

SUPREME COURT OF GEORGIA

Durden v. State

274 Ga. 868 (2002) · Decided March 11, 2002

SUMMARY

The Supreme Court of Georgia affirmed Kendra Durden’s convictions for murder, felony murder, attempted armed robbery, aggravated assault, and possession of a firearm during the commission of a crime. The court rejected challenges based on insufficient evidence, ineffective assistance of counsel, crime-scene photographs, victim testimony, and an unsolicited reference to a polygraph examination. The court found no reversible error and affirmed the judgment.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Hunstein, Justice
JURISDICTION	Georgia
DECIDED	March 11, 2002
DISPOSITION	affirmed
PROCEDURAL POSTURE	Kendra Durden appealed her convictions for malice murder, felony murder, attempted armed robbery, aggravated assault, and possession of a firearm during the commission of a crime, as well as the denial of her motion for new trial.
STANDARD OF REVIEW	The sufficiency of the evidence is reviewed under whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. Ineffective-assistance claims require proof of deficient performance and prejudice. Evidentiary rulings and denial of a mistrial were reviewed for reversible error.
PRECEDENTIAL VALUE	Published opinion of the Supreme Court of Georgia; precedential.
PARTIES	Kendra Durden v. State

TOPICS

- criminal procedure
- ineffective assistance
- evidence
- appellate procedure
- standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove beyond a reasonable doubt that Durden was a willing participant in the charged crimes.
2. Whether Durden received ineffective assistance of counsel based on counsel's qualifications, failure to investigate purported psychological abuse and emotional factors, and alleged unprofessional courtroom conduct.
3. Whether crime-scene photographs depicting the victim as found at the scene were relevant and properly admitted.
4. Whether testimony from the victim's mother about a telephone call with the victim before the murder was unduly prejudicial or improper victim-impact testimony during the guilt/innocence phase.
5. Whether an unsolicited reference to a polygraph examination required a mistrial.

HOLDINGS

1. The evidence was sufficient to authorize a rational trier of fact to find Durden guilty beyond a reasonable doubt of malice murder, felony murder, attempted armed robbery, aggravated assault, and possession of a firearm during the commission of a crime.
2. Durden failed to establish ineffective assistance of counsel because she did not prove deficient performance or resulting prejudice, and the record did not substantiate her claims concerning counsel's qualifications, investigation of emotional factors, or courtroom professionalism.
3. The crime-scene photographs depicting the victim as found at the murder scene were relevant and properly admitted.
4. The victim's mother's testimony describing her telephone call with the victim before the murder was relevant and did not exceed acceptable boundaries by unfairly prejudicing Durden or constituting improper victim-impact testimony.
5. The trial court did not commit reversible error by denying a mistrial after a witness spontaneously stated that he had taken a lie-detector test.

FACTUAL BACKGROUND

Durden drove several gang members to a grocery store, where one accomplice noticed the victim carrying a large amount of cash. Durden and the accomplices followed the victim from the store, pursued him in Durden's vehicle, and, after Durden directed an accomplice to act, the accomplice fired several shots into the victim's vehicle. One bullet caused the victim's death. Durden claimed that she participated because of threats and intimidation from a ranking gang member.

PROCEDURAL HISTORY

The crimes occurred on August 28, 1998. Durden was indicted in Walton County on November 16, 1998, and the State filed notice of intent to seek the death penalty on December 17, 1998. A jury trial was held June 19–28,

2000; the jury found Durden guilty on all charges, found no statutory aggravating circumstances, and she received life imprisonment plus consecutive sentences on the armed-robbery and possession convictions. The felony-murder and aggravated-assault convictions were vacated by operation of law. Her motion for new trial was denied on June 15, 2001, and the Supreme Court of Georgia affirmed.

DISPOSITION

affirmed

CASES CITED

- Akins v. State, 269 Ga. 838 (1), 504 S.E.2d 196 (1998)
- Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)
- Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
- Smith v. Francis, 253 Ga. 782, 783, 325 S.E.2d 362 (1985)
- Taylor v. State, 271 Ga. 629 (2), 523 S.E.2d 322 (1999)
- Jackson v. State, 270 Ga. 494 (8), 512 S.E.2d 241 (1999)
- Butts v. State, 273 Ga. 760 (15), 546 S.E.2d 472 (2001)
- Gulley v. State, 271 Ga. 337 (16), 519 S.E.2d 655 (1999)
- White v. State, 255 Ga. 210 (6), 336 S.E.2d 777 (1985)
- Crawford v. State, 256 Ga. 585 (2), 351 S.E.2d 199 (1987)

OPINION

HUNSTEIN, J.

Hunstein, Justice. Kendra Durden was convicted of murder, felony murder, attempted armed robbery, aggravated assault and possession of a firearm during the commission of a crime arising out of the shooting death of Patrick Ragan.¹ Finding no error, we affirm. 1.

The jury was authorized to find that on August 28, 1998 appellant drove three associate gang members to the Kroger in Conyers. While appellant and fellow gang member Rory Hill were standing in line to purchase an item, Hill noticed Ragan paying for groceries with a large amount of cash. Appellant and Hill followed Ragan out of the store and, along with Robert Winkfield and appellant's step-brother Delvin Henderson, chased Ragan as he drove out of the parking lot.

Appellant was driving as they pursued Ragan and according to other occupants in the vehicle throughout the pursuit appellant was "dancing" and appeared "excited, crumped, happy." When she pulled next to Ragan's car appellant instructed Winkfield to "get that car right there... don't punk out on me now." Winkfield fired several shots at Ragan. Some of the shots shattered Ragan's window and caused him to lose control of the car and swerve off the road.

Ragan's death was caused by one bullet which pierced his aorta and penetrated his lung. Appellant stopped her car after Ragan ran off the road and started to get out, but changed her mind when her accomplices threatened to leave her at the scene. Hill and Henderson were given immunity for testifying. Appellant testified that she was coerced into her actions by threats and intimidation from Winkfield, a ranking gang member.

The jury determines the credibility of witnesses. OCGA § 24-9-80; *Akins v. State*, 269 Ga. 838 (1) (504 SE2d 196) (1998). Contrary to appellant's contention that there was not sufficient evidence to show that she was a willing participant in the crimes, the evidence adduced was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that appellant was guilty of malice murder, felony murder, attempted armed robbery, aggravated assault and possession of a firearm during the commission of a crime.

Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979). 2. Appellant contends she received ineffective assistance of counsel based on trial counsel's lack of qualification to represent her in a death penalty case, counsel's failure to investigate the relationship between her psychological abuse as a child and her involvement in the crimes, and in lead-counsel Farnham's alleged unprofessional errors in the courtroom.

In order to prevail on this claim, appellant must show both that counsel's performance was deficient and that the deficient performance was prejudicial to her defense. *Strickland v. Washington*, 466 U. S. 668 (104 SC 2052, 80 LE2d 674) (1984); *Smith v. Francis*, 253 Ga. 782, 783 (325 SE2d 362) (1985).

Because the record fails to substantiate any basis for arguing that trial counsel were ineffective due to their lack of qualification as criminal attorneys, appellant's argument about the effectiveness of counsel on that issue fails.

Moreover, pretermitted whether the issue is moot, appellant's contention that she was denied effective counsel because counsel purportedly did not meet the basic requirements for death penalty counsel, see Unified Appeal Procedure Rule II (A) (2001), is without merit.

The trial court found that counsel met the qualifications for appointed counsel of the revised Unified Appeal Procedure, notwithstanding that the special requirements appellant complains about were not in effect at the time of counsel's appointment. Compare Unified Appeal Procedure (2000) with Unified Appeal Procedure, Rule II (A) (2001). Likewise, based on our review of the record, we find that appellant has failed to carry her burden of proving that her trial counsel's performance was deficient in regard to investigating the effect of purported emotional factors on her culpability for the crimes or that lead counsel was lacking in professionalism in the courtroom.

Decided March 11, 2002. Anthony S. Carter, for appellant. W. Kendall Wynne, Jr., District Attorney, Alan A. Cook, Assistant District Attorney, Thurbert E. Baker, Attorney General, Jennifer S. Gill, Assistant Attorney General, for appellee. 3.

The crime scene photographs which depicted the victim as he was found at the scene of the murder were relevant and properly admitted. See *Taylor v. State*, 271 Ga. 629 (2) (523 SE2d 322) (1999); *Jackson v. State*, 270 Ga. 494 (8) (512 SE2d 241) (1999). 4. Appellant complains that testimony from the victim's mother during the guilt/innocence phase of the trial in which she described the phone call she had with her son before the murder was unduly prejudicial.

This testimony which was relevant to information about the chronology of the crime did not exceed acceptable boundaries because it did not unfairly prejudice the defendant or constitute improper victim impact testimony. See *Butts v. State*, 273 Ga. 760 (15) (546 SE2d 472) (2001). 5. Appellant objected to the unstipulated reference to a polygraph test and moved for a mistrial.

We find no reversible error in the denial of the motion for mistrial. Witness Hill merely communicated to the jury in a spontaneous remark that he took a lie detector test. Since Hill did not further apprise the jury of the results of the test, there is no prejudice. *Gulley v. State*, 271 Ga. 337 (16) (519 SE2d 655) (1999); *White v. State*, 255 Ga. 210 (6) (336 SE2d 777) (1985).

Furthermore, the trial court's prompt curative instructions to the jury to disregard Hill's statement was sufficient to prevent the testimony from having any prejudicial impact. See generally *Crawford v. State*, 256 Ga. 585 (2) (351 SE2d 199) (1987). Judgment affirmed. All the Justices concur.

The crimes occurred on August 28, 1998. Durden was indicted on November 16, 1998, in Walton County. On December 17, 1998 the State filed a notice of intent to seek the death penalty. Durden was tried before a jury on June 19-28, 2000 and was found guilty on all charges.

In the sentencing phase of the trial, the jury found no statutory aggravating circumstances and Durden was sentenced to life imprisonment with a consecutive ten-year sentence on the armed robbery conviction and consecutive five-year sentence on the possession charge.

The felony murder and aggravated assault convictions were vacated by operation of law. Her motion for new trial filed on July 25, 2000 and amended on March 1, 2001 was denied on June 15, 2001. Her notice of appeal was filed July 12, 2001.

The case was docketed in this Court on October 17, 2001 and the case submitted for decision on the briefs.