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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM NELSON, III — APPELLANT

VS. — NO. 2007-KM-1048-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

I. THE STATE PROVIDED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

II. THE COURT DID NOT ALLOW "BAD CHARACTER" EVIDENCE.

III. THE COURT PROPERLY REJECTED JAMES BOWMAN'S "EXPERT" TESTIMONY.

IV. INSTRUCTION D-16 WAS PROPERLY REFUSED.

STATEMENT OF FACTS

On the night of December 8, 2005, William Nelson, III carried out a plan to rob Willie Broughton. Exhibits 28-29, T. 286-87, 293. During the robbery, Nelson shot and killed Broughton. T. 201, 288. When Broughton fell to the ground, Nelson rolled him over and took a pill bottle full of crack cocaine from him before fleeing the scene. T. 221-22, Exhibit 29 at p.12. Broughton died from massive blood loss due to a shotgun wound to abdomen. T. 263.

When Nelson surrendered to authorities, he admitted that he had an argument with Broughton prior to the shooting, but denied shooting him. T. 235. During a search, a packet of crack cocaine was found on Nelson's person. T. 235. During his first interview, Nelson admitted that he had robbed Broughton, but claimed that Keisha Bolton, Broughton's girlfriend, shot him. T. 287. However, during a second interview, Nelson admitted that he had shot Broughton. T. 288. Broughton subsequently led authorities to the location where he had disposed of the clothing he wore on the night of the murder and the location of the drugs he stole from the victim. T. 291-92.

Nelson was found guilty of capital murder and sentenced to life imprisonment. T. 407.

SUMMARY OF ARGUMENT

Nelson's claim that the State failed to prove the underlying felony of robbery is contrary to the record. Nelson's claim that the trial court allowed the jury to hear "bad character" evidence in violation of MRE 404(b) is also without merit. The complained of statement consisted of Nelson explaining the rules of the gang, and can in no way be considered evidence that he had been incarcerated. The trial court did not abuse its discretion in rejecting James Bowman's expert testimony, as he was not qualified as an expert, nor was his proposed testimony relevant and reliable. Finally, instruction D-16 was properly refused as being a misstatement of law.

ARGUMENT

I. THE STATE PROVIDED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

Evidence is legally sufficient to support a jury's verdict when the State has proven that the defendant committed every element of the crime charged. *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005). "In appeals from an overruled motion for JNOV the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State." *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993).

Nelson argues on appeal that the State failed to prove the underlying felony of robbery to support the capital murder charge. This contention is contrary to the record. Arthurene Pittman testified that after Nelson shot Broughton, he rolled him over and retrieved a pill bottle. T. 222. During a taped and transcribed interview, Nelson stated that the crack he stole from Broughton was in a pill bottle. Exhibit 29 at p. 12. Additionally, Nelson led officers to a wooded area were he hid some of the crack he stole from Broughton on the night of the murder. T. 292.

Nelson relies on *Clayton v. State*, 759 So. 2d 1169 (Miss. 1999), in arguing that no robbery occurred because Broughton "never knew that he was the victim of any theft." Appellant's brief at 6. First, *Clayton* is wholly inapplicable as it was reversed because the State failed to prove that the taking occurred by placing the victim in fear, and the indictment failed to include the option that the robbery occurred by violence. *Id.* at 1173 (¶13). In the case *sub judice*, the State did not similarly narrow the indictment, and the taking clearly occurred by violence, i.e., shooting Broughton to death. Further, it is of no consequence, if true, that Broughton did not know that he was the victim of any theft. The victim need not be deprived of his property prior to the killing in order to sustain a capital murder conviction with the underlying felony of robbery. *Knox v. State*, 805 So.2d 527, 531-32 (¶14)

(Miss. 2002). See also, *Spicer v. State*, 921 So.2d 292, 311-12 (¶ 39)(Miss. 2006). Accordingly, Nelson's first assignment of error fails.

II. THE COURT DID NOT ALLOW "BAD CHARACTER" EVIDENCE.

Nelson claims that the trial court erred in not directing the State to redact the following underlined portion from Nelson's statement which was admitted as Exhibit 29.

> McClenic: So a Vice Lord is beating up a G Queen? Is that like total disrespect to the Gangsters?
>
> Nelson: Not if she put herself out there like that for it, for him to do that, not if she give herself to him. See it's a difference between being in the penitentiary and being out on the streets and involved in an organization. If you out on the street the same rules don't apply for being in the penitentiary cause you out on the street you doing your own thing out there. You ain't obligated to no one out there on the street[,] but in the penitentiary you obligated to be your brother's keeper. See when you a gangster and you're out there on the street and you ain't got your fellow Gangster brothers helping you with your habit, helping you with your money and helping you just financially[,] then you ain't got to be obligated[,] and I ain't have nobody helping me do nothing out there so I wasn't obligated to none of them gangs out there on the street.

Exhibit 29 at p. 23. Nelson claims that allowing the statement to be presented to the jury amounted to an MRE 404(b) violation.

MRE 404(b) provides,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Nelson claims that the jury "would probably infer that Nelson was speaking from first hand knowledge gained from being in prison." Appellant's brief at 9. Regardless of what the jury may have inferred, MRE 404(b) aims to prevent evidence of other crimes, wrongs, or acts from being presented in attempt to show conformity therewith. The portion of the statement which Nelson claims amounts to such a violation is in no way evidence that he had previously been incarcerated. Even if by some stretch of the imagination the statement could be considered evidence of other crimes,

wrongs, or acts, it was in no way used to show that Nelson acted in conformity therewith. "The reason for the rule is to prevent the State from raising the inference that the accused has committed other crimes and is therefore likely to be guilty of the offense charged." *Denham v. State*, 966 So.2d 894, 898 (¶18) (Miss. Ct. App. 2007) (*White v. State*, 842 So.2d 565, 573(¶24) (Miss.2003). Because no 403(b) evidence was admitted, no balancing test was required. Nelson's second assignment of error is also without merit.

III. THE COURT PROPERLY REJECTED JAMES BOWMAN'S "EXPERT" TESTIMONY.

James Bowman was offered by the defense as an expert in firearms. The defense stated that it was offering Bowman's testimony to show that "a 12-gauge single-barrel shotgun could go off by not pulling the trigger." T. 310. Defense counsel also sought to introduce a videotaped demonstration performed by Bowman in which he tested four shotguns to see which, if any, would fire without pulling the trigger. T. 309. According to Bowman's testimony, only the pre-1960 manufactured shotgun he tested would fire by simply pulling the hammer back and not pulling the trigger. T. 309. The trial court ruled that Bowman was not qualified as an expert as he had no special knowledge about shotguns, "except that years ago he used his father's shotgun to hunt across the river." T. 329. The court also noted that there was no evidence in the record regarding the make, model, or type of shotgun involved in the murder, and that Bowman's testimony and videotaped demonstration were neither probative nor reliable. T. 329.

The decision to admit or exclude expert testimony is left to the sound discretion of the trial court. *White v. State*, 964 So.2d 1181, 1185 (¶10) (Miss. Ct. App. 2007) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (¶ 4) (Miss. 2003)). Such decision will not be disturbed on appeal unless arbitrary and clearly erroneous, amounting to an abuse of discretion. *Id.* The trial court's decision to exclude Bowman's testimony was not arbitrary or clearly erroneous. Not only was Bowman not qualified to testify as an expert, his proposed testimony and the videotaped experiment were clearly not relevant. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE. 401. Bowman's testimony and demonstration showed that a 12-gauge single-barrel shotgun manufactured prior to 1960 could fire

without the trigger being pulled. However, the murder weapon was never recovered, and no one testified that it was in fact a 12-gauge shotgun, how many barrels the weapon had, and when it was manufactured. As such, Bowman's testimony had no tendency to prove a consequential fact, rendering it irrelevant.

IV. INSTRUCTION D-16 WAS PROPERLY REFUSED.

The trial court refused proffered instruction D-16, which stated the following, "The Court instructs the Jury that the killing of any human being by the act, procurement, or omission of another shall be excusable when committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation." C.P. 152. Nelson argues on appeal that the refused instruction embodied his theory of the case, and reversible error resulted from the court's refusal of the instruction.

Although a defendant has the right to have an instruction given which presents his theory of the case, the right is limited in that the proposed instruction must correctly state the law, must not be covered fairly elsewhere in the instructions, and must have foundation in the evidence. *Livingston v. State*, 943 So.2d 66, 71 (¶14) (Miss. Ct. App. 2006). In the present case, Nelson was indicted, tried, and convicted of capital murder in violation of Mississippi Code Annotated §97-3-19(2)(e), which states, "The killing of a human being without the authority of law by any means or in any manner shall be capital murder . . . [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery . . . ." Because this variety of capital murder may be committed even when there is no intent to kill, "[i]t is no legal defense to claim accident . . ." *Griffin v. State*, 557 So.2d 542, 549 (Miss. 1990). Although the refused instruction recited Mississippi Code Annotated §97-3-17(b) verbatim, it was an incorrect statement of law in that the defense of accident is inapplicable to a charge of capital murder, in accordance with *Griffin*. As such, instruction D-16 was properly refused.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Nelson'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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This the 17th day of December, 2007.

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