

IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00061 COA

CLINTON BURTON, JR.

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. GEORGE C. CARLSON JR.

COURT FROM WHICH APPEALED: PANOLA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID CLAY VANDERBURG

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: DEWITT T. ALLRED III

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: CRIMINAL: MANSLAUGHTER

TRIAL COURT DISPOSITION: MANSLAUGHTER: SENTENCED TO 20 YRS IN THE MDOC WITH LAST 5 YRS SUSPENDED; PLACED UPON SUPERVISED PROBATION FOR 5 YRS; DEFENDANT SHALL PAY AND ALL COSTS OF COURT

BEFORE BRIDGES, P.J., COLEMAN, DIAZ, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Clinton Burton, Jr. was indicted for murder and convicted of manslaughter. The court sentenced Burton to serve twenty (20) years in the custody of the Mississippi Department of Corrections with the last five (5) years suspended plus five (5) years of supervised probation. The trial court denied Burton's motion for JNOV, or in the alternative, a new trial. We find that Burton's issues on appeal have no merit and therefore affirm.

FACTS

On the night of January 6, 1992, Angela Fonville was shot and killed in the living room of her house trailer by her former boyfriend, Clinton Burton, Jr., who was "playing" with a pistol. Persons present in the house trailer at the time of the shooting included Angela's fourteen-year-old daughter, Marshanda; and Angela's four-year-old son, Melvin; Angela's brother, Timothy; his girlfriend Rosemary Milam, and her four-year-old son, Kevin; and Burton's friends, Maurice McKinney and Ricky Wright. Marshanda, Timothy, and Rosemary testified that Burton was playing with the gun when it fired striking Angela Fonville in the shoulder and neck. Timothy and Rosemary each testified that they had told Burton to put the gun away before someone got hurt. Ricky and Maurice testified for the defense that Burton was handling the gun at the time it fired. Both Ricky and Maurice claimed that the shooting was an accident although they testified that the gun would not fire without being cocked. Timothy and Rosemary testified that the shooting "could have been" an accident.

Burton based his entire defense on the fact that the shooting was an accident. The jury was instructed on the elements of murder, manslaughter, and excusable homicide and returned a verdict of guilty of manslaughter. Burton's motions for directed verdict, mistrial, JNOV, and new trial were all denied by the trial court. The Court sentenced Burton to serve twenty (20) years in the custody of the Mississippi Department of Corrections with the last five (5) years suspended and five (5) years of supervised probation. Burton argues on appeal that the jury could not have found him guilty of anything other than excusable homicide and requests that the verdict be reversed and remanded or reversed and rendered.

ANALYSIS

I. DID THE TRIAL COURT ERR IN DENYING BURTON'S MOTIONS FOR DIRECTED VERDICT AND JNOV/NEW TRIAL?

Burton argues that the trial court erred in failing to grant his motions for a directed verdict and JNOV/new trial. Burton contends that the evidence justified a finding of accidental homicide and did not justify a conviction for manslaughter. Burton based his argument on the fact that all three defense witnesses testified that the shooting was an accident, and the State's witnesses testified that the shooting "could have been" an accident. Burton argues that he is entitled to a new trial or reversal on the grounds that no reasonable juror could have found him guilty of manslaughter.

The State argues that it is uncontroverted that Burton shot and killed Angela Fonville with a pistol. The State contends that the evidence was sufficient to support a finding of either murder or manslaughter, and the jury was properly instructed on these crimes. The State indicates that the trial judge was also of the opinion that the jury could have found the killing to be accidental and instructed the jury accordingly. The State argues further that the instruction based on the theory of accident could have been refused without error, and, in fact, Burton was given an accident instruction cast in terms unnecessarily favorable to his position. The State contends that Burton should count himself fortunate that the jury convicted him only of manslaughter and not murder.

In the present case, Burton was indicted for murder under section 97-3-19(1)(b) of the Mississippi Code. The trial judge, after hearing the evidence, was of the opinion that jury issues had been made as to whether the killing was murder, manslaughter, or excusable accident, and the trial judge instructed the jury as to each of these alternatives. Burton challenges the legal sufficiency of the evidence against him contending that the shooting was clearly accidental, and that the trial court should have granted his motion for directed verdict or JNOV.

A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled Burton's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Burton's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Id. (citations omitted).

We find that the evidence was legally sufficient to warrant jury consideration of murder, manslaughter, and excusable homicide. In the present case, the evidence indicated that Burton was aware that the gun was a dangerous weapon, and that it was loaded. Timothy Fonville and Rosemary Milam each testified that Burton was playing with the gun by pointing it toward the wall between the living room and the bedroom and at other people, and that he had been told more than once to put the gun away before someone got hurt. Ms. Milam and defense witnesses, Ricky Wright and Maurice McKinney, testified that they saw a bullet fall out of the gun's clip, saw Burton retrieve the bullet from under the couch, place the bullet into the gun clip, and insert the clip back into the gun. Marshanda Fonville testified that Burton told her and the younger children, moments prior to the shooting, to get out of the bedroom so that they would not get hit when he shot the pistol.

The evidence consistent with the guilty verdict must be accepted as true. *Id.* Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Burton not guilty of manslaughter or murder on the grounds that the shooting was an excusable homicide. Here the evidence was legally sufficient to support the conclusion, both directly and by inference, that Burton knew the gun was loaded and knew he should not be playing with it. Evidence showed that Burton was holding the gun when it fired, struck, and killed Angela Fonville. Mississippi law clearly provides that a homicide shall be excusable "when committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent." Miss. Code Ann. § 97-3-17(a) (1972). Here, the evidence was sufficient to show that Burton was not acting with "usual and ordinary caution." The evidence was sufficient to support the jury verdict that Burton was guilty of manslaughter and was not entitled to be excused on the grounds that the shooting was an accident. The evidence was also amply sufficient to support the trial court's denial of Burton's motions for directed verdict and of his post-trial motion for JNOV.

Burton also argues that the jury verdict was against the overwhelming weight of the evidence and 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's evidence showed that Burton was not acting with "usual and ordinary caution" when handling the gun as required by section 97-3-17(a) of the Mississippi Code. It is undeniable that Burton was in control of the gun when it fired and killed Angela Fonville. Burton

testified in his own behalf that the shooting was an accident. Other witnesses for the defense testified that it was an accident, and the State's witnesses testified that it could have been an accident. Also, the jury was provided with an accident instruction.

The testimony was clearly for the jury to evaluate. 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 Burton. The trial court did not abuse its discretion by refusing to grant Burton 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 Burton's motion for a new trial.

II. DID THE TRIAL COURT ERR IN PERMITTING DR. EMILY WARD TO TESTIFY AS TO THE CAUSE OF DEATH OF THE VICTIM, ANGELA FONVILLE?

Burton contends that the trial court erred in allowing Dr. Emily Ward to testify as to the cause of death of the victim, Angela Fonville. Burton argues that Dr. Ward's testimony was inadmissible hearsay because she was not the doctor who prepared the autopsy report and her opinion as to the cause of death of the victim was based on an autopsy report prepared by Dr. Lloyd White. Burton argues that in order for Dr. Ward's testimony to be admissible, the autopsy report on which Dr. Ward based her opinion would have to qualify as a record of a regularly conducted activity as defined by Rule 803(6) of the Mississippi Rules of Evidence. In his brief, however, Burton fails to address the applicability of Rule 803(6). We also note that Burton's objection at trial was based upon improper procedure and not on hearsay grounds.

The State contends that Dr. Ward's testimony is admissible under both Mississippi Rule of Evidence 703 and Rule 803(6). We find that because consideration of Rule 703 is dispositive of this issue, and because Rule 703 was the basis of the trial court's ruling, it is not necessary for this Court to address the applicability of Rule 803(6).

We agree with the State that Dr. Ward's testimony was properly admitted under Rule 703 of the Mississippi Rules of Evidence. Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

M.R.E. 703. The comment to Rule 703 states that there are three possible sources which may produce an expert's facts or data: (1) personal observation by the expert; (2) hypothetical question posed to the expert at trial or opinion based on testimony the expert has heard at trial; or (3) *data presented to the expert outside of court and other than by his personal observation*. M.R.E. 703 cmt. (emphasis added).

In the present case, Dr. Ward testified that Angela Fonville died as a result of a single gunshot to the shoulder and neck. Dr. Ward based her opinion on Dr. White's autopsy report, photographs of the victim taken during the post mortem examination as well as on tapes and handwritten notes prepared during the post mortem examination. We believe that the autopsy report, photographs, notes, and tapes are all items which fall into the category of "data presented to the expert outside of court and other than by his personal observation" as indicated by the comment to Rule 703. We find that the trial court did not err in allowing Dr. Ward's testimony as to the cause of death of the victim.

III. DID THE TRIAL COURT ERR IN PERMITTING THE STATE TO REFRESH THE MEMORIES OF WITNESSES, TIMOTHY FONVILLE AND ROSEMARY MILAM, DURING DIRECT EXAMINATION BY ALLOWING THE WITNESSES TO REFERENCE THEIR PRIOR STATEMENTS TO POLICE?

Burton contends that the trial court erred in allowing the State's witnesses, Timothy Fonville and Rosemary Milam, to refresh their memories while testifying on the witness stand. During the testimony of Timothy Fonville, the State presented Timothy with the written statement that he had made to the police following the shooting of Angela Fonville. Timothy identified his signature on the statement but indicated that he was not a good reader and was unable to read the statement. The State's attorney then read pertinent portions of the statement to Timothy in open court. Timothy testified that he still did not recall making the statements contained in the writing, and the State did not question him any further regarding the statements.

The State next called Rosemary Milam to the stand. The State presented Rosemary with a writing containing statements that she had made to the police following the shooting. The State's attorney asked Rosemary to identify her signature at the bottom of the statement, and Rosemary stated that someone else had signed her name to the statement. However, after reading pertinent portions of the statement silently, Rosemary indicated that she did recall making the statements and was then able to answer the State's questions pertaining to those statements.

Burton argues that the trial court erred by allowing the State's attorney to read Timothy Fonville's police statement aloud in open court, and Burton contends further that it was error for the trial court to allow the State's attorney to lead Rosemary Milam with a statement she had not signed. Burton argues that the State's actions amounted to "boosting" the testimony of their witnesses. Burton contends that the State did not comply with Mississippi Rule of Evidence 803(5) pertaining to recorded recollection in that the State offered no proof that the witnesses once had knowledge of the information contained in the statements, that the State failed to demonstrate an "exhaustion of memory," and that the State failed to show that the statements were made by the witnesses when the matter was fresh in their memory. Burton argues further that Rule 803(5) should be read in conjunction with Mississippi Rule of Evidence 612 which provides for writings used to refresh memory. Burton contends that Rule 612 requires the court to make a determination that the writing is "necessary in the interest of justice," and that the trial court failed to make such a determination.

The State contends that Mississippi Rule of Evidence 612 is the applicable rule in this situation and

not Rule 803(5). The State also argues that Burton's reading of Mississippi Rule of Evidence 612 regarding the "interests of justice" is an incorrect interpretation. We agree. Rule 612 provides that a witness may use "a writing, recording or object to refresh his memory for the purpose of testifying." M.R.E. 612. The comment to Rule 612 states that the purpose of the rule is "to stimulate memory in order to ascertain credible evidence." M.R.E. 612 cmt. In the present case, it seems clear that the State was attempting to refresh the memories of two of its witnesses through the use of their prior statements to police. Burton takes issue with the fact that the State failed to lay a foundation as required by Mississippi Rule of Evidence 803(5). A reading of the comment to Mississippi Rule of Evidence 612 indicates that laying a foundation is not necessary when seeking to refresh a witness's memory. The comment speaks specifically to the confusion that has developed between Rule 803(5) and Rule 612:

The pre-rule Mississippi practice of using a writing to refresh a witness' memory has often been confused with the past recollection recorded exception to the hearsay rule. Prior to the rules, a party who simply wanted to refresh a witness' memory often felt compelled to satisfy the foundation requirements of the hearsay exception. *Rule 612 eliminates this state of confusion and permits any writing, recording or object to be used, regardless of whether it is in compliance with the foundation requirements of the hearsay exception.*

M.R.E. 612 cmt (emphasis added).

Burton's objection that the witnesses failed to demonstrate an exhaustion of memory has been addressed by the Mississippi Supreme Court in *King v. State* where the court held that a witness may refer to his notes during testimony, even though the witness failed to establish an exhaustion of memory. *King v. State*, 615 So. 2d 1202, 1207 (Miss. 1993). Burton's objection regarding the reading of Timothy Fonville's statement in open court has also been addressed by the Mississippi Supreme Court. In *Gardner v. State*, the court indicated that Mississippi has deviated from the general rule as stated in C. Torcia, *Wharton's Criminal Evidence* § 416 (13th ed. 1973) that the contents of a memorandum used to refresh a witness's memory may not be read to the jury. *Gardner v. State*, 455 So. 2d 796, 799 (Miss. 1984). The *Gardner* court recognized that "Mississippi has not prohibited a witness from reading his memorandum to the jury." *Id.*

The present case differs in that the attorney instead of the witness read the statement in open court; however, we agree with the State in that Rule 612 is as well served when the attorney reads a part of the statement to the witness as when the witness reads it for himself. *See Cutshall v. State*, 203 Miss. 553, 35 So. 2d 318, 322 (1948).

Burton also takes issue with the fact that Rosemary Milam was permitted to refer to a statement which she had not signed. The Mississippi Supreme Court acknowledges the general rule that "since it is not the memorandum that is the evidence, but the recollection of the witness, the author of the memorandum may be a person other than the witness." *Gardner*, 455 So. 2d at 798 (quoting C. Torcia, *Wharton's Criminal Evidence* § 416 (13th ed. 1973)).

This Court finds further that Burton is mistaken in his assertion that Rule 612 requires the court to determine that the writing is necessary in the interest of justice. We believe that Burton is simply

misinterpreting the rule. As the State correctly argues, it is not the use of the writing by the witness to which the rule refers in relation to the court's discretion to determine necessity. Instead, the rule seems to be referring to whether an adverse party is entitled to have the writing produced at the hearing: "if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing, recording or object produced at the hearing" M.R.E. 612.

We find that the trial court did not abuse its discretion in permitting the witnesses to refresh their memory while testifying, and, therefore reject Burton's argument on this issue.

IV. DID THE TRIAL COURT ERR IN ADMITTING THE BULLET FRAGMENT INTO EVIDENCE?

Burton argues that the trial court erred in allowing the bullet fragment to be placed into evidence through the State's witness Dr. Emily Ward. Burton contends that the State failed to lay the proper foundation and/or establish the proper "change" of custody. Burton correctly states in his brief the law regarding identification of evidence and establishing chain of custody. Burton, however, does not indicate to this Court what it is that he believes the State failed to do in laying a proper foundation or establishing a chain of custody.

Mississippi Rule of Evidence 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." M.R.E. 901(a). The Mississippi Supreme Court has held that the test for chain of custody is "whether there is any indication of tampering or substitution of evidence." *Wells v. State*, 604 So. 2d 271, 277 (Miss. 1992). Furthermore, the State does not have to produce every person who handled the evidence, nor does the State have to account for every minute of every day. *Butler v. State*, 592 So. 2d 983, 985 (Miss. 1991).

In the present case, a reading of the record indicates that when Dr. White performed the autopsy, he recovered a bullet fragment from the deceased's body and placed it into an evidence envelope. The bullet fragment was then submitted to the Crime Lab, and Dr. Ward, the current State Medical Examiner, received the bullet fragment from the Crime Lab before leaving Jackson to appear at Burton's trial. Dr. Ward testified that the medical examiner's case number and the Crime Lab's case number on the evidence envelope corresponded to the numbers on the autopsy report and on the evidence submission form. There was no showing by Burton that the evidence was not what it was purported to be, nor was there any indication that the evidence had been tampered with or altered.

We do not find the trial court to be in error. The decision of whether the State has properly shown the chain of custody of evidence is left to the discretion of the trial court, *Wells*, 604 So. 2d at 277, and this Court will not reverse the trial court's ruling "absent abuse resulting in prejudice to the defendant." *Gibson v. State*, 503 So. 2d 230, 233 (Miss. 1987). This Court holds that the State properly presented the chain of custody of the evidence and we find this issue to be without merit.

V. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE BURTON REGARDING AN ALTERCATION THAT ALLEGEDLY TOOK PLACE BETWEEN THE VICTIM AND BURTON SIX

DAYS PRIOR TO THE SHOOTING?

Burton contends that the State attempted to bring out improper evidence concerning an altercation six days prior to the shooting between Burton and the victim. Burton argues that evidence of a prior criminal activity on the part of one criminally accused is inadmissible where the prior offense has not resulted in a conviction. Burton contends that the improper evidence and questions by the State prejudiced the Defendant and should not have been allowed. Burton requests that his conviction of manslaughter either be reversed and remanded for a new trial, or that the conviction be reversed and rendered and the Defendant discharged.

The State contends that there really was no evidence for the jury to disregard because the allegations were wholly within the attorney's questions, the Appellant did not admit the allegations, and no extrinsic proof was put on to rebut the Appellant's refusal to admit the allegations. The State argues, however, that the trial court's written admonishment to disregard the prosecutor's allegation was sufficient to overcome any possible prejudice.

When a judge is faced with an objection to improper evidence, he may do one of two things: (1) sustain the objection and admonish the jury accordingly, or (2) allow the evidence and give a cautionary instruction to the jury at the end of the trial. *Hudgins v. State*, 569 So. 2d 1206, 1209 (Miss. 1990). In the present case, the judge admitted the evidence but gave Instruction C-8 which reads as follows:

Members of the Jury, during the cross-examination of the Defendant, he was questioned by the State concerning alleged acts of burning Angela Fonville on New Year's Eve, a few days before the shooting incident which occurred on or about January 6, 1992. The Defendant, Clinton Burton, Jr., did not admit to committing those acts, and the State did not bring forth any affirmative evidence to support these alleged acts of burning. Therefore, the Court hereby cautions you and instructs you that you must not in any way consider these allegations of burning in arriving at your verdict in this case. In fact, these allegations of burning must be totally disregarded by you as you consider your verdict.

This Court finds that the trial judge should not have allowed the State's attorney to question Burton about the alleged altercation with the victim. M.R.E. 404(b); *see also Cabello v. State*, 490 So. 2d 852, 856 (Miss. 1986) ("The case law in Mississippi states clearly that the State may not introduce evidence of other crimes except to show identity, guilty knowledge, intent, or motive, or where the offense charged is so interwoven with other offenses that it cannot be separated."). However, the case law in Mississippi is equally clear that a jury is presumed to follow the instructions of the trial judge. *Williams v. State*, 512 So. 2d 666, 671 (Miss. 1987) (our law presumes that the jury does as it is told); *Shoemaker v. State*, 502 So. 2d 1193, 1195 (Miss. 1987) (holding that jurors are presumed to follow the trial judge's instructions, and it would show insufficient confidence in the good sense and discretion of trial judges to hold otherwise). We therefore find that the jury was properly instructed to disregard the inadmissible testimony, and the record contains no indication that they were unable to do so.

THE JUDGMENT OF THE CIRCUIT COURT OF PANOLA COUNTY OF CONVICTION

OF MANSLAUGHTER AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THE LAST FIVE (5) YEARS SUSPENDED AND FIVE (5) YEARS OF SUPERVISED PROBATION 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.