IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01384 COA

DUMAN CROCKER, JR. A/K/A DUMAN CROCKER **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

DATE OF JUDGMENT:	09/20/95
TRIAL JUDGE:	HON. JOSEPH H. LOPER JR.
COURT FROM WHICH APPEALED:	ATTALA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RAYMOND M. BAUM
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEAN SMITH VAUGHN
DISTRICT ATTORNEY:	DOUG EVANS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CAPITAL MURDER: SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE AS TO CT I; CT II ARSON IN THE FIRST DEGREE: SENTENCED TO 20 YRS IN THE MDOC TO RUN CONSECUTIVE TO THE SENTENCE IMPOSED IN CT I
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

THOMAS, P.J., FOR THE COURT:

Duman Crocker, Jr. appeals his convictions of capital murder and arson raising the following issues as error:

I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION IN LIMINE

PRIOR TO TRIAL CONCERNING THE ADMISSIBILITY OF DEFENDANT'S INVOLVEMENT IN PURCHASING A HANDGUN FROM THE TRUNK OF AN UNKNOWN ARMS DEALER'S AUTOMOBILE; OR, IN LIEU OF RULING THIS EVIDENCE WAS INADMISSABLE, THE COURT SHOULD HAVE GRANTED A LIMITING INSTRUCTION.

II. THE COURT SHOULD HAVE EXCUSED SEVERAL VENIREMEN FOR CAUSE DUE TO THEIR CLOSE ASSOCIATION WITH LAW ENFORCEMENT, INCLUDING ONE WHO WAS A POLICE OFFICER IN A NEIGHBORING COUNTY, HAD BEEN A DEPUTY IN ATTALA COUNTY, KNEW THE VICTIM OF THE HOMICIDE, AND HAD RESPONDED TO CALLS AT HIS PLACE OF BUSINESS DURING HIS TENURE AS AN ATTALA COUNTY DEPUTY.

Finding no reversible error, we affirm.

FACTS

Duman Crocker, Jr. bought a car from Percy Rainey. In his taped confession to police, which was played to the jury, Crocker stated that he was not happy with the car and he wanted to confront Rainey about the car and discuss a possible trade for a truck. Crocker drove to Rainey's house in McCool, but he parked his car in the woods approximately one mile from Rainey's home. Crocker stated that he talked with Rainey, and the two argued about the truck as Crocker was exiting the doorway. Crocker then pulled a knife, and Rainey closed and locked the door. Crocker kicked in the door and started stabbing Rainey. Rainey was stabbed in the face, neck, chest, and back area. Crocker then picked up Rainey's wallet and placed it in his own pocket. Crocker, in an attempt to get rid of the evidence, set fire to a couch, Rainey's clothes, a bed, and a chair. Crocker also took a leather bag and a phone from Rainey's house because he feared they had his fingerprints on them.

After Crocker killed Rainey and set his house on fire, Crocker proceeded back through the woods to his parked car. Crocker drove to Starkville and purchased a police scanner with money from Rainey's wallet. Crocker then drove to Jackson where he purchased a book. He then returned to his trailer in Carthage where he changed clothes and later shot pool. From Carthage, Crocker went gambling at a casino in Philadelphia, where he used Rainey's money. Crocker returned to Carthage where he spent the night. The following day, Crocker purchased a .357 handgun from a man selling guns out of his trunk. Later that evening, he returned to the casino in Philadelphia. He left the casino and "ended up" in Ackerman where he stayed at a motel. Crocker was apprehended in Ackerman.

The jury found Crocker guilty of capital murder, and he was sentenced to a term of life imprisonment without parole. The jury also found Crocker guilty of arson, and he was sentenced to serve a term of twenty years to run consecutively to his sentence of life imprisonment.

ANALYSIS

I.

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION IN LIMINE PRIOR TO TRIAL CONCERNING THE ADMISSIBILITY OF DEFENDANT'S INVOLVEMENT IN PURCHASING A HANDGUN FROM THE TRUNK OF AN UNKNOWN ARMS DEALER'S AUTOMOBILE; OR, IN LIEU OF RULING THIS EVIDENCE WAS INADMISSABLE, THE COURT SHOULD HAVE GRANTED A LIMITING INSTRUCTION.

Crocker contends that the trial court erred in denying his motion in limine concerning the admissibility of Crocker's statement as to purchasing the .357 handgun after he had already killed and set fire to Rainey. Crocker also argues that if the trial court was correct in denying his motion in limine, then the trial court should have granted a limiting instruction concerning the gun. The State contends that the evidence of the handgun was properly admitted for the limited purposes of showing the interwoven story of the crime. The State also argues that Crocker did not request that a limiting instruction be made, and therefore, M.R.E. 105 controls to bar his argument.

The trial court, after hearing argument and reviewing Crocker's taped confession, ruled that the jury would not reach the conclusion that Crocker was guilty by simply purchasing a gun on the side of a highway. The trial court stated that the purchase of the gun was showing an overall view and scheme of what happened following Rainey's murder. The trial court then balanced the probity of the evidence against its prejudicial effect under M.R.E. 403 and concluded that the evidence of the gun purchase was admissible.

"The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." ***Smith v. State*, 656 So. 2d 95, 98 (Miss. 1995)** (quoting *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990)). This court will not reverse the trial judge unless the judge's discretion is so abused as to be prejudicial to the accused. ***Parker v. State*, 606 So. 2d 1132, 1136 (Miss. 1992).**

Rule 105 of the Mississippi Rules of Evidence states:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 403 of the Mississippi Rules of Evidence states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404(b) of the Mississippi Rules of Evidence states:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rationale behind M.R.E. 404 (b) has been explained as follows:

> The reason for the rule is to preclude the State from raising the "forbidden inferential sequence, " that the accused has committed other crimes and is therefore more likely to be guilty of the offense charged.

***Smith*, 656 So. 2d at 98-99** (citing *Lancaster v. State*, 472 So. 2d 363 (Miss. 1985)).

The supreme court has held that "where another crime or act is 'so interrelated [to the charged crime] as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences,' proof of the other crime or act is admissible." ***Ballenger v. State*, 667 So. 2d 1242, 1256-57 (Miss. 1995)** (quoting *Duplantis v. State*, 644 So. 2d 1235, 1246 (Miss. 1994)). "Evidence of other crimes or bad acts is also admissible in order to tell the complete story so as not to confuse the jury." ***Ballenger*, 667 So. 2d at 1257**. Therefore, we conclude that Crocker's purchasing of the gun was admissible because the purchase was a closely related transaction or occurrence to the crimes of murder and arson. The information about the gun purchase was part of the complete story of the crime provided to the jury.

However, Crocker argues that the trial judge should have granted a limiting instruction, *sua sponte*, based on *Smith v. State*. In *Smith*, the State offered evidence or prior acts committed by the defendant for the reason of establishing his intent to distribute cocaine. ***Smith*, 656 So. 2d at 98.**Smith argued on appeal that the prior evidence was inadmissible because it dealt with events that did not occur at or about the time of trial and because the evidence was offered to impermissibly prove a propensity to sell. ***Id.*** At trial, the defense did not offer, and the jury was not given, an instruction as to the limited purposes for which the other crimes evidence could be considered. ***Id.* at 99.** The supreme court failed to reverse on this issue because of the language in M.R.E. 105, holding that because defense counsel did not request a limiting instruction, there was no error. ***Id.* at 100.**However, the court did state that in the future "wherever 404(b) evidence is offered and there is an objection which is overruled, the objection shall be deemed an invocation of the right to M.R.E. 403 balancing analysis and a limiting instruction." ***Id.*** The trial court on its own shall give a limiting instruction. ***Id.***

The supreme court revisited the *Smith* decision in ***Bounds v. State*, 688 So. 2d 1362 (Miss. 1997)**. The court reaffirmed its holding in *Smith*, but because the case was heard prior to the definitive ruling regarding limiting instructions, the court held that the trial judge was not bound by the *Smith* holding. ***Id.* at 1372.** Therefore, the *Bounds* court concluded that it was not reversible error for the trial judge to not give, *sua sponte*, a limiting instruction on M.R.E. 404(b) evidence. ***Id.***

The supreme court was faced with similar situations dealing with M.R.E. 404(b) in ***Brown v. State*, 690 So. 2d 276 (Miss. 1996)** and ***Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995).** Both *Brown* and *Ballenger*, like *Bounds*, were tried before, but decided after *Smith*, and both dealt with the admission of 404(b) evidence dealing with interrelated crimes or acts coinciding with the charged crime. Both cases held that the evidence was admissible to show the overall involvement of the individual defendants to the charged crimes. ***Brown*, 690 So. 2d at 286; *Ballenger*, 667 So. 2d at 1257.**

We find that the trial court was clearly in error when it did not follow the dictates of *Smith*in granting

a limiting instruction *sua sponte*. Although our supreme court, in *Smith*, has dictated that the trial court's inaction is error, it has not clearly and unequivocally mandated that reversal must automatically follow. We believe that errors, as in the case *sub judice*, are subject to a harmless error analysis as in any other evidentiary ruling. We hold under the facts of this case that the error was harmless. The proof of Crocker's confession without the harmful language of the purchase of the gun was overwhelming. The State did not try to profit from the admission of the evidence during the trial or during closing arguments other than to provide a complete picture the killing, theft, and arson to the jury. We, therefore, decline to reverse on this point.

II.

THE COURT SHOULD HAVE EXCUSED SEVERAL VENIREMEN FOR CAUSE DUE TO THEIR CLOSE ASSOCIATION WITH LAW ENFORCEMENT, INCLUDING ONE WHO WAS A POLICE OFFICER IN A NEIGHBORING COUNTY, HAD BEEN A DEPUTY IN ATTALA COUNTY, KNEW THE VICTIM OF THE HOMICIDE, AND HAD RESPONDED TO CALLS AT HIS PLACE OF BUSINESS DURING HIS TENURE AS AN ATTALA COUNTY DEPUTY.

Crocker asserts that the trial court should have excused several panel members for cause due to their close association with law enforcement. Specifically, Crocker contends that Michael Luvon Lee, who had been a deputy sheriff in Attala County and had responded to calls at the business establishment of the victim, should have been excluded for cause. After excluding panel members for cause, there were ten remaining panel members, out of a total of forty-five, who either were themselves in law enforcement or who had family members in law enforcement. Crocker tried to have the panel members excluded for cause because of their close ties with law enforcement; however, the court refused to grant the challenges for cause. Crocker was forced to exclude panel members through the use of his peremptory challenges. Ultimately, two of the final jury members had close ties to law enforcement.

Crocker argues that there was a "statistical aberration" in the venire similar to that of ***Mhoon v. State*, 464 So. 2d 77 (Miss. 1985)**, and therefore he was denied a fair trial. In *Mhoon*, of the thirty-nine venirepersons, nine of them were either policemen or related by blood or marriage to a current or former police officer. ***Id.* at 80.** Of this number, six ultimately served on the jury, and the jury foreman was a uniformed police officer. ***Id.*** To combat this situation, the defense attorney exhausted all of his peremptory challenges during jury selection. ***Id.*** The supreme court held that the "statistical aberration" which produced such a venire and ultimately the jury, mandated a reversal of Mhoon's conviction. ***Id.* at 81-82**. The court did point out that the mere presence of law enforcement officers in the jury pool was not per se improper, provided the prospective juror was otherwise qualified to serve. ***Id.* at 82.**

The supreme court has stated that absent the statistical aberration present in *Mhoon*, a reversal is not required simply because a member or members of the jury are somehow connected with law enforcement officials. ***Lockett v. State*, 517 So. 2d 1317, 1332 (Miss. 1987).** In *Lockett*, ten veniremen had close ties with law enforcement. ***Id.* at 1331.** Nine of the ten were struck by peremptory challenge. ***Id.*** Only one of the ten actually served on the jury. ***Id.*** The supreme court

contrasted the matter in *Lockett* with the extreme situation present in *Mhoon* and found the assignment of error to be without merit. ***Id.* at 1332.**

In the case *sub judice*, two jurors in the entire jury pool having any relation with law enforcement officials actually served on the jury. We do not feel that this reaches the "statistical aberration" present in *Mhoon.* Accordingly, this argument has no merit.

Crocker also contends that Michael Lee should have been removed for cause because of his ties with law enforcement. During voir dire, Lee stated that he could be a fair and impartial juror even though he was in law enforcement and had relatives in the field of law enforcement. Lee also stated that his business calls to Rainey's place of business would not influence his decision as a juror. Counsel for Crocker used his first peremptory challenge on Lee.

"Due to the trial judge's presence during the voir dire process, he is in a better position to evaluate the prospective juror's responses." ***Taylor v. State*, 672 So. 2d 1246, 1264 (Miss. 1996).**The determination on whether a juror is fair and impartial is a judicial question, and this determination will not be set aside unless it is clearly wrong. ***Id.*** Further, the supreme court was faced with a similar situation in ***Mettetal v. State*, 602 So. 2d 864 (Miss. 1992)** and concluded that:

> The loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use his peremptory challenges to achieve that result does not mean that the defendant was denied his constitutional rights. . . .
>
> This Court explained that a prerequisite to presentation of a claim of a denial of constitutional rights due to denial of a challenge for cause is a showing that the defendant had exhausted all of his peremptory challenges and that the incompetent juror(s) was forced to sit on the jury by the trial court's erroneous ruling. . . . Mettetal cannot make such a showing in the case at bar because he did in fact strike the veniremen peremptorily. The veniremen in question did not in fact sit on the jury. It is not error for the defense counsel to be compelled into using a peremptory challenge to remove a prospective juror. This assignment of error is without merit.

***Mettetal*, 602 So. 2d at 869** (citations omitted)**. *See also Davis v. State*, 660 So. 2d 1228, 1243 (Miss. 1995).**

Therefore, based upon the foregoing, we reject this argument and reject the assignment of error as a whole.

THE JUDGMENT OF THE ATTALA COUNTY CIRCUIT COURT OF CONVICTION ON COUNT I OF CAPITAL MURDER AND SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE; COUNT II OF ARSON IN THE FIRST DEGREE AND SENTENCE OF TWENTY (20) YEARS TO RUN CONSECUTIVE TO THE SENTENCE IMPOSED IN COUNT I, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO ATTALA COUNTY.

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