

IN THE COURT OF APPEALS 03/25/97
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-01261 COA

MICHAEL JAMES

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. JOHN LESLIE HATCHER

COURT FROM WHICH APPEALED: CIRCUIT COURT OF COAHOMA COUNTY

ATTORNEY FOR APPELLANT:

RICHARD B. LEWIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL: CAPITAL MURDER AND BURGLARY

TRIAL COURT DISPOSITION: CT I: CAPITAL MURDER; SENTENCE OF LIFE
IMPRISONMENT IN MDOC. CT II: BURGLARY OF INHABITED DWELLING AT NIGHT
ARMED WITH A DEADLY WEAPON; SENTENCE OF FIFTEEN YRS IN MDOC WITH CT II
SENTENCE TO RUN CONSECUTIVELY TO AND COMMENCE AT TERMINATION OF

SENTENCE IMPOSED IN CT I.

BEFORE THOMAS, P.J., PAYNE, AND SOUTHWICK, JJ.

PAYNE, J., FOR THE COURT:

Michael James was convicted in Count I for capital murder and Count II for burglary of an inhabited dwelling. The trial court sentenced James to serve a term of life in the custody of the

Mississippi Department of Corrections as to Count I and sentenced him to serve a term of fifteen (15) years in the custody of the Mississippi Department of Corrections as to Count II. The Count II sentence is to be served consecutively to and commence at the termination of the sentence imposed in Count I. The trial court denied James's motion for JNOV or, in the alternative, a new trial. We find that none of James's issues on appeal has merit and therefore affirm.

FACTS

Michael James was convicted of capital murder and burglary for acting in concert with Ronald Minor to rob William Timmons on the night of November 4, 1993. Terry Lee Timmons, the son of the victim, testified that he went to his father's home on the night of November 4, 1993, to give the victim fifteen hundred dollars (\$1500.00) to pay off a car loan. Terry Timmons testified that he discovered his father's body just inside the doorway of his apartment and immediately called the police. The evidence indicated that William Timmons died as a result of a gunshot wound to the head.

Co-defendant, Ronald Minor, admitted shooting Timmons. Minor testified that James had approached him on November 4th and asked if he wanted to make some money. Minor testified that James instructed him to go to Timmons's home and tell him that Michael James needed some money to be bonded out of jail. Minor indicated that he and a man named Billy did as instructed and Timmons told them that he would get James out the next day. Minor testified that later that day James gave him a gun and stated, "We're going to make some money." Minor testified that he and James then went back to Timmons's apartment and that he [Minor] knocked on the door while James remained out of sight at the corner of the building. Minor testified that he again asked Timmons to get James out of jail and that Timmons responded, "I got business to take care of. Well, Nigger, tell

him I said I'll come get him tomorrow." Minor testified that he shot Timmons when he saw the end of a .38 come out of Timmons's pocket. Minor testified that James then came running over and replied, "Man, you shot him." Minor testified that he and James went into the apartment and James searched through the drawers, the closet, and under the bed. Minor indicated that James then took the gun that he found lying beside Timmons's body.

Officer Danny Hill testified that during the investigation of the crime scene, he found Timmons on the floor with his pants pulled down and his pockets turned inside out. Hill also indicated that the apartment appeared to have been ransacked. Jacqueline Rash testified that on November 9th, she saw James in the grocery store showing Timmons's gun to Donald Mitchell, the grocery store owner. James was subsequently questioned by Officer Hill who found James to be in possession of

Timmons's gun. Hill testified that James admitted that he visited Timmons on November 4th but knew nothing about the murder. Officer Hill indicated that James provided no alibi for the time of the murder. Officer Hill questioned James again and stated that James then told him that he knew who killed Timmons but would not tell. Officer Hill testified that when he questioned James a third time, he named Minor as the shooter.

An acquaintance of James's, Mark Hollins, testified that James asked him on November 13th to tell the police that he had been shooting pool with James on the night of the murder and that Minor had come by and shown them two guns, a chrome .25 and a black .38. Hollins testified that he told James that he would tell the police the story. Hollins indicated, however, that he chose not to do so when he was questioned by the police.

James took the stand in his own defense and stated that Minor's story about him planning to get some money from Timmons was not true. James testified that he and Minor had gone to visit

Timmons on the afternoon of November 4th and that Minor had stolen a gun from Timmons's apartment. James testified that Timmons's later discovered that the gun was missing and that he knew Minor had taken it. James indicated that Timmons offered him fifteen dollars to get it back. James testified that on that same night he and Minor went back to Timmons's apartment and that he [James] waited at the corner of the building while Minor knocked on the door. James testified that he heard Minor talking to Timmons and then he saw Minor pull out the gun. James testified that he took off running and then heard a shot. James testified that Minor came running behind him. James testified that he did not know that Minor was going to shoot Timmons nor was he involved with any scheme to get money from the victim. James testified further that he did not go into Timmons's apartment after the shooting. James explained his possession of the stolen gun after the murder by saying that Minor had given it to him to hold right before he went into Mitchell's store. James also testified that Mark Hollins was lying about his asking for a fake alibi. The murder weapon was never recovered. Minor indicated to the police that he had hidden it behind a furniture store following the murder but did not know what had happened to the gun since that time. The owner of a pawn shop testified that Timmons was a frequent customer and had purchased two guns from her matching the description of the murder weapon and matching the serial number of the gun found in James's possession after the murder.

The jury subsequently returned a verdict of guilty of capital murder and burglary. Feeling aggrieved, James appeals the judgment of the trial court.

ANALYSIS

I. DID THE TRIAL COURT ERR IN DENYING JAMES'S MOTIONS FOR DIRECTED VERDICT AND JNOV/NEW TRIAL?

James challenges both the weight and the sufficiency of the evidence. A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion when the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled James's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [James's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to 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.

Id. (citations omitted).

The evidence consistent with the guilty verdict must be accepted as true. *Id.* at 778. Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find James not guilty of capital murder and burglary. We find that the trial court properly denied James's motion for a directed verdict.

James also complains that the jury verdict was against the overwhelming weight of the evidence, and he requests a new trial. James argues that the State's entire case was based on the trustworthiness of his co-defendant, Ronald Minor. James contends that Mississippi law requires that the testimony of co-conspirators be taken with great caution and suspicion. James argues that the State presented no physical evidence that he was involved with the murder of William Timmons. James claims that, without corroborating evidence, there is insufficient evidence to sustain a verdict of guilt based on the testimony of an accomplice.

The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *Id.* at 781 (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, we agree with the Appellant that the law in Mississippi does state that an accomplice's testimony should be taken with great caution and suspicion. *Wheeler v. State*, 560 So. 2d 171, 172 (Miss. 1990). As a matter of fact, the general rule is that the trial judge should give a cautionary instruction when the State is relying on the testimony of accomplices or co-conspirators. *Id.* at 173. We note that such an instruction was given in this case. We disagree, however, with the Appellant's contention that the evidence against him consists wholly of the testimony of his accomplice, Ronald Minor. A review of the record indicates that, in addition to the testimony of

Ronald Minor, the State produced two witnesses, Jacqueline Rash and Donald Mitchell, who saw James four days after the murder with the gun that had been stolen from Timmons's apartment on the night of the murder. This weapon was positively identified by serial number by the woman who sold Timmons the gun the day before he was killed. The State also produced Mark Hollins who testified that James had tried to get him to lie to the police about James's whereabouts at the time of the murder.

In the present case, the jury heard the witnesses and the evidence as presented by both the State and the defense. The testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its province. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict James. The trial court did not abuse its discretion by refusing to grant James a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to promote an unconscionable injustice. The trial court properly denied James's motion for a new trial.

II. DID THE TRIAL COURT ERR IN REFUSING TO GRANT INSTRUCTIONS D-1-A, D-2, AND D-3?

James contends that the jury was not properly instructed as to his theory of defense which was that he was present at the scene of the murder but did nothing to encourage this crime. James contends that he was unaware of Minor's intentions to commit a crime. James contends further that he was not present and knew nothing about the burglary of Timmons's home. James argues that instructions D-1-A, D-2, and D-3, had they been given, would have adequately covered his theory of defense.

The State, however, argues that the trial court committed no error in its decision to refuse the instructions presented by the defense. The trial court, in addressing this issue, decided that Instruction S-6 adequately covered James's theory of defense and that granting instructions D-1-A, D-2, and D-3 would have been repetitive. Instruction S-6 reads as follows:

The Court instructs the jury that each person present at the time, and consenting to or encouraging the commission of a crime, and knowingly, wilfully and feloniously doing any act which is an element of the crime, or immediately connected with it, or leading to its commission is as much a principle as if he had with his own hand committed the whole offense; and if you believe from the evidence, beyond a reasonable doubt, that the defendant, Michael James, while acting in concert with Ronald Minor, did wilfully, knowingly, unlawfully and feloniously do any acts which are elements of the crimes of capital murder and/or burglary of an inhabited dwelling in the nighttime while armed with a deadly weapon or immediately connected with them, or leading to their commission, then and in that event you should find the defendant guilty as charged on either or both counts, as the case may be.

It is James's position that Instruction S-6 does not set forth his theory of defense. James bases this proposition on *Sayles v. State*, 552 So. 2d 1383, 1389-90 (Miss. 1989), in which the Mississippi Supreme Court reversed the trial court for failing to give one of the defendant's instructions. *Id.* at 1390. The *Sayles* court stated that, under the facts of the case, the instructions given did not fairly instruct the jury and were confusing and abstract. *Id.* The court went on to hold that the instruction

requested by Sayles but not given would have accomplished the same purpose as the instructions given "in a clearer manner to squarely put the issue before the jury." *Id.*

We find that James's reliance on *Sayles* is misplaced. A reading of *Sayles* reveals that the court's holding was fact specific. The court in *Sayles* found the instructions given to be confusing as well as falling short in adequately presenting the defendant's theory of defense. We do not find this to be true of the instructions given in the present case. As the State correctly points out, Instruction S-6 gave the jury basically the same information included in the proffered defense instructions. It told the jury that if they found from the evidence that Michael James was present and, while acting in concert with Minor, did the acts which are the elements of capital murder and burglary, they should find him guilty.

The standard for reviewing jury instructions is well established. Mississippi law allows the trial judge to instruct the jury upon principles of law applicable to the case either at the request of a party, Miss. Code Ann. § 99-17-35 (1972), or on the court's own motion, *Newell v. State*, 308 So. 2d 71, 78 (Miss. 1975); *see also* Unif. Crim. R. Cir. Ct. Prac. 5.03. The Mississippi Supreme Court has held that the failure of a court to give a requested instruction is not grounds for reversal if the jury was "fairly, fully and accurately instructed on the law governing the facts of the case." *Smith v. State*, 572 So. 2d 847, 849 (Miss. 1990) (citation omitted); *see also* *Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990) (holding that the trial court may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions); *Calhoun v. State*, 526 So. 2d 531, 533 (Miss. 1988) (holding that a trial court is not required to instruct a jury over and over on the same point of law even though some variations are used in different instructions). The standard for reviewing jury instructions is to read all instructions together, not in isolation. *Townsend v. State*, 681 So. 2d 497, 509 (Miss. 1996).

We find that the instructions given by the trial court adequately presented James's theory of defense and therefore find this assignment of error to be without merit.

III. DID THE TRIAL COURT ERR IN FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF SIMPLE MURDER?

James contends that the jury should have been instructed as to the crime of simple murder based on the proof, the instructions given and based on the fact that he was not charged with armed robbery. James argues that the proper procedure would have been to instruct the jury as to a lesser- included offense of murder so that the jury could determine if he was an aider and abettor to such crime as well as burglary or if he was an accessory before or after the fact to simple murder and burglary. James contends that the lack of a lesser-included instruction confused the jury as is evidenced by the note they sent to the judge. James argues that the jury was confused because they were given no alternative but to find him guilty of capital murder or nothing at all.

A reading the record indicates that James did not request a lesser-included instruction for simple murder. It was the State who submitted the simple murder instruction but decided to withdraw it. James objected to the withdrawal of the instruction but the judge overruled. The State argues that the trial judge was correct in permitting the withdrawal of the simple murder instruction. The State contends that James is guilty of capital murder not because he killed Timmons himself, but because he was present and was acting in concert with Minor to commit the crime of armed robbery which

resulted in the death of Timmons. The State contends that, under these facts, James was guilty of capital murder or nothing at all. We agree. In the present case, James testified that he was on the scene but did not give Minor the gun nor was he aware that Minor was going to shoot Timmons. James testified that he in no way participated in the robbery nor did he enter Timmons's house after the shooting. James's testimony indicated that he ran as soon as Minor pulled out his gun. The State's evidence, contrary to James's testimony, indicated that James was the instigator of all of the events that took place on November 4, 1993. Thus, if the jury accepted the State's evidence, then James is guilty of capital murder. On the other hand, if the jury believed the testimony of the Appellant then they could not find him guilty of anything.

The Mississippi Supreme Court has held:

Jury instructions are not given unless there is an evidentiary basis in the record for such instructions. *Colburn v. State*, 431 So. 2d 1111, 1114 (Miss. 1983).

A lesser included offense instruction should be generally given when a reasonable jury could find the defendant, pursuant to the evidence presented, not guilty of the principle charge but guilty of a lesser included offense. *Toliver v. State*, 600 So. 2d 186, 192 (Miss. 1992); *Mackbee v. State*, 575 So. 2d 16, 23 (Miss. 1990).

Lesser included offense instructions should be refused only when the evidence could justify nothing other than a conviction on the principal charge, viewing the evidence in a light most favorable to the accused. *Hester v. State*, 602 So. 2d 869, 873 (Miss. 1992).

Haddox v. State, 636 So. 2d 1229, 1238-39 (Miss. 1994). We find that the evidence presented did not justify the giving of a lesser-included instruction for simple murder. We therefore find James's argument to be without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF COUNT I, CAPITAL MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED.

THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF COUNT II, BURGLARY OF AN INHABITED DWELLING AT NIGHT AND SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SAID SENTENCE TO RUN CONSECUTIVELY TO AND COMMENCE AT THE TERMINATION OF THE SENTENCE IMPOSED IN COUNT I IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO COAHOMA COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING,

AND SOUTHWICK, JJ., CONCUR.