IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NATHANIEL WALDEN — APPELLANT



VS. — NO. 2006-KA-2009

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

## APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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

**NATHANIEL WALDEN** **APPELLANT**

**vs.** **CAUSE No. 2006-KA-02009-COA**

**THE STATE OF MISSISSIPPI** **APPELLEE**

## BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

## STATEMENT OF THE CASE

This is an appeal against a judgement of the Circuit Court of Holmes County, Mississippi in which the Appellant was convicted and sentenced for his felonies of **MURDER** and **SHOOTING INTO AN OCCUPIED DWELLING.**

## STATEMENT OF FACTS

James Walden, of 1374 Beulah Grove Road, Holmes County, Mississippi, testified that he lived with his wife and six children at that address on 28 April 2005. On that date he was having difficulties with one of his brothers, the Appellant. These difficulties arose from an incident some two days earlier in which one of Walden's sons took a battery from the Appellant's log truck in order to repair a lawn mower. The Appellant took exception to the removal of the battery; Walden whipped his son for having taken the battery out. The Appellant was apparently still unhappy about the battery having been removed, was "causing confusion"

according to Walden, so Walden told the Appellant to take his truck and other belongings, with the battery, we suppose, away from Walden's property. In this the Appellant complied.

On 28 April 2005, Walden was working with a wood saw with another brother, Benjamin Walden. As they were working, the Appellant appeared and complained that someone had taken a part from his saw. Walden denied having taken any part of the Appellant's saw and told the Appellant to quit his land. However, this time the Appellant did not do as he was told, so Walden went inside his house, got his shotgun, which was unloaded, returned outside and pointed it at the Appellant and told the Appellant to leave. This time the Appellant did as he was told. Walden then put his shotgun back into his house and returned to work with his saw.

The Appellant then went to a sister's home. At some point, this sister made the Appellant leave her house. The Appellant returned to Walden's home, this time armed with a pistol. The Appellant fired a shot in the general direction of Walden's foot; Walden fled into his house. The Appellant's wife observed that "y'all need to leave that alone." Walden told her to get out of the way.

The Appellant then fired three shots into Walden's house. One shot was to the front door, another shot was to the Walden's bedroom, and the third shot was to the side of the house. Walden was by this time by his front door with this time a loaded shotgun. He returned fire, and the Appellant jumped into his truck and made a hasty withdrawal. The battle over, Walden went to put his gun away only to find that his wife had been mortally wounded in the fight. The sister with whom the Appellant had taken sanctuary before the gunfight rang the sheriff. Walden's wife was not outside the house during the exchange of gunfire, nor at the time Walden pointed the shotgun at the Appellant. ( R. Vol. 2, pp. 20 - 46).

Luther Cowan was Mary Walden's uncle. He stated that he was in James Walden's home

on the night of 28 April 2005. He observed bullet holes in the walls of the house. He later found a bullet in the bathroom, which he picked up, wrapped in toilet tissue, and gave to law enforcement. ( R. Vol. 2, pp. 47 - 58).

The sheriff of Holmes County, Willie March, testified that he apprehended the Appellant. When he did so, he found a .38 caliber pistol in the Appellant's vehicle. This weapon was sent to the crime laboratory. At the time of the arrest, the Appellant denied having shot anyone. ( R. Vol. 2, pp. 63 - 69).

Walter C. Thomas was a neighbor of James Walden. He testified as to the Appellant's actions on 28 April 2005. Specifically, the Appellant fired several shots into Walden's house. It was the Appellant who began firing first. The Appellant then left the premises. ( R. Vol. 2, pp. 70 - 79).

Deputy Roosevelt March testified that he investigated the shooting at Walden's home. He identified a series of photographs of bullet holes in the home. He further testified that he interviewed the Appellant after advising him of his *Miranda* rights and securing a waiver of those rights. The Appellant admitted having shot into the home, stating that he had emptied his gun while doing so. He said he did this because James Walden had previously pulled a gun on him. The Appellant claimed that he fired one shot, which was returned by James Walden, and that at that point he fired five more shots. The Appellant, though, also stated that the source of the difficulty between James Walden and himself was the act of the boy in removing a battery from the Appellant's truck. ( R. Vol. 2, pp. 80 - 114).

The Appellant told his sister on the afternoon of 28 April 2005 that he was going to kill their brother, James Walden. The sister did not see the Appellant fire upon his brother, but she did hear the report of the gun as it was fired. ( R. Vol. 2, pp. 115 - 135).

The victim, Mary Walden, died of a single gunshot wound to the head. ( R. Vol. 2, pp. 135 - 150).

The bullet found in the bathroom of James Walden's house was fired by the gun found in the Appellant's vehicle. ( R. Vol. 3, pp. 157 - 170).

The Appellant testified. He said that trouble developed between James Walden and himself when he discovered that Walden's son had taken a battery out of his truck. The Appellant asked his brother to tell the boy to put the battery back in the truck. Walden whipped the child and told him to put the battery back in the truck. Walden then told the Appellant to take his truck off of the property. This occurred about two weeks prior to Mary Walden's death.

After this incident, the Appellant said that the same boy went to his truck and got parts out from it. The Appellant followed him back to James Walden's house; at that point James Walden pointed a shotgun at the Appellant. The Appellant said he went to his sister's house after that occurred. He claimed that James Walden fired a shot at him. The Appellant claimed that he always kept a gun with him. After returning fire, he said he jumped in his truck and went to his auntie's house. He said he did not know he had shot someone.

The Appellant denied having told law enforcement that he fired one shot at James Walden, and that he fired five more at the house when Walden returned fire. On the other hand, he said he did not know how many shots he fired. He also testified that he was shooting into the air while running away. He also at other times testified that he did empty his gun. The Appellant concluded his rambling, confusing and contradictory testimony with the opinion that the shooting was an accident. ( R. Vol. 3, pp. 175 - 212).

## STATEMENT OF ISSUES

**1. DID THE TRIAL COURT ERR IN ADMITTING INTO EVIDENCE HEARSAY STATEMENTS MADE BY THE APPELLANT?**

**2. DID THE CIRCUIT COURT COMMIT REVERSIBLE ERROR BY CRITICIZING COUNSEL FOR THE APPELLANT IN THE PRESENCE OF THE JURY?**

**3. DID THE TRIAL COURT ERR IN REFUSING INSTRUCTION D-2?**

**4. IS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?**

**5. DID THE CUMULATIVE EFFECT OF ERRORS DEPRIVE THE APPELLANT OF A FAIR TRIAL?**

## SUMMARY OF ARGUMENT

**1. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING THE APPELLANT'S STATEMENTS TO LAW ENFORCEMENT TO EVIDENCE**

**2. THAT THE TRIAL COURT DID NOT CRITICIZE COUNSEL FOR THE APPELLANT**

**3. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE INSTRUCTION D-2**

**4. THAT THE VERDICTS WERE NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE**

**5. THAT THERE IS NO CUMULATIVE ERROR IN THE CASE AT BAR**

## ARGUMENT

**1. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING THE APPELLANT'S STATEMENTS TO LAW ENFORCEMENT TO EVIDENCE**

In the First Assignment of Error, it is said that the Appellant's incriminating statements, made to law enforcement after his arrest, should not have been admitted inasmuch as they were, so it is said, inadmissible hearsay.

After his arrest, the Appellant was given his *Miranda* rights. He acknowledged having been so informed of his rights, and he waived those rights. His statements were recorded and

then transcribed. At the point at which the prosecutor began to go into the contents of the statements, the Appellant objected. The Appellant claimed that the statements were inadmissible hearsay. The trial court overruled the objection, citing M.R.E 801(d). ( R. Vol. 2, pp. 89 - 95). In his statement, the Appellant admitted firing six shots and that he shot through the house. ( R. Vol. 2, pp. 96 - 102).

The Appellant claims that his statements were inadmissible hearsay. However, he provides no citation to authority for that position. On the other hand, we think it is well established that an accused's admissions are admissible under M.R.E. 801(d)(2). *Rankin v. State*, 963 So.2d 1255 (Miss. Ct. App. 2007). The statements simply were not hearsay. While the Appellant says that it is "stretching" Rule 801(d)(2) to permit the admission of his admissions, the decision he cites to support that notion, *Balfour v. State*, 598 So.2d 731 (Miss. 1992), does nothing to support this notion. The case at bar, unlike *Balfour*, is not an instance in which law enforcement failed to honor an accused's invocation of one or more of his rights.

The Appellant then says that he was ignorant and confused when he made his admissions, and that the law enforcement officer's methods were "suspect." Other than the Appellant's say - so, these claims are not borne out by the record. In any event, the most that these complaints amount to are weight and credibility matters. In no way do they affect the admissibility of the statements.

It is said that the State did not attempt to lay a foundation for the admission of the statements. This is simply untrue. ( R. Vol. 2, pp. 87 - 90). This was entirely sufficient, especially in view of the fact that there was no claim advanced to the effect that the statements were coerced, prompted by promises of lenity, or taken after the Appellant invoked his rights.

The admission of the statements was not for the purpose of "pre-impeaching" the

Appellant. Quite clearly, the State sought admission of them as part of Her substantive case. This was entirely legitimate from an evidentiary point of view, and commonly done in criminal trials.

The First Assignment of Error is without merit.

**2. THAT THE TRIAL COURT DID NOT CRITICIZE COUNSEL FOR THE APPELLANT**

In the Second Assignment of Error, the Appellant complains of three instances in which the trial court allegedly criticized his attorney in the presence of the jury. Preliminarily, we note that the Appellant entered no objection to these said - to - be instances of criticism. That being so, he may not complain of them here. *Bruce v. State*, 746 So.2d 901 (Miss. Ct. App. 1998). Also, given the fact that the Appellant never moved the trial court for recusal, we think the Second Assignment of Error is barred here for that reason. If the Appellant actually believed that the trial court was predisposed against him or otherwise partial against him, he should have moved for recusal. *In re Hampton*, 919 So.2d 949 (Miss. 2006).

Assuming that the Second Assignment is before the Court, there is no merit in it.

The first instance complained of occurred when the trial court told the defense attorney to speak less loudly to a witness. ( R. Vol. 2, pg. 55). It is true that the trial court judge told the defense attorney that he did not need to speak so loudly that "folks over at the café [could hear him], but we do not think that this was a criticism of the defense attorney. The comment was occasioned by the defense attorney's explanation of why he was speaking loudly. He told the court that he had been told to speak up so that the clerk could better hear him. He also told the court that it was his habit to be loud. The only reasonable construction to be given to the judge's comment was that the lawyer did not have to speak that loudly. It was perhaps phrased in a

colorful way, but it simply cannot be reasonably said that the comment prejudiced the Appellant or that the comment disclosed some sort of prejudice on the part of the trial court.

The next complaint is that the defense lawyer was restricted in his cross - examination of a witness. The defense attorney attempted to put an argumentative question to a witness. The State objected, and the trial court sustained the objection. ( R. Vol. 2, pp. 131 - 132). At that point, though, the defense attorney made sarcastic comment to the court. The prosecution objected. There was then a bench conference; after that, the defense attorney kept on arguing with the trial court. The trial court responded to the comments made by the defense attorney.

A trial court may explain its reasons for its ruling so long as it statements do not amount to a comment on the evidence in a prejudicial manner. *McDonald v. State*, 881 So.2d 895 (Miss. Ct. App. 2004). Here, the defense attorney, instead of accepting the trial court's ruling on the State's first objection, chose to chew on the issue in the presence of the jury. If the defense attorney really wanted to make a record of his complaint, he simply could have asked to make a record outside the presence of the jury. But he may not complain of the trial court's responses to his comments, made in the presence of the jury, when it was he who chose to have the jury present. None of the judge's comments amounted to a comment on the evidence. While the judge did indicate to the defense attorney that the attorneys should behave themselves, that was a comment brought upon by the defense attorney's conduct in effectively arguing with the court. The comments were not prejudicial to the Appellant.

In the last complaint, the Appellant says that the trial court repeatedly overruled his objections to the State's cross-examination of the Appellant, and that the trial court made comments while doing so.

The Appellant proved to be a very unruly witness. Rather than answering questions put

to him by the prosecution in an orderly fashion, he interrupted the prosecutor, and at one point asked the prosecutor a question. ( R. Vol. 3, pp. 189 190; 207). The defense attorney objected a number of times in the course of the cross - examination. Having reviewed them ( R. Vol. 3, pp. 190 - 204), we think the trial court correctly overruled them. The prosecutor was trying to get confusing testimony by the Appellant straightened out, trying to get the Appellant to explain the contradictions between his post - arrest statement and his trial testimony, and trying get the Appellant to explain why the testimony of other witnesses in the case contradicted his testimony. This was all perfectly legitimate cross - examination.

None of the comments of the judge were prejudicial. They extended no further than to overrule the objections with an explanation that the prosecutor was on cross - examination. This was no comment on the evidence. There is nothing in these comments to show hostility on the part of the judge.

There is nothing in the record as a whole to suggest prejudice or hostility on the part of the judge. The facts here are entirely different from those in *McGee v. State*, 820 So.2d 700 (Miss. Ct. App. 2000). In that decision, the trial court was said to have formed an opinion of that defendant's defense, had spoken to investigators in that case, and made his position rather clear in open court. There is nothing remotely similar here. Here, the trial court simply ruled on objections and said nothing that could possibly have been seen as prejudicial or hostile to the defense. Likewise, the facts in *In re Blake*, 912 So.2d 907 (Miss. 2005) are wholly different from those in the case at bar. There is simply nothing here to reasonably suggest hostility or prejudice on the part of this circuit court judge.

*Kelly v. State*, 735 So.2d 1071 (Miss. Ct. App. 1999), cited by the Appellant, does not concern comments made by a judge. The comments complained of there were made by a

prosecutor.

In the event, however, that this Court should find that the trial court was somewhat excessive in responding the Appellant's attorney, this should not be a basis for reversal. The evidence of the Appellant's guilt was overwhelming. The comments made by the trial court cannot possibly be seen as having prejudiced the Appellant. The verdicts of guilty were well - high inevitable.

The Second Assignment of Error is without merit.

**3. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE INSTRUCTION D-2**

The Appellant sought an instruction which would have instructed the jury that if it found that he possessed a pistol and that, without deliberate design to cause the death of the decedent, he fired it accidentally and through misfortune upon a sudden and sufficient provocation, it should find the Appellant not guilty. ( R. Vol. 1, pg. 64). The court reporter did not transcribe the conference on the jury instructions, if any there was. However, the instruction was denied. The trial court noted thereon that the evidence showed that the pistol was not fired accidentally, that there was no evidence of a struggle and that the Appellant admitted deliberate design.

The Appellant tells this Court that the instruction was an attempt to set forth a merger of defenses, specifically those of accident and lack of deliberate design to kill. However, we are not aware that such a hybrid defense has been recognized in this State, and the Appellant presents no authority to demonstrate that it is. It appears to us that the instruction is more in the nature of an accident instruction, it seeming that accident would by necessity negate deliberate design. The person who drafted the instruction might have had Miss. Code Ann. Section 97-3-17(b) (Supp. 2007) vaguely in mind. But whatever was intended, the instruction throws about the phrase "heat

of passion", "accident" and "deliberate design" in a willy-nilly fashion. The instruction was confusing and a dubious statement of law. The trial court might have denied it on that basis. *Presley v. State*, 321 So.2d 309 (Miss. 1975).

In addition to this, the instruction was not supported by the evidence. While it may be that the Appellant was not shooting at the victim, he most definitely was shooting at his brother. His firing at his brother was certainly not "accidental." Not even the Appellant's testimony suggests that the shooting was "accidental." Nor was there evidence of misfortune. Since there was no evidentiary support for accident, the trial court committed no error in refusing the instruction. *Wortham v. State*, 883 So.2d 599 (Miss. Ct. App. 2004).

Moreover, there was no evidence of a struggle between the Appellant and his brother. The Appellant re-entered the Appellant's property. After re-entering the property, at no time before or during the firing was there a physical struggle between the Appellant and his brother. Here, the Appellant claims that there was a struggle, but he makes no struggle with the record to show where there was a "very real struggle" between his brother and himself. He does not attempt to explain what he means by asserting that there was a struggle. Again, no evidentiary support.

Nothing in *Wortham v. State*, 883 So.2d 599 (Miss. Ct. App. 2004) or *Moore v. State*, 787 So.2d 1282 (Miss. 2001), cited by the Appellant, is of any use to him. The issues and instructions involved were entirely different from that involved here.

*Chinn v. State*, 958 So.2d 1223 (Miss 2007) is a case in which the Court found error in the refusal of an accident instruction. However, in that case there was an evidentiary predicate for such an instruction, a feature that is entirely lacking in the case at bar. The Court also found that the instruction submitted there tracked the language of Section 97-3-17(b) and was a proper

instruction. The same cannot be said of the instruction in the case at bar, confusing as it is.

The Third Assignment of Error is without merit.

**4. THAT THE VERDICTS WERE NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE**

The Appellant's Fourth Assignment of Error is a claim that the verdict is contrary to the credible evidence. However, his argument in support of this claim appears to be the different claim that the verdict was not supported by the evidence. We bear in mind the respective standards of review appurtenant to these different claims. *May v. State*, 460 So.2d 778 (Miss. 1984).

Briefly summarized, the evidence in this case in support of the verdict, taken as true together with all reasonable inferences therefrom, was that the Appellant and one of his brother became involved in a difficulty concerning a saw or part thereof belonging to the Appellant. The Appellant's brother pointed an unloaded shotgun at the Appellant, and the Appellant left the brother's property.

The Appellant went to a sister's house, where he allowed that he intended to kill his brother. The Appellant then returned to his brother's house, armed with a pistol, and he began firing at the house. He emptied his gun while doing so. The brother fired back once. The Appellant then left the property. The Appellant's action in firing upon the house was witnessed. In the course of the gunfire, the decedent was killed by one of the bullets fired by the Appellant.

The case at bar presents an instance of the application of the doctrine of transferred intent, with respect to the killing of the victim. *Dobbins v. State*, 766 So.2d 29 (Miss. Ct. App. 2000). Under that doctrine, where a person has express malice and the intent to kill, the accidental killing of a person other than the one who was intended to be killed is murder. Here, the

Appellant told his sister he intended to kill his brother, and he renewed the difficulty he had had with his brother. The Appellant went upon the brother's property and began firing away. In the course of doing so, he killed the victim. This was murder, and the evidence was entirely sufficient to support a verdict thereon. The decisions relied upon by the Appellant in his attempt to say otherwise simply do not compare in terms of strength of the evidence against the Appellant.

The action of firing into the brother's dwelling was willful; the evidence was more than sufficient to support the verdict of shooting into an occupied dwelling.

The Appellant, though, claims that the testimony concerning his intent to kill was "pressured", and he further claims that the State's evidence was "rife with contradictions and inconsistencies. We do not agree that there were any significant inconsistencies in the case. In any event, it is well established that it is for the jury to resolve witness and evidence weight and credibility issues. *Jones v. State*, 856 So.2d 389 (Miss. Ct. App. 2003). The point for the moment is that there was certainly sufficient evidence to permit verdicts of guilty on the charges exhibited against the Appellant. Credibility issues were for the jury to determine, not this Court.

In a very nebulous claim, the Appellant asserts that the jury instructions, taken as a whole, were so defective as to deny him a fair trial. Yet, the Appellant does not trouble himself to indicate what instructions should have been granted beyond those that were, other than instruction D-2. There is nothing for us to respond to in this contention, there being no instruction identified that should have been given. It is the Appellant's burden to demonstrate reversible error. *King v. State*, 857 So.2d 702 (Miss. Ct. App. 2003). His failure to identify what instructions should have been given amounts to a failure to sustain his burden.

Moreover, the Appellant should have submitted such other or different instructions as he

## CERTIFICATE OF SERVICE

I, John R. Henry, 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 11th day of January, 2008.

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