

IN THE COURT OF APPEALS 03/26/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01449 COA

DERRON LEONARD WELCH

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. WILLIAM BRYAN JONES

COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GEORGE S. SHADDOCK

ATTORNEY FOR APPELLEE:

OFFICE OF THE STATE ATTORNEY GENERAL, BY DEWITT ALLRED III

DISTRICT ATTORNEY: BEN SAUCIER

NATURE OF THE CASE: CRIMINAL - MURDER

TRIAL COURT DISPOSITION: GUILTY - SENTENCED TO A TERM OF LIFE
IMPRISONMENT

BEFORE FRAISER, C.J., BARBER, AND DIAZ, JJ.

BARBER, J., FOR THE COURT:

Appellant Derron Leonard Welch appeals from his conviction for murder and his sentence of life imprisonment. Finding no error in the proceedings below, we affirm.

I. BACKGROUND

In the early morning hours of September 1, 1992, Allen Ray Stallworth was shot in the head with a .25 caliber handgun as he was standing outside an establishment known as Tony's Tiptop Club in Moss Point, Mississippi. Two days later, Stallworth died in a Mobile, Alabama hospital.

At the time that he was shot, Stallworth had been standing outside Tony's Tiptop when a suspicious looking Jeep approached him. Apparently, Stallworth suspected that something ominous was about to happen, for he warned Jeffrey Carter, the man who was standing outside the club with him, to get out of the way. A white Cadillac then approached the area where Stallworth was standing. After Carter had moved a sufficient distance, Carter witnessed a man walk up to the dark area on the street where Stallworth was standing. Carter then heard gunshots and saw flashes of gunfire. He then saw the man who had walked up to Stallworth get into the Cadillac, which immediately left the scene.

At trial, the only fact at issue was the identity of the murderer.

After witnesses to the shooting identified Eddie James Flora as the man who was driving the white Cadillac, Flora pled guilty to the reduced charge of accessory after the fact to murder and implicated Derron Welch in the shooting. On February 9, 1993, a Jackson County grand jury indicted Welch for Stallworth's murder. On October 18, 1993, Welch's three and one-half day trial commenced. At the conclusion of the trial, the jury found Welch guilty. Welch then filed a motion to set aside jury verdict and a motion for new trial. Both motions were denied by the trial court. Welch now appeals.

II. DISCUSSION

a) Did the Trial Court Err in Denying a Circumstantial Evidence Instruction?

In Mississippi, it is well established that in a criminal case in which the prosecution's case rests entirely on circumstantial evidence, the defendant is entitled to a circumstantial evidence instruction advising the jury that they must not only find the criminal defendant guilty beyond a reasonable doubt, but also to the exclusion of every other reasonable hypothesis consistent with innocence. *See, e.g., Conner v. State*, 632 So. 2d 1239, 1255-56 (Miss. 1993), *cert denied*, 115 S. Ct. 314 (1994). The trial court denied Welch's proffered circumstantial evidence instruction. Welch asserts that this ruling was error.

"A circumstantial evidence instruction must be given only when the prosecution can produce neither an eyewitness nor a confession/statement by the defendant." *Ladner v. State*, 584 So. 2d 743, 750 (Miss. 1991), *cert. denied*, 502 U.S. 1015 (1991). In the present case, the trial court did not err in denying Welch's circumstantial evidence instruction because the prosecution's case included both an eyewitness account of the shooting and a statement by the defendant admitting guilt. Thus, the prosecution's case did not rest solely upon circumstantial evidence, but was also strongly supported by direct evidence.

Carter, the man who was standing outside Tony's Tiptop with Stallworth immediately before the shooting, testified that after Stallworth noticed a suspicious looking vehicle approaching, he warned

Carter that Carter should get away from the area because Stallworth felt "like something is going to happen." From the vantage point at which Carter then stopped, Carter testified that he could see a man walk into the area near where Stallworth was standing. At trial, he unequivocally identified this man as Welch. Although, it was apparently too dark for Carter to actually see Welch pull the trigger, Carter testified that he then both saw and heard the gunfire that immediately ensued. We think that this qualifies as direct, eyewitness evidence that Welch shot Stallworth.

Eddie Flora testified that he was driving Welch's white Cadillac when he pulled up to the scene of the shooting. According to Flora, the following incidents occurred:

Q. . . . Would you tell us what happened. You drive up in the white Cadillac. Would you tell us what happened in your own words?

A. I get out. When I get out I hear shots. So I'm getting ready to get back in the car. Then he walked up to the car and said let's go.

Q. He would be who?

A. Poncho, Derron Welch.

Q. All right, sir. What did you do when he said let's go?

A. I drove off.

Q. I see. And what happened after then?

A. We were riding. Then when I got home he said I shot somebody. I said who. He didn't tell me. Then I just went on in the house. See, I ain't believing him.

Q. I see. But Poncho told you that?

A. Yes, sir.

Flora's testimony as to what Welch told him obviously qualifies as an admission. "While not a confession properly so-called, this evidence does constitute . . . direct evidence of the crime such that the giving of the familiar circumstantial evidence instruction is not required." Mack v. State, 481 So. 2d 793, 795 (Miss. 1985) (citations omitted).

In view of the fact that the prosecution presented direct evidence that Welch shot Stallworth in the form of Carter's eyewitness testimony and Welch's admission, we hold that the trial court did not err in denying Welch's proposed circumstantial evidence instruction.

b) Did the Trial Court Err in Denying Welch's Motion to Set Aside Jury Verdict?

After trial, Welch filed his motion to set aside jury verdict. In doing so, he attached the affidavit of Margaret Ann Cameron, one of the trial jurors. Cameron's affidavit read in pertinent part:

I was a juror in the case of State of Mississippi vs. Derron Welch, Circuit Court of Jackson County, Mississippi which began on Monday, October 18, 1993 and ended on Thursday, October 21, 1993; on Thursday morning, prior to reporting for jury duty, while

dressing, I overheard a conversation between my daughter Melissa Landry and Kathy Brisco who were talking about the case that I was sitting on; Kathy Brisco did not know that I was a juror; I overheard Kathy say that . . . [the victim in this case] did not have a gun, where did the gun come from, that . . . [the victim] had locked the gun in his truck along with his keys and that he could not get back into the truck. She further said that she felt that this was the reason he got shot, because he couldn't shoot back. She also said "I think he did it" and all of this influenced my decision in this case..

On the basis of this affidavit, Welch argued that the jury's verdict should be set aside because one of the jurors was improperly influenced. The trial court conducted a hearing on the motion and entered an order denying it. Welch now asserts that this denial was error. We disagree.

Rule 606(b) of the Mississippi Rules of Evidence states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror*. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

M.R.E. 606(b) (emphasis added).

We think that Rule 606(b) makes it clear that Cameron's affidavit should not have been considered. The rule states that a juror may not testify as to the effect of anything upon her mind or emotions as influencing her to assent to or dissent from the verdict or indictment or concerning her mental process. Certainly, Cameron's testimony that Kathy Brisco's opinions and beliefs influenced her to assent to the verdict of guilty is precisely the type of testimony that is proscribed by Rule 606(b). Thus, the only way that Cameron's testimony *could* properly have been considered by the trial court would have been for it to fit within one of the exceptions contained in the Rule. We are of the opinion, however, that these exceptions did not apply. Quite simply, we believe that the words "except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror" contemplate something other than a juror inadvertently overhearing a conversation involving a person who is not aware that her communications are being monitored by a juror. This assignment of error therefore fails.

c) Did the Trial Court Err in Limiting Welch's Redirect Examination of One of His Witnesses?

At trial, Welch called Tony King, the owner of Tony's Tiptop, to the stand. King testified that on the night of the shooting, he patted Stallworth down and found a pistol on him; that Stallworth put the gun in his truck and then came into the club; that later, Stallworth went out to his car and got his

gun; that King again refused him entry because he was armed; and that at some point, Stallworth, while outside the club, fired a shot into the air. As to Welch, King testified that he thought Welch was inside the club at the time Stallworth fired his pistol and that he did not see Welch again that night. On cross-examination, King admitted that he did not know where Welch was at the time of the shooting; that he did not see Welch leave the club; and that Welch could have left the club and re-entered the club without King's knowledge.

On redirect, defense counsel attempted to ask King if he had patted Welch down at any time during the course of the evening and whether King had found a weapon upon Welch. The State objected to this question as being outside the scope of its cross-examination of King, and the trial court sustained this objection. Outside the presence of the jury, Welch was allowed to make a proffer as to what King's answer to this question would have been. King testified that he did not find a weapon on Welch when he patted Welch down and that Stallworth was the only person on whom he found a weapon that night.

Welch asserts that the trial court erred in limiting his redirect examination of King. Welch does so on the ground that this ruling denied him a crucial element of his defense.

"The general rule is that redirect [examination] is limited to matters brought out on cross-examination." *West v. State*, 463 So. 2d 1048, 1055 (Miss. 1985). Because Welch's proposed question to King touched on matters that were outside the scope of the matters brought out on cross-examination, we rule that the trial court did not err in sustaining the State's objection to it.

d) Was the Verdict Against the Overwhelming Weight of Credible Evidence or Contrary to Law?

Welch contends that the jury's verdict was against the overwhelming weight of the evidence because the homicide statute under which Welch was indicted, section 97-3-19 of the Mississippi Code, required the State to prove that in shooting Stallworth, Welch acted with "deliberate design to effect . . . [his] death." *See* Miss. Code Ann. § 97-3-19(1)(a) (1972). Welch specifically asserts that the State failed to present proof of Welch's malice, intent or deliberate design to kill Stallworth.

The Mississippi Supreme Court has stated:

When the fact of a killing, with all its attendant circumstances, is clearly proved, and the testimony either shows express malice, or that there was no malice at all, there is no room for presumption. But in cases where the killing is proved, and no accompanying circumstances appear in the evidence, *the law presumes the killing was done maliciously*. So, where the killing is proved, and the circumstances attending it are shown, *though no express malice may appear from the proof, it may be presumed from some attending fact; as if a deadly weapon were used, the law presumes malice*. So, if there be circumstances of barbarity and cruelty, the law presumes malice. These presumptions of law, *if unopposed*, may amount to full proof of the fact. They stand until the contrary is proved or until such facts are proved, as are sufficient to raise a contrary and stronger presumption.

Nicolaou v. State, 534 So. 2d 168, 171-72 (Miss. 1988) (emphasis added).

In *Nicolaou*, the court further stated:

[E]very killing is presumed to be malicious, and amounting to murder, until the contrary appears from the circumstances of alleviation, excuse, or justification; and that it is incumbent upon the defendant to make out such circumstances to the satisfaction of the jury unless they arise out of the evidence produced against him. . . . A killing with a deadly weapon may be susceptible of clear explanation by the accused or eyewitnesses as an accident, or justified as having been committed by the accused acting in lawful self-defense, or mitigated manslaughter. When no such proof is forthcoming the jury is warranted in finding the accused guilty of murder.

Nicolaou, 534 So. 2d at 172.

The record of the trial proceedings contains ample proof that Stallworth was killed with a deadly weapon and that Welch was the man who shot him. Welch has pointed to nothing in the record showing that he may have acted in lawful self-defense, excuse, justification, alleviation, or mitigated manslaughter. In such an instance, the presumption of malice is un rebutted, and the jury was therefore warranted in finding that Welch acted with malice or deliberate design to kill. This assignment of error is therefore without merit and fails.

e) Was There a Fundamentally Unfair Atmosphere at Trial?

At trial, Welch presented the testimony of Christy Jones to the effect that she saw an unidentified man shoot Stallworth and that she was certain that this man was not Welch. Subsequently, during its closing argument to the jury, the State referred to Christy Jones, as a "bought and paid for witness." In addition, in its comments to the trial judge during the hearing held in connection with the motion for a new trial, the State argued that if one disregarded Jones' testimony, one would have a very good case against Welch.

Welch points to these comments, along with a number of other unspecified "innuendoes and speculations" made by the State, and argues that the accumulation of these "improper and highly prejudicial" comments created a "fundamentally unfair atmosphere throughout the trial" and therefore denied Welch his right to a fair trial. We find this argument also without merit.

First, with respect to the comment the State made regarding the "bought and paid for" status of Christy Jones, Welch made no objection. The failure to object to a part of the closing argument which a defendant asserts was reversible error, procedurally bars us from considering it for the first time on appeal. *Foster v. State*, 639 So. 2d 1263, 1287 (Miss. 1994), *cert. denied*, 115 S. Ct. 1365 (1995). Second, any argument made to the trial judge to the effect that Jones' testimony should be disregarded by the judge in considering the motion for new trial was well within the prosecuting attorney's prerogative as an advocate for his case. Finally, with respect to Welch's vague and unspecified claims of other improper comments, we reject them outright. Without further specification as to what these comments were and without specific arguments as to why they were improper, we refuse to take them seriously. We, therefore, reject Welch's argument that the sum of comments made by the State created an unfair and prejudicial environment.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY OF CONVICTION OF MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED TO APPELLANT.

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