IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00982 COA

JOHN A. PERRY

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-

TRIAL JUDGE: HON. JOSEPH LOPER

COURT FROM WHICH APPEALED: WINSTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

RICHARD BURDINE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: BILLY L. GORE, SPECIAL ASSISTANT ATTORNEY GENERAL

DISTRICT ATTORNEY: DOUG EVANS

NATURE OF THE CASE: FELONY-MURDER

TRIAL COURT DISPOSITION: CONVICTED OF MURDER, SENTENCED TO LIFE AND FINED $5,000

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

MCMILLIN, J., FOR THE COURT:

John A. Perry appeals his conviction of murder and life sentence in the Circuit Court of Winston County. Perry assigns the following errors as a basis for the reversal of that conviction: (1) the verdict of the jury was against the weight of the evidence; (2) the trial court erred in allowing testimony of alleged conversations between the defendant and the victim; and (3) the defendant was denied a fair trial because his medical condition prevented him from meaningfully assisting counsel in his defense at trial.

After a careful review, we find no error warranting reversal of the conviction, and we, therefore, affirm the conviction.

I.

FACTS

On the morning of July 20, 1994, emergency personnel responded to a call reporting a shooting at the home of John and Delois Perry. Upon their arrival, they discovered Delois Perry kneeling in the kitchen area, suffering from an apparent bullet wound. Mrs. Perry was transported to the Winston County Hospital, where she was pronounced dead on arrival. Mrs. Perry's husband, John Perry, was indicted and tried in the Winston County Circuit Court for the murder of his wife. The jury convicted him of murder, and he was sentenced to life in prison. It is from this conviction and sentence that Perry brings this appeal.

Additional facts of the case will be discussed as they become relevant to our discussion.

II.

Weight of the Evidence

Perry argues that the jury's verdict was against the overwhelming weight of the evidence. He cites, in support of his argument, case law relating to challenges to both the weight and the sufficiency of the evidence against him. Perry argues that the State did not establish that he intentionally shot and killed his wife. This appears to be an argument attacking the legal sufficiency of the evidence. Perry moved for a directed verdict at the close of the State's evidence, but the motion was denied. Perry then proceeded to present evidence in his own defense and failed to renew this challenge to the evidence at the close of the evidentiary phase of the trial. His only post-trial motion sought a new trial, not a JNOV. Thus, any challenge to the sufficiency of the evidence is procedurally barred. *See Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992) (where the court held that "a defendant waives the appeal of an overruled motion for directed verdict made at the end of the State's case" when he chooses to go forward with evidence in his defense). Therefore, we will address only the weight of the evidence to support his conviction.

On appeal of the trial court's denial of Perry's motion for new trial, we must consider the evidence "in the light consistent with the verdict," giving the State all favorable inferences which can be drawn from that evidence. *Strong v. State,* 600 So. 2d 199, 204 (Miss. 1992). The trial court is charged to grant a new trial upon reaching a conclusion that to allow the verdict to stand would work a manifest injustice. *See Johnson v. State,* 642 So. 2d 924, 928 (Miss. 1994) (citations omitted); *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983). This Court will reverse "only when [we are] convinced that the trial court has abused its discretion in failing to grant a new trial." *Id.* (citation omitted).

Perry's challenge to the weight of the evidence appears to consist essentially of the proposition that the State failed to disprove his protestation that the shooting, which he admitted, was accidental. By his own testimony, he admitted pointing the gun at his wife, but claimed he thought the gun was unloaded and that he only intended to frighten his wife into admitting her suspected marital infidelity.

The State presented an eye-witness to the crime who indicated that Perry demanded at gunpoint that the victim admit her infidelity or she was going to "die right there," and that immediately thereafter, he fired the fatal shot and fled the residence in the only vehicle that would have been available to transport the seriously wounded woman to the hospital. Another witness testified that the day before the shooting, Perry told her he was going to kill his wife.

Perry was entitled to have the jury consider and rule on his claim of accident, but the jury was not obligated to believe him. Perry's assertion of how the shooting transpired is not so overwhelmingly persuasive on the issue of intent as to lead this Court to the conclusion that the jury's verdict produced a manifest injustice in this case. We, therefore, are of the opinion that this issue is without merit.

III.

Alleged Hearsay Testimony

Defendant, in his second error assignment, complains of damaging hearsay testimony admitted over his continuing objection. He makes no reference to the record where such an event occurred, he does not inform this Court of the substance of the hearsay evidence so that we may assess its prejudicial impact, nor does he cite the Court to any authority in support of his contention on this issue. This issue is not properly raised and will not be considered by this Court. *See Johnson v. State,* 626 So. 2d 631, 634 (Miss. 1993); *McClain v. State,* 625 So. 2d 774, 780 (Miss. 1993).

IV.

Inability to Assist Counsel in Forming Defense

Perry claims that, at the time of his trial, he was suffering from emphysema and pancreatitis and was medically unable to provide meaningful assistance to his counsel in the conduct of his defense. Were this in fact the case, it was incumbent upon defense counsel to call the matter to the court's attention through a request for a continuance prior to commencement of trial, or through an appropriate mid-

trial motion if the debilitating condition developed after the trial commenced. Perry did neither. He announced ready for trial when the trial court called the case. There is nothing in the record to demonstrate any prejudice to Perry in the presentation of his defense arising out of his medical condition. In his brief, Perry claims that his condition prevented him from speaking loud enough during his testimony to be heard by the jury. There is no factual basis for that proposition. The court reporter was apparently able to transcribe Perry's testimony verbatim, and there is no expression of concern by either the trial court, Perry's counsel, or any member of the jury that his testimony was inaudible to all or any part of the jury members. Defense counsel, at the commencement of Perry's testimony, cautioned him to speak loud enough to be heard over the noise of an air conditioner, and Perry indicated his ability to do so. The only remaining comment regarding the understandability of his testimony was a comment that he was speaking too fast at one point.

A trial court may not be put in error on a matter which was not properly presented to it for decision. *See Johnson*, 626 So. 2d at 634; *McClain,* 625 So. 2d at 780. The matter of Perry's health and its effect on the conduct of the trial is procedurally barred. Additionally, there is no factual basis in the record to establish such a claim were we disposed to consider the issue on the merits.

THE JUDGMENT OF CONVICTION OF THE WINSTON COUNTY CIRCUIT COURT FINDING JOHN A. PERRY GUILTY OF MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF $5, 000 IS AFFIRMED. SAID SENTENCE IS TO RUN CONSECUTIVELY TO ANY SENTENCE PREVIOUSLY IMPOSED. COSTS OF THIS APPEAL ARE ASSESSED TO WINSTON COUNTY.

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