

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-KA-00514 COA**

**JAMES WILLIE BROWN**

**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

DATE OF JUDGMENT:	4/12/96
TRIAL JUDGE:	HON. CLARENCE E. MORGAN, JR.
COURT FROM WHICH APPEALED:	MONTGOMERY COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	H. LEE BAILEY, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	KEVIN HORAN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF AGGRAVATED ASSAULT AND SENTENCED TO FIFTEEN YEARS IN THE CUSTODY OF MDOC
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

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

PAYNE, J., FOR THE COURT:

James Brown was convicted for the crime of aggravated assault on the person of Dallas Amos and was sentenced to serve a term of fifteen years in the custody of the Mississippi Department of Corrections. The trial court denied Brown's motion for JNOV or, in the alternative, a new trial. Finding no error, we affirm the judgment of the Montgomery County Circuit Court.

**FACTS**

During the early evening hours of January 25, 1996, James Brown placed a gun to the head of Dallas Amos and pulled the trigger. The bullet simply creased Amos's skull causing a flesh wound in the

center of Amos's forehead. Four witnesses, including Dallas Amos, testified for the State. Officer Jerry Nix testified that he was the first to be dispatched to the hospital where Amos had been taken following the shooting. Nix testified that Amos identified Brown as the man who shot him (Amos). Nix testified that after talking with Amos, he went to Medstat Ambulance Service where he found an intoxicated Brown lying on a couch and hollering "that he had done shot Dallas Amos, and he wanted somebody to lock him up, that he thought he had done killed him." Another police officer retrieved a gun from Brown's car that was allegedly used in the shooting. Thereafter, Brown was arrested and charged with public drunk, carrying a concealed weapon, and aggravated assault. Officer Nix testified further that after reading Brown his rights, Brown stated that he understood his rights and said: "Take me to jail. You know, I shot the guy." The victim, Dallas Amos, also testified as did two other eyewitnesses. All three indicated that Brown shot Amos.

Brown testified in his own behalf and claimed the shooting was in self-defense. According to Brown, Amos slapped a cigarette from Brown's mouth, and when Amos refused to pick up the cigarette, Brown shot him.

Subsequently, the case was submitted to the jury for consideration and the jury returned a verdict of guilty on the charge of aggravated assault. Feeling aggrieved, Brown appealed asserting four issues.

## ANALYSIS

### I. WHETHER AN IMPROPER CLOSING ARGUMENT BY THE PROSECUTION VIOLATED BROWN'S RIGHT TO A FAIR TRIAL UNDER MISSISSIPPI LAW.

Brown takes issue with the following statements by the prosecutor, Kevin Horan, during closing arguments:

BY MR. HORAN: . . . Dallas Amos, I hope if I ever pick up the habit of gambling, I hope that I have the luck that Dallas Amos had on January the 25th, 1996. He had the luck that that gun-- apparently he cocked his head back just enough where that gun did not penetrate his skull and kill him dead. That's what the Defendant intended that to happen. And he testified here today that he did that, and he said he was drunk. You know, you don't know what a man will do when he is drunk. I just shot him. He knocked a cigarette out of my mouth, so I shot him. *Is that the kind of person that the citizens of Montgomery County want walking around making decisions that if someone does the slightest--*(emphasis added).

Brown interrupted Mr. Horan in mid-sentence with his objection. The trial court indicated that it found nothing improper about the argument and overruled the objection. Brown argues that the argument improperly influenced the jurors to find Brown guilty as a matter of community service and as a representative action of the county instead of using their own individual judgments. The Mississippi Supreme Court has indicated that a prosecuting attorney is entitled to great latitude in framing his closing argument. *Dunaway v. State*, 551 So. 2d 162, 163 (Miss. 1989). In *Taylor v. State*, the court held:

The right of 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 the 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 debate, which, although not legitimate, are generally disregarded by the court, because in its opinion they are harmless.

**Taylor v. State, 672 So. 2d 1246, 1269 (Miss. 1996)** (quoting *Monk v. State*, 532 So. 2d 592, 601 (Miss. 1988)).

The test to determine if an improper argument by a prosecutor requires reversal is "whether the natural and probable effect of the prosecuting attorney's improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice." *Id.* (citations omitted). In the present case, we must agree with the trial judge that the statements by the prosecuting attorney did not rise to the point of creating unjust prejudice against the accused. We also agree with the State that any prejudice that might have resulted was cured or, at the very least, tempered by the jury instructions that told the jurors that the remarks by the attorneys during closing arguments were not evidence and that "[t]he verdict of the jury must represent the considered judgment of each juror." *See Williams v. State, 512 So. 2d 666, 671 (Miss. 1987)* ("Our law presumes the jury does as it is told.").

We find Brown's argument to be without merit and therefore affirm the decision of the circuit court as to this issue.

## **II. WHETHER THE ADMISSION OF A PHOTOGRAPH OF THE VICTIM WAS AN ABUSE OF DISCRETION.**

Brown complains about the admission of a photograph which depicts a frontal head shot of the victim. The purpose of the photograph was to show the gunshot wound on the victim's forehead. A superficial flesh wound in the center of the forehead at the hairline has been circled with a pen to identify it as the entrance wound for the jury. Brown argues that the photograph should not have been admitted into evidence because it had no probative value since "it was a dull and dark representation of the victim's wound and did not accurately portray what it attempted. This was needless presentation of cumulative evidence."

"As a general rule, the admissibility of photographs into evidence is within the sound discretion of the trial judge. The trial judge's decision will be upheld on appeal unless an abuse of discretion can be shown." *Chase v. State, 645 So. 2d 829, 848 (Miss. 1994)*. "A review of our case law indicates that the decision of the trial judge runs toward almost unlimited admissibility regardless of the gruesomeness, repetitiveness, and extenuation of probative value." *Robinson v. State, 662 So. 2d 1100, 1105 (Miss. 1995)*. "At this point in the development of our case law, no meaningful limits exists in these so-called balance of probative/prejudicial effect of photographs test." *Id.*

In the present case, we have reviewed the photograph in question and find it to be probative of the location of the injury. While we agree that the photograph is not of the best quality, we are hard-pressed to find that the judge abused his discretion in this instance. We therefore find Brown's argument to be without merit.

## **III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATEMENTS**

**OF BROWN INTO EVIDENCE IN VIOLATION OF UNITED STATES AND  
MISSISSIPPI CONSTITUTIONS AND MISSISSIPPI LAW.**

Winona Police Officer Jerry Nix testified that after he spoke with the victim, Dallas Amos, at the hospital, he received a call advising that Brown was at Medstat Ambulance Service "drunk on the couch." Nix stated that when he first walked into Medstat, Brown was hollering that he had shot Dallas Amos. On cross-examination, Brown's attorney asked Nix if, at any point, Nix asked Brown if he had shot anyone. Nix indicated that he had and that Brown responded that he had shot Dallas Amos. Brown's attorney then asked Nix if that question came before or after he had read Brown his rights. Nix indicated that he asked Brown about the shooting prior to reading him his rights. Brown's attorney then objected and requested that the trial judge admonish the jury regarding the statement Brown made about the shooting prior to having been read his rights. The trial judge overruled the objection.

Brown argues that the questioning of Brown was in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), in that Officer Nix knew Brown was the shooter when he entered Medstat, that Nix had every intention of arresting Brown, and that Nix was therefore obligated to read Brown his rights prior to questioning him. Thus, Brown contends that the trial judge should have instructed the jury to disregard the statement made by Brown prior to Nix's reading Brown his rights.

First, the State argues that *Miranda* does not apply in this instance because Brown was not in custody at the time Officer Nix asked him if he shot anyone. Second, the State contends that the prosecution did not introduce the pre-*Miranda* statement; rather it was brought out by the defendant during cross-examination. Thus, the State argues, "that a defendant cannot complain of evidence which he himself brings out." *Simpson v. State*, 366 So. 2d 1085, 1086 (Miss. 1979). Finally, the State argues that the statement is harmless because (1) Brown was hollering that he shot Dallas Amos when Officer Nix arrived at Medstat and (2) Brown admitted to shooting Dallas Amos after he was given his *Miranda* warnings.

We believe the State is correct in its assertion that *Miranda* is inapplicable in this situation. The Mississippi Supreme Court has stated that "*Miranda* is never brought to bear where the interrogation is investigatory and non-custodial." *Tolbert v. State*, 511 So. 2d 1368, 1375 (Miss. 1987). In *Tolbert*, the defendant was pointed out at the scene of the crime as the shooter. The officer then asked Tolbert if he knew anything about what happened, and Tolbert said, "I shot her." *Id.* at 1371. The supreme court found this statement by Tolbert to be admissible because the question was posed prior to Tolbert's being taken into custody. *Id.* at 1375. The present case is very similar in that Brown had not yet been taken into custody when Officer Nix asked him if he shot somebody. *See also Minnesota v. Murphy*, 465 U.S. 420, 431 (1984) ("The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings . . ."). The only distinguishing factor here is that the "interrogation" did not take place at the scene of the crime. Looking at the totality of the circumstances, however, we find this to be of little import.

Furthermore, had the judge's failure to admonish the jury been error, it would be harmless. The facts indicate that Brown was spouting off about having shot Amos when Officer Nix first arrived at Medstat. Additionally, Brown admitted to the shooting after his rights were read to him. Thus, the statement made by Brown in response to Officer Nix's question prior to being read his rights makes

little difference in this case as a whole. We therefore find Brown's argument to be without merit and find no error on the part of the trial judge.

#### **IV. WHETHER THE EVIDENCE WAS SUFFICIENT TO WARRANT A CONVICTION AGAINST BROWN.**

While Brown frames this issue in terms of sufficiency of the evidence, it is clear from his argument that he is challenging both the sufficiency and the weight of the evidence. Brown bases this challenge on his claim that he was acting in self-defense when he placed the gun to Amos's head and pulled the trigger. Brown cites to past instances in which he felt threatened by Amos but could do nothing about it because Amos is a much larger man than Brown. Brown claims that he shot Amos after Amos knocked a cigarette from his mouth. Brown indicated that he felt that deadly force was necessary because he could not be sure what Amos might do next.

A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion when the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled Brown's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Brown's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

*Id.* (citations omitted).

The evidence consistent with the guilty verdict must be accepted as true. *Id.* at 778. Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Brown not guilty of aggravated assault. We find that the trial court properly denied Brown's motion for a directed verdict.

Brown also complains that the jury verdict was against the overwhelming weight of the evidence, and he requests a new trial. The Mississippi Supreme Court has 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." *Id.* at 781 (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (holding that witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (holding that 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.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, the jury heard the witnesses and the evidence as presented by both the State and the defense. The State presented the testimony of the victim, Dallas Amos, who positively identified Brown as the shooter. The State also presented the testimony of two eyewitnesses who indicated that Brown shot Amos. Additionally, the testimony of the arresting officer, Nix, indicated that Brown, after waiving his rights, admitted shooting Amos. Finally, Brown, who testified in his own behalf, stated that he shot Amos because Amos slapped the cigarette out of his mouth.

The testimony was clearly for the jury to evaluate. 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 Brown. The trial court did not abuse its discretion by refusing to grant Brown a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that to allow it to stand would be to promote an unconscionable injustice. The trial court properly denied Brown's motion for a new trial.

**THE JUDGMENT OF THE CIRCUIT COURT OF MONTGOMERY COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO MONTGOMERY COUNTY.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR.**