

IN THE OF THE STATE OF MISSISSIPPI

JOSHUA KING

APPELLANT

V.

NO. 2011-KA-0137

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

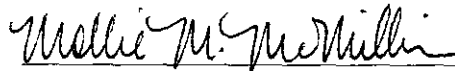
1. State of Mississippi
2. Joshua King, Appellant
3. Honorable Brenda F. Mitchell, District Attorney
4. Honorable Kenneth L. Thomas, Circuit Court Judge

This the 20th day of June, 2011.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

- I. THE TRIAL COURT ERRED BY ALLOWING INTRODUCTION OF GRUESOME PHOTOGRAPHS THAT WERE UNNECESSARY AND PREJUDICIAL TO KING**
- II. THE TRIAL COURT ERRED IN DENYING KING'S MOTION FOR A NEW TRIAL BECAUSE THE JURY'S VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Bolivar County, Mississippi, and a judgment of conviction for two counts of capital murder entered against Joshua King. King was sentenced to two life sentences in the custody of the Mississippi Department of Corrections following a jury trial on December 14-16, 2009, the Honorable Kenneth L. Thomas, Circuit Judge, presiding. King is presently incarcerated and appeals his convictions and sentences.

FACTS

King, along with Terrence Stanton, was indicted for two counts of capital murder in the deaths of Alfred Quong and So Ha Jung. (C.P. 10-11, R.E. 10-11). The indictment alleged that King

and Stanton killed Quong and Jung while engaged in the commission of a robbery. (C.P. 10-11, R.E. 10-11). King's first trial in July 2009 ended in a mistrial after the jury was unable to return a unanimous verdict. (C.P. 129-30). King was subsequently re-tried on December 14-16, 2010, and convicted on both counts of murder. (C.P. 170-71, R.E. 14-15).

On September 19, 2007, Keith Johnson, a police officer with the Shaw Police Department, and another officer responded to a 911 call regarding the Leadway Grocery Store in Shaw, Mississippi. (T. 226). The 911 call came in at approximately 10:00 p.m. (T. 226). Upon arriving at the store, Officer Johnson noticed that the doors to the front of the building were open. (T. 227). He walked around the counter of the store and saw two people lying on the floor. (T. 227). It appeared to Officer Johnson that the two victims had been shot. (T. 227). Officer Johnson testified that the male victim, Alfred Quong, was lying flat on his back. (T. 228). The female victim, So Ha Jung, was lying on top of Quong, in a sort of kneeling position. (T. 228). Officer Johnson secured the crime scene while waiting for the Bolivar County Sheriff's Department to arrive. (T. 229). Quong was taken to the hospital by ambulance, but later died. (T. 311). Jung died before officers arrived at the scene. (T. 311). Dr. Steven Hayne determined that Quong died from a gunshot wound to his head. (T. 451). Jung also died from a gunshot wound to her head. (T. 456).

Ulysses Brown, who lived across the street from the Leadway Grocery, testified that he could see the grocery store and the adjacent lumberyard directly from his home. (T. 237). Brown testified that on the night of September 19, 2007, he heard two gunshots just before 10:00 p.m. (T. 238). Brown went outside to see what happened, and he saw two people running away from the grocery store. (T. 239). Brown stated that the two people were running too fast for him to recognize. (T. 240). Brown testified that only a short period of time elapsed between his hearing the gunshots and seeing the two people run from the store. (T. 244). Brown went back into his house and called 911.

(T. 244). According to Brown, the two people he saw running away from the store that night were black. (T. 245). Further, Brown surmised that the people were young, because they were running fast. (T. 246). Brown testified that the two people seen running from the store were wearing dark clothing, but he could not tell what color. (T. 246).

Mary Phillips lived with Brown across the street from the Leadway Grocery. (T. 237). Phillips testified that she heard the two gunshots and then looked outside. (T. 250). Phillips saw two people running away from the store, one behind the other. (T. 250). She did not see them come out of the store. (T. 252). Phillips testified that it was too dark to see the people well enough to identify them, but she testified that they were black men. (T. 252-54). She also assumed that they were young because they were running fast. (T. 252).

Investigator Tim Pyles of the Mississippi Bureau of Investigation testified that he became involved in the investigation the afternoon after the shootings, on September 20th. (T. 265-66). Investigator Pyles testified that another investigator on the case received a tip that afternoon that led to the arrest of King and Terrance Stanton. (T. 267). Investigator Pyles interviewed Stanton on the night of September 20th. (T. 267). When he arrived at the sheriff's department the next morning, Stanton volunteered a second, revised statement concerning the murders. (T. 268-69). Investigator Pyles testified that he tape-recorded the first statement from Stanton, but only took notes during the second statement. (T. 274). In his second statement to Investigator Pyles, Stanton admitted that *he* killed Quong and Jung. (T. 276). Stanton gave Investigator Pyles information concerning the crime which led to the discovery of \$134 in cash in a field where Stanton and King had been arrested. (T. 270-71, Ex. 4a-4b).

Officer Charles Gilmer of the Bolivar County Sheriff's Office responded to Leadway Grocery store on the night of the murders. (T. 278). Officer Gilmer recovered some .380 caliber

shell casings and a live round of .380 caliber ammunition from the crime scene. (T. 281, 285). Officer Gilmer also collected a latent palmprint from the checkout counter of the grocery store. (T. 286). The palm print taken from the checkout counter of the grocery store matched King's known print. (T. 401).

Officer Gilmer collected other evidence related to the investigation. On September 21st, Officer Gilmer collected \$134 from a field near the Promise Land Apartments in Shaw. (T. 292, Ex. 4a-4b). He also recovered some clothing from the garbage bin at the same apartment complex. (T. 293, Ex. 5d-5f). Officer Gilmer testified that the clothing belonged to Stanton and King. (T. 295). Officer Gilmer testified that Investigator Charlie Griffin recovered a separate bundle of money containing \$310 and turned it over to Officer Gilmer for processing. (T. 299). Nobody attempted to process either the \$310 or the \$134 bundles of money for fingerprints to assist in the investigation. (T. 299). Officer Gilmer admitted that, although it can be difficult, fingerprints can be taken from money. (T. 299).

Investigator Griffin of the Bolivar County Sheriff's Office testified that he received information linking Stanton and King to the murders. (T. 303-04). Based on that information, he went to the Promise Land Apartments with Undersheriff Charles Anderson to look for the suspects. (T. 304). Investigator Griffin noticed the two men walking across the field adjacent to the apartments, approached them, and subsequently arrested them. (T. 304). Griffin testified that the separate sum of money, the \$310, was found at 405 Walker Street in Shaw. (T. 306). King led investigators to this piece of evidence. (T. 306). The money was located under a "bush tree" at the property. (T. 307, Ex. 4c-4f). The gun used in the murders was never found. (T. 311).

Investigator Griffin also testified regarding a sweatshirt which was found at 405 Woodlawn Street in Shaw. (T. 326). Griffin testified that officers never determined who the shirt belonged to.

(T. 326). The K-9 unit brought in the night of the murders tracked the men's route away from the store and led officers to the house at 405 Woodlawn. (T. 419).

Terrence Stanton testified for the State against Joshua King. (T. 332). Stanton testified that he had known King "for quite some time." (T. 334). Stanton stated that he got a chrome .380 handgun from King the night of the shootings. (T. 335). Stanton's testimony is difficult to understand at times, but he suggests that King got the gun the night before the shootings from a mutual friend named Jontarius Moody when the three men were together. (T. 335-36). According to Stanton, the gun was to be used as a "little scare tactic or whatever" in a robbery of the Leadway Grocery store. (T. 338). Stanton stated that he, King, Moody, and a couple more people had discussed robbing the grocery store the night before the crime. (T. 339).

Stanton testified that earlier in the day of the murders, he and King went to the Leadway Grocery store together. (T. 341). At that time, King went into the store alone and asked for some cold medicine. (T. 341). He then asked what time the store would close that night and left. (T. 342). Stanton testified that he and King later returned to the store. Stanton told King to stay outside the store, and "that's when everything happen[ed]." (T. 342).

According to Stanton, he and King planned to rob the grocery store. (T. 343). Stanton went inside the store, grabbed a soda, and took it to the counter. (T. 344). He asked Quong if he had any cold medicine. (T. 344). When Quong turned around to get the medicine, Stanton raised the gun up and shot Quong. (T. 344). After the first shot was fired, King came into the store. (T. 347). Stanton testified that he handed King the gun and reached into the cash register and took the money out. (T. 347).

Jung was on the floor holding Quong, who had been shot. (T. 347). Once Stanton had the money from the register, King gave him back the gun. (T. 348). Stanton testified that King then

asked Stanton, “Ain’t you gonna shoot her?” (T. 348). Stanton then shot Jung. (T. 348). Stanton testified that King then told him to shoot Quong a second time because he could still hear him breathing. (T. 349). In response, Stanton shot into the floor rather than shooting Quong a second time. (T. 349). The two men then ran to the back of the store in an attempt to leave through the back door. (T. 350). Stanton tried to shoot the lock off the back door, but failed. (T. 350). The men then ran out the front door of the store. (T. 350). The men ran from the store to the housing project – Promise Land Apartments. (T. 351).

Stanton stopped at his girlfriend’s house at Promise Land Apartments and changed clothes. (T. 353). Those clothes were later found in the trash at Promise Land Apartments. (T. 353). Stanton and King then left the apartments and went to a house in Boright. (T. 352). After leaving Boright, Stanton went back to the apartments. (T. 354). Stanton did not know where King went after the two left Boright. (T. 354). King and Stanton met up the next day after King got out of school. (T. 355). They were arrested a short time later in the field next to the Promise Land Apartments. (T. 355).

Stanton gave a statement the night he was arrested to Tim Pyles. (T. 356). He gave him another statement the next day, which he testified at trial was still only a partial statement. (T. 356). On cross-examination, Stanton admitted that he had already pled guilty to two counts of capital murder for the deaths of Quong and Jung. (T. 365). Stanton had an agreement with the State to testify against King in exchange for the State not seeking the death penalty. (T. 365).

King did not testify at trial. He did, however, present three character witnesses who testified that he had a good reputation for being peaceful and law-abiding. (T. 481, 486, 491).

SUMMARY OF THE ARGUMENT

The trial court erred by allowing the introduction of a gruesome crime scene photograph into

evidence. The photograph served no purpose, was more prejudicial than probative, and was highly prejudicial to King.

Secondly, the jury's verdict is against the overwhelming weight of the evidence. The verdict was based entirely on the testimony of the co-defendant, who admitted to shooting both victims. No other evidence presented at trial proves that King participated in the crime and was not merely present when the crimes occurred.

Therefore, King's convictions should be reversed and his case remanded for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED BY ALLOWING THE INTRODUCTION OF EXHIBIT 3e, A GRUESOME CRIME SCENE PHOTOGRAPH THAT WAS UNNECESSARY AND PREJUDICIAL TO KING.

The trial court allowed the State, over defense objection, to admit Exhibit 3e, a color photograph of Quong taken at the crime scene after Jung's body had been moved from on top of his body. (T. 432, Ex. 3e). King did not object to the admission of Exhibit 3d, which is a photograph depicting the two victims as they were found by investigators. (T. 429). However, the gruesome nature of Exhibit 3e caused King to argue that the photograph was more prejudicial than probative and should not be entered into evidence. (T. 430). The trial court overruled King's objection and allowed the photograph to be entered into evidence and published to the jury. (T. 432-33).

Generally, the admission of photographs into evidence is within the discretion of the trial court and will only be reviewed on appeal for an abuse of discretion. *Barfield v. State*, 22 So. 3d 1175, 1181 (¶14) (Miss. 2009) (citing *Chamberlin v. State*, 989 So. 2d 320, 340 (Miss. 2008)). The appellate court must consider whether the photographs were "so gruesome and inflammatory as to lack any evidentiary purpose and, therefore, be inadmissible." *Id.* (citing *McFee v. State*, 511 So.

2d 130, 134-35 (Miss. 1987)).

All that is necessary for a photograph to be admissible is “[s]ome probative value.” *Id.* (quoting *Chamberlin*, 989 So. 2d at 340). However, the Mississippi Supreme Court has stated that “gruesome photographs which have no evidentiary purpose and which only arouse the emotions of a jury should not be admitted.” *Id.* (quoting *Sharp v. State*, 446 So. 2d 1008, 1009 (Miss. 1984)). In *McIntosh v. State*, 917 So. 2d 78, 83 (¶13) (Miss. 2005), the supreme court stated that photographs are considered to have evidentiary value when they: “(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.” The photograph at issue in this case serves none of the above purposes.

Exhibit 3e does not aid in describing the circumstances of the killing. The photograph depicts Quong lying on his back with his face and the floor beneath him covered in blood. The photograph does not describe the location of the body, as no other part of the store is visible in the photograph other than the floor surrounding Quong’s head. Further, the photograph was not introduced to supplement the testimony of the witness or to clarify his testimony. Officer Mark Carpenter testified regarding Exhibit 3e, and the only testimony regarding this photograph is the description of what it depicts.

Officer Carpenter’s only testimony regarding the crime scene and the photographs consisted of the following:

Q. Okay. And tell us – tell us, then, what 3d is, the first photograph.

A. 3d is the way [Jung] was layin’ on top of [Quong].

Q. Okay. And 3e.

A. Is a picture of [Quong] after the EMS personnel had rolled [Jung] over.

(T. 432). Exhibit 3d supports testimony from Officer Johnson regarding the position of the bodies when he first arrived at the crime scene. (T. 228). Exhibit 3e, however, shows Quong after his and Jung's bodies had been moved.

While the photograph is relevant, the trial court should have excluded it because of the danger of unfair prejudice to the jury. Exclusion of relevant evidence is governed by Mississippi Rule of Evidence 403, which states:

Although relevant, evidence may be excluded *if its probative value is substantially outweighed by the danger of unfair prejudice*, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MRE 403 (emphasis added). In *Hewlett v. State*, 607 So. 2d 1097, 1102 (Miss. 1992), the Mississippi Supreme Court stated:

Photographs of a victim should not ordinarily be admitted into evidence where the killing is neither contradicted nor denied, and the corpus delicti and the identity of the deceased have been established. Photographs may nevertheless be admitted into evidence in criminal cases where they have probative value and where they are not so gruesome or used in such a way as to be overly prejudicial or inflammatory. *Sudduth v. State*, 562 So.2d 67, 70 (Miss.1990).

Further, the supreme court advised trial judges in *McNeal v. State*, 551 So. 2d 151, 159 (Miss. 1989), to consider the circumstances surrounding the photographs before admitting them into evidence. The Court in *McNeal* instructed trial judges to “specifically consider whether the proof is absolute or in doubt as to the identity of the guilty party, as well as whether the photographs are necessary evidence *or simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury.*” *Hewlett*, 607 So. 2d at 1102 (citing *McNeal*, 551 So. 2d at 159).

In this case, the killing is not contradicted and the identity of the victims had already been established by other witnesses without the use of crime scene photographs. King did not dispute that

he was present at the crime scene or that he fled with Stanton after the crimes were committed. The only question remaining for the jurors was whether King was part of the plan to rob the Leadway Grocery, or whether he was merely an accessory after the crime had been committed. Therefore, the photograph did not aid the jury in determining any fact necessary for their deliberations and merely served to prejudice them. Exhibit 3e served no meaningful evidentiary purpose and should have been excluded.

The admission of Exhibit 3e served only to arouse the emotions of the jurors; consequently, the verdict is the result of jury bias. Therefore, King respectfully requests that this Court find that the trial court erred in allowing the introduction of Exhibit 3e into evidence and grant him a new trial.

II. THE TRIAL COURT ERRED IN DENYING KING'S MOTION FOR A NEW TRIAL BECAUSE THE JURY'S VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

The trial court erred in not granting King's motion for new trial because the jury's verdict is against the overwhelming weight of the evidence. All of the evidence implicating King at trial, with the exception of the palm print found on the checkout counter, came from the testimony of Stanton, who admitted that he killed the two victims and that he accepted a plea deal with the State in exchange for his testimony against King.

This Court reviews a trial court's decision to deny a motion for a new trial under an abuse of discretion standard. *Simpson v. State*, 993 So. 2d 400, 410 (¶35) (Miss. Ct. App. 2008). In reviewing a challenge to the weight of the evidence, the verdict will only be disturbed "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*, 985 So. 2d 836, 844 (¶18) (Miss. 2005). If the appellate court, sitting as a hypothetical "thirteenth juror" and viewing the evidence in a light most favorable

CERTIFICATE OF SERVICE

I, Mollie M. McMillin, Counsel for Joshua King, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

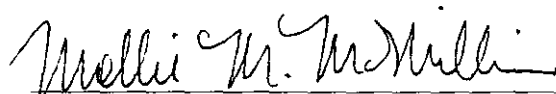
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