IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00267 COA

LEE ROY BRUMFIELD 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. RICHARD W. MCKENZIE

COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: S. CHRISTOPHER FARRIS

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: GLENN L. WHITE

NATURE OF THE CASE: CRIMINAL - AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED OF TWO COUNTS OF AGGRAVATED ASSAULT AND SENTENCED TO FORTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.

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

HINKEBEIN, J., FOR THE COURT:

Lee Roy Brumfield was convicted in the Forrest County Circuit Court of two counts of aggravated assault. Brumfield was sentenced to twenty years incarceration for each of the aggravated assault convictions, for a total of forty years in the custody of the Mississippi Department of Corrections. Aggrieved by his conviction, Brumfield appeals to this Court on the following grounds:

I. DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE TRIAL AND AT SENTENCING IN THIS CASE.

II. TWENTY YEARS FOR EACH COUNT OF AGGRAVATED ASSAULT FOR A TOTAL OF FORTY YEARS IS CRUEL AND UNUSUAL PUNISHMENT AND IS FURTHER DISPROPORTIONATE TO THE CRIME FOR WHICH THE DEFENDANT IS BEING SENTENCED.

III. IT WAS ERROR FOR THE COURT TO GRANT JURY INSTRUCTION S-1 BECAUSE IT CONTAINS LANGUAGE OF AGGRAVATED ASSAULT, NOT ATTEMPT, WHICH WAS PREVIOUSLY STRICKEN BY THE TRIAL COURT.

IV. THE COURT ERRED IN REFUSING JURY INSTRUCTION D-13 WHICH WAS A LESSER INCLUDED OFFENSE INSTRUCTION OF SIMPLE ASSAULT.

V. TRIAL COURT ERRED IN EXCLUDING THE MEDICAL RECORDS OF THE DEFENDANT THAT WERE SHOWN TO THE STATE THE DAY BEFORE TRIAL.

Holding these assignments of error to be without merit, we affirm the judgment of the circuit court.

FACTS

On the evening of March 8, 1994, the Hattiesburg Police Department received a call from a citizen reporting gunshots in a local neighborhood. Officer Mack Burch responded to the "shots fired" call. As Officer Burch arrived at the scene, Lee Roy Brumfield approached him at a hurried pace, waving his arms up and down in an apparent attempt to get the officer to stop his vehicle. Officer Burch stopped to investigate. According to Officer Burch's testimony, Brumfield told him that a white pick-up truck had almost run over him, so he fired several shots at the truck. Officer Burch immediately took Brumfield into custody, because he understood Brumfield's statements as an admission that he was the gunman responsible for causing the "shots fired" call that Officer Burch was responding to. Brumfield was subsequently indicted and convicted of aggravated assault upon both the driver and passenger of the white pick-up truck. It is from this conviction that the instant appeal is taken.

ANALYSIS

I. DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE TRIAL AND AT SENTENCING IN THIS CASE.

Brumfield directs this Court to ten alleged errors of his trial counsel, arguing that under the totality of the circumstances, these alleged errors demonstrate that he received legal representation insufficient to satisfy his Sixth Amendment right to counsel. The following, edited for clarity by this Court where possible, are Brumfield's points of contention:

1. Trial counsel, on voir dire, raised the *Batson* argument but failed to make any effort to challenge the prosecution's race-neutral reasons for striking two black jurors.

2. Trial counsel, on cross-examination of Officer Burch, began to challenge the out-of-court identification of the defendant by the witness Sherry Townsend, when this should have been done in pretrial and not in front of the jury.

3. Trial counsel made no objection to the lack of in-court identification of the defendant by the witness Grady L. Myrick, Jr.

4. Trial counsel made no objection to the drawings made in court by Detective Rigel, depicting the vehicle and the alleged hole in the vehicle.

5. Trial counsel objected to Detective Rigel's attempt to give expert testimony in the area of ballistics, which was sustained, yet she never again objected, or moved to strike, the testimony that followed the sustained objection. This error was compounded by trial counsel's subsequent tender of Detective Rigel as an expert in ballistics.

6. Trial counsel made no effort to locate or subpoena Bennie Caines, the individual allegedly present

with the defendant on the evening of the shooting.

7. Trial counsel failed to offer any character evidence, or references, or mitigation of the situation at trial. Trial counsel also failed to request a presentence investigation prior to sentencing.

8. Trial counsel should have objected to the State's jury instructions.

9. Trial counsel should have offered a lesser included offense jury instruction, as to the discharge of a firearm in the city limits, in addition to simple assault.

10. Trial counsel should have moved to suppress the out-of-court identification of the defendant, made by Sherry Townsend, as it was unduly suggestive.

The State responds by arguing that the alleged errors committed by Brumfield's trial counsel, as contained in the trial court record, are insufficient to satisfy the elements of an ineffective assistance of counsel claim.

In order to demonstrate that he was denied the effective assistance of counsel, a criminal defendant must show that 1) the counsel's performance was deficient and that the deficient performance prejudiced the defense, and 2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Mohr v. State*, 584 So. 2d 426, 430 (Miss. 1991) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Taylor v. State*, 682 So. 2d 359, 363 (Miss. 1996) (citing *Strickland*, 466 U.S. at 694). In order to make a successful ineffective assistance of counsel claim a defendant must satisfy both prongs of the *Strickland* test. *Mohr*, 584 So. 2d at 430. The deficiency and any prejudicial effect are assessed by looking at the totality of circumstances. *Carney v. State*, 525 So. 2d 776, 780 (Miss. 1988).

Addressing the first prong of the *Strickland* test, this Court must inquire as to whether Brumfield has demonstrated that his court-appointed counsel performed in a deficient manner, resulting in prejudice to him. While Brumfield has provided us with a lengthy listing of alleged error by his trial counsel, we feel that the majority (if not all) of these points were purely matters of trial strategy, and therefore were at his counsel's discretion. This Court is well aware that Mississippi law creates a strong, but rebuttable, presumption "that trial counsel's conduct is within the wide range of reasonable conduct and that decisions made by trial counsel are strategic." *Vielee v. State*, 653 So. 2d 920, 992 (Miss. 1995). Furthermore, it is the opinion of this Court that even if Brumfield's counsel had made some of the objections/motions that he argues should have been made, the trial court would almost certainly have been correct in overruling him. Simply stated, this Court holds that the majority of the objections/motions that Brumfield alleges his trial counsel was in error for not having made, would have been frivolous and without any basis in law or fact. However, this Court is a court of appellate review and we can not make factual findings. For purposes of our review we will assume, *arguendo*, that Brumfield's trial counsel acted in a deficient manner. This leads us to the second prong of

Strickland.

Under the second prong of *Strickland,* Brumfield is required to demonstrate that his trial counsel's deficient performance caused him prejudice. *Mohr*, 584 So. 2d 426, 430. This prejudice requirement mandates that the defendant show that "there is a reasonable probability that but for these errors by counsel, the defendant would have received a different result from the trial court." *Nicolaou v. State*, 612 So. 2d 1080, 1086 (Miss. 1992). After carefully scrutinizing his brief, we are unable to locate any argument by Brumfield, much less any factual evidence in the trial court record, that he would not have been convicted but for the alleged errors of his trial counsel. In an attempt to satisfy his burden of demonstrating prejudice, Brumfield has done little more than present this Court with his personal opinion, based entirely upon speculation, as proof of the prejudice that he supposedly suffered as a result of his attorney's "errors." We are not persuaded by Brumfield's speculations and hold that they fall woefully short of satisfying the prejudice requirement of *Strickland*. Because this Court is unable to conclude from the record that Brumfield's trial counsel was constitutionally ineffective, we hold this assignment of error to be without merit.

II. TWENTY YEARS FOR EACH COUNT OF AGGRAVATED ASSAULT FOR A TOTAL OF FORTY YEARS IS CRUEL AND UNUSUAL PUNISHMENT AND IS FURTHER DISPROPORTIONATE TO THE CRIME FOR WHICH THE DEFENDANT IS BEING SENTENCED.

Brumfield claims that his receipt of the statutory maximum penalty for each of his two convictions of aggravated assault was a violation of his Eighth Amendment right to be free from cruel and unusual punishment. The State responds by arguing that because Brumfield's sentence was within the limits fixed by statute, it did not amount to cruel and unusual punishment. The State also contends that Brumfield's sentence was not manifestly disproportionate to the crime committed, therefore, this Court need not conduct an Eighth Amendment extended proportionality analysis of the sentence.

The Mississippi Supreme Court has stated on numerous occasions "that a trial court will not be held in error or held to have abused its discretion if the sentence imposed is within the limits fixed by statute." *Edwards v. State*, 615 So. 2d 590, 597 (Miss. 1993) (citing *Johnson v. State*, 461 So. 2d 1288, 1292 (Miss. 1984)); *see also Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992) (holding that as general rule, sentencing is matter of trial court discretion so long as sentence imposed lies within statutory limits). However, in cases where the sentence is "grossly disproportionate" to the crime committed, the sentence is subject to attack on grounds that it violates the Eighth Amendment prohibition against cruel and unusual punishment. *Fleming*, 604 So. 2d at 302. In cases where the sentence appears grossly disproportionate to the crime, we must conduct an extended proportionality analysis as contained in the United States Supreme Court's decision of *Solem v. Helm*, 463 U.S. 277, 290-91 (1983). *See Hoops v. State*, 681 So. 2d 521, 538 (Miss. 1996) (holding that Mississippi uses analysis set forth in *Solem*, but that in light of recent Supreme Court decisions, the extended proportionality analysis in *Solem* is employed "only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality'").

In the case at bar, Brumfield's sentence, although severe, was within the limits fixed by statute. Despite the severity of the sentence, however, this Court notes that discharging a firearm at two of

his fellow citizens was a grave offense against the peace and dignity of this State. Had one or more of Brumfield's bullets struck a human being, there is a significant probability that tremendous human suffering would have resulted. The potential emotional and economic cost to both the victims and our State would be substantial. Accordingly, we hold that two consecutive sentences of twenty years incarceration, one for each victim, was not so grossly disproportionate nor shockingly excessive as to necessitate an extended proportionality analysis under *Solem*. Because the imposition of a sentence is in the discretion of the trial judge and the sentenced imposed in this case was within the limits fixed by statute, we hold this assignment of error to be without merit.

III. IT WAS ERROR FOR THE COURT TO GRANT JURY INSTRUCTION S-1 BECAUSE IT CONTAINS LANGUAGE OF AGGRAVATED ASSAULT, NOT ATTEMPT, WHICH WAS PREVIOUSLY STRICKEN BY THE TRIAL COURT.

Although the exact basis for Brumfield's claim of error with jury instruction S-1 is not clearly stated in his brief, apparently he feels that S-1 contained an incorrect pronouncement of the law controlling this case. Brumfield also asserts that the jury instructions he submitted to the court were incorrect and should not have been granted. The State argues that S-1 was a correct statement of the law, and therefore, the trial court was not in error for submitting it to the jury. The State also claims that Brumfield failed to make a contemporaneous objection to the trial court's grant of instruction S-1, thereby waiving any error.

We hold that the State is correct in asserting that this issue is procedurally barred from appellate review. As evidenced in the trial transcript, after the State offered jury instructions S-1 and S-2, the judge stated that "for the record, the instructions given on behalf of the [S]tate are given without objection." There are no statements by defense counsel, either before or after the court's announcement, to contradict or cause this Court to question the veracity of the judge's statement. It is well settled in Mississippi jurisprudence that "before an issue may be assigned and argued here, it must first have been presented to the trial court. Where the issue has not been timely presented below, it is deemed waived. The point is thus said to be procedurally barred when urged here [for the first time]." *Read v. State*, 430 So. 2d 832, 838 (Miss. 1983). Likewise, for Brumfield to now argue on appeal that his own jury instructions should not have been submitted is ludicrous; if he did not want the jury to use them, then he never should have offered them to the court. This assignment of error is clearly without merit

IV. THE COURT ERRED IN REFUSING JURY INSTRUCTION D-13 WHICH WAS A LESSER INCLUDED OFFENSE INSTRUCTION OF SIMPLE ASSAULT.

Brumfield asserts that the trial court committed reversible error in refusing to grant his instruction D-13, a lesser included offense instruction on simple assault. Brumfield argues that there was no evidence that he "intentionally" fired upon the victims. The State contends that the facts adduced at trial failed to support the granting of a lesser included offense instruction; therefore, the trial court was correct in denying Brumfield's request.

The Mississippi Supreme Court has clearly delineated the circumstances under which a defendant is entitled to have the jury pass on a lesser included offense instruction. The court has held that "the

submission of a lesser degree of an included crime is justified only where there is some basis in the evidence for finding the accused innocent of the higher crime, and yet guilty of the lower one . . . ." *Hoops v. State*, 681 So. 2d 521, 535 (Miss. 1996) (quoting *Rowland v. State*, 531 So. 2d 627, 632 (Miss. 1988)). Consequently, whether a defendant on trial for aggravated assault is entitled to a lesser included offense instruction on simple assault "turns on whether there is an evidentiary basis for it." *Jackson v. State*, 684 So. 2d 1213, 1230 (Miss. 1996).

Our analysis of Brumfield's claim is guided by our supreme court's opinion in *Hutchinson v. State*, 594 So. 2d 17 (Miss. 1992). In *Hutchinson*, as with the case at bar, the defendant was on trial for aggravated assault and requested that the jury be given a lesser included offense instruction on simple assault. Our supreme court analyzed Mississippi's aggravated assault and simple assault statutes, concluding that:

[f]rom the language of these statutes, it becomes apparent that aggravated assault is a carbon copy of simple assault, with the exception that aggravated assault has added the words " . . . with a deadly weapon . . . ." This suggests a statutory scheme where conduct which is simple assault under [s]ection 97-3-7(1)(a) becomes aggravated assault under [s]ection 97-3-7(2)(b) when "done with a deadly weapon." The scheme is completed when we realize that a subsequent subsection of the simple assault definition includes the negligent injury to another with a deadly weapon. No evidence suggests or even hints that [the defendant] acted negligently.

Hutchinson, 594 So. 2d at 19 (citations omitted). The court then held that Mississippi's statutory scheme precluded an intentional assault with a deadly weapon from ever being simple assault. *Id.* at 20. In arriving at this conclusion, the court noted that "the statute draws a distinction between intentionally inflicted bodily injury, which is simple assault, and a like, intentionally inflicted injury 'with a deadly weapon,' which is defined as aggravated assault." *Id.* The court went on to hold that "[t]he further distinction between negligently inflicted injury with a deadly weapon, which are simple assaults, and intentionally inflicted bodily injuries with a deadly weapon, which are aggravated assaults, confirms this view." *Id.* The court concluded that the defendant's use of a deadly weapon removed the case from our simple assault statute. *Hutchinson,* 594 So. 2d at 20. Accordingly, under Mississippi law "[o]nce a deadly weapon is introduced, the distinction between simple and aggravated assault, as defined by Miss. Code Ann. §§ 97-3-7(1) and (2), hinges upon whether the injuries were inflicted negligently or intentionally." *Jackson*, 684 So. 2d at 1230 (citing *Hutchinson*, 594 So. 2d at 20)).

In the case at bar, the evidence adduced at trial indicated that Brumfield acted intentionally toward his victims, as there was substantial credible evidence that he chased after them with a deadly weapon in his hand, firing the pistol at them as he ran. Even viewing the evidence in the light most favorable to Brumfield, this Court concludes that no reasonable jury could have found him innocent of aggravated assault, yet guilty of simple assault. In the instant case, the same evidence that establishes aggravated assault also establishes simple assault. To accept an argument such as Brumfield's would be "tantamount to the State being limited to prosecution of the crime with the lesser penalty in situations where the accused was guilty of two crimes." *Hoops*, 681 So. 2d at 535 (citing *Rowland*, 531 So. 2d at 631)). We decline to approve of such a proposition. Therefore, considering the evidence before the trial court, it was correct in denying Brumfield's request for a lesser included

offense instruction on simple assault. This assignment of error is without merit.

V. TRIAL COURT ERRED IN EXCLUDING THE MEDICAL RECORDS OF THE DEFENDANT THAT WERE SHOWN TO THE STATE THE DAY BEFORE TRIAL.

Brumfield argues that the trial court committed reversible error in excluding certain medical records from evidence. Brumfield contends that the trial court's exclusion of the medical records was in violation of Rule 4.06(i) of the Uniform Criminal Rules of Circuit Court Practice.[(1)] Specifically, Brumfield argues that Rule 4.06 required the trial court to order a continuance of the trial, in order to give the State a reasonable opportunity to become familiar with the documents at issue, rather than immediately granting the more radical sanction of excluding his medical records from evidence. The State contends that the trial court was correct in excluding the medical records from evidence because the records had not been properly made available to the State under the applicable discovery rules. The State argues that the trial court acted within its discretion granted under Rule 4.06 in excluding the evidence, based upon Brumfield's violation of the discovery rules.

At trial Brumfield attempted to introduce into evidence some medical records regarding an alleged injury to his ankle in an attempt to demonstrate that he was physically unable to chase after the victim's truck. The State objected to the introduction of this evidence, arguing that it had not properly been made available by the defense during the discovery process. The State argued that because the defense had shown the medical records to the State, for the first time on the previous day, the court had discretion under Rule 4.06(i) to exclude the medical records from evidence.

The Mississippi Supreme Court has discussed the proper procedures for discovery violations under Rule 4.06(i) of the Uniform Criminal Rules of Circuit Court Practice. The court has held that the essence of the procedure is that, where faced with a discovery violation in a criminal proceeding, the circuit court should -- pre-trial or during trial:

(1) Upon objection by a party, give that party a reasonable opportunity to become familiar with the undisclosed evidence by interviewing the witnesses, inspecting the physical evidence, etc.

(2) If, after this opportunity for familiarization, the objecting party believes that it may be prejudiced by lack of opportunity to prepare to meet the evidence, it must request a continuance. Failure to do so constitutes an acquiescence that the trial may commence or proceed and that the discovery rule violator may use the evidence as though there had been no discovery violation.

(3) If the objecting party requests a continuance, the discovery violator may choose to proceed with trial and forego using the undisclosed evidence. If the discovery violator is not willing to proceed without the evidence, the [c]ircuit [c]ourt must grant the requested continuance.

Houston v. State, 531 So. 2d 598, 611-12 (Miss. 1988). The court went on to caution trial courts against excluding a defendant's evidence, stating that the exclusion of evidence generally "ought [to] be reserved for cases in which the defendant participates significantly in some deliberate, cynical scheme to gain a substantial tactical advantage." *Houston*, 531 So. 2d at 612.

Regardless of how the trial court chose to resolve this situation, it is clear to this Court that any error that may have occurred in excluding Brumfield's medical records was, at worst, harmless. Brumfield was charged with the crime of aggravated assault. This required the prosecution to prove beyond a reasonable doubt that if Brumfield fired a pistol at the victims, he did so intentionally. We conclude that under these circumstances it was irrelevant whether or not Brumfield gave chase to the truck while shooting at it, or rather, fired the shots from a static position. In either case the evidence presented at trial was clearly sufficient to support the jury's finding of guilt. Accordingly, because of the overwhelming evidence of Brumfield's guilt, we hold that the jury's verdict was adequately supported by the evidence and that the trial court's error, if any, was harmless to his defense. This assignment of error is without merit.

THE JUDGMENT OF THE FORREST COUNTY CIRCUIT COURT OF CONVICTION OF TWO COUNTS OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20) YEARS EACH TO RUN CONSECUTIVE WITH EACH OTHER IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST FORREST COUNTY.

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

1. We note that effective May 1, 1995 the Uniform Criminal Rules of Circuit Court Practice were superseded by the Uniform Rules of Circuit and County Court Practice. In this case, the rule that Brumfield relies upon is now found at Rule 9.04(I) of the Uniform Rules of Circuit and County Court Practice. For purposes of this analysis, however, the old rules control the disposition of this case as they were in effect at the time of trial.