E-Filed Document Oct 17 2016 21:55:51 2015-KA-01623-SCT Pages: 20

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2015-KA-01623-SCT

KALE SCOTT **APPELLANT**

VERSUS

STATE OF MISSISSIPPI **APPELLEE**

APPEAL FROM

THE CIRCUIT COURT OF LOWNDES COUNTY

STATE OF MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

RODNEY A. RAY
301 5TH ST STE B
P.O. BOX 1018
COLUMBUS, MS 39703-0170
(662) 329-0110
MSB 8876
ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2015-KA-01623-SCT

KALE SCOTT **APPELLANT**

VERSUS

STATE OF MISSISSIPPI **APPELLEE**

APPEAL FROM

THE CIRCUIT COURT OF LOWNDES COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

RODNEY A. RAY
301 5th ST ST B
P.O. BOX 1018
COLUMBUS, MS 39703
Telephone: 662-329-0110
Facsimile: 662-329-3522
MSB 8876
Attorney for Kale Scott

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

KALE SCOTT	**APPELLANT**
VERSUS	**CASE NO. 2015-KA-01623-SCT**
STATE OF MISSISSIPPI	**APPELLEE**

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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

Kale Scott, Appellee

Rodney A. Ray, Trial and Appellant Counsel

Hon. Jim Hood, Attorney General

Jason L. Davis, Assistant Attorney General

Forrest Allgood, District Attorney (trial)

Scott W. Colom, District Attorney

Honorable James T. Kitchens, Jr., Trial Judge

/s/Rodney A. Ray
Rodney A. Ray
Attorney for Appellant

TABLE OF CONTENTS

	PAGE
Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Issue	1
Statement of Assignment	2
Statement of the Case	3
Summary of the Argument	5
Argument	6
Factual Background	6
First Assignment of Error	9
Conclusion	13
Certificate of Service/ECF Filing	14

TABLE OF AUTHORITIES

CASE	PAGE
Brown v. State, 152 So. 3d 1146 (Miss. 2014)	11
Bush v. State, 895 So. 2d 836 (Miss. 2005)	9,11
Carr v. State, 208 So. 2d 886 (Miss. 1968)	9
Cotton v. State, 144 So.3d 137 (Miss. 2014)	11
Kirk v. State, 160 So. 3d 685 (Miss. 2015)	9

STATUTES & OTHER AUTHORITIES

None.

STATEMENT OF THE ISSUE

I. WHETHER THERE WAS (A) SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION OF THE JURY AND/OR (B) WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

STATEMENT OF ASSIGNMENT

The Appellant does not believe there are issues in this appeal to require retention by the Supreme Court for the reasons stated under M.R.A.P. 16(b) or (d), nor are any cases sought to be overruled or perceived to be in conflict.

STATEMENT OF THE CASE

On the evening of May 22, 2014, Frederick Smith, Devin Montgomery, and Kale Scott were among approximately two hundred people attending a high school graduation party being held at the Lowndes County Fairgrounds, Columbus, Lowndes County, Mississippi. They arrived approximately at 10:30 P.M. in the evening, and by midnight, Frederick Smith had suffered a gunshot wound, and Devin Montgomery multiple gunshot wounds, apparently at the hand of Kale Scott. Frederick Smith would survive his injuries, Devin Montgomery did not.

By 9:00 A.M., arrest warrants had been issued related to this events naming Kale Scott as the shooter. The case was presented to the Lowndes County, Mississippi grand jury, and Kale Scott was indicted in a two-count indictment on February 6, 2015, on the charges of the aggravated assault of Frederick Smith and the murder of Devin Montgomery. The trial of Kale Scott for this multi-count indictment occurred between August 24, 2015, and August 26, 2015, in the Circuit Court of Lowndes County, Mississippi, in the City of Columbus, Mississippi.

Little doubt was offered to the fact that Kale Scott was the shooter, but the trial's purpose was to determine the degree of culpability of Kale Scott, if any. The witness testimony was primarily about the events of the evening, the prior relationship between Kale Scott and Devin Montgomery, and the professionals who established certain facts, such as cause of injury and death.

After instruction by the Judge and closing argument by counsel (T. 514), Kale Scott was convicted by the trial jury on August 26, 2015 (T. 560-561), and was sentenced to terms of twenty years confinement, with ten years suspended in the aggravated assault of Frederick Smith and lifetime incarceration for the murder of Devin Montgomery, to run consecutively (T.

561-565). On August 31, 2015, Kale Scott moved for a JNOV as to both verdicts (R.E. 5-8), which were denied on September 9, 2015, by the Circuit Court of Lowndes County, Mississippi (R.E. 9-10). From these denials, he now appeals to this Court.

SUMMARY OF THE ARGUMENT

I. There was insufficient evidence to sustain the elements of the conviction, in particular lack of proof of not acting in self-defense beyond a reasonable doubt. Further, even after taking evidence in light most favorable to the verdict, it would be manifest injustice to sustain the convictions given the evidence was presented at trial.

ARGUMENT

I. Factual Background

On the evening of May 22, 2014, Frederick Smith, Devin Montgomery, and Kale Scott were among approximately two hundred people attending a high school graduation party being held at the Lowndes County Fairgrounds, Columbus, Lowndes County, Mississippi. They arrived approximately at 10:30 P.M. in the evening, and by midnight, Frederick Smith had suffered a gunshot wound, and Devin Montgomery multiple gunshot wounds, apparently at the hand of Kale Scott. Frederick Smith would survive his injuries, Devin Montgomery did not.

Kale Scott testified in his own defense (T. 409). He admitted to going to the graduation party at the Lowndes County Fairgrounds with Deandra Buck and Ivan Chambers at about 10:30 P.M. (T. 412, 413). He paid the admission fee, talked to the security guard, and entered the building (T. 413). He went straight the stage area where the young ladies Keiansha and Bree (T. 417) was, that there was a deejay on the stage, the music was very loud, and the room dark except for the flickering deejay lights (T. 416). Kale Scott remained on stage for approximately 30-40 minutes, with the crowd building at the party, up to 200 people (T. 418).

At some point, Kale Scott had left the building, gone to his car, and came back into the building (T. 419). As he re-entered the building, and returned to the stage area, Kale Scott felt Devin Montgomery grab his leg, and had no idea why Montgomery had grabbed his leg (T. 419, 422). Montgomery asked to speak to Scott, but Scott refused the request and continued to walk (T. 422). Montgomery then struck Scott on the shoulder (T. 422). Scott requested to be left alone, and instead Montgomery grabbed him by his pockets, and started going through them (T. 423). Scott admitted pushing Montgomery's arm away (T. 423). Montgomery than grabbed and threw Scott off of the stage (T. 423). When the fight ended, Scott was left with his shirt over his

head and was struck again (T. 424). Scott said Montgomery was holding him and hitting him in his head (T. 424). Scott stated he could not see (T. 425).

After removing the shirt so that he could see, Scott was struck again in the head by someone, but he did not know by whom, (T. 425-6). At this point, Scott admitted he started shooting, that he had "lost it" (T. 426). He admitted because he had been picked on in the past, he brought a gun, but did not go the party with the intent to harm anyone (T. 426). He felt dazed, and cannot remember how many times he shot the gun (T. 427). He testified that he had never met nor knew victim Frederick Smith (T. 427). Because of two prior personal incidents within a a week of the party, and an alleged crime Montgomery was charged with (the fact Montgomery was indicted on a three-count assault indictment was stipulated, but the case was not concluded) (T. 381-2), Scott admitted he was scared of Montgomery (T. 429). Scott next remembered leaving the fairgrounds, having someone else drive him away (T. 430-431). Kale Scott stated that he did not intentionally aim the gun to try to hit either Frederick Smith or Devin Montgomery (T. 439).

Bernice Willis, Kale Scott's grandmother was called to testify (T. 388). She testified that she saw Kale at the police station the Sunday after the events in question (T. 389). Kale Scott's head had "knots and bruises" on it and the colors had started changing to black and blue (T. 389). Further, she had seen Kale in the hours before the events in question, getting dressed at her house, and there were no bumps or bruises present at that time, (T.389-90). Sherika Tillman, a mother of one of the graduates subject to the party was acting as a chaperone at the party (T. 395-6). She said she knew Kale Scott and had been a baby sitter for Devin Montgomery (T. 394). She saw Kale before the fight, as she had been present since about 8:00 P.M. as a chaperone, and he appeared to be his normal self. (T. 396). She heard a "commotion" and kids

walking past a concession stand she was working (T. 397). She asked generally of the group what was going on and the group said a fight was going on (T. 397). The lights came on and she went towards the stage where the fight appeared to be going on because she saw her daughter nearby (T. 397). Ms. Tillman then hear gunshots, and the kids started running away (T. 397-8).

Ms. Tillman saw Kale Scott in the middle of the floor, and saw "knots up side his head" and that he was standing there in a "daze" (T. 398). Kale never answered her question as to what had happened (T. 398). She then saw Devin Montgomery walk towards the front door and collapse, and she left Kale Scott behind (T. 398-399). She then treated and comforted Devin, losing track of Kale (T. 399-400).

Frederick Smith was called to testify (T. 263). He said he was at the graduation party in Columbus at the Lowndes County Fairgrounds on May 22, 2014 in the company of his cousin, Devin Montgomery (T. 263-264). He did not know Kale Scott before that night (T. 264). He testified that the Kale Scott moved in his direction and began firing the gun (T. 272). Frederick Smith started running, and as he was running away was struck in the leg (T. 272-273). He was taken to Baptist Memorial Hospital for treatment (T. 276). Dr. Keith McCoy, an emergency room physician at Baptist Hospital, testified that he treated Frederick Smith for a gunshot wound at approximately 12:45 a.m., May 23, 2014 (T.289-291).

Dr. Erin Barnhardt, Chief Deputy Medical Examiner for the State of Mississippi testified to establish the cause and manner of death of Devin Montgomery, (T. 247-8). She established that Devin Montgomery suffered from multiple gunshot wounds (T. 251-256). Devin Montgomery bled to death as the result of gunshot wounds he received (T. 257). The manner of death was ruled to be homicide (T. 257), which was explained to the jury only means that the

death was the result of actions of another, as opposed to illness, accident, or suicide (T. 259), and no conclusion made as to the events surrounding the homicide such as self-defense (T. 259).

After instruction by the Judge and closing argument by counsel (T. 514), Kale Scott was convicted by the trial jury on August 26, 2015 (T. 560-561), and was sentenced to terms of twenty years confinement, with ten years suspended in the aggravated assault of Frederick Smith and lifetime incarceration for the murder of Devin Montgomery, the terms to run consecutively (T. 561-565). On August 31, 2015, Kale Scott moved for a JNOV as to both verdicts (R.E. 5-8), which were denied on September 9, 2015, by the Circuit Court (R.E. 9-10). From these denials, he now appeals to this Court.

II. Argument

I. WHETHER THERE WAS (A) SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION OF THE JURY AND/OR (B) WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

A. Sufficiency of the Evidence

The standard for determining a sufficiency-of-the evidence argument is "whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.'" *Bush v. State*, 895 So.2d 836, 843 (Miss. 2005) (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). This Court must review the evidence in the light most favorable to the verdict. *Kirk v. State*, 160 So.3d 685, 695-96 (Miss. 2015). To convict, the State had to establish that Kale Scott was not acting in self-defense. If any doubt existed as to the reasonable possibility that Kale's account of events were, in fact, what happened that evening, the jury was required to acquit the Defendant.

No physical evidence refuted Kale Scott's account of the events. There was no statement from Kale Scott providing a different account. While the State tried to make proverbial hay with song choices from a Twitter account alleged to have been Kale Scott's account, no direct prior threat evidence was presented (T. 440-445). Witnesses may have saw Kale shoot the gun, but Kale Scott accounted for that in his testimony, he had been struck in the head several times and had his vision blocked by his own shirt. He got his shirt away, and began firing to stop the attack, for he did not know how many people had been striking him.

The case turns on the cross examination of the State of the Defendant, in particular at T. 456-457:

Q. You got in a fight, didn't you?

A. Yes, sir.

Q. Young people have been fighting every since the world began, have not they?

A. Yes, sir.

Q. and you lost?

A. Yes, sir.

Q. and you got mad?

A. No, sir.

Q. You said that you were angry, that you snapped, isn't that what you said?

A. I lost it. Yes, sir.

Q. You lost it. That's anger, isn't it?

A. It wasn't out of anger.

Q. You said you lost it, right?

A. Yes, sir.

Q. And you lost it out of anger. You lost it because you were mad. You lost it because the guy pulled the shirt over you start beating on you, right?

A. Yes, sir. They started jumping on me.

Q. So you pulled out a gun and you take care of business, right?

A. No, sir.

The State, in most forceful terms possible, attempted to get Kale Scott to admit that "losing it" was the equivalent of acting in anger. The State also attempted to get Kale Scott to admit he acted in anger, he held firm and said no. His failure to admit he acted in anger and that he acted merely to stop the attack, under the pressure of cross-examination, should have established that the State had not proven the element of not acting in self-defense beyond a reasonable doubt.

B. Weight of the Evidence

The Mississippi Supreme Court will disturb a verdict only when "it is 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. "The evidence must be viewed in the light most favorable to the verdict, and the evidence must preponderate heavily against the verdict." *Brown v. State*, 152 So.3d 1146, 1165 (Miss. 2014) (citing *Cotton v. State*, 144 So.3d 137 (Miss. 2014)). Unlike the sufficiency argument, this Court can make a freestanding decision to overturn the verdict if the verdict was an unconscionable injustice. The facts of the case are relatively undisputed, only the interpretation and what intent to infer to the Defendant, Kale Scott. Kale Scott testified that he did not initiate a confrontation, tried to remove himself from it, and the deceased struck him first.

After striking him repeatedly, Devin Montgomery pulled Kale Scott's shirt over his head and someone held Kale Scott and started hitting him in his head. He continued to receive blows

to his head, and decided to fire the gun he has brought with him to attempt to stop the attack. Kale Scott stated he did not aim at anyone, and did not come to the party looking for a confrontation. Evidence was presented by two witnesses who had seen Kale Scott immediately before the shooting without injury, and in the immediate aftermath of the incident, and two days later, saw where obvious blows had been struck against the Defendant's head. Allowing this conviction for murder is an unconscionable injustice.

CONCLUSION

There was insufficient evidence to sustain the verdict, and this Court should reverse the judgment and sentence of the Lowndes County Circuit Court and render a verdict of not guilty. In the alternative, this Court should find the judgment of the Lowndes County Circuit Court was against the overwhelming weight of the evidence, set aside the convictions and sentences, and enter a Judgment of Acquittal notwithstanding the verdict and/or remand both counts for a new trial.

This the 17th day of October, 2016.

RESPECTFULLY SUBMITTED,

KALE SCOTT

BY: /s/Rodney A. Ray

RODNEY A. RAY
301 5TH ST STE B
P.O. BOX 1018
Columbus, MS 39703
MSB 8876
TEL # (662) 329-0110

CERTIFICATE OF SERVICE

I, Rodney A. Ray, attorney for the Appellant, do hereby certify that on this day I electronically filed the foregoing principal brief of the Appellant in the matter of *Kale Scott (Appellant) v. State of Mississippi (Appellee)*, case number 2015-KA-01623-SCT, for filing with the Clerk of the Supreme Court/Court of Appeals using the MEC system, which notified the following parties:

Jason L. Davis
Assistant Attorney General
jdavi@ago.state.ms.us

Forrest Allgood
District Attorney (trial)
f_allgood@hotmail.com

Scott W. Colom
District Attorney (current)
scolom@msda16.org

The following parties were served a copy of the foregoing, as well as copy of the record excerpts, by placing a copy in the first-class, United States Mail, postage prepaid, because they are not a participant in the MEC System:

Hon. James T. Kitchens
Circuit Court Judge
P.O. Box 1387
Columbus, MS 39703-1387

Hon. Jim Hood
Attorney General Mississippi
P.O. Box 220
Jackson, MS 39205-0220

I have filed the Appellant's Record Excerpts as an attachment to this brief using the MEC system.

This the 17th day of October, 2016.

/s/Rodney A. Ray
Rodney A. Ray