

7/1/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00383 COA

EVERETT RODGERS A/K/A EVERETT F.

RODGERS 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. ROBERT L. GIBBS

COURT FROM WHICH APPEALED: YAZOO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: DAN W. DUGGAN, JR.

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: ED PETERS

NATURE OF THE CASE: CRIMINAL - CT I MURDER, CT II AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED ON CT I AND SENTENCED TO LIFE IN THE MDOC; CONVICTED ON CT II AND SENTENCED TO SERVE A TERM OF TWENTY YEARS WITH SENTENCES TO RUN CONCURRENT

MANDATE ISSUED: 7/22/97

BEFORE BRIDGES, C.J., COLEMAN, HINKEBEIN, AND SOUTHWICK, JJ.

HINKEBEIN, J., FOR THE COURT:

Everett Rodgers was tried and convicted in the Yazoo County Circuit Court of one count of murder and one count of aggravated assault. He was sentenced to serve a term of life imprisonment in the

custody of the Mississippi Department of Corrections on count one. As to count two, Rodgers was sentenced to serve twenty years to run concurrent with count one. Rodgers raises the following issues on appeal:

I. THE JURY'S VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

II. THE COURT COMMITTED ERROR IN GRANTING JURY INSTRUCTION S-2.

III. THE COURT COMMITTED ERROR IN PERMITTING THE STATE TO INTRODUCE MEDICAL RECORDS OVER THE OBJECTION OF APPELLANT.

IV. THE JURY COULD NOT HAVE CONVICTED THE APPELLEE OF MURDER SINCE THE FACTS INDICATE AT MOST APPELLANT COMMITTED MANSLAUGHTER.

Although we find the second assignment of error raised by the appellant in this case has merit and warrants reversal of the decision below, we will discuss the other assignments of error in order that those issues will not remain unaddressed at retrial.

FACTS

Fredrick Horne and Wayne Rayborne were walking along Horne's property line. Standing at the bottom of a hill, they noticed Rodgers on adjoining property at the top of the hill. Words were exchanged between the three men, then Rodgers fired four shots from a shotgun. The first shot went over Rayborne's head. Three more shots were fired striking Rayborne in the chest and abdomen and Horne in the eye. Horne, who works as a security guard, was carrying an unloaded nine millimeter revolver in his back pocket. After being fired upon, Horne attempted to load the revolver but was unable to do so. He then went to seek help and was picked up on the highway by his wife. Thereafter, Horne and his wife went to get Rayborne's wife and returned to the Horne residence to retrieve a 44-magnum revolver and a shotgun. According to Horne, he was planning to attempt to rescue Rayborne. Upon returning to the scene, Horne saw that law enforcement and medical personnel had already arrived. Rayborne died from his gunshot wounds en route to the hospital.

Rodgers surrendered to the police without incident and admitted that he had shot Horne and Rayborne. Rodgers, however, claims that he was acting in self-defense. According to Rodgers, both Horne and Rayborne approached him with weapons drawn.

ANALYSIS

I. THE JURY'S VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Rodgers submits that the overwhelming evidence in this case indicates that he shot Horne and Rayborne in self-defense. According to Rodgers, Horne and Rayborne were making verbal threats and were both approaching him with drawn firearms. Rodgers claims that he fired on the two men only because he believed they were going to kill him. Based on this argument, Rodgers asks that we reverse the decision of the trial court and render a decision in his favor.

Conversely, the evidence presented by the State, which included the testimony of the surviving victim, showed that Rodgers held the superior position, for either attack or defense, at the top of the hill. The State's evidence also showed that it was Rodgers who initiated the verbal confrontation and began firing upon Horne and Rayborne. Additionally, the physical evidence supported the State's version of events in that it demonstrated the terrain where the incident took place would have been a highly unlikely place from which Horne and Rayborne would have mounted an attack on Rodgers. Horne and Rayborne were positioned at the bottom of a hill, and Rodgers was at the top. Between them were brush, briars, and a barbed wire fence. Furthermore, they supposedly had their weapons drawn on Rodgers; yet, they never returned fire after being fired upon no less than four times. Finally, no physical evidence was found which would indicate that either victim had attempted to charge up the hill.

Although Rodgers frames his first issue as involving only the weight of the evidence, his argument implicates both the weight and sufficiency of the evidence. Because Rodgers's argument implicates both the weight and sufficiency of the evidence, we will address this issue by determining whether the trial court erred in failing to grant a directed verdict and in failing to grant a motion for a new trial.

When we review the denial of a motion for directed verdict, we give the State the benefit of all favorable inferences and then examine the evidence to be sure it supports the verdict beyond a reasonable doubt. *Pierre v. State*, 607 So. 2d 43, 54 (Miss. 1992). We will not reverse unless we conclude that no reasonable hypothetical juror could have found the defendant guilty. *Ross v. State*, 601 So. 2d 872, 874 (Miss. 1992). In reviewing the evidence in this case, we find it to be sufficient to support a verdict of guilty beyond a reasonable doubt. Therefore, we find no error in the denial of the motion for directed verdict.

When deciding whether the verdict is against the overwhelming weight of the evidence, we must accept as true all the evidence supporting the State's position, as well as all reasonable inferences flowing therefrom, in the light most favorable to the State. *Britt v. State*, 520 So. 2d 1377, 1379 (Miss. 1988). Considering this standard, and after reviewing the record, we find that the jury had ample evidence to support a verdict of guilty. Therefore, based upon the weight of the evidence supporting the verdict, we find that the trial court did not abuse its discretion in denying the Defendant's motion for a new trial. Accordingly, we find Rodgers's first assignment of error to be without merit.

II. THE COURT COMMITTED ERROR IN GRANTING JURY INSTRUCTION S-2.

As given, instruction S-2 reads as follows:

The Court instructs the jury that a person may not use more force than reasonably appears necessary to save his life or protect himself from great bodily harm. Where a person repels an assault with a deadly weapon, he acts at his own peril and the question of whether he was justified in using the weapon is for determination by a jury.

The Court further instructs the jury that the law tolerates no justification, and accepts no excuse for the destruction of human life, on the plea of self-defense, except that the death of the adversary was necessary, or apparently so, to save his own life, or his person from greatly [sic] bodily injury, and

there shall be imminent danger of such design being accomplished. The danger to life, or of great personal injury, must be imminent, present at the time of the killing, real or apparent, and so urgent that there is no reasonable mode of escape except to take life. The term "apparent", as in apparent "danger", means such overt, actual demonstration, by conduct and acts of a design to take life, or do some great personal injury, as would make the killing apparently necessary to self preservation.

Rodgers contends that the language in this instruction, specifically where it informs the jury that a defendant has a right to self-defense, but then acts at his own peril, is confusing, misleading and contradictory. The Mississippi Supreme Court has criticized this language in numerous opinions, stating that it was confusing. See *Robinson v. State*, 434 So. 2d 206 (Miss. 1983), *Scott v. State*, 446 So. 2d 580 (Miss. 1984) and *Bebley v. State*, 456 So. 2d 755, 756 (Miss. 1984). Finally, the court definitively addressed this issue in *Flowers v. State*, 473 So. 2d 164 (Miss. 1985). The *Flowers* case involved the granting of a similar self-defense instruction. The flawed instruction in *Flowers* reads as follows:

The court instructs the jury that to make a homicide justifiable on the ground of self-defense, the danger to the slayer must be either actual, present and urgent, or the slayer must have reasonable grounds to apprehend a design on the part of the deceased to kill him, or to do him great bodily harm, and in addition to this that there was imminent danger of such design being accomplished, and **hence mere fear, apprehension or belief, however sincerely entertained by the slayer, that another designs to take his life or to do him great bodily harm will not justify the slayer in taking the life of the latter party. The slayer may have a lively apprehension that his life is in danger or that he is in danger of great bodily harm, and believe the grounds of his apprehension just and reasonable, and yet he acts at his own peril.** He is not the final judge; the jury may determine the reasonableness of the grounds on which he acted.

If you believe from the evidence in this case beyond a reasonable doubt that the defendant, James Willie Flowers, did unlawfully, willfully, feloniously and of his malice aforethought shoot and kill Joe Lee Edison, a human being, at a time when he, the said James Willie Flowers, was not in any imminent danger of great bodily harm either real or apparent being inflicted upon him, then it is your sworn duty to find the defendant, Willie James Flowers, guilty of murder.

In *Flowers*, the court quoted from its earlier opinion in *Scott* wherein the court proclaimed that instructions similar to the one at issue in this case should no longer be used "because the instruction is self-contradictory and confusing." As the court further explained:

The troublesome part is the first sentence of the final paragraph. If a party has "an apprehension that his life is in danger" and believes "the grounds of his apprehension just and reasonable" a homicide committed by that party is in self-defense. These are the grounds upon which a claim of self-defense must be predicated. A party acting upon this principle does not "act at his own peril."

Flowers, 473 So. 2d at 165 (quoting *Scott v. State*, 446 So. 2d 580, 583-84 (Miss. 1984)).

Rather than merely criticizing the instruction as they had done previously, the court finally condemned it and proscribed its further usage.

It appears from our review that criticism by this Court is construed to mean this instruction is

approved for continued use. We intend precisely the opposite effect, that its use be discontinued. Presently to remove any such doubt, we now condemn Instruction S-2 and forthrightly hold it constitutes reversible error in this case and will be so considered in future cases.

Id.

We are bound to adhere to the clear precedent established by the Mississippi Supreme Court in *Flowers*. Because we are so constrained, we must find that the trial court committed reversible error in granting instruction S-2.

III. THE COURT COMMITTED ERROR IN PERMITTING THE STATE TO INTRODUCE MEDICAL RECORDS OVER THE OBJECTION OF APPELLANT.

Rodgers submits that although medical records are admissible pursuant to Mississippi Rule of Evidence 803 (6), the court erred in allowing the records to be introduced because they were not properly authenticated. The medical records in issue are those relating to Horne's injuries. Rule 803 (6) requires that the records be authenticated by the testimony of the custodian of the records or other qualified witness. In the case *sub judice*, the records were introduced by Horne, the surviving victim.

In *Gossett v. State*, 660 So. 2d 1285, 1295-96 (Miss. 1995), the Mississippi Supreme Court held that it was error to admit an autopsy report through a person who has not personally conducted the autopsy. The court opined that an autopsy report is not a "firmly rooted hearsay exception" and therefore cannot be admitted over an objection by the defendant. *Id.* The court concluded that such a report was not one of the firmly rooted exceptions because they may include expert opinions and information outside of the coroner's office. *Id.* at 1296-97.

The indicia of reliability of autopsy reports and medical records are substantially similar. Both are subject to the business records exception of the hearsay rule and both must be properly authenticated. Consequently, we conclude that they should be similarly treated. In *Gossett*, the court determined that it was error to admit the autopsy report without producing the author. Given that medical records also may include expert opinions and information, we must likewise conclude that it was error to admit Horne's medical records without producing either the preparer or custodian of the records. For the purpose of Rule 803 (6), the term "other qualified witness" is not sufficiently broad so as to allow Horne to introduce the medical records pertaining to his own injuries.

With that being said, the court in *Gossett* found that where ample additional evidence exists to establish the fact in issue, the error of allowing the hearsay record is harmless. *Id.* at 1297. As the State pointed out in its brief, Horne had already testified as to the nature and cause of his injuries: essentially that Rogers had "shot out" his eye. Also, Rodgers never contested that he shot and injured Horne; rather, he claims he did so in self-defense. Absent any genuine issue as to the nature, extent and treatment of Horne's injuries, and in light of the cumulative nature of the medical records, we find the admission of these documents was harmless error.

IV. THE JURY COULD NOT HAVE CONVICTED THE APPELLEE OF MURDER SINCE THE FACTS INDICATE AT MOST APPELLANT COMMITTED MANSLAUGHTER.

Rodgers argues in the alternative that if this Court refuses to find that his conviction was against the overwhelming weight of the evidence, then we should find that Rodgers can be guilty of no more than manslaughter. Rodgers submits that because Horne was in possession of a weapon during the altercation, he should not be found guilty of murder.

In support of his argument, Rodgers relies on the Mississippi Supreme Court's decision in *Dedeaux v. State*, 630 So. 2d 30 (Miss. 1993). In *Dedeaux*, the court found under similar facts that the trial court erred in refusing to grant an instruction for manslaughter. In the case at bar, the court did grant an instruction for manslaughter, as well as one for murder. The court's decision in *Dedeaux*, therefore, is not dispositive of the issue before us.

The jury in this case was allowed to consider all of the relevant facts and decide whether they believed Rodgers's version of events or that of the prosecution. Furthermore, they were properly instructed to determine whether the credible evidence supported a conviction of murder or manslaughter. The State's proof established that Rodgers aimed his shotgun from a position of advantage at the top of a hill, shot four times, continued to shoot at a person who had jumped behind an embankment for protection, and ceased shooting only when his gun malfunctioned.

If the evidence is such that fair-minded jurors might have reached different conclusions, the verdict must be allowed to stand. *Ashford v. State*, 583 So. 2d 1279, 1281 (Miss. 1991). In *Smith v. State*, 463 So. 2d 1102, 1103 (Miss. 1985), the court confirmed a murder conviction, holding that the defendant's claim of self-defense simply created "a classic jury issue." The jurors in this case found that the credible evidence supported a conviction of murder rather than a conviction of the lesser offense of manslaughter. We cannot say that the evidence did not support the murder conviction. Thus, the last assignment of error is without merit.

CONCLUSION

Although the Appellant has received an otherwise fair trial, we are forced to reverse on the issue of the jury instruction. We reiterate that the other issues of this appeal have been fully discussed in order to clarify the fact that this is the only reversible error which occurred at trial. Therefore, because we conclude that the court committed reversible error in granting instruction S-2, we reverse this conviction and remand for a new trial.

THE JUDGMENT OF THE YAZOO COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ARE ASSESSED TO YAZOO COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.