IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 92-KA-01317 COA

BILLY RAY JORDAN A/K/A HENRY LEE MCGINNIS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KEITH STARRET

COURT FROM WHICH APPEALED: COPIAH COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

M. LAMAR ARRINGTON, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: DUNN LAMPTON

NATURE OF THE CASE: CRIMINAL-ARMED ROBBERY

TRIAL COURT DISPOSITION: SENTENCED TO SERVE THIRTY-FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., DIAZ, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

Billy Ray Jordan was tried and convicted of armed robbery in the Copiah County Circuit Court. He was sentenced to serve 35 years in the custody of the Mississippi Department of Corrections as an habitual offender. Jordan appeals to this Court alleging as error that (1) the trial court erred in allowing evidence of Jordan's escape attempt; (2) the trial court erred in denying Jordan's motion for a mistrial after a witness testified that Jordan had previously been in prison; (3) the evidence was not sufficient to sustain a guilty verdict; and (4) his sentence of 35 years was excessive. We find Jordan's arguments to have no merit and, therefore, affirm the trial court's judgment and sentence.

I.

Facts

Marian Lynette Cotton returned home one evening to find that someone had broken into her home. The intruder was still in her home when she arrived. The man, wearing a stocking mask and carrying a rifle, ordered Cotton to the floor, told her to undress, and then raped her. Before leaving, he removed a sum of money from Cotton's purse.

Jordan was arrested by the Hazelhurst police officers because he fit the description, as to height and build, of Cotton's attacker; he had been frequently seen jogging near Cotton's home prior to the night of the crime; and Jordan's girlfriend placed him within a quarter of a mile of Cotton's home on the night of the crime. Cotton was able to identify Jordan out of a regular lineup based on his physical build, and identified Jordan's voice as being her attacker's in a voice lineup. In fact, after hearing only a few words of the tape recording of Jordan's voice, Cotton became very emotional, stating to police officer Freddie Tanner, "That's him, that's him, that's him . . . ."

II.

Evidence of the Attempted Escape

Jordan made a motion in limine to prohibit the State's attorneys from making any mention of Jordan's plan to escape from the county jail. The State intended to, and did, ask Jordan if he had a plan to intentionally drink rubbing alcohol in order to be taken to the hospital where he could escape with the help of his fiancee, Carolyn Rogers. The State argued that asking Jordan about this matter would impeach Rogers, an expected defense witness, by showing bias in the defendant's favor. The State's attorneys also told the judge that, if Jordan denied that he had such a plan to escape, then the State would call Ronald Reese in rebuttal to testify that Jordan told him about the planned escape.

The trial judge ruled that Jordan could be questioned about the escape attempt for the purpose of impeaching Rogers, and that the State could call Reese as a rebuttal witness in the event Jordan denied having the conversation. This is precisely what transpired at trial. Jordan testified that he did not tell Reese of a plan to escape, and Reese, called in rebuttal, testified conversely. Jordan now argues that this evidence was improperly admitted and resulted in the jury being severely prejudiced against him.

Issues of the relevancy and admissibility of evidence at trial are within the sound discretion of the trial judge, and reversal is required only where that discretion has been abused. *Craft v. State*, 656 So. 2d 1156, 1163 (Miss. 1995); *Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992). Though the escape incident was a subsequent offense, Jordan relies on authority to the effect that evidence of prior offenses is generally inadmissible for impeachment purposes or as substantive proof. *Winters v. State*, 449 So. 2d 766, 770 (Miss. 1984) (citing *Gray v. State*, 351 So. 2d 1342 (Miss. 1977)).

We have serious doubt that the evidence was admissible for the purpose offered. Reese's statement of what Jordan told him that Rogers was allegedly willing to do to help him escape is simply not probative on the issue of whether Rogers was, in fact, a prospective participant in an escape attempt. However, the Mississippi Supreme Court has held that evidence of an accused's escape or attempt to escape is admissible, stating, "Evidence of the escape and flight of a person charged with a crime, from jail or the custody of an officer, or of his attempt to escape is competent, in connection with other facts and circumstances, on the question of his guilt . . . ." *Wood v. State*, 74 So. 2d 851, 853 (Miss. 1954). Such "flight" evidence is admissible to demonstrate consciousness of guilt. Therefore, though the evidence came in under an incorrect theory, it was admissible for other purposes and cannot constitute reversible error. The trial judge did not err in allowing into evidence Jordan's plan to escape from the Copiah county jail.

III.

Evidence of Jordan's Prior Stay in Prison

At trial, one of the State's rebuttal witnesses, Claudia Holloway, mentioned that Jordan had previously been in Parchman. Jordan argues that this was an intentional, back-handed way for the prosecution to show the jury that Jordan had been convicted of another crime. The testimony at trial went as follows:

> Q. And at that time how well did you know Ray?
>
> A. I really didn't know him that well. He sent me a prayer from Parchman. He was in Parchman before, and I lost my son, and he used to call the house for Carolyn sometimes.

This appears, insofar as we can determine, to be an unsolicited statement that was not directly responsive to the question asked. The proper remedy would have been for Jordan's attorney to have objected and asked the trial judge to instruct the jury to disregard that portion of the answer. *Walker v. State*, 671 So. 2d 581, 622 (Miss. 1995). Jordan made no contemporaneous objection to Holloway's statements, and because no objection was made, this issue was not properly preserved for appeal. *Ballenger v. State*, 667 So. 2d 1242, 1251 (Miss. 1995) (citing *Cole v. State*, 525 So. 2d 365, 369 (Miss. 1987)). During the jury instruction conference, Jordan's attorney moved for a mistrial because of this testimony. Although the trial judge overruled the motion, he offered to give an instruction telling the jury to disregard the testimony. Jordan chose not to request the instruction. Jordan suggests that the reason that he did not want the instruction was that it would further draw

the jury's attention to the prejudicial statements. This was a purely tactical decision by trial counsel. It does not bear one way or the other on the issue of whether reversal is necessary in this case.

It may well be that there are situations where the prejudice from the admission of improper evidence is so great that it cannot be cured by a curative instruction, but this is not such a case. No trial is perfect. This one unsolicited remark indicating the possibility of prior criminal activity of an unknown nature, which passed into the record without objection, is not enough to convince this Court that so substantial an injustice has been done that a new trial must be granted.

IV.

Sufficiency of the Evidence

The third issue argued in Jordan's brief combines two separate points. First, that the proof of prior crimes committed by Jordan effectively denied him the right to a fair trial by prejudicing the jury against him, and, second, that the evidence was not sufficient to sustain a conviction against him. The effect of the evidence of other criminal acts committed by Jordan has already been discussed in this opinion. Therefore, we will address exclusively the sufficiency of the evidence issue here.

Jordan properly preserved this issue for appellate review by moving for a directed verdict at the end of the State's case and at the end of all the evidence. Further Jordan renewed this motion by filing a motion for a JNOV. Each of these motions was denied by the trial court.

Upon review of a challenge to the sufficiency of the evidence, this Court must consider all of the evidence in the light most consistent with the verdict, and give the State the benefit of all reasonable inferences that may be drawn from the evidence. If the evidence, viewed in that light, is such that reasonable jurors could have found the defendant guilty, then we do not have the authority to disturb the verdict. *Holly v. State*, 671 So. 2d 32, 40 (Miss. 1996) (citing *Heidel v. State*, 587 So. 2d 835, 838 (Miss. 1991); *Davis v. State*, 530 So. 2d 694, 703 (Miss. 1988)).

There was testimony that placed Jordan within a quarter of a mile of Cotton's home on the night of the crime. In addition, Cotton positively identified Jordan as her attacker in both a regular lineup and in a voice lineup. She testified that, although the attacker wore a mask, she was able to identify Jordan in the regular lineup by his physical build. Likewise, Cotton was able to identify Jordan's voice because he constantly talked to her during the commission of the crime. In viewing this evidence, and all reasonable inferences that could properly be drawn from it, we conclude that there was sufficient evidence to support the jury's verdict of guilty. Accordingly, this issue is without merit.

V.

The Thirty-Five Year Sentence

In addition to his arguments on the merits of the case, Jordan argues that his sentence of 35 years is grossly excessive. Jordan was prosecuted under section 97-3-79 of the Mississippi Code of 1972, the armed robbery statute. The 1974 amendment to section 97-3-79, empowered the jury to sentence a person convicted of armed robbery to life imprisonment; however, if the jury fails to fix the sentence at life imprisonment, then the judge must set the sentence at a term that is "reasonably expected to be

less than life." *Allen v. State*, 440 So. 2d 544, 545-46 (Miss. 1983). Jordan contends that his sentence exceeds this statutory requirement.

The Mississippi Supreme Court has held that trial judges may take judicial notice of the mortality tables to serve as guidelines in sentencing. *Henderson v. State*, 402 So. 2d 325, 328 (Miss. 1981). In *Henderson*, the trial judge sentenced Michael Henderson to a term of 41 years in prison. At the time of the sentencing, Henderson's life expectancy was 41.6 years. The supreme court noted on appeal that:

> [T]hose [mortality] tables along with the absence in the record of any physical impairment or illness of [Henderson], must have convinced the trial judge that a 41-year sentence was reasonably expected to be less than the life expectancy of [Henderson]. If the sentence complies with that standard, regardless of how many years less than the appellant's life expectancy the sentence is, it is within the statute . . . .

Henderson, 402 So. 2d at 329.

At the time of sentencing, the mortality tables reflected that Jordan's normal life expectancy was 35.9 years. The record contains no evidence that Jordan had any physical impairments or illnesses that would tend to decrease his life expectancy. Therefore, under *Henderson*, the trial judge's imposition of a 35-year sentence does not constitute error. *See also Ware v. State*, 410 So. 2d 1330, 1332 (Miss. 1982) (imposition of a 40-year sentence where defendant had a life expectancy of 40.51 years is not error).

After careful review, we find that the trial judge committed no error. Accordingly, we affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF COPIAH COUNTY OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF THIRTY-FIVE (35) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVELY TO ANY OTHER SENTENCE IS AFFIRMED. COSTS ARE ASSESSED TO COPIAH COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.