

IN THE COURT OF APPEALS 05/21/96
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00040 COA

JASON WILLIAM AUSTIN

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. JAMES E. THOMAS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

H. M. YOSTE, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE LOWRY

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL-MURDER

TRIAL COURT DISPOSITION: SENTENCED TO LIFE IMPRISONMENT IN THE CUSTODY
OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., McMILLIN, AND PAYNE, JJ.

FRAISER, C.J., FOR THE COURT:

Jason William Austin (Austin) was tried and convicted of murder by a jury in the Harrison County Circuit Court. He was sentenced to life imprisonment in the custody of the Mississippi Department of Corrections. On appeal, he presents the following issue for consideration:

1. DID THE TRIAL COURT ERR IN REFUSING A LESSER INCLUDED OFFENSE INSTRUCTION OF MANSLAUGHTER IN AUSTIN'S MURDER TRIAL?

After careful consideration of the record and the appropriate law, we find no error in the trial court's decision refusing the lesser included offense instruction. We affirm.

FACTS

On the evening of June 13, 1993, fifteen-year-old Austin and his friend, eighteen-year-old Steve White, made plans to obtain marijuana from the victim, William Thiroux. The two originally planned to buy the marijuana, but before departing White's home, they decided to steal the marijuana instead. Not only did they plan to steal the marijuana, they planned to kill Thiroux in the process. Maria Ross, Austin's girlfriend at the time, testified that before the two left White's home, they picked out knives to take with them, cutting up cardboard to test the knives' sharpness. Ross, who was present at White's house with White and Austin, testified to the following events:

Q. On the thirteenth of June, Maria, over at Steven's house, did you overhear Steven and Jason talking about going to Billy's [Thiroux] house?

A. Yes.

Q. Tell the jury exactly what you overheard?

....

A. I heard Steve mention he wanted to go buy some weed from this old man in D'Iberville, and they -- Jason agreed to go with him.

Q. What else were they talking about?

A. Well, then, that was really all, was buying weed. And then they started talking about going to steal it from him.

Q. Where were they having this conversation?

A. In the living room.

Q. And where were you?

A. In the living room.

....

Q. What did Jason say about going with Steven to steal the weed?

A. He said he would do it.

Q. Okay. Did they say how -- did Jason or Steven either one say how they were going to steal it?

A. They -- both of them said they would just -- well, Steve said -- suggested that they just tackle him and beat him up first.

Q. Okay. And then what? And then did they change that plan later on?

A. Yes. Steve suggested that they kill him.

Q. That they what?

A. Kill him.

Q. Steve first suggested that?

A. Yes.

Q. And what did Jason say when Steven White suggested that they kill him to get the dope?

A. He agreed with him.

Q. How? I mean, what did he say, if you remember?

A. He said, okay, let's do it.

Q. Did either of them discuss how they were going to kill him?

A. Stabbing him.

Billy Thiroux died as the result of twenty-three stab wounds. While Austin did not testify at trial, his statement was admitted. In his statement, he said that White tried to cut Thiroux's throat, but his knife was too dull to inflict a wound. At that point, Thiroux grabbed a knife of his own and began wrestling with White. Austin stated that White called out for help and at that point he grabbed his own knife and began attacking Thiroux. Austin described how he killed Thiroux:

And we walked in there and whenever he went to slit his throat they started to fighting, whenever they started fighting Billy got real close to the couch he was fighting his way to get closer to the couch and he reached under there and it was a silver knife, it was metal, had like a silver, silver blade and the whole knife was silver, he grabbed it and started swinging it real wild, and then Steve, I heard Steve yell, stab him, stab him he's trying to kill me, he's got my knife, stab him, and so that's whenever I grabbed my knife, and I went up there and I was gonna use my knife, but I threw my knife down cause I seen that one that had the points on it and stuff, I grabbed it and I went to stab him in the back or somewhere in his rib area in the back and whenever I did that the knife bent, so I threw that one down and my knife was all the way across the other side of the floor, I walked over there, well really like I ran but it, it was kind of slow motion you know, grabbed the knife, I went up to him and I stabbed him so many times and I stopped.

As White and Austin fled Thiroux's house, he tried in vain to run after them but collapsed in his front yard. He was taken to the hospital where he later died. Two of Thiroux's friends witnessed the stabbing while standing outside the front window. Nancy Shoemaker and Janice Seymour were driving by Thiroux's house on the night of the murder and stopped when they saw two men wrestling. Shoemaker testified that at first she was unsure of the activity, but then realized that one of the men was making stabbing motions with a long knife. After the two women realized what was happening to their friend, they started honking their car horn and yelling in an attempt to bring the violence to a halt. White and Austin ran out of the house, got into their vehicle, and returned to White's house. Both were later arrested and tried separately.

At trial, Austin requested the following manslaughter instruction, D-6:

The court instructs the jury that manslaughter is the killing of a human being in the heat of passion, without malice, by the use of a dangerous weapon, without authority of law, and not in necessary self-defense; and if the jury believe from the evidence beyond a reasonable doubt that Jason William Austin so killed William Thiroux, then the jury will find the defendant guilty of manslaughter.

And in that event the form of your verdict will be: "We, the jury, find the defendant guilty of manslaughter." Writing your verdict on a separate piece of paper.

Manslaughter is defined by statute as "[t]he killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense. . . ." Miss. Code Ann. § 97-3-35 (1972). Austin

was indicted under section 97-3-19(1)(a) which states:

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being.

Miss. Code Ann. § 97-3-19(1)(a) (1972). On appeal, Austin claims that he killed Thiroux without malice or intent, and was therefore entitled to a manslaughter instruction. Unbelievably, Austin contends that his stabbing Thiroux twenty-three times with two separate knives was merely the youthful mistake of a confused kid. The law in Mississippi regarding lesser included offenses is well-established:

A lesser included offense instruction should be given, on request, "if a 'rational' or a 'reasonable' jury could find the defendant not guilty on the principal offense charged in the indictment yet guilty of the lesser included offense." "A 'lesser included offense' is defined as 'one composed of some, but not all, of the elements of the greater crime, and which does not have any element not included in the greater offense.'"

....

Before an instruction can be given, as a general rule it must be supported by the evidence otherwise, it should not be given.

Ballenger v. State, 667 So. 2d 1242, 1254-55 (Miss. 1995) (citations omitted). In the case sub judice, there is no evidence to support a manslaughter instruction. In order to prove absence of malice and intent, Austin relies on his statement to the police in which he said that he did not intend to kill Thiroux prior to doing it. However, the record is clear that Austin was not assaulted by Thiroux. He was not put in any danger by Thiroux, and there was no provocation on Thiroux's part toward Austin. Instead, Austin picked up a knife from the floor and began stabbing Thiroux. When the blade on that knife broke, Austin deliberately crossed the room and obtained a second knife and proceeded violently to stab Thiroux twenty-three times. Austin's acts were deliberate and intentional, without provocation or heat of passion. Austin went to Thiroux's house armed with a sharpened knife and with the preconceived plan to kill him. There was clearly no evidence upon which to grant a lesser included offense instruction of manslaughter.

The supreme court affirmed the denial of a lesser included offense manslaughter instruction in *Barnett v. State*, 563 So. 2d 1377, 1379 (Miss. 1990). In that case, Barnett and an acquaintance got into an argument over "who could whip the other." *Id.* at 1378. The victim pulled a knife out of his car, and Barnett went into his trailer home to procure a rifle. *Id.* Barnett exited his trailer with the rifle and then entered his father's trailer home to retrieve a bullet. *Id.* He came out of his father's trailer with the rifle loaded and shot the victim, who later died. *Id.* The court held that "[t]here simply is no evidence upon which any jury could rationally conclude that Barnett shot Harmon as a result of a provoked rage. There was no gross insult, and the two were not engaged in physical combat." *Id.* at 1379. The same is true in the case sub judice.

Austin confessed to stabbing Thiroux twenty-three times. In gruesome detail, he explained how he started with one knife, found it to be unsatisfactory, found a better knife, and finished the job. The trial court was correct in denying the manslaughter instruction because there was no evidence supporting Austin's theory that he killed Thiroux without malice and in the heat of passion. We affirm.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS TAXED TO HARRISON COUNTY.

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