

**IN THE COURT OF APPEALS 3/25/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-00027 COA**

**WILLIAM FRED HENDERSON A/K/A WILLIAM FREDERICK HENDERSON**

**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 M. MONTGOMERY

COURT FROM WHICH APPEALED: CIRCUIT COURT OF OKTIBBEHA COUNTY

ATTORNEY FOR APPELLANT:

CHARLES BRUCE BROWN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: DEFORREST ALLGOOD

NATURE OF THE CASE: MURDER

TRIAL COURT DISPOSITION: APPELLANT CONVICTED OF MURDERING HIS WIFE AND  
SENTENCED TO LIFE IMPRISONMENT

BEFORE BRIDGES, C.J., KING, AND DIAZ, JJ.

KING, J., FOR THE COURT:

The Circuit Court of Oktibbeha County convicted William Fred Henderson of murdering his wife, Cheryl Henderson, and sentenced him to life imprisonment. Henderson does not dispute that he stabbed his wife; however, he claims that his actions did not evince an intentional killing but were done in the heat of passion and, therefore, he is guilty of manslaughter not murder. Henderson contends that the trial court erred in refusing to grant his motions for a directed verdict, peremptory instruction, and JNOV, or in the alternative, a new trial. Henderson also contends that the verdict was contrary to the law and the evidence; that the court erred by denying his motions for a continuance and a mental exam; that because only four African-Americans were on the jury, the court violated his Sixth Amendment rights; and that the indictment was flawed, because the venue was not alleged within the body of the indictment. We find that Henderson's arguments are without merit and therefore, affirm the judgment of the trial court.

#### FACTS

In the early morning hours of May 15, 1993, William Fred Henderson stabbed his wife, Cheryl Henderson. Henderson testified that he killed his wife as a result of a confrontation that occurred in the heat of passion, which concerned where she had spent the evening. He acknowledged becoming increasingly angry as the evening waned, and his wife had not come home. When Mrs. Henderson arrived home, around 1:30 a.m., Henderson confronted her, asking her where she had been. Mrs. Henderson told him she had been at the beauty salon. Prior to her arrival, Henderson had already telephoned the hairdresser and found out that Mrs. Henderson had left some time before. Mrs. Henderson called the hairdresser and asked her to tell Henderson that she had just left. Mrs. Henderson handed Henderson the telephone then ran into the bathroom and locked the door. Briefly, Henderson spoke to the hairdresser, but discarded the phone to pursue Mrs. Henderson in the bathroom.

Henderson yelled for Mrs. Henderson to open the door, but she refused. She told him that she knew that he was upset and she wished to avoid a confrontation. Henderson then knocked in the bathroom door and attacked his wife. He stabbed her several times about her body, including two times in the head and three times in the upper region of her left chest area.

Henderson claims to have "blacked out" during the attack and was unable to recall the event or any events that immediately followed the incident. However, he does remember calling his mother's home three separate times after the stabbing and speaking with his sister on each occasion. During the final call, Henderson told his sister that he had just killed his wife and was going to kill himself. Henderson testified that after hanging up the phone, he attempted to commit suicide by injuring himself with the knife. Both of the Hendersons were found lying in the floor of the apartment when Henderson's sister and the police arrived. Mrs. Henderson was pronounced dead at the scene, and Henderson was taken to the hospital.

Later, Henderson gave the police a signed confession, admitting that he had killed his wife. He was charged and indicted pursuant to section 97-3-19, of the Mississippi Code, for the murder of Cheryl Henderson. On July 29, 1993, the court set October 25, 1993, as the date for trial. On October 20, 1993, Henderson moved the court for a continuance. The court denied this motion, ruling that the case scheduling order, dated July 29, 1993, set forth the trial date in sufficient time to allow counsel to prepare for trial. On October 25, the day of trial, Henderson moved for a mental evaluation, pleading his lack of recollection of the murder. After a hearing on the motion, it was denied by the court. The jury convicted Henderson of murder and sentenced him to life imprisonment. After Henderson's post trial motions were denied, he perfected this appeal.

## I.

### THE TRIAL COURT ERRED IN REFUSING TO GRANT HENDERSON'S MOTION FOR A DIRECTED VERDICT, PEREMPTORY INSTRUCTION, JNOV, OR ALTERNATIVELY, A NEW TRIAL.

Henderson contends that the verdict was contrary to the law and the evidence presented. Specifically, he contends that the trial judge should have granted him a directed verdict, peremptory instruction, JNOV, or new trial pursuant to the "Weathersby Rule." Henderson challenges the sufficiency of the evidence, alleging the trial judge erred in denying his motion for directed verdict, peremptory instruction, or JNOV. The standard of review for such a challenge can be found in *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993):

[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 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. (citations omitted).

The facts and evidence of this case are that Henderson stabbed his wife after she returned home in the early morning hours of May 15, 1993. Henderson, the only living witness to this incident, claims that he killed his wife in the heat of passion. He claims that he did not intend to kill his wife but did so while in a state of mental "black out." He presented no evidence of the alleged "black out" other than his testimony.

Henderson relied on a heat of passion defense, and in his post-trial motions he asked the trial court to set aside the jury's conviction based upon the "Weathersby Rule." Under the "Weathersby Rule" "where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge." *Weathersby v. State*, 165 Miss. 207, 209 (1933). Henderson acknowledged stabbing his wife. However, he claimed that he did so in the heat of passion, and had no memory of

actually stabbing her. He failed to provide collaboration for that testimony. He did not provide medical testimony to substantiate the actual existence of any deteriorated mental state.

The State presented evidence of Henderson's mounting anger at his wife for her late arrival home as well as his discontent with her decision to initiate a divorce action against him the very next week. The State also presented evidence that Henderson pursued his wife in the bathroom and kicked the door in after she locked herself in to avoid a confrontation. In the face of the State's evidence, Henderson's version was both contradicted and unreasonable.

Under our standard of review we are required to give the prosecution the benefit of all favorable inferences that may be reasonably drawn from the evidence presented. Having done so we find that the trial judge did not err by denying Henderson's post-trial motions. Further, we find that the evidence was sufficient as a matter of law for Henderson's conviction of murder, and the jury's verdict was not against the overwhelming weight of the evidence.

## II.

### THE TRIAL COURT ERRED BY GRANTING THE STATE'S JURY INSTRUCTION S-3A OVER HENDERSON'S OBJECTION.

Henderson argues that the trial court should not have allowed the jury to consider the State's jury instruction S-3A that provided:

The court instructs the jury that you may consider a second form of murder while you are deliberating your verdict. If you find from the evidence beyond a reasonable doubt that the Defendant, William F. Henderson, did on or about the 15th day of May, 1993, unlawfully, wilfully and feloniously kill Cheryl Henderson, a human being, by stabbing her to death while acting in a manner eminently dangerous to another or others, and evincing a depraved heart, without regard for human life, even though he may not have had any premeditated design to effect the death of Cheryl Henderson, then you shall find the Defendant guilty as charged.

Henderson contends that the court's granting of jury instruction S-3A eliminated manslaughter from the jury consideration. We find this contention to be without merit. The trial court granted instruction S-4, which was a manslaughter instruction. Clearly, the jury received instructions that encompassed each theory alleged in the killing of Cheryl Henderson. Ultimately, the jury weighed the evidence and returned a verdict of murder.

## III.

### THE TRIAL COURT ERRED BY DENYING HENDERSON'S MOTION FOR A CONTINUANCE.

Five days prior to the date set for trial, Henderson moved for a continuance. The trial court denied the motion and ordered the trial to begin on the date set in the scheduling order, which had been entered at least two and one-half months prior to the scheduled date of trial. Henderson now alleges

that it was an abuse of discretion by the trial judge not to grant the motion.

Whether to grant or deny a motion for a continuance is within the sound discretion of the trial judge. *Fisher v. State*, 532 So. 2d 992, 998 (Miss. 1988). In the present case, the trial judge conducted a hearing on the motion and determined that the defendant had had ample time to prepare for trial. The judge took into consideration that the scheduling order established on July 29, 1993, set the trial for October 25, 1993. The court also found that the defendant had been given full discovery, including the names of various witnesses, and had had ample time to interview those witnesses. Finally, it was the court's determination that justice would best be served by going ahead with the trial. We find no abuse of discretion in the court's determination.

#### IV.

#### THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR A MENTAL EXAM.

On the day of trial, Henderson filed a motion for a mental exam. After a hearing on the motion, the court denied it citing Henderson's untimeliness in filing the motion as one reason. The court also determined that Henderson understood the court's instructions and from the court's observation was capable of going forward with his defense. It is noteworthy that Henderson failed to provide any testimony that he was not capable of participating in his defense, nor did he introduce any other evidence of such inability. Our supreme court has said that, "if the trial court is of the opinion, after weighing the evidence both for the state and the defendant, that there is not sufficient proof to show a probability that the defendant is incapable of conducting a rational defense, he should make such finding a matter of record. The case may then proceed to trial on the merits." *Emanuel v. State*, 412 So. 2d 1187, 1188 (Miss. 1982). The trial judge in the present case made the requisite finding on the record and we find no reason to disturb that finding.

#### V.

#### THE COURT ERRED IN ALLOWING THE TRIAL TO PROCEED WITH ONLY FOUR BLACKS ON THE JURY IN VIOLATION OF THE SIXTH AMENDMENT.

Henderson attempts to raise a *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) issue but concedes that no such issue was raised during trial. He is now barred from raising that issue for the first time on appeal. "[T]he failure of defense counsel to timely object to the State's peremptory challenges bars later attempts to advance that claim on appeal." *Thomas v. State*, 517 So. 2d 1285, 1286 (Miss. 1987).

#### VI.

#### THE INDICTMENT CHARGING THE DEFENDANT WAS FATALLY FLAWED IN THAT JURISDICTION WAS NOT ALLEGED IN THE INDICTMENT.

Henderson contends that the indictment charging him was fatally flawed, because it omitted the words "in the county aforesaid" after the allegation of the crime; therefore, the venue of the crime

was not alleged. We find no merit in this claim since the county was given in the caption of the indictment the jurisdiction was sufficiently alleged. *See Temple v. State*, 73 So. 2d 174, 175 (Miss.1954). We affirm.

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

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**