

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00748 COA

DIEGO D. CARTER A/K/A DIEGO DeVILLE CARTER

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. ELZY J. SMITH, JR.

COURT FROM WHICH APPEALED: CIRCUIT COURT OF COAHOMA COUNTY

ATTORNEY FOR APPELLANT:

RICHARD B. LEWIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED OF AGGRAVATED ASSAULT AND
SENTENCED TO TEN YEARS IN THE CUSTODY OF MDOC

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Diego Carter was convicted in the Circuit Court of Coahoma County of the aggravated assault of Herman Jackson. The trial court sentenced Carter to ten years in the custody of the Mississippi Department of Corrections. Carter appeals arguing that the verdict is against the overwhelming weight of the evidence. Finding no error, we affirm Carter's conviction and sentence.

STATEMENT OF THE FACTS

Herman Jackson testified that in the early morning hours of May 1, 1994, Diego Carter borrowed a flashlight from him. Herman stated that approximately twenty minutes later, he walked down the block to retrieve the flashlight. Herman discovered Carter and several others looking for a package Carter had hidden. According to Herman, he asked Carter for the flashlight, and Carter threatened him. As Herman turned to leave, Carter struck him twice in the face with a brick, knocking him to the ground and unconscious.

Dr. P. W. Hill, Jr. testified that he admitted Herman to the hospital suffering from extensive fractures and lacerations to the left side of his face and injuries to his right wrist, hand, and forearm. Hill testified that Herman's injuries were likely caused by being struck with the corner of a sharp object of some type. According to Dr. Hill, Herman's injuries were consistent with a brick.

Carlos Addison testified to viewing a woman breaking up an argument between Carter and another man.

Natalie Goodlow testified she saw the end of a fight or argument between two men. Natalie observed one man on the ground.

Amanda Jackson, no relation to Herman Jackson, testified that she saw Carter kicking an individual on the ground. Amanda testified that Carter had a brick in his hand. Amanda saw Carter kick the individual five or six times, including kicks to the head and face. Amanda testified that another individual unknown to her also kicked Herman two times. Amanda testified that Carter stated he wanted to kill Herman.

Ether Epps, Herman Jackson's grandmother, testified that Carter admitted to her that he hit Herman with a brick and kicked him. She also testified that Carter told her he wanted to kill Herman. L. D. Epps, Herman's grandfather, testified that he heard Carter admit to kicking and hitting Herman.

Investigator Robert Taylor was the investigating officer. Taylor testified that Carter admitted to hitting Herman with his fist. Carter told Taylor that Herman was trying to take some money from him. Several photographs taken of Herman by Taylor on the night of the incident were admitted into evidence.

Nathan Goodlow testified for the defense. Carter also testified in his own defense. Carter testified

that he hit and kicked Herman, alleging that Herman was attempting to take some money from him. Carter denied ever having a brick and denied striking Herman with anything other than his fist.

ARGUMENT AND DISCUSSION OF THE LAW

THE TRIAL COURT ERRED IN OVERRULING CARTER'S MOTION FOR DIRECTED VERDICT AND SUBSEQUENT MOTION FOR JNOV OR ALTERNATIVELY A NEW TRIAL SINCE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT EVIDENCE.

Carter argues that the verdict is against the weight of the evidence and based upon inconsistent, contradictory, and unreliable testimony. Carter specifically points out that he is not arguing sufficiency of the evidence.

The Mississippi Supreme Court has stated that when an appellate court considers whether a jury verdict is against the overwhelming weight of the evidence, it must accept as true all evidence favorable to the State and supportive of the verdict. *Ellis v. State*, 667 So. 2d 599, 611 (Miss. 1995) (citing *Isaac v. State*, 645 So. 2d 903, 907 (Miss. 1994)). Reversal is justified when the appellate court determines that an abuse of discretion existed in the lower court's denial of a new trial. *Id.*; see also *Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995) (citations omitted). The court has also held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain*, 625 So. 2d at 781 (citations omitted); see also *Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.*

In the present case, the jury heard the witnesses for and the evidence presented by both the State and the defense. The State's evidence showed that Herman Jackson suffered several fractures to the left side of his face requiring hospitalization. Herman testified that Carter was the individual who struck him with a brick. Dr. Hill testified that Herman's injuries were caused by a sharp instrument and were consistent with a brick. Amanda Jackson testified that she saw Carter kicking Herman as he lay on the ground. Amanda also saw Carter with a brick in his hand.

While Carter contends that the jury verdict was against the overwhelming weight of the evidence and requests a new trial, we believe the record clearly supports the jury verdict. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Carter. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would have been to promote an unconscionable injustice. Accordingly, we do not

find that the trial court abused its discretion by refusing to grant Carter a new trial based on the weight of the evidence.

THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE TO TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND ORDER TO MAKE FULL RESTITUTION TO THE VICTIM, IS AFFIRMED. SENTENCE IMPOSED SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO COAHOMA COUNTY.

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