

IN THE COURT OF APPEALS 3/25/97

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01326 COA

JEANETTE CARTER

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. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT

FOR APPELLANT:

LONI EUSTACE-MCMILLAN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT T. ALLRED III

DISTRICT ATTORNEY: FRANK CARLTON

NATURE OF THE CASE: CRIMINAL- MANSLAUGHTER

TRIAL COURT DISPOSITION: MANSLAUGHTER: SENTENCED TO 10 YRS IN MDOC AND
PAY COURT COSTS IN THE AMOUNT OF \$1,139.00

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

BRIDGES, C.J., FOR THE COURT:

Jeanette Carter was convicted of manslaughter on September 29, 1993, in the death of her estranged husband, Larry Carter. Larry died on November 28, 1992, after being stabbed numerous times by Jeanette with a fillet knife. Jeanette appeals arguing 1) discovery violations 2) that the verdict was against the overwhelming weight of the evidence, and 3) that she was denied her right to effective assistance of counsel. Finding no merit in any of Jeanette's issues, we affirm her conviction.

FACTS

On the night he was killed, November 28, 1992, Jeanette and Larry had been married for about eight years and separated for more than one. Jeanette had been living in the marital home near Sunflower, Mississippi. Larry had been living nearby with his sisters Patricia and Gloria. On the night of his death, Larry came to Jeanette's house, where she had been watching television with her boyfriend and cousin, and tried to persuade Jeanette to let him in by pounding on the door. Jeanette and her cousin refused to let Larry in and called the police.

Shortly thereafter, Larry damaged Jeanette's car by denting the fender and cracking the windshield. Jeanette fired three shots with a gun she had in the house. The order of these events is unclear. Furthermore, Jeanette stated that she was not firing the gun in Larry's direction. Larry then left, and a Sunflower Police officer arrived at Jeanette's residence. After observing the damage to her car, the officer reported the problem to the local sheriff because the house was out of his jurisdiction.

Jeanette, upset about the damage to her new car, decided to go to Larry's house to confront him. She took a fillet knife with her. Once inside Larry's house, Jeanette and Larry got into a physical altercation after Jeanette pushed Larry down. Jeanette stabbed Larry while the two were inside the house. The fight moved outside when Jeanette apparently attempted to leave. Larry followed her outside, carrying an eggbeater. The two struggled again outside and Larry was again stabbed by Jeanette. At this point, Jeanette left the scene, and Larry went inside his house. Larry later died of his stab wounds. Jeanette was charged with Larry's murder and was convicted of manslaughter.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE INTRODUCTION AND USE OF ITEMS NOT TIMELY PRODUCED IN DISCOVERY BY THE STATE.

Jeanette argues on appeal that she was denied a fair trial when the court allowed the introduction of certain items into evidence that had not been produced by the State until just before or just after the beginning of trial. Jeanette alleges these actions violate of Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice. The five items that are in question are:

1. a crime lab report

2. some of Larry's emergency room records
3. a 1992 complaint filed by Jeanette at the sheriff's office
4. two photographs of Jeanette's damaged car
5. the egg-beater held by Larry during the altercation

Of these items, the first three were not admitted into evidence and, therefore, were not prejudicial to Jeanette. The last two items, however, were introduced into evidence.

Our supreme court has opined that:

Rule 4.06 serves two dissimilar purposes. The first is to give the defendant an opportunity well in advance of trial to learn all evidence the State is going to offer in support of its case. Whatever evidence the State proposes to offer to convict him, he is entitled to discover well in advance of trial. This is to prevent surprise, or "trial by ambush."

The other purpose is quite different. The defendant is also entitled to examine and get a copy of any material which would tend to prove him innocent.

Gallion v. State, 517 So. 2d 1364, 1370 (Miss. 1987). With these purposes in mind, we can address the propriety of the introduction of the pictures and the egg-beater.

The prosecution did not become aware of the pictures of Jeanette's car until the day after the trial started. The pictures were brought to the attention of defense counsel. The trial judge then excluded the pictures because they had been discovered late and because they were of questionable probative value in light of the testimony already elicited at trial. During cross examination, Jeanette testified that Larry had completely broken her windshield to the point of broken glass being thrown on her front seat. At this point, the State had to admit the photographs into evidence to show that the break in the windshield was only a "peck." The *Gallion* case also involved the introduction of pictures to rebut conflicting testimony about the content of the pictures. *Gallion*, 517 So. 2d at 1366. After an appeal similar to Jeanette's was made by Gallion, the supreme court said:

No accused should be permitted to deliberately mislead the jury when he knows precisely that the State has in its possession evidence to contradict him, and not expect the State to offer such evidence before the jury. This was clearly rebuttal evidence under the circumstances of this case. Rule 4.06 is not a constitutional guaranty, and it should not be stretched to proportions now argued by Gallion.

We adopt the reasoning of the supreme court as it relates to this case. The defense had an opportunity to view the pictures and to prevent their being brought into evidence. The defendant's own statements required the admission of the pictures. We find no error in the trial judge's reconsideration of the probative value of the pictures upon the creation, especially by the defendant, of a factual question with regard to their content.

We also find no error in the admission of the egg-beater into evidence. The defense had anticipated the egg-beater's part in this trial because it had purchased an identical one before trial for use in place of the original. Furthermore, the defense did not object when the State had the original egg-beater admitted into evidence after it had been retrieved by one of the witnesses. There was no surprise or ambush regarding this evidence. In light of this, we cannot find the admission of the egg-beater into evidence to be reversible error. We find no merit in Jeanette's first issue.

II. WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Where the defendant contends that a new trial should have been granted because the jury verdict was against the weight of the evidence, the standard of review is as follows:

The challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. Procedurally such challenge necessarily invokes [Mississippi Uniform Criminal Rule of Circuit Court Practice] 5.16. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

McClain v. State, 625 So. 774, 781 (Miss. 1993). All matters concerning the weight and credibility of the evidence are resolved by the jury. *Id.*

The Supreme Court of Mississippi eloquently condensed this standard stating:

[O]nce the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part from that [sic] the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty.

Williams v. State, 463 So. 2d 1064, 1068 (Miss. 1985). Our review of the record in this case reveals evidence overwhelmingly in support of the jury's verdict. The jury was clearly entitled to believe the witnesses' testimony that Jeanette stabbed Larry numerous times. The jury's verdict of conviction of manslaughter when confronted with a murder indictment clearly shows that the jury heard and understood any evidence that would mitigate Jeanette's acts. We refuse to overturn this well supported verdict. We find no merit in Jeanette's second issue.

III. WHETHER THE DEFENDANT WAS DENIED HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

With respect to a claim of ineffective assistance of counsel, the Mississippi Supreme Court has stated:

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), the United States Supreme Court established a two-prong test, required to prove the ineffective assistance of counsel: the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense The burden of proof then rests with the movant

Under the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." . . . In short, defense counsel is presumed competent.

Under the second prong, even if counsel's conduct is "professionally unreasonable," the judgment stands "if the error had no effect on the judgment." . . . Consequently, the movant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome."

Handley v. State, 574 So. 2d 671, 683 (Miss. 1990) (quoting *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988)). Having stated the relevant standard, we now turn to Jeanette's specific contention.

Jeanette claims that her trial counsel was ineffective because of his failure to inject into the trial evidence of Jeanette's suffering from battered spouse syndrome. We find that trial counsel's actions were clearly strategic and, therefore, justified. We further find that Jeanette's claim does not overcome the strong presumption of counsel's competence. Finding no merit in this or any of the issues raised by Jeanette on appeal, we affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF SUNFLOWER COUNTY OF CONVICTION OF MANSLAUGHTER AND SENTENCE TO TEN (10) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO SUNFLOWER COUNTY.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.