

6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01023 COA

BRYANT 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. C.E. MORGAN III

COURT FROM WHICH APPEALED: GRENADA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: LELAND H. JONES III

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN

ASSISTANT DISTRICT ATTORNEY: CLYDE HILL

NATURE OF THE CASE: CRIMINAL - MURDER

TRIAL COURT DISPOSITION: MURDER CONVICTION, SENTENCE OF LIFE

MANDATE ISSUED: 7/8/97

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Bryant Brown was convicted by a Grenada County jury of murder. He appeals arguing that he should not have been prevented from introducing evidence that the victim appeared to have crack cocaine rocks in his possession when he was killed, that he should have been allowed to question a detective regarding another witness who was originally a suspect, and that he was entitled to cautionary instructions on accomplice testimony. Finding these arguments without merit, we affirm.

FACTS

In the late afternoon of February 1, 1995, Bryant Brown and two other people walked to the home of Henry Evans. On the way there Brown put a clip into a hand-gun. Evans was inside his automobile working on the car stereo system. According to witnesses, Brown was looking for Robert Evans, Henry's cousin. Robert had been in a fight two days earlier with Brown's brother. Brown went up to the car door and asked Henry Evans about the whereabouts of his cousin. Henry responded that he did not know, but assumed that Robert was at home. One witness testified that Brown's immediate response was to put a gun to Henry Evans's head while he still sat in the car, and pulled the trigger. Evans was killed.

That there may have been more to the story is suggested by the discovery of six rocks of what appeared to be crack cocaine under the victim's hand.

DISCUSSION

Brown alleges five errors. Because issues two and three are intertwined, as are issues four and five, we will address those pairs together.

1. Motion in limine. +

The first alleged error is that the trial court should not have granted a motion in limine by the state to exclude evidence of six rocks of a cocaine-like substance found under Evan's right hand after he was shot. The supreme court has delineated the standard for motions in limine.

The Court [in *Whittle v. City of Meridian*, 530 So. 2d 1341 (Miss.1988)] adopted a test espoused by the Kansas Supreme Court which held that motions in limine should be granted only when the trial court finds that two factors are present: (1) the material or evidence in question will be inadmissible at a trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury. The primary purpose of such motions is to exclude evidence highly prejudicial to the movant.

Gifford v. Four-County Electric Power Assoc., 615 So. 2d 1166, 1171 (Miss. 1992).

Brown argues that the evidence of six cocaine-like rocks found under the deceased's hand was relevant in his defense. Brown put on no witnesses, but made efforts during cross-examination to suggest that someone else murdered Evans as part of a drug transaction. There was no evidence presented to support this argument. There were two eyewitnesses to the encounter between Brown and the deceased. There was no evidence presented at trial that would indicate that this was a drug deal or that anyone but Brown did the shooting.

In ruling on the requested motion in limine, the trial court said this:

I am sustaining the Motion in Limine. If it should become relevant or you feel it becomes relevant during the trial, then you need to ask for a 401 hearing on it, and at that time we will hear it outside the presence of the jury. But I am sustaining the Motion in Limine at this time.

Thus, the trial court reserved the right to allow this evidence if Brown showed that the evidence was

relevant. Even if drugs were part of the discussion between Brown and the victim, that would not affect Brown's guilt of murder absent some evidence of self-defense or other justification. No evidence of that was ever presented. It is a valid exercise of discretion when "[t]he trial court reserves the right to revisit any motion in limine ruling if the evidence develops in a manner which the court could have concluded that other evidence is relevant." *Thompson Machinery Commerce Corp. v. Wallace*, 687 So. 2d 149, 152 (Miss. 1997); citing *Gifford v. Four-County Elec. Power Ass'n*, 615 So. 2d 1166, 1172 (Miss.1992). Brown never showed the relevance of the cocaine-like substances. Therefore the motion in limine was properly granted.

2 & 3. Prohibiting cross-examination of detective regarding charges and subsequent dismissal of murder charges against witness, and regarding inconsistent statements of that witness.

Brown argues that the trial court erred in precluding him from cross-examining Detective Murphree concerning the fact that witness Charles Long, Jr. had earlier been charged with the murder of Henry Evans. A hearing was held outside the presence of the jury. The trial court ruled that it was hearsay to allow Brown to ask about statements that Long had made to the detective. The trial judge sustained an objection by the State that allowing Brown to question Detective Murphree about inconsistent statements made by Long would be improper because it would be an attempt to impeach a witness who has not yet testified. Brown's counsel argued that the questioning should be permitted because it would not be impeachment, but would go to credibility. The trial judge stated that this was still improper because "it would only be credibility as to this witness, and that predicate has not been laid. Credibility as to what the other witness is going to say, you will just have to raise that at a future time with your witnesses."

The supreme court has stated that the "relevancy and admissibility of evidence are left, in large part, to the discretion of the trial court." *Johnson v. State*, 666 So. 2d 499, 503 (Miss. 1995). The trial judge did not abuse his discretion. Until Long testified and was himself asked about allegedly inconsistent prior statements, the proper predicate was not laid. *Whigham v. State*, 611 So. 2d 988, 994 (Miss. 1992). The evidence Brown sought to have admitted was eventually brought out through Murphree and Long's testimony. Murphree testified that Long had been arrested and charged with murdering Henry Evans, but was later cleared of the murder. Long testified that he had originally told the detective that he knew nothing about Evans's murder, and that he later gave a statement detailing what had actually happened. There was no proffer made to show what additional evidence would have been acquired from further cross-examination of detective Murphree. There was no error.

4 & 5. Refusal of Brown's cautionary instructions

Brown argues that the trial court erred in refusing to grant instruction D-7, which stated:

A person criminally involved with others in a crime is an accomplice. The testimony of an accomplice is to be considered and weighed with great care and caution and suspicion. You may give it such weight and credit as you deem it is entitled.

Also rejected was instruction D-9:

The court instructs the jury that the law looks with suspicion and distrust on the testimony of the alleged accomplice, and requires that jury to weigh same with great care and caution and suspicion.

You should weigh the testimony from alleged accomplices, and passing on what weight, if any, you should give this testimony, you should weigh it with great care and caution, and look upon it with distrust and suspicion.

Brown alleges that these instructions should have been given in light of the fact that Detective Murphree had signed an affidavit charging Long with the murder in question. Brown cites case law that deals with the granting of cautionary instructions in situations involving co-conspirators. None of these cases requires cautionary instructions when the witness was formerly considered a suspect, but evidence of the witness's complicity was not introduced at trial. The charges against Long had been dropped before the trial began.

Brown was entitled to question Long about his possible involvement, and those questions were asked. During closing argument, Brown's attorney said that witness and supposed accomplice was "lying to save his own hide." The factual issue was squarely put before the jury. The only appellate issue is whether the special accomplice instructions should have been given to the jury when the witness was not charged as an accomplice. We refuse to extend the case law to cover situations in which the defense wishes to characterize a witness as a possible suspect, but the State has dropped all charges against the witness.

**THE JUDGMENT OF THE CIRCUIT COURT OF GRENADA COUNTY OF
CONVICTION OF MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE
MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE IMPOSED
IN THIS CAUSE SHALL RUN CONSECUTIVELY TO ANY SENTENCE PREVIOUSLY
IMPOSED. COSTS ARE ASSESSED TO GRENADA COUNTY.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING,
HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.**