IN THE COURT OF APPEALS 09/17/96

OF THE

STATE OF MISSISSIPPI

NO. 92-KA-01170 COA

PETER SHANE ROGERS

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. ANDREW C. BAKER

COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JACK R. JONES, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: CRIMINAL - MURDER

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE LIFE IMPRISONMENT IN THE CUSTODY OF THE MDOC; SENTENCE TO RUN CONSECUTIVE TO SENTENCE IN CAUSE NO. 5107

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

BARBER, J., FOR THE COURT:

Peter Rogers was indicted for the crime of capital murder. The events leading up to the indictment relate to the murder and robbery of William Johnson in DeSoto County, Mississippi on or about August 6, 1991. The jury returned a verdict of guilty for the lesser included offense of murder. Rogers was sentenced to life imprisonment to run consecutively with a sentence previously imposed in another case. Feeling aggrieved by the verdict and the sentence, Rogers appeals raising the following eight issues for consideration:

> I. THE TRIAL COURT IMPROPERLY DENIED THE MOTION FOR MISTRIAL MADE WHEN THE DEFENDANT WAS BROUGHT BEFORE THE COURT IN HANDCUFFS.
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> II. THE TRIAL COURT IMPROPERLY DENIED THE MOTION FOR CONTINUANCE AND MISTRIAL AS WELL AS THE MOTION FOR NEW TRIAL MADE DUE TO THE PROSECUTOR'S DISCOVERY VIOLATION.
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> III. THE TRIAL COURT ERRED IN DENYING THE MOTION IN LIMINE DIRECTED AT THE SPECULATIVE TESTIMONY OF FRANK HICKS.
>
> IV. THE TRIAL COURT ERRED IN ALLOWING HEARSAY TESTIMONY FROM TIM DUNN WHEN HIS STATEMENT WAS ALLOWED INTO EVIDENCE.
>
> V. THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE THE SLIDES AND PHOTOGRAPHS OF THE VICTIM.
>
> VI. THE TRIAL COURT ERRED IN REFUSING DEFENDANT'S INSTRUCTIONS 5, 6, AND 9.
>
> VII. THE TRIAL COURT ERRED IN OVERRULING THE OBJECTIONS TO THE "PERSONAL EXPERIENCES" ARGUMENT OF THE PROSECUTOR.
>
> VIII. THE TRIAL COURT ERRED IN REFUSING TO HEAR THE PETITION FOR WRIT OF ERROR CORAM NOBIS.

Finding that none of the Appellant's assignments of error warrant reversal in this cause, we accordingly affirm the decision of the trial court.

ANALYSIS

I. THE TRIAL COURT IMPROPERLY DENIED THE MOTION FOR MISTRIAL MADE WHEN THE DEFENDANT WAS BROUGHT BEFORE THE COURT IN HANDCUFFS.

Prior to trial, Rogers was brought to court from the DeSoto County jail. He was, at the time, handcuffed and otherwise restrained. Rogers complains that to present him in such a manner, where prospective jurors could see him, constitutes reversible error. Rogers cites *Marion v. Commonwealth*, 108 S.W.2d 721, (Ky. 1937) as authority in support of his argument.

The Mississippi Supreme Court has more recently addressed this issue in *Wiley v. State*, 582 So. 2d 1008, 1013 (Miss. 1991). In that case, the defendant contended "that his right to a fair trial by an impartial jury was prejudiced when the jurors who saw him brought to the court room in shackles were allowed to sit on the jury and decide his case." *Id.* The court found that while generally it is the right of the defendant to be free from bonds in the presence of the jury, an unintentional failure to remove handcuffs for a short period, causing no prejudice to the defendant, is not grounds for reversal. *Id.* The court held that where "there is no evidence presented that any of the jury actually saw the defendant in shackles or handcuffs, then such a technical violation is harmless." *Id.* at 1014.

Rogers produced no evidence that any potential juror actually saw him in the handcuffs or that failure to remove the handcuffs were the result of anything more than inadvertence or happenstance. Therefore, we find no abuse of discretion in the trial judge's denying Rogers' motion for a mistrial. This assignment of error is without merit.

II. THE TRIAL COURT IMPROPERLY DENIED THE MOTION FOR CONTINUANCE AND MISTRIAL AS WELL AS THE MOTION FOR NEW TRIAL MADE DUE TO THE PROSECUTOR'S DISCOVERY VIOLATION.

Rogers asserts that testimony at trial revealed that someone had painted the words "you will die" on the victim's home. Rogers claims that investigators discovered that someone other than Rogers was responsible for this. Rogers further complains that it was discovered sometime after trial that the prosecution was in possession of a tape recording of a phone call to the victim's home wherein threats to the victim were made. The phone call and the threats were made by someone other than Rogers. Based upon this, Rogers maintains that the prosecution failed to disclose exculpatory material to the defense, and consequently, his motion for a new trial should have been granted.

What the record reveals is that sometime after the murder and after the investigation of the crime scene, vandals apparently ransacked the home and painted this graffiti on the exterior of the house.

The court found that because this incident occurred long after the murder, this information was not exculpatory. We agree and thus find that there was no discovery violation committed by the State not divulging this information to the defense.

The trial court held a hearing regarding the matter of the tapes which were supposedly withheld from the defense. Subsequent to the hearing, the trial court denied the Defendant's motion for a new trial based on the purported discovery violation in a two-page order which made specific findings of fact concerning the tape. The court found that the tapes, of which Rogers complained that his attorneys were never made aware, were turned over to the police either by him or in his presence. The court found that the cassette tapes were available for inspection before trial, and that cassette tapes were listed in the State's discovery response. Neither the Defendant nor his attorneys ever listened to any of the tapes listed or available. None of the tapes were introduced at trial. The existence and contents of the tapes were first made known by a pro se motion filed by the Defendant; and, therefore, the Defendant had full knowledge of the tapes and their contents. The court concluded that because the Defendant had knowledge of the existence and contents of the tape recordings, he cannot now claim prejudice by the fact that his attorneys were not made aware of their existence prior to trial. *Accord Ladner v. State*, 584 So. 2d 743, 752-53 (Miss. 1991). Furthermore, the threats contained in the recording, which were made by someone other than Rogers, occurred four years prior to the murder. The court found that these threats were remote in time to the murder and thus, were not exculpatory material. Therefore, even if there was a technical violation of the discovery rules, it was harmless error. We agree with the trial court's well reasoned analysis regarding the tapes and find no error on the part of the court in denying the Defendant's motion for a new trial on this issue. This assignment of error is without merit.

III. THE TRIAL COURT ERRED IN DENYING THE MOTION IN LIMINE DIRECTED AT THE SPECULATIVE TESTIMONY OF FRANK HICKS.

Prior to trial, defense counsel disclosed that Frank Hicks, a handwriting expert, would be called to establish that a handwritten check list concerning the murder of the victim and the disposition of the body and evidence may have been written by Rogers. The note was apparently found in the home of Rogers' mother in DeSoto County.

Rogers filed a motion in limine to prevent what he deemed to be "speculative" testimony. After arguments of counsel, the motion was denied. Rogers now contends that it was error to allow such testimony where the expert was not able to identify Rogers as the writer of the list within a reasonable degree of professional certainty. Rogers correctly states that expert testimony cannot consist of mere speculation. *Goforth v. City of Ridgeland*, 603 So. 2d 323 (Miss. 1992). Expert testimony should rise to a level above that of a "reasonable" hypothesis. *Id.*

On the other hand, an expert is not required to state his opinion beyond a reasonable doubt. *Cole v. State*, 405 So. 2d 910, 912 (Miss. 1982). "That rule only applies to the burden of the State to prove material elements of a crime beyond every reasonable doubt. In doing so, the jury would be entitled to consider all of the testimony of those who testify, with reasonable inferences flowing from their testimony, and in addition they have the right to observe the demeanor of those witnesses. . . ." *Id.*

In the case at bar, what Rogers argues is that unless the handwriting expert can definitively state whether Rogers was or was not the writer of the list, his testimony is too speculative to be admissible. This is not the correct legal standard to be applied.

The testimony of this expert was clearly explained. The expert explained the manner in which the handwriting samples were collected. The expert pointed out for the jury similarities that tended to show that the handwriting on the note was Rogers'. Also, the expert noted certain discrepancies in the handwriting samples and explained how these affected his conclusion. Furthermore, the expert clearly explained the scale upon which his conclusion was based. They are as follows:

Conclusively Reason Some reason Strong reason Conclusively

not to to to the

the same believe believe believe same

This expert opined, after explaining how he arrived at his conclusion, that there was "strong reason to believe" that the note was written by the Defendant. We agree with the State that this testimony rises to a level above that of mere speculation and does assist the trier of fact in understanding the evidence. Therefore we find this assertion of error to be without merit.

IV. THE TRIAL COURT ERRED IN ALLOWING HEARSAY TESTIMONY FROM TIM DUNN WHEN HIS STATEMENT WAS ALLOWED INTO EVIDENCE.

During rebuttal testimony offered by the State, Timmy Dunn was called as a witness. The prosecutor began to question Mr. Dunn about a statement he had given to a law enforcement officer. The prosecutor subsequently offered the statement into evidence. The questioning about the statement pertained only to its existence. The Defendant objected to its admission into evidence on the grounds that the statement contained hearsay. After a discussion before the court, the objection was overruled.

The statement refers to out-of-court remarks made by Mr. Dunn's wife, Tami, concerning the Defendant's arrival at the Dunn home on the night of the murder. On direct examination, Tami stated that Peter's mother had dropped him off at the Dunn home. Tami admitted on cross-examination that she had earlier told the Defendant's attorney that she was somewhat intoxicated on the evening of the murder and that she might have been confused as to the particular night the Defendant arrived via his mother.

The State argues that Mr. Dunn's statement was not hearsay according to Mississippi Rules of Evidence 801(d)(1)(B). It is the position of the State that defense counsel implied that the testimony and statements of the Dunns were a result of recent fabrication or improper influence or motive.

The Mississippi Supreme Court decision in *Ponthieux v. State*, 532 So. 2d 1239 (Miss. 1988), is instructive on this issue. The facts of that case are analogous to the facts before us. In *Ponthieux*, the

testimony of Mr. Rose, regarding what he was told by another witness, Nixon, Jr., was held to be not hearsay because Nixon, Jr. was available for cross-examination concerning the statement. The statement was also consistent with Nixon, Jr.'s earlier testimony, and the statement of Mr. Rose was offered to rebut a charge of improper influence or motive. *Id.* at 1247-48.

Similarly, the facts before us demonstrate that the testimony by Mr. Dunn, as to what he was told by Mrs. Dunn, is not hearsay because Mrs. Dunn was available for cross-examination concerning the statement. The statement was consistent with her earlier testimony, and it was offered to rebut the implication of recent fabrication or improper motive or influence. Therefore, we hold the testimony of Mr. Dunn was not hearsay pursuant to Mississippi Rule of Evidence 801(d)(1)(b). As such, this assignment of error is without merit.

V. THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE THE SLIDES AND PHOTOGRAPHS OF THE VICTIM.

Rogers complains that although the actual death of the victim was not disputed, the prosecution was allowed to introduce post-mortem photographs and slides of the victim. Rogers contends that these photographs were gruesome and had no probative value. He also claims that such evidence was highly prejudicial and inflammatory.

The State asserts that each photo was necessary to show the corpus delicti connecting the events, in connecting the evidence to the victim's residence and, ultimately, to the Defendant. Moreover, the photos were helpful to the witnesses that testified and were not so gruesome as to inflame the jury.

The trial court's ruling on the admissibility of photographs rests within the sound discretion of the trial judge. "We will not reverse the lower court on the ground that the photographs were gruesome and prejudicial unless the trial judge has abused his discretion." *Hewlett v. State*, 607 So. 2d 1097, 1101 (Miss. 1992). Photographs used to corroborate witness testimony may be relevant, and their admission is not an abuse of discretion. *Id.* at 1103.

The photographs here were used to corroborate, illustrate, or explain witness testimony. Additionally, after reviewing the photographs, we find that they were not so gruesome as to inflame the jury, and whatever prejudicial effect they may have had was substantially outweighed by their probative value. The trial judge in this case did not abuse his discretion in admitting the photographs. Therefore, this assertion of error is without merit.

VI. THE TRIAL COURT ERRED IN REFUSING DEFENDANT'S INSTRUCTIONS 5, 6, AND 9.

Rogers maintains that it was error for the trial court to refuse Defendant's Instructions D-5 and D-6 because they pertained to the circumstantial evidence theory of the case. The State, however, contends that these two instructions were cumulative. The State points out that the court had already given a circumstantial evidence instruction in the court's Instruction C-6. The record also reflects that this instruction was given and that the trial judge based his refusal of D-5 and D-6 on the fact that he

had already given a circumstantial instruction. Consequently, the trial court did not abuse its discretion in not granting Instructions D-5 and D-6.

Next, Rogers claims that it was error for the trial judge to refuse Instruction D-9. This instruction pertained to the lesser charge of accessory after the fact. Rogers, nevertheless, continued to deny throughout the trial that he had any knowledge of the circumstances pertaining to the murder of the victim.

In refusing this instruction, the trial court found that there was no evidentiary basis for the instruction. We agree with the trial court's findings on this matter. Instructions on lesser offenses should only be given if they are supported by the evidence. *Rogers v. State*, 599 So. 2d 930, 934 (Miss. 1992). Furthermore, granting an instruction which is not supported by the evidence constitutes error. *Id.* "Unwarranted submission of a lesser offense is an invitation to the jury to disregard the law." *Presley v. State*, 321 So. 2d 309, 311 (Miss. 1975). We find no error in the trial court's refusal of this instruction. This assignment is without merit.

VII. THE TRIAL COURT ERRED IN OVERRULING THE OBJECTIONS TO THE "PERSONAL EXPERIENCES" ARGUMENT OF THE PROSECUTOR.

Rogers asserts that during the prosecutor's summation, an improper closing argument tactic was utilized. Specifically, that the prosecutor was allowed to comment on personal experiences regarding personal phone calls. The statement was in response to arguments made by counsel for the defense during his closing argument.

Defense counsel argued during closing that the State had subpoena power to obtain records of long distance phone calls. This comment by the defense was in reference to testimony elicited by defense counsel to determine whether the Defendant had made a telephone call from the scene of the murder or elsewhere. Defense counsel essentially argued that if Rogers had called from the murder scene to the witness's place of employment, it would have been a long distance phone call and a record would have been available as proof.

In response, during the State's final closing, the prosecutor pointed out that most people had "area calling"; therefore, a long distance record of such a call would not be available. We find this comment falls within the wide latitude allowed to counsel during closing argument. *See Peyton v. State*, 286 So. 2d 817, 819 (Miss. 1973); *Craft v. State*, 271 So. 2d 735, 737 (Miss. 1973). As such, no reversible error was committed.

VIII. THE TRIAL COURT ERRED IN REFUSING TO HEAR THE PETITION FOR WRIT OF ERROR CORAM NOBIS.

After Rogers had filed the appeal of his conviction and sentence, James Morris, a witness for the prosecution, submitted an affidavit recanting his testimony. Morris' testimony was to the effect that Rogers had admitted committing the crime during a prison card game. Subsequently, the Defendant filed a writ of error coram nobis. The trial judge filed an order stating that it could not act on the writ

because it had been divested of jurisdiction. Rogers argues that the trial court's refusal to hear the petition was erroneous and requires reversal.

The writ of error coram nobis was repealed and/or abolished with the passing of our Post-Conviction Relief Act, codified at section 99-39-3(1) et seq. of the Mississippi Code, effective from and after April 17, 1984. "The relief formerly accorded by such writs may be obtained by an appropriate motion under this chapter." *Id.* Motions for post-conviction relief are now within the

jurisdiction of the Mississippi Supreme Court. *Id.* Therefore, the trial court did not err in refusing to hear the petition for writ of error coram nobis.

THE JUDGMENT OF THE DESOTO COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE SHALL RUN CONSECUTIVE TO SENTENCE ROGERS IS NOW SERVING IN CAUSE NO. 5107. COSTS ARE ASSESSED AGAINST DESOTO COUNTY.

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