

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DONOVAN ERIC JOHNSON

APPELLANT

VS.

NO. 2009-KA-0711

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The trial court correctly denied Johnson's Motion for New Trial.
- II. The trial court correctly granted Instruction S-1.
- III. The Trial Court correctly admitted State's Exhibits S-3 through S-8.

STATEMENT OF THE CASE

On or about February 3, 2009, the Grand Jury of Attala County indicted Donovan Johnson on three counts of sale of cocaine. (C.P. 1) On March 19, 2009, Johnson was tried on Counts II and III and was convicted of two counts of sale of cocaine. Johnson was sentenced to a term of 25 years in the Custody of the Mississippi Department of Corrections in Count II. He was sentenced to a term of 25 years in the Custody of the Mississippi Department of Corrections in Count III, to be served concurrently with the sentence in Count II. (Tr. 170) Count I was dismissed. (Tr. 170)

STATEMENT OF THE FACTS

Testimony of Officer Louis Gowan

Officer Louis Gowan testified that he is a corporal with the Kosciusko Police Department. He and Officer Bobby Land conducted multiple buys on January 23, 2008. (Tr. 52) They enlisted a confidential informant, Laci Gove, to buy narcotics from Donovan Johnson. (Tr. 52). The officers gave Ms. Gove marked money to purchase the drugs. They did a complete pat down of Ms. Gove and had her empty all her pockets. Officer Gowan searched her vehicle as well. He did not find any narcotics or weapons on Ms. Gove or in her vehicle. (Tr. 53)

The officers equipped Ms. Gove with a video camera which they placed inside her makeup bag. They initiated the camera and put Ms. Gove into her car. Before she left, Officer

Land went to the Monfort Jones Memorial Hospital parking lot, directly across from Donovan Johnson's house. The hospital is less than 100 yards from Johnson's house and the officer had a good, clear view with no blockage. (Tr. 54) Officer Gowan followed Ms. Gove to Johnson's house at 429 Peachtree Street. She turned into Johnson's driveway and Officer Gowan went straight across the highway and pulled into the parking lot beside Officer Land. (Tr. 55) Officer Gowan testified that he followed Ms. Gove all the way to the driveway and never lost sight of her. He pulled across the highway. Robert Land also had her in his sight at that time. (Tr. 55)

Officers Gowan and Land observed Ms. Gove get out of the vehicle, go into Johnson's house. Officer Gowan testified that Ms. Gove was in the house for a few minutes and came back out and went to her car. (Tr. 56) They observed her leaving the house, getting into the car, and backing out of the driveway. Gowan followed her back to the police station in his vehicle and never lost sight of her. (Tr. 56) She handed him a small bag of cocaine. (Tr. 57) Officer's Land and Gowan sealed the bag and sent it to the crime lab. (Tr. 57)

Officer Gowan testified that Ms. Gove made a second buy later that day. The process was the same. He patted her down, searched her car and gave her marked money. (Tr. 59) They initiated the video equipment, but it malfunctioned during the second buy. (Tr. 59) They followed Ms. Gove to Peachtree and never lost sight of her. Officer Robert Land, again parked at the Monfort Jones Memorial Hospital parking lot was visualizing the house at all times. (Tr. 59) Ms. Gove did not go into the house. Mr. Johnson came out and the two had a conversation at her car. Johnson left and Ms. Gove backed out of the driveway. Officer Gowan then followed Ms. Gove back to the police department. He took possession of the cocaine she had purchased, bagged it and sealed it and sent it to the crime lab. (Tr. 61)

Testimony of Officer Robert Land

Officer Land testified that on January 23, 2008, he was working with Officer Gowan doing drug buys. (Tr. 74) Officer Land testified that Officer Gowan gave Ms. Gove \$40 to make the buy. Officer Land testified that he was instructed to go to the Monfort Jones Memorial Hospital. (Tr. 75) Officer Land watched Johnson's house from that vantage point. He waited a few minutes and saw Ms. Gove's vehicle with Officer Gowan following behind her. (Tr. 76) Ms. Gove turned into Johnson's driveway. She got out of her car and went into the house. She was in there a few minutes and then Mr. Johnson followed her back out to the car. Officer Land observed the events with binoculars. (Tr. 76) Ms. Gove left Johnson's house and Officer Gowan followed her back to the police department. Officer Land remained at the location until Officer Gowan called him to come back up to the police station. (Tr. 77)

Officer Land testified that they made a second buy that day. The second buy occurred in the same manner as the first. Officer Land observed from the Monfort Jones Memorial Hospital Parking Lot. (Tr. 77) He observed Ms. Gove pull into Johnson's driveway. Johnson came out to her vehicle. He was at her vehicle for a minute or two and then Ms. Gove pulled out of the driveway. (Tr. 77) Officer Land remained in his position until Officer Gowan called him back to the police station.

Testimony of Laci Gove

Ms. Gove testified that she met with Officer Gowan on at around 9:00 or 9:30 on January 23, 2008 in order to make a buy of cocaine from Johnson. (Tr. 81) Ms. Gove testified that Officer Gowan patted her down and searched her car. Ms. Gove testified that Officer Gowan gave her \$40 to make the buy. (Tr. 82) She testified that Officer Gowan put a camera in her

makeup bag and followed her to Johnson's house. (Tr. 82) Ms. Gove testified that she went into Mr. Johnson's house and they talked a bit. She gave him the money and he gave her the cocaine. They hugged and said goodbye. (Tr. 83) Ms. Gove left and went back to meet with Officer Gowan at the Police Station. (Tr. 83) Officer Gowan told her she needed to make one more buy and she agreed to make the buy. (Tr. 83)

Ms. Gove identified the bag of cocaine she purchased from Johnson. (Tr. 83) Ms. Gove identified State's exhibits 3-8 as pictures of Johnson taken at his house on January 23, 2008 at the time she was making the buy for Officer Gowan. (Tr. 84) Ms. Gove identified State's Exhibit 3 as a picture of Johnson outside as she was getting out her car. She identified State's Exhibit 5 as a picture of Johnson in his living room as they were talking about making the deal. She identified State's Exhibit 6 as a picture of Johnson in his living room reaching in his pocket to get the cocaine. (Tr. 86) She identified State's Exhibit's 7 and 8 as Johnson in his living room opening the bag of cocaine. (Tr. 87) Ms. Gove also identified the video recording as an accurate depiction of the drug deal. (Tr. 88)

Ms. Gove testified that after the first buy she went to pick up her dog from the vet. She then went to meet with Officer Gowan again and made the second buy. Ms. Gove testified that she had \$40 given to her by Officer Gowan to make the second buy and that on the second buy she did not go into Johnson's house. She gave the money to Johnson in exchange for cocaine, left his house and then went to meet with Officer Gowan. She gave Officer Gowan the cocaine Johnson had given her. (Tr. 92) Ms. Gove then identified the second bag of cocaine she bought from Johnson. (Tr. 92)

Ms. Gove testified that she agreed to be a confidential informant because her ex-

boyfriend convinced her to sell xanax bars for him and she was caught and arrested. She agreed to make the cocaine buys in order to help her out on her pill charges. (Tr. 93)

Testimony of Donovan Johnson

Donovan Johnson testified that he was the individual shown in State's Exhibit's 3-8. He testified that the object in the baggie was not cocaine, but was an inhaler he used for his breathing treatments. He testified that while Laci Gove was at his house, he was in the process of preparing to take a breathing treatment. He testified that Laci Gove came to his house twice on January 32, that she came in the house to visit the first time she came by and that she stayed in the driveway in her car the second time she came by. He denied selling cocaine to Ms. Gove.

SUMMARY OF THE ARGUMENT

Viewing the evidence in the light most favorable to the verdict, there was no abuse of discretion in the trial court's denial of the motion for new trial as the evidence supported the verdict. The evidence shows that Johnson sold drugs to Laci Gove and received money in exchange for the drugs. Officers Gowan and Land, as well as Laci Gove testified that Ms. Gove bought cocaine from Johnson on January 23, 2008. The substance recovered was tested by the Mississippi Crime Lab and proved to be cocaine. The first buy was filmed and Johnson is clearly identifiable in the video and the still shots extracted from the video. He is shown handling a ziplock bag containing an irregularly shaped rock. Although, he denies selling Gove the cocaine, Johnson testified that he is the man depicted in the video recording and the pictures which show him holding the ziplock bag and its contents. Laci Gove testified that she gave him \$40.00 in exchange for the cocaine. He took the cocaine out of his pocket and then removed it from the ziplock bag and gave it to her in exchange for the money. The weight of the evidence supported

the verdict and, examining the evidence in the light consistent with the verdict, allowing the verdict to stand does not sanction an unconscionable injustice.

Johnson did not offer a specific objection at trial for State's Instruction 1. Further, even if constituted an objection specific enough to preserve the issue for appeal, Johnson acquiesced to the trial court's explanation regarding the instruction to the jury to disregard anything that was not offered into evidence, and, therefore, as a practical matter, withdraws her objection. (Tr. 132) A "party's failure to object to jury instructions at trial procedurally bars the issue on appeal."

Johnson never objected pursuant to M.R.E. 901(a) at trial. The complete objection at trial was, "There's been testimony today that this all took place at two o'clock in the afternoon, and that's not what these pictures reflect. It is inaccurate information." (Tr. 85) The Mississippi Supreme Court has stated that "[c]ounsel must make specific objections in order to preserve a question for appellate review. This Court has said many times that general objections will not suffice. Objections to the admissibility of evidence must specifically state the grounds; otherwise, the objection is waived." Seeling v. State, 844 So.2d 439, 445 (Miss. 2003). There was no objection made at trial pursuant to Mississippi Rule of Evidence 901(a), therefore this issue is procedurally barred. Notwithstanding the procedural bar, this issue lacks factual support in the record, as Laci Gove clearly authenticated State's Exhibits 3-8.

ARGUMENT

I. The trial court correctly denied Johnson's Motion for New Trial.

The Mississippi Court of Appeals has held:

When reviewing the denial of a motion for new trial based on an

objection to the weight of the evidence, this Court will only reverse 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. Bush v. State, 895 So.2d 836, 844 (Miss.2005). In making our determination, this Court is required to view the evidence in the light most favorable to the verdict; we will grant a new trial “only in exceptional cases in which the evidence preponderates heavily against the verdict.” Id. However, in considering whether the evidence is legally sufficient to sustain a conviction in the face of a motion for [a] JNOV, our inquiry is “whether the evidence shows ‘beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed.’ ” Id. at 843 (quoting Carr v. State, 208 So.2d 886, 889 (Miss.1968)). The critical question in dealing with such an issue is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id. We will deem the evidence sufficient if the evidence against the defendant is such that “reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense.” Id.

Dixon v. State, 953 So.2d 1117, 1121 (Miss.Ct.App.2006).

In this case, Johnson was indicted for the sale of cocaine, which required the State to prove that Johnson did willfully, unlawfully, feloniously, and knowingly sell and deliver a controlled substance in violation of Mississippi Code Annotated section 41-29-139(a)(1). Johnson testified that he was in fact the man depicted in the video recording. Viewing the evidence in the light most favorable to the prosecution, the video recording and testimony of the crime lab technician, Officers Gowan and Land and confidential informant Laci Gove are sufficient evidence of the sale of cocaine.

Johnson contends that the verdict is against the overwhelming weight of the evidence and that he is entitled to a new trial. This argument is without merit. The evidence proves that

Johnson sold drugs to Laci Gove and received money in exchange for the drugs. Johnson testified that he is the man depicted in the video recording and the pictures which show him holding a ziplock bag containing a rock of cocaine. Laci Gove testified that she gave him \$40.00 in exchange for the cocaine. He took the cocaine out of his pocket and then removed it from the ziplock bag and gave it to her in exchange for the money.

Johnson argues that Gove's testimony was not credible because prior to trial she did not admit to his friend and his lawyer that she was going to testify against him at trial. The two instances were unsworn. Further, the credibility of a witness is a question for the jury to decide. Williams v. State, 923 So.2d 990 (Miss. 2006) (citing Pearson v. State, 428 So.2d 1361, 1363 (Miss.1983)). “[T]he credibility of witnesses is not for the reviewing court.” Webster v. State, 817 So.2d 515, 519 (Miss.2002) (quoting Gathright v. State, 380 So.2d 1276, 1278 (Miss.1980)). It is up to the jury to decide what parts of the witnesses' testimonies to accept or reject as credible. *Id.* Based on the verdict, the jury obviously determined that Gove was a credible witness.

Johnson further argues that Officer Gowan's search of Laci Gove left opportunities for her to secrete drugs on her person and in particular he argues that she may have hidden drugs inside her makeup tube in order to frame Johnson for the sale of cocaine. Johnson testified that he patted down Gove and checked her car for drugs. He further testified that he and Officer Land had her in their sight until she was in Johnson's presence and went into his house. There was not indication on the tape of Gove ever taking the time to reach for a hidden packet. The jury clearly did not find defense counsel's suggestion that Gove had secreted the drugs on her person sufficient to create a reasonable doubt.

In *Ricks v. State*, 1 So.3d 943, 946 (Miss.Ct.App. 2009), Ricks argued that Williams, a confidential informant with a police record, obtained the cocaine elsewhere, and that Williams was attempting to frame him in order to help Williams escape prosecution for charges that he had pending. Ricks also pointed to the fact that the video did not show money exchanging hands. The Court of Appeals held:

The jury has the responsibility to weigh and consider the credibility of witnesses and any conflicting evidence. *Neal v. State*, 451 So.2d 743, 758 (Miss.1984). “When an informant testifies in open court and his background is thoroughly explored, it is up to the jury to assess his credibility.” *Mallard v. State*, 798 So.2d 539, 543 (Miss.2001) (citing *Clayton v. State*, 582 So.2d 1019, 1021 (Miss.1991)). The testimony by the two agents from the Mississippi Bureau of Narcotics corroborated Williams's testimony regarding the purchase of cocaine on August 25, 2005. In addition, the jury was also able to view the video evidence of the transaction.

Ricks v. State, 1 So.3d 943, 946 (Miss.Ct.App. 2009)

The court in *Ricks*, viewing the evidence in the light most favorable to the verdict, found no abuse of discretion in the trial court's denial of the motion for new trial as the evidence supported the verdict and affirmed the conviction. *Ricks v. State*, 1 So.3d 943 (Miss.Ct.App. 2009)

Examining the evidence in the light consistent with the verdict, allowing the verdict to stand does not sanction an unconscionable injustice. Therefore, this issue is without merit.

II. The trial court correctly granted Instruction S-1.

State's Instruction S-1, given at trial as Instruction No. 3, provides as follows: “[t]he defendant, Donovan Eric Johnson, has been charged in Counts Two and Three of the Indictment with the crimes of Sale of Cocaine.” The indictment then enumerates and details Count II and

Count III, both for sale of cocaine. There is no "Count I" mentioned or described in the instruction.

At trial, the following colloquy occurred during the consideration of instructions:

By the Court: . . . [h]as the defense had an opportunity to look at S-1?

By Mrs. Jordan: I have, your Honor. As – as far as the language, in and of itself, I don't have an issue. But the problem that I have is that it refers to everything as Counts 2 and 3, and I think it kind of leaves the jury the impression that there's a Count 1 out there.

I don't know what the remedy is to cure that.

By the Court: I don't think there's any other way to instruct them, though because it is Counts 2 and 3 of the indictment. And, you know, in my court instructions, I am telling them not to speculate about anything that wasn't offered in evidence and things like that, so I think they're being honest in C-1 that they're not trying to speculate about anything that wasn't presented to them, so . . .

By Mrs. Jordan: Okay. Other than this I did not have a problems with S-1.

By the Court: S-1 will be given. And then I'll mark this as C-5 that tells them to mark it on a separate sheet of paper and all that. It will be given as C-5.

(Tr. 132)

While there is a nominal mention of a "problem" with C-5, trial counsel did not frame this problem as an objection. She also stated that she did not know of a remedy that would cure

the problem. Further, the trial court notes that the jury will be instructed not to speculate about anything that was not offered into evidence, which would include a speculative Count I. (Tr. 132) Defense counsel then confirms that she is satisfied, replying, “Okay” to the Court’s explanation of the curative effect of the jury instruction to disregard anything not offered into evidence. If an objection was made, it appears to have been withdrawn at this point as defense counsel acquiesces to the court’s explanation. Therefore, this issue has not been preserved for appeal.

First, objections to jury instructions must be specific. In order to preserve a jury instruction issue on appeal, a party must make a specific objection to the proposed instruction in order to allow the lower court to consider the issue. *Humphries v. State*, 18 So.3d 305 (Miss.Ct.App. 2009) Despite the Appellant’s contention that defense counsel objected and argued that the instruction informed the jurors of an additional criminal charge, trial counsel’s actual statement was that there was a “problem” and that it “left the impression that there was a Count I out there.” Trial counsel never argued that Instruction S-1 was in violation of the trial court’s order granting the Motion in Limine as to prior bad acts. The trial court never had the opportunity to rule on such an objection to Instruction S-1.

Further, it appears that, even if trial counsel’s “problem” for which there was no remedy constituted an objection specific enough to preserve the issue for appeal, she acquiesces to the trial court’s explanation regarding the instruction to the jury to disregard anything that was not offered into evidence, and, therefore, as a practical matter, withdraws her objection. (Tr. 132) A “party’s failure to object to jury instructions at trial procedurally bars the issue on appeal.”

Hawthorne v. State, 835 So.2d 14, 19 (Miss.2003) (citing *Walker v. State*, 729 So.2d 197, 202

(Miss.1998)).

Appellant argues that listing the two counts as Count II and Count III, as they appeared in the indictment, confused the jury due to differences in the testimony regarding the time of the buys. However, the testimony of all of the witnesses was consistent as to the order of the two buys and what occurred in each one. The Officer Gowan, Officer Land and Laci Gove all testified that when the first buy occurred, Johnson came out to meet Laci Gove when she pulled up in his driveway and she then went into his house where the two talked and then carried out the transaction. They all three testified that the second time Laci Gove went to transact a buy with Johnson, she remained in her car and Johnson came outside. Johnson, in fact, though he denies selling cocaine to Laci Gove, agrees that the two visits occurred in that order, with Laci entering the house the first time and remaining in her car the second time. Any discrepancies in the testimony were for the jury to resolve. When presented with conflicting testimony, it is for the jury to weigh the credibility of the witnesses, as well as the evidence. Nix v. State, 8 So.3d 141, 146 (Miss.2009) It is the jury's role to assess the weight and credibility of the evidence and to resolve conflicts in the evidence. Latiker v. State, 918 So.2d 68, 73 (Miss.2005). The jury may accept the testimony of a witness in whole or in part, may reject a witness's testimony altogether, and may accept in part and reject in part the evidence on behalf of the State or on behalf of the accused. Mangum v. State, 762 So.2d 337, 346 (Miss.2000).

Finally, as the trial court noted, the jury was instructed to not consider anything not entered into evidence. (C.P. 37-39) "Juries are presumed to follow the instructions given to them by the court." Walton v. State, 998 So.2d 971, 977 (Miss.2008) (citing Wheeler v. State, 826 So.2d 731, 740 (Miss.2002)).

For the foregoing reasons, this issue is without merit and the rulings of the trial court and the jury's verdict should be affirmed.

III. The Trial Court correctly admitted State's Exhibits S-3 through S-8.

This issue is procedurally barred for failure to make a specific objection. The standard of review regarding the admission or exclusion of evidence is abuse of discretion. Juarez v. State, 965 So.2d 1061, 1065 (Miss.2007). Johnson cites Mississippi Rule of Evidence 901(a) for the proposition that the State's Exhibits S-3 through S-8 for the proposition that there was insufficient evidence at trial to authenticate the photographs. However, Johnson never objected pursuant to M.R.E. 901(a) at trial. The complete objection at trial was, "There's been testimony today that this all took place at two o'clock in the afternoon, and that's not what these pictures reflect. It is inaccurate information." (Tr. 85) The Mississippi Supreme Court has stated that "[c]ounsel must make specific objections in order to preserve a question for appellate review. This Court has said many times that general objections will not suffice. Objections to the admissibility of evidence must specifically state the grounds; otherwise, the objection is waived." Seeling v. State, 844 So.2d 439, 445 (Miss. 2003). There was no objection made at trial pursuant to Mississippi Rule of Evidence 901(a), therefore this issue is procedurally barred.

Notwithstanding the procedural bar, Johnson's argument also fails on the merits. Johnson's argument lacks factual support. He argues that Officers Gowan and Land testified that the first buy occurred around 2:00 p.m. and that therefore the pictures could not be an accurate depiction of what they purport to be. However, Laci Gove authenticated the pictures by testifying that they were pictures of Johnson taken at his house on January 23, 2008 at the time of the buy she made for Officer Gowan. (Tr. 84) Officer Gowan testified that the camera did not

work during the second buy. Laci Gove testified that the pictures were an accurate representation of what happened that day. (Tr. 84)

Johnson's nonspecific objection appears to address a conflict in the evidence between the testimony of Officers Gowan and Land and the date printed on the photographs. It is the jury's role to assess the weight and credibility of the evidence and to resolve conflicts in the evidence. Latiker v. State, 918 So.2d 68, 73 (Miss.2005). The jury may accept the testimony of a witness in whole or in part, may reject a witness's testimony altogether, and may accept in part and reject in part the evidence on behalf of the State or on behalf of the accused. Mangum v. State, 762 So.2d 337, 346 (Miss.2000).

This argument is procedurally barred and further has no support in the record. Therefore, this issue is without merit.

CONCLUSION

The Appellant's assignments of error are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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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