

IN THE COURT OF APPEALS 07/02/96
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00603 COA

JANICE O'NEAL

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. FRANK G. VOLLOR

COURT FROM WHICH APPEALED: WARREN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

FRANK J. CAMPBELL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART

DISTRICT ATTORNEY: G. GILMORE MARTIN

NATURE OF THE CASE: CRIMINAL - MANSLAUGHTER

TRIAL COURT DISPOSITION: SENTENCED TO 20 YEARS IN THE MDOC WITH 15 YEARS
TO SERVE AND FIVE YEARS SUSPENDED FOR A PERIOD OF FIVE YEARS.

BEFORE FRAISER, C.J., BARBER, DIAZ, AND McMILLIN, JJ.

BARBER, J., FOR THE COURT:

Janice O'Neal was tried and convicted of manslaughter in the Warren County Circuit Court. She was sentenced to serve a term of twenty years imprisonment in the custody of the Mississippi Department of Corrections, with five years suspended. Feeling aggrieved, O'Neal appeals her conviction on the following grounds:

I. THE TRIAL COURT ERRED BY FAILING TO GRANT INSTRUCTION D-12 THEREBY PREVENTING THE DEFENDANT FROM PUTTING FORTH A VALID DEFENSE.

II. THE COURT ERRED BY ALLOWING THE INTRODUCTION OF GRUESOME PHOTOGRAPHS AS (1) THE PHOTOGRAPHS HAD LITTLE IF ANY PROBATIVE VALUE, AND (2) WOUNDS CAUSED BY MEDICAL INTERVENTION WERE DEPICTED.

III. THE VERDICT IS CONTRARY TO THE EVIDENCE AND WITHOUT ADEQUATE EVIDENCE TO SUPPORT IT.

We find that the issues raised by the Appellant are without merit and affirm the decision of the trial court.

FACTS

On October 12, 1992, Shirley Williams and Lavishia McDonald drove to the drive through window at the Taco Casa Restaurant in Vicksburg, Mississippi to purchase some tacos. Janice O'Neal worked at the window and handed Williams and McDonald a bag with tacos in it. Williams told O'Neal that she had the wrong order. O'Neal gave Williams another bag and change. Williams looked into the bag and told O'Neal that there was no sauce in the bag for the tacos. O'Neal handed the sauce to Williams, and they began to argue. O'Neal then threw a soft drink into Williams' car. At this point, Williams parked her car and went into the restaurant.

The women continued to argue and curse one another. Initially, O'Neal was standing behind the counter with Williams and McDonald in front. Then, O'Neal came from behind the counter with a knife hidden behind her back. Williams and O'Neal began to fight. During the altercation, O'Neal stabbed Williams once through the heart. Williams then left the restaurant with McDonald and was taken to an emergency room. Her injury, however, proved to be fatal.

Prior to the incident on October 12, O'Neal had on previous occasions sought assistance from the police for harassing phone calls from Williams. This attempt for police assistance was corroborated by police reports from the prior month. Additionally, at trial, O'Neal testified that she feared Williams because Williams had attempted to run down Willie Thomas with an automobile about a month

before the incident at Taco Casa. Willie Thomas was dating O'Neal at the time and was also the father of Williams' child. At trial, he corroborated O'Neal's testimony concerning this incident. Also, O'Neal claimed that Williams carried a gun and had threatened to "use it if she had to."

ANALYSIS

I. THE TRIAL COURT ERRED BY FAILING TO GRANT INSTRUCTION D-12 THEREBY PREVENTING THE DEFENDANT FROM PUTTING FORTH A VALID DEFENSE.

Instruction D-12 reads as follows:

The court further instructs the jury that if you find from the evidence that Janice O'Neal was justified in obtaining a knife from her purse in anticipation of a conflict with Shirley Williams and that after Janice O'Neal had obtained such knife, Shirley Williams first grabbed or hit Janice O'Neal and then a fight ensued and that during such fight Shirley Williams accidentally incurred a mortal wound, but such wound was not purposely and intentionally inflicted by Janice O'Neal, either in the heat of passion or with malice aforethought, then you must find the Defendant not guilty of either murder or manslaughter.

O'Neal submits that it was the defense's position throughout the trial that Williams was fatally stabbed in an altercation with O'Neal, but that the single mortal wound was not purposely or intentionally done and was not done in the heat of passion, but apparently was incurred in the melee of events that occurred after O'Neal was attacked by Williams and McDonald.

The Mississippi Supreme Court has held that, as a general rule, if there is a serious doubt as to whether a particular jury instruction should be given, such instruction should be given. *Lenard v. State*, 552 So. 2d 93, 95 (Miss. 1989); *Wadford v. State*, 385 So. 2d 951, 955 (Miss.1980). It is also generally true that a defendant is entitled to have an instruction on his theory of the case. *Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990). This is not appropriate, however, when there is insufficient evidence to support the instruction. Our supreme court decisions also hold that all instructions must be supported by evidence. "Where an instruction is unsupported by evidence, it should not be given. Furthermore, we have held that to grant an instruction which is not supported by evidence constitutes error." *Rogers v. State*, 599 So. 2d 930, 934 (Miss. 1992). The trial court in this case found that there was insufficient evidence to support this instruction. After carefully reviewing the record we must agree. Furthermore, the court granted O'Neal's instruction on self defense. This issue is without merit.

II. THE COURT ERRED BY ALLOWING THE INTRODUCTION OF GRUESOME PHOTOGRAPHS BECAUSE (1) THE PHOTOGRAPHS HAD LITTLE IF ANY PROBATIVE VALUE, AND (2) WOUNDS CAUSED BY MEDICAL INTERVENTION WERE DEPICTED.

O'Neal submits that, in the case at bar, the photographs served virtually no useful evidentiary purpose. She argues that almost every aspect of the nature of the stab wound was conceded and was admitted into evidence through the testimony of Dr. Hayne. Additionally, O'Neal argues that the picture also included "wounds" which were incurred during the course of treatment. This further added to the picture's lack of probative value and increased the prejudicial effect of inflaming the jury and causing confusion as to what wound was caused during the altercation and what wounds were caused by medical treatment.

The trial court's ruling on the admissibility of photographs rests within the sound discretion of the trial judge. The trial judge will be upheld unless an abuse of discretion is shown. *Jenkins v. State*, 607 So. 2d 1171, 1175 (Miss. 1992). The photographs must, however, serve a legitimate evidentiary purpose. *Butler v. State*, 320 So. 2d 786, 789 (Miss. 1975). Photographs with no useful evidentiary purpose and which can only arouse passion and inflame the jury should not be admitted. *Martin v. State*, 64 So. 2d 629, 632 (Miss. 1953). Photographs which show the location of wounds have been held to serve a legitimate evidentiary purpose. *Stevens v. State*, 458 So. 2d 726, 729 (Miss. 1984). *Clingon v. State*, 293 So. 2d 823, 827 (Miss. 1974). Furthermore, photographs used to corroborate witness testimony may be relevant, and their admission is not an abuse of discretion. *Hewlett v. State*, 607 So. 2d 1097, 1103 (Miss. 1992).

The photograph complained of was used to corroborate, illustrate, and explain the testimony of the expert witness, Dr. Hayne, and therefore was relevant. In fact, the defense itself asked questions of Dr. Hayne regarding the photograph. Furthermore, after reviewing the photograph, we find that whatever prejudicial effect it may have had was substantially outweighed by its probative value. Finally, after reviewing the record, we find that the other wounds depicted in the photograph which were caused by surgical intervention were clearly explained so as not to cause any confusion among the jury. The trial judge in this case did not abuse his discretion in admitting the photograph. Therefore, this assertion of error is without merit.

III. THE VERDICT IS CONTRARY TO THE EVIDENCE AND WITHOUT ADEQUATE EVIDENCE TO SUPPORT IT.

O'Neal submits that the overwhelming evidence in this case indicates the mortal wound occurred after Williams grabbed her and during the melee of events that ensued, and further there was not an intentional or purposeful stabbing, but one which occurred accidentally. O'Neal states no facts in her brief to support her position. Rather, she refers this Court to the entire transcript. Based on this argument, O'Neal asks that we reverse the decision of the trial court and render a decision in her favor.

Because O'Neal's argument implicates both the weight and sufficiency of the evidence, we will address this issue by determining whether the trial court erred in failing to grant a directed verdict and in failing to grant a motion for a new trial. The standard of review in such instances is as follows:

If no reasonable hypothetical juror could have reached a guilty verdict, the defendant's

motion for a directed verdict must result in discharge. When [we review] a trial court's denial of a motion for directed verdict, the Court will give the state the benefit of all favorable inferences and then examine the evidence to be sure it supports the verdict beyond a reasonable doubt.

[We] will reverse the trial court's denial of a motion for new trial only if, by denying, the trial court abused its discretion. A new trial should be granted only when the jury's verdict so contradicts the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice.

Pierre v. State, 607 So. 2d 43, 54 (Miss. 1992) (citations omitted).

We find no error in the trial court's denial of O'Neal's motion for directed verdict. The trial court correctly found that there was sufficient evidence in this case to pose a jury question. Regarding her motion for new trial, the weight of the evidence supports the jury's verdict. To wit, the undisputed facts are that Williams got into an argument with O'Neal, and Williams entered the Taco Casa Restaurant without a weapon of any kind and without a purse or anything in which to carry a weapon. O'Neal armed herself with a knife that she retrieved from her purse and held it behind her back so that it could not be seen. O'Neal then went from behind the counter into the restaurant to fight with Williams. O'Neal stabbed Williams in the heart with the knife. Williams died as a result of a single stab wound to the heart.

The Mississippi Code defines manslaughter 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 in self-defense . . ." Miss.Code Ann. §97-3-35 (1972). Taking the evidence in the light most favorable to the verdict, the verdict was not against the overwhelming

weight of the evidence. Thus, we find O'Neal's third assignment of error without merit. Given the foregoing reasons, the judgment of the trial court is affirmed.

THE JUDGMENT OF THE WARREN COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH FIFTEEN (15) YEARS TO SERVE AND FIVE (5) YEARS SUSPENDED FOR A PERIOD OF FIVE (5) YEARS IS AFFIRMED. COSTS ARE ASSESSED AGAINST WARREN COUNTY.

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

