

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00321 COA

JAMES FITZGERALD TURNER 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. JOSEPH H. LOPER, JR.

COURT FROM WHICH APPEALED: CIRCUIT COURT OF ATTALA COUNTY

ATTORNEY FOR APPELLANT: RAYMOND M. BAUM

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: DOUG EVANS

NATURE OF THE CASE: MURDER

TRIAL COURT DISPOSITION: GUILTY OF MURDER AND SENTENCED TO LIFE IN THE MDOC

MOTION FOR REHEARING FILED:6/16/97

MANDATE ISSUED: 8/19/97

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

THOMAS, P.J., FOR THE COURT:

James Turner appeals his conviction of murder, raising the following issues as error:

I. THE TRIAL COURT ERRED IN REFUSING TO ADMIT STATEMENTS GIVEN TO POLICE INVESTIGATORS BY TWO EYEWITNESSES, WHO WERE UNAVAILABLE

TO TESTIFY AT THE TRIAL, AFTER THE STATE HAD AGREED THE STATEMENTS WOULD BE ADMITTED, AND DEFENDANT RELIED ON THE ASSERTION OF THE STATE.

II. THE TRIAL COURT ERRED IN GRANTING CONTRADICTIONARY AND CONFUSING INSTRUCTIONS REGARDING MURDER AND MANSLAUGHTER.

III. THE TRIAL COURT ERRED IN REFUSING TO REMOVE A JUROR WHO SPENT TWO AND ONE HALF HOURS ALONE WITH THE DECEDENT'S AUNT PRIOR TO RETIRING TO RENDER A VERDICT; SAID JUROR HAVING FAILED DURING VOIR DIRE TO DISCLOSE TO THE COURT UPON QUESTIONING HER RELATIONSHIP TO THE VICTIM'S FAMILY.

IV. THE TRIAL COURT ERRED IN CALLING SAID JUROR TO TESTIFY BEFORE THE COURT CONCERNING HER CONDUCT WITH THE DECEDENT'S AUNT PRIOR TO DELIBERATING.

As the third issue is dispositive of this case, we reverse and remand on this issue. However, we will discuss the first two issues for these problems may reappear on remand.

FACTS

James Fitzgerald Turner was indicted for the February 24, 1993 shooting death of Stephen Lamont Johnson during commission of an act "eminently dangerous to others and evincing a depraved heart." Miss. Code Ann. 97-3-19 (Supp. 1992). Turner fired a gun through his front door fatally wounding Johnson in the chest. Turner asserts that he fired the gun to scare away Darren Ashford, who Turner thought was on the other side of the door. Turner fought with Ashford earlier that day. During voir dire, the court asked the panel if any member had relationships with Johnson or a member of Johnson's family. Four jurors answered that they had relationships with either Johnson or some member of his family. Juror Allene Lattimore did not answer this question. Juror Lattimore was a friend of Johnson's aunt, R. V. Alston. The two worked together at a nursing home. Each of the answering jurors was questioned by the court and ultimately struck for cause.

After testimony was complete, there was a break of two and one-half hours before the jury was to begin deliberations. During this break, Juror Lattimore was seen in the company of R. V. Alston. Alston had been present throughout the entire trial. Juror Lattimore and Alston spent the entire break time together shopping and eating. They even rode in the same vehicle to and from the courthouse during this break. Counsel for Turner asked the trial judge to remove Juror Lattimore from the panel and replace her with the alternate juror. The trial judge denied Turner's request to remove Juror Lattimore.

I.

THE TRIAL COURT ERRED IN REFUSING TO ADMIT STATEMENTS GIVEN TO POLICE INVESTIGATORS BY TWO EYEWITNESSES, WHO WERE UNAVAILABLE

TO TESTIFY AT THE TRIAL, AFTER THE STATE HAD AGREED THE STATEMENTS WOULD BE ADMITTED, AND DEFENDANT RELIED ON THE ASSERTION OF THE STATE.

Turner argues that statements made by two eyewitnesses to the shooting should have been admissible because the two eyewitnesses were unavailable. Joseph Jenkins and Joe Boatman were allegedly in Turner's home when the shooting of Johnson took place. They were both interviewed by the police shortly after the incident, and made written statements on February 24, 1993 and again on February 28, 1993. In a pre-trial discovery motion, Officer Dick Thayer stated that he spoke with Jenkins and Boatman and took oral statements from both. In their oral statements to the police, both told police that Darren Ashford shot through the door while Ashford fought with Turner. This was also the essence of Turner's first statement to the police. The written statements by Jenkins and Boatman were that there was a knock on the window, Turner jumped up and grabbed his gun, then asked who it was, and the person either responded "Me" or "Dee." "Dee" was the nickname of Ashford. Turner then went to the door while both Jenkins and Boatmen were in the bedroom. Turner then fired a shot through the door killing Johnson.

Turner offered the written statements of Jenkins and Boatman during a pre-trial motion hearing. The district attorney indicated that he would agree not to oppose the introduction of those statements if they went ahead to try the case that day. The defense counsel balked at this notion, and instead stated that he wanted the jury to be able to observe the demeanor of Jenkins and Boatman during a trial. The cause was then continued until September 12, some six months later.

On the date of trial, Jenkins and Boatman were still unavailable for trial, being out of state. The district attorney stated that both could be charged with accessory after the fact to murder, and realistically, this is the reason for their absence. Turner sought to introduce the written statements of Jenkins and Boatman under the "catchall" exceptions to the hearsay rule, Rules 804(b)(5) and 803(24). The trial judge found that the statements were unreliable and untrustworthy, and denied Turner's request to allow the statements to be offered as evidence.

"The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Parker v. State*, 606 So. 2d 1132, 1136 (Miss. 1992) (quoting *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990)). This court will not reverse the trial judge unless the judge's discretion is so abused as to be prejudicial to the accused. *Parker*, 606 So. 2d at 1136.

The Mississippi Supreme Court dealt with Rule 804(b)(5), which is identical in form to Rule 803(24), in the case of *Cummins v. State*, 515 So. 2d 869 (Miss. 1987). The *Cummins* court gave guidelines for dealing with Rule 803(24). First, "the proponent of evidence to be offered must give notice to the party against whom the evidence is to be offered. This notice should be given 'sufficiently in advance of the trial or hearing to provide . . . a fair opportunity to meet it. . .'" *Cummins*, 515 So. 2d at 873 (quoting *U.S. v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977)). The court held that one day before trial is not sufficient notice. *Cummins*, 515 So. 2d at 874. Second, the evidence must be found to possess "circumstantial guarantees of trustworthiness" as offered under the specific exceptions listed in Rule 803. *Id.* at 874 (quoting *U.S. v. Ruppel*, 666 F.2d 261, 271 (5th Cir. 1982)). The *Cummins* court then said "To do this the need for the evidence must be balanced against the trustworthiness of the

evidence." *Cummins*, 515 So. 2d at 874. In order to determine reliability, the trial judge should determine the credibility of the extra-judicial declarant when he made the statement attributed to him, whether the statement was oral or written, the character of the statement, the relationship of the parties, the motivation of the declarant in making the statement, and the circumstances under which the statement was made. *Id.* Third, the statement must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." *Id.* (citing *Byrd v. Hunt Tool Shipyards, Inc.*, 650 F.2d 44, 46 (5th Cir. 1981)). Finally, the trial judge should find that the general purposes of the Mississippi Rules and the interests of justice are served by the admission of the hearsay statement. *Cummins*, 515 So. 2d. at 874. The trial judge has a wide latitude of discretion in determining whether to admit hearsay evidence under this "catchall" exception, and his determination will not be overruled unless an abuse of discretion has occurred. *Parker*, 606 So. 2d at 1138.

Following these guidelines, the trial judge did not err in denying the statements of Jenkins and Boatman into evidence. First, Turner did not meet the notice requirement. Turner's attorney notified the district attorney the day before trial that he planned to use the two hearsay statements. Turner argues that the district attorney was on notice because he had agreed to the admission of the statements six months before in a discovery hearing. However, no trial was had at that time, and the statements were not relevant until this trial was held six months later. Turner did not give adequate notice to the prosecution in accordance with *Cummins* and Rules 803(24) and 804(b)(5). Second, the statements were neither trustworthy nor reliable because each declarant gave conflicting statements. Each declarant was a friend of Turner with interests in helping him cover up the shooting. Further, both Jenkins and Boatman were being sought after by the State for accessory after the fact charges to murder because of their first oral statements. Third, the statements were not more probative on point because Officer Thayer testified in front of the jury that Turner stated there was a knock on the door; Turner then asked who was at the door; and Turner, thinking Darren Ashford was on the other side of the door, shot to scare Ashford away. This is exactly the same as the written hearsay statements of Jenkins and Boatman. Finally, the interest of justice would not have been served by the admission of the statements because the State did not have the proper notice, and the State would not have an opportunity to cross-examine the two witnesses. For these reasons, the trial judge did not err by denying the statements.

II.

THE TRIAL COURT ERRED IN GRANTING CONTRADICTORY AND CONFUSING INSTRUCTIONS REGARDING MURDER AND MANSLAUGHTER.

Turner contends that the trial judge erred by granting confusing and contradictory jury instructions. However, the two instructions on which Turner asserts the trial court committed error, S-1 and D-3-A, were not objected to at trial. Furthermore, Turner's attorney agreed to their being given to the jury. Since Turner failed to make a contemporaneous objection to the given instructions, he is procedurally barred from raising this issue on appeal. *King v. State*, 615 So. 2d 1202, 1205 (Miss. 1993); *Fleming v. State*, 604 So. 2d 280, 294 (Miss. 1992).

III.

THE TRIAL COURT ERRED IN REFUSING TO REMOVE A JUROR WHO SPENT TWO AND ONE HALF HOURS ALONE WITH THE DECEDENT'S AUNT PRIOR TO RETIRING TO RENDER A VERDICT; SAID JUROR HAVING FAILED DURING VOIR DIRE TO DISCLOSE TO THE COURT UPON QUESTIONING HER RELATIONSHIP TO THE VICTIM'S FAMILY.

Prior to the time the jurors were to begin deliberations, Turner made a motion to remove Juror Allene Lattimore from the panel and to substitute the alternate juror. Turner put on proof to show that Juror Lattimore had lunch and went shopping with Mrs. R. V. Alston, the aunt of the deceased. The trial judge declined to remove Juror Lattimore from the panel, and Turner raises this issue as error. Turner also raises the issue that Juror Lattimore failed to disclose her relationship with the victim's family during voir dire. It is on this issue that we reverse.

During voir dire, the trial judge asked, "How many of you might have known Stephen Lamont Johnson?" Four panel members raised their hands and were further questioned by the judge. Two panel members previously stated to the court that they were acquaintances with Turner, the defendant, and would be unable to be an impartial juror. The judge did not question them further regarding their relationships with Johnson. The other two panel members were friends of Johnson's family. The judge asked each if they could be fair and impartial, and each responded that they could not. All four panel members were struck for cause. The trial judge then asked, "Anyone else that would have any relationship with Mr. Johnson or Mr. Johnson's Family?" There was no further response. Juror Lattimore was a friend of the Johnson family, having worked with the deceased's aunt.

The use of alternate jurors is controlled by statute. Miss. Code Ann. 13-5-67 (Supp. 1996) provides that an alternate jurors:

shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties.

The statute provides that there are two situations in which a juror may be replaced. One is where the juror is no longer able to perform his or her duties due to illness, death in the family, etc., and the other is where the juror has become disqualified. Juror Lattimore was not unable to perform her duties, and we must now determine whether or not she had become disqualified.

A juror is disqualified under Section 13-5-67 where he or she has withheld information or misrepresented material facts during voir dire examination. *Myers v. State*, 565 So. 2d 554, 558 (Miss. 1990). The test is whether the juror withheld substantial information or misrepresented material facts in the face of a clearly worded question propounded on voir dire examination, and whether prejudice could be inferred from the juror's failure to respond. *Myers*, 565 So. 2d at 558. See *Fleming v. State*, 687 So. 2d 146 (Miss. 1997); *Odom v. State*, 355 So. 2d 1381 (Miss. 1978).

Voir dire examination is often the most crucial crucible in forging our primary instrument of justice: the fair and impartial jury. Like a fine suit of clothes, a jury must be tailored to fit, and court and

counsel examine prospective jurors under settled rules tending toward that fit. When offering challenges for cause and challenges peremptory, parties and their lawyers must rely on the objective candor and responsiveness of prospective jurors, and nothing turns on who asks the question, so long as it was clearly worded.

Myers, 565 So. 2d at 558 (citing *Brown v. State*, 529 So. 2d 537, 539 (Miss. 1988); *Caldwell v. State*, 381 So. 2d 591, 592 (Miss. 1980)).

Prejudice is presumed where a party shows that a juror withheld substantial information or misrepresented material facts, and where a full and complete response would have provided a valid basis for challenge for cause. *Myers*, 565 So. 2d at 558. This is grounds for reversal on appeal. *Id.* In the case *sub judice*, the record reveals the trial judge asked if anyone knew Stephen Lamont Johnson. Four jurors raised their hands, while two told the judge that they knew members of Johnson's family. They were questioned by the judge, and admitted that they would not be fair and impartial. Each prospective juror was struck for cause. The trial judge then specifically asked the panel if any member had any relationships with Johnson or his family. There was no response. The record clearly reflects that Juror Lattimore was a friend of R.V. Alston, the aunt of the deceased. The record also reflects that Juror Lattimore and Alston went to lunch and went shopping during the break time before the jury met to deliberate.

Based on the above facts, we must conclude that the trial court erred when it did not remove Juror Lattimore and replace her with the available alternate after learning of the relationship between Juror Lattimore and the deceased's family. The facts indicate that Turner was denied a fair and impartial jury, and ultimately, he was denied justice because of this.

The sad part about this case is that there was an alternate juror readily available to take the place of juror Lattimore *before* jury deliberations began. That is all that Turner's counsel requested; he made no motion for a mistrial. Without question the State's case here was strong, and, but for this unnecessary error, would have been affirmed.

THE JUDGMENT OF THE CIRCUIT COURT OF ATTALA COUNTY IS REVERSED AND REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS ARE TAXED AGAINST ATTALA COUNTY.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY HINKEBEIN, J.

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PAYNE, J., DISSENTING:

Although I agree that, for appearance sake, the trial judge should have substituted the alternate for the challenged juror, I do not, however, agree that such failure constituted reversible error. Two things would have to be present to require the elimination of this juror: (1) lying about a relationship in voir dire, and (2) talking about the case with the victim's aunt during lunch.

In regard to the voir dire issue, I think that it is hard to say that the juror had a relationship with the victim's family. When the question was: "Do any of you have a relationship with the victim or the victim's family?" it did not unambiguously include working with the victim's aunt who does not live in the residence with the victim's immediate family. The American Heritage Dictionary of the English Language 659 (3d ed. 1992) describes "family" to mean:

1.a. A fundamental social group in society typically consisting of a man and woman and their offspring. b. two or more people who share goals and values, have long-term commitments to one another, and reside usually in the same dwelling place. 2. All the members of a household under one roof. 3. A group of persons sharing common ancestry. 4. Lineage, especially distinguished lineage.

It therefore cannot be said unequivocally that a juror would construe an aunt to be a member of the victim's family, in the common usage or dictionary definition of the word "family." Although lawyers and judges, who are well trained in the need for identifying conflicts of interest, might make that connection immediately, a member of the general public who did not recognize that connotation cannot categorically be held to have been lying.

In regard to the second question, we would have to disbelieve the sworn testimony of the juror and of the victim's aunt when they testified that they had not discussed the case because the judge had explicitly instructed all jurors not to discuss the case with anyone. In numerous cases about limiting instructions given to jurors we have held that a juror is presumed to have followed the judge's instructions. Here, no presumption is necessary. The juror and her lunch partner stated under oath (under penalty of perjury) that they did not discuss the case. The testimony was uncontradicted. We cannot go outside the record. *Robinson v. State*, 662 So. 2d 1100,1104 (Miss. 1995).

Had I been the trial judge, I believe that I would have released the juror just to avoid the mere appearance of impropriety, but I do not believe that the judge abused his discretion in not doing so. Furthermore, in this case we should not "reward" the defendant with an overturned conviction and a

new trial because of an assumption outside the record. For these reasons, I respectfully dissent.

HINKEBEIN, J., JOINS THIS SEPARATE WRITTEN OPINION.