

IN THE COURT OF APPEALS 8/6/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00794 COA

GEORGIA LEE BLACKMON

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, JR.

COURT FROM WHICH APPEALED: CARROLL COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

LELAND H. JONES, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: DOUG EVANS

NATURE OF THE CASE: MURDER AND GRAND LARCENY

TRIAL COURT DISPOSITION: VERDICT OF GUILTY ON COUNT ONE, MURDER, AND
NOT GUILTY ON COUNT TWO, GRAND LARCENY. SENTENCED TO LIFE
IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF
CORRECTIONS CONSECUTIVELY TO ANY OTHER SENTENCE PREVIOUSLY IMPOSED.

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

THOMAS, P.J., FOR THE COURT:

Blackmon was convicted of murder and sentenced to life imprisonment. Feeling aggrieved, she appeals, assigning the following issues as error: (1) whether the trial court erred in refusing to grant any jury instructions on the lesser offense of manslaughter; (2) whether the trial court erred in permitting a photograph of the victim to be admitted into evidence; and (3) whether the trial court erred in failing to grant a directed verdict on the charge of murder. Finding all three issues without merit, we affirm.

FACTS

In the early morning hours of April 25, 1993, Georgia Blackmon and her boyfriend Bruce King returned from a date to the trailer where Blackmon lived with her mother, Beauty Blackmon. Blackmon and King had been arguing as they drove home, and the argument continued when they stopped outside of the trailer. There was some testimony at trial that King had been hitting and choking Blackmon at some point during their argument, and the couple continued to yell at one another after stopping the car. Beauty Blackmon came outside and attempted to get Blackmon to come inside the trailer; however, Blackmon refused. Eventually the argument ended and the couple began talking. King then asked Blackmon to get out of his car so that he could go home since he had to go to work early that morning. Blackmon refused to get out of the car. After King had tried unsuccessfully for over half an hour to get Blackmon to go inside, Blackmon's brother yelled outside for King to come inside and call the sheriff's department in order to get Blackmon out of the car.

King got out of his car and walked inside the trailer. Blackmon picked up a gun from the floorboard of King's car and followed King. Blackmon testified that she had no intention of shooting King when she entered the trailer. As she entered the trailer, King was standing with his back toward her. As Beauty Blackmon attempted to prevent Blackmon from firing the weapon, King turned toward Blackmon, and she shot him in the neck.

Blackmon then ran out into the yard. Beauty followed her and knocked the gun from her hand. Blackmon then re-entered the trailer and retrieved the keys to King's car, the only available vehicle. She then fled in King's car and took fourteen dollars from his wallet. Later that morning, Blackmon called the sheriff's department and drove herself to the jail. Blackmon confessed to the crime and signed a confession which was introduced into evidence at trial.

ANALYSIS

I. Did the trial court err in refusing to grant jury instructions on the lesser included offense of manslaughter?

Blackmon's first assignment of error is the trial court's failure to grant her proposed jury instructions on the lesser included offense of manslaughter. Manslaughter is defined as "[t]he killing of a human

being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense. . . ." Miss. Code Ann. § 97-3-35 (1972). Blackmon was indicted under section 97-3-19 which provides that "[t]he killing of a human being without the authority of law by any means or in any manner shall be murder. . . [w]hen done with deliberate design to effect the death of the person killed. . . ." Miss. Code Ann. § 97-3-19(1)(a) (1972).

A jury instruction on a lesser included offense should be given "if a 'rational' or a 'reasonable' jury could find the defendant not guilty of the principal offense charged in the indictment yet guilty of the lesser included offense. A 'lesser included offense' is defined as 'one composed of some, but not all, of the elements of the greater crime, and which does not have any element not included in the greater offense.' " *Ballenger v. State*, 667 So. 2d 1242, 1254 (Miss. 1995) (citations omitted). The Mississippi Supreme Court has recognized that manslaughter instructions should not be indiscriminately given in murder prosecutions unless there is substantial evidence of heat of passion to support such an instruction. *Barnett v. State*, 563 So. 2d 1377, 1380 (Miss. 1990) (citing *Cook v. State*, 467 So. 2d 203, 209 (Miss. 1985)).

Mississippi law has defined heat of passion as "passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time." *Buchanan v. State*, 567 So. 2d 194, 196 (Miss. 1990). This State has recognized:

[t]he indulgence shown by the law in such [manslaughter] cases, proceeds on the supposition, that the reason or judgment of the party perpetrating the act has been temporarily suspended or overthrown by the sudden access of violent passion. But a high degree of sudden and resentful feeling will not alone palliate an act of homicide committed under its influence. It is essential that the excited and angry condition of the party committing the act, which would entitle him to the milder consideration of the law, should be superinduced by some insult, provocation, or injury, which would naturally and instantly produce, in the minds of ordinarily constituted men, the highest degree of exasperation. . . .

Barnett, 563 So. 2d at 1379 (citations omitted).

In order to reduce the crime of murder to manslaughter, there must be, in addition to passion and anger, "such circumstances as would indicate that a normal mind would be roused to the extent that the reason is overthrown and that passion usurps the mind destroying judgment." *Id.* (citations omitted). There is simply no evidence to support a manslaughter instruction in the case sub judice. Although the couple had been arguing earlier in the morning, the argument had been over and the couple had been merely "talking," as Blackmon readily admitted, for a significant amount of time before Blackmon shot King. King was simply trying to get Blackmon out of his car so that he could go home to get some sleep before he had to go to work. Blackmon was not in any danger from King. In fact, King had gone into her mother's trailer to call the sheriff's department to force Blackmon out of his car when she retrieved the gun from the floorboard of his car. King's back was toward Blackmon, and he was merely attempting to use the telephone when she entered her mother's trailer

to shoot him. As he turned toward the door where Beauty Blackmon was trying to stop her daughter, Blackmon deliberately shot him. Blackmon's acts were intentional and deliberate, without any provocation or heat of passion. The trial court correctly denied the manslaughter instructions because there was no evidence to support Blackmon's theory that she killed King without malice in the heat of passion.

II. Did the trial court err in permitting a photograph of the victim to be admitted into evidence ?

At trial, the State introduced thirteen photographs, eleven of the scene and two of the victim. One photograph showed King in the position in which he was found, lying face down on the floor of the hallway. The other photograph of King, exhibit fourteen, was taken after his body had been turned over so that the gunshot wound was visible. Blackmon objected to the admissibility of exhibit fourteen on the grounds that it was unfairly prejudicial to Blackmon.

The Mississippi Supreme Court has repeatedly said that it will not address assignments of error to which there is no citation of authority. This Court also declines to address such assignments of error. Blackmon is procedurally barred from raising this assignment of error since she does not cite this Court to any authority in support of her position. *McClain v. State*, 625 So. 2d 774, 780 (Miss. 1993); *Rogers v. State*, 599 So. 2d 930, 933 (Miss. 1990), *rev'd on other grounds*, *Mayfield v. State*, 612 So. 2d 1120 (Miss. 1992).

Even if she were not barred from raising this issue, there is no merit to the issue. The admission of photographs into evidence rests within the sound discretion of the trial court, and this Court will not reverse such a ruling absent a clear showing of abuse of discretion. *Davis v. State*, 660 So. 2d 1228, 1259 (Miss. 1995) (citations omitted); *Shamblin v. State*, 601 So. 2d 407, 413 (Miss. 1992).

The trial court must look to Mississippi Rule of Evidence 403 in determining whether to admit photographs. *Davis*, 660 So. 2d at 1259. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403. Such photographs are not normally admitted if the killing is not contradicted and the identity of the victim is established. However, photographs of bodies may be admitted where they have probative value and are not so gruesome or used in such a way as to be unfairly prejudicial or inflammatory. *Id.* (citations omitted). Since exhibit fourteen was the only photograph showing the wound and was necessary to assist the pathologist in his testimony regarding the injuries sustained by King, the photograph was properly admitted into evidence.

III. Did the trial court err in failing to grant a directed verdict on the charge of murder ?

Blackmon's final assignment of error is that the trial court erred in failing to grant a directed verdict on the charge of murder and allow the case to proceed only on the lesser included offense of manslaughter. The State asserts that Blackmon has waived this assignment of error since she made her motion only at the close of the State's case in chief and failed to renew her motion when she rested. However, the record reveals that Blackmon did submit a peremptory instruction regarding her guilt which the trial court refused. She also filed a motion for JNOV which the trial court also refused. Although a defendant's failure to renew a motion for directed verdict after she has testified

may constitute a waiver of the motion, the Mississippi Supreme Court has held that a request for a peremptory instruction or a motion for JNOV are sufficient to prevent such a waiver. *Doby v. State*, 557 So. 2d 533, 535 (Miss. 1990); *Harris v. State*, 413 So. 2d 1016, 1018 n. 3 (Miss. 1982).

This Court will review the evidence on the last occasion when the sufficiency of the evidence was challenged before the trial court which was at the time of the motion for JNOV. *McClain*, 625 So. 2d at 778; *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987). The sufficiency of the evidence is viewed in a light most favorable to the State. We may reverse only where the evidence is such that reasonable and fair minded jurors could only find the defendant not guilty. *McClain*, 625 So. 2d at 778. There was more than sufficient evidence for the jury to conclude that Blackmon was guilty of the murder of Bruce King. There is no merit to this issue.

THE JUDGMENT OF THE CARROLL COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE TO LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO BE SERVED CONSECUTIVELY TO ANY OTHER SENTENCE PREVIOUSLY IMPOSED IS AFFIRMED. ALL COSTS ARE ASSESSED TO CARROLL COUNTY.

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