

RICHARD MONROE SIMS *v.* STATE OF ARKANSAS

5819

491 S.W. 2d 583

Opinion delivered March 5, 1973

1. CRIMINAL LAW—RECEPTION OF EVIDENCE—ACCUSED'S RIGHT TO CONFRONT WITNESSES.—The admission of codefendant's confession from which accused's name had been deleted did not constitute a denial of accused's right to be confronted with witnesses against him where codefendant later testified in his own defense and accused had an opportunity to cross-examine him.
2. CRIMINAL LAW—CONFESSIONS—SUBMISSION OF VOLUNTARINESS TO JURY AS PREJUDICIAL.—Action of the trial court in submitting the issue of voluntariness to the jury after having found accused's con-

fession to have been voluntary did not result in prejudicial error since it afforded accused a second opportunity to obtain a favorable decision upon the issue of voluntariness.

3. CRIMINAL LAW—EVIDENCE—ADMISSION AS PREJUDICIAL.—Admission by a State's witness that he had participated in the robbery but denial that accused had participated in the crime did not constitute prejudicial error.

Appeal from Pulaski Circuit Court, Fourth Division, *Richard B. Adkisson*, Judge; affirmed.

*Howard, Howard & Howard*, for appellant.

*Jim Guy Tucker*, Atty. Gen., by: *Frank B. Newell*, Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. According to the State's proof, four men, one of whom was armed with a pistol, robbed the Rosedale Drug Store in Little Rock on January 24, 1972. Two of the men, Tommy Stacker and the appellant Sims, were tried jointly. Sims was found guilty and, as a habitual offender, was sentenced to 21 years imprisonment. A mistrial was declared with respect to Stacker, the jury being unable to agree upon a verdict.

Sims first complains of the admission in evidence of Stacker's confession from which all references to Sims by name had been deleted. Stacker later testified in his own defense, denying that he voluntarily signed the confession and insisting that he had no part in the robbery. For the reasons stated in *Jackson v. State*, 253 Ark. 1116, 491 S.W. 2d 581, also decided today, there was no denial of Sims's right to be confronted with the witnesses against him, for he unquestionably had an opportunity to cross-examine Stacker.

Upon the appellant's second point for reversal, we cannot say that the trial judge, after having found Sims's own confession to have been voluntary, erred in submitting the issue of voluntariness to the jury. See *Walker v. State*, 253 Ark. 676, 488 S.W. 2d 40 (1972), and cases there cited. The court's action was certainly not prejudicial, since it afforded Sims a second opportunity to obtain a favorable decision upon the issue of voluntariness.

Finally, the State called Charles Moorman as a witness. Moorman admitted having participated in the robbery of the drug store, but he surprised the prosecution by denying that Sims and Stacker participated in the crime. Sims nevertheless complains of this question and answer, from Moorman's testimony:

"Q. Were these two men with you when that drug store was robbed?

"A. No, sir; they wasn't. I never robbed anything with those two gentlemen."

The appellant contends that Moorman's answer might have been construed by the jury to mean that Moorman had participated in other crimes with Sims and Stacker, but that remote possibility is far too conjectural to represent prejudicial error.

Affirmed.

---