

IN THE COURT OF APPEALS 09/17/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01271 COA

SARAH P. DALIL

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. HOWARD Q. DAVIS, JR.

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ALSEE MCDANIEL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: FRANK CARLTON

NATURE OF THE CASE: CRIMINAL: MURDER

TRIAL COURT DISPOSITION: GUILTY VERDICT; SENTENCED TO LIFE IMPRISONMENT

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

SOUTHWICK, J., FOR THE COURT:

Sarah Dalil was convicted of murder and sentenced to serve life in prison. She appeals her conviction, challenging the weight and sufficiency of the evidence and contending that the trial court erred in refusing an instruction concerning "excusable homicide." We affirm.

FACTS

Dalil and a friend were patrons in a bar in 1991, when the victim in this case became involved in an argument with them. Dalil left the bar, leaving the victim and the friend embroiled in a fist-fight. When Dalil returned, she pulled a gun and, aiming at the victim, pulled the trigger. The bullet from Dalil's gun struck the victim in his head. He ultimately died after Dalil had fled the scene.

DISCUSSION

1. Weight & Sufficiency of the Evidence

Our standard for reviewing challenges to convictions based on sufficiency of the evidence is well established. As to each element of the offense, we consider all of the evidence in the light most favorable to the verdict. We reverse when, with respect to an element of the offense charged, the evidence 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). As to whether the verdict is contrary to the overwhelming weight of the evidence, a similar standard is employed. We view the evidence in the light most favorable to the verdict. The trial court is given discretion to order a new trial in the face of overwhelming evidence contrary to the jury's verdict to prevent an unconscionable injustice. *McClain*, 625 So. 2d at 781 (citation omitted).

As to the charge of murder in this case, the prosecution had the burden of proving three elements beyond a reasonable doubt: (1) venue; (2) a killing of a human being; and (3) a "deliberate design" to kill. Miss. Code Ann. § 97-3-19(1) (1972). These elements were well proved at trial. Dalil's victim was at a club in Sunflower County celebrating his birthday. Dalil and her niece were also at the club. The niece and the victim became involved in a heated argument that turned violent. Before the argument, Dalil had left the club. She returned with her gun when she learned of the fight. While only one witness testified that Dalil appeared to select the best place to get a clear shot at her victim, all of the occasion witnesses, except Dalil, testified that Dalil deliberately aimed her gun directly at her victim's head. Finally, the victim's death was proved,¹ and a pathologist testified that the path of the bullet in the victim's brain indicated that Dalil's gun was held pointing directly at the victim's head.

Dalil's main contention on appeal is that the State failed to present sufficient evidence to prove intent. On this point, we find the supreme court's opinion in *Shive v. State*, 507 So. 2d 898, 900 (Miss. 1987) to be instructive.

[The issue of intent] was an issue for the jury to resolve. In *Shanklin v. State*, 290 So. 2d 625 (Miss. 1974), we said:

Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case. The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent.

Shanklin, at 627. Too, criminal intent may be proved by circumstantial evidence. *Stinson v. State*, 375 So. 2d 235 (Miss. 1979). Intent may be determined from the acts of the accused and his conduct and inferences of guilt may be fairly deducible from all the circumstances. *Newburn v. State*, 205 So. 2d 260 (Miss. 1967).

Shive v. State, 507 So. 2d 898, 900 (Miss. 1987). We hold that there is ample evidence in the record from which the jury could infer the requisite intent to find Dalil guilty of murder. Except for Dalil herself, all of the witnesses who testified about the matter stated that Dalil aimed her gun directly at her unarmed victim. The witnesses universally testified that the altercation between the victim and Dalil's niece had ceased when she aimed her gun. In addition, there was no evidence that Dalil was in any imminent danger or presented with any other circumstance that might negate or militate against an inference of intent.

2. *Refused Instruction*

At trial, Dalil offered the following instruction:

The killing of a human being is an excusable homicide if

1. Defendant's act which caused the death of [the victim] was the result of an accident and misfortune, in the heat of passion, upon sudden and sufficient provocation, [or]
2. [The victim's] death was caused by the accidental shooting of him while Sarah P. Dalil was attempting to shoot in the air above decedent's head in an effort to stop[] what she believed to be an assault upon [her friend] by the decedent . . . , then the homicide is excusable.

If the killing of [the victim] was excusable, it is immaterial whether Sarah P. Dalil had ill will or malice toward [the victim and] then your verdict shall be for the defendant.

Dalil argues that, by refusing this instruction, the trial court deprived the jury of the opportunity to find her not guilty of murder, yet guilty of manslaughter. The instruction appears to be an effort to track the language of section 97-3-17 of the Mississippi Code which defines excusable homicide as:

The killing of any human being by the act, procurement, or omission of another shall be excusable:

- (a) When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent;
- (b) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation;

(c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.

Miss. Code Ann. § 97-3-17 (1972).

We conclude that Dalil's position is without merit and that the trial court correctly refused the instruction. Among other defects, the instruction is simply without evidentiary support. In the absence of such support, Dalil was not entitled to the instruction she requested. *See Payton v. State*, 642 So. 2d 1328, 1335-36 (Miss. 1994). No witness—not even Dalil—testified to any circumstances supporting a heat of passion or provocation instruction. The supreme court has defined "heat of passion" as:

In criminal law, a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

Buchanan v. State, 567 So. 2d 194, 196 (Miss. 1990). Even when cast in the light most favorable to Dalil, no testimony supports the conclusion that Dalil killed in the heat of passion.

Moreover, there was no testimony supporting the notion that the gun was fired by accident, using usual and ordinary caution during the commission of a lawful act. *See O'Bryant v. State*, 530 So. 2d 129, 133-43 (Miss. 1988). Dalil admitted that she closed her eyes when she shot her pistol in a crowded bar. In addition, there was no evidence that Dalil was engaged in a lawful act when she fired her gun. Assuming without deciding that the proffered instruction's attempt to present a killing in defense of another defense was adequate, there was no evidence to support such a theory. All of the witnesses, including Dalil, testified that the altercation between her victim and her niece was over by the time the shot was fired. There is no indication in the record that Dalil could reasonably perceive that her niece was in danger of death or serious bodily harm that justified the use of deadly force. *See Newman v. State*, 222 Miss. 660, 671-72, 77 So. 2d 282, 284 (1955) (holding that killing in defense of another is examined by placing accused in shoes of the one defended); *see also Hughes v. State*, 420 So. 2d 1060, 1062 (Miss. 1982) (explaining elements of self-defense).

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

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

