

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00699 COA

SIDNEY HAVARD IV

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. GRAY EVANS

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

LELAND H. JONES, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIDRE MCCRORY DISTRICT ATTORNEY: FRANK CARLTON

NATURE OF THE CASE: CRIMINAL (FELONY)- MURDER

TRIAL COURT DISPOSITION: MURDER: SENTENCED TO SERVE A TERM OF LIFE IN CUSTODY OF MDOC

MANDATE ISSUED: 6/10/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT:

Sidney Havard IV was convicted of murder in the Leflore County Circuit Court in the shooting death of his estranged wife, Judy Havard. Havard did not deny the shooting, but claimed that it occurred accidentally while the two were engaged in a struggle. He now appeals his conviction, claiming that the trial court improperly allowed an investigating police officer to testify that he thought the shooting was intentional.

Detective Melvin Andrews, the primary investigating officer of the homicide, was not called as a witness by the State. The defense called him as a witness, and during cross-examination by the prosecution, he was asked, "Based on your investigations of this case, having taken into consideration the statements of the witnesses, your actual viewing of the scene itself, do you have an opinion as to whether or not this shooting was accidental?" Defense counsel immediately objected. The trial court overruled the objection and permitted Andrews to respond, "My opinion was that it was not an accidental shooting, my opinion that he intentionally . . . intentionally murdered his wife."

This was error of the plainest sort. The inquiry is indistinguishable, as a practical matter, from the question, "Based on what you've seen and heard, do you think the defendant is guilty?" There is no suggestion that Andrews was an expert qualified to give such an opinion under Mississippi Rule of Evidence 702. Rule 701, dealing with lay witness opinions, requires that the opinion be "(a) rationally based on the perception of the witness and (b) helpful to . . . the determination of a fact in issue." M.R.E. 701. The State's question, implicating as it did the officer's "consideration [of] the statements of the witnesses" self-destructed as a Rule 701 matter before it ever got off the ground, and the trial court should have so held. Equally as bad, it simply cannot be reasonably argued that this police officer's opinion was "helpful" in any way to the jury's consideration of the case.

Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided It is believed all courts would exclude such extreme expressions. There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision.

1 *McCormick on Evidence* 12, at 47 (John W. Strong et al. eds., 4th ed. 1992). Our supreme court has said that "[q]uestions which would merely allow a witness to tell the jury what result to reach are not permitted." *Whittington v. State*, 523 So. 2d 966, 975 (Miss. 1988).

It is difficult for this Court to envision any rational basis for the prosecution to think such a question was proper or for the trial court to think an answer was permissible. Nevertheless, against all odds, that is the situation that now confronts the Court, and we must determine what to do about it.

Every error regarding the introduction of evidence that should have been excluded does not require reversal. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected" M.R.E. 103(a).

Havard argues that, not only was the officer's opinion not helpful to the jury, it was quite harmful to his chances of convincing the jury that his accident defense had merit. He claims that an opinion from an experienced police officer must, inevitably, carry great weight with the jury and was, therefore, so prejudicial that his conviction must be reversed. The State counters by claiming that the evidence of guilt was so overwhelming that the admission of the officer's opinion was harmless.

We begin our analysis with a general observation. We doubt that a jury, empaneled to try a murder charge, would be surprised to learn that the lead investigating officer thought, in his own mind, that the defendant was guilty. To the contrary, we suspect that the average juror would have considered that opinion to be a more-or-less foregone conclusion. Thus, it does not seem that permitting the jury to hear such an opinion expressed in court destroys, beyond salvage, the possibility that the jury could properly decide the case. We must, then, consider the strength of the State's evidence of guilt to properly assess the prejudicial impact of this opinion evidence.

We will not rehash in detail the overwhelming evidence of Havard's guilt in this case. There was testimony that Havard had, shortly before the shooting, stated that he would kill his wife before he would see her with someone else. Havard's wife was shot in the back of the head, hardly the bullet entry point one would expect from an accidental pistol discharge during a struggle. There were, unfortunately for the defendant, a significant number of people in the residence when the shooting occurred. These witnesses testified to very incriminating facts, including evidence that Havard threatened his wife with a pistol, and that, immediately after the fatal shot was fired, Havard was seen standing over her body and was heard to say, "Die." Several witnesses reported that, in the immediate aftermath of the shooting, he reported killing his wife, referring to her by a derogatory epithet. One investigating officer reported that Havard not only admitted to the shooting, but expressed a hope that his wife would die, again referring to her with the same epithet.

This Court is of the opinion that the jury could reasonably conclude that this evidence, uncontradicted and unimpeached, was inconsistent with the behavior of a man who had accidentally injured his wife, especially where the injury was life-threatening. Havard tries to make much of the testimony of one witness who was present in the home, William Robinson. Robinson expressed an opinion that he thought Havard's gun had discharged accidentally. However, Robinson's factual testimony -- not his essentially baseless opinion -- seemed to point more toward the proposition that the shooting was wilful.

On this evidence, the Court concludes that admitting Detective Andrews' opinion, as patently wrong as that was, did not so fundamentally undermine the integrity of the trial that we must reverse the conviction. The error, though obvious, was, in the context of this case, harmless. *See Stogner v. State*, 627 So. 2d 815, 820-21 (Miss. 1993). The conviction is affirmed.

THE JUDGMENT OF THE LEFLORE COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE TO LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO LEFLORE COUNTY.

BRIDGES, C.J., THOMAS, P.J., DIAZ, HERRING, PAYNE, AND SOUTHWICK, JJ., CONCUR. COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, J. HINKEBEIN, J., NOT PARTICIPATING.

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00699 COA

SIDNEY HAVARD IV 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

COLEMAN, J., DISSENTS:

I concur wholeheartedly with every word, sentence, and paragraph which the majority opinion contains down to the bottom of page 2 of that opinion. I respectfully dissent because I disagree with the majority's conclusion that "it does not seem that permitting the jury to hear [the] opinion [of detective Melvin Andrews that the shooting was not accidental] expressed in court destroys, beyond salvage, the possibility that the jury could properly decide the case." I disagree with the statement because I feel unable to devine what the jury thought about the officer's opinion. Were I to speculate about the jury's evaluation of the detective's opinion, I would attain a result different than that reached by the majority. I suspect that the average juror would pay close attention to and would seriously weigh the opinion of an officer experienced in the investigation of homicides. Thus, the just consequence of this "error of the plainest sort" can only be to reverse and to remand this case for a new trial in which the jury would deliberate the guilt of Havard free from the influence of this "error of the plainest sort."

KING, J., JOINS THIS OPINION.