IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00139 COA

JOHN D. SMITH

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. WILLIAM F. COLEMAN

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HINDS COUNTY

ATTORNEYS FOR APPELLANT:

GEORGE S. LUTER

MERRIDA P. COXWELL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: ED PETERS, BOBBY DELAUGHTER

NATURE OF THE CASE: CRIMINAL: MURDER

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO LIFE IMPRISONMENT

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

PAYNE, J., FOR THE COURT:

John D. Smith was convicted of the murder of Matt Devenney in the First Judicial District of the Circuit Court of Hinds County. Smith used the defense of insanity which was rejected by the jury. Smith was sentenced to life imprisonment. Feeling aggrieved, Smith appeals arguing (1) that the jury's verdict was arbitrary and against the overwhelming weight of the evidence; (2) the trial court erred in refusing Smith's instruction D-6, the American Law Institute's (ALI) rule of criminal responsibility, and that this Court should abandon the M'Naghten Rule of criminal responsibility; and (3) the trial court erred in refusing Smith's instruction D-7 as to the lesser included offense of manslaughter. Finding no error, we affirm Smith's conviction and sentence.

STATEMENT OF THE FACTS

On June 19, 1991, John D. Smith was at the Stew Pot Soup Kitchen in Jackson, Mississippi. Smith shot and killed Matt Devenney. Charles Moore, an eyewitness to the shooting, testified that someone mentioned to Devenney that Smith was carrying a gun. Devenney then asked Smith to leave the premises. Smith then made a remark "who are you to tell me to carry my gun away. I'm the governor." Smith also stated that the police did not give him the authority to carry a gun, and he gave the police the authority to carry a gun. Smith then walked across the street. Smith went to the center of the street and balanced his gun firing two shots from across the street. One shot hit a telephone pole. Devenney was behind the telephone pole, and Moore was beside Devenney. Smith then came back across the street grabbing Devenney by the right arm, jerking Devenney around and shooting him in the abdomen. Moore testified that Devenney was not armed, nor was he posing a threat to Smith in any way that Moore could see. Moore testified that no one else was making any threats to Smith. After Smith shot Devenney, Smith ran across the street, waived his gun back, and continued walking east away from the scene.

Shortly after the shooting, Smith was arrested approximately one and one-half miles away from the Stew Pot. The arresting officers recovered a .32 caliber revolver and ammunition from Smith at the time of his arrest

At trial, Smith alleged he was not guilty by reason of insanity. To support his insanity defense, Smith offered the expert testimony of Dr. Chris Lott, clinical psychologist at the Mississippi State Hospital, and Dr. E. Fuller Torrey, a research and clinical psychiatrist from Bethesda, Maryland. Both testified that Smith was schizophrenic and that Smith did not know right from wrong at the time of the shooting. Smith's bother, Dennis Smith, also testified as to Smith's background and behavior and his often mistaken beliefs that he was a governmental official, father of fourteen children, and a millionaire.

In rebuttal to Smith's insanity defense, the State offered several lay witnesses who knew Smith including Fran Blake, Charles Moore, Calvin Rodgers, and Mike Hatcher. The State also relied upon the medical file introduced into evidence containing the report from the doctors at the state hospital. This report, contained in the record, reflects that the doctors evaluating Smith determined that Smith was competent to stand trial and also determined that Smith did know right form wrong at the time of the shooting. The letter to the court from the Mississippi State Hospital contains the following:

Mr. John D. Smith is a thirty-nine year old man admitted to the Forensic Service of Mississippi State Hospital at Whitfield on 15 July 91 per order of your court. He is charged with murder in a crime occurring 19 June 91. He was sent to this service for a mental evaluation to assess his competency to be tried and sanity at the time of the crime.

Prior to evaluating Mr. Smith we received a copy of your court order, information concerning the crime including the investigator's report, his prior arrest record, and our patient information form. We were also able to review the medical records from his previous admissions, including his forensic admissions, here and to contact the psychiatrist who had been treating Mr. Smith at the Jackson VA Hospital.

Mr. Smith has been on our service for approximately two months. During that time he has been under twenty-four hour a day observation and has been seen in formal and informal interviews. He has also been receiving medication.

Mr. Smith was interviewed by me and other members of the forensic staff in a formal conference this morning. He was cooperative during this interview and gave relevant responses to our questions. He knew the name of his charge and the possible penalty of conviction. He understood the purpose of a criminal trial and the possible outcomes in his case. He understood the roles in court of his defense attorney, the prosecuting attorney, the judge, the jury, and witnesses. He understood the behavior expected of him in a court of law and in assisting his attorney in the preparation of his defense. He understood the concept of plea bargaining.

He was able to relate the events occurring at the time of the crime with no objective impairment in his memory. He described his actions as well as his thoughts and feelings at the time of the crime. He indicated that he believed that the victim wanted to fight with him and that he was frightened and angry. Mr. Smith also made statements about his continuing beliefs regarding his various governmental appointments and his vast wealth.

Mr. Smith has received a diagnosis of Schizophrenia, Paranoid Type, Chronic. This diagnosis reflects his longstanding unusual beliefs and his fears that others are out to harm him. Some of Mr. Smith's symptoms, such as his suspisciousness [sic] and hostility have improved since he has been here. Other symptoms, such as his belief that he is the "ex-federal governor of Mississippi," and that he ownes [sic] property worth "$75 billon" [sic] have not changed.

> We are unanimous in our opinion that Mr. Smith presently has a rational as well as factual understanding of his legal situation and is able to confer with his attorney in the preparation of his defense. The majority of the staff, including myself, are also of the opinion that Mr. Smith knew the difference between right and wrong in relation to his actions at the time of the crime. It is Dr. Lott's opinion that Mr. Smith was so mentally ill that he may not have known the nature and quality of his actions or that they were wrong at the time of the crime.
>
> Mr. Smith will be returned to the custody of the sheriff of Hinds County and we will be making a referral for him to the mental hygiene clinic of the Jackson VA Medical Center for follow-up psychiatric care. If we can be of further assistance to you regarding Mr. Smith, please do not hesitate to contact us.

This letter, dated September 17, 1991, was signed by R. McMichael, M.D., Director of Forensic Service, and William C. Lott, Ph. D., Clinical Psychologist.

ARGUMENT AND DISCUSSION OF THE LAW

> I. WHETHER THE VERDICT OF THE JURY WAS ARBITRARY AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Smith challenges the jury's determination that he was legally sane at the time of the shooting. "The jury's determination will remain undisturbed unless this Court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice." *Tyler v. State*, 618 So. 2d 1306, 1309 (Miss. 1993) (citations omitted); *see also Roundtree v. State*, 568 So. 2d 1173, 1181(Miss. 1990) (citations omitted). Mississippi has adopted the M'Naghten Rule as the test to determine whether an individual is legally sane. *Westbrook v. State*, 658 So. 2d 847, 850 (Miss. 1995); *Tyler*, 618 So. 2d at 1309 (citing *Roundtree*, 568 So. 2d at 1181; *Davis v. State*, 551 So. 2d 165, 173 (Miss. 1989)). The test is whether Smith was unable to distinguish right from wrong at the time of the shooting. *Tyler*, 618 So. 2d at 1309 (citing *Roundtree*, 568 So. 2d at 1181; *White v. State*, 542 So. 2d 250 (Miss. 1989)). The determination of sanity is within the province of the jury. *Tyler*, 618 So. 2d at 1309 (citations omitted); *Roundtree*, 568 So. 2d at 1181 (citations omitted); *Davis v. State*, 551 So. 2d 165, 173-74 (Miss. 1989) (citations omitted); *White*, 542 So. 2d at 252 (citations omitted). The jury may accept or reject expert and lay testimony as to sanity of the defendant. *Tyler*, 618 So. 2d at 1309 (citations omitted); *Roundtree*, 568 So. 2d at 1181 (citations omitted); *Davis*, 551 So. 2d at 173 (citations omitted).

In the present case, the jury assimilated the testimony and other evidence and determined that Smith was sane under the M'Naghten Rule and guilty of murder. The jury was presented with both expert and lay testimony as to Smith's sanity as well as eyewitness testimony as to Smith's behavior just prior to the shooting and immediately after the shooting. After careful review of the record, we must conclude that the jury's verdict is not so contrary to the overwhelming weight of the evidence as to require reversal. The jury's verdict must remain undisturbed. Thus, this issue is without merit.

II. WHETHER THE TRIAL COURT ERRED IN REFUSING SMITH'S INSTRUCTION D-6, THE AMERICAN LAW INSTITUTE'S (ALI) RULE OF CRIMINAL RESPONSIBILITY, AND WHETHER THE COURT SHOULD ABANDON THE M'NAGHTEN RULE OF CRIMINAL RESPONSIBILITY.

Smith argues that the trial court erred in denying his insanity instruction which set out the American Law Institute's (ALI) standard for legal insanity. Smith attempts to persuade this Court to abandon the long standing M'Naghten Rule in Mississippi jurisprudence. Smith would have this Court adopt the American Law Institute's (ALI) standard for legal sanity as set out in the Model Penal Code. Similar attempts have long been rejected by the Mississippi Supreme Court. *See Westbrook v. State*, 658 So. 2d 847, 850 (Miss. 1995); *Burk v. State*, 506 So. 2d 993, 993 (Miss. 1987); *Laney v. State*, 421 So. 2d 1216, 1219 (Miss. 1982); *Hill v. State*, 339 So. 2d 1382, 1385-86 (Miss. 1976); *Edmond v. State*, 312 So. 2d 702, 704, (Miss. 1975); *Jones v. State*, 288 So. 2d 833, 834-35 (Miss. 1974); *Harvey v. State*, 207 So. 2d 108, 115 (Miss. 1968). We are bound by the precedent set by the Mississippi Supreme Court and are without authority to abandon the M'Naghten Rule. *See* 20 Am. Jur. 2d *Courts* § 201 (1965). The trial court correctly denied Smith's requested instruction which failed to correctly state the law of this State. Accordingly, this issue is without merit.

III. WHETHER THE TRIAL COURT ERRED IN REFUSING SMITH'S INSTRUCTION D-7 AS TO THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER.

Smith requested a lesser included offense instruction on manslaughter. The trial court denied the instruction determining that no evidence warranted such an instruction. Smith argues that the trial court erred in refusing his proposed manslaughter instruction.

Specifically, Smith points to the testimony of the expert witnesses who testified regarding his mental illness. Essentially in this assignment of error, Smith is attempting to have this Court revisit the issue of his sanity at the time of the shooting. Smith uses this opportunity to again argue that he is legally insane in that his mental illness caused him to perceive that he was in a confrontation with Devenney. We have previously addressed the standard in Mississippi for insanity and its application to the present case. *See* Parts I. and II. *supra.*

However, we also see the need to address the merits of Smith's argument as to a lesser included offense instruction of heat of passion manslaughter. Smith argues that he was entitled to heat of passion manslaughter instruction. Section 97-3-35 includes:

> § 97-3-35. Homicide; killing without malice in the heat of passion.
>
> The 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, shall be manslaughter.

Miss. Code Ann. § 97-3-35 (Rev. 1994).

As a general rule, an instruction should not be given unless supported by the evidence. *Ballenger v. State*, 667 So. 2d 1242, 1255 (Miss. 1995) (citations omitted). "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*, 667 So. 2d at 1254 (quoting *Cannaday v. State*, 455 So. 2d 713, 724 (Miss. 1984) (quoting *Black’s Law Dictionary* 812 (5th ed. 1979))). The Mississippi Supreme Court in discussing when a lesser included offense instruction should be granted has stated:

> [A] lesser-included offense instruction should be granted unless the trial judge and ultimately this Court can say, taking the evidence in the light most favorable to the accused and considering all the reasonable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of a lesser-included offense (conversely, not guilty of at least one essential element of the principal charge).

Ballenger, 667 So. 2d at 1255 (quoting *Conner v. State*, 632 So. 2d 1239, 1254 (Miss. 1993) (quoting *McGowan v. State*, 541 So. 2d 1027, 1028 (Miss. 1989))).

Now we turn to the evidence presented in the present case. There was clearly no testimony to indicate that this killing occurred in the heat of passion. Charles Moore, the eyewitness to the shooting, testified that there was no argument or heated exchange between Smith and the victim. Moore testified that Devenney neither threatened Smith nor was Devenney armed. Moore also testified that no one else was making threats to Smith. Put very simply, the evidence does not support the granting of a heat of passion manslaughter instruction. We find this issue to be without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF MURDER AND SENTENCE TO LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.

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