

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BERNARD YOUNG

APPELLANT

FILED

VS.

MAR 05 2008

NO. 2007-KA-0989

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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Rule 803(1) of the Mississippi Rules of Evidence

Rule 803(3) of the Mississippi Rules of Evidence

STATEMENT OF THE ISSUES

- I. The trial court correctly admitted the testimony of the police information officer under the presence sense impression exception to the general rule against hearsay.
- II. The overwhelming weight of the evidence supports the jury's verdict.

STATEMENT OF THE FACTS

On June 26, 2006, at about 9:45 a.m., Bernard Young shot and killed Tamara Neal. Within about ten to fifteen minutes prior to her death, Tamara Neal went to the Lee County Sheriff's Office to report that Young was following her. She stated, in the presence of the officer, "I am just tired of him following me and I want to file charges against him." Because Neal lived in Plantersville, she left to go to Plantersville to file charges against Young. The first statement was offered by the State as a present sense impression admissible pursuant to Rule 803(1) of the Mississippi Rule of Evidence. The Officer's testimony regarding Neal's plans to go to Plantersville to file charges was offered by the State as a "then existing mental, emotional or physical condition" pursuant to Rule 803(3) of the Mississippi Rules of Evidence.

Carrie Lee Culver, the information officer at the Lee County Sheriff's Department testified that at about 9:15 or 9:30 on the morning of June 26th, Tamara Neal came in the lobby and state that she wanted to file a report for harassment and stalking. Ms. Culver was taking down Ms. Neal's information when a man walked into the lobby. He told Ms. Neal, "I would just like to talk to you." Neal told him, "No. I'm tired of you following me. I just want you to leave me alone. I'm taking out papers." Culver identified the man who spoke to Neal in the lobby as Young. The man left the lobby and Culver continued to get information from Neal. Since Neal's home was within the city limits of Plantersville, she suggested that Neal go there to file the report.

Fifteen or twenty minutes later, Young returned to the lobby of the Lee County Sheriff's Office. Culver said, "Sir, can we help you?" Young replied that he was there to turn himself in.

Culver told him that Neal had not filed a report with the Sheriff's Office. Young then stated, "I know. I shot her." Culver asked him, "You did what?" and Young then repeated himself, stating, "I shot her."

Culver then called the dispatcher to send an officer to the front lobby. Chief Deputy John Hall responded to the call. Before she handcuffed him, Culver said, "Do you have any weapons on you?" and Young replied that he did not. After he was removed from the lobby, Culver had no further contact with him.

Testimony from Shaquitta Green, a worker at Creative Kids Day Care, established that Young had called the center and asked for Neal in a loud and angry voice. When Neal arrived at the center, Green told her about the phone call and Neal stated that she knew and that Young was "outside acting a fool". Neal then dropped her kids off and left the daycare.

Adrian Beard testified that Young was at the daycare on the morning of June 26th when she went to rent an extra van for a field trip. He had blocked the daycare's van in with his blue SUV. Beard asked him to move and he did. Michael Lindsay testified that Young borrowed a dark blue Laredo Jeep SUV from him in April of 2006. He got the car back from the Lee County Sheriff's Department in June of 2006.

Ken Ables testified that he lives between Plantersville and Nettleton on Highway 6. Between 9:30 and 9:45 a.m. on January 26th of 2006 Ables was returning to Nettleton. He caught a vehicle making a U-turn and then turning back to Tupelo. It came at a high rate of speed, and Ables was only able to see that it was a midsize SUV. After the SUV went by, Ables saw a Mustang facing south in the northbound lane. The car was sitting almost off the road. Ables drove up to it and saw a woman inside slumped over. There was blood on the woman and the

driver's side window was busted out. The police arrived on the scene while Ables and other bystanders were attempting to call 911.

Wanda Kay Settlemires testified that on the morning of June 26th she and her husband were headed north on Highway six toward Tupelo. The Settlemires saw a vehicle blocking another vehicle. The vehicles had the road blocked and so they Settlemires pulled onto a small side road so that they would not be seen. A slim black man got out of a dark colored SUV with a pistol and shot into the green mustang, shot the lady three time and then got back into his vehicle and spun out. The man got into his vehicle and spun out and headed back to Tupelo. The Settlemires then pulled up to the green Mustang and saw Neal, who appeared to have been shot three times.

Sergeant Truman Carter, a police officer with the Criminal Investigation Division of the Lee County Sheriff's Department testified that he got at dispatch at 9:50 a.m. that a young black woman had been shot on Highway 6 South. Sergeant Carter arrived at the scene at 9:55 and found the vehicle positioned diagonally on the road and facing south in the northbound land. The car was headed in the direction of Plantersville. Sergeant Steve White arrived and took photos of the scene.

Investigator Cary Gaddy testified that he heard that assistance was needed in the lobby. He went to the lobby and found Chief Deputy John Hall and Deputy Sam Sisk searching Yount for weapons. Hall asked Gaddy to take Young to the Sergeant's office. Gaddy read Young his rights as soon as he got Young back there (about 10:00 a.m). Young said that he understood his rights and that he wanted to make a statement. Young told them that he threw the weapon out of the side of Briar Ridge Raod near the Dollar General Store. Young told Gaddy that he shot "her"

in the car, but did not give a name. The weapon was never located.

Chief Deputy John Hall testified that he went back into the room where Gaddy had taken Young. Officer Gaddie went to try to locate the gun. Hall presented a formal Miranda waiver from to Young. At that time Young invoked his right to counsel and Hall stopped speaking to me as related to the matter. It was documented that Gaddy had mirandized Young, but no written statement was taken from Young.

Dr. Steven Hayne testified that Tamara Neal had three lethal gunshot wounds and one non lethal gunshot wound. Her death was ruled a homicide.

Deputy Steve White was called as a witness for the defendant. He testified that he performed gunshot residue test on Young. He testified that the test can come back negative even if a person has fired a gun. The type of weapon, ammunition used, the weather and the environment can cause a test to come back negative. White tested Young's hands later on the day of the 26th and did not know whether Young had washed or wiped his hands before the test.

SUMMARY OF THE ARGUMENT

This issue is procedurally barred since Young did not object on the grounds of hearsay at trial. The sole objection articulated on the record by Young's counsel is late discovery. The trial court correctly admitted the testimony of the police information officer under the presence sense impression exception to the general rule against hearsay. Pursuant to M.R.E. 803(1) and 803(3), the trial court was not required to hold a hearing to determine whether the statements were more probative than prejudicial. Even if the trial court committed error, there was not prejudice to Young, since the remaining evidence against him was sufficient for a conviction and Young cannot show that there would have been a different outcome. The overwhelming weight of the evidence supports the jury's verdict.

ARGUMENT

I. The trial court correctly admitted the testimony of the police information officer under the presence sense impression exception to the general rule against hearsay.

Young's contention that Carrie Lee Culver's testimony of Tamara Neal's statements immediately after her death was inadmissible hearsay is without merit for a number of reasons. Finally, this issue is procedurally barred. While the State offered the testimony of Ms. Culver concerning Neal's statements in the lobby of the Lee County Sheriff's Department a few minutes before her death pursuant to M.R.E. 803, the record reflects that Young's **sole objection** to the statements is that they were not provided in discovery. Young asks for a mistrial and continuance on the basis of the alleged discovery violation. However, the trial court allowed Young's counsel the opportunity to speak with the witness prior to trial and thus cured that issue. Young cannot now object on the basis of hearsay when he did not make a contemporaneous objection at trial based on that theory. It has long been held that an objection must be made with specificity in order to preserve it for appeal. *Oates v. State*, 421 So.2d 1025, 1030 (Miss.1982). Young may have intended to object on the grounds of hearsay in addition to objecting on grounds of discovery, but he did not make it clear at trial in order to preserve it. Young cannot now argue new grounds for an objection on appeal. *Lester v. State*, 692 So.2d 755, 772 (Miss.1997). This proposition was not properly preserved at trial specifically in terms of a hearsay objection, thus the court should decline to review this issue.

A few minutes prior to her death, Tamara Neal went to the Lee County Sheriff's Office to report that Young was following her. She stated, in the presence of the officer, "I am just tired

of him following me and I want to file charges against him.” Because Neal lived in Plantersville, she left to go to Plantersville to file charges against Young. The first statement was offered by the State as a present sense impression admissible pursuant to Rule 803(1) of the Mississippi Rule of Evidence. The Officer’s testimony regarding Neal’s plans to go to Plantersville to file charges was offered by the State as a “then existing mental, emotional or physical condition” pursuant to Rule 803(3) of the Mississippi Rules of Evidence.

Carrie Lee Culver, the information officer at the Lee County Sheriff’s Department testified that at about 9:15 or 9:30 on the morning of June 26th, Tamara Neal came in the lobby and state that she wanted to file a report for harassment and stalking. Ms. Culver was taking down Ms. Neal’s information when a man walked into the lobby. He told Ms. Neal, “I would just like to talk to you.” Neal told him, “No. I’m tired of you following me. I just want you to leave me alone. I’m taking out papers.” Culver identified the man who spoke to Neal in the lobby as Young. The man left the lobby and Culver continued to get information from Neal. Since Neal’s home was within the city limits of Plantersville, she suggested that Neal go there to file the report.

First, the trial judge was within his discretion to admit evidence that so clearly fell within exceptions to the rule against hearsay. “The admissibility of testimonial evidence is left to the sound discretion of the trial court within the boundaries of the Mississippi Rules of Evidence, and it will not be found in error unless it is has abused its discretion.” *Harris v. State*, 861 So.2d 1003, 1018 (Miss.2003). “Such error will warrant reversal only when the abuse of discretion has resulted in prejudice to the accused.” *Id.* Furthermore, the Mississippi Supreme Court has held that a relevant statement made by a murder victim prior to his death may be admissible as an

exception to the hearsay rule under the declarant's then-existing mental condition, or state of mind exception under M.R.E. 803(3). *Brown v. State*, 890 So.2d 901, 914-15 (Miss.2004); *Harris*, 861 So.2d at 1019. Thus, Tamara Neal's statements at the Lee County Sheriff's Department, made just moments before her murder were admissible to show her then mental condition or state of mind pursuant to M.R.E. 803(3). The statements were admitted to show Neal's intent to file the charges and to show that based on that intent she left to go to Plantersville to file the charges there. That evidence clearly places Neal on the road to Plantersville where she was killed. The statements further reflect that Neal was at least concerned if not afraid of Young's stalking behavior and it is evidence of a potential motive to kill Neal.

The admissibility of testimonial evidence is left to the sound discretion of the trial court within the boundaries of the Mississippi Rules of Evidence, and it will not be found in error unless the trial court has abused its discretion. *Harris v. State*, 861 So.2d 1003, 1018 (Miss.2003). "Such error will warrant reversal only when the abuse of discretion has resulted in prejudice to the accused." *Id.*

The substance of the testimony that Young argues should not have been allowed involves statements by the victim to Culver and statement's made to Young in Culver's presence. These statements were made just minutes before Neal was killed. This testimony qualifies as an exception to the hearsay rule as a statement of a then-existing mental condition, or state of mind under Mississippi Rule of Evidence 803(3). "Mississippi Rule of Evidence 803(3) encompasses relevant statements made by murder victims before their death." *Id.*

In *Dendy v. State*, 931 So.2d 608 (Miss.Ct.App. 2005), Dendy asserted that the trial court

erred in admitting into evidence hearsay statements that witnesses said the victim made to them prior to her murder. Dendy argued that the statements were inadmissible because he did not have an opportunity to cross-examine the declarant. When the issue was raised in the trial court, the State argued that they were relevant to rebut Dendy's assertion that the only thing he and Windle ever fought about was who loved the other the most. The State further argued that the statements were admissible as hearsay exceptions pursuant to M.R.E. 803(3) which provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition ... is not excluded by the hearsay rule."

Young argues that *Dendy* is distinguishable since the trial court in *Dendy* held a hearing weighing the probative versus prejudicial effect of the evidence. However, the trial court in this case was well within its discretion to admit Culver's testimony since the evidence clearly fell under the exceptions contained in M.R.E. 803(1) and 803(3). The trial court was not required pursuant to M.R.E. 803(1) and 803(3) to make a detailed, on the record determination that the evidence was more probative than prejudicial.

In *Bogan v. State*, 754 So.2d 1289, 1293,94 (Miss. 2000), the hearsay involved was a statement by a co-defendant that he was going to pick up Bogan. The present state of mind exception states that "[a] statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health. Neal's statements were clearly evidence of a disagreement between the two.

In addition, Rule 803(1) of the Mississippi Rules of Evidence provides that a statement describing or explaining an event or condition made while the declarant was perceiving the event or

condition or immediately thereafter is not excluded by the hearsay rule. The comment to 803(1) states that “spontaneity is the essential ingredient.” This court has explained that the question of spontaneity is to be decided upon the facts and circumstances of each individual case and such a determination is a question for the trial court. *Evans v. State*, 547 So.2d 38, 41 (Miss.1989). When such statements are admitted, the action of the trial court should not be reversed unless the comment could not, under a reasonable interpretation of the facts presented, be spontaneous. *Id.* Also,

M.R.E. 803(3), which provides that a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition is not excluded by the hearsay rule, is applicable. Here, the prosecution had established through Hampton's testimony that Pope was “upset” and “crying” when she made the statements, and that he had arrived between 30 and 35 minutes from the time the rape occurred. The testimony was admissible under M.R.E. 803(1) and (3), and this issue is without merit.

Wright v. State, 958 So.2d 158 (Miss. 2007).

Further, A trial judge has discretion to either accept or reject evidence offered. *Austin v. State*, 784 So.2d 186, 193 (Miss.2001). “That discretion must be exercised within the scope of the Mississippi Rules of Evidence, and reversal will only be had when an abuse of discretion results in prejudice to the accused.” *Id.* at 193-94. Further, the Mississippi Supreme Court has held that “[w]e are not required to reverse a case based solely upon the showing of an error in evidentiary ruling. A denial of a substantial right of the defendant must have been affected by the evidentiary ruling.” *Jackson v. State*, 645 So.2d 921, 924 (Miss.1994) (quoting *Newsom v. State*, 629 So.2d 611, 612 (Miss.1993)).

Therefore, if the admission of these statements was error, that error is harmless and does not warrant reversal. The statements did not result in prejudice to Young because Young confessed to the crime and eyewitnesses testified that they saw a man who looked like Young,

driving the same kind of vehicle as young, commit the crime. Young cannot show that the outcome of this case would be any different if the Culver's testimony about Neal's statements had not been admitted, and therefore, he cannot show prejudice.

II. The overwhelming weight of the evidence supports the jury's verdict.

In reviewing a motion for new trial, the question is whether the jury verdict is against the overwhelming weight of the evidence. *Montana v. State*, 822 So.2d 954, 967-68 (Miss. 2002) (citing *Dudley v. State*, 719 So.2d 180, 182 (Miss. 1988)). The appeals court must accept as true any evidence supporting the verdict, and may only reverse if the trial court abused its discretion in failing to grant a new trial. *Montana*, 822 So.2d at 967-68. However a verdict that is so contrary to the overwhelming weight of the evidence that it creates an unconscionable injustice warrants reversal.

“A motion for new trial challenges the weight of the evidence. A reversal is warranted only if the lower court abused its discretion in denying a motion for new trial.” *Edwards v. State*, 800 So.2d 454, 464 (Miss.2001) (citing *Sheffield v. State*, 749 So.2d 123, 127 (Miss.1999)). “A greater quantum of evidence favoring the [S]tate is necessary for the [S]tate to withstand a motion for a new trial, as distinguished from a motion for J.N.O.V.” *Pharr v. State*, 465 So.2d 294, 302 (Miss.1984). The verdict must be “so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” *Bush*, 895 So.2d at 844. Further in *Bush*, we held:

the evidence should be weighed in the light most favorable to the verdict. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, “unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.” Rather, as the “thirteenth juror,” the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

The instant case is laden with evidence against Young, including his own confession. Young confessed to Carrie Lee Culver, stating, "I shot her." When she asked him "You did what?" he repeated "I shot her". He confessed again to Investigator Gaddy. Eyewitness testimony of the shooting establishes that a man of the same build and race as Young and driving a dark SUV like Young's shot Tamara Neal in the road on the way to Plantersville. The record reflects that Young was stalking Neal and that he had followed her to the daycare and to the Lee County Sheriff's Department that morning.

There is no doubt that the overwhelming weight of the evidence supports Young's conviction for the murder of Tamara Neal. The trial court correctly denied Young's Motion for New Trial.

CONCLUSION

Young's conviction is supported by the overwhelming weight of the evidence. The State respectfully submits that Young's arguments are without merit. Accordingly, the jury's verdict and the trial court's judgment against Young should be affirmed.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

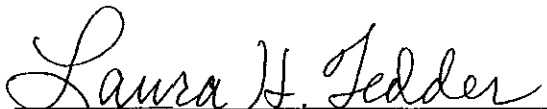
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 5th day of March, 2008.



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