IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KP-00134 COA

SAM BELL III

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. LARRY EUGENE ROBERTS

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

PRO SE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: BILBO MITCHELL

NATURE OF THE CASE: CRIMINAL: COCAINE

TRIAL COURT DISPOSITION: DELIVERY OF COCAINE (ENHANCED): SENTENCED TO SERVE 30 YRS IN THE MDOC; PAY A FINE OF $10,000.00; RESTITUTION OF $184.50; $125.00 TO CRIME LAB AND $80.00 TO THE BUREAU OF NARCOTICS

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

PAYNE, J., FOR THE COURT:

Sam Bell III, was indicted and convicted for the delivery of cocaine. The trial court sentenced Bell to serve an enhanced sentence, pursuant to Mississippi Code, section 41-29-147, of thirty (30) years in the custody of the Mississippi Department of Corrections, pay a fine in the amount of $10,000.00, and pay restitution for court costs in the amount of $184.50, $125.00 to the crime lab, and $80.00 to the Mississippi Bureau of Narcotics. The trial court denied Bell's motions for directed verdict and a new trial. We find that none of Bell's issues on appeal has merit and therefore affirm.

FACTS

On April 29, 1992, Officer Stanley Wash and three members of the Mississippi Bureau of Narcotics conducted an undercover operation in which he and confidential informant, Darlene Ratcliff, went to the home of the Appellant, Sam Bell, to purchase crack cocaine. Upon arrival at Bell's home, Ratcliff asked Tony Dunigan to come to her car at which time she introduced him to Officer Wash. Ratcliff then told Dunigan that Wash wanted "50." Officer Wash testified that he then saw Dunigan walk into Bell's house where he observed Bell hand some items to Dunigan. Dunigan then walked back to the car and handed Wash five off-white rock-like substances from the same hand he had received the items from Bell. Wash indicated that he gave Dunigan $80.00 for the items. At trial, Wash identified Sam Bell as being the same man he saw give the rock-like substances to Dunigan which Dunigan then sold to Wash for $80.00. The substances were submitted to the crime lab for analysis and were determined to be crack cocaine.

Bell was subsequently arrested and charged with delivery of cocaine. The jury convicted him of this charge, and the trial court sentenced him to serve a term of thirty (30) years in the custody of the Mississippi Department of Corrections, pay a $10,000.00 fine, and to pay restitution totaling $389.50. Bell contends on appeal that his Sixth Amendment right to a fair trial was violated, and that the verdict was not supported by sufficient evidence and was against the overwhelming weight of the evidence.

ANALYSIS

I. DID THE TRIAL COURT DENY BELL'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL TRIAL?

Bell contends that he was denied his Sixth Amendment right to a fair trial. Specifically, Bell argues that ninety-nine objections were made during the course of the trial by defense counsel and the prosecuting attorney in front of the jury and at no time did the court ever appear to have control of the trial. Bell contends that "this continuing show of disrespect by officials of the court, merely

obfuscated the issues to be decided by the jury and left the jury shrouded by the smoke."

Bell cites no authority to support his claim that the number of objections were prejudicial to him, nor does he explain how the number of objections denied him a fair trial. The long standing rule in this State is that the "failure to cite any authority can be treated as a procedural bar, and this Court is under no obligation to consider the assignments." *Smith v. Dorsey*, 599 So. 2d 529, 536 (Miss. 1992) . We will therefore not consider this assignment of error.

Bell argues further that the State elicited hearsay testimony from Officer Wash after the court specifically instructed Officer Wash not to testify to what confidential informant Darlene Ratcliff told him. Bell cites to the record in which the State asked Officer Wash if Ratcliff gave him the name of the individual from whom Dunigan received the cocaine. Bell objected to this testimony as hearsay, and the court sustained the objection. The State then asked Officer Wash to identify the individual that Ratcliff named. Bell objected, and the court overruled the objection instructing Officer Wash not to state the name he was given. Officer Wash then asked the court if he should answer, and the court said yes. Officer Wash then stated that Ratcliff had given him the name of Sam Bell. Bell contends that this incident was just one of the times the court failed to correct testimony and/or conduct on behalf of the prosecution.

Again, Bell offers no authority for his assignment of error. However, procedural bar aside, we will address the merits of the issue. Bell alleges that the prosecution intentionally elicited hearsay testimony from Officer Wash in direct conflict with the instructions of the court. A review of the record, however, indicates no intentional improper conduct on behalf of the prosecutor but instead evidences an attempt by the prosecutor to cure the improper testimony as soon as he realized that Officer Wash did not understand what answer the court was instructing him to give. As to the impact of the inadmissible hearsay statement, we look to Rule 103(a)(2) of the Mississippi Rules of Evidence which states "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." M.R.E. 103(a)(2). In the present case, Officer Wash had already testified that the Appellant, Sam Bell, was the same man he saw at the scene of the drug buy who gave something to Dunigan immediately before Dunigan returned to the car with the cocaine. We fail to see how Wash’s revelation that Ratcliff had named Sam Bell as being the other person present at the drug buy affected any of Bell’s substantial rights. Therefore, we do not find the admission of the hearsay testimony to be reversible error nor do we find that the prosecution behaved improperly in this instance.

Bell also contends that the State offered testimony of witnesses in violation of discovery rules. In his brief, Bell makes no attempt to identify what discovery violations he believes occurred during this trial, nor does he give this Court any indication of how he believes said discovery violations contributed to his being denied a fair trial. Other than a statement in Bell’s brief that "there were discovery violations," Bell offers no argument for this issue much less cites any authority. As we stated earlier, we are not bound to address assignments of error that are not properly before this Court. *McClain v.* State, 625 So. 2d 774, 781 (Miss. 1993); *Smith v. Dorsey*, 599 So. 2d 529, 532 (Miss. 1992).

Finally, Bell argues that he was prejudiced by the admission of a "tainted" tape recording. Again, Bell makes no argument regarding this issue nor does he cite to any portion of the record that would

support a finding that the recording was tainted. A review of the record reveals that the only tape recording admitted during the trial was the recording made during the drug buy between Officer Wash and Dunigan. At the time of the drug buy, Officer Wash was wearing a body wire which was being monitored by a surveillance team in a nearby van. The only objection that Bell makes regarding the tape recording is one in which he states that he doesn't believe a proper predicate has been laid. In response, the court instructed the State to further establish the predicate. Officer Wash then testified that he had listened to the tape recording, and that it contained the conversation picked up by the body wire. Wash also testified that the tape had not been tampered with or changed. The court overruled the objection and admitted the tape into evidence. Although Bell's continuous questioning of the State's witnesses indicates that Bell believed the tape had been altered, Bell never once objected to the admission of the tape on grounds that it had been altered or that a proper chain of custody had not been established. The law is well established that an issue not objected to at trial may not be raised for the first time on appeal. *Brandau v. State*, 662 So. 2d 1051,1053 (Miss. 1995) (citing *Patterson v. State*, 594 So. 2d 606, 609 (Miss. 1992)). Despite the procedural bar, it is clear from the record that Bell failed to meet the burden imposed by law; that is, he failed to produce evidence of a broken chain of custody or of tampering. *Hemphill v. State*, 566 So. 2d 207, 208 (Miss. 1990) ("In such matters, the presumption of regularity supports the official acts of public officers, and the burden to produce evidence of a broken chain of custody (i.e., tampering) is on the defendant." (citati ons omitted)).

We find that Bell's argument has no merit and therefore affirm on this issue.

> II. DID THE TRIAL COURT ERR IN DENYING BELL'S MOTIONS FOR DIRECTED VERDICT AND NEW TRIAL? DID THE IRREGULAR FORM OF THE WRITTEN VERDICT AS RETURNED BY THE JURY CONSTITUTE REVERSIBLE ERROR?

The heading of the second proposition in Appellant's brief states that the issue is one concerning the sufficiency and weight of the evidence. However, Bell only makes reference to the sufficiency and weight issue in the last sentence of this proposition in which he states that "the evidence at trial failed to prove beyond a reasonable doubt that appellant was guilty as charged." The bulk of Bell's argument deals with the form of the written verdict as returned by the jury and is completely unsupported by citation to authority. We will first address what we believe to be a challenge to the weight of the evidence and then, although not bound to do so, we will address the merits of Bell's argument regarding the written form of the verdict. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). We will not address the sufficiency of the evidence as a review of the record indicates that Bell chose to go forward with his case after his motion for a directed verdict was overruled. The Mississippi Supreme Court has held that "a defendant waives the appeal of an overruled motion for directed verdict made at the end of the state's case when the defendant chooses to go forward with its case." *Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992). We note that a motion for JNOV was not made, so the question of sufficiency is beyond our reach.

WEIGHT OF THE EVIDENCE

Bell argues 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." *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.* 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 for, and the evidence presented by both the State and the defense. The State presented the testimony of Officer Wash who stated that he and Ratcliff went to a location believed to be the home of Sam Bell where they encountered Troy Dunigan. Officer Wash testified that he, Ratcliff, and Dunigan engaged in a discussion regarding the purchase of crack cocaine. Officer Wash testified that in response to this discussion, Dunigan went into Bell's house where he [Wash] observed Bell place something in Dunigan's hand. Officer Wash testified that Dunigan immediately returned and handed Wash five off-white rock-like substances from the same hand in which he had received the items from Bell. Officer Wash testified that he gave Dunigan $80.00 for the items. The State presented evidence from the crime lab that the items purchased by Wash had tested positive as crack cocaine. Furthermore, Officer Wash positively identified the Appellant as being the same person from whom Dunigan received the drugs just prior to the exchange of money from Wash to Dunigan. The State also offered into evidence a tape recording of the conversation that took place between Wash, Ratcliff, and Dunigan during the drug buy. The Appellant chose not to testify in his own behalf but did present the testimony of Darlene Ratcliff who indicated that Sam Bell was not present during the drug buy. 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 Bell. The trial court did not abuse its discretion by refusing to grant Bell 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 Bell's motion for a new trial.

FORM OF THE VERDICT

Bell argues that the form of the jury's written verdict was contrary to Instruction S-3 which set forth the proper form in which a guilty/not guilty verdict should be written. In the present case, the jury returned a verdict written as follows: "We the jury find the defendant guilty of cocaine." Instruction S-3 provided that a guilty verdict should state, "We, the Jury, find the Defendant guilty of *delivery of cocaine*. (emphasis added). The trial judge, noticing the omission in the language of the verdict, made the following statement to the jury:

> Ladies and gentlemen, I have read that verdict and it is very similar to the verdict form. I am taking for granted that the intent of the jury was to return a verdict of guilty of

> delivery of cocaine, and I'm accepting it as such. I do need to know whether or not this is a unanimous verdict of all 12 jurors and in order to find that out I ask you to raise your hand if this is your verdict. And I want to ask you that now.

In response, all twelve jurors raised their hands indicating that they did find Bell guilty of delivery of cocaine.

Bell contends that the aforementioned action by the trial judge was such that the judge placed himself in the position of a "thirteenth juror" thus denying the Appellant a fair and impartial trial. We disagree. The Mississippi Supreme Court has held that "a verdict of guilty need only state that the jury finds the defendant guilty." *Singleton v. State*, 495 So. 2d 14, 16 (Miss. 1986). The court also stated that courts have the power to make an obviously irregular verdict conform to "a clear and unequivocal jury intent." *Id.* The *Singleton* court stated further that "[a] verdict is sufficient in form if it decides the question in issue, and is certain in such a way as to enable the court intelligently to base a judgment thereon." *Id.* (citation omitted). We find the verdict in the present case to be sufficient in form and find further that the trial judge acted appropriately in verifying the verdict decided upon by the jury and in no way placed himself in the position of a thirteenth juror. We believe Bell's argument to be without merit and therefore affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF LAUDERDALE COUNTY OF CONVICTION OF DELIVERY OF COCAINE AND ENHANCED SENTENCE OF THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF TEN THOUSAND DOLLARS ($10,000.00) AND RESTITUTION IN THE AMOUNT OF THREE HUNDRED EIGHTY-NINE DOLLARS AND FIFTY CENTS ($389.50) IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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