

IN THE COURT OF APPEALS 04/23/96
OF THE
STATE OF MISSISSIPPI
NO. 92-KA-01294 COA

MICHAEL ANGELO PATTON

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. KOSTA V. VLAHOS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JIM DAVIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: MURDER

TRIAL COURT DISPOSITION: FOUND GUILTY OF MANSLAUGHTER AND SENTENCED
TO SERVE SIXTEEN (16) YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

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

BRIDGES, P.J., FOR THE COURT:

The Appellant, Michael Angelo Patton, was indicted for murder in Harrison County, Mississippi. At trial, the jury acquitted the Appellant of the murder charge, but found him guilty of manslaughter. Patton was then sentenced to serve a term of sixteen years in the Mississippi Department of Corrections. Patton appeals his conviction and sentence claiming the following errors: 1) the lower court erred in not allowing testimony by Patton and two other witnesses

concerning the victim's propensity to kill; 2) the lower court erred in not allowing into evidence an out of court statement made by a witness who was also under indictment as accessory after the fact in the same crime; 3) the lower court erred in not giving proper jury instructions. Finding that all three of the issues raised by Patton are without merit, we affirm the judgment and sentence of the lower court.

FACTS

On January 3, 1991, the Appellant, Michael Angelo Patton (Patton), shot and killed Curtis Hilliard at the Edgewood Manor apartment building in Gulfport, Mississippi. At trial, a number of witnesses testified that Curtis Hilliard and Patton were involved in an argument after which Patton shot Hilliard in the chest. Patton claims that he shot Hilliard in self-defense because he thought Hilliard had a gun and was going to shoot him. From the testimony at trial by Patton and various eyewitnesses, this Court has adduced the following chain of events:

On the day in question, Patton and Jermille Johnson (Johnson) left the Edgewood Manor apartment complex to cash their pay checks and buy beer from a local convenience store.

At about 4:00 P.M., the victim, Curtis Hilliard and another gentleman approached the apartment building and parked their car nearby. The two men had been drinking all day, and Hilliard appeared to be in good spirits and somewhat intoxicated. Hilliard knocked on the door of a bottom floor apartment building and entered. The apartment belonged to Angela Joyce Thompson, Patton's girlfriend.

Patton testified that when he returned from the convenience store, his girlfriend told him that she and Hilliard had a confrontation. At this time, Patton left his girlfriend's apartment to go to

Johnson's apartment which was on the second floor. He testified that he was on his way up the stairs when he saw Hilliard and asked Hilliard to please stay away from his girlfriend's apartment. In response, Hilliard suggested he might harm Patton. Patton replied, "I told you to stay away from the house, I don't care what you do." Patton then testified that Hilliard said, "I'll be right back" and then Hilliard went to his car. Patton claims that he saw Hilliard reach under the seat, and stick something behind his back. Patton testified that he ran up the stairs to Johnson's apartment and asked for a gun. When Johnson was unable to provide a gun, Johnson and Patton went to another upstairs apartment which belonged to Demar Hardnet and asked to use the phone. Patton called 911 and told the operator that a man was outside with a gun, and that the man had pulled a gun on him. Patton stated at trial that after he made the phone call, he turned around and Johnson came out of one of the back

rooms of the apartment with a gun and a handful of shells. Another young man that was in the apartment at the time, opened the door to leave and found Hilliard standing at the door. Patton testified that when the door opened he heard Hilliard say, "M_ _ _ f_ _ _ , I got mine [gun] and you got yours, come on." Patton claims that he replied, "Look, I ain't going to worry with this, I'm going to let the police deal with it." Patton testified that at that point, Hilliard took about three steps down the stairs and made a motion with his right hand as if to reach behind his back. Patton stated that he then grabbed the gun from Johnson and shot Hilliard in the chest. Hilliard died at the hospital a little over an hour later.

Other eyewitnesses testified that they saw Hilliard knock on Patton's girlfriend's door and then start climbing the stairs toward the platform on which Patton and his friends stood. These witnesses testified that they never saw Hilliard reach the top of the stairs. These witnesses also stated that when Hilliard reached the fourth stair from the top, Patton said to Hilliard, "Man just wait a minute." These witnesses stated that Patton either turned to grab the gun or picked up the gun as it lay resting against the banister. According to these witnesses, Patton then made a step toward Hilliard. At this point, Hilliard saw the gun and made a motion as if to run. Patton then shot Hilliard. They did not see Hilliard make any overt movements as if to reach for a gun. The State presented testimony that there were no other weapons found at the scene of the crime except the gun used to kill Hilliard.

At trial, Patton never denied killing Hilliard, but claimed that he killed Hilliard in self- defense. Patton claims that he shot Hilliard because he was scared that Hilliard would shoot him first. According to Patton, Hilliard had a bad reputation in the community and was considered a violent individual. In attempting to prove Hilliard's reputation for violence, Patton sought to testify that he had witnessed Hilliard shoot a man, Tony Floyd, thirteen years previous to trial and that the incident had affected his state of mind at the time he shot Hilliard. He also tried to introduce the testimony of two other witnesses who also witnessed Hilliard shoot Tony Floyd. The trial judge refused to allow testimony of Tony Floyd's shooting by Hilliard into evidence. However, Patton was allowed to testify in front of the jury that three years previous to trial he had occasion to approach a car which Hilliard was driving and saw that Hilliard had a gun between his legs.

The jury convicted Patton of manslaughter, and he was sentenced to serve sixteen years in the Mississippi Department of Corrections. Aggrieved, Patton appeals to this Court.

ARGUMENT AND DISCUSSION OF LAW

I. WHETHER THE LOWER COURT ERRED IN REFUSING TO ALLOW THE WITNESSES TO TESTIFY AS TO THE VICTIM'S SHOOTING ANOTHER INDIVIDUAL THIRTEEN YEARS EARLIER.

In support of his theory of self-defense, Patton sought to introduce testimony from himself and two other witnesses of an incident in which Hilliard had shot another individual. The incident occurred thirteen years prior to trial. Patton attempted to introduce testimony that he and the other witnesses had personally observed the shooting. Hilliard was indicted for this shooting, but the charges were later dismissed. The testimony was offered to prove Hilliard's reputation for violence and to prove that Patton had ample cause to believe that he was in imminent danger of being harmed by Hilliard. The judge disallowed the testimony stating that the thirteen years was too remote in time to be probative and would only serve to confuse and prejudice the jury. We hold that the trial judge ruled

correctly.

It is clear that prior to adoption of the Mississippi Rules of Evidence, testimony of specific instances of violence by the victim would have been inadmissible. *Berry v. State*, 455 So. 2d 774, 776 (Miss. 1984) (citations omitted). Presently, however, Mississippi Rule of Evidence 405(b) states:

In cases in which character or a trait of character of a person is an essential element of a charge claim or defense, proof may also be made of specific instances of his conduct.

M.R.E. 405(b). The new rule has affected previous case law. Now there may be limited and special circumstances in which the defendant *in the discretion of the circuit court*, would be able to introduce testimony of some specific acts of violence by the victim. *McDonald v. State*, 538 So. 2d 778, 779 (Miss. 1989). The evidence of the specific act will only be allowed if it can be shown that the defendant either saw the act himself or had knowledge of the act. *Id.*

The Appellant's proffered testimony showed that he had personal knowledge of the crime. However, cases now provide that evidence admissible under Rule 405 must independently pass muster under Rules 401-03. *Heidel v. State*, 587 So. 2d 835, 844 n.8 (Miss. 1991). When evidence is objectionable to on Rule 403 grounds, the court is required to apply a balancing test. *Foster v. State*, 508 So. 2d 1111, 1117 (Miss. 1987). Relevant evidence should not be admitted unless its probative value substantially outweighs the danger of prejudicing the jury, confusing the issues, misleading the jury, or wasting the court's time. *Id.* (Miss, 1987). The trial court has broad discretion in weighing the interests of the admissibility of relevant evidence. *Williams v. State*, 543 So. 2d 665, 677 (Miss. 1989). In addition, our supreme court has stated that threats, *which are not remote*, made against a defendant, and the conduct of the deceased *at, and within a reasonable time prior to the homicide*, are admissible to show who was the aggressor. *Evans v. State*, 457 So. 2d 957, 958 (Miss. 1984).

During the proffer of proof, Patton stated that he had seen the victim shoot another individual thirteen years prior to trial. After applying the balancing test, the trial judge concluded that the evidence sought to be introduced would unduly prejudice the jury. The judge in the lower court also stated that because the act occurred thirteen years prior to trial, the evidence was more prejudicial than probative.

Here, the trial judge weighed the probative value against the danger of unfair prejudice. He applied the proper balancing test and came to a valid conclusion. Since the trial judge has broad discretion in this matter, we cannot disturb his decision. This issue is without merit.

II. WHETHER THE LOWER COURT ERRED IN NOT ALLOWING THE STATEMENT JERMILLE JOHNSON MADE TO POLICE INTO EVIDENCE.

In further support of his theory of self-defense, Patton called Jermille Johnson to the stand. Johnson had been indicted as an accessory after the fact for the same crime since he allegedly hid the gun that

Patton used to shoot Hilliard. He also allegedly asked Demar Hardnet to flush the bullets from the gun down the toilet. At the time of trial of the case at hand, Johnson's case had not yet been tried. Johnson had made a statement to the police after the shooting, certain portions of which the defense claims would support Patton's theory of self-defense.

Once called to the stand by the defense, Johnson pleaded his Fifth Amendment privilege against self-incrimination to every question asked of him. As a result, defense counsel sought to have Johnson declared an unavailable witness and have the statement admitted under Mississippi Rule of Evidence 804(b)(3) as a declaration against interest. The trial judge would not allow the statement admitted under Rule 804(b)(3) because the statement was not a declaration against interest but a narrative of Johnson's perception of the events.

Mississippi Rule of Evidence 804(b)(3) reads as follows:

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

M.R.E. 405(b)(3).

At trial the judge decided, based on the circumstances in which the statement was made, that the statement was not a declaration against penal interest. He also found that no corroborating circumstances existed from which to conclude the statement was trustworthy. We believe that the judge acted correctly for the reasons cited by the judge in the record. This issue is without merit.

III. WHETHER THE LOWER COURT ERRED IN REFUSING TO GIVE INSTRUCTION D-7.

A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is fairly covered elsewhere in the instructions, or is without foundation in the evidence. *Jackson v. State*, 645 So. 2d 921, 924 (Miss. 1994) (citations omitted). When dealing with an issue of a refused jury instruction, as we are here, the trial court is afforded considerable discretion and our primary concern on appeal is that "the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it." *Splain v. Hines*, 609 So. 2d 1234, 1239 (Miss. 1992) (citing *Rester v. Lott*, 566 So. 2d 1266, 1269 (Miss. 1990)).

At the end of trial, but before jury deliberations, defense counsel asked the court to give jury instruction D-7 which read as follows:

The Court instructs the Jury that while the danger which justifies the taking of another's life must be imminent, impending, and present, that danger does not have to be unavoidable. Michael Angelo Patton need not have avoided the danger to his person presented by Curtis Hilliard by fleeing. As long as Michael Angelo Patton was in a place where he had the right to be, and was neither the immediate aggressor or provoker, Michael Angelo Patton may stand his ground without losing his right of self-defense.

The judge in the lower court refused to give this instruction over the objection of defense counsel. The lower court did, however, give other instructions concerning the theory of self-defense.

The Mississippi Supreme Court has articulated exactly what language should be used in a self-defense instruction. *Robinson v. State*, 434 So. 2d 206, 207 (Miss. 1983), *overruled in part on other grounds by Flowers v. State*, 473 So. 2d 164 (Miss. 1985). The "*Robinson* instruction" very clearly and comprehensively sets out the theory of self-defense. The Court in *Robinson* dealt with the issue of an instruction offered by the State and granted by the trial court. The supreme court proposed that the following instruction, instead of the one offered in the trial of *Robinson*, should

be used to present the self-defense theory to the jury:

The court instructs the jury that to make a killing justifiable on the grounds of self-defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to apprehend a design on the part of the victim to kill him or to do him some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the defendant acts.

Id.

Here, the trial court granted instruction C-2 which states:

The court instructs the jury that to make an assault justifiable on the grounds of self-defense, the danger to the defendant must be actual, present and urgent, or the Defendant must have reasonable grounds to apprehend a design on the part of the victim to kill him or to do him some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the Jury to determine the reasonableness of the ground upon which the defendant acts.

This instruction properly stated the theory of self-defense presented at trial. Instruction C-2 is essentially identical to the *Robinson* instruction and therefore properly set forth the Defendant's

theory of self-defense.

Moreover, there are numerous cases in Mississippi that have been reversed on the basis that misleading or confusing jury instructions were granted. *See, e.g., McCary v. Caperton*, 601 So. 2d 866, 869 (Miss. 1992); *Brazile v. State*, 514 So. 2d 325, 326 (Miss. 1987); *Holmes v. State*, 483 So. 2d 684, 686 (Miss. 1986). In the case at hand, this Court believes that giving jury instruction D-7 would have confused and misled the jury since the instruction is not applicable to the facts. There

was no evidence of an overt act of violence against the Defendant, Patton, or that the victim was the aggressor. The law was correctly stated by instruction C-2.

Therefore, this issue is without merit.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF SIXTEEN (16) YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED AGAINST HARRISON COUNTY.

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