IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LOREN SHELL BLACKWELL **APPELLANT**

VS. **NO. 2018-KA-01135-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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Statement of the Case

On February 26, 2016, the Grand Jury of Hinds County indicted Loren Shell Blackwell on one count of capital murder, in violation of Miss. Code Ann. §97-3-19(2)(c) and one count of auto theft, in violation of Miss. Code Ann. §97-17-42(1) for her part in actin gin consort with, aiding, abetting, assisting, or encouraging Walter Lee Young. (CP 12). The case eventually proceeded to trial, Circuit Court Judge Jeff Weill, Sr., presiding. (TR 1).

At trial, the jury found Blackwell guilty on both counts. (CP 321). The trial court sentenced Blackwell to serve a term of life without parole in the custody of the Mississippi Department of Corrections for her capital murder conviction, and to serve a period of five (5) years in custody, to run consecutive to her life sentence. (CP 346). Blackwell filed a motion for judgment notwithstanding the verdict (JNOV) and a supplemental motion for JNOV, which the trial court denied. (CP 353-386, 397). Blackwell filed timely notice of appeal. (CP 398).

Statement of the Facts

On August 31, 2015, Lee Kendrick, an eighty-one year old resident of Pearl, Mississippi, went missing. (TR 259). His daughter reported him missing to the police,

who plastered Mr. Kendrick's face on the news and social media. (TR 272). Harvey Fielder, of Clinton, Mississippi, saw Mr. Kendrick on the news on September 1st and called the police to say that Mr. Kendrick had been to his home between three and four o'clock on August 31st to quote a new fence for him. (TR 286-289). Mr. Fielder had paid Mr. Kendrick $1,600 cash and work was scheduled to begin the next day. (TR 289).

Mr. Kendrick's phone was tracked to the area of Keele Street in Jackson, Mississippi. (TR 369). His body was discovered by maintenance workers at Cedarstone Apartments. (TR 424). Mr. Kendrick had been shot in the back of the head and was found naked with a strap on dildo. (TR 369-390). His vehicle was missing. (TR 416).

Data recovered from Mr. Kendrick's phone eventually led to Loren Shell Blackwell. (TR 474, 602). Blackwell turned herself in to the authorities and eventually admitted to being in the apartment with Mr. Kendrick when he was killed. (TR 823). DNA collected at the scene matched Blackwell. (TR 524-552). After several interviews, Blackwell incriminated Walter Young. (TR 610). At trial, Young testified that he saw Blackwell shoot Mr. Kendrick in the apartment. (TR 975-976).

Additional facts will be discussed below.

Summary of the Argument

The evidence was properly handled by the trial court when it allowed certain evidence of prior bad acts that illustrated intent or motive. The guilty verdict is supported by the weight of the evidence. The jury was properly instructed.

Argument

I. The trial court properly handled the evidence.

Standard of Review

"The admission or suppression of evidence is within the sound discretion of the [circuit court] and will not be reversed unless there is an abuse of that discretion." *Sturkey v. State*, 946 So.2d 790, 794 (Miss. Ct. App. 2006). "We will only reverse under that standard if the admission of the evidence results in prejudice or harm to the opposing party, or if it adversely affects a substantial right of the party." *Id*.

Argument

Detective Thomas's Testimony

The State called Detective Ella Thomas to take the stand. (TR 583). The defense reminded the trial court of its prior bad acts motion; the defense said, "what I'm specifically referring to is at the very end of the last video." (TR 585). There was a brief proffer of Detective Thomas's testimony. (TR 586). Detective Thomas recalled that "[Blackwell] stated that [she and Walter Lee Young] got a hotel room. Walter got the room because he the only someone had an ID to get the room. And she said that once her and Mr. Kendrick was in the room, she asked him to take a shower with her. And once they got in the shower, when they came back out, Mr. Kendrick noticed he had money missing as well as a cell phone was missing from his belongings." (TR 587). Detective Thomas clarified that Mr. Kendrick was missing $1,500. (TR 587). She also said that Blackwell indicated that "Mr. Kendrick loved to video and take pictures of them having sex. And also wanted to measure her boyfriend's - - ." (TR

587). Then, the State told the trial court that it would like to play a portion of the recording where Blackwell says that $1500 was stolen from Mr. Kendrick, that she knew Walter Young and Shadarrine were staying at the hotel, and that she didn't want to stay where she was staying because it reminded her of the "Psycho" movie. (TR 589). Blackwell convinced Mr. Kendrick to pay for the room for the rest of the week, although he did not know that Walter Young and Shadarrine were staying there, too. (TR 590). Blackwell later told Detective Thomas that Mr. Kendrick always had money. (TR 666). She also referred to the instance in the shower when $1,500 was taken from Mr. Kendrick's pants. (TR 669).

The State argued that this testimony was relevant and probative, even though it is another bad act because it meets the 404(b) exceptions of plan, lack of mistake, motive. (TR 590). Again, the defense argued the evidence was an inadmissible prior bad act and was irrelevant. (TR 590-591). The State responded, "In defense counsel's opening statement he laid out what the story of the defense was. He said that [Young] found a girl and that they were gonna have a threesome. And he said that unbeknownst to the defendant; he robbed him. She just admitted in that tape that at another time she alleges that she got a room, she took the defendant [sic] to the location that she knew two other people were at, and he was robbed. And she knew that before. If that's not probative and not a planned motive and a number of other exceptions, I don't know what is." (TR 591-592). The trial court overruled the defense's objection and said, "I think it's at least clearly 404(b) evidence. It's not

substantive evidence in this trial." (TR 592). The defense later asked for a continuing objection. (TR 594).

Betty Newman's Testimony

On cross-examination, the defense asked Betty if Blackwell, Loren, or Shadarrine had ever called and asked for money; Betty answered affirmatively. (TR 877). Counsel then asked Betty if she felt like they were taking advantage of her, to which she said no. (TR 877). Betty clarified that she supported them on occasion "to give them something to eat [referring to her great grandchildren]." (TR 877). On redirect, the State asked, "When Loren has visited in the past had anything come up missing in your home?" (TR 878). The defense objected and the trial court sustained the objection. (TR 878). A bench conference was held and the State indicated that it thought the defense opened the door to this issue when they asked Betty about sending money to Blackwell and/or feeling taken advantage of. (TR 878-879). "Ms. Newman had told an officer when she was being interviewed that after Loren would leave that money would be missing from her account or there would be questionable things happening to her bank account." (TR 879). The trial court allowed the State's line of questioning because it determined the defense opened the door. (TR 879). Betty continued to testify that she had concerns about things in her bank account after Blackwell had visited her home, for example, Blackwell had used Betty's debit card online without her consent. (TR 880).

Argument

Under Miss. Rule of Evidence 404(b), "[e]vidence 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." Therefore, evidence of other acts cannot be admitted to show that the defendant acted in conformity with his character. Even if the proposed evidence meets one of the exceptions to the rules, it must be filtered through M.R.E. 403 to determine whether the evidence is more probative than prejudicial. *Derouen v. State*, 994 So.2d 748, 756 (Miss. 2008). If the evidence in question is more probative than prejudicial, it can be admitted with a limiting instruction. *Id.*

On appeal, "the task of an appellate court reviewing a Rule 403 determination is not to engage anew in the Rule 403 balancing process. Rather, it must simply determine whether the trial court abused its discretion in weighing the factors and admitting or excluding the evidence." *Giles v. State*, No. 2018-KA-01222-COA, 2019 WL 2590861, at *3 (Miss. Ct. App. June 25, 2019)(internal citations omitted).

Here, the testimony by Detective Thomas and Betty Newman is evidence of Blackwell's motive or intent to rob and kill Mr. Kendrick. Betty's testimony shows that Blackwell had financial difficulties in the past and was unable on at least one occasion to feed her children. The testimony also shows that Blackwell was comfortable stealing from her grandmother, as evidenced by her use of Betty's credit card online without permission. Detective Thomas's testimony shows an escalation of behavior regarding Blackwell's financial woes and schemes to get money. Blackwell

knew that Mr. Kendrick always had money, so he was a good target to rob. Again, this evidence shows motive and plan, both of which are exceptions to M.R.E. 404(b).

In *Williams v. State,* the Mississippi Supreme Court determined that a trial court did not abuse its discretion when it admitted two of the defendant's indictments for grand larceny and a pretrial diversion agreement because it was admitted to show motive under Rule 404(b)(2). 234 So.3d 1278, 1289(Miss. 2017). The evidence of Williams's prior crimes and diversion agreement showed that she knew if she stopped for law enforcement, she could be found in violation of her agreement. *Id*. According to the Court, this evidence showed her motive to flee from law enforcement. *Id.*

As in *Williams*, the evidence at issue here showed an underlying motive to rob Mr. Kendrick and steal his vehicle and a plan of sorts involving Sherradine, who would help steal the money. For this reason, the trial court did not abuse its discretion when it allowed this evidence to be presented to the jury.

Ineffective Assistance of Counsel

In the alternative, Blackwell claims she received ineffective assistance of counsel from her attorney who did not ask for a Rule 105 limiting instruction.

"The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Smith v. State*, 877 So. 2d 369, 377 (Miss. 2004)(citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). "A defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case." *Id*. "Unless a

defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* (citing *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984)).

Here, it is evident that Blackwell's trial attorney's performance was not deficient.

"The Supreme Court has recognized on a number of occasions that the defendant may not want such an instruction because it may actually 'focus the jury's attention' on the potentially prejudicial testimony." *Tate v. State*, 912 So. 2d 919, 928 (Miss 2005) (quoting *Brown v. State*, 890 So. 2d 901, 913 (Miss. 2004)). In this instance it seems plausible that Blackwell's attorney may have not asked for a limiting instruction because it would have drawn attention to undesirable testimony that occurred at various points in a lengthy trial. Requesting such an instruction might have reminded the jury of the testimony in question, which was not helpful for Blackwell's case. This Court rarely second guesses trial counsel regarding matters of trial strategy." *Renfrow v. State*, 202 So. 3d 633, 638 (Miss. Ct. App. 2016). It may be argued that Blackwell's counsel intentionally chose to not request a limiting instruction. Such trial strategy has been acknowledged in the past and could be applied to Blackwell's case. The lack of evidence demonstrating deficient performance by Blackwell's attorney means there can be no valid claim of inefficient assistance of counsel here. This issue is without merit.

II. Blackwell's capital murder conviction is supported by the weight of the evidence.

Standard of Review

In determining whether a jury verdict is against the overwhelming weight of the evidence, the reviewing court must accept the evidence which supports the verdict as true and may only reverse when it is convinced that the circuit court has abused its discretion in failing to grant a new trial. *Boone v. State,* 973 So. 2d 237, 243 (Miss. 2008). Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. *Id*.

Argument

Blackwell argues her conviction for capital murder is not supported by the weight of the evidence because it depended upon the testimony of Walter Lee Young, who she claims is an unreliable witness. Young testified that he had not entered a plea deal or been promised anything in exchange for his testimony. (TR 926). Even so, "[t]he jury must be left to resolve matters regarding the weight and credibility of the evidence." *McClain v. State*, 625 So.2d 774, 778 (Miss.1993). Here, the jury clearly believed Young's testimony in spite of his so-called unreliability. Moreover, there was additional evidence to support Blackwell's conviction.

The weight of the evidence presented at trial supports Blackwell's murder conviction because she admitted to Detective Thomas that she was at the scene of the murder when it happened. (TR 823). Blackwell's DNA was found on the condom found on a dildo in the room. (TR 823). She was seen later that evening in Mr. Kendrick's vehicle, which she later sold. (TR 606, 608-609). Blackwell told Detective Thomas where she had disposed of the murder weapon (near a mattress) and a mattress was

found in the obscure location Blackwell named. (TR 794). Walter Young testified that he went to the apartment with Mr. Kendrick, Blackwell, and Sharradine and when he entered the apartment he saw Mr. Kendrick with a dildo strapped on him. (TR 910). "Loren had the gun to Mr. Kendrick's head. She had a plastic bag and some paper around her hand. She put the gun to Mr. Kendrick's head, and she shot Mr. Kendrick." (TR 910). Young said Mr. Kendrick did not see what was going on because he was strapping on the dildo. (TR 911). The photographs of the scene show that the dildo was not completely fastened, as if he was unable to finish affixing it to himself. Young's description of Blackwell's position behind Mr. Kendrick is consistent with the autopsy findings, which determined Mr. Kendrick was shot in the back of the head. (TR 446, 911). Young said that he, Blackwell, and Shadarrine went to the Jubilee store later in Mr. Kendrick's vehicle, which is supported by video evidence and the testimony of Dorothy Lewis. (TR 564, 608-609, 915).

The guilty verdict is supported by the weight of the evidence.

III. The jury was properly instructed.

Standard of Review

"Jury instructions are within the discretion of the trial court and the settled standard of review is abuse of discretion." *Tutwiler v. State*, 197 So. 3d 418, 424–25 (Miss. Ct. App. 2015)(citing *Watkins v. State*, 101 So.3d 628, 633 (Miss.2012)). The instructions should be considered as a whole and read together; no single instruction should be taken out of context. *Id.* (citing *Johnson v. State*, 19 So.3d 145, 147 (Miss.Ct.App.2009)). No reversible error will be found when the instructions are read

together and deemed to properly state the law and create no injustice. *Id.* "A voluntary-intoxication instruction is proper when the issue of intoxication is before the jury." *Davis v. State*, 684 So.2d 643, 653 (Miss. 1996).

Argument

Blackwell claims that the inclusion in the indictment of the value of the vehicle stolen and its omission from the elements instruction, S-4, amounted to a constructive amendment and prohibited the jury from having to make findings on all the necessary elements of the offense.

During the jury instruction conference, defense counsel said, "We prefer D-5 to S-4 [as an elements instruction]. D5 properly captures the value element. And D-5 also properly identifies the actual car in question in Paragraph 9." (TR 1036). The court asked the State, "Do you object to that substitution, which really seems reasonable to me." (TR 1036). The prosecutor replied, "Your Honor, as to the value per the statute, the State doesn't have to prove value so that's why S-4 is as it is." (TR 1036). The defense interjected, "We'll take a misdemeanor then." (TR 1036).

The court explained, "So the statute - - I mean, the indictment said 5,000 to 25[,000] and you're saying the statute doesn't call for that?" (TR 1036-1037). The State answered affirmatively. (TR 1037). The defense maintained that because the State proved value during its case-in-chief that D-5 is proper. (TR 1037). The trial court refused D-5. (TR 1037).

Blackwell claims she was not charged with auto theft and instead, was charged with grand larceny because of the inclusion of the vehicle's value in the indictment.

The top of the indictment clearly says "Auto theft 97-17-42." (CP 12). Blackwell refers to *Richmond v. State*, 751 So.2d 1038 (Miss. 1999) to support her claim. Richmond's indictment contained the dollar value required for grand larceny and the essential elements for motor vehicle theft, which Richmond argued failed to put him on notice of the charge against him. *Id*. Notably, the State attempted to have the value of the car deleted as surplusage in the indictment, but Richmond objected. *Id.* at 1046. The Mississippi Supreme Court determined that he was charged with auto theft, as set forth at the top of his indictment, and noted that the inclusion of the dollar value was not proven to have prejudiced Richmond, although it also said "the State handicapped itself through this indictment by adding an unnecessary element of proof." *Id*.

Blackwell tries to overcome this prejudicial barrier by claiming the variance between the indictment and instruction amounted to a constructive amendment which materially altered the essence of the offense. Essentially, Blackwell asserts that the indictment was for grand larceny and not auto theft because it included the value of the vehicle. Unlike Richmond, that surplusage in this indictment was not removed prior to trial.

The State proved the value of the vehicle, asserted in the indictment, at trial. Although the jury was not instructed regarding the value of the vehicle, in light of the overwhelming evidence, any such error is harmless.

Conclusion

The issues raised by the Appellant are without merit. Accordingly, the State of Mississippi respectfully requests that this Honorable Court affirm Blackwell's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed (and mailed via the United States Postal Service) the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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This the 3rd day of September, 2019.

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