

6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00573 COA

PERNELL SHEPHERD A/K/A PERNELL

DWAYNE SHEPHERD 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. LILLIE SANDERS

COURT FROM WHICH APPEALED: ADAMS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: PAMELA FERRINGTON

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: ALONZO H. STURGEON

NATURE OF THE CASE: CRIMINAL: MURDER

TRIAL COURT DISPOSITION: MURDER; LIFE SENTENCE IN THE MDOC

MANDATE ISSUED: 7/8/97

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

DIAZ, J., FOR THE COURT:

Pernell Shepherd (Shepherd), the Appellant, was tried and convicted in the Adams County Circuit Court of murder. He was sentenced to serve a life sentence in the Mississippi Department of Corrections. Aggrieved from this judgment, Shepherd appeals to this Court asserting the following issues: (1) that the lower court erred in denying the Appellant's motion for directed verdict and (2)

that the lower court erred in allowing a rebuttal witness. Finding no reversible error, we affirm.

### FACTS

On the afternoon of August 18, 1994, Takarri Wallace, (Wallace) was driving around in his car with three of his friends, Mack Washington (Washington), Charles Buchannan (Buchannan), and Jessie White (White). The four men were driving around town when they decided to seek out Shepherd and purchase some crack cocaine from him. Wallace testified that Buchannan and White approached Shepherd, and returned with rocks of crack cocaine. When Wallace approached Shepherd, Shepherd handed him some rocks of cocaine as well. Wallace returned to his car and drove away without paying Shepherd.

Wallace then dropped off Buchannan at home, and the remaining three men continued to drive around town. After some time, Wallace turned down a street and saw Shepherd standing outside of a house. When Shepherd recognized Wallace's car, he picked up a gun and pointed it at Wallace's car, but did not shoot. At that point, White asked to be dropped off at his grandmother's apartment. After driving around some more, Wallace and Washington, the only ones remaining in the car, saw Shepherd parked by a car wash. As Wallace and Washington drove by, Shepherd shot into the car hitting Washington three times in the head.

According to Shepherd, the four men originally approached him and asked to purchase some crack cocaine. When he told them that he did not have any, they asked him if he had change for \$200. He gave Wallace ten twenty dollar bills. Shepherd then testified that Wallace returned to his car and drove off without giving him the \$200. Later on, he saw Wallace, Washington and White drive and flash "gang signs" at him. The second time he saw Wallace drive by, he testified that Wallace was shooting at him, so he grabbed his gun and shot back.

### DISCUSSION

#### DIRECTED VERDICT

When reviewing the sufficiency of the evidence, all the evidence consistent with the defendant's guilt is accepted as true together with any reasonable inferences that may be drawn from the evidence. *Gossett, Jr. v. State*, 660 So. 2d 1285, 1293 (Miss. 1995). "This Court may reverse only where the evidence is such that reasonable and fair-minded jurors could only find the accused not guilty." *Id.*

Shepherd offers two arguments in support of this issue. First he argues that the State failed to prove the statutory elements of murder. Shepherd was indicted under Section 97-3-19 of the Mississippi Code for murder. The indictment charged that Shepherd did "wilfully, unlawfully, feloniously and of his [sic] malice aforethought kill and murder one Mack Washington, a human being"; Shepherd argues that the State failed to prove that Shepherd acted with malice aforethought. Malice aforethought is defined as the equivalent of "deliberate design." *Gossett*, 660 So. 2d at 1293.

"Deliberate indicates full awareness of what one is doing, and generally implies careful and unhurried consideration of the consequences. 'Design' means to calculate, plan, contemplate . . . deliberate

design to kill a person may be formed very quickly, and perhaps only moments before the act of consummating the intent." *Id.* Applying this definition, we find that the evidence was sufficient to show that Shepherd had the requisite intent necessary for the charge.

Shepherd also argues that the evidence was insufficient to support the verdict. As stated above, we find that the evidence supported the verdict. There is no merit to this argument.

### REBUTTAL WITNESS

Shepherd contends that the lower court erred in refusing to allow Derry Dunmore to testify in the State's case-in-chief, but later allowed him to testify as a rebuttal witness. Shepherd argues that this evidence was improperly admitted and a violation of the discovery rule. Dunmore was at the car wash when Washington was shot. When the police first questioned him, he told them that he only heard gunshots, but did not see anything. A few days before trial, Dunmore told another witness that he had actually seen what happened in front of the car wash that day.

Shepherd testified that he had shot at Wallace's car in self defense. According to Dunmore, he saw Shepherd parked in front of a lounge, apparently near the car wash. Dunmore stated that he saw Shepherd hop out of the car, go into his trunk, and run toward the car wash with a gun shouting "Run now, motherfucker." At that point, Dunmore saw Shepherd aim the gun at Wallace's car, and heard three shots fired. The judge would not allow the State to call Dunmore in its case-in-chief because of the discovery rule violation; however, once Shepherd testified that he had shot in self-defense, the judge allowed Dunmore to testify as a rebuttal witness.

Ordinarily, the party who has the burden of proof must introduce all substantive evidence in its case-in-chief. *Powell v. State*, 662 So.2d 1095, 1098 (Miss. 1995).

When there is a doubt as to whether evidence should be admitted as case-in-chief or rebuttal evidence, the court should resolve the doubt in favor of reception into rebuttal if: (1) its reception will not consume so much additional time as to give an undue weight impractical probative force to the evidence so received in rebuttal, and (2) the opposite party would be substantially well prepared to meet it by surrebuttal as if the testimony had been offered in chief, and (3) the opposite party upon request therefor is given the opportunity to reply by surrebuttal.

*Id.* "This Court has encouraged liberal application of the rebuttal evidence rule." *Id.* The determination of whether evidence is properly admitted as rebuttal evidence is within the trial court's discretion. *Powell*, 662 So. 2d at 1099. In *Powell*, the court allowed the State to introduce a rebuttal witness after discovering through one of its witnesses only several days before trial that the rebuttal witness had knowledge of the events. *Id.* at 1097.

In the case at bar, the State's witnesses testified in the State's case-in-chief that Shepherd ran toward Wallace's car as Wallace drove down the street. Dunmore did not necessarily add any additional information to the evidence already presented by the State other than to rebut the self-defense claim made by Shepherd. The defense was allowed an opportunity to interview Dunmore before he took the stand; however, the defense declined an interview stating that it already knew the substance of Dunmore's anticipated testimony. It was within the trial court's discretion to allow additional

testimony in this instance. Finding no merit to this appeal, we affirm the judgment.

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

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**