

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00855 COA

JIMMY LEE AVERA

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:

JIM DAVIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED, III DISTRICT ATTORNEY: STEPHEN SIMPSON

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: DEFENDANT CONVICTED OF MURDER AND SENTENCED TO LIFE IN PRISON IN THE CUSTODY OF THE MISSISSIPPI DEPT. OF CORRECTIONS

MOTION FOR REHEARING FILED: 6/3/97

MANDATE ISSUED: 9/2/97

EN BANC

McMILLIN, P.J., FOR THE COURT:

Jimmy Lee Avera was convicted of murder by a jury in the Circuit Court of Harrison County. He appeals to this Court, raising six issues which he contends require his conviction to be reversed. We conclude that one of the issues raised has merit, and we reverse and remand.

The facts surrounding the violent death of the victim are largely irrelevant to the issue on which we reverse. Avera did not deny firing the fatal shot; rather, his defense was that he was temporarily insane when he shot his victim.

I.

The Insanity Defense Issue

Avera properly noticed the prosecution of his intention to offer an insanity defense, and both sides presented expert testimony on the issue. At the conclusion of the evidence, Avera requested an instruction concerning his insanity defense as numbered instruction D-11, the text of which is as follows:

If you find that the State has proved beyond a reasonable doubt all the essential elements of - MURDER- then you must find the Defendant was sane at the time of the commission of the offense you find to have been committed.

In order to prove the Defendant sane at the time of the commission of -MURDER-the State must prove beyond a reasonable doubt that at the time of the commission of -MURDER-, the Defendant had the mental capacity to realize and appreciate the nature and quality of his act and to distinguish between right and wrong with reference to the act he committed.

If after considering all of the evidence in this case you find the State has failed to prove beyond a reasonable doubt that the Defendant was sane at the time of the commission of -MURDER-, then your verdict must be NOT GUILTY BY REASON OF INSANITY.

The trial court refused the instruction, stating that the elements of the insanity defense were encompassed in a previous instruction, numbered S-1, which is quoted as follows:

The Court instructs the Jury that the Defendant, Jimmy Lee Avera, has been charged by an indictment with the crime of Murder for having caused the death of Tabitha Ann Sparks, with the deliberate design to kill Tabitha Ann Sparks.

If you find from the evidence in this case beyond a reasonable doubt that:

1. The deceased, Tabitha Ann Sparks was a living person; and,
2. The Defendant, Jimmy Lee Avera, did wilfully, feloniously, and without authority of law, kill Tabitha Ann Sparks, with deliberate design to effect the death of Tabitha Ann Sparks; and
3. *The Defendant had the mental capacity to realize and appreciate the nature and quality of his act and to distinguish between right and wrong with reference to the act he committed; and,*

4. The event occurred in the First Judicial District of Harrison County, Mississippi, on or about April 28, 1992, then you shall find the Defendant, Jimmy Lee Avera, guilty of Murder.

If the State has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find the Defendant, Jimmy Lee Avera, not guilty of Murder. (emphasis supplied).

The court further stated that instruction D-12, a form of the verdict instruction, included the possibility of a "not guilty by reason of insanity" verdict as one alternative for the jury.

This Court concludes that the jury, on these instructions, was not properly instructed as to how to resolve the insanity defense issue. While D-12 gave the proper form for a verdict based on that defense, there was no companion instruction informing the jury under what circumstances it could properly return such a verdict. Instruction S-1 did not rectify the situation. In fact, the direction to the jury contained in S-1 is, on its face, incorrect. The instruction breaks the elements of the crime down to four separate numbered elements. The third numbered paragraph of the instruction sets out the State's burden in regard to establishing the mental capacity of the defendant at the time the incident occurred, indistinguishable from any other element of the crime. The necessity of proving the defendant's mental capacity is not normally considered one of the elements of the State's proof. It arises solely when the defendant asserts an insanity defense and has met his initial burden "to introduce evidence creating a reasonable doubt as to his sanity at the time of the act." *White v. State*, 542 So. 2d 250, 252 (Miss. 1989). Otherwise, it would have been unnecessary to instruct the jury on this point since "[t]he defendant is presumed sane until a reasonable doubt of his sanity is created." *Davis v. State*, 551 So. 2d 165, 173 (Miss. 1989), *sentence vacated on other grounds*, 655 So. 2d 864 (Miss. 1995).

The error in this instruction is its failure to distinguish between the proper verdict if the State failed on any of the other elements and the proper verdict if the State failed on the third element relating to the defendant's mental capacity. The instruction, on its face, instructs the jury to return a "not guilty" verdict upon reaching the conclusion that the State has failed to prove any one of the elements. Thus, Instruction S-1 quite incorrectly informs the jury that if they conclude the defendant did not have "the mental capacity to realize and appreciate the nature and quality of his act and to distinguish between right and wrong with reference to the act he committed," they must return a verdict of "not guilty." This is a general verdict of acquittal. A verdict of not guilty by reason of insanity is a special verdict. Section 99-13-7 of the Mississippi Code of 1972 states that "[w]hen any person shall be indicted for an offense and acquitted on the ground of insanity the jury rendering the verdict *shall state therein such ground . . .*" Miss. Code Ann. 99-13-7 (1972).

Instruction D-12, giving several forms of the verdict, including one for "not guilty by reason of insanity," offers no direction as to when that verdict would be proper. Even if it did, it would be in hopeless conflict with the directions of Instruction S-1.

There is a difference between a verdict of "not guilty" and a verdict of "not guilty by reason of insanity" that goes beyond mere form. Section 99-13-7 contemplates, in certain circumstances, the involuntary confinement of the defendant in a state asylum for the insane. *See* Miss. Code Ann. 99-13-7 (1972). A verdict of "not guilty" permits the defendant to walk from the courtroom a free man.

Instruction S-1 was the only instruction defining the test for "sanity" in a criminal trial. It compelled the jury to acquit if the State failed to prove the defendant to be sane.

There is no room for harmless error analysis in this case. The defendant asserted an insanity defense, and the trial court apparently concluded that he made the requisite showing necessary to make the issue a jury question. This defendant was effectively deprived of the opportunity to have his insanity defense properly decided by the jury. The erroneous notion appearing in the instructions that a finding of insanity required the jury to completely exonerate him was not cured by the "form of the verdict" instruction.

II.

Remaining Issues on Appeal

Avera also complains on appeal that his counsel should have been permitted to attend the defendant's court-ordered mental evaluation. We find no precedent establishing this right and decline to create one in this case.

Several of his issues raised in this appeal are attacks on the weight and the sufficiency of the evidence supporting the conviction. When viewed in the light most favorable to the State, we cannot conclude that the evidence was insufficient on the issue of Avera's guilt. Avera did not deny firing the weapon that killed his victim. His defense was temporary insanity, and there was conflicting competent evidence on this issue. The proof on all the other elements of the charged crime was substantial. There is no basis to reverse and render this conviction due to the insufficiency of the evidence. *See e.g., Morgan v. State*, 681 So. 2d 82, 93 (Miss. 1996); *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). Because we are reversing and remanding for a new trial where the proof may be different, there is nothing to be gained by assessing the weight of the evidence at the first trial, and we consider that issue moot.

Avera's fifth issue, an attack on the constitutionality of the Mississippi Court of Appeals, was disposed of by the Mississippi Supreme Court prior to assigning this case to our Court for resolution of the remaining issues.

Finally, Avera urges that he should have been entitled to a lesser included offense instruction on manslaughter. There must be some evidentiary basis for giving a lesser included offense instruction. *See Hester v. State*, 602 So. 2d 869, 872-73 (Miss. 1992). The proof at trial indicated that Avera picked up a gun, chased his victim from the house, and then shot her in the back. On that evidence, we are unconvinced that Avera was entitled to a manslaughter instruction. However, we are mindful that on retrial, the proof may not be the same. Therefore, nothing we say in this paragraph should be construed as pre-judging Avera's request for a manslaughter instruction at the close of the new trial. That is an issue to be considered and ruled on by the trial court based on the evidence presented at that trial.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR A NEW TRIAL. COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.

**BRIDGES, C.J., COLEMAN, DIAZ, HERRING, KING, AND SOUTHWICK, JJ., CONCUR.
THOMAS, P.J., HINKEBEIN AND PAYNE, JJ., NOT PARTICIPATING.**