

IN THE COURT OF APPEALS 04/08/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00878 COA

JUNE THORNTON AND CLEATH SMITH A/K/A CLEATH LAMONTH SMITH

APPELLANTS

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. HOWARD Q. DAVIS, JR.

COURT FROM WHICH APPEALED: HUMPHREYS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

JOE M. BUCHANAN

RABUN JONES

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: WAYNE SNUGGS AND

SCOTT STUART

DISTRICT ATTORNEY: HALLIE GAIL BRIDGES

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: DEFENDANTS CONVICTED OF MURDER AND

SENTENCED TO LIFE IMPRISONMENT

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

SOUTHWICK, J., FOR THE COURT:

In the Humphreys County Circuit Court, June Thornton and Cleath Smith were convicted of murder and sentenced to life in prison. On appeal Cleath Smith argues that there was insufficient evidence to support a verdict against him for aiding and abetting the murder of Carl McDougal. June Thornton attacks both the sufficiency and the weight of the evidence to support a verdict against him for murder. In addition, both argue that one of the jury instructions in effect estopped them from arguing self defense. Because we find insufficient evidence to convict Cleath Smith, we reverse the judgment against him and order the indictment dismissed. Based on a fundamentally erroneous jury instruction, we also reverse the conviction of June Thornton and remand for further proceedings.

FACTS

The facts viewed in the light most favorable to the jury's verdict are these:

On January 27, 1994, a number of people gathered at the house of Dorothy Smith to play dominos and drink beer. Among those people were Ms. Smith's niece, Dorothy Ann "Red" Smith; the soon-to-be shooting victim and Red's intermittent boyfriend, Carl McDougal; and the defendants, June Thornton and Cleath Smith. In addition to dating McDougal, Red said that she also "slept around" with June. During the party, McDougal and Red had an argument outside the house about Red's ending the relationship with McDougal. Red was sitting in the back seat of the car Cleath Smith was using that night. McDougal physically dragged her out of the car. June Thornton, who was sitting in the front seat, intervened and told McDougal to leave Red alone. Red also testified that while the three of them were in the car, McDougal threatened to kill her and Thornton as well as Cleath Smith if she was having sexual relations with them. Red and McDougal continued their argument in a bedroom inside the house. The owner of the house, Dorothy Smith, asked McDougal to go home, which he did.

Shortly thereafter, Cleath Smith said he was going to find out why McDougal pulled Red from the car. At about the same time, Thornton asked Cleath Smith for a ride home. Smith responded, "No, I'm going to see about this nigger snatching Red out of mama's car." Cleath Smith and Thornton left together. Smith was driving.

Red testified that, though she was not sure, she thought she saw someone open the trunk of Cleath Smith's car that night. On at least one occasion, she had seen a gun in that trunk. She saw the trunk open on this night and assumed someone took the gun from the trunk and put it inside the car.

The two defendants drove to McDougal's house, pulled up in front, and honked. McDougal's roommate, Charles Riley, came outside, saw the two men, and noticed Thornton sitting in the passenger seat with his right hand between his legs. Smith asked, "Where's Carl's punk ass at?"

Charles told him Carl McDougal was in the house. McDougal emerged from the house wearing only a pair of pants (suggesting the places to conceal a weapon were few). He began arguing with Smith, who remained seated in the car. McDougal approached the car and stood leaning into the passenger side of the car, where Thornton was sitting. McDougal challenged Smith to get out of the car and fight him, telling him, "I'll beat you with these right here," indicating his fists. Smith did not get out of the car.

While leaning into the car through Thornton's passenger side window he pointed his finger across Thornton at Smith. Thornton told him to stop pointing and to get away from the car. McDougal replied to Thornton, "You ain't got nothing to do with this; this is between Cleath and me." Thornton and Cleath Smith both testified that McDougal slapped Thornton, but witnesses for the State testified that they did not see that happen. They only saw McDougal pointing in Thornton's face. Another witness testified that Thornton just before shooting said to McDougal, "I'm tired of this G-- D--- sh-- ." The evidence was less than certain, but it appears McDougal withdrew from the window and stood upright outside the car. Thornton then fired a fatal gun shot that went through McDougal's hand and into his chest. Thornton testified that he thought McDougal was reaching into his pocket for a gun, which he was known to carry. The victim did not have a gun as he had pawned it three weeks prior to this incident.

The defendants left the scene. At Thornton's request, Smith drove across a bridge where Thornton threw the gun into a river. Then they went to Thornton's house, contacted the police, and were arrested shortly thereafter.

DISCUSSION

I.

Cleath Smith argues that the court erred in failing to direct a verdict in his favor due to insufficient evidence of his being an accessory, an aider, or an abettor to the murder. He argues the evidence failed to show any act he performed in furtherance of the killing other than driving his car.

Our standard of appellate review on this issue is stringent:

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for prosecution-- in the light most consistent with the verdict. We give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fairminded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict is thus placed beyond our authority to disturb.

Hart v. State, 637 So. 2d 1329, 1341 (Miss. 1994), citing *Garrett v. State*, 549 So. 2d 1325, 1331 (Miss. 1989).

In order to render one responsible as an aider or abettor, it is essential that he share in the criminal intent of the direct actor. *Gibbs v. State*, 77 So. 2d 705, 707 (Miss. 1955). The common intention need not be formed before convening at the place of the crime. It may have arisen on the spur of the moment, but it must exist at the time the crime is committed, and not merely before or after. *Id.*

In the one recent case the supreme court stated:

[A]ny person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense is an aider and abettor and is equally guilty with the principal offender.

Hooker v. State, 1996 WL 122898 (Miss.), quoting *Sayles v. State*, 552 So. 2d 1383, 1389 (Miss. 1989). The court in *Hooker* also held:

Aiding and abetting is defined to be the offense committed by those persons who, although not the direct perpetrator of a crime, are yet present at its commission, doing some act to render aid to the actual perpetrator.

Hooker, 1996 WL 122898 (Miss.), quoting *Walters v. State*, 65 So. 2d 465, 467 (Miss. 1953), citing *Swinford v. State*, 653 So. 2d 912, 915 (Miss. 1995).

Aiding and abetting may be manifested by acts, words, signs, motions, or any conduct which unmistakably evinces a design to encourage, incite or approve of the crime, or even being present, with the intention of giving assistance, if necessary, though such assistance may not be requisitioned. *Id.* It is clear that mere presence of a person is not sufficient even though such person might have approved the crime. *Griffin v. State*, 293 So. 2d 810, 812 (Miss. 1974), citing *Prine v. State*, 7 So. 2d 555 (1942); *Bruce v. State*, 103 So. 133 (1925); *Harper v. State*, 35 So. 572 (1904).

The starting point is that Cleath Smith was definitely present. We must determine whether any acts Smith committed in front of McDougal's house or prior to that time constituted intentional assistance in the commission of murder. Any assistance rendered after the shooting, without a prior intention to assist, at worst would make Smith an accessory after the fact.

The State points us to the following facts: Cleath Smith left Dorothy Smith's house with the intent to confront Carl McDougal. We agree the evidence supports that, as does testimony regarding the verbal altercation in front of McDougal's house. We also agree with the State that Smith enticed McDougal to come outside by honking the horn. Once McDougal was outside, for most of the altercation, he and Cleath Smith were the verbal antagonists. All we have so far is Smith's intent to argue with McDougal, without any threats even to fight him. What the State must show is an intent

to murder. For that, the State argues that although it is not clear from the evidence who got the gun out of the trunk and put it in the front seat, it is "clear" that immediately prior to going to McDougal's, one of the defendants did. Actually, that evidence is anything but clear.

"Red" Smith, the woman who was at the center of Cleath Smith and McDougal's disagreement, testified that she knew that there was a gun in the car and thought that it was under the front seat. When asked if she knew how it got to that location, she said, "I think one of them got it out of the trunk; I'm not sure." The reason for that opinion was that Red Smith knew a gun was normally carried in the trunk. Her opinion on that came from the fact that once on a previous day she had seen the trunk open and saw the gun. Red testified that she had not seen the gun taken out of the trunk, but only knew that a gun was usually kept there. At some stage on the night McDougal was killed she had seen the trunk open, but she was not able to say the gun was in the trunk. Also on the night of McDougal's death, she saw the gun inside the car, on the floor and only partially exposed from underneath the seat. She would not guess which defendant put the gun in the car, nor when she saw the gun. The last time she testified that she had been in the car was just before being pulled out of the car by McDougal. She did go outside one more time and was near the car. The State argues that an inference of intent to murder arises from the fact that Red's testimony would support the theory that, after the dispute between McDougal and Red, either Cleath Smith or Thornton took the gun out of the trunk preparatory to going to confront McDougal. It also allegedly justifies the State's getting an instruction that will be discussed later, that the defendants armed themselves and went to McDougal's in order to provoke a chance to shoot him. However, if Red Smith saw the gun the last time she was inside the car, and she did not remember when she saw it, that was before Cleath Smith would have in the State's construction of events become enraged at McDougal for pulling her out of the car.

Red Smith actually never testified that she saw anyone take the gun out of the trunk, and, at most, gave an opinion that one of the defendants must have done so. The conclusions that a witness jumps to based on observations, and the permissible conclusions for a jury and court to reach, are not necessarily identical.

The first part of the evidentiary chain is speculation. Red Smith believed that a gun was taken out of the trunk for two reasons: (1) she saw the trunk open, and (2) the gun, which was "always" in the trunk (based on seeing it there once), must have been taken out and put inside the car in order for it to be there when the shooting occurred. She did not testify that she had seen the gun in the trunk that night, and the only evidence on that came from both defendants, who testified that the gun was placed inside the car the day before. She also had seen the gun inside the car at a time that as likely as not was before either defendant could have been reacting to McDougal's argument with Red.

To support the conviction of Cleath Smith for murder, we must agree that Red Smith's speculation (based only on the fact that the trunk lid was open at some time) that the gun was removed from the trunk the night of the shooting was credible evidence. We then must agree that an inference of an intent to go to McDougal's to shoot him can be built on that speculation. Criminal intent is not always or even often announced to people who at trial can be witnesses. Finding intent from actions is necessary. The only known actions and words that the jury could accept were that Cleath Smith was mad at McDougal, that he went to McDougal's house wanting to find out why he treated Red Smith the way he had, and that after arriving the argument continued. McDougal was shot by

Thornton, without any witness's testifying that Smith encouraged him to do so.

An inference is a "a logical or reasonable conclusion of fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from established facts." *Black's Law Dictionary*, 776 (6th ed. 1990). "Speculation" on the other hand is "theorizing about a matter as to which evidence is not sufficient for certain knowledge." *Black's*, at 1399. In other words, it is choosing one conclusion among several that are equally possible.

We have carefully examined all the evidence supporting the State's theory that one of the defendants took a gun out of the trunk just before starting to drive over to McDougal's, and that was proof they had formed an intent to provoke a fight and shoot him. What we find is no testimony that either defendant in fact took a gun from the trunk. If the trunk was open on the night of McDougal's death, it is a reasonable inference that it was one of the defendants who opened the trunk of their own car. That they removed a gun that the witness had not that day seen in the trunk, and then placed it inside the automobile, and that this occurred after the confrontation between Red and McDougal, is only speculation.

Finally and most tellingly, in order to implicate Cleath Smith it must also be shown by sufficient evidence that he was the one who took the gun from the trunk after the confrontation or that he was aware of Thornton's doing so. If it was Thornton, then Smith must have understood Thornton's alleged intent to confront and shoot McDougal. There is absolutely no evidence of any of that. Red Smith is entitled to her conclusion. It was for the prosecution to elicit evidence to support it, an obligation which they could not meet.

The Mississippi Supreme Court in a civil context has said that as a general rule, "an inference essential to establish a cause of action may not be based upon another inference." *Vines v. Windham*, 606 So. 2d 128, 131 (Miss. 1992), quoting, *Goodyear Tire & Rubber Co. v. Brasher*, 298 So. 2d 685, 688 (Miss. 1974). While this is the general rule, the rule is not absolute. *Id.* The test lies in the strength of the inferences:

[W]here the ultimate inference has become only a strong possibility, such proof is insufficient to support a judgment. . . [W]e must, in allowing inference upon inference, do so with the firm limitation that the probabilities thereby permitted to be entertained are safe and dependable probabilities.

Id. at 132.

In this case, safe and dependable probabilities are not present. The verdict rested on an overly attenuated piling of inference upon inference. The State's evidence only showed that Cleath Smith was present at the murder of Carl McDougal, and not that he aided the murder. He drove to the victim's house, but there is no evidence that there was then an intention on Thornton's part, known to Smith, that there would be a murder. Smith argued strenuously with McDougal, but did not threaten him, according to any of the witnesses. Thus there is no evidence that Smith shared in the criminal intent to murder.

Because we find insufficient evidence, Cleath Smith's conviction for murder must be reversed and he must be discharged from further jeopardy for those charges.

II.

June Thornton also argues that there was insufficient evidence against him to prove murder. He focuses on the issue of premeditation, and alleges that the proof supports no greater crime than manslaughter. He argues, in the alternative, the verdict was against the weight of the evidence, and the court erred in failing to grant him a new trial.

There must be some evidence to support each element of the crime of murder. The only element Thornton disputes is premeditation. An inference of malice and intent can be drawn from the use of a deadly weapon. *Fairchild v. State*, 459 So. 2d 793, 802 (Miss. 1984). The necessary premeditation does not require long contemplation, but it is sufficient if the defendant made a conscious decision to kill only moments before the shooting. *See Catchings v. State*, 684 So. 2d 591, 594 (Miss. 1996), citing *Windham v. State*, 520 So. 2d 123, 125 (Miss. 1987). In *Windham*, the court did not use the word "premeditated" but used the words "deliberate design." Under Mississippi law, the two words are synonymous. *See Fairman v. State*, 513 So. 2d 910, 913 (Miss. 1987); *Mallett v. State*, 606 So. 2d 1092, 1094 (Miss. 1992).

After reviewing the evidence in the light most favorable to the verdict, we find sufficient proof of Thornton's criminal intent. The weight of the evidence also supports the verdict.

III.

Both defendants argue that the court failed to instruct the jury fully on the law of self defense, in particular, on the defendants' right to act upon appearances in light of the fact the victim was found to be unarmed. In considering whether reversible error has occurred in instructions withheld from the jury, the instructions must be considered as a whole. *Taylor v. State*, 597 So. 2d 192, 195 (Miss. 1992).

We have reviewed the instructions offered by the defendant and rejected by the court, as well as the ones given by the court. With the exception of S-4 discussed below, we find the jury was adequately instructed on the defendants' theory of self defense.

IV.

Both defendants argue the court erred in giving jury instruction S-4, which in effect, estopped them from arguing self defense. The instruction given states:

INSTRUCTION S-4

The Court instructs the Jury that if you believe from the evidence in this case beyond a reasonable doubt that the Defendants, JUNE THORNTON and CLEATH SMITH, armed themselves with a deadly weapon and sought Carl McDougal, with the formed felonious intention of invoking a difficulty with Carl McDougal, or brought on, or voluntarily entered into any difficulty with Carl McDougal with the designed and felonious intent to cause serious bodily harm to Carl McDougal then the Defendants, JUNE THORNTON

and CLEATH SMITH, cannot invoke the law of self-defense no matter how imminent the peril in which JUNE THORNTON and CLEATH SMITH found themselves.

The Mississippi Supreme Court has repeatedly denounced this type of instruction. See *Hart v. State*, 637 So. 2d 1329, 1337 (Miss. 1994); *Keys v. State*, 635 So. 2d 845, 849 (Miss. 1994); *Thompson v. State*, 602 So. 2d 1185, 1189 (Miss. 1992); *Williams v. State*, 482 So. 2d 1136, 1138 (Miss. 1986); *Barnes v. State*, 457 So. 2d 1347, 1349 (Miss. 1984); *McMullen v. State*, 291 So. 2d 537, 540 (Miss. 1974); *Patrick v. State*, 285 So. 2d 165, 168 (Miss. 1973); *Craft v. State*, 271 So. 2d 735, 736 (Miss. 1973); *Ellis v. State*, 208 So. 2d 49, 50 (Miss. 1968); *Tate v. State*, 192 So. 2d 923, 925 (Miss. 1966).

An instruction estopping one from asserting self defense is improper except in cases where all the elements of estoppel are clearly present. *Thompson v. State*, 602 So. 2d 1185, 1190 (Miss. 1992). The reason for permitting a self defense theory to be decided by a jury far outweighs the reasons for estopping one from asserting this most basic right. *Id.* Only in rare cases is the proof clear enough to warrant such an instruction. See *Hart v. State*, 637 So. 2d 1329 (Miss. 1994); *Barnett v. State*, 563 So. 2d 1377 (Miss. 1990); *Hall v. State*, 420 So. 2d 1381 (Miss. 1982); *Reid v. State*, 301 So. 2d 561 (Miss. 1974).

The court found such a rare case in *Hart v. State*, 637 So. 2d 1329 (Miss. 1994). In *Hart*, the court allowed the instruction where the only viable challenge on appeal was whether the words, "or voluntarily entered into" were supported by the evidence; and the evidence was uncontradicted that the defendant armed himself at a time when he was in no physical danger and with the intent of provoking difficulty with the victim. *Hart*, 637 So. 2d at 1337, citing *Prine v. State*, 19 So. 711 (Miss. 1896). In *Hart*, the defendant admitted to arming himself with a 20 gauge shotgun and going over to the victim's house because "he wanted to get (it) over with." *Id.* at 1333. Earlier that evening, he made several threatening phone calls, one to the victim's ex-mother-in-law telling her to get her grandchildren, who were at the victim's house, because he was going over there to burn the house down. *Id.* at 1331. After he killed the victim, he called the ex-mother in law again and told her, "I did it. I killed him." When he was arrested, he told the police he had gone over to the victim's house and that the victim, who was in the front yard, began to run toward his car, and he shot him from the car. *Id.* at 1331.

In discussing the instruction, the court stated:

It is a rare case indeed where an instruction cutting off one's right to self-defense is supported by the evidence. The S-4 charge precluded the jury from considering a claim of self-defense, no matter how imminent the peril, in the event the jury found the existence of certain facts. The purpose of S-4 was to inform the fact-finder that one cannot arm himself in advance when he is not in any physical danger, go forth and provoke a confrontation or difficulty with another, shoot the other, and then attempt to hide behind a smoke screen of self-defense.

Hart, 637 So. 2d at 1337. The court warned that the instruction and others like it are "fraught with danger," and when the State seeks this instruction, "it does so at its own peril." *Id.* at 1338.

The court also allowed the instruction in *Barnett v. State*, 563 So. 2d 1377, 1381 (Miss. 1990), where the proof showed that the defendant went into two trailers, fully armed himself, and in a matter of seconds, came out, shot and killed the victim.

The court did not allow the instruction in *Keys v. State*, 635 So. 2d 845 (Miss. 1994). The proof showed that Keys and the victim began their argument in a basketball game during the afternoon. That evening, Keys went to the store, carrying his pistol allegedly because he had previously been the victim of a robbery, and ran into the victim. During the confrontation, the victim asked Keys why he was following him, to which Keys replied he was ready to "straighten his business," and pulled out the pistol. A witness testified that Keys stated, "Nobody slaps me, I'm going to kill him," and then fired twice at the victim. Although Keys claimed he thought the victim was armed, there was no weapon found on or near the victim. The court in *Keys* held that even if the great weight of the evidence against Keys supported a contrary view, Keys was still entitled to present his theory of self defense to the jury unimpaired by instructions which preclude his right of self defense. *Id.* at 849.

The evidence here of arming is non-existent, depending as it does on an inference based on an inference of possibilities that are no more likely than other possibilities. The State argues that even if the instruction was error, then it is not reversible error because when read together, the instructions correctly state the law. *Thompson v. State*, 602 So. 2d 1185, 1190, citing, *Roberts v. State*, 458 So. 2d 719, 721 (Miss. 1984). The arming instruction has never been found to be harmless error, as it in effect voids the other self-defense instructions. The court in *Keys v. State*, 635 So. 2d 845, 849 (Miss. 1994) held the instruction was error even though the jury was given four other self defense instructions, that the instruction was neither necessary nor useful and was potentially confusing.

The court in *Keys* also focused on the effect of the instruction as a peremptory instruction for the prosecution, and held that it placed a higher burden on the defendant to assert a claim of self-defense than is required by our law, allowing certain parts of the evidence to be considered while omitting other parts advantageous to the defendant's case. *Id.* The court stated that its condemnation of this instruction began almost a century ago when it held: "The fourth instruction is unfair to the prisoner, in that it singles out certain parts of the evidence for prominent presentation to the jury, and omits other parts favorable to the accused." *Id.* at 849, quoting *Prine v. State*, 19 So. 711, 712 (Miss. 1896).

Though the supreme court occasionally allows the instruction, a prosecution with evidence sufficient to convict is better off without gambling with the instruction. A prosecution without sufficient evidence cannot possibly uphold the instruction on appeal.

S-4 was reversible error because it cut off the jury's consideration of self-defense. Therefore, we also reverse the judgment as to June Thornton for such additional proceedings as are consistent with this opinion.

THE JUDGMENT OF THE HUMPHREYS COUNTY CIRCUIT COURT OF CONVICTION OF CLEATH SMITH FOR MURDER IS REVERSED AND THE INDICTMENT AGAINST HIM IS DISMISSED. THE JUDGMENT OF CONVICTION OF JUNE THORNTON OF

MURDER IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. COSTS ARE TAXED TO HUMPHREYS COUNTY.

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