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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VICTOR LOWELL FRYOU

APPELLANT

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SUPREME COURT
COURT OF APPEALS

VS.

NO. 2007-KA-0635

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

- I. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING ON APPEAL THE ISSUE OF A LESSER-INCLUDED OFFENSE JURY INSTRUCTION ON SIMPLE MURDER; HOWEVER, NOTWITHSTANDING THE BAR, THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO ALLOW SAID INSTRUCTION.
- II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO ALLOW A LESSER-INCLUDED OFFENSE INSTRUCTION ON MANSLAUGHTER.
- III. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING ON APPEAL THE ISSUE OF AN INSTRUCTION BASED UPON THE WEATHERSBY RULE; HOWEVER, NOTWITHSTANDING THE BAR, THE WEATHERSBY RULE IS NOT THE PROPER SUBJECT OF A JURY INSTRUCTION.

STATEMENT OF THE FACTS

There is no dispute that the Defendant, Victor Lowell Fryou [hereinafter "Fryou"], killed Patrick Devriendt by stabbing him 57 times with a knife. (Transcript p. 180 and 278). On the morning of August 20, 2005, Fryou woke up, got dressed, and left his sister's house where he was living with his girlfriend, Andrea Newsome, their children, and his sister. (Transcript p. 121-122). He walked to Mr. Devriendt's house, stabbed him 57 times, stole his wallet, and then drove away

in Mr. Devriendt's truck. (Transcript p. 127, 270, and 277). He later returned to his sister's house covered in scratches and told his girlfriend, "God forgive me, I killed him." (Transcript p. 125 and 278).

Not only did he admit the murder to his girlfriend, but also to Candy Woodard, Officer Kamien of the Gulfport Police Department, and Investigator Pullen of the Harrison County Sheriff's Office. (Transcript p. 98-99, 152, and 208). During the subsequent investigation, Mr. Devriendt's wallet was found, without any money, buried in Fryou's sister's yard and Mr. Devriendt's truck was found abandoned near 54th Avenue and 28th Street. (Transcript p. 164, 167, and 201).

Fryou was indicted for and convicted of capital murder. He was sentenced to life in prison without the possibility of parole or probation.

SUMMARY OF THE ARGUMENTS

Fryou is procedurally barred from raising on appeal the issue of a lesser-included offense jury instruction on simple murder as he did not raise the issue in his motion for new trial. Notwithstanding the procedural bar, the trial court acted within its discretion in refusing to allow a lesser-included jury instruction on simple murder as the evidence did not support such an instruction. Additionally, the trial court acted within its discretion in refusing to allow a lesser-included offense instruction on manslaughter.

Fryou is also procedurally barred from raising the issue of whether he was entitled to a *Weathersby* rule instruction as he did not raise the issue in his motion for new trial. Again, the trial court acted within its discretion in refusing the instruction as the *Weathersby* rule is not the proper subject of a jury instruction.

ARGUMENTS

Jury instructions are within the sound discretion of the trial court. *Shumpert v. State*, 935 So.2d 962 (Miss. 2006). “Abuse of discretion is found when the reviewing court has a ‘definite and firm conviction’ that the court below committed a clear error of judgment and conclusion it reached upon a weighing of the relevant factors.” *Jones v. State*, 912 So.2d 501, 504 (Miss. Ct. App. 2005) (quoting *Withers v. State*, 907 So.2d 342, 345 (Miss. 2005)).

I. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING ON APPEAL THE ISSUE OF A LESSER-INCLUDED OFFENSE JURY INSTRUCTION ON SIMPLE MURDER; HOWEVER, NOTWITHSTANDING THE BAR, THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING SAID INSTRUCTION.

Fryou asserts that the “trial court erred when it refused to grant him a lesser-included offense instruction on simple murder” arguing that “the evidence is insufficient to find he was engaged in the commission of robbery at the time he killed Mr. Devriendt.” (Appellant’s Brief p. 4). However, Fryou is procedurally barred from raising the issue on appeal as it was not raised in his motion for new trial. (Record p. 95). *See Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App. 2002) (holding that the issue in question was procedurally barred even though an objection was raised at trial because the matter was not raised in the motion for new trial) and *Beckum v. State*, 917 So.2d 808, 813 (Miss. Ct. App. 2005) (holding that the issue in question was procedurally barred as it was not specifically raised in defendant’s motion for J.N.O.V. or motion for new trial). Moreover, this Court has held that “as a general rule, a litigant cannot raise issues for the first time on appeal because the trial judge had no opportunity to deal with the issue at the trial level.” *Jones v. State*, 958 So.2d 840, 843 (Miss. Ct. App. 2007) (citing *Crowder v. State*, 850 So.2d 199, 200 (Miss. Ct. App. 2003)). As Fryou’s motion for new trial did not specifically raise this issue, he is procedurally barred from raising it on appeal.

Regardless of the procedural bar, Fryou's first issue is without merit. Mississippi law is "well-settled that jury instructions are not given unless there is an evidentiary basis in the record for such." *Fairchild v. State*, 459 So.2d 793, 800 (Miss.1984) (citing *Colburn v. State*, 431 So.2d 1111, 1114 (Miss.1983) and *Johnson v. State*, 416 So.2d 383, 388 (Miss.1982)). Further, it has been held with regard to jury instructions:

The standard of review is "whether an issue should be submitted to the jury is determined by whether there is evidence, which, if believed by the jury, could result in resolution of the issue in favor of the party requesting the instruction. Conversely, only where the evidence is so one-sided that no reasonable juror could find for the requesting party on the issue at hand may the trial court deny an instruction on a material issue."

Gill v. State, 924 So.2d 554, 556 (Miss Ct. App. 2005) (quoting *Walls v. State*, 672 So.2d 1227, 1230 (Miss. 1996)). Additionally, the Mississippi Supreme Court has also held that "[l]esser offense instructions should not be granted indiscriminately, and only where there is an evidentiary basis in the record." *Shumpert v. State*, 935 So.2d 962 (Miss. 2006) (citing *Gangl v. State*, 539 So.2d 132, 136 (Miss.1989)) (*emphasis added*). Moreover, "[u]nwarranted submission of a lesser offense [instruction] is an invitation to the jury to disregard the law." *Id.* (quoting *Stewart v. State*, 909 So.2d 52, 55 (Miss.2005)) (*emphasis added*).

Mississippi Code Annotated §97-3-19(2)(e) defines capital murder as "[t]he killing of a human being without the authority of law by any means or in any manner . . . [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery . . . or in any attempt to commit such felonies." In the case at hand, the underlying crime during which Mr. Devriendt was killed was robbery. Therefore, in order for there to be sufficient evidence of capital murder, there must be evidence that Fryou killed the victim while in the commission of a robbery. There is more than sufficient evidence in this regard:

- a. Fryou admits to killing Mr. Devriendt. (Transcript p. 278).
- b. Fryou admits that he drove away from Mr. Devriendt's house in Mr. Devreindt's truck. (Transcript p. 277).
- c. Fryou admits that he buried Mr. Devreindt's wallet. (Transcript p. 302).
- d. Mr. Devreindt's wallet was found buried in Fryou's sister's yard with no cash inside. (Transcript p. 164 and 167).
- e. Fryou's girlfriend testified that Mr. Devreindt returned from the victim's house with "paper money" and "lots of it." (Transcript p. 127).

Fryou, however, states that "whether Mr. Fryou killed Mr. Devriendt is not at issue," and argues that "the issue is whether the jury could have found Mr. Fryou guilty of killing Mr. Devriendt without Mr. Fryou being in the commission of a robbery." (Appellant's Brief p. 8). In *Spicer v. State*, the defendant also argued that because there was "some evidence supporting his contention that he did not rob [the victim], he was entitled to a jury instruction of the lesser-included offense of murder." 921 So.2d 292, 312-13 (Miss. 2006). The Court disagreed noting that there was "too much evidence in the record of the underlying felony of robbery for a reasonable juror to find Spicer guilty of simple murder beyond a reasonable doubt" as there was "evidence that he stole the sword because he was in possession of it after [the victim's] death and it had [the victim's] blood on it." *Id.* at 313. In the case at hand, Fryou admitted to burying Mr. Devreindt's wallet in his sister's yard and the wallet was found in the yard with Mr. Devreindt's identification but without cash. (Transcript p. 164, 167, and 302). Further, Fryou was seen immediately after the murder with "paper money" and "lots of it." (Transcript p. 127). "Possession of a deceased's property creates a reasonable inference that the property was stolen." *Id.* at 312.

Fryou also asserts that there was evidence of simple murder in that "the killing took place because of the sexual relationship between Mr. Devreindt and Ms. Newsome and the fact that Mr. Devriendt bragged about it." (Appellant's Brief p. 8). However, Fryou testified that he went to see Mr. Devriendt to discuss the alleged sexual relationship with his girlfriend days earlier and there was

no violence whatsoever at that time. (Transcript p. 267 - 268). Further, Mr. Devriendt denied the sexual relationship with Fryou's girlfriend so the murder certainly could not be a result of his bragging. (Transcript p. 268). Furthermore, and most importantly, there was ample evidence of a robbery, and "there is no evidence to support a theory of simple murder when the underlying felony to that murder is glaringly obvious." *Walker v. State*, 913 So.2d 198, 237 (Miss. 2005) (*emphasis added*). Moreover, "the evidence must support a finding that the killing was not committed during the commission of [a robbery] in order to justify a simple murder instruction." *Bell v. State*, 725 So.2d 836, 854 (Miss. 1998) (*emphasis added*). As the evidence does not support a finding that Mr. Devriendt's murder was not committed during the commission of a robbery, there is no basis for a simple murder instruction. As such, Fryou's first issue is without merit.

II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO ALLOW A LESSER-INCLUDED OFFENSE INSTRUCTION ON MANSLAUGHTER.

Fryou also argues that the "trial court erred when it refused to grant him a lesser-included offense instruction on manslaughter." (Appellant's Brief p. 9). However, a homicide which occurs during the commission of a robbery is capital murder regardless of the intent of the defendant and the defendant is, therefore, not entitled to a manslaughter instruction. *See Burns v. State*, 729 So.2d 203, 225 (Miss. 1998) and *Griffin v. State*, 557 So.2d 542, 549 (Miss. 1990). As set forth above, there was more than sufficient evidence that Fryou committed a robbery in that he had possession of the victim's wallet and money and he drove away in the victim's truck.

Fryou claims that he was provoked to swing at the victim when he spoke badly of Fryou's girlfriend and therefore, killed Mr. Devriendt in the "heat of passion." Similarly, the defendant in *Jacobs v. State*, a capital murder case in which the underlying felony was robbery, also requested a manslaughter instruction claiming that he did not have the intent to rob because of duress and that

he shot the victim because he was under the imminent threat of death. 870 So.2d 1202, 1209 (Miss. 2004). However, the Mississippi Supreme Court upheld the trial court's decision to refuse the lesser instruction stating:

This Court finds that the trial court was correct in denying the manslaughter instruction because there was no factual basis or evidence to support the instruction. Even if Jacobs was found not guilty of murder, he would nevertheless be guilty of capital murder because the victim was killed in the commission of a robbery. The jury was given instructions that duress is a defense to robbery, and the jury found that there was no such duress. Therefore, because Jacobs was found guilty of robbery, and the death resulted in the commission of the robbery, Jacobs is guilty of capital murder regardless of whether a lesser-included offense instruction is given. The trial court did not err in refusing the jury instruction of the lesser-included offense of manslaughter.

Id. (emphasis added). As Fryou was also found guilty of robbery and as the victim's death resulted in the commission of the robbery, Fryou was not entitled to a manslaughter instruction. Therefore, Fryou's second issue is without merit.

III. DEFENDANT IS PROCEDURALLY BARRED FROM RAISING ON APPEAL THE ISSUE OF AN INSTRUCTION BASED UPON THE WEATHERSBY RULE; HOWEVER, NOTWITHSTANDING THE BAR, THE WEATHERSBY RULE IS NOT THE PROPER SUBJECT OF A JURY INSTRUCTION.

Lastly, Fryou argues that the trial court erred in refusing to grant a jury instruction based on the *Weathersby* rule. (Appellant's Brief p. 12). However, Fryou failed to raise this issue in his motion for new trial. (Record p. 95). Accordingly, as set forth in detail above, he is procedurally barred from raising the issue on appeal. Furthermore, notwithstanding the bar, "the *Weathersby* Rule is not the proper subject of an instruction to the jury." *Green v. State*, 631 So.2d 167, 175 (Miss. 1994 (quoting *Windham v. State*, 602 So.2d 798, 800 n. 3 (Miss. 1992))). Accordingly, Fryou's third issue is also without merit.

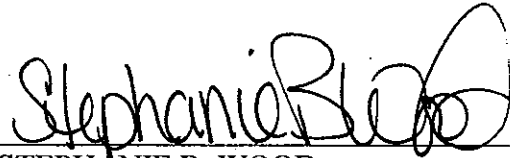
CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm Fryou's conviction and sentence as the trial court did not commit reversible error.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in black ink, appearing to read "Stephanie B. Wood", written over a horizontal line.

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CERTIFICATE OF SERVICE

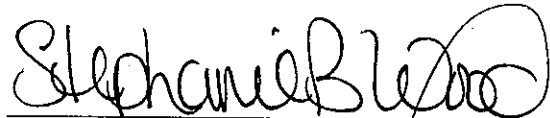
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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