IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEMARIOUS LATWAN BANYARD — APPELLANT

VS. — NO. 2006-KA-1843

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

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STATEMENT OF ISSUES

I. THE TRIAL COURT PROPERLY REFUSED THE DEFENDANT'S MANSLAUGHTER INSTRUCTIONS.

II. THE TRIAL COURT PROPERLY REFUSED THE DEFENDANT'S DURESS INSTRUCTION.

III. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO APPOINT AN EXPERT IN "SUSCEPTIBILITY OF ADOLESCENTS TO INTIMIDATIONS, SUGGESTIBILITY, AND INFLUENCE."

STATEMENT OF FACTS

On the evening of February 24, 2003, Ray Green and his girlfriend, Monica Dear, were leaving Westwick Apartments in Jackson to go visit Green's mother in the hospital. T. 204. Dear told Green to hurry up and get in the car because she had just seen a boy with a gun running from the area of the apartment's office toward the apartment entrance . T. 187, 205-06. As the couple approached the apartment entrance, a black Chevy Malibu emblazoned with a Dominoes Pizza sign was stopped in front of them. T. 207. After a moment went by, Dear assumed that the driver ahead of them was adjusting his radio. T. 207. A line of cars quickly formed at the entrance and began blowing their horns. T. 207, 369. The vehicle behind Green and Dear drove around to pass, but then backed up and told Green to call 911. T. 186, 207. Green walked over to the black Chevy Malibu and saw that the driver, twenty-five-year-old Robin Ballard had been shot in the neck. T. 187. Ballard appeared to be unconscious but breathing. T. 187. Green called 911 and stayed with the victim until paramedics arrived. Ballard's foot eventually slipped off the brake, and Green reached in the car and placed the gear shifter into park. T. 208. By the time emergency personnel arrived, Ballard was pronounced dead on arrival. T. 264.

Shameka Williams, Delaysia Robinson, and Traven Kyser witnessed the events leading up to Ballard's death. Williams testified that she was cranking up her car when she saw "a little boy" running past her vehicle toward the apartment entrance. T. 216. Williams followed the boy with her eyes "to see what he was fixing to do because I seen him trailing the pizza man's car." T. 227. Williams saw the boy walk up to the victim's car, which was stopped at a stop sign, "[stick] the gun in the car and [shoot] the pizza man." T. 216-17. Williams knew the shooter, thirteen-year-old Demarious Banyard, "from around the apartments." T. 217. When asked if anyone was with Banyard when he shot the victim, Williams stated that no one was with Banyard, but there were

some boys "standing far back from him." T. 217, 230.

Robinson was twelve-years-old at the time of the shooting and also knew Banyard. T. 234. Robinson was in the parking lot when Banyard walked past her alone. T. 236-37. Shortly thereafter, she heard a gunshot and saw Banyard tucking a gun in his back pocket while walking back toward the apartments from the entrance. T. 237. Robinson testified that she saw no one else with Banyard as he walked back toward the apartments. T. 237.

Kyser testified that he and a large group of boys had been playing basketball at the apartment complex that evening. T. 245. After the game, "somebody came around the corner and said the pizza man is out there, let's go rob him." T. 245. According to Kyser, eighteen-year-old Dennis Ragsdale then went to his Jeep and retrieved a gun.[1] T. 245. Kyser saw Ragsdale take the clip out of the gun and give it to Banyard. T. 246 He then saw the two walk toward the apartment entrance. T. 246. Kyser stated that he told Banyard not to go through with it before Kyser left the group. T. 246. He also testified, "[Ragsdale] was pushing him to do it. . . . He wasn't actually pushing him, he was just tempting him to do it, telling him to go do it." T. 246.

Banyard testified in his own defense. He claimed that he did not want to rob the victim, but he was scared that Ragsdale would put bullets in the gun and shoot him if he did not go along. T. 379-80. Banyard admitted that Ragsdale did not physically force him or even verbally threaten him to participate in the robbery, but stated that Ragsdale looked "serious and mean." T. 379, 381, 386, 397. Banyard testified that he stood at the driver's side of the victim's car while Ragsdale walked to the passenger's side and told the driver to give him his money. T. 384. According to Banyard,

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[1]Kyser and Banyard testified that Ragsdale was nineteen years old, but according to Ragsdale's information on the MDOC website, he was actually eighteen years old at the time of the shooting.

when Ragsdale was unable to get any money, he walked over to the driver's side where Banyard was standing. T. 384, 394. Banyard claims that he was going to hand Ragsdale the gun, but it went off all by itself and just happened to shoot the victim in the neck. T. 384.

Banyard was found guilty of capital murder and sentenced to life without the possibility of parole. C.P. 50.

SUMMARY OF ARGUMENT

Banyard's first assignment of error fails as a matter of law, as defendants charged with a murder which occurred during the course of a robbery are not entitled to manslaughter instructions. Similarly, the trial court properly refused Banyard's duress instruction, as duress is not a defense to murder. Lastly, the trial court properly refused to appoint an expert to assist Banyard with his defense of duress, because no expert could aid Banyard in this regard since duress is not a defense to murder. Further, even if duress was a legitimate defense, the facts of the case simply do not support a showing of duress.

ARGUMENT

I. THE TRIAL COURT PROPERLY REFUSED THE DEFENDANT'S MANSLAUGHTER INSTRUCTIONS.

Although a criminal defendant is entitled to jury instructions which present his theory of the case, the trial court may refuse instructions which incorrectly state the law, have no evidentiary basis, or are covered fairly elsewhere. *Livingston v. State*, 943 So.2d 66, 71 (¶ 14) (Miss. Ct. App. 2006). Additionally, "no reversible error will be found to exist if, when read together, the instructions correctly state the law and effectuate no injustice." *McKlemurry v. State*, 947 So.2d 987, 990 (¶3) (Miss. Ct. App. 2006).

On appeal, Banyard claims that the trial court erred in refusing his tendered culpable negligence manslaughter instructions. However, Mississippi case law makes crystal clear that a defendant is not entitled to a manslaughter instruction when the killing with which he is charged occurred during the course of a robbery. *Simmons v. State*, 805 So.2d 452, 474 (¶32) (Miss. 2001) (citing *Burns v. State*, 729 So.2d 203, 225 (¶103) (Miss. 1998)). See also, *Fryou v. State*, No. 2007-KA-00635 (Miss. Ct. App. April 8, 2008) (citing *Jacobs v. State*, 870 So.2d 1202, 1209(¶ 19) (Miss. 2004)); *Barber v. State*, 840 So. 2d 100, 102 (¶7) (Miss. 2003); *Griffin v. State*, 557 So.2d 542, 548 -549 (Miss. 1990). Therefore, the trial court properly refused Banyard's manslaughter instructions as a matter of law. Furthermore, the culpable negligence manslaughter statute relied on by Banyard on page 11 of his brief, explicitly excludes killings which occur during the course of a robbery.

> The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any felony, **except those felonies enumerated in Section 97-3-19(2) (e) and (f)**, or while such other is attempting to commit any felony besides such as are above enumerated and excepted, shall be manslaughter.

Miss. Code Ann. 97-3-27 (emphasis added). Robbery is a felony listed in Mississippi Code

Annotated §97-3-27, and Banyard was found guilty of capital murder with the underlying crime of robbery. Accordingly, Banyard's first assignment of error fails.

II. THE TRIAL COURT PROPERLY REFUSED THE DEFENDANT'S DURESS INSTRUCTION.

Banyard also claims that the trial court erred in refusing his duress instruction. However, duress is not a defense to murder. *Fuqua v. State*, 938 So.2d 277, 283 (¶20) (Miss. Ct. App. 2006) (citing *Watson v. State*, 212 Miss. 788, 793, 55 So.2d 441, 443 (1951)); *Sanders v. State*, 942 So.2d 156, 161 (¶23) (Miss. 2006); *Milano v. State*, 790 So.2d 179, 191 (¶59) (Miss. 2001) "A person is not authorized to take the life of another person at the command of a third person, whether he is in fear of such person or not...." *Id.* (quoting *Wilson v. State*, 390 So.2d 575, 576 (Miss.1980)). As such, the trial court properly refused Banyard's duress instruction.

To be sure, Banyard was charged with and convicted of capital murder, not "simple" murder. However, in *Fuqua*, the appellant was also convicted of capital murder, and this honorable Court held that he was not entitled to a duress instruction because duress is not a defense to murder. In *Milano*, another capital murder case, the supreme court again stated that duress is not a defense to murder. *Milano*, 790 So. 2d at 191 (¶59). The State acknowledges, however, that our reviewing courts have considered this issue in other capital murder cases and concluded that appellants were not entitled to a duress instruction due to lack of an evidentiary basis, while remaining silent as to the aforementioned rule of law. See *Walker v. State*, 913 So. 2d 198, 234-36 (¶¶133-139) (Miss. 2005); *Moody v. State*, 838 So.2d 324, 338 (¶55) (Miss. Ct. App. 2002). Accordingly, out of an abundance of caution, the State would argue in the alternative that no evidentiary basis existed for a duress instruction.

The defense of duress is composed of the following elements.

> (1) that the defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) that he had not recklessly or negligently placed himself in the situation; (3) that he had no reasonable legal alternative to violating the law; and (4)

> that a direct causal relationship may be reasonably anticipated between the criminal action and the avoidance of harm.

Lester v. State, 767 So.2d 219, 224 (¶18) (Miss. Ct. App. 2000) (citing *West v. State*, 725 So.2d 872 (Miss. 1998)). According to Banyard's own testimony, Ragsdale did not even verbalize a threat toward him, much less use any physical force to enlist Banyard in the robbery. T. 397-98. Rather, Banyard just "felt threatened" because Ragsdale looked "serious and mean." T. 379, 381, 386, 397. There can be no serious argument that such a perceived "threat" meets even the first element of the defense of duress. Banyard also claimed that he was scared that if he did not go along with Ragsdale that Ragsdale would put bullets in the gun and shoot him. T. 380. However, Banyard admitted that Ragsdale gave him the gun before they ever approached the victim. T. 398. As such, he certainly had a legal alternative to violating the law. The trial court properly refused Banyard's duress instruction for the alternative reason that no evidentiary basis existed for the instruction.

III. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO APPOINT AN EXPERT IN "SUSCEPTIBILITY OF ADOLESCENTS TO INTIMIDATIONS, SUGGESTIBILITY, AND INFLUENCE."

A trial court's denial of funding for expert assistance is reviewed for an abuse of discretion. *Flora v. State*, 925 So.2d 797, 805 (¶11) (Miss. 2006). Even where the appellant shows that the trial court abused its discretion in denying funding for a defense expert, the appellant must also show that the abuse was so egregious as to deny him due process, rendering his trial fundamentally unfair. *Id.* In order to receive public funds for the appointment of an expert, the defendant must show how expert assistance is necessary to prepare and present an adequate defense. Griffin v. State 557 So.2d 542, 551 (Miss. 1990). Further, "a defendant must come forth with concrete reasons, not unsubstantiated assertions that assistance would be beneficial." Harrison v. State 635 So.2d 894, 901 (Miss. 1994).

Banyard's final assignment of error is that the trial court erred in denying his motion for appointment of an expert in "susceptibility of adolescents to intimidations, suggestibility and influence." Banyard contends that such an expert was necessary in helping prove his defense of duress. However, as discussed under the previous issue, the facts of the case even according to Banyard himself simply do not amount to showing of duress. Even had an expert been appointed, nothing the expert could have testified to regarding adolescent susceptibility to intimidations, suggestibility and influence would change the fact that Ragsdale did not even verbally threaten Banyard to engage in the robbery. As such, no expert could have helped prove the defense of duress. Accordingly, Banyard can not show that the trial court abused its discretion or that he was denied due process by the trial court's denial of funding for an expert.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Banyard's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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:

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