

IN THE COURT OF APPEALS 04/23/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00100 COA

BETTY PITCHFORD A/K/A BETTY

JEANESE PITCHFORD

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. L. BRELAND HILBURN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DONALD BOYKIN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: PATRICIA BENNETT

NATURE OF THE CASE: CRIMINAL - CONSPIRACY TO COMMIT ARMED ROBBERY

TRIAL COURT DISPOSITION: GUILTY OF CONSPIRACY TO COMMIT ARMED
ROBBERY, SENTENCED TO FIVE (5) YEARS

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

DIAZ, J., FOR THE COURT:

Betty Pitchford was indicted, tried and convicted of conspiracy to commit armed robbery by the Circuit Court of Hinds County, Mississippi. She was sentenced to serve five (5) years in the Mississippi Department of Corrections. On appeal, Pitchford raises thirteen (13) issues. Finding merit to four of the assignments of error, we reverse and remand for a new trial.

FACTS

On October 20, 1993, Billy P. Whitner was fatally shot at the Holiday Motel in Jackson, Mississippi. Whitner, the victim of an attempted armed robbery, was shot twice with a .25 caliber pistol allegedly owned by Betty Pitchford. The weapon was recovered and Pitchford was arrested and charged with conspiracy to commit armed robbery. Pitchford was indicted by the grand jury on June 30, 1994.

At trial, the State's primary witness was Jerry Parker, a confessed co-conspirator to the armed robbery which resulted in the death of Whitner. Parker was offered a plea bargain to testify against Pitchford and he accepted. According to Parker's testimony, there were four (4) co-conspirators to the October 20, 1993 robbery. Parker named himself, Betty Pitchford, Samuel Rawls and Patricia Humphries as the conspirators.

Although many facts related by Parker were disputed at trial, Pitchford admitted to being in the motel parking lot the evening Whitner was killed and admitted to owning a .25 caliber weapon similar to the one involved in the crime. However, Pitchford denied any involvement in the alleged conspiracy to rob Whitner.

The jury found Pitchford guilty of conspiracy to commit armed robbery and sentenced her to serve five years in the custody of the Mississippi Department of Corrections.

ISSUES

1. Did the Trial Court Err in

Submitting Instruction S-6 to the Jury?

Pitchford argues that instruction S-6 should not have been granted by the trial judge. According to Pitchford, it was error for the trial court to comment on what the jury should consider in its deliberations. The State contends that the trial court is limited in this manner only when the defendant is the sole witness testifying to the facts. Instruction S-6 reads as follows:

"The Court instructs the jury that you are the sole judges as to the credibility of witnesses, and, in determining whether witnesses will be believed or not; you are not bound by the opinions of the

witnesses, but have the right to consider all the testimony of the case, the motives, and interest of any witness, the nature of his or her testimony, and all the facts in evidence."

We find this instruction should not have been given. An instruction such as S-6 is erroneous if the defendant is the only defense witness with an interest in the outcome of the case and the only defense witness testifying to the facts and circumstances surrounding the offense. *Yelverton v. State* 191 So. 2d 393, 395 (Miss. 1965), *Hall v. State*, 165 So. 2d 345, 350 (Miss. 1964). In the case *Sumrall v. State* the court held that when an accused takes the stand and he alone has an interest in the outcome of the case, an instruction commenting on the credibility and interests of the defendant is erroneous. *Sumrall v. State*, 343 So. 2d 481, 482 (Miss. 1977). Pitchford was the only witness for the defense to testify to the facts and circumstances of the crime charged and only Pitchford had an interest in the outcome of the case. Instructions such as S-6 have been consistently condemned when the defendant was the only witness called to testify in her behalf. *Yelverton*, 191 So. 2d at 395. Accordingly, this instruction was granted in error.

2. Did the Trial Court Err in Allowing the Jury to View a Photograph of the Deceased?

Pitchford argues that the jury was erroneously allowed to view Exhibit 7, a photograph of the deceased. Pitchford contends the picture was more prejudicial than probative and lacked any evidentiary purpose. The State counters that the photograph was necessary to corroborate Parker's testimony and that the trial judge did not abuse his discretion in admitting the photo.

Generally, the admissibility of photographs rests within the sound discretion of the trial judge. *McNeal v. State*, 551 So. 2d 151, 159 (Miss. 1989). However, if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice the photo will be excluded. *Kniep v. State*, 525 So. 2d 385, 388 (Miss. 1988).

This Court has examined the photograph in question. We find the photograph lacks any evidentiary purpose for proving the conspiracy charge. Although the State contends the photograph was necessary to corroborate Parker's testimony, we believe any probative value the photograph may have is outweighed by its tendency to unfairly prejudice Pitchford in the eyes of the jury. Furthermore, Pitchford stipulated that the victim was wearing a white tee shirt and white underwear which was Parker's testimony that the State wanted to corroborate. Pitchford was on trial for conspiracy, not murder, and the admission of the photograph was wholly unnecessary.

Accordingly, the judgment of the trial court is reversed on this issue.

3. Did the Trial Court Err in Allowing Dr. Hayne to Testify Concerning the Location of the Gunshot Wounds?

At trial, the court allowed Dr. Haynes' to testify concerning the location of the gunshot wounds to the victim. Pitchford argues that this testimony was prejudicial and lacked any probative value concerning the conspiracy charge. The State again contends the testimony was relevant to corroborate Jerry Parker's testimony and argues that Pitchford failed to demonstrate an abuse of discretion by the trial judge in admitting Dr. Haynes' testimony. Again, Pitchford was on trial for conspiracy to commit armed robbery. Testimony concerning the trajectory and location of gunshot wounds had little or no probative value in this trial.

As previously discussed, relevant evidence may be inadmissible when its probative value is outweighed by its tendency to mislead, confuse, or prejudice the jury. *Kniep*, 525 So. 2d at 388. We find no evidentiary basis for the admission of Dr. Haynes' testimony concerning the location of the gunshot wounds. We hold the trial court abused its discretion and erred in allowing the jury to hear this testimony.

4. Did the Trial Court Err in Denying Instruction D-6?

Pitchford contends that trial court erred by not granting instruction D-6 which instructed the jury not to consider the indictment as evidence of guilt. The State argues that the denial of D-6 is not reversible error because the content of the instruction was covered by another instruction.

Instruction D-6 reads as follows:

"Any indictment by the Grand Jury furnishes no evidence of the guilt of the Defendant. An indictment is merely an accusation; therefore, notwithstanding such indictment, the Defendant is presumed to be innocent of the charge, and unless the State has overcome this presumption beyond a reasonable doubt, you are on your oath duty-bound, to find the Defendant 'Not Guilty'. In other words, in arriving at your verdict, you cannot consider the mere existence of an indictment. Instead, you must consider only the law given you by the Court and the testimony which you have heard from the witness stand."

The record reveals the trial judge denied this instruction because he felt it went to the presumption of innocence which was covered by another instruction. Instruction D-7 instructed the jury as follows:

"The law presumes every person charged with the commission of a crime to be innocent. This presumption places upon the State the burden of proving the defendant guilty of every material element of the crime with which the defendant is charged. Before you can return a verdict of guilty, the State must prove beyond a reasonable doubt that the defendant is guilty. The presumption of innocence stays with the defendant throughout the trial and prevails at its close unless overcome by evidence which satisfies the jury of the defendant's guilt beyond a reasonable doubt. The defendant is not required to prove her innocence."

Presumption of innocence was properly instructed by D-7. However, Pitchford's assignment of error is based on the fact that the jury was not instructed how to treat the *indictment*. After reviewing the instructions granted, we can find no instruction which mentioned the indictment whatsoever. The record also reveals that the jury was allowed to take a copy of the indictment into the jury room during deliberations. When this is allowed, the jury should be instructed that the fact the defendant was indicted should not be considered as evidence of guilt. *Rainer v. State*, 438 So. 2d 290, 293 (Miss. 1983), *Wood v. State* 275 So. 2d 87 (Miss. 1973). The failure to instruct the jury that the indictment was not evidence coupled with the fact that the jury was allowed to take a copy to the jury room was also error.

CONCLUSION

Betty Pitchford was convicted of conspiracy to commit armed robbery on November 14, 1994. The granting of instruction S-6, the denial of a jury instruction concerning the indictment, and admitting prejudicial photos and testimony concerning gunshot wounds to the victim denied Pitchford her constitutional right to a fair trial. Due to the errors discussed above, we must reverse Pitchford's conviction and remand for a new trial.

THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY IS REVERSED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS. COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.

FRAISER, C.J., CONCURRING IN RESULT ONLY.

PAYNE, J., NOT PARTICIPATING.