

IN THE COURT OF APPEALS 09/17/96
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00432 COA

JEFFERSON BENNIE HUNT

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. MELVIN KEITH STARRETT

COURT FROM WHICH APPEALED: PIKE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOHN P. PRICE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: DUNN LAMPTON

NATURE OF THE CASE: CRIMINAL (FELONY)-AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: DEFENDANT HUNT CONVICTED OF AGGRAVATED
ASSAULT AND SENTENCED TO SERVE FIFTEEN YEARS IN THE CUSTODY OF MDOC
WITH EIGHT YEARS TO SERVE AND SEVEN SUSPENDED; ALSO ORDERED TO SERVE

FIVE YEARS PROBATION FOLLOWING SENTENCE

BEFORE BRIDGES, P.J., BARBER, AND MCMILLIN, JJ.

MCMILLIN, J., FOR THE COURT:

This case is before the Court on the appeal of Bennie Jefferson Hunt from his conviction for aggravated assault by a jury in the Circuit Court of Pike County. Hunt seeks a reversal of his conviction on three separate issues:

- (a) He claims that the trial court abused its discretion in denying his various continuance requests.

- (b) He claims error in the admission of the testimony of the alleged victim's seven-year-old child who was present when the assault occurred.

- (c) He claims that the verdict of the jury was against the weight of the evidence.

This Court has concluded that the issues raised on appeal are without merit and that the conviction should be affirmed.

I.

Facts

On December 25, 1992, at approximately 8:00 P.M., John Pace was on a rural road in Pike County. After an attempt to shoot some fireworks failed due to inclement weather, Mr. Pace and his two small children were stopped in their vehicle in the hope that they could see a deer. Another vehicle approached and stopped so that the driver's side windows of the two vehicles were approximately three feet apart. The driver asked Pace twice what his name was, to which Pace twice made the appropriate response. The driver then, without warning, fired one shot from a pistol. The trajectory of the bullet was such that it struck Pace in his left hand before entering and lodging in his body. Pace immediately drove off, went to a nearby house to obtain assistance, but was unable to get anyone to the door. He then drove himself and his children to the hospital where he was treated for his wounds.

Pace claimed to have recognized his assailant as the defendant, based upon his personal acquaintanceship of some years and upon his recognition of the vehicle as being that of the defendant's. The defendant was, at the time, the county coroner and drove a white Chevrolet with a

searchlight affixed to the driver's side and two large antennas on the rear. The evidence shows that Pace verbally identified the defendant as his assailant immediately upon arrival at the hospital.

The defense presented at trial consisted essentially of (a) proving that the defendant had no motive to commit the crime, and (b) attempting to demonstrate that the defendant could not have been at the location of the shooting at the critical time.

II.

Failure to Grant a Continuance

The defendant claims that the trial court committed reversible error in rushing this case to trial without giving defense counsel adequate time to prepare his defense. He specifically claims prejudice in the resulting unavailability of one fact witness and the inadequate time to properly present the alleged exculpatory expert testimony of Dr. Michael West, an expert originally consulted by the State in its investigation.

A.

Attorney Preparation Time

Defense counsel requested a continuance due to general inability to prepare for trial resulting from the press of other business requiring his attention in the short interval between indictment and trial. The defendant was served with the indictment on March 8, 1993, and the case was tried on April 1. He argues that this was insufficient time to consider discovery, interview witnesses, arrange possible expert witnesses and related matters of trial preparation, especially in view of the fact that defense counsel had other matters pending before the court in the interval.

The trial court concluded that defense counsel had been retained shortly after the defendant's arrest and had participated in a preliminary hearing held in January, and that, on these facts, defense counsel had adequate time to prepare a meaningful defense. The matter of granting a continuance is committed to the sound discretion of the trial court, and we may reverse only upon a finding of an abuse of the exercise of that discretion. *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995) (citations omitted). This Court can find nothing in the record or the briefs that would indicate that the defendant was handicapped in presenting his defense by virtue of his inability to obtain a continuance. The case was vigorously fought and his theory of his defense was fully developed and presented to the jury for consideration. The evidence bearing on guilt presented by the State was straightforward and uncomplicated. All witnesses presented by the State were rigorously cross-examined, and any discrepancies in their testimony were fully developed.

Thus, on the issue of lack of time to prepare an adequate defense, we are unable to determine that the trial court committed such an abuse of discretion in denying a continuance that this Court should reverse this conviction. *Atterberry*, 667 So. 2d at 631.

B.

Failure to Grant Continuance for Unavailable Witnesses

1.

Joey Bailey

Defendant claims he was entitled to a continuance because of the anticipated unavailability of Joey Bailey. A part of the defense consisted of attempting to show the defendant was in a local store purchasing beer at the time of the shooting. Joey Bailey was a clerk in the store. His recollection of the timing of certain events was at odds with other store employees, and, according to the defendant, was favorable to the defense. Shortly before the trial, Bailey underwent major surgery and was physically unable to come to court to testify. The trial judge denied a continuance for this reason; however, he offered to permit the taking of this witness's testimony by telephone hook-up or by a videotape presentation. For reasons that are not totally clear in the record, the defendant did not avail himself of either of these options. The matter of granting a continuance, as we have observed, is vested in the sound discretion of the trial judge. Whenever a trial is scheduled involving a number of witnesses, there is always the possibility that one or more may be unavailable. Especially in view of the grave nature of this witness's medical condition, there appeared to have been some doubt as to when, or even if, he would ever be available. Any continuance runs the risk that, at some future trial date, other critical witnesses will have become unavailable, or that the reliability of witnesses' recollection of critical events will have dimmed. This witness's testimony does not, based upon his affidavit, appear so critical to the defense that to deny his testimony for the jury's consideration must be seen as depriving the defendant of a fundamentally fair trial. His testimony would, in its most favorable light to the defense, have simply tended to impeach somewhat the recollection of others in the store that day as to time the defendant was in the store and the size of cans of beer he bought. Had these issues been so critical to the defense as he would now have us conclude, this Court is at a loss to understand why an effort was not made to present that evidence to the jury by the alternate means proposed by the trial court, even though such a procedure may have been viewed as something less than optimum.

2.

Dr. Michael West

Dr. Michael West had done some forensic tests for the State shortly after the shooting. The State had decided not to call Dr. West, but in the course of discovery, the defendant determined that his testimony might be helpful to the defense. The defense attempted to serve Dr. West with a subpoena, but was unsuccessful in having him served. The defense then moved for a continuance on the basis that the defense had inadequate time to fully investigate the exculpatory possibilities of Dr. West's testing and on the basis that Dr. West claimed to be unavailable for trial due to a prior out-of-state professional commitment. Ultimately, Dr. West's testimony was presented to the jury, though out of sequence, in order to permit him to honor his other commitments. Dr. West had conducted tests for gunpowder residue on the defendant's clothing and for evidence of recent trauma to the defendant's shooting hand that would be consistent with the violent recoil of a fired weapon. The results were, to say the least, inconclusive. Based upon our review, we cannot determine that his testimony shed any appreciable light on the issues to be resolved by the jury. Thus, any diminution in the impact of his testimony because it was taken out of normal sequence is certainly harmless. Neither can we conclude that, given more time to prepare, the defendant could have elicited any additional

information or presented the information in a way that would have been more meaningful to the defense. The defendant, in his brief, has not shown any facts to support such a proposition. Thus, the failure to deny a continuance because of the alleged late disclosure of Dr. West's supposedly exculpatory testing is without merit.

III.

The Victim's Daughter's Testimony

Pace's daughter was seated next to him in the vehicle when the shooting occurred. She testified that she saw the assailant's car as it approached and stopped. She identified it as a white car, and she further testified that the driver was a white man with black hair. This evidence was certainly probative since it was consistent with the description of the defendant's car and his physical characteristics. In response to one question, the child had answered, "Then he shot him," leaving it unclear which of the two principals in her narrative (her father and the defendant) was the subject of the action and which was the object. The prosecuting attorney asked, apparently for purposes of clarification only, "Who shot who?" The daughter responded, "Bennie Hunt shot my daddy." There is no dispute that the daughter did not know Bennie Hunt by name and was unable, of her own personal knowledge, to identify him specifically as the assailant, either at the time of the shooting or subsequently at trial. Defense counsel immediately objected and also moved for a mistrial.

Thus, though the defendant frames this issue on appeal as an issue of the competency of a child of such tender years to testify, it is clear that the real issue asserted by the defendant is the prejudicial impact of this statement which was based upon something other than the witness's own personal knowledge. That such a statement by the witness was improper is not open to question. Nevertheless, the fact that objectionable matter has been presented to the jury does not automatically result, in every case, in reversible error. *Davis v. State*, 611 So. 2d 906, 914 (Miss. 1992). The supreme court has said that the trial court is in the best position to judge the prejudicial impact of such matters, and that the refusal to declare a mistrial will require reversal on appeal only upon a conclusion that the trial court abused its discretion. *Johnson v. State*, 666 So. 2d 784, 794 (Miss. 1995) (citations omitted).

In this case, the trial court immediately sustained defense counsel's objection to the testimony, admonished the jury to disregard the statement, and then inquired of the jurors if there was anyone who could not follow the court's instruction. Immediately thereafter, it was demonstrated beyond doubt from the witness's own testimony that she could not identify the assailant by name. Later proof in the record indicated that this child had, on the night of the shooting, heard her father identify his assailant to other persons, and certainly it is reasonable to conclude that she had, in the ensuing period prior to trial, heard the defendant's name mentioned repeatedly as being the person accused of shooting her father. The jury was capable of assessing the weight to be given to this small child's testimony, of understanding the circumstances under which this improper identification was made, and of understanding that it was without any legitimate foundation. We do not think that her unsolicited remark, made as the result of her apparent misunderstanding of the import of the question put to her, was so prejudicial in its impact as to require a mistrial.

IV.

The Challenge to the Evidence Establishing Guilt

Defendant has assigned as error the assertion that his conviction was against the weight of the evidence, yet he cites as his only authority an excerpt from the case of *Wetz v. State* dealing with the sufficiency of the evidence. *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987). The argument that follows the citation appears, without doubt, however, to be an attack on the weight of the evidence. We will, out of an abundance of caution, consider the evidence supporting the conviction from both aspects.

A.

The Sufficiency of the Evidence

There does not appear to be any real issue as to the sufficiency of the evidence to support the defendant's conviction. The victim, Pace, was very firm in his identification of the defendant as his assailant, and his testimony was not impeached in any significant way. The defense did show that Pace and the defendant, though they were acquainted, had no relationship that would explain the assault. Such a consideration, however, goes more to the weight of the evidence than its sufficiency. The proof established that it was essentially impossible for anyone to have predicted the victim's presence at that location at that time, so that the shooting can be seen as nothing more than an unexplained random act of violence. Nevertheless, through excited utterances of the victim, it was shown that, within a very short time of the incident, Pace was quite certain in his identification of his assailant, and he was never shown to have wavered from that identification. Certainly, the testimony of this witness alone, if accepted as true by the jury, was sufficient to sustain a conviction. *Sistrunk v. State*, 200 Miss. 437, 444, 27 So. 2d 606, 608 (1946).

B.

The Weight of the Evidence

The related issue of the weight of the evidence also requires this Court to view the evidence in the light most favorable to the State, and we are permitted to reverse and remand for a new trial only upon reaching the conclusion that an unconscionable injustice will occur if the verdict is allowed to stand. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993).

The defense consisted, as we have observed, of demonstrating that the defendant had no motive to shoot Pace and further attempting to show that the defendant could not have been at the scene of the shooting at the critical time.

Again, the lack of motive merits little consideration since the State's theory of the case all along was that it was an unexplained act of violence against a victim whose sole apparent connection with his assailant was that he was in the wrong place at the wrong time. In view of the uncontradicted proof that it was mere happenstance that Pace was at that location at the crucial time and that no one was aware of his destination, it seems almost certain that Pace was a randomly selected victim. However, this conclusion does nothing to detract from the fact that he was, unquestionably, shot, and shot under circumstances where any rational motive would appear nonexistent. Thus, the argument that

the defendant had no reason to shoot Pace does not diminish the weight of the evidence, on the State's theory of the case, that he did, in fact, do so. To believe otherwise would require the jury to conclude either that Pace was mistaken in his identification made at a distance of only a few feet, or that Pace was shot under different circumstances and concocted this story to frame the defendant during the time he was driving himself to the hospital to seek medical assistance, while enlisting the aid of his two small children in the process. Whether the jury elected to disbelieve the eye-witness identification by Pace of his assailant on these facts is a matter entrusted to it for decision and one which the trial court may disturb only upon the conclusion that a manifest injustice has occurred. *Jackson v. State*, 551 So. 2d 132, 148 (Miss. 1989). Likewise, this Court may interfere on appeal only if we conclude the trial court was manifestly in error in its decision. *Jackson*, 551 So. 2d at 148. That simply is not the case in this instance.

The defense's proof that the defendant could not physically have been present at the shooting scene at the critical time appears merely to have raised another jury issue which was resolved by the trier of fact against the defendant. In fact, the defense presented alternate theories of the defendant's whereabouts that essentially contradicted each other, making it difficult to determine where the weight of the evidence demonstrating his absence from the crime scene would lie.

The defense presented a rather involved time-line analysis that, if accepted by the jury, would have resulted in a conclusion that the defendant was at a local retail establishment purchasing two cans of beer at the exact moment the shooting was taking place a few miles away. On the other hand, the defense presented a number of witnesses who supported the proposition that for an extended period of time encompassing the alleged time of the shooting, the defendant was in his mother's apartment with his vehicle parked in plain view in the complex parking lot. Certainly, both of these scenarios cannot be true, and the evidence in support of either theory was not so conclusive as to compel its acceptance by the jury.

The jury was entitled to conclude, based upon its collective common sense, that the proof of the time of occurrence of critical events on the night of the shooting was sufficiently imprecise as to permit the necessary leeway for the defendant to have committed the crime and still have bought beer only a few miles away within a short time before or after. As to the alternate theory that he was at his mother's apartment, that proof consisted solely of the testimony of neighbors who claimed to have had the apartment and parking lot under observation during the course of the evening. However, the State presented proof in the form of an oral statement by the defendant that he had left the apartment twice on the night in question to go to the store to buy beer, and there was the testimony of two store employees placing the defendant in the store at a time that was in close proximity to the apparent time of the shooting. Considering this evidence in the light most favorable to the State, it was within the discretion of the jury to conclude that the neighbors' claimed observation of the events at the defendant's mother's apartment was not as scrupulously conducted as the defendant would urge, and that it was credible to believe that these neighbors simply did not observe the apartment during such times as the defendant departed and returned.

V.

Conclusion

This Court finds that the defendant was not so prejudiced by the denial of his various continuance

requests that he was deprived, in any meaningful way, of a vigorous defense and fair trial. The unfortunate statement by the victim's young child identifying the defendant as the assailant by name when she had no basis to do so other than the hearsay statements of others was quickly corrected, and it was clearly demonstrated to the jury that there was no proper basis for the statement. The trial court admonished the jury to disregard the statement, and the jurors affirmatively indicated their ability to do so. There was no abuse of discretion in subsequently denying a mistrial motion on this ground. There was conflicting evidence presented, some of which pointed to guilt and some of which indicated that the defendant could not have been involved in the shooting incident. None of it can be said to be conclusive on the issue. This conflicting evidence was presented to the jury for resolution, and they resolved the conflict against the defendant. There is no basis to disturb that verdict based upon either the weight or the sufficiency of the evidence.

The conviction is affirmed.

THE JUDGMENT OF THE CIRCUIT COURT OF PIKE COUNTY FINDING BENNIE JEFFERSON HUNT GUILTY OF THE CRIME OF AGGRAVATED ASSAULT AND SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH EIGHT YEARS TO SERVE AND SEVEN YEARS SUSPENDED FOLLOWED BY FIVE YEARS PROBATION, AND TO PAY RESTITUTION IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT.

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