

IN THE COURT OF APPEALS 04/23/96
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00080 COA

DOROTHY L. FRIEND

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. BARRY W. FORD

COURT FROM WHICH APPEALED: MONROE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

J. DUDLEY WILLIAMS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: JOHN R. YOUNG

NATURE OF THE CASE: CRIMINAL: MURDER

TRIAL COURT DISPOSITION: GUILTY VERDICT; SENTENCED TO LIFE IMPRISONMENT

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

SOUTHWICK, J., FOR THE COURT:

Dorothy Friend was convicted of murder and sentenced to life imprisonment. She appeals her conviction, challenging the correctness of a murder instruction. We affirm.

FACTS

Friend had engaged in continuous confrontations with her victim over a year in which the two lived in apartments in Amory. Friend had threatened to kill her victim and had purchased a pistol for the express purpose of completing the task. In December 1993, the victim was arguing with a woman while Friend watched. According to some witnesses, at some point during the argument, Friend began striking the victim with a stick and a fight ensued. All witnesses agreed that Friend ultimately shot and killed her victim. The prosecution presented testimony that Friend deliberately pulled out her pistol, took aim, and fired one shot into her victim's head. Friend testified that she had simply grabbed her gun from her pocket and that it had fired by accident.

The jury returned a verdict of guilty on the charge of murder, and the trial court sentenced Friend to serve a term of life in prison.

DISCUSSION

Friend's sole challenge to her conviction below rests on a claim that instructions given to the jury on murder were legally incorrect. Friend criticizes the following two instructions:

[W]hile malice aforethought is a necessary ingredient in the crime of murder, still malice aforethought means the same as killing a human being with the deliberate design to effect the death of the person killed; and, this malice aforethought and deliberate design do not necessarily mean hatred and ill will, and need not exist for any definite time, not for days or hours or even minutes, but if the deliberate design to kill is formed prior to the time the fatal wound was made, this is sufficient premeditation and deliberation to constitute the offense of murder.

If you find from the evidence in this case beyond a reasonable doubt that the deceased . . . was a living person, and . . . Friend, did wilfully and with malice aforethought kill [the deceased], without authority of law, and not in necessary self defense, or by accident, then you shall find . . . Friend, guilty of Murder. If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find the defendant not guilty of Murder.

Friend contends that there was reversible error because while one instruction requires a finding of the formation of "deliberate design" prior to infliction of the fatal wound, the instructions do not require prior formation of malice aforethought. Malice aforethought has been defined as a deliberate design. Therefore, by requiring the formation of a deliberate design prior to the killing, the instructions in this case also require prior formation of the synonymous malice aforethought. *Graham v. State*, 582 So.

2d 1014, 1018 (Miss. 1991) (citation omitted); *Johnson v. State*, 475 So. 2d 1136, 1139 (Miss. 1985). We conclude that, read as a whole, the instructions correctly express the law.

In addition, Friend argues that these instructions precluded a conviction of manslaughter rather than murder. The argument is based on the position that a killing in the heat of passion can arise from a quickly formed deliberate design to kill. Friend argues that the jury was required under these instructions to find her guilty of murder even if the deliberate design was one resulting from heat of passion. The initial problem with that argument is that there is no evidence of heat of passion. A manslaughter instruction was given to the jury that, if it concluded that there was an absence of proof beyond a reasonable doubt that malice aforethought existed and instead the killing was done in the heat of passion, then it could return a manslaughter verdict. Friend's testimony described an accidental killing, not a heat of passion one. She testified that she pulled the gun from her purse to scare the victim, but it accidentally discharged. Each of the relevant instructions informed the jury that Friend should not be convicted of murder or manslaughter if the shooting was accidental. We hold that the instructions accurately presented the theory of Friend's case to the jury, and there was no error.

THE JUDGMENT OF CONVICTION OF THE MONROE COUNTY CIRCUIT COURT 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 MONROE COUNTY.

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