

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00816 COA

SCOTT W. SHAMEL A/K/A SCOTT WAYNE SHAMEL

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. KATHY KING JACKSON

COURT FROM WHICH APPEALED: GEORGE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM T. BAILEY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWERY DISTRICT ATTORNEY: DARYL DRYDEN

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: JUDGMENT AND SENTENCE: AGGRAVATED ASSAULT:
SENTENCED TO SERVE 20 YRS IN THE CUSTODY OF THE MDOC

MANDATE ISSUED: 6/10/97

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

Scott Shamel was found guilty of aggravated assault and sentenced to twenty years imprisonment in the Mississippi Department of Corrections. Aggrieved, Shamel filed this appeal.

FACTS

On Saturday, July 31, 1993, a party was held by friends and family members of Sonya Shoemaker, who had been planning to move to Florida the following week with her friend, Scott Shamel. Shamel had been living with Sonya in her house trailer for several weeks.

During the late afternoon or early evening hours of July 31, 1993, Sonya left the party in her motor vehicle with Angela Rhymes, and they drove to the residence of John Cochran where Sonya, who had been drinking heavily, met with Cochran and convinced him to come back with her and Angela to the party.

As they approached the location where the party was being held, Sonya drove her vehicle into a ditch. Shamel and Erwin Rouse, Sonya's brother-in-law, then appeared on the scene and were present either at the time of, or immediately prior to, the vehicle being pulled out of the ditch. During this episode, Shamel and Cochran met for the first time. According to Cochran, he had previously been out with Sonya on five or six occasions and was not aware of her relationship with Shamel. According to the testimony, Shamel and Cochran exchanged words. After the vehicle had been pulled from the ditch, Cochran reentered the vehicle and occupied the driver's seat. Shamel then informed Cochran that he could not drive Sonya's automobile. At this point, there is conflicting testimony as to exactly how the altercation began, but both Cochran and Shamel agree that Shamel inflicted two deep cuts on Cochran with a knife, once in the lower abdomen and once on the back of the neck.

Shamel testified that Cochran came at him with a tire tool and attempted to hit him over the head with it. Shamel's statement was that at this point, he pulled out a pocket knife and stabbed Cochran in self-defense. As a result of the stab wounds, Cochran had a laceration behind his ear and a deep wound in the abdomen resulting in the protrusion of his intestines. On the other hand, Cochran denied having a weapon at the time he was attacked by Shamel, and his testimony was supported by several other witnesses. The only witness who supported Shamel's account of what happened was Phillip Platt, a "bouncer" at the Country Club Lounge in Fairview, Alabama, where Rouse took Shamel after his confrontation with Cochran. Platt testified that he and Shamel were friends and had worked together as bouncers at the Country Club Lounge in the past. Platt stated that when Rouse delivered Shamel to the lounge, Platt took Shamel to his own house trailer and "put him to bed." According to Platt, Rouse told him that Cochran had a tire tool in his hand at the time of his confrontation with Shamel. Rouse not only denied that he told Platt that Cochran had a tire tool in his hand, but Rouse also denied that he was even present when the altercation took place.

For the next fifteen to sixteen days, Shamel remained in Alabama until he was advised that a nationwide warrant had been issued for his arrest and that his mother had been contacted in Michigan. At this point, he turned himself in to the authorities.

During the course of the trial, a substantial amount of testimony was elicited from several witnesses, including Shamel, regarding whether or not the defendant was "hiding out" after the altercation with

Cochran in order to avoid arrest. In this regard, Rouse testified that his sister-in-law, Sonya, told him to get Shamel out of her trailer and take him to Alabama, which is what he did. On the other hand, Shamel testified that Rouse stated that he was taking Shamel to Alabama in order to avoid further trouble for Shamel from Cochran's family. It should be noted that Shamel owned no vehicle, owned or rented no home, and stayed with friends in Alabama until the day of his arrest. Rouse denied Shamel's story on this point.

ISSUES

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT GRANTED THE STATE'S MOTION TO AMEND THE INDICTMENT?

II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT GRANTED FLIGHT INSTRUCTIONS?

III. DID THE TRIAL COURT ERR WHEN IT DENIED DEFENSE INSTRUCTIONS D-1, D-2, D-6, AND D-10?

IV. WAS THE VERDICT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?

DISCUSSION

I. DID THE TRIAL COURT COMMIT ERROR WHEN IT GRANTED THE STATE'S MOTION TO AMEND THE INDICTMENT?

Prior to presenting its opening statement, the State moved to amend the indictment returned against Shamel. The original indictment stated that Shamel, in violation of section 97-3-7(2)(b) of the Mississippi Code of 1972, as amended,

did lawfully, wilfully, purposely, knowingly *or recklessly* and feloniously cause *serious* bodily injury to John Cochran, by stabbing the said John Cochran in the stomach with a deadly weapon, to-wit: a knife, *manifesting extreme indifference to the value of human life and being a means likely to produce death or serious bodily injury*, contrary to the form of the statute

(emphasis added). The motion to amend asked that the italicized portions of the indictment as shown above be deleted as surplus language. The State's motion was granted over the objection of Shamel, whose motion to quash the indictment was denied.

Section 99-7-21 of the Mississippi Code of 1972 states: "[T]he court for any *formal* defect, may, if it be thought necessary, cause the indictment to be forthright amended, and thereupon the trial shall proceed as if such defect had not appeared." (emphasis added). On the other hand, the trial court has no authority to amend an indictment as to a "matter of substance" without the concurrence of the grand jury that rendered the indictment. *Akins v. State*, 493 So. 2d 1321, 1322 (Miss. 1986); *Rhymes v. State*, 638 So. 2d 1270, 1276 (Miss. 1994). Only amendments as to "mere informalities may be

made by the trial court." *Quick v. State*, 569 So. 2d 1197, 1199 (Miss. 1990). Moreover, the accused must be given fair notice of that with which he has been charged from a reading of the indictment as a whole. *Harbin v. State*, 478 So. 2d 796, 799 (Miss. 1985). Thus, our inquiry is whether the *original indictment* afforded Shamel with adequate notice that he was being prosecuted for aggravated assault in violation of section 97-3-7(2)(b), and whether the amendment to the indictment was an amendment of substance rather than form.

Section 97-3-7 of the Mississippi Code of 1972, as amended, states, in pertinent part:

(2) A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm

It is apparent from a reading of the original indictment that it contains language taken both from section 97-3-7(2)(a) ["recklessly . . . causes serious bodily injury . . . manifesting extreme indifference to the value of human life and being a means likely to produce death or serious bodily injury] as well as language from section 97-3-7(2)(b) ["by stabbing the said John Cochran in the stomach with a deadly weapon, to-wit: a knife"].

In *Quick v. State*, 569 So. 2d 1197, 1199 (Miss. 1990), our supreme court ruled that sections 97-3-7(2)(a) and 97-3-7(2)(b) were separate offenses involving aggravated assault and that the trial court committed reversible error when it amended an indictment to allow a jury to convict under subsection (a), when the indictment had been returned charging a crime under subsection (b). In other words, the trial court erroneously allowed an amendment of substance rather than an amendment of form.

While it is true that "formal or technical words are not necessary in an indictment, if the offense can be substantially described with them," *See* Rule 2.05, Uniform Criminal Rules of Circuit Court Practice, in effect at the time when trial of the case *sub judice* was conducted. and that mere surplus language will not defeat an indictment unless it can be shown that the accused is unduly prejudiced in some way by such language. *Allman v. State*, 571 So. 2d 244, 248 (Miss. 1990). it is difficult to comprehend how Shamel in the present case could have received fair notice of the crime charged against him from a reading of the original indictment. On the one hand, Shamel was charged with aggravated assault with a deadly weapon because of intentional misconduct. On the other hand, he was also charged with aggravated assault because of reckless misconduct in the same indictment. In essence, Shamel was charged with two crimes in a single-count indictment in violation of section 99-7-2(1) of the Mississippi Code of 1972, as amended which states:

(1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

It is apparent that the State recognized the problem which it had with the original indictment and attempted to correct it by amendment. The trial court committed reversible error when it granted the motion to amend, thereby substantially altering the indictment and the charge with which Shamel was

charged. At this point, the matter should have been remanded to the grand jury to correct the wording of the indictment.

II. WHETHER THE COURT ERRED WHEN IT GRANTED FLIGHT INSTRUCTIONS?

At the close of the proceedings, the trial court granted, *inter alia*, the following instructions:

JURY INSTRUCTIONS S-6

The Court instructs the Jury that flight is a circumstance for which guilty knowledge and fear may be inferred. If you believe from the evidence in this case beyond a reasonable doubt that the defendant, Scott W. Shamel, did flee or go into hiding, such flight or hiding is to be considered in connection with all other evidence in this case. You will determine from all the facts whether such flight or hiding was from a conscious sense of guilt or whether it was caused by other things and give it such weight as you think it is entitled to in determining the guilt or innocence of the defendant, Scott W. Shamel.

JURY INSTRUCTION S-7

The Court instructs the Jury that Flight is the evading to the course of justice by voluntarily withdrawing one's self in order to avoid arrest or detention or the institution or continuance of criminal proceedings, regardless of whether one leaves the jurisdiction.

Shamel argued that these instructions should not have been granted, given the testimony presented at the trial of this action. We agree.

In *Pannell v. State*, 455 So. 2d 785, 788 (Miss. 1984), our supreme court historically set forth the evolution of flight instructions and identified two factors to be considered when deciding whether a flight instruction should be granted:

1. Only unexplained flight merits a flight instruction.
2. Flight instructions are to be given only in cases where that circumstance has considerable probative value.

Id. More recently, the supreme court in *Banks v. State*, 631 So. 2d 748, 751 (Miss. 1994), stated: "Where the defendant is arguing self-defense, a flight instruction should be automatically ruled out and found to be of no probative value." Though there was considerable conflict in the testimony concerning why Shamel left the area after his altercation with Cochran, and why he waited sixteen days before he turned himself in, flight instructions were not appropriate in the case *sub judice*. Rouse, the brother-in-law of Sonya, testified that she instructed him to take Shamel to Alabama and get him out of her house trailer, where he had been living for the three weeks prior to his altercation with Cochran. Shamel did not own a motor vehicle and it is reasonable to believe that he had no option but to find another place to stay. Thus, it was logical for him to return to Fairview, Alabama, where he had recently worked as a bouncer. It was there that he found lodging for the night with a former co-worker and he later moved in with another friend until he turned himself in.

Shamel argued that he stabbed Cochran in self-defense. Independent testimony revealed that he was taken from the area because of fear of revenge from the Cochran family. While this testimony was disputed and vigorously challenged, it still takes the case out of the circumstance where a flight instruction was justifiable. As stated in *Banks*:

A flight instruction will have particular prejudicial effect in a case where self-defense is argued. Where the person against whom self defense has been exercised is still alive and has the back up support of other persons, flight seems logical and necessary. In other words, in the present case, it seems to have been illogical for Banks not to run. To suggest and highlight, through the sanction of a court granted instruction, that the defendant's flight was possibly an indication of guilt suggests that the court does not accept the self-defense argument.

Banks, 631 So. 2d at 751. In this case, Shamel's leaving the area after the altercation could be explained in several ways. Additionally, because of Shamel's self-defense argument, the trial court committed reversible error when it granted the flight instructions and called undue attention to his departure from the local area.

In support of its position that the two flight instructions were correctly given by the trial court, the State cites *Brock v. State*, 530 So. 2d 146, 153 (Miss. 1988) and *Evans v. State*, 579 So. 2d 1246, 1248 (Miss. 1991). In *Brock*, a case involving robbery, kidnaping, and rape, the defendant's explanation of his flight had no support outside of his own testimony. *Brock*, 530 So. 2d at 153. In *Evans*, also a case involving rape, the defendant's explanation that "fear caused him to flee . . . did not show that there was an independent reason for the flight, which reason would allow for a conclusion of an innocent purpose" *Evans* 579 So. 2d at 1248. In the case *sub judice*, there was independent testimony from the State's witness that Sonya Shoemaker asked her brother-in-law to help her remove Shamel from her house trailer by taking Shamel to Alabama. Moreover, self- defense was not an issue in either *Brock* or *Evans*. Thus, they have no application to the facts before us in the present case.

CONCLUSION

The other assignments of error raised by Shamel have no merit. However, because we find that the original indictment was defective, that the trial court erred when it allowed the original indictment to be amended, and that the trial court erred in granting flight instructions, we reverse and remand this action for further proceedings consistent with this opinion.

THE JUDGMENT OF THE GEORGE COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE TAXED TO GEORGE COUNTY.

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