

IN THE COURT OF APPEALS 08/20/96
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00470 COA

HARVEY LEE CARPENTER

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. ROBERT W. BAILEY

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROGERS J. DRUHET, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: DAN ANGERO

NATURE OF THE CASE: CRIMINAL - MURDER

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE LIFE
IMPRISONMENT IN THE MDOC

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT:

Harvey Lee Carpenter was convicted in the Circuit Court of Lauderdale County on a charge of murder and sentenced to a term of life imprisonment. Feeling aggrieved, Carpenter appeals from that judgment, asserting the following as error:

I. THE VERDICT WAS AGAINST THE WEIGHT OF THE CREDIBLE EVIDENCE.

II. THE COURT ERRED IN DENYING THE DEFENDANT'S INSTRUCTION ON "HEAT OF PASSION" MANSLAUGHTER.

III. THE COURT ERRED IN NOT ALLOWING CARPENTER TO TESTIFY AS TO HIS STATE OF MIND PRIOR TO THE FATAL SHOOTING.

Finding no merit in these assertions of error, we affirm the decision of the trial court.

FACTS

On the evening of October, 26, 1991, Harvey Carpenter shot and killed Jerome Birge. Carpenter fired at least two shots from a pistol. One bullet struck Birge in the chest and the other entered through the neck. Carpenter and the victim had not met prior to the evening of the shooting. The testimony at trial revealed that a brief verbal altercation occurred between Carpenter and Birge immediately prior to the shooting. Officer Rita Coleman, who was present at the scene of the shooting, testified at trial that she did not observe a weapon or anything that might have been perceived as a weapon in the victim's vehicle, or anywhere around the victim. This testimony was corroborated by Detective Mike Mitchell.

ANALYSIS

I. THE VERDICT WAS AGAINST THE WEIGHT OF THE CREDIBLE EVIDENCE.

In challenging the weight of the evidence, Carpenter asks this Court to vacate the judgment below so that his case may be retried. When deciding whether the verdict is against the overwhelming weight of the evidence, we must accept as true all the evidence supporting the State's position, as well as all reasonable inferences flowing therefrom, in the light most favorable to the State. *Britt v. State*, 520 So. 2d 1377, 1379 (Miss. 1988).

The proof presented by the State of Mississippi showed that Carpenter deliberately shot Birge, who was unarmed, knocking him to his knees. Then, Carpenter shot him again in the back while Birge was attempting to escape. While he admits to the shooting, Carpenter argues that his actions, although

not justifiable, were "not bad enough to be murder". He submits that his actions were no more than manslaughter because he was either acting in the heat of passion or in self defense. "Factual disputes are properly resolved by the jury and do not mandate a new trial." *Benson v. State*, 551 So. 2d 188, 193 (Miss. 1989). Furthermore, we will not "reverse criminal cases where there is a straight issue of fact, or a conflict in the facts; juries are impaneled for the very purpose of passing upon such questions of fact" *Evans v. State*, 132 So. 563, 564 (Miss. 1931). Considering the standard of review governing this issue, we find that the jury had ample evidence to support a verdict of guilty. Therefore, based upon the weight of the evidence supporting the verdict, we conclude that the trial court did not abuse its discretion in denying Carpenter's motion for a new trial.

II. THE COURT ERRED IN DENYING THE DEFENDANT'S INSTRUCTION ON "HEAT OF PASSION" MANSLAUGHTER.

The trial court denied Carpenter's "heat of passion" manslaughter instruction because it was not supported by the evidence. The court found that, at most, the evidence showed that Carpenter fired because he thought the victim was about to shoot him. "[I]n a murder prosecution, manslaughter instructions should not indiscriminately be given. Heat of passion being an affirmative element of manslaughter not present in murder, that type of manslaughter instruction should not be given unless there is substantial evidence to support it." *Cook v. State*, 467 So. 2d 203, 209 (Miss. 1985).

Carpenter consistently denied that at the time of the shooting, he was acting under any emotion which could be characterized as heat of passion. Instead, he testified that he shot Birge because he thought Birge was going to shoot him first. Thus, we also conclude that there was no evidence in this record to support a heat of passion manslaughter instruction. The court committed no error in refusing to instruct the jury on this theory of manslaughter. Moreover, the court did allow Carpenter an instruction on manslaughter. The instruction was limited to the theory of imperfect self defense, which was supported by the record.

III. THE COURT ERRED IN NOT ALLOWING CARPENTER TO TESTIFY AS TO HIS STATE OF MIND PRIOR TO THE FATAL SHOOTING.

Carpenter argues that the court refused to allow him to testify as to his state of mind on the night of the crime, which he claims, resulted in ambiguous testimony regarding his heat of passion defense. Carpenter, however, completely fails to cite any authority in support of his argument that the trial court's ruling on this issue constitutes reversible error. Our courts have consistently held that an unsupported assignment of error will not be considered. *Ellis v. Ellis*, 651 So. 2d 1068, 1073 (Miss. 1995). Therefore, we find this assignment of error to be without merit.

Nevertheless, were we to consider this argument on the merits, it would still fail. After reviewing the record regarding this matter, we find that while there was some testimony regarding Carpenter's state of mind which was not allowed because the form of the question was improper, Carpenter was ultimately allowed to give testimony regarding his state of mind on the evening of the shooting.

For the above stated reasons, the decision of the trial court is affirmed.

THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST LAUDERDALE COUNTY.

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