IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RODARIUS BONARD STEWART — APPELLANT

VS. — NO. 2006-KA-1528

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RODARIUS BONARD STEWART **APPELLANT**

VS. **NO. 2006-KA-1528**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR CHANGE OF VENUE.

II. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING HIS SECOND ISSUE ON APPEAL.

STATEMENT OF THE FACTS[1]

Rodarius Bonard Stewart [hereinafter "Stewart"] was charged with and indicted for depraved heart murder for the killing of Tyler Gant Hamlin. (Record p. 7). Prior to trial, Stewart filed a motion for change of venue which was denied for failing to meet the statutory requirements. (Transcript p. 6 - 7). However, the trial court granted Stewart an extension of time for filing motions and a second motion for change of venue was filed. (Record p. 46).

A hearing on the second motion was held on August 26, 2005 during which evidence was presented by both sides regarding whether Stewart could receive a fair trial in Alcorn County. In

[1] The State did not set forth the facts regarding the crime itself as the issues presented to the Court are procedural.

support of his position, Stewart presented the court with two "letters" from local citizens requesting that the trial be moved to another county and stating their belief that Stewart could not get a fair trial in Alcorn County.[2] (Record p. 58 - 59). Stewart then called Assistant District Attorney Arch Bullard who testified that at the time of the preliminary hearing, which was very close in proximity to the date the victim was killed, the District Attorney's Office refused to lower bond because they felt it would be safer for Stewart to remain in jail. (Transcript p. 106). Stewart also called his mother, Elonda Reagan, and Jackie Burt, both of whom testified that, in their opinion, Stewart could not receive a fair trial in Alcorn County. (Transcript p. 125 - 141). The trial court noted that "[i]nterestingly, Jackie Burt testified that following the alleged murder, she talked to several people and most expressed an opinion favorable to the defendant" and that she "testified that she had heard no conversations at her place of employment, Magnolia Hospital, in the last year about the case." (Record p. 117). The State introduced the affidavit of Jimmy Mitchell and called Mayor Jerry Latch and Sheriff Jimmy Taylor, all of whom testified that there was little or no discussion of the crime in the community and that Stewart could receive a fair and impartial jury in Alcorn County. (Record p.60 - 61 , Transcript p. 61 - 104).

The trial court noted that it derived from testimony at the hearing that "one article had been printed in the *Daily Corinthian*, there had been little discussion of the case except for the few days following the event, there had been no protests or riots, nor had any leaflets, banners, or other material been disseminated about the case." (Record p. 116). The trial court ultimately denied Stewart's motion stating that "the Court is of the opinion that the defendant can and will receive a

---

[2] Stewart later presented an affidavit from one of the authors of the "letters" which was in the proper statutorily required form. However, the author of the second "letter" never submitted an affidavit in the proper form. During the hearing, Stewart's counsel requested that they be given an extension to provide additional affidavits from other citizens as well. The Court granted the extension but noted that it received no additional affidavits.

fair and impartial trial." (Record p. 115 - 119).

Stewart was subsequently tried and convicted of depraved heart murder. He was sentenced to life in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENTS

The trial court did not abuse its discretion in denying Stewart's motion for change of venue. Any presumption raised by Stewart that he was unable to receive a fair trial was rebutted. Further, the record indicates that Stewart did, in fact, receive a fair trial.

Stewart is procedurally barred from raising his second issue on appeal as he cited to no legal authority whatsoever with regard to his first sub-issue and as no contemporaneous objection was raised with regard to his second sub-issue.

ARGUMENTS

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR CHANGE OF VENUE.

"The granting of a change of venue is so largely in the discretion of the trial court that a judgment or conviction will not be reversed on appeal, on the ground that a change of venue was refused, unless it appears that the trial court abused its discretion." *Adams v. State,* 944 So.2d 86, 89 (Miss. Ct. App. 2006). The Mississippi Supreme Court has noted that in reviewing whether the trial court abused his discretion in denying a change of venue "we look to the completed trial, particularly including the voir dire examination of prospective jurors, to determine whether the accused received a fair trial." *Lutes v. State*, 517 So.2d 541, 546 (Miss. 1987) (citing *Winters v. State*, 473 So.2d 452, 457 (Miss. 1985) and *Billiot v. State,* 454 So.2d 445, 455 (Miss. 1984)).

Mississippi law is clear that "[u]pon proper application for a change of venue, a presumption arises that an impartial jury can not be obtained;" however, that presumption may be rebutted by the

State. *Evans v. State,* 725 So.2d 613 (Miss. 1997). The Mississippi Supreme Court has set forth "certain elements which, when present would serve as an indicator to the trial court as to when the presumption is irrebutable:

(1) Capital cases on consideration of a heightened standard of review;
(2) Crowds threatening violence toward the accused;
(3) An inordinate amount of media coverage, particularly in cases of:
(a) serious crimes against influential families,
(b) serious crimes against public officials;
(c) serial crimes,
(d) crimes committed by a black defendant upon a white victim;
(e) where there is an inexperienced trial counsel.

White v. State, 495 So.2d 1346 (Miss. 1986).

The trial court properly denied Stewart's motion for change of venue as Stewart was able to receive, and did in fact receive, a fair trial in Alcorn County. First, none of the elements were present in this case which would indicate an irrebutable presumption that Stewart could not receive a fair trial in Alcorn County. Second, any presumption raised by Stewart was rebutted in that he received a fair trial and the verdict was consistent with the evidence. Lastly, the media coverage in this case did not rise to the level of coverage seen in previous cases in which appellate courts have held that a change of venue was warranted.

While there is some question as to whether Stewart properly applied for a change of venue and thereby raised a presumption that an impartial jury could not be obtained[3], any such presumption raised was not irrebutable as those elements from *White* set forth above were not present in Stewart's case. (1) Stewart's case was not a capital case. (2) There was no evidence of any crowds, or of any

[3] The trial court noted that only one affidavit was submitted in the proper form by Stewart. Even after requesting and being granted an extension to submit additional affidavits, none were presented. The Mississippi Supreme Court has noted that the presumption that the defendant cannot receive a fair trial only arises when "the accused has complied with the 'proper application' requirement by making a motion supported by affidavits of two or more witnesses in conformance with Miss. Code Ann. §99-15-35." *Lutes*, 517 So.2d at 545.

one person for that matter, threatening violence toward Stewart. (3) Stewart's case was certainly not one with an inordinate amount of media coverage. In fact, the record indicates that there was only one newspaper article written about the crime and that there was no evidence of any television or radio coverage of the incident.[4] Thus, any presumption raised by Stewart is clearly rebutable.

Second, the trial court properly denied the motion as any presumption raised by Stewart was rebutted. As set forth above, the focus of such inquiries is whether "under the totality of the circumstances it appears reasonably likely that, in the absence of [a change of venue], the accused's right to a fair trial may be lost." *Lutes*, 517 So.2d at 545. The *Lutes* Court quoted *Shimniok v. State*, 197 Miss. 179, 192, 19 So.2d 760 (1944) in this regard stating that:

> In testing the fairness or bias of the jurors, we may also look at the verdict they reached viewed in the light of the evidence on the merits as a completed trial. We have done that and direct attention to the recital of the evidence appearing hereinafter in this opinion. Under these circumstances, we cannot say the trial judge abused his discretion. He had all the witnesses on the motion and the qualifying jurors before him and was in better position than we are to be judge of their credibility.

Id. at 546. In Stewart's case, the verdict reached by the jurors was more than reasonable considering the evidence. Stewart was convicted of depraved heart murder which is defined as "the killing of a human being without the authority of law by any means or in any manner . . . [w]hen done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual." Miss. Code Ann. §97-3-19(1)(b). Stewart, himself, testified that he shot the gun two times. (Transcript p. 1200). He further admitted to police that he shot into the crowd and did not think to shoot into the air. (Transcript p. 719). There is no question whatsoever that this action

---

[4] The State recognizes that this was a case involving a serious crime against a member of well-known family in the community (i.e. the grandson of the former sheriff) and involving a crime committed by a black defendant against a white victim. However, these factors do not weigh in favor of an irrebutable presumption of an unfair trial as there was no inordinate amount of media coverage as required by case law to support such a finding.

constituted depraved heart murder. *See White v. State*, 153 So. 387 (Miss. 1934). Accordingly, regardless of whether Stewart was tried in Alcorn county or in another county, there is little doubt that Stewart would have been convicted of depraved heart murder.

Third, the motion was properly denied in that the media coverage of the incident in question was minuscule compared to the coverage in cases in which appellate courts have held that the trial court should have granted a motion for change of venue. In the case at hand, there was evidence of only one newspaper article regarding the crime and that article was published two days after the incident and over two years before the trial. In cases in which the appellate courts have held that venue should have been changed, the amount of media coverage was substantially greater. For example, in *Fisher v. State*, the evidence indicated that 60 stories regarding the crime at issue were printed in the local newspaper, most of which were printed on the first page; the crime was listed as one of the top news events of the year by that same newspaper; and there was even more extensive television and radio coverage than newspaper coverage. 481 So.2d 203 (Miss. 1985). In *Johnson v. State*, eight representatives of local media testified to the sixty-four plus newspaper articles written, numerous radio broadcasts aired, and countless television broadcasts aired regarding the crime. 476 So.2d 1195 (Miss. 1985). The media coverage in Stewart's case is certainly a far cry from the coverage in these cases and therefore, further evidences that the trial court acted within its discretion in refusing to grant Stewart's motion for change of venue.

Stewart, however, argues in support of his contention that he was entitled to a change of venue, that many of the prospective jurors knew or knew of the victim and/or his family as he was the grandson of the former sheriff of Alcorn county. With regard to this contention, it is important to consider that in *Shimnock v. State,* a case in which a popular former sheriff was himself murdered, the Mississippi Supreme Court upheld the trial court's decision to deny the defendant's motion for

change of venue under similar circumstances. 19 So.2d 760 (Miss. 1944). To further bolster his argument, Stewart also points to several specific selected jurors who knew or knew of the victim and/or his family. (Appellant's Brief p. 4 - 7). However, each of these listed jurors, with the exception of one, stated that their knowledge of the victim and/or his family would have no influence on their ability to render a verdict solely on the evidence. (Juror Mary Hall - Transcript p. 353; Juror Angela Avent - Transcript p. 359; Juror Patsy Cornelius - p. 340; Juror April Haddock - p. 365).[5] Moreover, as noted in *Conner v. State*, Stewart had ample "opportunity to question members of the venire and to use both his peremptory challenges and challenges for cause." 2005-KA-01994-COA (2007). If Stewart believed that any of these specific jurors, of whom he now complains, could not be impartial, he could have attempted to strike them for cause or use a peremptory strike. Many prospective jurors who knew various members of both the victim's family and Stewart's family were struck and there is no indication on the record that Stewart's counsel attempted to strike any of the now complained of jurors during jury selection. Furthermore, the remaining selected jurors did not know the victim and/or his family, but one remaining juror did know Stewart's parents and saw them on a regular basis and was yet also able to render a guilty verdict based upon the evidence presented. (Transcript p. 325 - 326 and 1396).

Stewart also argues that "ADA Arch Bullard's testimony that he was concerned for Defendant's safety if he was released on bond" further bolsters his position that the trial court should have granted the venue change. Again, a similar argument was used by the defendant in *Shimnock*,

[5] Juror Frank Parvin stated that his knowledge of the victim's family might influence him.

and was rejected.[6] Additionally, as noted by the trial court, "the District Attorney's office refused to agree to lower the bond immediately following the preliminary hearing which was held in close proximity to the time of the alleged murder." (Record p. 117). However, the testimony at the hearing indicated that during the months prior to trial, there was no discussion of the case.

As such, the trial court properly denied Stewart's motion for change of venue as Stewart was able to receive, and did in fact receive, a fair trial in Alcorn County. Thus, Stewart's first issue is without merit.

II. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING HIS SECOND ISSUE ON APPEAL.

Stewart first argues that "[d]uring cross examination of Defense witness, Alisha Grimes, Prosecutor improperly interject[ed] his opinion of 'what a reasonable person would do.'" (Appellant's Brief p. 10). However, Stewart is procedurally barred from raising this issue on appeal as he cited no legal authority whatsoever to support his contention. The Mississippi Supreme Court has previously held that "[w]e require counsel to not only make a condensed statement of the case but, must also support propositions of law with reasons and authorities." *Pate v. State,* 419 So.2d 1324, 1325-26 (Miss. 1982). *See also Drennan v. State,* 695 So.2d 581, 585 (Miss. 1997) (holding that "it is the duty of the appellant to provide authority and support of an assignment.") and *Williams v. State,* 708 So.2d 1358, 1360 -1361 (Miss. 1998) (holding that "[i]f a party does not provide this support this Court is under no duty to consider assignments of error when no authority is cited.").

Notwithstanding the procedural bar, the issue is without merit. After the objection to the questioning was made, the Court instructed the jury to disregard the question. (Transcript p. 1185)

---

[6] The defendant in *Shimnock* argued that he had been confined prior to trial in a separate county by order of the trial court with the reasons given for such confinement as "reasons of public safety and public welfare." 19 So.2d 760 (Miss. 1944).

The Mississippi Supreme Court has held the following in this regard:

> It is presumed that the jury follows the instructions of the trial court. We have repeatedly held that where the trial court sustains an objection to the inadmissible testimony of a witness and instructs the jury to disregard same, prejudicial error does not result from that improper testimony.

Knight v. State, 854 So.2d 17, 20 (Miss.App.,2003) (quoting *Baldwin v. State*, 784 So.2d 148(¶ 31) (Miss.2001)). Accordingly, this issue is meritless.

Stewart also contends that "the prosecutor sent an impermissible racial message to the jury in his closing rebuttal." (Appellant's Brief p. 11). This issue is also procedurally barred in that no objection was made at trial. This Court has previously held that:

> "It is axiomatic that a litigant is required to make a timely objection." *Smith v. State*, 797 So.2d 854, 856(¶ 7) (Miss.2001) (citing *Barnett v. State*, 725 So.2d 797, 801(¶ 23) (Miss.1998)). The failure to make a contemporaneous objection, serves as a waiver of any error. *Id.* Thus, the failure to make a timely objection serves as a procedural bar in this case.

Washington v. State, 957 So.2d 426, 429 (Miss. Ct. App. 2007). *See also Roles v. State,* 952 So.2d 1043, 1046 (Miss. Ct. App. 2007) (holding that "[f]ailure to make a contemporaneous objection waives an issue for purposes of appeal."); *Ramsey v. State,* 959 So.2d 15, 21 (Miss. Ct. App. 2006); and *Rumfelt v. State*, 947 So.2d 997, 1001 (Miss. Ct. App. 2006).

Again, notwithstanding the bar, this issue is without merit. "Counsel is allowed wide latitude when making their arguments to the jury." *Sanders v. State,* 939 So.2d 842, 846 (Miss. Ct. App. 2006). The standard used in reviewing closing arguments is "whether the natural and probable effect of the prosecuting attorney's improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice." *Id.* Stewart contends that the assistant district attorney "improperly interjected . . . race into the verdict" in his closing argument. (Appellant's Brief p. 11). However, race had been interjected into the case from the beginning. The jury could

plainly see that the defendant was black and that the victim was white. Further, defense counsel questioned many of the witnesses regarding whether racial slurs were used during the confrontations that took place on the night in question. Thus, even before the assistant district attorney's closing argument, the jury was aware of the underlying racial issues present in the case. During closing, the assistant district attorney was merely asking the jury to remember that regardless of these underlying racial issues, that the case had "nothing to do with race because justice is blind." (Transcript p. 1380).

Furthermore, the comments made by the assistant district attorney are distinguishable from the comments discussed in the case relied upon by Stewart, *Tate v. State*, 748 So.2d 208 (Miss. 2001). In *Tate*, racial slurs heard earlier in the trial from testimony were repeated during closing argument. In the case at hand, the assistant district attorney did not repeat the racial slurs stated during testimony, but instead simply reminded the jury that even though there seemed to be underlying racial issues involved in the case, justice is blind. As such, Stewart's second issue is without merit.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of the defendant in this case as the trial court did not abuse its discretion in denying defendant's motion for change of venue and as defendant's remaining issues are procedurally barred.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

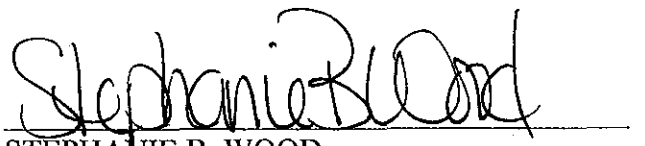
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Sharion Aycock
Circuit Court Judge
P. O. Drawer 1100
Tupelo, MS 38802-1100

Honorable John R. Young
District Attorney
P. O. Box 212
Corinth, MS 38834

John R. White, Esquire
Attorney At Law
123 South Fulton Street
Iuka, Mississippi 38852

This the 12th day of October, 2007.



STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680