

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDSEL BURTON

APPELLANT

VS.

FILED

NO. 2007-KA-0212

STATE OF MISSISSIPPI

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SUPREME COURT
COURT OF APPEALS**

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUE

Proposition One

The trial court did not err in refusing the Burton's proposed "heat of passion" manslaughter jury instruction since the evidence did not support a "heat of passion" manslaughter instruction and no reasonable jury could have found Burton guilty of the lesser related offense of manslaughter.

STATEMENT OF THE FACTS

Testimony of Nancy Wheeler

Nancy Wheeler, the daughter of the victim, Jewel Burton, testified that her mother married Edsel Burton in August of 1991 and that the Burtons lived in Itawamba County at 2414 Highway 25 South during their entire marriage. She characterized the marriage as "an abusive relationship." On April 24, 2005, Jewel Burton spend the night with her daughter and the next day said that she was going to go home to check on the animals. Wheeler told her not to, but later realized her mother had gone. Wheeler went to work at 4:00 p.m. and later checked and her mother was not at home or at Wheeler's house. Wheeler assumed that the Burtons had gotten back together and that her mother

had stayed at her own home. A friend called the next day, April 26th, to say that she had not been able to get in touch with Mrs. Burton. Wheeler went to the Burton home and saw her mother's car in the yard. She knocked on the back door and no one answered. Wheeler entered the house and found her mother laying on the bathroom floor. She called 911 and was advised to go outside since Mr. Burton walked through and went into the bathroom. Wheeler sat in her car and waited for law enforcement to arrive. She stated that she knew they had been "into it," but that she never expected Mr. Burton to "follow through." (Tr. 120-28)

Testimony of Lieutenant Mickey Baker

Lieutenant Baker is a supervisor special agent for the Mississippi Bureau of Investigation division of the Mississippi Highway Patrol. Baker received a call from the Itawamba County Sheriff's Office requesting assistance in a murder case. Baker sent Special Agent Chris Jones to assist with the investigation until Baker could get there. The Sheriff's Department had sealed the crime scene and a search warrant was obtained. The house was photographed and then a search was made. Investigators collected a Smith and Wesson .38-caliber revolver, serial number 9197. They collected samples of blood stains taken from the hall by the bathroom inside the house, a white towel that was on the kitchen counter underneath the revolver, a hair from a beer bottle in the bathroom and some notes which were found in the bedroom. The gun had three live rounds in the cylinder and two rounds had been removed. Dr. Hayne removed two projectiles from Mrs. Burton and those were compared to the revolver.

Lieutenant Baker was present at an interview conducted with Edsel Burton. He testified that Burton was in a good from of mind, was responsive to any question Baker asked of him and spoke clearly and coherently during the interview. Burton responded that he did not have any questions and that he did wish to speak with investigators. During the interview, Burton told Baker that he and

his wife got into an argument and he shot her. She tried to get up and he shot her again. He did not try to render any medical aid after shooting her because she was already dead. Burton admitted that he had been drinking for several days, therefore, Baker waited 24 hours before conducting the interview. Burton told investigators that it was dark outside when he shot his wife. Baker estimated that it was probably the night of April the 25th.

During the interview Burton told Baker that he had been drinking for several days, but he was very clear on what he did, how he did it and what he did it with. Burton told investigators that he and his wife had been arguing and that she told him that she was going to do some things and then leave and he shot her. She struggled to get up and he walked over shot her in the head. He indicated to Baker that he knew he shot her in the head and he told Baker that he shot her twice.

He described the weapon he used as being a stainless steel five-shot revolver with black handles. He could not remember what he had done with the gun afterwards and told Baker that he would have shot himself with it if he had found it. Burton told Lieutenant Baker that after he shot his wife he went back in the bedroom, laid down and went to sleep. Baker testified that Burton was very clear and very detailed about what he did and how he did it, what his wife did and how she reacted. Burton further described all the firearms he owned in detail, stating specific types of weapons and calibers.

Testimony of Special Agent Christopher Jones

Agent Jones testified that he went to the Burton residence on April 16th 2005 to assist the Itawamba County Sheriff's Department with a murder investigation. Jones took pictures at the scene. They found Mrs. Burton's body in the bathroom and noted that there appeared to be a small entrance wound, possibly a bullet wound on the back of her head. They secured the scene and Agent Jones went to obtain a search warrant. Jones interviewed Mrs. Burton's daughter. He was also

present when Mr. Burton's statement was taken. Burton told the interviewers that he had "done a bad thing" and that he wanted to plead guilty and get the death penalty. After he was mirandized, he again reiterated his desire to make a statement. Burton told interviewers that he and his wife Jewel had gotten into an argument, that she was leaving him and that he got mad at her and shot her in the bathroom. After he shot her, she went down on the floor. She attempted to get up and he shot her in the back of the head. Jones testified that the evidence they had found at the house corroborated Burton's story.

Testimony of Steven Keith Wilburn

At the time of the murder, Wilburn was the Chief Deputy in Itawamba County. Wilburn testified that he responded to a call on Highway 25 South that a lady had been found in her home. When they arrived, Burton was still in the house and they ordered him to leave. He was taken into custody as a person of interest. They discovered Mrs. Burton lying on the bathroom floor. Her body was cool and she was in a state of rigor. They cleared the house, secured the house and contacted the Mississippi Bureau of Investigations. MBI arrived and acquired a search warrant. Wilburn identified a photograph of the weapon Burton used lying on a white towel on the kitchen counter. Wilburn also was present when Burton's statement was taken and testified that Burton made a spontaneous statement that he had done a bad thing and wanted to plead guilty and get the death penalty. He testified that Burton was mirandized and appeared to understand what he was doing and what his rights were when he made his statement. He testified that Mr. Burton was not intoxicated at the time he was questioned.

Testimony of Dr. Stephen Hayne

Dr. Hayne is the Chief State Medical Examiner for the Department of Public Safety Medical Examiner's Office. He is a forensic pathologist. He testified that the significant findings of Jewel Wheeler Burton's autopsy included two gunshot wounds, either of which would be lethal. One gunshot wound struck Mrs. Burton on the right back of her head at 4 inches below the top of her head. It was located immediately behind her right ear. The bullet went through the cerebella hemispheres on the lower part of the brain and through the brainstem. The second gunshot wound struck Mrs. Burton on her left arm 21.5 inches below the top of her head and traveled across her arm, exiting on the inner surface of her arm and struck her far left chest wall. It went through her left lung and through her heart. It also went through her aorta and struck her backbone at the 6th thoracic vertebra and lacerated her spinal cord. In Dr. Hayne's opinion, the gunshot wound to the left arm probably occurred first. The toxicology report indicated that there was no alcohol or other drugs or medications in Mrs. Burton's system at the time she was killed.

Testimony of Sheriff Phillip Keith Crane

When Sheriff Crane arrived at the Burton house, there were already several deputies there. They had the house surrounded and called for Burton to come out. He came out and was arrested without incident. Sheriff Crane testified that they found Mrs. Burton lying on the floor in the bathroom. Sheriff Crane was present when Burton was interviewed at the Itawamba County Jail. Burton came into the office and stated that he had done a terrible thing, but he wanted to tell the truth. He wanted to plead guilty and be executed as soon as possible. He was advised of his rights and made the same statement after having been read his rights. Sheriff Crane testified that Burton knew what he was doing when he gave his statement that day and that he appeared to be sober. He had been in jail for 24 hours and had not had any alcohol during that time. Sheriff Crane testified

that Burton was clear on the details of what happened when he killed Mrs. Burton.

Testimony of Byron C. McIntyre

McIntyre is a forensic scientist at the Mississippi Crime Laboratory and specializes in firearms and toolmark identification. McIntyre testified as an expert witness in the field of firearms identification and identified the revolver found at the Burton home as the gun that fired the projectiles which were recovered from Mrs. Burton's body.

State Rests

After Mr. McIntyre's testimony, the State of Mississippi rested its case and Burton moved for a Directed Verdict, arguing that the State had failed to meet its prima facie case to prove murder and had failed to prove the elements of malicious aforethought or deliberate design necessary to support its indictment for murder. The trial court denied Burton's motion.

Testimony of Jamie Bush

Bush is the manager of the Meridian Facility of the Mississippi Crime Laboratory. Bush conducts latent print examinations and testified as an expert in latent prints. Bush testified that no latent prints were developed on either the gun or the bullets. Bush testified that it is possible for a person to touch something and not leave a latent print.

Testimony of David Whitehead

David Whitehead is a forensic scientist in the trace evidence section of the Jackson laboratory and testified as an expert in that field. Whitehead testified that the gunshot residue test that was conducted on samples collected from Burton was negative. Whitehead testified that a negative gunshot residue test does not tell you whether a person fired or didn't fire a weapon.

Testimony of Edsel Burton

Burton testified that the week he killed his wife he was preparing a trailer in the backyard to move into. He testified that he couldn't fix the inside of the house he shared with Mrs. Burton. Mrs. Burton was going to live with a friend in Fulton. Mrs. Burton had been away for a day or so and Mr. Burton had been drinking. He stated that he had consumed two half gallon containers of Smirnoff vodka and Johnny Walker Red whiskey and a case and half of Miller's Natural draft beer. He had purchased the alcohol at the end of the prior week.

Burton testified that he had been drinking for years, but that he drank so much over the four to five days prior to the murder because he was so perturbed. Mrs. Burton came home "to get some stuff to take back, take and go back to Fulton." Burton testified that they were "fussing" and he was trying to get her to stay home and she was leaving. Burton testified that he was angry that she was leaving. He was "just completely flustered" and did not want her to leave. He testified that he does not remember anything else from the 26th. He testified that he remembers being ordered out of the house and that his wife was laying in the bathroom floor. He testified that he did not remember signing the confession he made and that his signature looked "ragged." He testified that he was told by his cellmates that he was having "DTs" in jail.

Testimony of Jimmy Perrine

Jimmy Perrine was called by the State as a rebuttal witness. Perrine testified that he was housed with Mr. Burton in jail and that Burton told him that he had been drinking for two weeks straight and shot his wife twice.

SUMMARY OF THE ARGUMENT

The trial court did not err in refusing the Burton's proposed "heat of passion" manslaughter jury instruction since the evidence did not support a "heat of passion" manslaughter instruction and no reasonable jury could have found Burton guilty of the lesser related offense of manslaughter. Burton's Motion for Judgment of Acquittal JNOV or in the Alternative for a New Trial did not raise the issue of the trial court's failure to grant a manslaughter instruction. "The failure to preserve a matter by motion for new trial or JNOV may also serve as a procedural bar to its consideration by an appellate court. *Seals v. State*, 767 So.2d 26 (Miss.Ct.App.2000). While Alonso objected to the testimony of Dr. Moore, he did not include in his motion for a new trial or JNOV, that this testimony was admitted in error." *Alonso v. State*, 838 So.2d 309 (Miss.Ct.App. 2002). Burton is therefore procedurally barred from raising this issue on appeal.

Notwithstanding the procedural bar, this issue lacks merit. Burton must still be denied the relief he requests, since he did not put on any proof of a sufficient provocation or that he was in a rage. Burton also argues that he is entitled to a jury instruction for heat of passion manslaughter because he "cannot remember" what happened. This is no evidence at all. There is no evidence to support a heat of passion manslaughter instruction and the trial court was correct in denying the requested instruction.

ARGUMENT

Proposition One

The trial court did not err in refusing the Burton's proposed "heat of passion" manslaughter jury instruction since the evidence did not support a "heat of passion" manslaughter instruction and no reasonable jury could have found Burton guilty of the lesser related offense of manslaughter.

Burton requested a manslaughter instruction based on the definition of manslaughter given in *Mullins v. State*, 493 So.2d 971, 974 (Miss. 1986):

.... a state of violent and uncontrollable rage engendered by a a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Pasion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at a time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

This request was denied and a manslaughter instruction was not given. Burton's Motion for Judgment of Acquittal JNOV or in the Alternative for a New Trial did not raise the issue of the trial court's failure to grant a manslaughter instruction. "The failure to preserve a matter by motion for new trial or JNOV may also serve as a procedural bar to its consideration by an appellate court. *Seals v. State*, 767 So.2d 26 (Miss.Ct.App.2000). While Alonso objected to the testimony of Dr. Moore, he did not include in his motion for a new trial or JNOV, that this testimony was admitted in error." *Alonso v. State*, 838 So.2d 309 (Miss.Ct.App. 2002). Burton is therefore procedurally barred from raising this issue on appeal.

Notwithstanding the procedural bar, this issue lacks merit. Burton must still be denied the relief he requests, since he did not put on any proof of a sufficient provocation or that he was in a rage. Burton also argues that he is entitled to a jury instruction for heat of passion manslaughter because he "cannot remember" what happened. His testimony at trial was that he was so drunk that he does not remember his state of mind at the time of the killing. Therefore he cannot produce *any* evidence that would support a manslaughter verdict. While a defendant is entitled to have instructions on his theory of the case presented even though the evidence that supports it is weak, inconsistent, or of doubtful credibility; where, taking the evidence taken in the light most favorable to the accused, a reasonable jury could not find the defendant guilty of the lesser related offense, the

not constitute an insult, provocation or injury that would have produced “the highest degree of exasperation”. Further, these are mere words and are thus insufficient to reduce an intentional and unjustifiable homicide from murder to manslaughter. *Id.*

Burton argues that he drank heavily over a three or four day period and was still drinking the day of the murder because he was “just so perturbed.” Jewel Burton came home on the morning of the 26th to get some things to take back to Fulton where she was planning to live. Burton testified that that he did not remember getting into an argument with her, but that they had been fussing and fighting constantly. Burton stated that he does not know whether he was angry, but testified that he was “completely flustered” and did not want her to leave.

His testimony does not provide the evidentiary support for a “heat of passion” manslaughter instruction because there is no evidence whatsoever of an insult, provocation or injury that would product the “highest level of exasperation”, nor is there testimony that Burton was in an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror. *Mullins* at 974. Pursuant to these statements of the law of heat of passion manslaughter, a defendant’s statement that he was “perturbed” or “flustered” is not evidence of heat of passion. Burton did not present any evidence at trial to support his theory that he was provoked into a heat of passion and should therefore be convicted of manslaughter instead of murder and the evidence clearly reflects an intentional murder. Burton already knew that his wife was leaving him, since the testimony of her daughter and his own testimony was that the marriage was tumultuous and that she had already left the house to stay with her daughter. This was not surprising, provoking news and does not constitute evidence that would support a manslaughter instruction. Burton’s testimony that he does not remember what happened certainly does not support a manslaughter instruction, since he presented no evidence that he was in a rage that would satisfy the definition of manslaughter.

CERTIFICATE OF SERVICE

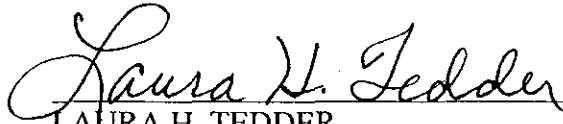
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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