

2007 - KA - 00670 - CDA

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ARGUMENT

I. THERE WAS NOT LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE FINDING OF CULPABLE NEGLIGENCE RESULTING IN DEATH

As the State indicates in its brief, the evidence presented indicates that Tate was not driving on the wrong side of the road, but that he simply “crossed the center line into on-coming traffic” (Brief of Appellant p.6), i.e. an accident. Crossing the center line into on-coming traffic does not in any way rise to the level of culpable negligence.

The record is replete with evidence that Tate’s actions were not tantamount to culpable negligence - “all of a sudden lost it” (T. 67-68); no reckless conduct, Tate just left his lane of travel (T. 158); no massive amount of speed (T. 156); no testimony that Tate was speeding (T. 136, 156, 130, 68).

Dr. Lykissa testified that in his expert opinion, the level of cocaine in Brooks’ system at the time of the accident was some, if not all, of the cause of the accident. (T. 205).

There was only lay testimony about Tate’s rate of speed (T. 68), and that testimony does not comply with M.R.E. 701. Where a witness does not have special qualifications to express an opinion, admission of the opinion is error. Whittington v. State, 523 So. 2d 966 (Miss. 1988), and this error may be reviewed under the plain error rule.

The State simply did not meet its burden of proving beyond a reasonable doubt that Tate killed Brooks by culpable negligence by driving on the wrong side of the road at a high rate of speed (R.54), thus reversal is required.

II. THE TRIAL COURT DID ABUSE ITS DISCRETION IN ALLOWING THE ADMISSION OF THE EVIDENCE OF ALCOHOL AT THE SCENE

Any alleged probative value of the evidence of alcohol was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Due to the State’s

charges against Tate, the jury was under a duty to determine if Tate was driving an automobile on the wrong side of the road at a high rate of speed with said actions being significant enough to rise to the level of culpable negligence (R.54).

There was plenty of evidence presented that Tate did not consume alcohol - Greer (T. 96); Ables (T. 102); McCammon (T. 111-112); the beers in the cooler were unopened (Ex. Pg. 15), and there was no evidence of alcohol in Tate's blood (T. 8-10, 12).

Tate was denied his constitutional right to a fair trial by the decision of the trial court to allow admission of the evidence of alcohol, thus reversal is required.

III. THE TRIAL COURT DID ERR IN LIMITING THE ARGUMENT OF TATE

The state fails to consider in its argument, that Defendant was limited not only in closing, but throughout the entire case during examination, cross examination, and in all other phases. Tate's constitutional right to a fair trial was violated by this ruling, thus reversal is required.

IV. THE TRIAL COURT DID ERR IN DENYING JURY INSTRUCTION D-2

Instruction D-2 correctly states the law and would have aided Tate in presenting his theory of the case that no crime was committed and his actions did not rise to the level of culpable negligence. Smith v. State, 20 So.2d 701 (1945). The State had to prove beyond a reasonable doubt that the conduct of Tate was unlawful and felonious. Without D-2, the jury could have easily concluded that driving on the wrong side of the road carelessly and negligently always rises to the level of culpable negligence. Thus, the denial of D-2 caused a denial of Tate's constitutional right to a fair trial warranting reversal.

V. THE TRIAL COURT DID ERR IN DENYING JURY INSTRUCTION D-3

The circumstantial instruction D-3 was proper. There was no evidence presented as to what caused Tate to veer across the center line - the cause of the accident. Yes, there was one

eyewitness to the accident, but he did not offer any testimony as to what caused Tate to veer across the center line, making the case a circumstantial evidence case. (T. 66-88). Without a circumstantial instruction, there was not a fair presentation of the law. The denial of instruction D-3 created a denial of Tate's constitutional right to a fair trial, thus this case should be reversed.

VI. THE TRIAL COURT DID ABUSE ITS DISCRETION WHEN IT ALLOWED INTO EVIDENCE THE PICTURE OF THE DECEASED YVONNE BROOKS

The State does not cite to any authority for the necessity of the photograph for identification. "Photographs are considered to have evidentiary value in the following instances: (1) to aid in describing the circumstances of the killing; (2) to describe the location of the body and cause of death; (3) to supplement or clarify witness testimony. Photographs of the victim should not ordinarily be admitted into evidence where the killing is not contradicted or denied, and the corpus delicti and the identity of the deceased have been established. Randolph v. State, 852 So.2d 547, 566 (Miss. 2002), citing Spann v. State, 771 So.2d 883, 895 (Miss. 2000).

The picture admitted did not aid in any of the above circumstances. Brooks' death was not in any way denied and her identity had been established. (T. 28-29, 71-72).

The picture had no probative value thus making it irrelevant, and the picture was extremely prejudicial. Thus, Tate's constitutional right to a fair trial was affected, therefore requiring reversal.

CONCLUSION

Based on the foregoing, this case should be reversed. A tragic accident occurred, plain and simple; not a crime for which a man should be incarcerated.

CERTIFICATE OF SERVICE

I, Beth Windsor Burton, do hereby certify that I have this day served by U.S. mail, postage prepaid, a true and correct copy of the above and to:

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This the 31st day of March 2008.



BETH WINDSOR BURTON