IN THE COURT OF APPEALS 02/11/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00005 COA

DAVID FREEMAN

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 LOUIS GOZA JR.

COURT FROM WHICH APPEALED: MADISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

WALTER E. WOOD

RICHARD FLOOD

FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: JOHN KITCHENS

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: MANSLAUGHTER: SENTENCED TO SERVE A TERM OF 20 YRS IN THE CUSTODY OF THE MDOC

BEFORE THOMAS, P.J., MCMILLIN, P.J. AND KING, J.

MCMILLIN, P.J., FOR THE COURT:

David Freeman appeals the manslaughter conviction rendered against him by a Madison County Circuit Court jury, for the death of LaDarious Powell, a child of less than two years of age at his death. In seeking reversal of his conviction, Freeman challenges both the weight and sufficiency of the evidence presented to establish his guilt. He also raises a number of additional issues, all of which will be discussed individually. This Court has determined that the issues raised are without merit and that the conviction should be affirmed.

I.

Facts

Freeman began living with LaDarious Powell's mother when LaDarious was approximately fifteen months old. The proof at trial included evidence of several episodes of abusive behavior against LaDarious by Freeman beginning in the weeks prior to his death. The episodes included acts of intimidation of the child as well as incidents of physical abuse by striking the child and repeatedly throwing the child against the wall. Approximately one week prior to his death, LaDarious was examined by a physician who noted extensive bruising on the child's body and reported the matter to Department of Human Services officials. Unfortunately, any possible intervention on the child's behalf came too late. On the morning of July 13, 1992, a relative discovered LaDarious at home in his bed in an unconscious condition. The child was carried to the hospital where he died as the result of severe trauma to the head. A post-mortem examination showed the child to have a cut lip and his body to be covered with multiple bruises. It was also discovered that he was experiencing internal bleeding in his skull cap together with fluid build-up on the brain. A physician testified that these findings were all consistent with a conclusion that the child's death was a homicide. The doctor also testified that the symptoms were consistent with a course of physical abuse continuing over some period of time and contributing to a steady decline in the child's condition.

The child's mother was not in the home at the time the child was discovered. She claimed to have left earlier that morning seeking to obtain employment. Freeman was, however, in the home. Both the child's mother and Freeman were criminally indicted -- Freeman for capital murder and the child's mother for manslaughter. Freeman was tried first and the child's mother was a witness for the State, relating many of the alleged episodes of abusive conduct that occurred in the weeks leading up to LaDarious's death.

II.

The Sufficiency of the Evidence

Freeman raised three separate challenges to the sufficiency of the evidence against him at the trial level, and suggests on appeal that the trial court erred in each instance when it denied relief. Freeman

moved for a directed verdict of not guilty at the close of the State's proof. The motion was denied and Freeman thereafter presented proof in his defense. By doing so, he waived any claim to reversible error based on this ruling by the trial court. *Ellis v. State,* 469 So. 2d 1256, 1260 (Miss. 1985).

However, by renewing the motion at the close of all the proof, and by moving the court for a judgment notwithstanding the verdict after the jury returned its guilty verdict, Freeman has procedurally preserved an appeal question on the sufficiency of the evidence.

A challenge to the sufficiency of the evidence suggests that, as to one or more of the essential elements of the crime, the proof by the State is so lacking that a reasonable and fair-minded jury could only find the accused not guilty. *Nicolaou v. State,* 612 So. 2d 1080, 1083 (Miss. 1992).

Though Freeman was originally indicted for capital murder, he was convicted of the lesser-included-offense of manslaughter. Under instructions given to the jury on manslaughter, the jury was required to find, beyond a reasonable doubt, that Freeman killed LaDarious Powell, without malice, by inflicting cerebral trauma to the victim's body by striking him or throwing him.

There appears to be little doubt as to the manner of the child's death. Thus, the only real issue with which the jury had to contend was whether there was sufficient evidence to demonstrate Freeman's involvement in the child's injuries. The proof in that regard consisted, to a great extent, of the testimony of LaDarious's mother of incidents occurring over a course of several weeks leading up to the child's death where Freeman displayed an apparent propensity to treat the child in an unduly rough manner. She testified to coming into a room occupied only by Freeman and the child and seeing the child lying on the floor with his eyes rolled back. She testified to seeing Freeman repeatedly forcefully throw the child against the wall. Another relative testified to seeing Freeman strike the child a blow with his hand. The medical evidence permitted the jury to conclude that the child died, not as the result of an isolated incident, but from a continuous course of physical abuse that prevented the child's recovery from previous injuries and, instead, caused a progressive aggravation of existing internal injuries to the point that the child died.

We conclude that the proof was sufficient to implicate Freeman in the extended physical abuse of the child that ultimately led to his death. Freeman's counsel, without doubt, was able to effectively demonstrate to the jury certain facts that would tend to impeach the testimony of the child's mother. However, it is the province of the jury, armed with the evidence, to ultimately determine the degree of credibility it will assign to the witnesses. *Sudduth v. State,* 562 So. 2d 67, 70 (Miss. 1990). We do not conclude, based upon this record, that the child's mother was so substantially impeached that the jury would be required, as a matter of law, to disregard her testimony implicating Freeman in the physical abuse of LaDarious. There was other testimony concerning Freeman's conduct concerning the child during the relevant period that would tend, to some extent, to lend some credence to the mother's testimony.

That the State failed to present evidence directly implicating Freeman in a particular incident where a life-ending blow was delivered is not fatal to the State's case. Based upon credible medical evidence, the jury could have concluded that such an event did not even take place. The jury could have concluded that this child died of repeated instances of abuse, none of which taken in isolation, would have proved fatal. The jury could have also reasonably inferred, without direct proof of every instance of physical abuse, that Freeman was involved, on a continuing basis, in a pattern of abusive

behavior that could have contributed to the child's initial non-life-threatening injuries and to the progressive aggravation of those injuries as the child's condition degenerated day after day. Viewing the evidence in the light most favorable to the verdict, as this Court is required to do, we are unable to say with the requisite certainty necessary to reverse this verdict that the evidence was insufficient to sustain the jury's verdict. *See McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993).

III.

The Weight of the Evidence

In his post-trial motion, Freeman sought a new trial by claiming that the verdict was against the weight of the evidence. The trial court denied the motion, and Freeman now asserts this as reversible error. The trial court, in considering such a motion, is required to view all of the evidence in the light most favorable to the verdict. *Strong v. State*, 600 So. 2d 199, 204 (Miss. 1992). As to matters upon which the evidence was in conflict, the court should assume that the jury resolved the conflict in a manner consistent with the verdict. *Gossett v. State*,660 So. 2d 1285, 1294 (Miss. 1995). The court must grant a new trial if it reaches the conclusion, based upon a review of the evidence in this light, that to sustain the verdict would work a manifest injustice. *Burrell v. State*, 613 So. 2d 1186, 1191 (Miss. 1993). Otherwise, the court should deny the motion.

When this Court is called upon to decide if the trial court erred in denying the new trial motion, our authority is limited. We may disturb the trial court's decision only if we determine that the court committed a manifest abuse of discretion. *Id.* In this case, the State presented evidence that implicated Freeman in incidents that would permit a reasonable inference of his culpability in the death of LaDarious Powell. The essential challenge to the weight of the evidence seems to be that there was no direct evidence of incidents of abuse involving Freeman that would appear to be of life-threatening severity. For reasons we have already discussed, this argument is without merit. Also, it cannot be disputed that the child's mother was, to an extent, impeached in her testimony by showing that she had made previous inconsistent statements concerning Freeman's treatment of the child. This, unquestionably, requires an evaluation of the weight of the evidence supporting the guilty verdict. Nevertheless, the trial court, by virtue of being physically at the trial and hearing the evidence first-hand and observing the demeanor of the witnesses, is better able to evaluate the probative value of a witness's testimony than is this Court. The trial court apparently concluded that the testimony of the child's mother was not totally beyond belief. Based upon our limited scope of review, we are unable to conclude that the trial court in this case abused its discretion when it so concluded and refused to grant Freeman a new trial. We, therefore, find this issue to be without merit.

IV.

Defense Counsel's Motion to Withdraw

Freeman filed a complaint against his appointed counsel with the Mississippi Bar, prior to trial claiming dissatisfaction with the attorney's efforts to resist a continuance motion filed by the State. The attorney then filed a motion to be relieved of further duties as counsel for Freeman. The trial court denied the motion when Freeman affirmatively represented to the court that he desired the attorney's continued involvement in the case. However, Freeman now claims on appeal that it was reversible error not to let the attorney out of the case. We conclude this issue to be without merit for

two separate, but equally valid, considerations. In the first place, the resolution of such matters is vested in the sound discretion of the trial court, so that this Court may find reversible error only upon the conclusion that the trial court abused its discretion. *Burney v. State*, 515 So. 2d 1154, 1157 (Miss. 1987). Freeman has failed to articulate or factually demonstrate any abuse of discretion or to show any prejudice arising out of the trial court's decision not to relieve counsel. Secondly, we conclude that Freeman's affirmative representation to the trial court that he desired the attorney to remain in the case constituted a waiver of any otherwise-existing objection Freeman might have. Freeman, by so indicating, effectively deprived the trial court of the opportunity to consider the issue on the merits, and the supreme court has repeatedly said that a trial court will not be put in error on a matter upon which it was not permitted the opportunity to rule. *Robinson v. State*, 662 So. 2d 1100, 1104 (Miss. 1995).

V.

The Trial Court's Refusal to Quash the Venire

During voir dire, one member of the venire gave a response that indicated that the member had a firm preconceived notion of what the penalty should be for one convicted in the death of a child by physical abuse. The clear import of the statement was that the death penalty was the only appropriate punishment. Freeman moved for a mistrial, claiming the assertions of the potential juror tainted the entire panel. The court proceeded to explain to the jury that, in a death penalty case, the trial is bifurcated and that the jury must pass on both the issue of guilt and separately on the possibility of execution of the defendant. He then inquired of the venire if they understood the role of the jury, and all members responded affirmatively. The trial court is vested with wide discretion in determining whether a mistrial is warranted in circumstances such as this. *Benson v. State*, 551 So. 2d 188, 191, (Miss. 1989). The trial court, by virtue of being physically present and observing the events, is deemed to be in the best position to assess the prejudicial impact of such occurrences. Therefore, an appellate court will not reverse such a discretionary call unless convinced that the trial court has abused its discretion. *Id.*

We find nothing particularly inflammatory in the opinion expressed by the potential juror. One of the primary purposes of voir dire is to detect and permit the exclusion of persons having preconceived notions such as this that militate against a fair trial for the defendant. *Foster v. State*, 639 So. 2d 1263, 1277 (Miss. 1994). We doubt that the remaining randomly drawn venire members were so impressionable that the statements of one of their number would deprive the others of their objectivity and ability to follow the instructions of the court. We also note that, ultimately, Freeman was convicted only of manslaughter, and the maximum punishment for this crime does not include execution. Thus, it is difficult to see how one venire member's opinions, ultimately ignored by the jury, could reasonably be said to have deprived Freeman of a fair trial.

VI.

Challenges to Jurors for Cause

Freeman sought to challenge ten jurors for cause. All of these challenges were denied by the trial court. At that point, Freeman asked for alternative relief in the form of additional peremptory challenges. This request was also denied. Freeman claims both of these rulings to be reversible error.

However, he fails to point out with any particularity how the trial court abused its discretion in denying any of his challenges for cause, and cites no authority for the proposition that, because his challenges for cause were unsuccessful, he should have been granted additional peremptory strikes. We treat this failure as a procedural bar and decline to consider these issues. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993).

VII.

Opening Statement

Freeman requested permission to reserve his opening statement until the conclusion of the State's case in chief. The trial court refused the request, requiring the defendant to make his opening statement immediately at the conclusion of the State's opening remarks. Freeman now claims this was reversible error. We note that the recently-adopted Uniform Circuit and County Court Rules provide that "[t]he defense may make an opening statement to the jury at the conclusion of the state's opening statement or prior to the defendant's case in chief." UCCCR 10.03. However, this trial occurred prior to the adoption of the rule and at a time when case law provided that:

> This [the timing of opening argument] is a matter which must be allowed to rest largely within the discretion of the trial court. In the absence of a showing of manifest abuse of discretion, or that substantial prejudice resulted, the action of a trial judge in such a case must be sustained.

Black v. State, 308 So. 2d 79, 80 (Miss. 1975).

Freeman has failed to demonstrate how the trial court abused its discretion or how he was prejudiced in any way by virtue of the timing of his opening statement to the jury. Absent such a showing, the trial court cannot be put in error on this point. *Smith v. State*, 386 So. 2d 1117, 1120 (Miss. 1980).

VIII.

Alleged Violations of Rule of Evidence 404

Freeman claims that the jury was allowed to hear testimony of his alleged mental and physical abuse of LaDarious's mother for the sole purpose, apparently, of proving that he was an abusive person by nature and, thus, more likely to have committed the acts of abuse that caused the child's death. Freeman claims such proof violated Mississippi Rule of Evidence 404(b), which prohibits introduction of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." M.R.E. 404(b).

One of the incidents involved the witness's response to a question about events occurring shortly after she began living with Freeman. The question asked was, "Who was abused?" The witness responded, "Myself." It is clear to this Court that the prosecution did not purposely elicit this response and did not expect it. The matter was not explored further after Freeman's counsel moved for a mistrial that was denied.

There is no way to guarantee that improper evidence will never get before a jury. Neither is the defendant guaranteed that, if such improper evidence is inadvertently admitted, he is automatically entitled to a mistrial. Such questions are submitted to the sound discretion of the trial court to determine if the impact is so prejudicial that it has effectively denied the defendant a fair trial. *Gossett v. State,* 660 So. 2d 1285, 1290 (Miss. 1995). This Court reviews such a ruling only in the context of determining if the trial court abused that discretion. *Id.* We do not find this isolated unsolicited response to be so prejudicial to the rights of the defendant that a mistrial was the only remedy available. Thus, we do not find the trial court's ruling to be an abuse of discretion.

On two other occasions when LaDarious's mother was describing incidents of abuse by Freeman against the child, the mother related how Freeman had included her in the events by pointing a pistol at her and threatening to shoot her. These remarks appear merely incidental to the narrative that the witness was relating. They were not unduly emphasized by the State. In fact, the record shows that the State attempted as best it could to confine the witness's testimony to events relating directly to LaDarious. The facts of this witness's testimony related primarily to the treatment of LaDarious and only included her treatment as a part of giving a complete description of the events in question. The supreme court has, on occasion, said that it is permissible for a jury to have the entire picture of the events surrounding a crime, even though such evidence may reveal other bad acts by the defendant not directly relevant to the particular charge being tried. *Ballenger v. State,* 667 So. 2d 1242, 1257 (Miss. 1995). Such considerations appear to have some application in this case. We conclude that there was no reversible error in the testimony of this witness concerning the fact that Freeman's acts of abuse against LaDarious were, on occasion, expanded to encompass this witness.

IX.

The Exclusion of Evidence of Abuse of the Victim's Brother

Freeman sought, through several different witnesses, to introduce evidence that would indicate that LaDarious's mother had been suspected of the physical abuse of the victim's brother, Leonar'do, at a time before Freeman became involved with the family. The court excluded the evidence, sustaining the State's relevancy objection. Freeman now claims that to be reversible error, apparently on the proposition that such evidence was exculpatory to Freeman as showing it more likely that the child's mother was responsible for the abuse. Questions concerning evidentiary matters are vested in the sound discretion of the trial court and that court may be reversed only upon a showing that the court abused its discretion. *Shamblin v. State,* 601 So. 2d 407, 413 (Miss. 1992). Even erroneous rulings on evidence questions may not be the basis for reversal "unless a substantial right of the party is affected . . . ." M.R.E. 103(a).

The trial court apparently determined that proof that the child's mother had been suspected of abuse of another child was too remote to serve the purpose of implicating LaDarious's mother as the sole culprit in his death and thereby shifting suspicion from Freeman. This would seem to be the ruling dictated by Mississippi Rule of Evidence 404(b), which prohibits the introduction of such evidence for the indicated purpose. Although the child's mother was not a party to this proceeding, nevertheless, this rule of evidence is not applicable solely to the parties, but to all witnesses.

In addition, even were the jury permitted to consider such evidence, there is no reasonable basis to suggest that it would have produced a different result. The State never implied that the child's mother was faultless in this situation. In fact, the jury was aware that the mother had also been criminally indicted in connection with LaDarious's death. Thus, even were the jury to become convinced that the mother likely contributed to the abuse which led to the child's death, that conclusion would not necessarily be exculpatory to Freeman. The proof showed that the child probably died of abuse extending over some period of time. It was not necessary, in order to obtain a conviction, to show that Freeman administered each and every blow that ultimately led to the tragic death of this child. This issue is without merit.

X.

Jury Nullification Instruction

Freeman requested what has come to be known as a jury nullification instruction that essentially informs the jury that it is within its province to disregard the evidence and the other instructions given by the court on the applicable law and acquit the defendant based upon nothing more than the jury's raw authority to do so.

Such an instruction is destructive to an orderly administration of justice. It advances a theory of the jury's role that is contrary to the most fundamental concept of the legitimate purpose of a criminal proceeding. The possibility of jury nullification is nothing more than the necessary price our society pays for the right of trial by jury and the protections afforded a defendant under constitutional principles of double jeopardy. To raise that necessary evil to a guiding principle solemnly pronounced by the court is a proposition unworthy of serious consideration. The trial court was eminently correct in refusing the instruction. *See Davis v. State*, 520 So. 2d 493, 494 (Miss.1988).

THE JUDGMENT OF THE MADISON COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO MADISON COUNTY.

BRIDGES, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., CONCURS IN RESULT ONLY. HERRING, J., NOT PARTICIPATING.