

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2017-KA-00612-COA

**CEDERIC YOUNG A/K/A CEDRIC YOUNG
A/K/A CEDRIC DEMONE YOUNG A/K/A
MONSTER SUPREME**

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 04/24/2017
TRIAL JUDGE: HON. LEE J. HOWARD
COURT FROM WHICH APPEALED: OKTIBBEHA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: OFFICE OF STATE PUBLIC DEFENDER
BY: JUSTIN TAYLOR COOK
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: LAURA HOGAN TEDDER
DISTRICT ATTORNEY: SCOTT WINSTON COLOM
NATURE OF THE CASE: CRIMINAL - FELONY
DISPOSITION: AFFIRMED: 05/01/2018
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE IRVING, P.J., FAIR, AND WILSON, JJ.

FAIR, J., FOR THE COURT:

¶1. Cedric Young was convicted of armed robbery, attempted murder, and being a felon in possession of a firearm. He was sentenced to serve fifty years in the custody of the Mississippi Department of Corrections. Young appeals his convictions, arguing that the court erred in dismissing a juror and that his counsel was ineffective. We find no abuse of discretion in the court's juror dismissal. Because Young's ineffective-assistance-of-counsel claim is better suited for a post-conviction relief motion, we dismiss his claim without prejudice.

FACTS

¶2. On January 23, 2015, Starkville Police responded to an alarm at the B-Quik gas station in Starkville, Mississippi. When police arrived, they found the gas-station attendant, Timothy Crook, on the floor. He had been shot in the head. Crook was conscious and could talk to police. When emergency medical services arrived, they treated Crook, and he was transported from the scene. Crook survived the gunshot wound, but he later died from unrelated causes.

¶3. Greg Sharp, the store's owner, reviewed video surveillance of the gas station, downloaded a copy, and turned that copy of the video over to police. The video showed a black male in a red hooded sweatshirt entering the store, talking briefly, demanding money, and shooting Crook in the head.

¶4. A shell casing was found behind the counter next to Crook's feet. The bullet was found in the south window of the store. No fingerprints of any value were found in the area shown in the video.

¶5. Detective Jonathan Headley with the Starkville Police Department reviewed the tape and contacted Reginald Cannon, a paid informant who was on probation. Cannon watched the video and identified the person who robbed the store as "Monster" – Young's alias.

¶6. Detective Headley also showed the video of the incident to Young's mother and sister, Cathy King and Jessica Young. When Headley left King and Jessica alone in the room, a camera caught the two questioning whether the person in the video was Young, and arguably

concluding that it was. King testified to the contrary at trial, stating that the man on the video was not Young. She testified that it was not his walk or his voice. King further testified that she did not recall saying that the man in the video was Young. On cross-examination, she reiterated that she still believed the person in the video was not Young. Jessica likewise testified that she did not know who the person in the video was. She also testified that she did not recall speaking with her mother after police initially showed her the video.

¶7. Raphael Woods, who was housed in jail with Young, testified that Young admitted to the crime. According to Woods, Young said he asked Crook where the bathroom was to make sure the store was empty. Young also told Woods he was wearing something red.

¶8. Diandra Gay testified that on the night of the robbery, Young came over to her boyfriend's house. The group watched some television, and Young said that he was going to Tupelo to get some shoes. Young asked Gay and her boyfriend if they had heard about the armed robbery. Sometime later, Gay was shown surveillance footage from the gas station. She testified that she identified the person in the video as Young based on the way he talked.

¶9. After the State rested, Young presented no additional evidence. He was convicted of armed robbery, attempted murder, and possession of a weapon by a convicted felon.

DISCUSSION

1. Juror Dismissal

¶10. Young argues that the circuit court erred in removing Juror 11 and replacing him with

an alternate juror. After the State's case-in-chief, the State informed the court that Juror 11 had written some notes on the transcript given to the jury to assist them in watching State's Exhibit 4 – the video of Cathy and Jessica watching the gas-station surveillance video. The jurors had not been instructed to write on the transcript. Some of Juror 11's handwritten notes were asterisks. On the back page of the transcript, the juror wrote the following: “[v]ideo is not as dramatic. Several people spotted him but no witnesses presented. Page 12: That’s him (both). It’s all drama after [page] 8[.] 12, still no proof only someone turning him in. Up to page 11 they were in denial and asked questions.” The State moved that the juror be removed, claiming that it was an unintended communication from a juror to an attorney in the case. The State explained that it had no way of knowing whether or not Juror 11 had communicated his thoughts with other jurors. The State moved to strike the juror, and the defense objected.

¶11. Mississippi Code Annotated section 13-5-67 (Rev. 2012) governs the replacement of regular jurors with alternates, providing that “[a]lternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties.” “The decision to dismiss a juror for good cause and the subsequent replacement with an alternate is completely within the trial court’s discretion.” *McCoy v. State*, 820 So. 2d 25, 29 (¶11) (Miss. Ct. App. 2002) (citing *Stevens v. State*, 513 So. 2d 603, 604 (Miss. 1987)). More specifically:

The trial court, as a general rule, may remove a juror when it is of the opinion that the juror [cannot] decide the case competently or impartially, *Pierre v.*

State, 607 So. 2d 43, 49 (Miss. 1992), or “. . . for any reason personal to such person which would make his service as a juror oppressive, or in fact for any reason which to the judge deems sufficient.” *Nixon v. State*, 533 So. 2d 1078, 1085 (Miss. 1987) (quoting 47 Am. Jur. Jury § 121 (1969)).

Smith v. State, 729 So. 2d 1191, 1199 (¶30) (Miss. 1998) (omission in original). In removing Juror 11, the judge stated the following:

I know that the State has become aware of what they perceive to be one juror’s question about a fault in the State’s case or a weakness in the State’s case. That was pretty clear from the communication on the juror’s notes on that document that they used as an aid in following the video – audio portion of the video really – language. Had the State not divulged it and moved to reopen and put on additional evidence and testimony to address what they perceive to be that juror’s question, then it would be, of course, reversible error because the State possessed that information from a juror without divulging it and tried to cure that lingering issue that the juror had. That would not only be improper conduct by the State, it would also be I think grounds for reversal in the event of a conviction. So the State has divulged it to both sides.

The State perceives it to be maybe a weakness in their case, also. And the defendant perceives that that particular juror is leaning towards the defense. That’s the way I read what the communication said.

We are at the stage of the trial where there has been no verdict. The simplest cure, since I have 14 jurors, is to replace that juror. It is misconduct. It was misconduct for the juror to assume I guess that he was going to get to keep his transcript and to write on it, take notes without any instructions from the Court concerning note-taking.

¶12. While the juror’s note-taking may not have been intentional misconduct, it did result in communication from a juror to an attorney. Further, the juror’s notes indicated that he had made up his mind about the case before all evidence had been presented by both sides, and therefore could not be impartial. After review, we find that the judge acted within his discretion in excusing the juror and replacing him with an alternate juror.

2. Ineffective Assistance of Counsel

¶13. Young also argues that his trial counsel was constitutionally ineffective under the Sixth Amendment of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution for failure to object to hearsay and failure to request a cautionary instruction where witnesses allegedly received a benefit for their testimony.

¶14. Mississippi Rule of Appellate Procedure 22(b) addresses the propriety of raising the issue of ineffective assistance of counsel on direct appeal:

Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

¶15. Further, the Mississippi Supreme Court has stated:

It is unusual for this court to consider a claim of ineffective assistance of counsel when the claim is made on direct appeal. This is because we are limited to the trial court record in our review of the claim[,] and there is usually insufficient evidence within the record to evaluate the claim. . . . [W]here the record cannot support an ineffective assistance of counsel claim on direct appeal, the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief. This Court will rule on the merits on the rare occasions where (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge.

Wilcher v. State, 863 So. 2d 776, 825 (¶171) (Miss. 2003) (internal citations and quotation marks omitted). The record does not affirmatively indicate that Young suffered denial of

effective assistance of counsel of constitutional dimensions. Nor have the parties stipulated that the record was adequate to allow the appellate court to make a finding without considering the findings of fact by the trial judge. As a result, we decline to address this issue without prejudice to Young's right to seek post-conviction relief if he chooses to do so.

¶16. This Court hereby dismisses Young's ineffective-assistance-of-counsel claim without prejudice to his ability to raise it in post-conviction proceedings.

¶17. **AFFIRMED.**

**LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, CARLTON, WILSON,
GREENLEE, WESTBROOKS AND TINDELL, JJ., CONCUR.**