IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RACO PEARSON — APPELLANT

VS. — NO. 2009-KA-1582-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The grand jury of Clarke County indicted defendant, Raco Danyell Pearson for the sale of cocaine within 1500 feet of a public park in violation of Miss. Code Ann. §§ 41-29-139 & 41-29-142. (Indictment, cp.4). After a trial by jury, Judge Robert Walter Bailey, presiding, the jury found defendant guilty. (C.p.41). Defendant was sentenced to 15 years, with five years suspended and five years supervised probation under the supervision of the Mississippi Department of Corrections. Further defendant was fined $5,000, fees of $300, and costs of $308.50. (Judgment of Conviction & Sentence, cp. 42).

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF THE FACTS

On September 11, 2007, Officer Satcher and Agent Will Peterson of the Mississippi Bureau of Narcotics met with Informant Rutledge to discuss plans to purchase illegal narcotics from individuals in Clarke County, Mississippi. (R. 62). During this meeting, Informant Rutledge made a decision to purchase drugs from Raco Pearson, an old high school classmate. (R. 63). Rutledge used a cellular phone and calls defendant Pearson to set up a drug transaction. (R. 63). Rutledge talks to Pearson and Pearson tells him to meet at Summerall Park to purchase the drugs.

After the phone conversation take places, Officer Satcher searched Rutledge and his vehicle to make sure there was no money or drugs on Rutledge. (R. 65-66). Immediately following the search, Officer Satcher equipped Rutledge with a body wire and video camera and gave him $50.00 to purchase drugs. (R. 65-67). Rutledge drove to Summerall Park and met defendant Pearson. (R. 155). Rutledge then bought crack cocaine from defendant Pearson for $50. The video camera recorded the drug transaction between Rutledge and defendant Pearson and it sent audio through a transmitter so the audio could be monitored by Officer Satcher and Agent Peterson. After, the drug purchase, Rutledge returned to the prior meeting location and gave the cocaine to Officer Satcher. The recording was transferred to a DVD and admitted into evidence. The cocaine was also put in a sealed evidence bag and sent to the

Mississippi Crime Laboratory. (R. 78-79). The substance tested as powder cocaine. (R. 84). Although the report stated "crack cocaine," Officer Satcher testified this was a typographical error and it was indeed powder cocaine.

The jury heard the evidence and found the defendant guilty as charged.

SUMMARY OF THE ARGUMENT

Issue I.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF POWDER COCAINE BECAUSE THE OFFICER MADE A TYPOGRAPHICAL ERROR ON HIS REPORT.

A. The indictment stated that Pearson was charged with the sale of cocaine within 1500 feet of Summeralll Park and did not list a type of cocaine.

B. The testimony of Officer Satcher and Keith McMann both showed the chain of custody was not broken.

Issue II.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE VERDICT OF THE JURY TO STAND BECAUSE THE WEIGHT OF THE EVIDENCE WAS NOT OVERWHELMINGLY CONFLICTING.

A. A videotape showed Pearson and Rutledge making a drug transaction.

B. Rutledge testified that Pearson sold him cocaine for $50 at Summeralll Park.

C. Officer Satcher testified that he searched Rutledge before he met defendant Pearson and the informant did not have any drugs on him, but when Rutledge returned to meet Officer Satcher the informant had cocaine in his possession.

Issue III.

ALTHOUGH THE TRIAL COURT ALLOWED THE PROSECUTION TO COMMENT ON WHY THE DEFENDANT DID NOT CALL HIS WIFE AS AN ALIBI WITNESS, THE BURDEN OF PROOF DID NOT SHIFT AND THE WEIGHT OF THE EVIDENCE IS SO OVERWHELMING AGAINST THE DEFENDANT, ERROR, IF AT ALL, IS HARMLESS.

A. The prosecution did not shift the burden of proof by asking Pearson why he did not call his wife as an alibi witness.

B. The prosecutor's comment on why Pearson did not call his wife as an alibi witness was not prejudicial.

Issue IV.

THE COURT DID NOT ERR IN ALLOWING THE DEFENDANT TO BE CONVICTED OF AN ENHANCED SALE BECAUSE EVIDENCE SHOWED THE SALE TOOK PLACE WITHIN 1500 FEET OF A PUBLIC PARK.

A. A videotape showed a drug transaction between Pearson and Rutlegde at Summerall Park.

B. Rutledge testified that the drug transaction occurred at Summeralll Park.

C. Pearson testified that he goes to Summeralll Park often and that it was his voice and face on the videotape.

Issue V.

THE STATE PROVED ALL THE ELEMENTS AS CHARGED IN THE INDICTMENT. THEREFORE, THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND J.N.O.V.

A. A videotape proved that Pearson did sell cocaine within 1500 feet of Summerall Park.

B. Rutledge testified that Pearson sold him cocaine for $50 at Summerall Park.

ARGUMENT

Issue I.
THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF POWDER COCAINE BECAUSE THE OFFICER MADE A TYPOGRAPHICAL ERROR ON HIS REPORT.

The defendant asserts there were inconsistencies in the reports as to whether the cocaine was crack or powder. The indictment stated that Pearson was charged with cocaine. It did not state whether it was powder or crack cocaine. During the officer's cross examination, he gave testimony that he made a typographical error in the report. The jury is to evaluate the credibility of the officer's testimony. *Jackson v. Daley*, 739 So.20 1031, 1039 (Miss. 1999). The Mississippi Supreme Court has "repeatedly held that the jury is responsible for judging the credibility of witnesses and the weight that should be attached to their testimony. The judge had the discretion to allow the evidence into the trial." *Doby v. State*, 532 So. 2d 584, 588 (Miss. 1988).

Additionally, defendant claims the chain of custody was broken in maintaining the evidence, which led to the inaccurate reports. The test for chain of custody claims is to ascertain whether there is any indication of tampering or substitution of evidence. *Gibson v. State*, 503 So.2d 230 (Miss. 1987); *Grady v. State*, 274 So.2d 141, 143 (Miss. 1973). Officer Satcher and Keith McMann both testified about the

procedure of turning in evidence to the Mississippi Crime Lab. Officer Satcher stated the following:

> "Once we turned it into the evidence custodian, it's logged into our vault. It stays into our vault until the evidence custodian is going to the crime lab which we use in Meridian. And usually he will take a number of cases at one time. He will log them out and take them to the crime lab." (Tr. 78).

In Keith McMann testimony's, he stated the following procedure for admitting and testing evidence in the Mississippi Crime Laboratory:

> "Whenever evidence is brought into the laboratory by an officer, the first thing we do is inspect the evidence to make sure that all the seals are in tact; it's sealed the way it's supposed to be. Then each case is given a unique Mississippi Crime Laboratory case number; and within each case, each submission is given a unique Mississippi Crime Laboratory submission number. A bar code is generated which has this Mississippi Crime Laboratory case number and submission number on it, and this bar code is placed on the evidence. Then once the evidence is fully received, it is it goes into our vault where it remains until the analyst who is going to be working the case retrieves it from the fault." (Tr.132).

McMann also stated the evidence was delivered and received according to the procedure. (Tr.134). McMann testified the substance tested was powder cocaine. Therefore, the chain of custody was amply documented and there was no indication the evidence had been altered or tampered. Issues regarding the chain of custody are largely left to the discretion of the trial judge. *Doby v. State*, 532 So. 2d 584, 588 (Miss. 1988); *Morris v. State*, 436, So.2d 1381 (Miss. 1983). According to McMann,

there is no indication that the cocaine had been tampered with in any way.

Consequently, the trial court should not be held in error and no relief should be granted on this allegation of error.

Issue II.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE VERDICT OF THE JURY TO STAND BECAUSE THE WEIGHT OF THE EVIDENCE WAS NOT OVERWHELMINGLY CONFLICTING.

Next, defendant challenges the weight of the evidence supporting the jury's verdict. Specifically asserting inconsistencies in the officer and confidential informant's testimony do not support the verdict. Officer Satcher testified he did not have defendant Pearson's number and that Rutledge, the confidential informant, used his own cellular phone. Rutledge testified the Officer already had Pearson's number in the officer's phone and it was the officer's phone was used to call Pearson.

There are going to be inconsistencies in testimony. The testimony of the officer, Rutledge, and Pearson identifying Pearson as the person on the video tape and Rutledge returning back to Officer Satcher with cocaine in his possession is enough evidence for the jury to find defendant Pearson guilty. In *Bush v. State*, 895 So.2d 836 844(Miss. 2005), the Mississippi Supreme Court stated, "...we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." However, the evidence should be weighed in the light most favorable to the verdict. *Id.* The evidence in this trial most definitely puts defendant Pearson at the scene of the crime, regardless of which phone was used to initiate the sale.

Consequently, there being no unconscionable injustice the State would ask this court to deny any relief based upon this allegation of error.

Issue III.

ALTHOUGH THE TRIAL COURT ALLOWED THE PROSECUTION TO COMMENT ON WHY THE DEFENDANT DID NOT CALL HIS WIFE AS AN ALIBI WITNESS, THE BURDEN OF PROOF DID NOT SHIFT AND THE WEIGHT OF THE EVIDENCE IS SO OVERWHELMING AGAINST THE DEFENDANT, ERROR, IF AT ALL, IS HARMLESS.

Defendant argues the State shifted the burden of proof at trial because the prosecution questioned Pearson about not calling his wife as an alibi witness.

It is well settled that the burden of proof never shifts from the state in a criminal case. *Brown v. State*, 556 So.2d 338, 339 (Miss. 1990); *McVeay v. State*, 355 So.2d 1389, 1391 (Miss. 1978). Every mandatory element of proof is assigned to the prosecution.

The prosecution asked: "All right. Now, so at 6:00 p.m. on September the 11th, 2007, you were not at Summerall Park; right?" (Tr.194). The prosecution was simply cross examining defendant about his whereabouts on the evening the drug transaction took place. The prosecution was merely trying to prove defendant was at the scene of the crime. The prosecution was not trying to the shift the burden of proof to the defendant.

The appellant claims the trial court committed an error by allowing the prosecution to comment on why the defendant did not call his wife as an alibi witness. During cross examination, the prosecution questioned defendant about

calling his wife as an alibi witness. The prosecution simply asked Pearson whether he was going to call his wife as an alibi witness since he claimed he was at home with his wife and kids at 6:00 pm and not at Summerall Park. (Tr. 194).

The general rule as to commenting on the failure of a party to produce or examine a witness is in *Phillips v. State*, 183 So.2d 908 (Miss. 1996), the Mississippi Supreme Court stated, "We held in *Brown v. State*, 200 Miss. 881, 27 So.2d 838 that the failure of either party to examine a witness equally accessible to both is not a proper subject to comment before a jury by either of the parties." 183 So.2d at 911. However, the Mississippi Supreme Court has also held that where there is substantial evidence supporting the defendant's guilt, a prosecutor's comment about a potential witness's absence is not reversible error in and of itself. *Brock v. State*, 530 So.2d 146, 154-155 (Miss. 1988). The court noted that a jury is more likely prejudiced where the evidence is close. *Id.* The evidence in Pearson's case was not remotely close but overwhelming. The jury was probably not prejudiced by the prosecutor's comment.

Defendant Pearson was caught on video surveillance making a drug sale transaction to Rutledge, the confidential informant, in Summerall Park. Defendant even admitted in his testimony it was his voice and face on the video shown to the jury. (Tr. 203). In this video, defendant makes an arm movement and says "...here

you go". (Tr. 199). Not to mention, Rutledge testified on the stand defendant sold him cocaine in Summerall Park.(Tr. 152).

Consequently and comment or question by the prosecution was minor considering the evidence presented to the jury. It is the jury's job to reconcile any conflicts in the trial. The jury was not unduly prejudiced by the prosecutor's comment and found defendant guilty based on the evidence.

Issue IV.

THE COURT DID NOT ERR IN ALLOWING THE DEFENDANT TO BE CONVICTED OF AN ENHANCED SALE BECAUSE EVIDENCE SHOWED THE SALE TOOK PLACE WITHIN 1500 FEET OF A PUBLIC PARK.

Continuing the challenge to the evidence defendant avers the State did not put on evidence he sold cocaine to Rutledge at Summerall Park.

Miss. Code Ann. § 41-29-142 states:

> Except as provided in subsection (f) of Section 41-29-139 or in subsection (2) of this section, any person who violates or conspires to violate Section 41-29-139(a)(1), Mississippi Code of 1972, by selling, bartering, transferring, manufacturing, distributing, dispensing or possessing with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance, in or on, or within one thousand five hundred (1,500) feet of, a building or outbuilding which is all or part of a public or private elementary, vocational or secondary school, or any church, public park, ballpark, public gymnasium, youth center or movie theater or within one thousand (1,000) feet of, the real property comprising such public or private elementary, vocational or secondary school, or any church, public park, ballpark, public gymnasium, youth center or movie theater shall, upon conviction thereof, be punished by the term of imprisonment or a fine, or both, of that authorized by Section 41-29-139(b) and, in the discretion of the court, may be punished by a term of imprisonment or a fine, or both, of up to twice that authorized by
>
> *Miss. Code Ann.* § 41-29-139(b).

Rutledge testified that defendant sold him cocaine at Summerall Park. The transcript stated the following: "Q. And in relation to Summerall Park, where was it? A. Right there -- right there when you pull in the driveway. I mean, his car was sitting there, and I pulled up right beside him." (Tr. 148).

This testimony puts defendant and Rutledge at Summerall Park on the day that the crime was committed. The video tape even showed Rutledge and defendant at Summerall Park where the drug sale transaction took place. Further, defendant himself testified it was his face on the videotape. These facts alone are enough evidence to place defendant at Summerall Park the day the crime was committed. It was the duty of the jury to listen to all of the testimony and determine whether the evidence supports the crime charged. *Bridges v. State*, 716 So.2d 614, 617 (Miss. 1998).

The State would ask this court to affirm the enhanced charges as there was enough evidence to support the sale within 1500 feet of a park.

Issue V.

THE STATE PROVED ALL THE ELEMENTS AS CHARGED IN THE INDICTMENT. THEREFORE, THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND J.N.O.V.

Lastly defendant claims the State did not prove all the elements of the indictment because it could not prove he: (1) sold cocaine, (2) within 1500 feet of Summerall Park, (3) to a confidential source, (4) for fifty dollars.

The Mississippi Court of Appeals "...will not reverse unless the evidence with respect to one or more of the elements of the offense charged is such that reasonable and fairminded jurors could only find the accused not guilty." *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993).

The record is replete with evidence supporting each element of the offense charged. The videotape with defendant Pearson selling cocaine to Rutledge, a confidential informant, at Summerall Park. Officer Satcher gave testimony that he searched Rutledge before he went to Summerall Park and found no drugs on him. Then after Officer Satcher completed his search, he gave Rutledge cash to purchase the cocaine. Rutledge met Pearson at Summerall Park, where he videotaped the entire transaction, and returned to Officer Satcher with a bag of cocaine. The language "within 1500 feet of a ballpark" is not a substantive element to the offense of sale of a controlled substance; instead, it relates only to the imposition of an enhanced penalty upon conviction. *Wolverton v. State*, 859 So.2d 1073 (Miss. 2003).

In conclusion, there was ample legally sufficient evidence of such weight and credibility to support the jury verdict and enhanced sentencing by the trial court.

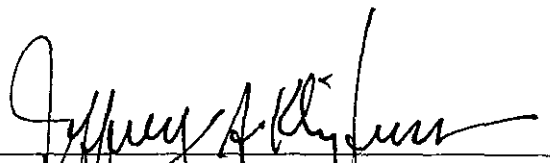
No relief should be granted on this last claim of error.

CONCLUSION

Based upon the arguments presented herein as supported by the transcript and evidence introduced at trial the State would ask this reviewing Court to affirm the jury verdict and enhanced sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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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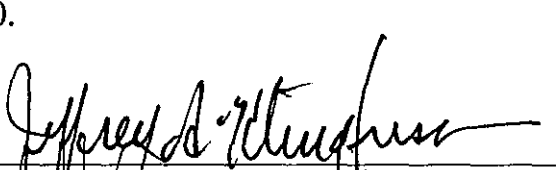
This the 4th day of August, 2010.



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