IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00139 COA

CHARLES MCLAURIN 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. ROBERT G. EVANS

COURT FROM WHICH APPEALED: COVINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: OBY T. ROGERS

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS

DISTRICT ATTORNEY: DEWITT L. FORTENBERRY, JR.

NATURE OF THE CASE: CRIMINAL-FELONY

TRIAL COURT DISPOSITION: MANSLAUGHTER: SENTENCED TO SERVE A TERM OF 16 YRS IN THE MDOC

MOTION FOR REHEARING FILED:10/7/97

MANDATE ISSUED: 12/9/97

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Charles McLaurin was convicted of manslaughter by a Covington County Circuit Court jury. He appeals, arguing the trial court erred in sustaining various hearsay objections, in overruling a motion to suppress, and in failing to give a circumstantial evidence instruction. Finding no reversible error, we affirm.

FACTS

The facts viewed in the light most consistent with the verdict are these. Charles McLaurin was at his house with his son, Keith, and his cousin, Michael Goody. McLaurin's girlfriend, Amanda Magee entered the house, went into the bedroom and demanded that McLaurin come in and talk to her. Goody had seen a pistol in McLaurin's pajama top pocket; he saw McLaurin go into the bedroom with the pistol in his right hand. Goody heard McLaurin and Magee argue, then heard a gun shot. Goody opened the door to the bedroom and saw McLaurin holding a gun in his right hand. McLaurin was standing over Magee who was slumped on the floor, and McLaurin said to Goody, "The gun went off."

When one of the neighbors came to the house, McLaurin told the neighbor that Magee had shot herself, and that when he heard the shot, he ran into the bedroom from the living room and found her. He told the police the same story.

The gun was found at McLaurin's house hidden behind a vase. The Mississippi Crime Lab tested Magee's hands for metal residue. The test was negative. McLaurin's hands tested positive for metal residue, and an additional test was taken which showed gun shot residue on his hands, which was consistent with McLaurin having held a gun which had discharged.

McLaurin testified to a different version of events. Magee came into his house on the night of the shooting and asked him to join her in the bedroom so that they could talk. He refused, then decided to see what she wanted. When he opened the door, she was pointing the gun at herself. He tried to move her arm to keep her from shooting herself, but during the struggle, the gun fired and flew out of her hands.

The jury found McLaurin guilty of manslaughter. He was sentenced to serve sixteen years.

DISCUSSION

I. Hearsay Objections

McLaurin argues that the trial court erred in not allowing him fully to develop his defense that Magee was about to shoot herself when McLaurin intervened and the gun fired. He wished to present testimony that Magee abused cocaine and that as a result that she was suicidal.

McLaurin first attempted to establish his defense by offering the results of Magee's blood analysis to show that Magee had cocaine in her blood stream. He tried to introduce the evidence through Dr. Hayne, who performed the autopsy on Magee's body. Dr. Hayne submitted the blood for analysis to the state crime lab, but did not perform the test himself. McLaurin did not offer the custodian of the records or the person who performed the test. The judge did not allow Hayne to testify as to the results of the tests, but Hayne testified in a proffer that Magee's blood analysis tested positive for cocaine.

Had McLaurin offered the results through the person who performed the test, the results would have been admissible. See *Kettle v. State*, 641 So. 2d 746, 749 (Miss. 1994). The results could also have been admissible if they had been offered through the custodian of the records of the Mississippi Crime Lab. See *Gossett v. State*, 660 So. 2d 1285, 1296 (Miss. 1995). Because Hayne neither performed the test nor was the records custodian, the court correctly excluded his testimony.

McLaurin also attempted to question Charles Jackson, in whom Magee had supposedly confided that she had a drug problem. Jackson testified in a proffer that Magee told him that her drug problem sometimes made her feel like killing herself. McLaurin argues that the testimony was admissible Mississippi Rule of Evidence 803(3). That rule allows the admission of a statement that would have otherwise been excluded as hearsay, when it is a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition. The comment to the rule states that "statements which indicate intention to do something in the future are admissible to prove that the act intended took place." M.R.E. 803(3) Cmt.3. The Second Circuit held that "a declarant's out-of-court statement of intent may be introduced to prove that the declarant acted in accordance with that intent." *U.S. v. Torres*, 901 F.2d 205, 239 (2d Cir. 1990) (quoting *U.S. v. Delvecchio*, 816 F.2d 859, 863 (2d. Cir. 1987).

The State pointed out below and in its brief here that Jackson could not pinpoint when Magee had made this statement, and that it could have been more than a month before the shooting. Even a statement that fits under a hearsay exception category can be excluded for remoteness or other reasons that undermine its relevance. M.R.E. 401; *Tillis v. State*, 661 So. 2d 1139, 1144 (Miss. 1995). The court found the statement to be "too remote to be considered part of res gestae." It is true that part of what is covered by this exception fits under the traditional pre-Rule "res gestae" category. M.R.E. 803, Comt. 1. The rule itself is broader, however. It "requires that the declarant describe a state of mind, emotion, sensation or physical condition existing at the time of the condition, the evidentiary effect is broadened by the inference of continuity of time." MICHAEL H. GRAHAM, FEDERAL PRACTICE & PROCEDURE, § 6754 at 580 (1992). If a declarant has an intent on the day of the statement to commit a specific act, there is some inference that the intent

continues. How long that inference should continue depends on the kind of acts and the supporting feelings and attitudes. GRAHAM, § 6754 at 580. "Determining questions involving continuity of inference rests very much in the discretion of the court." *Id.*

Whether or not the trial court's use of the word "remote" was in the context of continuity of intent, we find that the passage of three to four weeks since the statement of intent allegedly was made to so weaken the inference of continuity that the statement properly was excluded.

Through his own testimony, McLaurin was allowed to present his argument that the Magee's cocaine habit made her suicidal. The jury heard his version of events that he was trying to prevent her from shooting herself and that she had a cocaine problem. This hearsay evidence, even had it been admitted, was merely cumulative. At worst its exclusion would have been harmless error. *Young v. State*, 679 So. 2d 198, 203 (Miss. 1996).

II. Motion To Suppress

McLaurin argues the trial court erred in overruling his motion to suppress the results of a gun powder residue test taken from his hands. A search warrant was issued for one kind of test, but the investigators then ordered a second test without getting an additional warrant. McLaurin argues that the taking of evidence from his hands was an unreasonable search and a violation of his rights under the Fourth and Fourteenth Amendment.

The State argues that the original search warrant to conduct a metal trace test was issued upon a showing of probable cause. This first test showed McLaurin positive for metal traces and Magee negative, thereby undermining McLaurin's statements that Magee had shot herself. The State argues that the additional test on McLaurin was valid due to "exigent circumstances" in that McLaurin could have easily destroyed the gun residue on his hands by simply washing them.

We find that there was probable cause for the original search warrant, and for the follow-up test. The second test was justified because of the ease with which McLaurin could have destroyed the evidence, as by merely washing his hands. *See Cupp v. Murphy*, 412 U.S. 291, 296 (1973). There was no unreasonable search in this case.

III. Circumstantial Evidence Instruction

McLaurin argues that the court failed to give a circumstantial evidence instruction offered by the defense. McLaurin cites *Barclay v. State*, 43 So. 2d 213 (Miss. 1949) for the proposition that where the defendant is the only eyewitness to a homicide, his version of the killing must be accepted as true if it is reasonable and not substantially contradicted by the physical facts, and where the state relies upon circumstantial evidence to establish any essential element of the crime charged, the evidence must rise to the level to exclude every reasonable hypothesis of innocence. *Barclay*, 43 So. 2d at 215.

There was direct evidence in the form of eye and ear witness testimony. There was also scientific test results indicating that McLaurin was guilty of having murdered the victim. The trial court refused to grant the instruction because there was direct evidence of the gravamen of the offense. The supreme

court has held that testimony from witnesses who hear a crime being committed is sufficient direct evidence to deny a circumstantial evidence instruction. *Martin v. State*, 609 So. 2d 435, 440 (Miss. 1992). In this case, there is direct evidence of a crime. Therefore the circumstantial evidence instruction did not need to be given. *Gray v. State*, 549 So. 2d 1316, 1324 (Miss. 1980).

THE JUDGMENT OF THE COVINGTON COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF SIXTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO COVINGTON COUNTY.

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