

IN THE COURT OF APPEALS 3/25/97
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00987 COA

ANDRE 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

TRIAL JUDGE: HON. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

WILLIAM B. SULLIVAN

TRAVIS H. BRYANT

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: JEANNENE PACIFIC

NATURE OF THE CASE: CRIMINAL-MANSLAUGHTER

TRIAL COURT DISPOSITION: CONVICTED OF MANSLAUGHTER AND SENTENCED TO
SERVE 20 YEARS IN THE CUSTODY OF THE MDOC

BEFORE BRIDGES, C.J., DIAZ, AND KING, JJ.

BRIDGES, C.J., FOR THE COURT:

Andre Brown (Brown) was indicted for the murder of his wife in the Jones County Circuit Court. He was tried and convicted of manslaughter and sentenced to serve a term of twenty (20) years in the custody of the Mississippi Department of Corrections (MDOC). He presents the following issues on appeal:

I. THE STATE'S "LOSS" OF CERTAIN PHYSICAL AND PHOTOGRAPHIC EVIDENCE WAS PREJUDICIAL TO THE APPELLANT AS IT CONTAINED EXCULPATORY MATERIALS.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S JURY INSTRUCTION D-8.

III. THE TRIAL COURT'S DENIAL OF BOND FOR THE APPELLANT PENDING SENTENCING WAS PREJUDICIAL AND AN ABUSE OF DISCRETION.

IV. THE CUMULATION OF ERROR IN THIS CASE REQUIRES REVERSAL.

Finding no error, we affirm.

FACTS

Brown and his wife, Farlias lived in the Brown Circle housing project in Laurel, Mississippi. Farlias had four children, two of whom Brown was the father. On the night of February 15, 1994, Brown began kicking and beating his wife (Farlias) in the parking lot of the housing project. Farlias ran from Brown to a friend's apartment and begged her friend to let her in and call the police. Brown followed her and hit her in the head with a small automatic pistol. Brown then forced Farlias down the walkway to their apartment. Witnesses testified that shortly after Brown and Farlias entered their apartment they heard a gunshot. Brown exited the apartment stating, "I killed my wife. I killed my wife. I didn't mean to kill my wife."

Officer Steve Dearman (Dearman) of the Laurel Police Department arrived at the scene and found Farlias lying on the kitchen floor, her head in a pool of blood. Officer Harold Buckhaults arrived after Dearman and found the victim with a gaping gunshot wound to the head. The victim had a small pocketknife cupped in her right hand and a pistol laying next to her head. Brown was put in police custody and transported to the hospital for the treatment of three small puncture wounds to his shoulder and arm. He was arrested and charged with the murder of his wife.

At trial, Brown did not deny hitting his wife or having the gun. His defense was that he and his wife were tussling over the gun and it accidentally went off, killing Farlias. However, Dr. Stephen Hayne, the forensic pathologist who performed the post-mortem exam on Farlias testified that the deadly wound Farlias received could not have been the result of a tussle over the gun. Dr. Hayne testified that Farlias died as the result of a contact wound to her forehead:

So the gunshot wound was a contact. The muzzle was placed against the skin surface, it was fired downward into the right producing massive injuries to the brain on the right side as well as multiple fractures or breaks of the bone of the skull cap and the base of the skull that the brain sits on.

Moreover, Dr. Hayne testified that it would be possible to a reasonable degree of medical certainty that the angle of the fatal shot could have been produced by someone Brown's height firing downward into the face of someone Farlias's height. Joe Andrews (Andrews) of the Mississippi Crime Lab testified that he performed a gunshot powder residue test on Farlias to determine if any gunpowder residue was on her hands. The existence of gunshot residue on a person's hands indicates that that person fired a firearm. Andrews testified that Farlias did not have any gunshot residue on her hands, therefore indicating that she had not fired the pistol.

Brown testified in his own defense and maintained that the pistol went off while he and Farlias were tussling over the gun. He stated that while they were tussling over the gun, Farlias had attacked him with a pocketknife. The medical records indicated that while Brown was treated at the hospital for three puncture wounds approximately one centimeter long each, he was not in any distress. After seven hours of deliberation, the jury returned a verdict of manslaughter.

I. THE STATE'S "LOSS" OF CERTAIN PHYSICAL AND PHOTOGRAPHIC EVIDENCE WAS PREJUDICIAL TO THE APPELLANT AS IT CONTAINED EXCULPATORY MATERIALS.

Before the trial, the Laurel Police Department misplaced all of the photographs of the crime scene, photographs of the puncture wounds on Brown's arm, and the jogging suit top that Brown was wearing the night of the killing. Brown claims that the loss of this evidence was prejudicial to his defense because it denied him potentially useful evidence. However, Brown does not allege any error by the trial court, but even so argues that a new trial should be granted because of the police department's loss of evidence. Brown never presented this question of the lost evidence to the trial court for its ruling. The only mention of the lost evidence at trial was the stipulation both parties agreed to that the photographs were indeed misplaced. Therefore, Brown is procedurally barred from raising this issue for the first time on appeal. "It is elementary that a party seeking reversal of the judgment of a trial court must present this court with a record adequate to show that an error of reversible proportions has been committed and that the point has been procedurally preserved." *Chase v. State*, 645 So. 2d 829, 845 (Miss. 1994), *cert. denied*, 115 S.Ct. 2279 (1995).

Even if Brown had presented this question for determination in the trial court, the issue is meritless. The state's duty to preserve evidence is limited to that which might be expected to play a significant role in the defendant's case. *Tolbert v. State*, 511 So. 2d 1368, 1372 (Miss. 1987). "Significant role" is defined as exculpatory in nature, and such nature and value of the evidence must be apparent before the destruction of the evidence, and the evidence must be of such a nature that the defendant is unable to find comparable evidence within reasonable means. *Id.* Moreover, "the mere possibility the evidence might aid the defense does not satisfy the constitutional materiality standard." *Id.* If destruction, or in Brown's case, loss of evidence is not done with fraudulent intent but as a matter of routine, there is no inference of bad faith. *Taylor v. State*, 672 So.2d 1246, 1271 (Miss. 1996), *cert. denied*, 117 S.Ct. 486 (1996). Brown never proved the exculpatory nature of the misplaced photos

or the jogging suit top, nor did he prove any bad faith on the part of the state or the police department. This issue is meritless.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S JURY INSTRUCTION D-8.

Brown requested the following instruction D-8, which was subsequently denied:

The Court instructs the jury that a reasonable doubt of guilt may arise from the evidence, or from the lack of evidence, or from an insufficiency of the evidence, or from a conflict in the evidence, or from an application of the law in these instructions to the evidence, or from credibility of a material witness, but however it may arise, if it does arise, it demands a verdict of not guilty at your hands.

The trial court denied D-8 because it was sufficiently addressed in other instructions granted by the court. *Williams v. State*, 667 So. 2d 15, 24 (Miss. 1996) (Holding jury instructions are to be read together as a whole, and reversal is not warranted when jury is fully and fairly instructed by other instructions.) Moreover, when the trial court denied D-8, Brown did not object or offer any record of why the trial court may have improperly denied the instruction. *See Chase supra* p. 4. This issue is meritless.

III. THE TRIAL COURT'S DENIAL OF BOND FOR THE APPELLANT PENDING SENTENCING WAS PREJUDICIAL AND AN ABUSE OF DISCRETION.

After Brown was found guilty, he requested a pre-sentence investigation. The trial judge agreed, but denied bond pending the pre-sentence investigation. Brown then waived the pre-sentence investigation and was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections. While admitting that this is a difficult issue to raise, Brown contends that the trial judge abused his discretion in denying post-conviction pre-sentence bond. However, denial of bond is not grounds for reversal. In *King v. State*, the trial judge denied the defendant's bail prior to trial, and the defendant raised the denial as error on appeal. 580 So. 2d 1182, 1185 (Miss. 1991). The Mississippi Supreme Court stated, "[d]isposition of this issue is unnecessary; whether the judge improperly incarcerated James has nothing to do with the merits of this case and, as a consequence, reversal is not a possible remedy." *Id.* at 1186. Furthermore, the granting of bond was at the trial judge's discretion, and in light of the crime of which Brown was convicted, the trial judge did not abuse his discretion. This issue is meritless.

IV. THE CUMULATION OF ERROR IN THIS CASE REQUIRES REVERSAL.

According to Brown, cumulation of improper and highly prejudicial prosecutorial error warrants a new trial. However, the record fails to support Brown's scurrilous accusations, but instead reveals a record devoid of any objections to the state's conduct throughout the course of the trial. Additionally, Brown raises this cumulative error issue for the first time on appeal. Again he failed to present this issue to the trial court for consideration. "It is well established that this Court will not consider issues which were not raised in the trial court. A trial judge cannot be put in error on a

matter which was not presented to him for decision." *Crenshaw v. State*, 520 So. 2d 131, 134-35 (Miss. 1988). This issue is meritless, and the judgment is affirmed.

THE JUDGMENT OF THE JONES COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE TAXED TO JONES COUNTY.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.