

IN THE COURT OF APPEALS 01/14/97
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-01164 COA

ARTHUR FARMER A/K/A ARTHUR LEE FARMER

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. HENRY ROSS

COURT FROM WHICH APPEALED: MONTGOMERY COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

H. LEE BAILEY, JR.

ATTORNEYS FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS

DISTRICT ATTORNEY: KEVIN HORAN

NATURE OF THE CASE: CRIMINAL: BURGLARY

TRIAL COURT DISPOSITION: 15 YRS IN MDOC

MANDATE ISSUED: 6/5/97

BEFORE BRIDGES, P.J., BARBER, AND MCMILLIN, JJ.

BRIDGES, P.J., FOR THE COURT:

Arthur Lee Farmer was convicted in the Circuit Court of Montgomery County of burglary of an occupied dwelling. He was sentenced to a fifteen year term in the custody of the Mississippi Department of Corrections. Feeling aggrieved by this judgment, Farmer appeals, raising the following issues: (1) the court erred in overruling his motion to recuse the trial judge, (2) the court erred in its handling of jury selection, (3) the court erred in granting certain jury instructions, (4) the court erred in overruling Farmer's objection to the State's closing argument, (5) the court erred in refusing to grant a new trial/JNOV.

FACTS

On March 25, 1994, at 4:00 A.M. Louise Cain was awoken by a man in her bed. According to Louise's testimony, "he was feeling all over me . . . and trying to do it to me through my gown." She then got up, went to the bathroom, and turned on the light. At that time, she recognized that the man was Arthur Farmer. Louise then went to get her husband, and upon returning, Arthur Farmer ran out the back door. Farmer was convicted of burglary of an occupied dwelling.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE TRIAL COURT ERRED IN OVERRULING FARMER'S MOTION TO RECUSE THE TRIAL JUDGE.

Prior to trial, Farmer requested judicial recusal of the trial judge, Henry Ross, because of statements allegedly made by Judge Ross. The Appellant claims Judge Ross promised to "hand down some stiff sentences to the defendant." These statements were never proved and the judge responded on the record by saying:

The court finds that the court has made statements to Mr. Bailey to the effect that this term of court comes immediately before our judicial election; that as judge I have not been here but three days in term during my tenure in this office, and that it was my desire to have some criminal trials in order that the populace of Montgomery County might see me in the role of a judge, and take judicial action appropriately. I made no mention specifically of this Defendant that I can recall, or of any specific sentences. This court has a completely open mind in regard to defendant Arthur Farmer, and any sentence or action the court takes will be based on the law, on the facts, the Defendant's background, if he is convicted, on the impact of the victim and the impact to society only in sentencing this Defendant.

The general standard for recusal is whether the judge has sufficient connections with parties or preconceived opinions regarding a case so that he could not fulfill the role of a judge in deciding the case. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744, 754 (Miss. 1996); *Cantrell v. State*, 507 So. 2d 325, 328 (Miss. 1987).

Canon 3(C)(1) of the Code of Judicial Conduct requires a judge to recuse himself in the following

circumstances:

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

Code of Judicial Conduct Canon 3(C)(1).

"The canon enjoys the status of law such that we enforce it rigorously." *Green v. State*, 631 So. 2d 167, 177 (Miss. 1994). Along with Canon 3(C)(1), this Court has adopted an objective test to determine when a judge should recuse himself. *Jenkins v. State*, 570 So. 2d 1191, 1192 (Miss. 1990). "A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." *Aetna Casualty & Sur. Co. v. Berry*, 669 So. 2d 56, 74 (Miss. 1996) (citing *Rutland v. Pridgen*, 493 So. 2d 952, 954 (Miss 1986)).

The presumption is "that a judge, sworn to administer impartial justice, is qualified and unbiased. To overcome the presumption, the evidence must produce a reasonable doubt." *Turner v. State*, 573 So. 2d 657, 678 (Miss. 1990). If a judge is not disqualified by Article 6, section 165 of the Mississippi Constitution or by section 9-1-11 (1972), "the propriety of his or her sitting is a question to be decided by the judge and is subject to review only in case of manifest abuse of discretion." *Dowbak v. State*, 666 So. 2d 1377, 1388 (Miss. 1996), *Green v. State*, 631 So. 2d 167, 177 (Miss. 1994) (citing *Ruffin v. State*, 481 So. 2d 312, 317 (Miss. 1985)).

From the facts presented, there was no evidence of prejudice or impropriety that would require the trial judge's recusal; therefore, it cannot be said that there was a manifest abuse of the trial court's discretion and the judge's denial of the motion to recuse himself is affirmed.

II. WHETHER THE LOWER COURT ERRED IN STRIKING FOUR BLACK POTENTIAL JURORS IN VIOLATION OF *BATSON*.

The use of peremptory challenges to exclude blacks from a jury may be the basis for a claim of purposeful racial discrimination under the due process clause. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986). Because even the peremptory challenge of one juror based on his or her race can offend the Equal Protection Clause, a court must carefully determine whether that one peremptory challenge ought to result in the reversal of the defendant's conviction. For example, in the case of *United States v. Ratcliff*, 806 F.2d 1253, 1256 (5th Cir. 1986), the appellant, Elijah W. Ratcliff, argued that "the government impermissibly discriminated against him by utilizing a peremptory challenge to exclude a black female from the jury," pursuant to *Batson v. Kentucky*, 476 U.S. 79, 98 (1986). In the *Ratcliff* opinion the court observed:

Ratcliff does not establish a prima facie case of purposeful discrimination as required by Batson. It is insufficient that the government merely challenged a prospective juror whose race is the same as that of the defendant; the defendant must "raise an inference that the prosecutor used the practice to exclude the veniremen from the petit jury on account of their race."

Ratcliff, 806 F.2d at 1256 (citations omitted).

To raise an inference that counsel used the practice of peremptory challenges to exclude a member of the venire from the jury because of their race, the *Batson* case requires that Farmer prove the existence of three factors in order to make a prima facie showing of discrimination before the State will be compelled to give a racially neutral reason for the use of a peremptory challenge. Those factors are:

1. That [Farmer] is a member of a "cognizable racial group";
2. That the [State] exercised peremptory challenges toward the elimination of veniremen of race; and
3. That facts and circumstances infer that the [State] used [its] peremptory challenges for the purpose of striking minorities.

Lockett v. State, 517 So. 2d 1346, 1349 (Miss. 1987).

The application of these three factors to the evidence in the record *sub judice* demonstrates that Farmer's objection to the four jurors met the first two factors. It is with regard to the third factor that Farmer's argument fails. The record simply contains no evidence that the State used its peremptory challenges for the purpose of striking minorities. The State explained its rationale for each of the four strikes as follows:

Juror #15, a black female, was stricken "based on the representations that the law enforcement made . . . plus the fact she did not fill out a juror information card, gave reason to strike her."

Juror #16, a black female, was stricken because "she's third cousin to the Defendant and she had . . . some family member that was sentenced to a felony crime."

Juror #19, a black male, was stricken because "Bill Thornburg, deputy sheriff . . . said they've had severe problems out of the Gholstons . . . he is kin to some of those, and they do not feel like [he] would be a very impartial juror, and would not give the State the benefit of the burden of proof required in this particular case."

Juror #24, a black male, was stricken because "he went to school with the Defendant . . . and also went to school with a potential witness for the Defendant."

The court found that the reasons cited by the State were sufficient and race-neutral. The court then added, "[T]here is no violation of any constitutional rights . . . in this case to a fair trial, and any other rights under the 14th Amendment."

The pivotal inquiry is whether the State was able to present a race-neutral explanation for its peremptory strike. *Griffin v. State*, 607 So. 2d 1197, 1202 (Miss. 1992). In the case of *Lockett v. State*, 517 So. 2d 1346, 1352 (Miss. 1987), the Mississippi Supreme Court stated that the explanation need not rise to the level of a challenge for cause. "[T]hese findings largely turn on credibility and thus *Batson* states that 'ordinarily,' a reviewing court should give the trial court 'great deference.'" *Id.* at 1349. Further, *Lockett* held that a "trial judge's factual findings relative to [the] . . . use of peremptory challenges on minority persons are to be accorded great deference and will not be reversed unless they appear clearly erroneous or against the overwhelming weight of the evidence." *Id.* at 1350. From the evidence presented in the record, we find that the trial judge's determination of this issue warrants our giving him "great deference" in his determination; thus, we accept his findings.

III. WHETHER THE TRIAL COURT ERRED IN GRANTING INSTRUCTIONS S-1 AND D-8, AND REFUSING INSTRUCTION C-4.

A. INSTRUCTION S-1

In his brief, Farmer argues the court erred in granting instruction S-1, which reads as follows:

The defendant, Arthur Farmer, has been charged with the crime of burglary by breaking and entering the occupied dwelling house of Wallace and Louise Cain, with the intent to commit a crime once inside.

If you find from the evidence in this case beyond a reasonable doubt that:

- (1) a house located at 901 Kimberly, Kilmichael, Mississippi, was occupied by Wallace and Louise Cain as their dwelling; and
- (2) the defendant, Arthur Farmer, on or about March 25, 1994, did unlawfully and feloniously, break and enter Wallace and Louise Cain's occupied dwelling by breaking a window and entering through that window; and
- (3) the defendant, Arthur Farmer, once inside intended to commit an assault, then you shall find the defendant guilty of burglary of an occupied dwelling.

If the State has failed to prove any or more of these elements beyond a reasonable doubt, then you shall find the Defendant not guilty of burglary of an occupied dwelling.

Farmer contends that the jury instruction was in error because there was no actual evidence of an assault once he was inside the house. The assertion is flawed because according to the elements of a burglary charge, the State is not required to prove a completed crime occurred inside the dwelling for the Defendant to be convicted of burglary. *Williams v. State*, 512 So. 2d 666, 669 (Miss. 1987).

According to the record, Farmer broke into the Cain's house around 4:00 A.M. Once inside the dwelling, he undressed, got into bed with Louise Cain, and began assaulting her. This is all that is necessary for the crime of burglary; it is not necessary to prove the completed assault.

For his argument, Farmer relies on the testimony of Louise during cross-examination. He claims that

because she was not harmed, no burglary occurred; therefore, the instruction was invalid.

Q: What you're saying, he didn't hurt you. Is that right?

A: No, sir he didn't hurt me. I ain't gonna tell no story. He didn't hurt me. He ain't put a-- he ain't put a scar on me nowhere. He didn't even hit me.

This testimony does not make instruction S-1 invalid. Regardless of whether Louise Cain was hurt, Farmer still intended to commit an assault when he got into bed with Louise. Because Farmer got into bed with Louise and began assaulting her, we find the requisite intent apparent. As a result, we find instruction S-1 to be valid and Farmer's argument to be without merit.

B. INSTRUCTION C-4

Farmer next argues that the trial court's failure to include instructions to the jury on the lesser-included offense of trespass is so prejudicial as to require reversal. We disagree. The court granted jury instruction C-4, which reads as follows:

Your verdict should be written upon a separate sheet of paper, need not be signed by you, and may be in either of the following forms:

If you find the defendant guilty: "We, the jury, find the defendant guilty as charged."

If you find the defendant not guilty: "We, the jury, find the defendant not guilty."

Farmer's contention was that he should have been given the lesser-included offense jury instruction D-8, which reads as follows:

If you find that the State failed to prove any one of the essential elements of the crime of burglary of a dwelling, you must find the defendant not guilty of burglary and you will proceed with your deliberation to decide whether the State has proved beyond a reasonable doubt all of the elements of the lesser crime of trespass.

The crime of burglary is distinguished from trespass by the absence or failure to prove intent to commit an assault, as alleged in the indictment. Trespass is the knowingly entering the lands of another without the permission of or without being accompanied by the landowner.

A trial court is required to grant a lesser-included offense instruction only when a reasonable jury could find from the evidence that the defendant was not guilty of the principal charge, but guilty of the lesser included offense. *Haddox v. State*, 636 So. 2d 1229, 1238 (Miss. 1994). The test used by this Court in deciding whether a lesser-included offense instruction should have been granted by the trial court is set out in *Griffin v. State*, 533 So. 2d 444, 447 (Miss. 1988):

A lesser-included offense instruction should only be granted if there is an evidentiary basis therefor in the record. The test has been fleshed out in *Harper v. State*, 478 So. 2d 1017 (Miss. 1985):

[A] lesser included offense instruction should be granted unless the trial judge--and ultimately this Court--can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge).

In the case sub judice, a lesser-included offense instruction was not proper. The State proved "intent to commit an assault" as required by the crime of burglary. Farmer broke into the Cain's house, undressed, got into bed with Louise Cain and began assaulting her. The fact that he did not hit Louise does not absolve Farmer from the crime of burglary. He entered with intent to commit an assault. Accordingly, we find instruction C-4 to be the proper instruction, and the lesser-included offense instruction of trespass, as requested by Farmer, outside the realm of the evidence presented. Since there was no evidentiary basis to support a lesser-included instruction, the trial court was correct in denying the same.

IV. WHETHER THE TRIAL COURT ERRED IN OVERRULING FARMER'S OBJECTION TO THE STATE'S CLOSING ARGUMENT.

Farmer contends that the trial court committed error by allowing the prosecution's closing argument, which went as follows:

Prosecution: I think the proof is quite clear, ladies and gentleman, that man intended to rape Mrs. Cain once he was inside the house. She testified he felt up close to her, and appeared he was trying to penetrate her from the rear. He was fondling her...

Defense: Judge, I object to this argument. There's been no testimony of anything of an attempted rape, and I object to this.

By the Court: All right, that's overruled. I believe the evidence was otherwise. Continue.

The Mississippi Supreme Court has held in *Davis v. State*, 530 So. 2d 694, 701-02 (Miss. 1988), that:

As set forth in *Craft v. State*, 226 Miss. 426, 84 So. 2d 531 (1956), the test to determine whether an improper argument by a prosecutor requires reversal is whether the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created.

According to *Clemons v. State*, 320 So. 2d 368, 371 (Miss. 1975) there are certain well-established limits beyond which counsel is forbidden to go; he must confine himself to the facts introduced in evidence and to the fair and reasonable deductions and conclusions to be drawn therefrom, and to the application of the law, as given by the court, to the facts. The court, in *Clemons*, further stated:

So long as counsel in his address to the jury keeps fairly within the evidence

and the issues involved, wide latitude of discussion is allowed, but, when he departs entirely from the evidence in his argument, or makes statements intended solely to excite the passions or prejudices of the jury, or makes inflammatory and damaging statements of fact not found in the evidence, the trial judge should intervene to prevent an unfair argument

Since a prosecutor is entitled to great latitude in framing his closing argument, the lower court correctly ruled on Farmer's objection. *Dunaway v. State*, 551 So. 2d 161, 162 (Miss. 1989). The prosecution's statement of an attempted rape was supported by the evidence presented at trial. Louise Cain testified that she awoke to find someone, which was later identified as Farmer, in her bed fondling her all over, and trying "to do it to me through my gown." In *Carleton v. State*, the court ruled that statements supported by the record are permissible in the closing argument. *Carleton v. State*, 425 So. 2d 1036, 1038 (Miss. 1983). There was evidence in the record to support the contention that Louise Cain was the victim of an attempted rape, and therefore, we find Farmer is not entitled to reversal on this point, and we affirm the lower court.

V. WHETHER THE TRIAL COURT ERRED IN REFUSING A NEW TRIAL/JNOV.

A motion for a new trial is a challenge to the weight of the evidence, and as stated many times by the Mississippi Supreme Court, the standard of review for a challenge to the weight of the evidence is found in *Thornhill v. State*:

In determining whether or not a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when it is convinced that the circuit court has abused its discretion.

Thornhill v. State, 561 So. 2d 1025, 1030 (Miss. 1989), *Isaac v. State*, 645 So. 2d 903, 907 (Miss. 1994) (citations omitted).

In this case, the court must accept as true the evidence supporting the guilty verdict. As already explained, evidence was presented that proved Farmer broke into the Cain's house and attempted to assault Louise Cain. There is no evidence that the court abused its discretion; therefore, we affirm the lower court's ruling as to the denial of a new trial.

Next, a motion for a JNOV challenges the sufficiency of the evidence. This standard of review is stated in *McClain v. State*:

In appeals from an overruled motion for JNOV, the 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 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.

McClain v. State, 625 So. 2d 774, 778 (Miss. 1993) (citations omitted).

In the case at hand, testimony proved that Farmer was indeed the culprit who broke into the Cain's home and assaulted Louise Cain, and the jury affirmed this with its guilty verdict. We find Farmer's JNOV request to be without merit, and we affirm the lower court.

THE JUDGMENT OF THE MONTGOMERY COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY OF AN OCCUPIED DWELLING AND SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE SHALL BE SERVED CONSECUTIVELY TO ANY SENTENCE PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO MONTGOMERY COUNTY.

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