

IN THE COURT OF APPEALS 2/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00983 COA

HOWARD LEE RUFF

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. FRANK A. RUSSELL

COURT FROM WHICH APPEALED: CIRCUIT COURT OF ITAWAMBA COUNTY

ATTORNEY FOR APPELLANT:

CAROLYN R. BENSON

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: HOLLY BRIDGES WIGGS

DISTRICT ATTORNEY: JOHN R. YOUNG

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTED OF MANSLAUGHTER AND SENTENCED TO
SERVE A TERM OF TWENTY (20) YEARS IN THE CUSTODY OF THE MDOC

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

THOMAS, P.J., FOR THE COURT:

Howard Lee Ruff was indicted for murder and, after trial, convicted of manslaughter. Aggrieved, Ruff appeals assigning three issues as error; finding none, we affirm.

FACTS

On the morning of December 31, 1993, Cytrice Nicole Chambers, the eighteen-month-old daughter of Howard Lee Ruff and Phaedra Chambers, was smothered to death. Phaedra Chambers was driven to work by Willie Ruff, the mother of Howard Lee Ruff. Howard Lee Ruff was left in the home with Cytrice. When Willie Ruff returned home after her ten minute trip, she encountered Howard Ruff running out of the home with Cytrice in his arms and proceeded to drive with him to the hospital. Encountering a police car en route to the hospital, Ruff flagged down the car of Deputy Sheriff Roger Nichols who took Howard Ruff and Cytrice to the Fulton Family Medical Center. Deputy Nichols testified that he thought Cytrice was dead when Ruff got into his car. Nichols stated that Cytrice was "blue around the mouth." Cytrice was then flown to the hospital in Tupelo. Efforts to revive Cytrice were unsuccessful.

According to Howard Ruff, Cytrice was sitting on the couch whining when Phaedra Chambers and Willie Ruff left that morning. Howard Ruff convinced Cytrice to come to bed with him and, when he awoke, Cytrice was jumping on the living room sofa. Howard Ruff went into the kitchen to get a drink of water and claimed he heard a bump that sounded like someone fell. He found Cytrice lying on the floor with her teeth gritted and her eyes wide open. He stated that when he could not get Cytrice to respond, he ran out the door with the intention of going to the hospital. At this point, he encountered Willie Ruff.

During the trial, Dr. Emily Ward, state medical examiner and forensic pathologist, testified as to the cause of Cytrice's death. Ward's autopsy revealed hundreds of petechial hemorrhages around the eyes, lungs, heart, thymus gland and brain of Cytrice. Ward concluded this pressure phenomena only occurs in three situations: asphyxiation, strangulation, or smothering. She ruled out asphyxiation because nothing was found in Cytrice's airway and also ruled out strangulation because no hemorrhaging was found around Cytrice's neck. Ward concluded the only possible cause for the injuries and death was smothering.

ANALYSIS

I.

DID THE TRIAL COURT ERR IN FAILING TO GRANT DEFENDANT'S INSTRUCTION ON EXCUSABLE HOMICIDE?

At the close of evidence, Ruff submitted the following instruction on excusable homicide:

The Court instructs the jury that the killing of any being by act, procurement, or omission of another shall be excusable:

- (a) When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution and without any lawful intent;
- (b) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation;
- (c) When committed upon any sudden combat, without any dangerous weapons being used, and not done in a cruel or unusual manner.

If you find that the Defendant, Mr. Ruff, did or could have contributed to the death of Cytrice Chambers in his attempt to resuscitate her, you may find him guilty of excusable homicide.

Ruff's theory of defense was that the death of Cytrice may have occurred as a result of his efforts to revive Cytrice. The judge refused Ruff's instruction as not conforming with the proof presented during the trial, concluding the jury could not find that Ruff or anyone else caused the death of Cytrice by attempting to resuscitate her.

The law is clear that a defendant is entitled to have the jury instructed on his theory of the case. *Anderson v. State*, 571 So. 2d 961, 964 (Miss. 1990). However, the instructions "must be warranted by the evidence." *Perry v. State*, 637 So. 2d 871, 874 (Miss. 1994) (quoting *Monroe v. State*, 515 So. 2d 860, 863 (Miss. 1987)). "Where an instruction is not supported by the evidence then it should not be given." *Givens v. State*, 618 So. 2d 1313, 1320 (Miss. 1993) (quoting *Hicks v. State*, 580 So. 2d 1302, 1306 (Miss. 1991)). Further, the granting of an instruction not supported by the evidence presented at trial is error. *Givens*, 618 So. 2d at 1320.

The jury was fully instructed on the elements of murder and manslaughter in the heat of passion. Ruff was found guilty of the lesser crime of manslaughter.

The State contends, and we agree, that the trial court was correct to refuse this instruction due to a lack of evidentiary foundation. Ruff claims that the instruction was to present the defense theory of death caused by resuscitation. Based on the evidence presented to the jury, the State did not accuse Ruff of killing Cytrice during the process of resuscitation. The State accused Ruff of placing his hand over her mouth and smothering Cytrice.

The Supreme Court discussed the standard which the trial court should follow when confronting the issue of the correctness of refusing a proffered jury instruction in *Ferrill v. State*, 643 So. 2d 501 (Miss. 1994). In *Ferrill*, the Court held:

The refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is proper, only if the trial court--and this Court on appeal--can say, taking 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.

Id. at 505 (quoting *Hill v. Dunaway*, 487 So. 2d 807 (Miss. 1986)).

According to the theory presented by Ruff, Cytrice was jumping on the couch, and when Ruff heard a bump, he rushed to find Cytrice lying on the floor not breathing. A review of the record fails to support Ruff's claim of death caused by resuscitation. The only evidence presented by Ruff on this matter was his testimony that he tried to pry Cytrice's mouth open when he first noticed her on the floor, he breathed into Cytrice's mouth one time while riding in the police car, and he shook Cytrice in the police car in an effort to revive her. These nominal efforts to revive Cytrice can hardly be elevated to an evidentiary foundation to support an accident instruction. The only medical evidence presented at trial, by Dr. Emily Ward and Dr. Leroy Riddick, supports the conclusion that Cytrice's death was not caused by any effort of resuscitation. Ward's conclusion was supported by an opinion from Dr. Leroy Riddick, a pathologist from Mobile, Alabama. Ward testified that the only evidence of resuscitation was associated with the hospital's attempts to revive Cytrice. Ruff's theory that the scratches on Cytrice's face could have been caused by the attempt to pry open her mouth was dismissed by Ward's testimony regarding placement of the fingers and placement of the scratches. Therefore, taking the evidence in the light most favorable to Ruff, and considering all reasonable favorable inferences which may be drawn in his favor, we conclude that a reasonable jury could not find that Ruff accidentally killed Cytrice while attempting to resuscitate her. The evidence presented indicated the only possible cause of death was smothering.

II.

DID THE TRIAL COURT ERR IN PERMITTING AUTOPSY SLIDES OF THE VICTIM INTO EVIDENCE?

During her testimony, Dr. Ward presented ten picture slides she had taken during the autopsy performed on Cytrice. The slides were presented to show the abrasion's on Cytrice's face, along with the hemorrhages in the interior of her body. Ruff filed a motion in limine to exclude certain slides arguing that their prejudicial effect outweighed their probative value. The trial judge found that each slide had probative value in assisting Ward in describing her findings. Ruff asserts the trial judge erred by allowing the jury to view the slides based on their prejudicial effect.

The admissibility of photographic evidence rests within the sound discretion of the trial judge. *Hurns v. State*, 616 So. 2d 313, 319 (Miss. 1993); *Hewlett v. State*, 607 So. 2d 1097, 1101 (Miss. 1992). We will not reverse the lower court on the ground that the photographs were gruesome and prejudicial, unless the trial judge abused his discretion. *Alexander v. State*, 610 So. 2d 320, 328 (Miss. 1992); *Hewlett*, 607 So. 2d at 1101.

In the case *sub judice*, the slides were presented to show the condition of Cytrice's body after the incident. More importantly, the slides were used to explain and clarify the testimony of Dr. Ward. The slides were necessary to show the jury the number and type of hemorrhages present in Cytrice's body. The slides were not of such a gruesome nature as to constitute reversal. The trial judge did not abuse his discretion in determining that the probative value of the slides outweighed any prejudice to Ruff.

III.

DID THE TRIAL COURT ERR BY NOT GRANTING A DIRECTED VERDICT FOR THE DEFENDANT AT THE CLOSE OF ALL EVIDENCE?

Ruff asserts the trial court should have granted his motion for a directed verdict. Ruff requested a directed verdict at the close of the State's case-in-chief, and after the close of all evidence presented at trial. The jury found Ruff guilty of the lesser-included offense of manslaughter. Ruff contends the judge should have granted his motions for directed verdict because no reasonable jury could have found Ruff guilty of manslaughter.

The standard for reviewing the legal sufficiency of the evidence is:

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 the evidence-not just that supporting the case for the 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 is 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 fair minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb. [citations omitted].

Carr v. State, 655 So. 2d 824, 837 (Miss. 1995) (quoting *Roberson v. State*, 595 So. 2d 1310, 1318 (Miss. 1992)).

Viewing the evidence in the light most consistent with the verdict, the evidence supports the judge's decision to overrule the two motions for directed verdict and allow the case to go to the jury. The jury was properly instructed on the elements of murder and manslaughter. The jury was also given a circumstantial evidence instruction.

The evidence presented at trial showed that Ruff was left alone with Cytrice at the time of the incident. Ruff claims Cytrice fell off the couch and he found her lying on the floor. Ruff tried to revive Cytrice, and when his efforts failed, Ruff ran out the door and headed for the hospital. He managed to get into the car of Deputy Nichols who testified that Cytrice was lifeless and blue around the mouth when Ruff entered his car. Deputy Nichols took Ruff and Cytrice to the Fulton Family Medical Center. Cytrice was then taken by helicopter to the hospital in Tupelo. Cytrice could not be revived.

Further, the testimony of Dr. Ward, the state medical examiner, showed hundreds of petechial hemorrhages around Cytrice's eyes, lungs, heart, thymus gland and her brain. Ward concluded the hemorrhages could be caused by smothering, asphyxiation or strangulation. Ward ruled out

asphyxiation and strangulation, and concluded Cytrice died from being smothered.

In cases such as this, where the defendant is the only eyewitness to the homicide and if his version of what happened is both reasonable and consistent with innocence and if, further, there is no contradiction of the defendant's version in the facts, then it follows that no reasonable juror could find the defendant guilty beyond a reasonable doubt. *Wetz v. State*, 503 So. 2d 803, 809 (Miss. 1987). Under this situation, the granting of a directed verdict would be proper. However, where the facts and circumstances in evidence materially contradict the defendant's version of what happened, as is the case here, the trial court is not required to direct a verdict for the defendant. *Id.* "Rather, the matter becomes a question for the jury." *Id.*

The evidence presented at trial supports the elements of the crime of manslaughter. The conflicting evidence between Ruff's testimony and the testimony of Dr. Ward, as to the manner of Cytrice's death, warranted the issue to be settled by the jury and not the trial judge. The jury will decide the credibility of each witness, and weigh that credibility against other witnesses, when making its decision. Therefore, considering the evidence in the light most consistent with the verdict, we find the record supports the decision of the trial judge to overrule Ruff's two motions for directed verdict and allow the issue of Ruff's guilt or innocence to go to the jury.

THE JUDGMENT OF THE ITAWAMBA COUNTY CIRCUIT COURT OF MANSLAUGHTER AND SENTENCE AS A HABITUAL OFFENDER TO 20 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS ARE TAXED TO ITAWAMBA COUNTY.

BRIDGES, C.J., McMILLIN, P.J., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HERRING, J., NOT PARTICIPATING.