IN THE COURT OF APPEALS 10/1/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00195 COA

RICKY ALFORD

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. BILL JONES

COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GEORGE S. SHADDOCK

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEAN SMITH VAUGHAN

DISTRICT ATTORNEY: DALE HARKEY

NATURE OF THE CASE: NARCOTICS: DISTRIBUTION OF A SCHEDULED II CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE 10 YEARS IN THE CUSTODY OF THE MDOC

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

KING, J., FOR THE COURT:

A jury convicted Alford of distributing cocaine, and the Circuit Court of Jackson County sentenced him to serve ten years in the custody of the Mississippi Department of Corrections. Aggrieved, Alford appeals and argues for the reversal of the conviction and sentence. Because his appeal lacks merit, we affirm the conviction and sentence.

FACTS

In April 1991, agents of the Mississippi Bureau of Narcotics were investigating the

distribution of controlled substances in the city of Moss Point. The agents suspected that cocaine was being distributed in the vicinity of the Busy Bee Cafe; therefore, the agents employed a confidential informant (CI) and arranged an undercover buy. On April 3, 1993, the CI and Agent Frazial Williams went to the Busy Bee Cafe. The CI encountered Alford in the parking lot of the cafe and directed him to William's vehicle. When Alford asked Williams what he desired to purchase, Williams told Alford that he desired to purchase "two bills" of cocaine, and Alford obtained a large rock from a plastic bag and handed it to Williams. In exchange for the rock, Williams gave Alford two hundred dollars in State funds.

After the transaction, Williams met with Sergeant Shepard and Agent Jackson at a pre-arranged location and tendered the rock which he had purchased. Two days later, the rock was transported to the State Crime Lab for analysis. The crime lab report indicated that the rock contained cocaine. At trial, Williams positively identified Alford as the individual who sold him the rock.

ANALYSIS OF THE ISSUES AND DISCUSSION OF LAW

I.

DID THE TRIAL COURT ERR IN GRANTING THE PROSECUTION'S MOTION TO AMEND THE INDICTMENT?

The indictment originally alleged that the transaction between Agent Williams and Alford occurred on April 3, 1992. On the morning of the trial, the State moved for leave to amend the indictment to reflect that the transaction occurred on April 3, 1991, and the court granted the motion. Alford contends that he was prejudiced by the court's action because he had predicated his defense on establishing his whereabouts on April 3, 1992, not April 3, 1991.

On July 16, 1992, defense counsel received discovery from the State, which indicated that the offense occurred on April 3, 1991. The Defendant was apprised of the date of the alleged offense seven

months in advance of trial. Therefore, we find that the Defendant was neither surprised nor prejudiced by the amendment. This assignment of error lacks merit.

II.

DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION FOR A CONTINUANCE?

After the court had granted the State's motion to amend the indictment to correct the date of the offense, defense counsel moved for a continuance. Defense counsel argued that the continuance was necessary so that he could discover witnesses with knowledge of Alford's whereabouts on the date alleged by the amended indictment. The court refused to grant the continuance. Not surprisingly, Alford claims that the court denied him the opportunity to adequately prepare his alibi defense.

The decision to grant or deny a continuance is left to the sound discretion of the court. *Lambert v. State*, 654 So. 2d 17, 21 (Miss. 1995). The denial of a continuance is not grounds for reversal unless we are satisfied that an injustice has resulted. Miss. Code Ann. § 99-15-29 (1972). Therefore, this court will not reverse unless manifest injustice appears to have resulted from the denial of the continuance. *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995).

We are not convinced that an injustice resulted from the court's denial of the continuance. The record indicates that Alford had at least seven months in which to secure and discover witnesses who had knowledge of his whereabouts on April 3, 1991. In addition, Alford was not deprived of an alibi defense. Witnesses testifying for the defense suggested that Alford could not have been present at the Busy Bee Cafe on April 3, 1991, because it was not in operation. Hence, the court did not abuse its discretion. This assignment of error lacks merit.

III.

DID THE TRIAL COURT ERR BY AMENDING AND SUBSTITUTING JURY INSTRUCTIONS?

Alford argues that the court erred when it substituted instruction D-6(a) for instruction D-6. In addition, Alford argues that the court erred when it amended instruction D-4. A trial judge may modify instructions submitted by the parties "if in his discretion, he concludes such to be necessary." *Harper v. State*, 478 So. 2d 1017, 1022 (Miss. 1985) (citing *Newell v. State*, 308 So. 2d 71, 78, (Miss. 1975)).

The record indicates that upon amending instruction D-4 as originally proffered, the trial judge commented, "I don't know what a preponderance of the evidence has got to do with this case." The trial judge apparently concluded that the proffered instruction would confuse and mislead the jury. Arguably, the proffered instruction could confuse or mislead the jury. In addition to referring to the burden of proof established for criminal cases, the instruction also refers to the burden of proof established for civil cases. Therefore, the trial judge properly exercised his discretion in amending the

instruction.

Instruction D-6(a) is similar to the "Sharplin Charge," the only instruction approved by the supreme court for submission to a deadlocked jury. *Bolton v. State,* 643 So. 2d 942, 944 (Miss. 1994). Although proper, the instruction was given before the court was confronted with a hung jury.

Instruction D-6 deviated from the "Sharplin Charge." The supreme court has rejected instructions which deviated from the "Sharplin Charge" on the basis that the instructions were coercive in nature. *Bolton,* 643 So. 2d at 944. Therefore, the trial court was wise for substituting the instruction. This assignment of error lacks merit.

IV.

DID THE TRIAL COURT ERR IN DENYING ALFORD'S MOTION FOR A NEW TRIAL?

Alford contends that the verdict was against the overwhelming weight of the evidence; therefore, the court should have granted his motion for a new trial. In determining whether a jury verdict is against the overwhelming weight of the evidence, we accept as true the evidence which supports the verdict and reverse only if we are convinced that the circuit court abused its discretion in failing to grant a new trial. *Isaac v. State,* 645 So. 2d 903, 907 (Miss. 1994) (citations omitted). In adherence to that standard, we accept as true Agent William's testimony that Alford gave him a large rock in exchange for two hundred dollars in the parking lot of the Busy Bee Cafe on April 3, 1991. We also accept as true Allison Smith's testimony that the rock like substance contained cocaine. Because Agent Williams positively identified Alford as the man who sold him the rock, which was later determined to contain cocaine, we find ample evidence supporting the jury's verdict. Therefore, the trial court did not abuse its discretion when it denied the motion for a new trial.

In conclusion, there is no merit to Alford's appeal; therefore the conviction and sentence are affirmed.

THE JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY OF CONVICTION OF DISTRIBUTION OF A CONTROLLED SUBSTANCE AND SENTENCE OF 10 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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

THOMAS, P.J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J.

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THOMAS, J., CONCURRING:

I concur with the majority in affirming the conviction and sentence in this case and all that is stated within the opinion, with the exception of how the issue of the granting of instruction D-6(a) and the refusal of instruction D-6 is addressed.

Instruction D-6(d) is a standard model jury instruction regarding the jury's duty to deliberate. The identical language has been approved in both sets of Model Jury Instructions published by the Mississippi Judicial College, and this instruction has been granted innumerable times by trial judges in this state and never once criticized by our supreme court. Although the language of D-6(d) is included within the "*Sharplin* charge," it has nothing to do with a hung jury. Instruction D-6(d) is supposed to be given to the jury before the jury retires to deliberate. The "*Sharplin* charge" is to be given only when the trial court is confronted with a hung jury.

Instruction D-6 is what is sometimes referred to as a "sinker" instruction. Although I personally believe the instruction invites a jury to disagree, should not be approved, and the language of which in any event is incorporated in substance in D-6(a), the form here appears proper and, therefore, should have been given. However, the error in failing to grant D-6 is harmless in view of the proof of guilt as shown by the State's case and the trial court's action in granting D-6(a).

FRAISER, C.J., JOINS THIS SEPARATE WRITTEN OPINION.