IN THE COURT OF APPEALS 09/17/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01031 COA

MELVIN HEMPHILL

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. JOSEPH H. LOPER

COURT FROM WHICH APPEALED: CIRCUIT COURT OF CHOCTAW COUNTY

ATTORNEY FOR APPELLANT:

R.W. BOYDSTUN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: DOUG EVANS

NATURE OF THE CASE: CRIMINAL: CULPABLE NEGLIGENCE MANSLAUGHTER

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO FOURTEEN YEARS IN THE CUSTODY OF THE MDOC

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

PAYNE, J., FOR THE COURT:

Melvin Hemphill was convicted at a bench trial on September 1, 1993, of culpable negligence manslaughter. On that same day, Hemphill was sentenced to serve fourteen years in the custody of the Mississippi Department of Corrections. Feeling aggrieved, Hemphill appeals arguing: (1) the trial court erred in denying his motion for a view of the scene; (2) the trial court erred in finding him guilty of culpable negligence; (3) the trial court erred in denying his motion to appoint a pre-sentence investigator; and (4) the trial court erred regarding the testimony of Tony Cunningham. Finding no error, we affirm Hemphill's conviction and sentence.

STATEMENT OF THE FACTS

The State sought to prove that Hemphill and Tony Cunningham were involved in a road race which resulted in Cunningham's wrecking with a third car, killing the driver of that car. The testimony and other evidence revealed that both Hemphill and Cunningham were traveling east on state Highway 12 in Choctaw County. Billy Jean McMullen was also traveling east on Highway 12 when he attempted to turn left onto Drain Road. The front end of Cunningham's car collided with the driver's side of McMullen's car as McMullen attempted to turn. McMullen was killed, and his passenger was injured. Hemphill continued east on Highway 12.

Jeff McKnight was traveling west on Highway 12 and witnessed the collision. McKnight testified that he met McMullen's car as it slowed. McKnight next met Hemphill's car which had its bright lights on. McKnight recognized the third car as Cunningham's orange cutlass. McKnight testified that both cars traveled at a high rate of speed. After passing the intersection, McKnight watched the cars in his rearview mirror. McKnight testified that Hemphill's lights came on briefly, and then Cunningham's car moved into the left lane colliding with McMullen.

Charles Parish also testified at trial. Parish is the proprietor of a store in Attala County which is located approximately one and one-half miles from the scene of the collision. Both Hemphill and Cunningham were at Parish's store previous to the collision. Parish testified that the men had a discussion about racing. According to Parish, Hemphill stated that he could beat Cunningham with a junkyard motor. Parish witnessed both men exiting his store in their respective cars at a high rate of speed with their tires "squalling." Parish heard the call for an ambulance on his police scanner a few minutes later.

The Mississippi Highway Patrol's accident reconstructionist, L.M. Claiborne, testified that Cunningham's minimum speed at the moment of impact was ninety miles per hour.

Hemphill contended at trial that he knew nothing of the collision until the next morning.

ARGUMENT AND DISCUSSION OF THE LAW

> I. THE TRIAL COURT ERRED IN DENYING HEMPHILL'S MOTION FOR THE COURT TO VIEW THE SCENE.

Hemphill fails to cite any authority for this assignment of error or directly argue its merits and instead

quotes the record. The Mississippi Supreme Court has recognized that it will not consider issues on appeal with no citation to authority. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1282 (Miss. 1993) (citations omitted); *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993) (citations omitted); *Smith v. Dorsey*, 599 So. 2d 529, 532 (Miss. 1992) (citations omitted). This Court likewise is not bound to consider issues without citation to authority. However, we note that under section 13-5-91, "the trial court has discretionary authority to allow the jury to view or inspect the place at which an offense has allegedly been committed. And this Court will reverse only in the event of a clear abuse of discretion." *Green v. State*, 614 So. 2d 926, 936 (Miss. 1992) (citing *Tolbert v. State*, 511 So. 2d 1368, 1378 (Miss. 1992)). In the present case, the scene of the incident was established by testimony, diagrams and photographs. Hemphill fails to establish the necessity of the trial court to view the scene. We cannot say that the trial court abused its discretion. Thus, this issue is without merit.

> II. THE LOWER COURT ERRED IN MISTAKING SIMPLE NEGLIGENCE, IF ANY, FOR CULPABLE NEGLIGENCE AMOUNTING TO MANSLAUGHTER.

> IV. THE LOWER COURT ERRED IN RENDERING A JUDGMENT WHICH IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Hemphill's arguments for his second and fourth assignments of error are essentially the same, and we will consider them together. Hemphill attacks the credibility of the evidence against him, and argues that the trial court erred in finding him guilty of culpable negligence manslaughter. The Mississippi Supreme Court has defined culpable negligence as "negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, and that this shall be so clearly evidenced as to place it beyond every reasonable doubt." *Craig v. State*, 520 So. 2d 487, 492 (Miss. 1988) (quoting *Grinnel v. State*, 230 So. 2d 555, 558 (Miss. 1970) (quoting *Smith v. State*, 197 Miss. 802, 818, 20 So. 2d 701, 706 (1945))). The court has also noted that culpable negligence may be defined as "the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the wilful creation of an unreasonable risk thereof." *Evans v. State*, 562 So. 2d 91, 93 (Miss. 1990) (citing *Smith v. State*, 197 Miss. 802, 818, 20 So. 2d 701, 706 (1945)); *Craig v. State*, 520 So. 2d 487, 492 (Miss. 1988).

The case of *Campbell v. State* is instructive:

> The driver of a motor vehicle who enters into an unlawful race with the driver of another motor vehicle may be held criminally responsible for the death of a third person caused by the speed and reckless driving of the latter driver, even though the former's vehicle has no physical contact at any time with the victim of the killing, where the acts of both drivers lead directly to and are a proximate cause of the killing.

Campbell v. State, 285 So. 2d 891, 893 (1973) (quoting 7 Am. Jur. 2d *Automobiles & Highway Traffic* § 277, at 825 (1963)). In *Campbell*, like the present case, the appellant's vehicle was never involved in the collision, and he did not stop at the scene of the accident.

In determining whether the verdict is against the overwhelming weight of the evidence, we must accept as true all of the evidence which supports the verdict, and will reverse only when convinced that the trial court abused its discretion in failing to grant a new trial. *See McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993); *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987) (citation omitted). This Court will not disturb a verdict on appeal unless it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *See McClain*, 625 So. 2d at 781; *Wetz*, 503 So. 2d at 812.

In the present case, Parish testified regarding Hemphill and Cunningham's discussion of racing and their subsequent departure with wheels squalling. Claiborne's expert testimony included his estimation that the vehicles were traveling ninety miles an hour. McKnight testified that both Hemphill's and Cunningham's vehicles were traveling together at a high rate of speed.

Hemphill attempts to have this Court reweigh the evidence. The weighing and considering of testimony and other evidence is within the province of the jury. *See McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). In the present case, Hemphill was tried without a jury. The judge was not obligated to accept Hemphill's explanation that he was adjusting his radio/tape player and actually knew nothing of the wreck. We decline to reevaluate the evidence. If we are to accept as true all of the evidence favorable to the verdict, we are of the opinion that to allow Hemphill's conviction of culpable negligence manslaughter to stand would not sanction an unconscionable injustice. Accordingly, this issue is without merit.

> III. THE TRIAL COURT ERRED IN DENYING HEMPHILL'S MOTION TO APPOINT A PRE-SENTENCE INVESTIGATOR.

Pre-sentence investigations are provided for in section 47-7-9 (3)(a) of the Mississippi Code. Rule 6.02 of the Uniform Criminal Rules of Circuit Court Practice provides for the appointment of a pre-sentence investigator. The record reveals that Hemphill was sentenced on September 1. On September 2, Hemphill filed a motion for appointment of a pre-sentence investigator which was denied by the trial court. "[T]he use of presentence investigations and reports is discretionary with the trial judge and is not mandatory. A defendant does not have a right to a presentence investigation." *Edwards v. State*, 615 So. 2d 590, 598 (Miss. 1993) (citing *Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992)). The use of a pre-sentence investigator and report is clearly left for the judgment of the trial court. Hemphill was convicted of culpable negligence manslaughter which carries a maximum statutory sentence of twenty years. Miss. Code Ann § 97-3-25 (1972). The trial court imposed a fourteen year sentence on Hemphill which is within the limits fixed by the statute. We do not find that the trial court abused its discretion in electing not to use a pre-sentence investigator. Thus, this issue is without merit.

> V. THE LOWER COURT ERRED IN RULING THAT IF A WITNESS TAKES THE WITNESS STAND, HE WAIVES THE RIGHT TO CLAIM HIS IMMUNITY, OR REFUSE TO ANSWER QUESTIONS THAT MIGHT TEND TO INCRIMINATE HIM; OR AS STATED BY THE LOWER COURT, "I DON'T THINK YOU CAN ALLOW ONE TO ANSWER ONE QUESTION AND NOT ANOTHER QUESTION."

Hemphill points to the trial court's statements regarding the testimony of Cunningham. The trial court's statement must be considered in context with the series of exchanges in which it occurred. A

review of the transcript reveals that the trial court's statement resulted from Hemphill's attempt to restrict the testimony of Cunningham as a rebuttal witness, thus limiting the State's scope of cross-examination. The trial court also stated that once called to the stand, the State would have the opportunity to ask Cunningham questions. Counsel for Cunningham was present in the courtroom and represented to the court that he had advised Cunningham not to answer any questions beyond his name and address and to invoke his Fifth Amendment right to not incriminate himself.

Hemphill is correct in his assertion that the trial court's statement, when considered alone, incorrectly articulated the law in regard to a witness's right to invoke his right against self-incrimination. The Mississippi Supreme Court has held that "it was reversible error to refuse to permit the defendant to call a witness to the stand and question him in the presence of the jury even though it had been demonstrated that the witness would refuse to answer most of the questions on grounds of self-incrimination." *Hall v. State*, 490 So. 2d 858, 859 (Miss. 1986) (citation omitted); *see also Coleman v. State*, 388 So. 2d 157, 159 (Miss. 1980) (citing *Stewart v. State*, 355 So. 2d 94, 96 (Miss. 1978)). "However, as we recognized in *Hall*, the right to call a witness does not diminish that witness' right to invoke his privilege against self-incrimination. The witness may choose to answer only relevant questions or remain silent if his testimony would subject him to potential prosecution." *Williamson v. State*, 512 So. 2d 868, 872 (Miss. 1987) (citing *Hall*, 490 So. 2d at 859; *Mississippi State Bar v. Attorney L*, 511 So. 2d 119, 123 (Miss. 1987)). This appears to conflict with the statement made by the trial court. Regardless, in the present case, Hemphill was permitted to call Cunningham as a witness. Cunningham answered Hemphill's question regarding his name. The trial court then allowed Hemphill to ask Cunningham a specific question regarding his and Hemphill's departure from Parish's store to which Cunningham replied that he was invoking his Fifth Amendment right and refusing to answer on the ground that it might incriminate him. Cunningham was then excused as a witness. Because Hemphill was allowed to call the witness and question him, we find that Hemphill has failed to establish any prejudice as a result of the trial court's misstatement. Thus, we find this issue to be without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF CHOCTAW COUNTY OF CONVICTION OF MANSLAUGHTER, CULPABLE NEGLIGENCE, AND SENTENCE TO SERVE FOURTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE IMPOSED IN THIS CAUSE SHALL RUN CONSECUTIVELY TO ANY PREVIOUS SENTENCE. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

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