

IN THE COURT OF APPEALS 09/17/96
OF THE
STATE OF MISSISSIPPI
NO. 92-KA-00842 COA

LEMARIO BELL

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. WILLIAM F. COLEMAN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

A. RANDALL HARRIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIDRE MCCRORY

DISTRICT ATTORNEY: BOBBY DELAUGHTER

NATURE OF THE CASE: MURDER

TRIAL COURT DISPOSITION: GUILTY OF MURDER, SENTENCED TO SERVE A TERM OF
LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

DIAZ, J., FOR THE COURT:

Lemario Bell (Bell) was indicted, tried, and convicted of murder by the Hinds County Circuit Court and sentenced to serve a life term in the custody of the Mississippi Department of Corrections. On appeal, Bell asserts three errors: (1) sufficient proof does not exist to support a conviction for murder as the perpetrator or accessory; (2) the lower court erred in refusing Bell's requested circumstantial evidence instruction, and (3) the lower court erred by excluding black jurors in violation of the *Batson* rule. Finding his arguments without merit, we affirm.

FACTS

In the morning hours of May 2, 1991, Bell arrived at J.R.'s Lounge (J.R.'s) in Jackson, Mississippi. After entering J.R.'s, Bell began talking with Anthony Bailey (Bailey) and a few other men he knew. At some point, Knight arrived at J.R.'s and began socializing with Brenda Thomas (Brenda), Jackie Riley (Jackie) and Frankie Thomas (Frankie). After speaking for a few minutes, Brenda, Jackie and Frankie walked outside. Bailey and Bell followed the trio onto the patio and began questioning Frankie about Knight's gang affiliation. Bell and Bailey were members of a local gang called the Vice Lords, and were asking whether Knight had changed his allegiance from the Vice Lords to the rival Folks gang. Frankie encouraged Bell and Bailey to leave Knight alone and everyone returned inside. Bailey approached Knight inside the club and accused him of changing his affiliation from the Vice Lords to the Folks. Knight, Jackie and Brenda walked away and attempted to leave J.R.'s. When Knight walked out the door, he was pursued by approximately seven men, including Bell and Bailey. Bell, Bailey and several more unknown men proceeded to attack Knight in the parking lot. Suddenly, the attack on Knight ceased, and he got up and began to walk toward the door of J.R.'s Lounge with Brenda. As they neared the door, they heard a gunshot. Brenda turned and saw Bailey pointing a gun towards her and Knight. Knight said, "They're shooting," and he pushed Brenda toward the door. The bullet had scraped Brenda's ear and lodged in the wall behind her. Brenda and Knight began running toward the doorway when a second shot was fired. Brenda turned to look behind her and testified that Bell was holding the gun and Knight was shot in the abdomen. Knight managed to get inside the club and laid on the floor, bleeding heavily. Witnesses testified that Knight said, "I'm going to get Lemario. I can't believe he shot me." Shortly thereafter, Knight died.

DISCUSSION

1. Sufficient Proof Does Not Exist to
Support a Conviction for Murder as the
Perpetrator or Accessory

Bell contends that the evidence presented at trial was not sufficient to support his conviction either as the person who fired the fatal shot which killed Knight or as an accessory before the fact. At trial, the State's primary theory was that Bell actually fired the shot that killed Knight. The State prosecuted alternatively that Bell was an accessory before the fact. This is permissible because Bell could be indicted as the principal whether he fired the shots or whether he aided and abetted the individual who actually fired the shots. Miss. Code Ann. § 97-1-3 (1972); *see Scales v. State*, 289 So. 2d 905, 908 (Miss. 1974).

In reviewing the legal sufficiency of the evidence, this Court applies a well-established standard.

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all the evidence -- not just that supporting the case for the prosecution -- in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge is required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.

Carr v. State, 655 So. 2d 824, 837 (Miss. 1995).

The evidence established that Bell and Bailey were members of the same street gang, were seen together outside J.R.'s Lounge when the shooting began, that Bailey and Bell were at odds with Knight over his affiliation with a rival gang, that Knight attempted to leave the nightclub but was followed by Bailey and Bell, that a fight erupted in the parking lot, that witnesses testified that they saw a gun in Bailey's hand after the first shot and in Bell's hand immediately following the gunshot which ended Knight's life, and that Knight identified Bell as the shooter before dying.

Although conflicting testimony was presented by Bell, it is within the province of the jury to determine the credibility of witnesses, and the jury can take into consideration such things as motive and bias. *Carr*, 655 So. 2d at 838. A primary witness that testified on behalf of Bell was affiliated with the same gang as Bell.

Considering the evidence in the light most favorable to the verdict, we find that the evidence in this record is sufficient to establish that Bell was present at the commission of the murder, possessed the requisite mens rea for the crime and, in fact, fired the fatal shot which killed Knight. Therefore, the jury verdict finding Bell guilty of murder either by firing the fatal shot or as an accessory is supported by substantial evidence, and Bell's first assignment of error is without merit.

2. The Trial Court Erred in Refusing Bell's

Circumstantial Evidence Instruction

In Bell's second assignment of error, he maintains two arguments. First, he argues that the trial court allowed Knight's statement into evidence in violation of the hearsay rule. Second, Bell argues that the trial court erred in refusing him a circumstantial evidence instruction because the State produced no direct evidence of his guilt. The State contends that Knight's statement was admissible as a present sense impression and an excited utterance. Thus, the State argues, direct evidence existed and a circumstantial evidence instruction was not warranted.

A review of the record reveals that, after being shot, Knight managed to get back into the establishment. Elizabeth Mayes then heard Knight say, "Lemario done shot me." The trial judge allowed this statement into evidence as an exception to the hearsay rule under Mississippi Rules of Evidence 803(1)-(2), or both. Rule 803, parts (1) and (2) provides in pertinent part:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

In order to be admissible, the statement must be spontaneous. *Evans v. State*, 547 So. 2d 38, 41 (Miss. 1989). Spontaneity is a matter largely within the discretion of the trial judge and will be decided on a case by case basis. *Id.* The lower court's decision will not be held in error "unless this Court would be justified in concluding that under all and any reasonable interpretation of the facts the explanation could not have been spontaneous." *Id.* at 41. Knight's comment was made immediately following the shooting concerning a "startling event" while still under the stress or excitement of the event. We find that the trial judge did not err by admitting the statement of Knight.

Bell further contends that the State produced no direct evidence of his guilt, and therefore, he was wrongly denied a circumstantial evidence instruction. A circumstantial evidence instruction is not required unless the State's case is devoid of direct evidence. *Mack v. State*, 481 So. 2d 793, 795 (Miss. 1985). In the case at bar, the State presented direct evidence that the Appellant was at the murder scene, had argued and fought with the deceased prior to the shooting, and was seen holding a gun immediately after Knight was shot. Additionally, Knight identified Bell as the shooter seconds after he was hit by the bullet. We are of the opinion that the testimony of the witnesses coupled with the statement by Knight was sufficient to support the denial of a circumstantial evidence instruction. Thus, the second assigned error is rejected.

3. The Lower Court Erred by Excluding Black

Jurors in Violation of the *Batson* Rule

The use of peremptory challenges to unconstitutionally exclude black venire members on the basis of race undermines our entire system of justice and fairness. Such impermissible exclusion denies the accused his right to a fair trial in violation of the due process clause and unconstitutionally discriminates against the excluded juror. *Batson v. Kentucky*, 476 U.S. 79, 86-87 (1986). Although the State may ordinarily exercise peremptory challenges for any reason at all, so long as the challenge is related to the outcome of the case, the Equal Protection Clause prohibits the use of a challenge to exclude venire persons solely on account of race. *Batson*, 476 U.S. at 89.

In the case sub judice, Bell asserts that the State's use of peremptory challenges to exclude ten black venire members violated *Batson*. He additionally asserts that the State did not provide sufficient race neutral reasons for five of the ten strikes against black venire members.

To succeed in a challenge of the racial make-up of peremptory challenges under *Batson*, the defendant must demonstrate:

1. That he is a member of a "cognizable racial group";
2. That the prosecutor has exercised peremptory challenges to remove veniremen of his race, and
3. That the facts and circumstances infer that the prosecutor used his peremptory challenges for the purpose of striking minorities.

Id. at 96 (citations omitted); *see also Walker v. State*, 671 So. 2d 581, 627 (Miss. 1996). The record reveals that the venire consisted of forty-eight members; ten black females, nine black males, fourteen white females, and fifteen white males. The State used ten of its challenges to strike black individuals. These facts are sufficient to meet the first two prongs of the *Batson* test and present a prima facie case of discrimination on behalf of the State. Once this showing was made, the State was required to explain its peremptory challenges of the black venire persons and provide a race neutral reason for the exercise of its strikes. *Lockett v. State*, 517 So. 2d 1346, 1349 (Miss. 1987) (citation omitted). The record reveals that the State provided the following justifications for its strikes of the five contested jurors:

In stating his reasons for striking Willie Rucker, the State explained:

The State challenged Willie Rucker, Your Honor, on several grounds, only being that he answered no questions at all and made no eye contact. He's 58 years old. He has a ninth grade education, and has been working for six months.

The court found that the State's reasons were sufficiently race neutral and that the defense had failed to rebut the State's explanation.

For striking Virginia Terry, the State explained:

Virginia Terry is a 40 year old substitute teacher . . . But from the time I got back from

lunch, she was pretty much trying to stay awake and wasn't doing very well. Secondly, she is a 40 year old teacher. I had a 40 year old teacher on a jury last week with overwhelming proof that . . . sent out for chalk, and I later learned was diagramming trajectories on the . . . black board, and held the jury out for four hours. And I have just got a bad taste in my mouth for relatively young teachers right now.

The court found that the reason cited by the State was a sufficiently race neutral reason.

For striking Antoine Gibbs, the State explained:

State's Four is 25 years old. He's got a twelfth grade education. He's only been working for five months. . . . The only information I have about Antoine Gibbs is what's on the sheet. He never answered anything. I didn't get a feel for any background at all.

The court found that the strike was based on racially neutral grounds and that the explanation by the State was not sufficiently rebutted by Bell.

For striking Charlotte Williams, the State explained:

[She] was challenged because she has a cousin who was picked up on tickets, went to jail, got out, got picked up again; her brother has been picked up for forgery, was fired, and he did a month in jail.

The defense rebutted the explanation with the following:

There were I don't know how many people, maybe 15 or 20 people, who all came in and talked about knowing someone who was a victim of a crime. And she was just one of a group of many people.

The court requested that the State explain its acceptance of Mr. Kern, a juror who also had

a family member with a criminal record.

In response, the State justified its challenge as follows:

Your Honor, Mr. Kern said -- I believe that was an in-law, and his connection with him --

I asked him if he was close to him, and he said about 40 years ago. This woman has two current members of her family, her brother and her cousin, who have recently gone to jail. The only two people I know with connections that had crimes was an in-law 40 years ago and a husband 20 years ago before Ms. Humer met him. This woman has two members of her family that are currently doing time, that are blood relatives.

The court found this reason was race neutral.

The last challenge was to Larry Nunnery, a black male. The court found that the State was unable to provide a sufficient race-neutral reason for the strike and reinstated Nunnery as an alternate juror.

The central inquiry is whether the State was able to present a race-neutral explanation for its peremptory challenge. *Griffin v. State*, 607 So. 2d 1197, 1202 (Miss. 1992). The explanation need not rise to the level of justifying exercise of a challenge for cause. *Lockett v. State*, 517 So. 2d 1346, 1352 (Miss. 1987). Additionally, a trial court's findings relative to the exercise of a peremptory challenge on minority venirepersons are to be afforded great deference and will not be reversed unless clearly erroneous or against the overwhelming weight of the evidence. *Id.* at 1350. The record indicates that the trial judge undertook an evaluation of each explanation provided by the State for striking each venireperson. Based on the foregoing, we find that the evidence presented supports the trial judge's determination, particularly in light of the court's decision to reinstate Nunnery on the jury due to the State's insufficient race-neutral explanation for striking him. The reasons given for striking the other nine minority venire persons were based on race neutral considerations, and the trial court correctly so ruled.

Accordingly, we affirm the judgment of the lower court.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.