

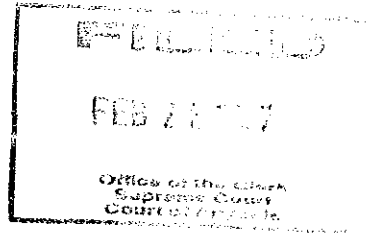
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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**DAVID GENE BURNETT BUTT**

**APPELLANT**

**VS.**



**NO. 2006-KA-1015-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE ISSUES**

- I. THE OFFENDING ACT OCCURRED WITHIN THE STATE OF MISSISSIPPI, AND THE TRIAL COURT PROPERLY EXERCISED JURISDICTION.
- II. PROPOSED INSTRUCTION D-11 WAS PROPERLY REFUSED.
- III. BUTT'S FIRST WIFE WAS COMPETENT TO TESTIFY AGAINST HIM.

## **STATEMENT OF FACTS**

Margaret Corly, a life-long resident of Petal, worked at a local construction company for thirty-eight years. T. 140. In 1998, Margaret met David Butt at a square dance T. 141. In February of the following year the couple married. T. 144. Three months later, Margaret suffered a massive stroke. T. 145. After her illness, Margaret relied on Butt to handle her financial affairs. T. 166. Butt advised Margaret to withdraw all of the money in her IRA and place it in their checking account so that he could reinvest it for her. T. 153. Margaret complied and her savings were transferred on July 15, 2003. Exhibit 11. The new investment was to be titled in Margaret's name only. T. 153, 155, 161. One month later, Butt transferred nearly \$50,000 of Margaret's savings to a Monex account. T. 157. Butt left \$7,500 of the money from Margaret's IRA in their checking account, and told her that he would reinvest that money at a later date. T. 162.

On August 29, 2003, Margaret contacted the Petal police department to report Butt as a missing person as he had not arrived home on the previous day. T. 102. The responding officer filed a welfare check on Butt in the National Crime Information Center database. T. 103. The next day, the officer was called back to Margaret's house. T. 104. He was shown Butt's golf bag which was embroidered with the name David Burnett. T. 104. The officer ran this name in the NCIC database and discovered that David Burnett was a missing person out of Florida. T. 108. The officer also discovered that Butt and Burnett shared the same birth date and that their social security numbers matched except for the first digit. T. 108. The officer turned the information over to Detective David Bassett, who determined that Butt and Burnett were one in the same. T. 117.

Shortly after reporting Butt missing, Margaret discovered that the Monex account had been titled in Butt's name, and that he withdrew all of the money one day after opening the account. T.

156, 158-59. He also took the \$7,500 that he was to invest for Margaret at a later date. T. 162-63.

Detective Bassett contacted “Burnett’s” first wife, Pamela Dwyer, and discovered that after nearly a decade of marriage, “Burnett” left on a shrimping boat in 1998 and never returned. T. 117, 85. Dwyer eventually petitioned a Florida court to declare Butt dead so that she could go on with her life. T. 86. Dwyer remained Butt’s lawful wife until May 29, 2002 when he was declared dead. T. 87.

On November 16, 2005, Detective Bassett received information from the Oregon Department of motor vehicles that a David Burnett had presented the title to a vehicle purchased from a David Butt. T. 120. Butt was extradited to Mississippi, where he was convicted by a Forrest County Circuit Court jury of bigamy and two counts of false pretense. T. 122, C.P. 99-100.

## SUMMARY OF THE ARGUMENT

Mississippi's bigamy statute, Mississippi Code Annotated § 97-29-13, prohibits persons already lawfully married from simultaneously acquiring a second spouse. Our courts have never been asked to determine whether the statute outlaws only the second marriage ceremony, or the second marriage in its entirety. Butt claims that because the marriage ceremony was conducted in Tennessee, Mississippi was without jurisdiction to try him for crime of bigamy. The State disagrees and asserts that it is the second marriage in its entirety which is offensive. However, regardless of whether the prohibited act is the marriage ceremony alone or the marriage in its entirety, the Forrest County Circuit Court exercised proper jurisdiction under either Mississippi Code Annotated §§ 99-11-15 or 99-11-17.

Butt next claims that he could not have committed false pretense because the money in question was temporarily placed in a bank account owned jointly by he and Margaret. Butt misses the point. The relevant question is how did Butt come to possess the money in question? The jury's answer - by false pretense. The evidence proved beyond a reasonable doubt that Butt convinced Margaret to let him reinvest her IRA money for her. Relying on Butt's misrepresentation, Margaret cashed out her IRA and placed the money in their joint checking account. One month later, Butt reinvested the money in a Monex account titled solely in his name, withdrew it the next day, and disappeared for the next two years.

Finally, Butt claims that his first spouse was not competent to testify against him. He cites several cases which state that in a bigamy prosecution, the first and lawful spouse is not a competent witness to testify against the defendant. However, the cases cited by Butt involved spouse-witnesses who were still lawfully married to the defendant. In the case *sub judice*, after Butt "went missing"

for a number of years and had entered into a bigamous marriage, his first wife had him declared dead, and their divorce was lawfully terminated. At the time of trial Dwyer was not married to Butt, and was therefore a competent witness to testify against him.



## **ARGUMENT**

### **I. THE OFFENDING ACT OCCURRED WITHIN THE STATE OF MISSISSIPPI, AND THE TRIAL COURT PROPERLY EXERCISED JURISDICTION.**

On February 28, 1999, Margaret and Butt, both Mississippi residents, were married in Sevierville, Tennessee. T. 143-144, 149. The couple spent the week following their marriage ceremony in Sevierville, which is located near Gatlinburg. T. 143. Following the honeymoon, the couple returned to their home in Petal, Mississippi, where Butt remained until his disappearance in August of 2003. T. 143, 101-02. Butt argues on appeal that the marriage ceremony alone is the prohibited act, and because the Butts' ceremony occurred in Tennessee, the Forrest County Circuit Court lacked jurisdiction. Assuming for the sake of argument only that Butt's contention is correct that Mississippi Code Annotated § 97-29-13 prohibits only the marriage ceremony, the Forrest County Circuit Court had jurisdiction under Mississippi Code Annotated § 99-11-17. Mississippi Code Annotated § 99-11-17 states,

Where an offense is commenced in this state and consummated out of it, either directly or by the accused or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such offense was commenced or from which such means or agency proceeded.

Butt and Margaret were residents of Petal, Mississippi, which is located in Forrest County. Butt took Margaret out of state for the purpose of having a bigamous marriage ceremony conducted. Under Butt's own theory, the crime was commenced in this state, specifically, in Forrest County, and consummated in Tennessee. Accordingly, the Forrest County Circuit Court exercised proper jurisdiction.

The State contends that marriage ceremony alone is not the prohibited offense, but it is the purported second marriage in its entirety that is offensive. Although the marriage ceremony

occurred in Tennessee, Butt took his victim-bride back to their Petal, Mississippi residence where the sham marriage continued for the next four years until Butt's disappearance. Accordingly, the Forrest County Circuit Court had jurisdiction under Mississippi Code Annotated § 99-11-15.

Mississippi Code Annotated § 99-11-15 states,

Where an offense is commenced out of this state and consummated in it, or where an offense is consummated in this state by any means or agency proceeding from a person out of this state, the person so commencing such offense or putting in operation such means or agency, although out of the state at the time such offense was actually consummated, shall be liable to indictment and punishment therefor in the county in which the offense was consummated.

Regardless of whether this honorable Court determines that the marriage ceremony or the marriage in its entirety is the prohibited act, the State submits that the Forrest County Circuit had jurisdiction under either Mississippi Code Annotated §§ 99-11-15 or 99-11-17.

## **II. PROPOSED INSTRUCTION D-11 WAS PROPERLY REFUSED.**

Butt offered the following jury instruction which was refused by the trial court.

The Court instructs the jury that in the State of Mississippi accounts may be in the name of two or more persons, whether minor or adult, in such form that the money in the accounts are payable to either adult, or their survivors, in such money due under such accounts, and all additions thereto, shall be the property of such persons jointly with the right of survivorship. The money due under such accounts made [sic] be paid to, or on the order of, any on of such persons during his lifetime.

If you find that the money charged to have been the subject of the false pretense counts was owned by both the Defendant and Margaret M. Corley [sic] (Butt), then you must find the Defendant not guilty.

Butt claims that the court erred in refusing the instruction because his defense theory was that he was joint owner of the money in question because it was temporarily placed in the Butts' joint checking account.

Although a defendant is entitled to an instruction which presents his theory of the case, a trial

court may properly refuse the instruction if it incorrectly states the law, is fairly covered elsewhere, or if it is without foundation in the evidence. **Poole v. State**, 826 So.2d 1222, 1230 (¶27) (Miss. 2002). Also, jury instructions are also to be read as a whole with no single instruction taken out of context. **Id.** The trial court properly refused Butt's instruction because it was fairly covered elsewhere (instruction S-6), and it takes the relevant facts completely out of context. There is no question that Margaret's IRA money was temporarily transferred into the Butts' joint checking account. However, the evidence is undisputable that Butt told Margaret that he would reinvest the money in her IRA for her. Margaret relied on this misrepresentation in cashing out her IRA and placing the money in the joint account to be reinvested. Instruction D-11 improperly omits these critical facts relevant to the false pretense charges.

Furthermore, the trial court correctly noted that the second paragraph of the instruction was peremptory in nature. A peremptory instruction is properly refused when the State presents legally sufficient evidence. **Watson v. State**, 722 So.2d 475, 478 (¶15) (Miss. 1998). The State clearly presented legally sufficient evidence on each element of the crime of false pretense. Butt's second issue is without merit.

### **III. BUTT'S FIRST WIFE WAS COMPETENT TO TESTIFY AGAINST HIM.**

Citing Mississippi Code Annotated § 13-1-5 and M.R.E. 504, Butt argues that Dwyer should not have been allowed to testify against him. Mississippi Code Annotated § 13-1-5 governs spousal competency, while M.R.E. 504 governs spousal privilege. A person is competent to testify against a former spouse, but may not testify regarding privileged information. **Dycus v. State**, 396 So.2d 23, 28 (Miss. 1981); **Holden v. State**, 399 So.2d 1343, 1344 (Miss. 1981). As of May 29, 2002, when the Florida court declared Butt dead, Dwyer was no longer married to him. T. 87-89.

Accordingly, at Butt's 2006 trial, Dwyer was a competent witness. Further, her testimony included no privileged communications.

Butt also alleges that Dwyer's testimony was used to show other bad acts and was solicited only to inflame and prejudice the jury against him. Dwyer simply testified as to the time period during which she was married to Butt, Butt's disappearance, and the dissolution of their marriage. Even if Dwyer's testimony regarding Butt's disappearing act could somehow be construed as a prior bad act, such testimony is admissible to show preparation and plan. M.R.E. 404(b). Further, her testimony was relevant to one of the essential elements of the bigamy charge. Butt's final assignment of error is without merit.

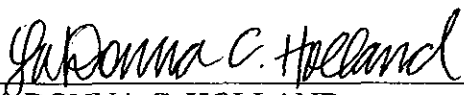
## CONCLUSION

For the foregoing reasons, the Appellee asks this honorable Court to affirm Butt's convictions and sentences.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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 28th day of February, 2007.

  
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