

IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 96-KA-00073 COA

MARIO PRIMER 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. MARCUS D. GORDON

COURT FROM WHICH APPEALED: LEAKE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: EDMUND J. PHILLIPS, JR.

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: PAT S. FLYNN

DISTRICT ATTORNEY: KEN TURNER

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: MURDER: SENTENCED TO SERVE A TERM OF LIFE IMPRISONMENT

MANDATE ISSUED: 9/30/97

BEFORE McMILLIN, P.J., COLEMAN, AND PAYNE, JJ.

McMILLIN, P.J., FOR THE COURT:

Mario Primer was convicted of murder by a Leake County Circuit Court jury. He now appeals, citing three issues which he contends require reversal of his conviction. This Court has concluded the issues to be without merit, and we affirm the judgment entered on the verdict of guilt.

I.

Facts

Thomas Stribling was shot and killed during a disturbance in the parking lot of a convenience store in the city of Carthage. Testimony showed that the lot was a late-evening gathering place for young people and that at the time Stribling was killed there were as many as several hundred youths congregated in the area. Three eyewitnesses claimed to have seen Primer fire a pistol at the victim. Another witness, Lathadius Luckett, testified that he had a pistol in his possession that night in his back pocket, but that apparently someone removed the pistol without his knowledge. He testified that Primer told him the next day that he had gotten the pistol and informed Luckett where he had hidden it after the incident. Luckett retrieved the pistol, and it was ultimately recovered by investigating officers.

The defense elicited a number of inconsistencies in the testimony of some of the eyewitnesses. One testified that he saw Primer shoot Stribling in the back; however, the physical evidence showed that Stribling had been shot in the chest. The witnesses also reported that Primer shot Stribling while Primer was seated in a car and Stribling was standing outside, and there was testimony concerning the path of the bullet through Stribling's body that would tend to make this scenario improbable. There was also testimony that multiple shots may have been fired and that one of the shots struck a pay telephone in front of the convenience store. Primer attempted to advance the argument that Stribling was struck by accident when a bullet hit the telephone and ricocheted, striking the victim solely by chance.

On this conflicting evidence, the jury returned a guilty verdict.

In a new trial motion filed eight days after the trial concluded, Primer attached an affidavit of another

purported witness to the incident that had come forward after the trial. The affidavit indicated that the witness saw Lathadius Luckett discharge a pistol twice at the time Stribling was shot and that the witness did not see Primer at the scene.

## II.

### Newly-Discovered Evidence

Primer claims that the eyewitness who came forward after the trial could provide "new and material evidence . . . which would probably produce a different result at a new trial . . ." and this was, thus, a basis to grant him a new trial. *See* U.R.C.C.C. 10.05. The trial court disagreed and denied the motion, and Primer assigns that as error on appeal. Our review of the denial of such motions is limited to searching for an abuse of discretion. *Gaston v. State*, 562 So. 2d 61, 63 (Miss. 1990).

New evidence, in addition to being so persuasive that it would, on a fair evaluation, be seen as likely to produce a different result, must also be something that "could not have been discovered sooner by diligence of counsel." *See* U.R.C.C.C. 10.05.

Though the trial court did not, in the order denying the new trial, disclose the specific basis on which the motion was denied, this Court concludes that it was within the range of the trial court's discretion to deny the motion for either of two reasons.

There is no basis to assume that this witness's testimony, contradictory to that of three eyewitnesses, would have been so persuasive that the jury would "probably" have accepted it over the other witnesses. The court was presented with no information concerning the vantage point from which the witness viewed the incident, no information concerning her connection with any of the principal actors in the drama, no explanation as to why, possessed of this seemingly exculpatory evidence, the witness failed to come forward for over six months, nor any explanation as to what prompted her to finally come forward. The lack of any information on these and similar considerations, by which the trial court could make a legitimate assessment as to the potential impact of this witness, apparently left the trial court unpersuaded that this suddenly-emerging witness would probably have produced a different result. This Court is of essentially the same opinion. It is not uncommon to have conflicting eyewitness testimony, some of which is exculpatory, and yet see the jury return a verdict of guilty. There is nothing in this record to indicate that this witness's testimony would have been so credible as to create a substantial likelihood that the jury would disregard the testimony of three other close-range eyewitnesses who were certain that Primer fired the fatal shot. The burden of persuasion regarding the impact of this newly-discovered witness was with Primer. We conclude that the lack of a credible basis to argue that this witness's testimony would *probably* have produced a different

result requires us to find that this burden of persuasion was not carried.

Secondly, there is nothing in the record to indicate the degree of diligence with which defense counsel undertook to discover, prior to trial, if there were eyewitnesses to the incident unknown to investigating authorities who could provide exculpatory evidence. Certainly, any attempt to locate and interview several hundred potential eyewitnesses is a daunting task; nevertheless, there is nothing in the record that shows any of the efforts by the defense, in its investigation and trial preparation, to locate other individuals who had some information about the incident. Had there been some demonstration in the record of the efforts expended by the defense to locate other witnesses, and some explanation offered as to why the efforts failed to uncover this witness, this aspect of the motion might be viewed in a different light. In the absence of any proof of the extent of the defense's pre-trial investigation, however, there is no legitimate basis to conclude that a reasonable measure of diligence would not have produced this witness prior to trial.

Because the burden of persuasion was with the defendant on this point also, we cannot say that denying the motion was an abuse of discretion.

### III.

#### The Failure to Fully Instruct the Jury

Primer asked for an excusable homicide instruction that told the jury, if it concluded that Stribling's death was the result of accident or misfortune, then no crime had been committed. *See* Miss. Code Ann. § 97-3-17(b) (Rev. 1994). Primer's theory of accident was based on his assertion that the jury could conclude that the bullet that struck and killed Stribling was the one that hit the pay telephone and that it was merely an unfortunate twist of fate that the bullet ricocheted and struck Stribling in the chest. There was no evidence to support such a proposition except speculation and conjecture. To the contrary, a forensic pathologist testified that the entry wound was essentially circular, and that ricochet wounds normally present an irregular wound since the bullet is deformed by its impact with the previous object.

There must be a factual basis to support a proposed instruction. *Manuel v. State*, 667 So. 2d 590, 591 (Miss. 1995). There was no credible evidence in the record indicating that Stribling was killed by an unfortunate ricochet. Beyond that, this Court is unpersuaded that had it been proven beyond doubt that Stribling was killed by a ricochet bullet, Primer would have been entitled to such an instruction. If one discharges a firearm in the direction of an intended victim, with full intent to kill or cause serious bodily injury, the law would not seem to permit the shooter to escape criminal responsibility by showing that his aim was poor and that he was able to accomplish the intended result only through a fortuitous bounce of the errant bullet. There is no merit in this issue.

### IV.

## The Weight of the Evidence

Primer also contends that the verdict was against the weight of the evidence. Much of his argument in this regard consists of (a) an attack on one witness's testimony that he thought Stribling had been shot in the back and (b) an argument that because the proof showed the bullet's downward trajectory as it traveled through Stribling's body, it was essentially impossible for Primer to have fired the fatal shot while seated in a car as Stribling stood erect outside the car.

An attack on the weight of the evidence must be first presented to the trial court by appropriate post-trial motion. *See* U.R.C.C.C. 10.05. The trial court is obligated to review all the evidence in the light consistent with the verdict. *Strong v. State*, 600 So. 2d 199, 204 (Miss. 1992). Only if convinced that in viewing the evidence in this light, a manifest injustice has occurred, should the trial court order a new trial. *Burrell v. State*, 613 So. 2d 1186, 1191 (Miss. 1993). Such a subjective evaluation necessarily vests the trial court with broad discretion when considering the matter. The question before this Court on an appeal from a denial of a new trial is whether the trial court abused that discretion. *Id.*

All three eyewitnesses reported essentially the same sequence of events. Each testified to seeing Primer fire multiple gunshots toward Stribling. Each witness was well-acquainted with Primer, so there was no real possibility of misidentification. The jury is certainly obligated to consider discrepancies in the State's proof; however, the fact that one eyewitness thought that Stribling had been struck in the back rather than in the chest does not so destroy the probative value of all three eyewitnesses that this verdict would appear unduly suspect.

The forensic pathologist testified that the bullet path through Stribling's body was not inconsistent with a bullet being fired from a lower elevation if Stribling's body had been bent over when the bullet struck. There was evidence that Stribling was engaged in a physical altercation when the fatal shot was fired, so it is not improbable that his upper body was in something other than a fully perpendicular position when he was shot.

These issues were fully developed at trial and fairly presented to the jury, as fact-finder, for resolution. The jury resolved the issues against the defendant, and the trial court declined to disturb that decision by the jury. We are unconvinced that in doing so, the trial court abused the discretion properly granted to it in such matters.

This conviction must be affirmed.

**THE JUDGMENT OF THE CIRCUIT COURT OF LEAKE COUNTY OF CONVICTION OF MURDER AND SENTENCE TO LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO LEAKE COUNTY.**

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