

IN THE COURT OF APPEALS 11/12/96
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00736 COA

ALTON JAMES TERRY

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. JERRY OWEN TERRY SR.

COURT FROM WHICH APPEALED: HANCOCK COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES G. TUCKER III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL: MANSLAUGHTER

TRIAL COURT DISPOSITION: MANSLAUGHTER: SENTENCED TO SERVE A TERM OF 20
YRS IN THE CUSTODY OF THE MDOC

BEFORE FRAISER, C.J., BARBER, PAYNE, AND SOUTHWICK, JJ.

PAYNE, J., FOR THE COURT:

A jury in the Circuit Court of Hancock County found Alton James Terry guilty of manslaughter. Terry was sentenced to twenty years in the custody of the Mississippi Department of Corrections. Terry appeals arguing: (1) that the circuit court did not have jurisdiction; (2) that autopsy photos were too gruesome to show the jury; and (3) that the State drew attention to his failure to testify. Finding no error, we affirm Terry's conviction and sentence.

STATEMENT OF THE FACTS

The victim, Junell George, was a seventeen-month-old toddler who was killed on August 25, 1992. Junell lived with her mother, Tanya George, and her mother's boyfriend, Alton Terry, in the home of Terry's mother, Mary Terry. Terry and Tanya's infant son, Alton, Jr., also lived with the couple. At noontime on August 25, Tanya George was unable to awaken Junell and discovered the child was cold.

The testimony revealed that Terry was last to be with the child during the late hours of August 24 and/or the early morning hours of August 25. Terry gave several statements to police in which he acknowledged that Junell hit her head on the wall while they were playing, that he had struck Junell on the back of the head when she was shaking her brother's crib, and that a blow to her chest may have been harder than he realized. Terry admitted in one of his statements that he hit Junell hard enough to daze her, and with enough force to have her fall back against the wall and hit her head on the wall.

Dr. Paul McGarry, a forensic pathologist, testified as an expert for the State. Dr. McGarry performed an autopsy on Junell and testified that her injuries involved the head, the lower front of the chest and the upper stomach region, and smaller injuries over the face and right arm. Dr. McGarry testified that the child's fatal injury was a ruptured liver which resulted from a hard blow to the lower part of her chest.

The jury found Terry guilty of manslaughter, and the trial court sentenced Terry to twenty years in the custody of the Mississippi Department of Corrections.

ARGUMENT AND DISCUSSION OF THE LAW

I. THE CIRCUIT COURT DID NOT HAVE JURISDICTION BECAUSE THERE WAS NO RECORD OF TRANSFER OF JURISDICTION FROM THE YOUTH COURT.

Terry argues that there should be some record of how the circuit court acquired jurisdiction of this cause because at the time of the toddler's death Terry was seventeen years old. Terry argues that the record fails to disclose any record of a transfer hearing or an order transferring jurisdiction from the youth court to the circuit court. Terry relies upon section 43-21-157 of the Mississippi Code

particularly emphasizing subsection (6)(f) which requires:

(6) If the youth court transfers jurisdiction of the alleged offense to a criminal court, the youth court shall enter a transfer order containing:

(f) *A designation of the alleged offense transferred and of the court to which the transfer is made and a direction to the clerk to forward for filing in such court a certified copy of the transfer order of the youth court.*

Miss. Code Ann. § 43-21-157 (1972) (emphasis added). Terry concludes that this statute mandates that the transfer order be forwarded for filing in the circuit court.

Upon review of the record, we find that the State supplemented the record to include the transfer order which Terry complains is absent. This "Order to Transfer" is dated September 8, 1992, and the document indicates that it was filed with the clerk of the Circuit Court of Hancock County on September 9, 1992. Terry's argument that the circuit court lacked jurisdiction is not supported by the record. We find this assignment of error is without merit.

II. THE TRIAL COURT ERRONEOUSLY ALLOWED GRUESOME AUTOPSY PHOTOGRAPHS INTO EVIDENCE.

Over Terry's objection, the trial court allowed autopsy photographs of the toddler's skull and abdominal cavity to be entered into evidence and shown to the jury. Terry argues that the

photographs were too gruesome to be submitted to the jury. Terry asserts that the probative value of the photographs was outweighed by the risk of unfair prejudice pursuant to Mississippi Rule of Evidence 403. However, Terry concedes the autopsy photographs corroborate the testimony of the pathologist who described Junell's injuries. Terry concludes that the admission of the autopsy photographs requires a new trial.

The admissibility of photographs is within the discretion of the trial court. *Westbrook v. State*, 658 So. 2d 847, 849 (Miss. 1995); *Hurns v. State*, 616 So. 2d 313, 319 (Miss. 1993) (citations omitted). The Mississippi Supreme Court has held that "[a] photograph, even if gruesome, grisly, unpleasant, or even inflammatory, may still be admissible if it has probative value and its introduction into evidence serves a meaningful evidentiary purpose." *Noe v. State*, 616 So. 2d 298, 303 (Miss. 1993). In *Westbrook*, the court held:

Photographs have evidentiary value where they: 1) aid in describing the circumstances of the killing and the corpus delicti; 2) where they describe the location of the body and cause of death; and 3) where they supplement or clarify witness testimony.

Westbrook, 658 So. 2d at 849 (citations omitted). While the photographs are indeed graphic, they are not overly gruesome or inflammatory. As Terry concedes, the photographs corroborate the testimony of the pathologist. We find that the photographs were relevant and had probative value to assist Dr. Paul McGarry, the forensic pathologist, in his explanation to the jury of the nature and extent of the injuries suffered by Junell. We find that the trial court did not abuse its discretion in allowing the photographs to be entered into evidence. Therefore, we reject this assignment of error.

III. THE STATE IMPROPERLY COMMENTED ON TERRY'S FAILURE TO TESTIFY.

Terry argues that the State improperly commented on his failure to testify at trial. Quoting from the record with his own emphasis added, Terry points to the following statement by the State during closing argument:

What have we got? We've got an eighteen month old child that's died. She's died of a fractured skull, bruises on her forehead, a ruptured liver. There's only one person that could have caused that. *The only evidence before you as to the cause of these injuries is that that man right there did it, Alton Terry.*

Terry asserts that this argument requires this Court to reverse his conviction.

The State first argues that Terry's assignment of error is not properly before this Court, and he is procedurally barred from claiming that the prosecutor commented on his failure to testify because no contemporaneous objection was made, and the trial court was not given the opportunity to address this alleged error. We agree. Recently, the Mississippi Supreme Court declined to continue its practice of overlooking a procedural bar where the error is a comment on the defendant's failure to testify. *Blue v. State*, 674 So. 2d 1184, 1213 (Miss. 1996). In the present case, Terry failed to contemporaneously object to the prosecutor's argument. Thus, this issue is procedurally barred. *Id.*

Alternatively, we will address the merits of Terry's argument. "[A]lthough it is error to comment on the accused's failure to testify, it is not error to comment on the defense's failure to offer any evidence whatsoever to counter or explain the [S]tate's evidence." *Lee v. State*, 435 So. 2d 674, 678 (Miss. 1983). In *Lee*, the defense chose not to present any evidence at all. *Id.* During closing arguments, the prosecutor stated, "It's undisputed that these defendants did have possession of these drugs." *Id.* at 677. The prosecutor went on to state three facts concluding after each that it was "undisputed." *Id.* On appeal, the court held that "no error was committed when the prosecutor commented on the defense's failure to dispute the [S]tate's evidence." *Id.* at 678.

We are presented with essentially the same type of comment in the present case, albeit a singular, rather than multiple, reference. We find that the prosecutor was simply commenting on the State's evidence, and the argument was not error. Thus, this issue is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED.

ALL COSTS OF THIS APPEAL ARE TAXED TO HANCOCK COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.