IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00341 COA

PATRICIA LYNN CARTER HALL APPELLANTS

AND RUDOLPH CARTER

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. CLARENCE E. MORGAN III

COURT FROM WHICH APPEALED: CIRCUIT COURT OF CHOCTAW COUNTY

ATTORNEYS FOR APPELLANTS: KEVIN NULL

JOE C. GRIFFIN

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: DOUG EVANS

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTION FOR ARMED ROBBERY AS TO CARTER AND HALL; CONVICTION FOR AGGRAVATED ASSAULT AS TO HALL.

MOTION FOR REHEARING FILED: 11/19/1997

MANDATE ISSUED: 9/30/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

HERRING, J., FOR THE COURT:

Patricia Lynn Carter Hall (Hall) and her brother, Rudolph Carter (Carter), were convicted of armed robbery in a joint trial that was conducted in the Circuit Court of Choctaw County, Mississippi, on March 3, 1995. Hall was also convicted of aggravated assault. Hall, classified as a habitual offender, was sentenced to fifty years with the Mississippi Department of Corrections as a result of the armed robbery conviction and twenty years on the aggravated assault charge, with the terms of the sentences to run concurrently. Carter was sentenced to twenty years with the Mississippi Department of Corrections as a result of his conviction of armed robbery. Both defendants now appeal their convictions to this Court and cite the following errors as grounds for their appeal:

I. HALL CLAIMS THAT THE TRIAL COURT ERRED IN FAILING TO GRANT HER MOTION FOR A CONTINUANCE.

II. HALL CLAIMS THAT THE TRIAL COURT ERRED IN REFUSING TO ORDER A MENTAL EVALUATION OF HER, OR ALTERNATIVELY, A MISTRIAL.

III. HALL CLAIMS THAT THE TRIAL COURT ERRED IN GRANTING STATE'S INSTRUCTION S-1A.

IV. HALL CLAIMS THAT THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT HER FAILURE TO TESTIFY COULD NOT BE HELD AGAINST HER.

V. HALL CLAIMS THAT THE SENTENCE OF THE TRIAL COURT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

VI. CARTER CLAIMS THAT THE TRIAL COURT ERRED IN FAILING TO SUSTAIN

CARTER'S MOTION FOR SEVERANCE.

VII. CARTER CLAIMS THAT THE TRIAL COURT ERRED IN GRANTING STATE'S INSTRUCTION S-1A.

VIII. CARTER CLAIMS THAT THE TRIAL COURT ERRED IN NOT GRANTING CARTER'S MOTION FOR NEW TRIAL.

After careful consideration, we affirm the judgment of the trial court on all issues.

THE FACTS According to the testimony presented by Carter, his sister, Patricia Hall, asked him to take a ride with her during the early morning hours of January 8, 1995, but did not say where they would be going. Carter agreed to do so, and the two of them, who both lived with their mother, left their

mother's house in Ackerman, Mississippi, together at approximately 4:00 a.m., with Hall driving the

vehicle. Hall later picked up Willie Johnson, who testified that he had only known Hall and Carter for approximately two or three weeks.

At approximately 4:30 a.m., Hall drove her vehicle to the home of Berwin Steadman, an individual with whom Hall, Carter, and Johnson were acquainted. Carter stated his belief that his sister had been granting sexual favors to Steadman for a period of time in exchange for money. Hall got out of the automobile and approached Steadman's house alone. Steadman was awake and answered the front door, at which time he was advised by Hall that she wanted to talk to him about some checks. Steadman allowed Hall to enter his home while Carter and Johnson remained outside in the vehicle.

At some point, the conversation between Steadman and Hall became violent, and Hall grabbed two kitchen knives and began stabbing Steadman. According to Steadman, Hall told him that she was going to kill him, and in the melee, he attempted to get to his shotgun and other weapons which were located in the living room closet. At one point, Steadman did get his hands on two different guns. However, he was not able to hold them and dropped them to the floor.

Rudolph Carter and Willie Johnson entered the house when they heard loud voices and saw the lights of the house going on and off. Carter testified that when he entered the premises, he saw Hall and Steadman wrestling over a gun and admonished them both to stop fighting. He further stated at trial that he got Steadman's guns and told his sister that it was time to leave. Hall wanted Steadman's wallet, which had $25 to $30 inside. In his defense, Carter stated that he attempted to get her to leave the wallet and just take the money, to no avail. He also stated that as they were leaving, his sister said, "I have got to finish killing this M . . . F . . . first." Finally, Carter stated that

he never threatened or pointed a gun at Steadman and his only purpose for being in the house was to get his sister out of there, with no further violence to anyone.

Willie Johnson testified for the State after entering into a plea bargaining agreement with the

prosecutor. He was twenty-three years old and had only recently moved to Choctaw County. He confirmed that Hall and Carter had unexpectedly come to his home in the early morning hours of January 8, 1995, and that he went with them at Hall's request. He did not know where they were going. He further acknowledged that they drove to Steadman's house and that Hall initially entered the house alone. Only after he and Carter heard loud voices did they enter Steadman's home.

According to Johnson, there was blood on the floor and on Steadman's clothes when he entered the house. Hall had two knives in her hands, and Steadman was backing towards a closet. Johnson further testified that Rudolph Carter took a rifle in his hands and pointed it at Steadman. When Hall asked Steadman for money, he bent down to pick up his wallet, and she stabbed him in the shoulder. Hall then instructed Johnson to get a gun out of the closet, which he did. According to Johnson, Steadman was unarmed at all times.

After Steadman gave Hall his wallet and money, the three assailants left the premises, and according to Johnson, Hall stated, "I should have killed the M . . . F . . . ." After taking the money, Hall gave Johnson the wallet and instructed him to get rid of the knives and guns after they had returned to the home of Pearl Carter, the mother of Hall and Carter. Carter carried two guns away from the premises, and Johnson carried Steadman's twelve-gauge shotgun. Johnson complied with Hall's directions by throwing the guns and knives into a wooded area approximately one and one-half miles from the Carter home.

Steadman testified that Hall stabbed him several times and took $25 to $30 from him. He confirmed that Rudolph Carter suggested that Hall leave the wallet but also stated that Carter pointed one of the weapons at him and threatened to kill him. Steadman acknowledged that Hall was attacking him with knives when Carter entered his home, and that Carter broke up the attack.

According to Dr. Morris Parsons, a physician at the Choctaw County Medical Center emergency room on the day in question, Steadman suffered from multiple lacerations and light stab wounds or cuts. Tommy Curtis, a deputy sheriff for Choctaw County, testified that Steadman was black and blue over his left eye and had suffered numerous cuts on his body. Curtis testified that he found blood all over the kitchen and dining room when he visited Steadman's house. Willie Johnson was picked up by officials, and he directed Officer Curtis to the scene where he had disposed of the knives and guns.

Officer Curtis arrested Hall on January 8, 1997, but she denied being at Steadman's home or having anything to do with the altercation that occurred that morning. Carter and Johnson both admitted being at Steadman's home when the altercation occurred and that Hall was also there.

At the trial in this matter, Hall was called to testify in her own defense but immediately became hysterical when taking the witness stand. The trial court adjourned the proceedings and met with the parties and their attorneys in chambers. Hall informed the judge that she wanted to defend herself but could not control her emotions. Her attorney then moved for a mistrial and continuance, based upon her behavior. He also asked that she undergo a mental examination. These motions were denied, and the trial judge stated his belief that Hall was behaving in a manner purposefully designed to delay or disrupt the trial. After informing Hall of the importance of her right to testify or not to testify, the court then granted a recess until the following day to allow Hall to compose herself and to confer with her attorney. That evening, the court allowed Hall to see Dr. Parsons. She was given a mild sedative but otherwise was found to be in good health. The next day, Hall took the witness

stand and, once more, became hysterical. This time she actually fled the witness stand and ran to her mother who was sitting in the audience exclaiming, "I want my mama." After Hall's refusal to testify, both defendants rested.

II. ANALYSIS

Since both Hall and Carter are appealing from their convictions, we will address separately each of the issues raised by each defendant.

A. *Patricia Lynn Carter Hall.*

I. DID THE TRIAL COURT ERR IN FAILING TO GRANT HALL'S MOTION FOR A CONTINUANCE?

The events which led to Hall's indictment and ultimate conviction of armed robbery and aggravated assault occurred on January 8, 1995. A preliminary hearing was held on February 1, 1995. Thereafter, Hall was indicted and pre-trial discovery was furnished on February 11, 1995. She filed a motion for continuance on February 27, 1995, which was heard a day later. At the hearing, defense counsel alleged insufficient time to prepare for trial and a busy trial schedule, but the motion for continuance was denied, and the trial began on March 1, 1995.

Whether a continuance should be granted or denied is within the sound discretion of the trial court. *Jackson v. State*, 684 So. 2d 1213, 1221 (Miss. 1996). Only where manifest injustice appears to have resulted from a denial of the continuance should an appellate court reverse on that basis. *Jackson,* 684 So. 2d at 1221; *Johnson v. State*, 631 So. 2d 185, 189 (Miss. 1994). Moreover, a motion for continuance on the ground that an attorney has not had adequate time to prepare for trial is subject to proof and also is subject to facts as they may appear from that which is known to the trial court. *Pool v. State*, 483 So. 2d 331, 335 (Miss. 1986).

At the hearing of the motion for continuance, Hall put forth no evidence or written affidavit in support of her motion, other than the oral statement of her attorney that he had a busy trial schedule and had not had adequate time to spend with Hall or to interview other witnesses. Following oral argument by counsel on the motion for continuance, the trial court stated:

The Court finds that this incident occurred on January the 8th, 1995, in Choctaw County, Mississippi, that there has been a preliminary hearing in this cause the 1st of February. The discovery was provided to the Defendant on or about, on or before February the 11th, that it is now set for trial on March the 1st. That is another two weeks down the road; that there has been sufficient time to prepare this case for trial. The Motion for a Continuance is overruled.

Under our appropriate standard of review, we hold that the trial court did not abuse its discretion in

denying Hall's motion for continuance on the grounds stated in the motions.[(1)] The facts of this case were not complicated, and the number of witnesses were few. Moreover, Hall presented no evidence of prejudice as a result of the Court's denial of the continuance. Thus, we rule that this assignment of error has no merit.

II. DID THE TRIAL COURT ERR IN REFUSING TO ORDER A MENTAL EVALUATION OF HALL, OR ALTERNATIVELY, DID IT ERR IN REFUSING TO GRANT A MISTRIAL?

As stated, Hall attempted to testify in her own defense but became hysterical and could not, or would not, answer even the most elementary questions. She now claims that she was unable to assist in her own defense and that the trial court erred in denying her a mental examination to determine her competency to stand trial. On this issue, Hall relies on the Mississippi Supreme Court's decision in *Lavender v. State*, 378 So. 2d 656, 658 (Miss. 1980). In *Lavender*, the court stated:

We reiterate, as we have said in a number of cases, that the lower court has discretion in passing on these matters, but in our opinion we have clearly set out the principle that if there is a reasonable probability that the accused is incapable of making a rational defense, he should receive proper and adequate psychiatric examination and evaluation.

Lavender, 378 So. 2d at 658 (citations omitted). The Mississippi Supreme Court more recently elaborated upon our appropriate standard of review in *Dunn v. State*, 693 So. 2d 1333 (Miss. 1997):

This was a decision that was within the discretion of the trial judge. There is no abuse of discretion in denying a mental evaluation where there has been no proof presented to the judge. *Wheeler v. State*, 536 So. 2d 1347, 1354 (Miss. 1988). When the trial court has made a finding that the evidence does not show a probability that the defendant is incapable of making a rational defense, this Court will not overturn that finding unless the finding was manifestly against the overwhelming weight of the evidence.

Dunn, 693 So. 2d at 1340-41 (citation omitted).

In the case *sub judice*, we believe that the trial court was well within its discretion in denying the motion for mental examination. The trial court made an on-the-record finding of fact, stating:

I find that the actions by Ms. Hall are inconsistent with her other actions. Her actions on the stand are inconsistent with her other actions in this trial. She has at all times aided her defense up until the point where she takes the stand, and then she goes into hysteria, I think, for the purpose of disrupting this trial. That Motion is overruled.

We hold that this decision by the trial court was not against the overwhelming weight of the evidence. Therefore, we have no authority to reverse on this issue. It is noteworthy that the court recessed the trial overnight and allowed Hall to be evaluated by a local physician, who prescribed only a mild sedative after examining her.

As to Hall's motion for a mistrial, she puts forth no argument supporting this motion on appeal. The

only reference in her brief as to this issue is the following sentence: "Alternatively, her behavior in the presence of the jury created so much prejudice to her case that the Court should have granted the defense motion for a mistrial." As a general rule, unsupported assignments of error are not considered on appeal. *Holmes v. State*, 483 So. 2d 684, 687 (Miss. 1986). Therefore, we decline to comment on this issue specifically, but otherwise rule that it is wholly without merit.

III. DID THE TRIAL COURT ERR IN GRANTING STATE'S INSTRUCTION S-1A?

State's instruction S-1A reads:

If the evidence warrants it, you may find the defendants, PATRICIA LYNN CARTER HALL and RUDOLPH CARTER, guilty of a crime lesser than Armed Robbery as to Count I; however, notwithstanding this right, it is your duty to accept the law as given to you by the Court, and if the facts and the law warrant a conviction of Armed Robbery, then it is your duty to make such finding uninfluenced by your power to find a lesser offense. *This provision is not designed to relieve you from the performance of an unpleasant duty. It is included to prevent a failure of justice if the evidence fails to prove the original charge of Armed Robbery but does justify a verdict for the lesser crime of robbery.*

If you find that the state has failed to prove from all the evidence in this case beyond a reasonable doubt any one of the essential elements of the crime of Armed Robbery, you must find the defendants, PATRICIA LYNN CARTER HALL and RUDOLPH CARTER, not guilty of Armed Robbery as to Count I, and you will proceed with your deliberations to decide whether the State has proved from all the evidence in this case beyond a reasonable doubt all the elements of the lesser crime of robbery.

If the state has failed to prove any one or more of the above elements beyond a reasonable doubt as to either one or both of the defendants, then you shall find that defendant or defendants not guilty, as the case may be. (emphasis added).

Hall objects to the first paragraph of this instruction, claiming that it was confusing and misleading to the jury. However, the State calls to our attention three cases, *Chase v. State,* 645 So. 2d 829, 852 (Miss. 1994), *Lambert v. State,* 462 So. 2d 308, 314 (Miss. 1984) and *Davis v. State,* 530 So. 2d 694, 700-01 (Miss. 1988), in which the same language has been held to be proper. In all three of these cases, the Mississippi Supreme Court reviewed the language challenged here and held that they were accurate statements of the law. Therefore, we find that this issue has no merit.

IV. DID THE TRIAL COURT ERR IN REFUSING TO INSTRUCT THE JURY THAT THE HALL'S FAILURE TO TESTIFY COULD NOT BE HELD AGAINST HER?

While the judge was considering the proposed jury instructions outside the presence of the jury and prior to closing arguments, Hall's attorney *orally* requested an instruction which would have informed the jury that her failure to testify should not be held against her. The trial court refused to give such an

instruction on the ground that Hall actually took the witness stand and testified, thereby waiving such an instruction. At this point in the trial, the following dialogue took place:

BY THE COURT: Okay, thirty minutes to a side.

BY MR. NULL: As I had indicated earlier, Your Honor, the Defense for Patricia Lynn Carter Hall would also like to request an instruction to the jury that her failure to testify not be held against her in any way.

BY MR. HORAN: The State would object to that, Judge

BY MR. NULL: You can't do that.

BY MR. HORAN: The State would object to that.

BY THE COURT: I think her testimony has been limited, but I think she has testified, and I don't think she is entitled to an instruction.

Hall now claims that it was error for the trial court to refuse to grant such an instruction, citing *Richardson v. State*, 402 So. 2d 848 (Miss. 1981) and *Lenard v. State*, 552 So. 2d 93 (Miss. 1989). Normally, it is reversible error for a trial court to refuse to grant a jury instruction which would instruct jurors that they have no right under the law to draw any unfavorable inference against a criminal defendant because she did not testify in the case. *Richardson*, 402 So. 2d at 852. The Mississippi Supreme Court in *Richardson* relied on the holding in *Carter v. Kentucky*, 450 U.S. 288, 304 (1981) where the United States Supreme Court stated:

The freedom of a defendant in a criminal trial to remain silent "unless he chooses to speak in the unfettered exercise of his own will" is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. Just as adverse comment on a defendant's silence "cuts down on the privilege by making its assertions costly, . . . the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a *timely* request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, *upon proper request*, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.

(Emphasis added) (citations omitted).

In the case *sub judice*, the State correctly points out that a trial court cannot be held in error for failing to grant an instruction that was not in writing. *See Griffin v. State*, 480 So. 2d 1124, 1127 (Miss. 1985) wherein our supreme court stated:

In *Newell v. State*, 308 So. 2d 71, 78 (Miss. 1975), this Court held that the lower court cannot be put in error for refusal to instruct the jury where no written request was submitted. Rule 5.03, Uniform Criminal Rules of Circuit Court Practice, states, in part: "At least twenty-four hours prior to the time that a case is set for trial, each of the attorneys shall number and file his jury instruction with the clerk and submit to opposing counsel a number copy of the instruction so filed in the case."[(2)]

Thus, we hold that, since the instruction regarding Hall's failure to testify was not properly requested, the trial court committed no error in refusing it. Moreover, putting aside question of procedure, we further hold that when Hall voluntarily offered to testify, actually took the witness stand twice, took the oath, and answered two questions on each occasion she took the stand, she waived her right to object to the trial court's refusal to grant such an instruction. *See Johnson v.* U.S., 318 U.S. 189, 195 (1943); *Cooley v. State*, 391 So. 2d 614, 626 (Miss. 1980).

V. DOES THE SENTENCE OF THE TRIAL COURT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT?

The penalty for robbery by use of a deadly weapon is life imprisonment if so fixed by a jury. Miss. Code Ann. § 91-3-79 (Rev. 1994). In cases where the jury declines to fix the punishment at imprisonment for life, the trial court shall fix the penalty at "imprisonment in the state penitentiary for any term not less than three (3) years." *Id.* In the case *sub judice*, the jury convicted Hall of armed robbery and aggravated assault[(3)] but declined to fix her punishment at imprisonment for life. Thereafter, the trial court heard evidence from the State concerning Hall's record as a habitual offender during the sentencing phase of the trial. The evidence showed that Hall had previously been convicted of burglary and also for feloniously uttering a forged document. Furthermore, she was facing two other felony charges at the time, including an incident where she was charged with carrying a concealed weapon while a convicted felon. The State also put on proof to show that Hall's life expectancy was 51.3 years. Hall, on the other hand, presented no evidence in mitigation. She simply asked for mercy and that the sentences on the two charges run concurrently. The trial court thereupon adjudged Hall to be an habitual offender as defined in section 99-19-81 of the Mississippi Code as amended[(4)] and sentenced Hall to serve a term of fifty years with the Mississippi Department of Corrections without parole or suspension. The court also sentenced Hall to serve a term of twenty years on the aggravated assault charge, to run concurrently with the sentence imposed as a result of her armed robbery conviction.

Hall now contends that the trial court's sentence constituted cruel and unusual punishment and should be set aside, citing *Presley v. State*, 474 So. 2d 612 (Miss. 1985). In *Presley*, the defendant took two packages of meat from a grocery store and exhibited a knife in front of store employees while engaged in the theft. At his trial for armed robbery, the jury convicted Presley but failed to fix his

punishment. He was then sentenced to serve a term of forty years with the Mississippi Department of Corrections, having first been adjudged to be a habitual offender. The sentence was less than Presley's life expectancy. The *Presley* court held that an adequate pre-sentencing hearing was not held in that case, vacated the sentence imposed upon Presley, and remanded the case for an additional pre-sentence hearing pursuant to Rules 6.02 and 6.04 of the Uniform Rules of Circuit and County Court Practice.[(5)] In making this ruling, the supreme court directed that counsel for the defendant put on some evidence in mitigation but acknowledged:

[W]hen sentences are within the limits of the statute, the imposition of such sentences is within the sound discretion of the trial court and this Court will not reverse them. Likewise, we have held that providing punishment for [a] crime is a function of the legislature, and, unless the punishment specified by statute constitutes *cruel and unusual treatment*, it will not be disturbed by the judiciary.

Presely, 474 So. 2d at 620 (citations omitted) (emphasis added). In its opinion in *Presley*, the supreme court cited *Solem v. Helm*, 463 U.S. 277 (1983) which discusses the constitutional principle of *proportionality* in relation to the Eighth Amendment of the Constitution of the United States. *Solem* stands for proposition that a sentence which is disproportionate to the crime violates the Eighth Amendment bar against "cruel and unusual treatment."

The State concedes that where a jury declines to impose a life sentence upon a defendant when allowed to do so, it is the duty of the trial court to impose a sentence "reasonably expected to be less than life . . . ." *Stewart v. State* 372 So. 2d 257, 258-59 (Miss. 1979). However, the State correctly points out that there are a number of cases approved by our supreme court where the trial court took judicial notice of mortality tables and imposed sentences similar in nature to the sentences imposed upon Hall in the case *sub judice*. *See Arrington v. State*, 411 So. 2d 779, 780 (Miss. 1982); *Henderson v. State*, 402 So. 2d 325, 328-29 (Miss. 1981); *Stewart v. State*, 394 So. 2d 1337, 1339 (Miss. 1981). In each of those cases, the sentences imposed were slightly less than the life expectancies of the defendants involved. Moreover, the State contends that the facts in this case are not similar to the facts in *Presley*. In the case *sub judice*, we are dealing with a vicious attack by Hall upon an old man, during which he was robbed in his home and at the point of a gun. *Presley* involved the theft of two boxes of steaks.

A recent Mississippi Supreme Court case that deals in depth with issues involving sentencing is *Hoops v. State*, 681 So. 2d 521 (Miss. 1996). In *Hoops*, the supreme court reaffirmed its position in *Presley* that sentencing is within the discretion of the trial court and not subject to review if the sentence is within the limits prescribed by statute. *Hoops*, 681 So. 2d at 537. However, the court also stated, "Proportionality review of sentences is required . . . in particular situations." *Id.* at 538. According to *Hoops*, the three-pronged proportionality analysis set forth in *Solem*, 463 U. S. at 292, is still used to review the proportionality of sentences in cases where a threshold comparison of the crime committed to the sentence imposed leads the trial court to an inference of "gross disproportionality." *Hoops*, 681 So. 2d at 538. *See also Smallwood v. Johnson*, 73 F.3d 1343, 1347 (5th Cir. 1996). It is noteworthy, however, that the *Solem* case was overruled by *Harmelin v. Michigan*, 501 U.S. 957, 965-66 (1991), to the extent that it found an Eighth Amendment guarantee of proportionality. Thus, in comparing the crime committed by Hall with sentence imposed upon her, we must determine whether there is an inference of "gross disproportionality." If there is none, an

extended proportionality review under *Solem* is not required.

In making this comparison in *Hoops*, the Mississippi Supreme Court used the facts in *Rummell v. Estelle*, 445 U.S. 263, 265-66 (1980), as a guide and found that a *Solem* review was not necessary. *Hoops*, 681 So. 2d at 538. In the case *sub judice,* we likewise find that there is no gross disproportionality between the crime committed and the sentence imposed. Thus, an extended proportionality review by this Court is not warranted, and Hall's final assignment of error has no merit.

B. *Rudolph Carter*

I. DID THE TRIAL COURT ERR IN FAILING TO SUSTAIN RUDOLPH CARTER'S MOTION FOR A SEVERANCE?

Carter claims that he was denied a fair trial of the armed robbery charge against him because he was forced to defend himself in a joint trial with his sister, Patricia Hall.[(6)] Carter specifically asserts that his sister was also being tried for aggravated assault against Steadman (an offense he had nothing to do with) and as a habitual offender, factors that should have led the trial court to separate trials for Hall and Carter.

The trial court has the authority to grant a severance where multiple defendants are jointly indicted, if a severance is necessary to promote a "fair determination of the defendant's guilt or innocence." *Hawkins v. State*, 538 So. 2d 1204, 1207 (Miss. 1989). *See also* URCCC 9.03 (formerly UCRCCP 4.04) and Miss. Code Ann. § 99-15-47 (Rev. 1994). Additionally, the Mississippi Supreme Court in *Usry v. State*, 378 So. 2d 635, 637 (Miss. 1979) stated, "We would observe, however, that in cases involving multiple defendants, where one or more is charged as an habitual offender, a severance would ordinarily be preferred." In *Brown v. State*, 340 So. 2d 718, 719 (Miss. 1976), our supreme court also stated, "[T]rial judges must anticipate the danger . . . of error in joint trials where evidence may be introduced which is admissible against one defendant and is prejudicial to another."

In *Duckworth v. State*, 477 So. 2d 935 (Miss. 1985), our supreme court established a number of criteria to be used in determining whether a motion for severance is proper:

These criteria are whether or not the testimony of one co-defendant tends to exculpate that defendant at the expense of the other defendant and whether the balance of the evidence introduced at trial tends to go more to the guilt of one defendant rather than the other. *Absence a showing of prejudice, there are no grounds to hold that the trial court abused its discretion.*

Id. at 937 (emphasis added).

In *Hawkins v State,* as in the case *sub judice,* one defendant testified and the other did not. *Hawkins,*

538 So. 2d at 1207-08. The supreme court ruled that the defendant who testified was not entitled to a severance, since he was allowed to set forth his case to the jury without any conflicting testimony from his co-defendant, regardless of the severance issue. *Id.* Therefore, there was no showing of prejudice to the defendant as a result of the trial court's failure to grant a severance. *See also Tillman v. State*, 606 So. 2d 1103, 1106 (Miss. 1992).

We hold that the rationale employed in *Hawkins* is appropriate in the case *sub judice*. Carter was able to put on his own defense regardless of the severance issue, and he exculpated himself through his testimony at the expense of Hall. Thus, he was not prejudiced by the lack of severance. Accordingly, this assignment of error is without merit.

II. DID THE TRIAL COURT ERR IN GRANTING INSTRUCTION S-1A?

The first paragraph of instruction S-1A was also objected to by Hall, and we adopt here that portion of our opinion in which we rejected Hall's objections to instruction S-1A. Carter only philosophically objects to the first paragraph of the instruction. However, he cites authority for his objections to the instruction's second paragraph, which essentially required that the jury first find the defendant not guilty of armed robbery before they could consider whether to find the defendant guilty or innocent of the lesser-included offense of robbery. Relying on *United States v. Tsanas*, 572 F.2d 340, 345-46 (2d Cir. 1978), Carter takes the position that he should have been given a choice to determine (1) whether the court's instructions should have required the jury to "acquit first" as to the major offense, prior to considering any lesser included offense, or (2) whether the jury should have been allowed to consider the lesser offense of robbery without first acquitting Carter of armed robbery. Without finally addressing this issue, our supreme court made the following comment in *Mack v. State*, 650 So. 2d 1289, 1322-23 (Miss. 1994):

A number of other states require an "acquit first" instruction. *Allen*, 717 P.2d at 1180 (citing cases from several states requiring acquit first). In a case followed by several federal circuits the Second Circuit observed that such an instruction is not faulty as a matter of law and that it has some benefits for a defendant. *United States v. Tsanas*, 572 F.2d 340 (2d Cir. 1978). That court decided that the defendant should be given the choice . . . .

In *Mack*, the defendant failed to object to the "acquit first" instruction at the trial court level and therefore waived the right to object. *Mack*, 650 So. 2d at 1323.

A number of Mississippi Supreme Court decisions have expressly approved instructions similar to instruction S-1A. *See Chase v. State*, 645 So. 2d 829, 851-52 (Miss. 1994) and *Davis v. State*, 530 So. 2d 694, 700 (Miss. 1988). Thus, we rule that instruction S-1A was properly given and decline the invitation to follow the ruling in *Tsanas*, in the absence of express instruction to do so from the Mississippi Supreme Court.

III. DID THE TRIAL COURT ERR IN NOT GRANTING CARTER'S MOTION FOR A NEW TRIAL?

The question of whether a motion for a new trial should be granted essentially raises the question as

to whether the verdict of the jury was against the overwhelming weight of the evidence. *See Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987). Under our familiar standard of review of such motions,

[a] motion for a new trial is addressed to the sound discretion of the trial judge who may grant a new trial if he deems such is required in the interest of justice or if the verdict is contrary to the law or the weight of the evidence . . . . The trial judge should not order a new trial unless he is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice.

Wetz, 503 at 812. In reviewing a motion for a new trial, the appellate court must accept as true all evidence favorable to the State and reverse only if it is convinced that the trial judge has abused his discretion. *Malone v. State*, 486 So. 2d 360, 366 (Miss. 1986). With these guidelines in mind, we cannot say that the trial court abused its discretion in denying the motion for a new trial and in determining that the verdict was not against the overwhelming weight of the evidence.

Carter's motion for new trial asserted that the trial court erred in failing to grant his motion for directed verdict and included certain other allegations attacking the *sufficiency* of the evidence presented against him, which would have more properly been raised in a motion requesting a judgment notwithstanding the verdict. *See Yates v. State*, 685 So. 2d 715, 718 (Miss. 1996). In considering a motion attacking the sufficiency of the evidence, the appellate court must, with respect to each element of the offense, consider all evidence presented in the light most favorable to the verdict rendered. The prosecution must be given the benefit of all reasonable inferences that might reasonably be drawn from the evidence. *Yates*, 685 So. 2d at 718. "We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty." *Wetz*, 503 So. 2d at 808.

In the case *sub judice*, Steadman testified that Carter pointed a gun at him and threatened to kill him. Carter admits that he entered Steadman's house without authority and carried several guns out with him. His accomplice, Willie Johnson, testified that Carter was present when Hall stabbed Steadman in the shoulder with a knife and that Carter pointed a gun at Steadman. With these facts in mind, we cannot say that reasonable and fair-minded jurors could not have found Carter guilty of armed robbery.

THE JUDGMENT OF THE CIRCUIT COURT OF CHOCTAW COUNTY OF CONVICTION OF PATRICIA LYNN HALL ON COUNT I OF ARMED ROBBERY AND SENTENCE AS A HABITUAL OFFENDER OF FIFTY YEARS, WITH SENTENCE TO BE SERVED CONSECUTIVELY TO ANY SENTENCE PREVIOUSLY IMPOSED; COUNT II OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS WITH SENTENCE IN COUNT II TO RUN CONCURRENTLY TO SENTENCE IMPOSED IN COUNT I, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED.

THE JUDGMENT OF THE CIRCUIT COURT OF CHOCTAW COUNTY OF CONVICTION OF RUDOLPH CARTER OF ARMED ROBBERY AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH

SENTENCE TO BE SERVED CONSECUTIVELY WITH ANY SENTENCE PREVIOUSLY IMPOSED, IS AFFIRMED.

CHOCTAW COUNTY IS TAXED WITH ALL COSTS OF THIS APPEAL.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. COLEMAN, J., NOT PARTICIPATING.

1. Hall's attorney orally made another motion for a mistrial and continuance at a later stage of the trial which we will discuss below.

2. The requirements of the Uniform Criminal Rules of Circuit Court Practice Rule 5.03 are now embodied in Uniform Rules of Circuit and County Court Practice Rule 3.07 which were adopted by the Mississippi legislature and became effective May 1, 1995.

3. The maximum punishment one can receive for the conviction of aggravated assault is twenty years in the state penitentiary. Miss. Code Ann. § 97-3-7(2) (Rev. 1994).

4. Section 99-19-81 states that a person who has been convicted previously of two felonies and was sentenced on those charges to serve at least one year at any State penal institution, shall receive the maximum punishment available upon a third felony conviction, and such sentence shall not be reduced or suspended. In addition, no parole or probation will be allowed. Miss. Code Ann. § 99-19-81 (Rev. 1994).

5. Rules 11.01 and 11.02 of the Uniform Rules of Circuit and County Court Practice have replaced Rules 6.02 through 6.04 of the Uniform Criminal Rules of Circuit Court Practice.

6. Hall never moved for a severance at trial and therefore may not raise this issue on appeal.