified Williams as the person who asked for their assistance in robbing the store. R. 68; 84. Young admitted that State's exhibit S-1 was the hand gun that Williams had at the store. R. 86. This was the gun Young went to retrieve after Williams dropped it. R. 86.

Young and Veal also both testified that Williams was wearing a t-shirt with holes cut for eyes as a disguise. R. 72; 89. Stephanie Canon, the victim, corroborated them by testifying that the person holding the gun in the store had a t-shirt over his face. R. 48. Stephanie corroborated Veal in testifying that the first young man in the store asking about merchandise did not have on any disguise. R. 47; 71.

Officer James Lewis Ward with the Ruleville police department testified that he found a hand gun, state's exhibit 1, inside the door at Stephanie's store. R. 40. Ward also corroborated Ms. Canon by testifying that there was a trail of blood leading out of the store to a location across the street. This was where Young was found with a bullet wound. R. 39; 55. Two t-shirts were recovered at the scene. This corroborated Canon's testimony that the would be robber had his face covered by a t-shirt. R. 62. One of the two t-shirts was white and it had holes cut in it for eyes if it pulled over someone's head. R. 64. This corroborated Ms. Canon who testified that the t-shirt covering the gunman's face was white. R. 48.

In **Morgan v. State**, 793 So.2d 615, 617 (Miss. 2001), the Supreme court found that unless there were errors so egregious as to result in a fundamental miscarriage of justice they would not be considered plain error.

In **Ross v. State**, 603 So.2d 857, 864 -865 (Miss. 1992), the Supreme Court found that references in closing argument to Ross's failure to call a witness allegedly with him at the time of crime was not a violation of his right to a fair trial. In that case, the issue was not waived, since there was a contemporaneous objection during closing argument.

Given this alibi and Ross's relation to the absent witness, the state appropriately argued the logical inference that, but for Ricky Ross's inability to corroborate his defendant brother's testimony, he would have taken the stand. The fact that the state could have subpoenaed Ricky Ross is irrelevant. By the reasoning in **Brown**, (27 So. 2d. 838, 841 (1946)), Ross's brother stood in a "community of personal interest" with Ross such that he cannot be considered to have been equally available to the state.

In **Shook v. State**, 552 So. 2d 841, 851 (Miss. 1989), the Court found that the prosecutions' comments in closing about the lack of a defense would not be considered a comment upon a defendant's failure to testify.

Moreover the State is entitled to comment on the lack of any defense, and such a comment will not be construed as a reference to a defendant's failure to testify by 'innuendo and insinuation.' *Id.* (citing **Wilson v. State**, 433 So. 2d 1142, 1146 (Miss. 1983)). The comments in the case at bar are comments on the defense presented, or lack thereof, and not comments on the failure to testify. Therefore, this part of the appellant's assignment is denied.

In **Dunaway v. State**, 551 So. 2d 162, 163-164 (Miss. 1989), the Court stated that prosecuting attorneys are entitled to great latitude in framing closing argument.

The right to argument contemplates liberal freedom of speech and range of discussion confined only to bounds of logic and reason; and if counsel's argument is within limits of proper debate, it is immaterial whether it is sound or unsound or whether he employs wit, invective, and illustration therein. Moreover, figurative speech is legitimate if there is evidence on which it may be founded. Exaggerated statements and hasty observations are often made in the heat of the day, which, although not legitimate, are generally disregarded by the court, because in its opinion they are harmless. There are, however, certain well established limits beyond which counsel is forbidden to go. He must confine himself to the facts introduced in evidence and to the fair and reasonable deduction and conclusions to be drawn therefrom and to the application of the law, as given by the court, to the facts.

The appellee would submit, as shown by cites to the record, that the prosecutor's closing argument was about facts in evidence and inferences from those facts. It was an argument about the corroboration in the record for the prosecution's case, and the lack of any corroboration for Williams' alibi defense to the charge.

The appellee would also submit that in this case the witness mentioned was more accessible

to Williams than she was to the prosecution.

This issue was not only waived, but it was also lacking in merit.

CONCLUSION

Williams' armed robbery conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in cursive script, appearing to read "W. Glenn Watts", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 31st day of July, 2009.



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