

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JONATHAN BARFIELD

APPELLANT

VS.

NO. 2008-KA-1606-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Harrison County, Mississippi, wherein a jury convicted Jonathan Barfield for the manslaughter of Tiffany Talley. CP 103;104. Circuit Judge Lisa P. Dodson sentenced Barfield to twenty (20) years in the custody of the Department of Corrections. CP 143. After denial of post trial motions, Barfield appealed. CP 144; 146-47.

STATEMENT OF THE ISSUES

- ISSUE NO. 1:** Whether the trial court erred in admitting Exhibit 6, an autopsy photograph?
- ISSUE NO. 2:** Whether the trial court erred in denying Barfield's motion for a change of venue?
- ISSUE NO. 3:** Whether there was sufficient evidence to support the trial court's denial of Barfield's motion for directed verdict based upon the Weathersby rule?
- ISSUE NO. 4:** Whether the verdict was against the overwhelming weight of the evidence?

STATEMENT OF THE FACTS

On December 27, 2006, Tiffany Talley (Tiffany) died of a single gunshot wound to the head while at Jonathan Barfield's home. Jonathan Barfield (Barfield) lived alone in a FEMA trailer park in Harrison County. Tiffany and Barfield had been dating for almost two (2) years when she died. T 213; 251; 355. Barfield was arrested and charged with manslaughter; a grand jury subsequently indicted him for murder and a jury found him guilty of manslaughter.

At trial, Barfield testified in his own defense. Barfield testified that his relationship with Tiffany was a regular relationship like any other couple with its ups and downs. According to Barfield the relationship was fine T. 355. Barfield testified Tiffany called him on the morning of December 27 to let him know she was leaving basketball practice. T. 358. Basketball practice was over at eleven o'clock that morning. T 359. According to Barfield, he was asleep on the couch in the living room of the trailer when she called and woke him up. T. 355.

Barfield testified he received another call from Tiffany while he showered. T. 362-63. Barfield testified during the telephone call with Tiffany, he heard a loud banging at his front door. *Id.* Barfield told Tiffany to hold on and he walked through the hallway toward the living room. *Id.* Barfield testified that when he got to the door, he noticed that the door knob was turning on the door. *Id.* Barfield set his phone on the table and grabbed his gun. *Id.* Barfield testified he went to the door with the gun to surprise whoever was trying to come into his house. *Id.* The bottom lock on the door was unlocked, but the top lock was locked. *Id.* Barfield slid the lock quickly to surprise the intruder with his gun. *Id.* Barfield then realized that Tiffany was at the door. *Id.* He testified she had "an attitude" and questioned him on what he planned to do with the gun. T. 364. According to Barfield, as he un-cocked the gun, he heard a bang noise and the gun fired. T. 364-65. Barfield testified that Tiffany had not been at his house a good thirty (30) seconds when the gun went off.

Id. Barfield dropped the gun after it accidentally discharged. *Id.*

Barfield testified he was so scared and shaken up that the gun discharged in the house he took it and threw it over a fence beside his house. *Id.* Barfield went back in to tell Tiffany to get up and he saw blood. *Id.* Barfield testified that he just thought Tiffany had fallen to the floor to cover herself from the gun shot. *Id.*

Barfield testified that he did not have much knowledge about operating firearms. T. 366. Barfield was trying to uncock the revolver pistol. *Id.* He also testified that he had never shot that gun prior to the accident. *Id.* Barfield did indicate that in order to uncock the revolver, he had to hold the trigger and ease up the lever. *Id.* As Barfield tried to un-cock the pistol, Tiffany bumped him causing his finger to slip off of the gun. T. 367.

Barfield testified, once he realized Tiffany was shot, he called his father who in turn told him to call 911. T 369. Barfield told the 911 dispatcher that he had been showering when Tiffany walked up; they were playing around with a gun and Tiffany got shot. Ex. S-9. Barfield claimed it was an accident; he didn't want to go the prison. *Id.* "We were playing around and the gun went off." He also told the dispatcher that he "threw the .22 over the fence." *Id.*

Deputy Joseph Fore, the first responding officer to the shooting, testified Barfield told him the shooting was an accident. Barfield told him he and Tiffany got into a little argument, nothing big, and were playing with the gun. T. 157. Barfield told Fore the gun was cocked by his leg and pointed at the floor when they bumped into each other, causing the gun to fire and shoot her in the face. *Id.* Fore testified when he entered the trailer he saw Tiffany on the floor, and noticed two boxes of ammunition sitting on the coffee table and the TV was on with a movie paused. T. 164.

Deputy Glenn Roe, the second responding deputy to the scene of the shooting, testified Barfield said it was an accident. T. 167. Roe handcuffed Barfield at the scene and subsequently

transported him to the Sheriff's Department. T. 167-69. Barfield was barefoot and dressed in light weight pants when taken to the Sheriff's Department. T. 168. Roe testified Barfield had some blood on his hand and a drop of blood on his foot. T. 169.

Fore and other officers testified to an extensive, unsuccessful search for the weapon in the adjoining field where Barfield told officers he had thrown the gun. T. 158-59; 169; 254-56.

Detective Twomey with the Harrison County Sheriff's Department questioned Barfield at the scene. T. 279. During the initial questioning Barfield "said that he was standing by the table in the living room, and that she had come by before she had to be at work. He said that his weapon was a black-colored .22 revolver, and basically that he had come to the door, gun-in-hand, cocked back, and that she had shoved me to get by and the gun went off." T. 279.

Twomey interviewed Barfield again at the Sheriff's Department. During this second interview Twomey testified

- A. He described that he was taking a shower and that he had heard somebody trying to get in his door. He described the noise as someone banging on the door a lot. He was afraid of being robbed so he put a towel around him and he went to the door, passed through the kitchen where he kept the revolver on the table already cocked, and he grabbed that. He went to the door, he opened it very quickly so he could get the surprise on whoever it was. He stated that he saw it was Tiffany. He lowered the pistol down by his side. He pointed it toward the floor and he moved away from the doorway to let her in. He said Tiffany said something like, "What are you going to do with that?" And she bumped him as she was coming in. Barfield said that he heard an explosion and the gun just went off.
- Q. Having informed you of that did you further ask him or inform of the nature of the injury sustained by Tiffany Talley and where she was shot?
- A. At that time myself and Investigator Tracey had him demonstrate how he was actually holding the gun using his finger as what the gun -- depicting where the gun would have been.
- Q. How did he demonstrate?

A. Simply holding it down by his side.

Q. Did you tell him where she was shot at on her body?

A. Yes.

Q. Did he have a response for that information?

A. He said that he must have dropped the gun because he was holding it lightly and it must have hit the floor and went off.

Q. So the statement that he gave you went from that she bumped him and the gun went off to he must have dropped it and the gun went off?

A. Yes.

T. 285-286.

Dr. Paul McGarry, the pathologist who performed the autopsy on Tiffany, testified Tiffany died from a single, "close range gunshot wound entering the right cheek and perforating the brain."

T. 250. The bullet traveled at a 45-degree angle. T. 250; Exhibit S-6.

SUMMARY OF THE ARGUMENT

Barfield's assertion that the trial court incorrectly admitted Exhibit 6, an autopsy photograph, is procedurally barred, as defense counsel raised no contemporaneous objection to its admission at trial.

The trial court correctly denied Barfield's Motion for Change of Venue. The State rebutted the presumption that Barfield could not receive a fair trial by proving through voir dire that the trial court impaneled an impartial jury. *Holland v. State*, 705 So.2d 307, 336 (Miss.1997).

The evidence sufficiently supported the jury's verdict; the *Weathersby* rule did not apply in the case at bar. The physical evidence, Barfield's conflicting statements and the testimony of the law enforcement officers substantially contradicted Barfield's testimony at trial thereby making *Weathersby* inapplicable.

The overwhelming weight of the evidence supported the jury's verdict. Judging the facts most favorable to the verdict, a reasonable juror could find Barfield guilty of manslaughter beyond a reasonable doubt.

ARGUMENT

ISSUE NO. 1: Whether the trial court erred in admitting Exhibit 6, an autopsy photograph?

In his first assignment of error, Barfield asserts the trial court erred by allowing the introduction of gruesome autopsy photographs into evidence, specifically Exhibit 6. Barfield argues the photograph served no probative purpose and was highly prejudicial.

Barfield's argument is procedurally barred. Barfield failed to make a contemporaneous objection at trial to the photograph. Barfield cannot now complain about something which he did not object to in his trial. T. 249. "A failure to object at trial waives any error which may have been presented, even in capital cases." *Foley v. State* citing *Duplantis v. State*, 644 So.2d 1235, 1245 (Miss. 1994) (quoting *Chase v. State*, 645 So.2d 829, 859 (Miss.1994)); *Smith v. State*, 724 So.2d 280, 316 (Miss. 1998).

Procedural bar aside, the Mississippi Supreme Court previously held "The determination as to whether photographs are admissible rests within the sound discretion of the trial judge whose decision will be upheld absent a showing of abuse of discretion." *Lanier v. State*, 533 So.2d 473, 483-84 (Miss.1988). "Some 'probative value' is the only requirement needed to buttress a trial judge's decision to allow photographs into evidence." *Parker v. State*, 514 So.2d 767, 771 (Miss.1986) (emphasis added). "The mere fact that photographs depict an unpleasant or gruesome scene is no bar to their admission if they are relevant." *Lanier*, 533 So.2d at 484 (citing *Dase v. State*, 356 So.2d 1179 (Miss.1978)).

"Photographs are considered to have evidentiary value in the following instances: (1) aid in describing the circumstances of the killing; (2) describe the location of the body and cause of death; (3) supplement or [clarify] witness testimony." *McIntosh v. State*, 917 So.2d 78, 84 (Miss.2005)

(quoting *Spann v. State*, 771 So.2d 883, 895 (Miss.2000)).

Exhibit S-6 is a photograph of Tiffany's face with the gunshot entry wound to the right cheek and a small probe inserted in the wound to show the trajectory of the bullet. T. 248. The State contends that Exhibit S-6 assisted the jury in understanding the testimony of the pathologist who conducted the autopsy on Tiffany, as well as corroborated his testimony. See *Williams v. State*, 3 So.3d 105 (Miss.,2009). Barfield's first assignment of error is both procedurally barred and without merit.

ISSUE NO. 2: Whether the trial court erred in denying Barfield's motion for a change of venue?

Next, Barfield asserts that because of the pre-trial publicity and media coverage, the trial court should have granted his request for a change of venue. "The decision to grant or deny a motion for change of venue is within the discretion of the trial judge." *McCune v. State*, 989 So.2d 310, 316 (Miss.2008). "This Court 'will not disturb the ruling of the lower court where the trial judge did not abuse his discretion....' " *Id.* (quoting *Mingo v. State*, 944 So.2d 18, 30 (Miss.2006)). The trial court *sub judice* did not abuse its discretion in denying Barfield's motion for change of venue.

Pursuant to Mississippi Code Annotated section 99-15-35, Barfield filed a motion for change of venue. Attached were two affidavits from citizens who stated that Barfield could not receive a fair and impartial trial in Harrison County. The motion noted the "numerous" newspaper articles and television stories discussing the case, published prior to Barfield's indictment, citing the circulation of the newspapers and the broadcast area of the television stations as reasons for the inability to obtain an impartial jury. C.P. 137-42.

Upon filing an application for change of venue supported by two affidavits affirming the defendant's inability to receive a fair trial, there arises a presumption that an impartial jury cannot

be obtained. *King v. State*, 960 So.2d 413, 429-430 (Miss.2007). The State may rebut the presumption that an impartial jury cannot be obtained “by proving from voir dire that the trial court impaneled an impartial jury.” *Holland v. State*, 705 So.2d 307, 336 (Miss.1997) (citing *Harris v. State*, 537 So.2d 1325, 1329 (Miss.1989)). “If the State demonstrates such, this Court will not overturn the trial court's finding that an impartial jury could be found, despite adverse publicity.” *Id.*

Additionally, 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 irrebuttable.” *King*, 960 at 429 (quoting *White v. State*, 495 So.2d 1346, 1349 (Miss.1986)). In determining whether Barfield could receive a fair and impartial jury, the trial court looked at the elements set forth in *King*. The case *sub judice* was not a capital case, there were no crowds threatening violence, there was not an inordinate amount of media coverage, and there was no showing of involvement by an influential family, public official, serial killer, a black on white crime or an inexperienced trial counsel. T. 137-38.

Upon determining that *King* does not apply, this Court must then determine whether the State rebutted the presumption of an impartial jury. During voir dire, the venire was questioned as to whether they recalled any news media coverage regarding the case. Less than twelve prospective jurors from five-plus panels responded affirmatively. The trial judge subjected each to individual voir dire as to whether they had formed a fixed opinion based upon the coverage and if anything in the articles or news coverage would carry over into the facts of the case or into deliberations as a juror. T. 65-76; 98-101. In addition, during voir dire questioning, each prospective juror agreed that the defendant would be presumed innocent until the evidence proved otherwise. Moreover, the prospective jurors stated that they were, in fact, impartial and unaffected by media coverage of the case.

Only one member of the selected panel answered that she had seen coverage of the case in the media. However, the juror advised the court that she could base a verdict on what she heard in the courtroom. T. 70; 71. The Mississippi Supreme Court held “[T]his Court will treat with deference a venire person's assertions of impartiality.” *Holland*, 705 So.2d at 336 (citing *Scott v. Ball*, 595 So.2d 848, 850 (Miss.1992)). Defense had no objection to the jurors impaneled. T. 120-132.

The State rebutted the presumption that the defendant could not receive a fair trial by proving from voir dire that the trial court impaneled an impartial jury. See *Holland v. State*, 705 So.2d307 (Miss.1997). After hearing arguments of counsel reviewing the news articles and questioning the venire, the trial court was satisfied that Barfield could receive a fair trial in Harrison County and denied his motion for change of venue. T. 134-38.

There is no evidence in the record to indicate that the jurors were not fair and impartial. The trial judge took appropriate steps, through voir dire, and jury instruction, to ensure that Barfield's right to a fair trial was preserved.

ISSUE NO. 3: Whether there was sufficient evidence to support the trial court's denial of Barfield's motion for a directed verdict based upon the *Weathersby* rule?

Barfield asserts that the trial court erred by not granting his motion for a directed verdict in accordance with the *Weathersby* rule. *Weathersby v. State*, 165 Miss. 207, 209, 147 So. 481, 482 (1933). Barfield argues that the *Weathersby* rule applies to his case and as such, the trial court's granting of his motion for directed verdict is required.

In reviewing issues of legal sufficiency, the reviewing court does not “ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.” *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

Rather, the Court will view the evidence in the light most favorable to the State and determine whether any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Id.*

The *Weathersby* rule states “that where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state or by the physical facts or by the facts of common knowledge.” *Weathersby*, 165 Miss. at 209, 147 So.2d. at 481. Barfield maintains that Tiffany was not the victim of a homicide but rather victim of an accidental shooting and argues that, as the only eyewitness to the shooting, the trial court must accept as true his version of the events, in accordance with *Weathersby*.

Upon review of the record, Barfield's argument lacks merit. During the State's case-in-chief, the State presented the testimony of the forensic pathologist that the gun was within twelve to eighteen inches of Tiffany's face when discharged with the bullet entering her face at 45 ° angle. T. 248-251. Ex. S-6. Dr. McGarry's findings were inconsistent with Barfield's version of events. Detective Twomey testified as to Barfield's inconsistent statements with reference to how the gun was positioned when fired and how the accidental shooting occurred.

Barfield told the 911 operator and Deputy Fore that he and Tiffany were playing with the gun, she accidentally bumped him and the gun went off. T. 157; Ex. S-9. He told Fore “that she had come over, they got into a little argument, nothing big, and that they were playing with the gun. He had the gun cocked by his leg pointed at the ground and they bumped into each other and the gun went off and shot her in the face.” T. 157.

Barfield told Investigator Twomey that someone was banging on the door so loudly that he heard it from in the shower. He went to the door with his gun cocked in hand to surprise the intruder

but he pointed the gun at the floor after he opened the door and realized that it was Tiffany. She bumped into him and the gun went off. T. 285-290. When Twomey questioned how Tiffany was shot in the face if the gun were pointed downward, Barfield's story changed to he "must have dropped the gun because he was holding it lightly and it must have hit the floor and went off." T. 287. Barfield also gave inconsistent statements as to what happened after the shooting. T. 289.

Barfield told investigators and the 911 dispatcher that he tried to help Tiffany after she was shot, but the evidence indicated otherwise. The photographs of the crime scene, Barfield's statements during the 911 call, and the testimony of the officers indicated there was a large amount of blood. Even though Barfield made statements that he tried to help Tiffany after the shooting he had very little blood on him when the police arrived at the scene. T. 290.

Barfield told investigators that his relationship with Tiffany was fine. State's witnesses Felicia Shaw and Julisia Taylor testified as to the couple's volatile relationship, how Barfield was often overly possessive and threatening, and that Tiffany broke up with him the night before the shooting. Tiffany was going to return an item to Barfield. T.212-213; 229-232. The State argued the item she was returning was the cell phone Barfield had given Tiffany. Tiffany's co-worker Walter Jackson testified that Tiffany told him about her rocky relationship with Barfield and that she was concerned for her safety if she broke up with Barfield. T. 219-224.

Since Barfield's recollection of the events was "substantially contradicted in material particulars by a credible witness or witnesses for the state or by the physical facts or by the facts of common knowledge," the *Weathersby* rule does not apply. Rather, the difference in the testimony presented an issue for the jury's determination. It is well-settled law in Mississippi that issues of credibility and the weight assigned to the testimony presented are determinations which are made by the jury. *Jackson v. Griffin*, 390 So.2d 287, 289 (Miss.1980). The jury made this determination

and found the evidence presented by the State was due greater weight than the testimony of Barfield. The Mississippi Supreme Court previously stated, “the authority to interfere with a jury verdict is quite limited.” *McFee v. State*, 511 So.2d 130, 133 (Miss.1987). The procedure to be followed by a reviewing court was stated in *McFee* as follows:

We proceed by considering all of the evidence-not just that supporting the case for the prosecution-in the light most consistent with the verdict. We give prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
McFee, 511 So.2d at 133-34.

After reviewing all evidence in the light most favorable to the State, there was sufficient evidence for a fair-minded and reasonable jury to convict Barfield of manslaughter.

ISSUE NO. 4: Whether the verdict was against the overwhelming weight of the evidence?

Barfield's final assignment of error is that the verdict of the jury was against the overwhelming weight of the evidence and a new trial should be granted. This Court will “only disturb a jury verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” *Bush v. State*, 895 So.2d 863, 844(¶ 18) (Miss. 2005) (citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). To determine if this has occurred, the Court will look at the evidence in a light most favorable to the verdict. *Id.* While there are conflicts in the evidence presented to the jury, it has long been held that when such an instance arises the jury shall “be the sole judge of the credibility of witnesses and the weight and worth of their testimony.” *Harris v. State*, 970 So.2d 151, 156(¶ 20) (Miss.2007).

The jury heard the testimony of Dr. McGarry concerning the distance of the gun from Talley's face when fired and the trajectory of the bullet. The jury heard the testimony from the law enforcement officers about Barfield's inconsistent statements surrounding the shooting, the inconsistent statements as to how the gun was positioned and fired, and the inconsistent statements as to the disposal of the gun. The jury heard from State witnesses that the couple had a rocky relationship and broke up the night before the shooting. The jury heard the 911 tape and Barfield's taped statement. Then the jury heard from Barfield. The conflicting evidence presented a factual dispute for jury resolution and obviously the jury believed the State's witnesses.

In the case *sub judice*, when viewing the evidence in the light most favorable to the verdict, the State asserts this Court cannot say the jury's guilty verdict constitutes an unconscionable injustice or that the verdict of the jury was against the overwhelming weight of the evidence. The trial court did not abuse its discretion in denying the motion for a new trial. This assignment of error is without merit.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's conviction of Jonathan Barfield for manslaughter.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I, Lisa L. Blount, 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 29th day of May, 2009.



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