

IN THE COURT OF APPEALS 8/6/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00013 COA

KENNETH K. WHITE A/K/A KENNETH K. WHITE, SR.

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. JOHN B. TONEY

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CHOKO LUMUMBA

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: JOHN KITCHENS

NATURE OF THE CASE: FELONY: KILLING OF HUMAN BEING WHILE UNDER THE
INFLUENCE OF ALCOHOL

TRIAL COURT DISPOSITION: CONVICTED OF MANSLAUGHTER AND SENTENCED TO
SERVE A TERM OF 18 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF
CORRECTIONS

BEFORE FRAISER, C.J., COLEMAN, AND KING, JJ.

KING, J., FOR THE COURT:

On or about July 30, 1991, Victoria Hollingsworth's automobile was struck by a vehicle driven by the Defendant, Kenneth White. Victoria's two minor children, Melissa and Nathan, and Victoria's mother-in-law were passengers in Victoria's vehicle. Victoria, Melissa, and Victoria's mother-in-law survived the accident, but young Nathan died two days following the accident.

After the accident, police officers arrived. Upon talking to White regarding the cause of the accident, the officers smelled alcohol and began to administer field sobriety tests. White failed the field sobriety tests. Thereafter, White was transported to the Pearl Police Department and given a number of physical sobriety tests which indicated that White was intoxicated; however, White refused to take a breath intoxilyzer test.

Officer Steen charged White with driving under the influence but failed to serve a copy of the citation upon White. The charge was upgraded to aggravated assault and then manslaughter, when the police learned of Nathan's death.

Following a two-day jury trial, White was convicted of manslaughter and sentenced to serve eighteen years in the custody of the Mississippi Department of Corrections. Aggrieved by the conviction and sentence, he appeals. We find the appeal to be lacking in merit and therefore, affirm the conviction.

I.

DID THE TRIAL COURT ERR IN DENYING WHITE'S MOTION IN LIMINE REQUESTING EXCLUSION OF EVIDENCE REGARDING HIS REFUSAL TO TAKE THE BREATH INTOXILYZER?

White argues that the trial court erred in denying his motion in limine, which requested exclusion of evidence regarding his refusal to take a breath intoxilyzer test. White argues that because he was charged with manslaughter by culpable negligence, his refusal to take the breath intoxilyzer was irrelevant and therefore, should not have been introduced into evidence.

All relevant evidence is admissible. M.R.E. 402. Relevant evidence is evidence that tends to show whether a fact of consequence to an action either occurred or did not occur. *Wade v. State*, 583 So. 2d 965, 967 (Miss. 1991) (citations omitted). The grand jury's indictment of White contained the following charge:

[White] unlawfully and feloniously . . . without authority of law, and of his culpable negligence, did cause the death of Nathan Hollingsworth, a human being, by driving an automobile, while under the influence of alcohol, and at an extreme and dangerous rate of speed, against the peace and dignity of the State of Mississippi.

Proof that White operated an automobile while under the influence of alcohol was integral to the State's case. Officer McQueen and Officer DeWitt testified that White failed field sobriety tests. In addition, Officer DeWitt testified that he noticed that three-quarters of a pint of bourbon lying on the seat of White's truck had been consumed. The testimony of the officers alone shows that White operated the truck while under the influence of alcohol. Evidence that White refused to take the intoxilyser has minute relevance because it explains the absence of test results corroborating the officers' testimony.

White also argues that admitting evidence of his refusal to take a blood alcohol test violates his Fifth Amendment privilege against self-incrimination. White recognizes that our supreme court dispelled this argument in *Ricks v. State*, 611 So. 2d 212, 214-16 (Miss. 1992) (citing *South Dakota v. Neville*, 459 U. S. 553, 564 (1983)). However, he contends that *Ricks* is distinguishable from the present case because unlike *Ricks*, he is not being prosecuted for driving under the influence but manslaughter by culpable negligence. Although *Ricks* concerned a prosecution pursuant to Mississippi's implied consent law, we do not believe that the supreme court meant for its holding to be confined within the narrow perimeter of DUI prosecutions. Indeed, blood, saliva, and hair samples have been held admissible and not violative of the Fifth Amendment in a prosecution for rape. See *Wesley v. State*, 521 So. 2d 1283, 1286 (Miss. 1988). The Defendant has not cited, nor do we find any compelling reason to make a distinction when the charge is manslaughter by culpable negligence. Therefore, we find that the trial court correctly denied the motion in limine.

II.

WAS DEFENDANT DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND A FUNDAMENTALLY FAIR TRIAL?

White argues that he was denied the effective assistance of counsel. In support of this argument, White cites the following errors of trial counsel:

1. Failure to object to Victoria Hollingsworth's testimony regarding Nathan's condition;
2. Failure to object to badgering of Defendant by prosecution;
3. Failure to rehabilitate Defendant by redirect examination;
4. Failure to cross-examine Lisa May, a witness for the prosecution;
5. Failure to call pertinent witnesses in case in chief;
6. Submission of an improper jury instruction

When faced with a claim of ineffective assistance of counsel, this Court follows the *Strickland* test. *Mohr v. State*, 584 So. 2d 426, 430 (Miss. 1991) (citations omitted). Under the *Strickland* test, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient

performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Assuming White satisfies the first prong of the test, we are not convinced that White has met the second prong of the test. Under the second prong of the test, White must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Mohr*, 584 So. 2d at 430. White's catalogue of defense counsel's failures does not undermine our confidence in the outcome. Absent defense counsel's alleged failures, the record contains abundant evidence from which a jury could find White guilty of manslaughter by culpable negligence. Law enforcement officers testified that White had smelled of alcohol and had failed field sobriety tests, and disinterested witnesses testified that White was speeding and driving recklessly immediately prior to the collision. Therefore, we do not believe that the outcome would have been different. This assignment of error lacks merit.

III.

DID THE TRIAL COURT ERR BY GIVING AN IMPROPER JURY INSTRUCTION?

White argues that the court erred by granting the State an instruction which defined culpable negligence because there was no evidence that he acted with wanton or reckless disregard for human life. "Our law is well settled that jury instructions are not given unless there is an evidentiary basis in the record for such." *Dedeaux v. State*, 630 So. 2d 30, 33 (Miss. 1993) (citing *Davis v. Davis*, 530 So. 2d 694, 701 (Miss. 1988)); *Dennis v. State*, 555 So. 2d 679, 683 (Miss. 1989) (citations omitted). Conversely, a timely requested and correctly phrased jury instruction on a genuine issue of material fact should not be refused unless the court can say:

[T]aking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inferences which may be drawn from the evidence in favor of the requesting party, that no hypothetical, reasonable jury could find the facts in accordance with the theory of the requested instruction.

Ferrill v. State, 643 So. 2d 501, 505 (Miss. 1994) (citations omitted). When we consider the evidence in a light most favorable to the State, we are not convinced that reasonable jurors could not find that White's conduct evinced a conscious, wanton or reckless disregard for the value or safety of human life. Unlike the defendant in *Evans v. State*, disinterested witnesses testified that White was speeding and driving recklessly immediately prior to the accident, and there was evidence that White had consumed three-quarters of a pint of bourbon hours before the accident. Thus, the record contains evidence, which justifies the granting of the instruction. *Cf. Evans v. State*, 562 So. 2d 91, 96 (Miss. 1990) (evidence that defendant had drunk five cans of beer prior to accident held insufficient to sustain convictions for manslaughter by culpable negligence because witnesses to the accident testified that defendant had been driving well, not recklessly, negligently, unlawfully, or at a high rate of speed). There is no merit to this assignment of error.

Because we find no merit in the Defendant's appeal, we affirm the conviction and sentence of the court.

THE JUDGMENT OF THE CIRCUIT COURT OF RANKIN COUNTY OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF 18 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO RANKIN COUNTY.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

BRIDGES, P.J., NOT PARTICIPATING.