

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STACY HICKS

APPELLANT

VS.

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SUPREME COURT
COURT OF APPEALS

NO. 2007-KA-0696-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On February 21, 2007, Mr. Stacy Hicks, "Hicks" was tried for aggravated domestic violence before a Clarke County Circuit Court jury, the Honorable Robert W. Bailey presiding. R. 1. This was for allegedly causing serious bodily injury to his mother with whom he was living at the time. Hicks was found guilty and given a life sentence as an habitual offender in the custody of the Mississippi Department of Corrections. C.P. 38. From that conviction, he appealed to the Mississippi Supreme Court. C.P. 43.

ISSUES ON APPEAL

I.

**WAS OFFICER KUFEL'S TESTIMONY
PROPERLY RECEIVED?**

STATEMENT OF THE FACTS

In the February 2007 term, Hicks was indicated for aggravated domestic violence under M. C. A. § 97-3-7(4) by a Clarke County Grand jury. This was for committing an aggravated assault. He allegedly inflicted serious bodily injury on his mother, Ms. Villa Hicks, on October 28, 2005. He injured her by allegedly beating her with an ironing board. C. P. 04.

On February 21, 2007, Stacy Hicks was tried for aggravated domestic violence before a Clarke County Circuit Court jury, the Honorable Robert W. Bailey presiding. R. 1. Hicks was represented by Mr. Earl Jordan. R. 1.

Ms. Villa Hicks testified that she was attacked by Hicks. This was October 28, 2005. She was sitting in a chair talking with him while she was drinking coffee. Unexpectedly Hicks attacked her without warning. He hit her some six to eight times with a folded up ironing board. R. 67-68. See photographic exhibit 2 in manila envelop marked "Exhibits." It shows a bent up ironing board with streaks of blood. Ms. Hicks was Mr. Hicks' 71 year old mother. R. 76. Hicks had been living with her for a week after being released from detention. Hicks was around 35 years old. R. 76.

Ms. Hicks testified that she was beaten bloody with the ironing board. She was knocked to the floor. She asked Hicks to call 911 for medical assistance. He did nothing. As a result of the beating, she permanently lost sight in one of her eyes. R. 68; 79. Hicks identified the blood on the ironing board as being her own. R. 70. After "playing possum" on the floor and seeing that her son had left her home, Ms Hicks walked to a neighbor's house. The neighbor, Ms. Follins, called 911 for assistance. Hicks was taken to a Watkins hospital ER room for examination and treatment for her wounds. Ms. Hicks identified A, B, C and D of exhibit 5 as photographs of her injuries. These photographs were taken at the hospital. These were the injuries caused by the blows to her body from the ironing board. R. 74. Ms. Hicks testified that prior to being beaten by her son, she had no

injuries to her eye, her head or shoulder. R. 77-78.

Ms. Hicks testified that she never fought or struggled with Hicks. She never hit him with anything before or after the beating. R. 78.

Ms. Hicks denied either having a knife or using it to stab Hicks. R. 91-92. She testified that she never touched him. R. 90. She also testified that Hicks was not harmed. This was when he was beating her with the board. R. 91. Ms. Hicks testified that in the past she had "rounds" with Hicks. R. 92.

Ms. Ann Follins testified that she was Ms. Hicks' next door neighbor. R. 94. Ms. Hicks unexpectedly came to her door on October 28, 2005. Follins testified to seeing that Ms. Hicks was "bleeding." R. 95. Her gown had so much blood on it that it was "clinging to her." R. 95. Follins testified that she saw that Ms. Hicks had injuries to her head. R. 95.

Officer J. G. Kufel, an investigator with the Clarke County Sheriff's Office, testified to investigating an alleged domestic assault. Kufel went to Ms. Villa's residence which was 32 County Road 1661. R. 99. Kufel took photographs of the alleged crime scene inside the house. Kufel testified that he saw what appeared to be blood on the victim's phone. R. 102.

He took photographs of the injuries that were visible on Ms. Villa. These photographs were taken at the hospital where she was being treated for her injuries. He also took photographs of the alleged injuries to Hicks. This was based upon his allegations of self defense. This was after Mr. Hicks told him he was allegedly defending himself from Ms. Villa's knife. R. 102.

States' photographic exhibits are contained in manila envelopes marked "Exhibits." Ms. Villa Hicks testified that the blood streaks on the bent up ironing board was her own. R. 70. Exhibit 3 was a photograph of the blood soaked light pink gown Ms. Hicks had on when attacked with the ironing board. R. 71. Blood splatter also appears on the carpet at the crime scene. Kufel testified that he

found no knife at the crime scene. R. 107.

Officer Kufel testified that based upon his 18 years of experience, he would have expected more severe injuries to Mr. Hicks had he been defending himself against a knife attack. R. 107. The trial court overruled an objection to this testimony. The objection was that Officer Kufel was "not qualified" to give such testimony. R. 106.

Mr. Hicks testified in his own behalf. R. 125-143. Hicks testified that he did not attack his mother with the ironing board. R. 127. Hicks testified that she attacked him with a knife. He merely used the ironing board to defend himself. R. 127. Hicks testified that the abrasions shown on his hand and knee in exhibit 9 and 10 were the result of his being cut with the knife his mother used to attack him. R. 129-130.

On cross examination, Hicks admitted that he did not have any stitches as a result of his alleged injuries. R. 136. He did not receive any "medical attention." R. 136. Hicks testified that he "never struck her with no ironing board." 142. Rather he allegedly used it "to push her" away from him. R. 142.. He testified that the visible cuts on his mother were the result of Hicks "pushing her pretty good." R. 143. Hicks testified that while he was told that his mother was blind in one eye, he believed that she could still see "two or three things" out of it. R. 143.

Hicks was found guilty of aggravated domestic violence. After finding sufficient evidence for establishing Hicks was an habitual offender under M. C. A. § 99-19-83, the trial court gave him a life sentence without benefit of parole in the custody of the Mississippi Department of Corrections. R. 170; C.P. 38. See Certification of Prison Records for Mr. Stacy Hicks in manila envelop marked "Exhibits." From that conviction, he appealed to the Mississippi Supreme Court. C.P. 43.

SUMMARY OF THE ARGUMENT

1. The record reflects that this issue was waived for failure to raise it with the trial court. R. 106. **Spicer v. State**, 921 So. 2d 292, 305 (¶22) (Miss. 2006). The only objection to the testimony of Officer Kufel was that he was “not qualified” to answer the question. R. 106. There was no specific contemporaneous objection to his allegedly testifying as an expert witness. Nor was this issue or any related issue raised in Hicks’ motion for a J.N.O.V.. C.P. 40.

The record reflects this issue is also lacking in merit. Officer Kufel was cross examined about the basis for his conclusions on the comparative significance of the injuries. R. 110-111. The photographs showing the injuries was provided in discovery. And Hicks testified about the exact same issues based on the photographs before the jury. R.129-130. Hicks testified that the abrasions on his hand and knee were the result of his being cut by his mother’s knife. R. 130. He also testified that he never hit his mother with an ironing board. Her visible injuries were allegedly the result of his “pushing her pretty good” with the ironing board.. R. 143.

The Appellee would submit that under this set of facts there was no “substantial injury” to any of Hicks’ rights based upon Officer Kufel’s testimony. M. R. E. 103(a). **Newsom v. State**, 629 So. 2d 611, *614 (Miss. 1993). This would be for Kufel’s testimony about how he understood the “significance” of the injuries to the victim and the accused. This was based upon the photographs that he took of both parties along with the scene of the crime at Ms. Hicks’ house. The record reflects not only cross examination about the significance of the photographs, but also Hicks testifying about them extensively. R. 125-143. Hicks claimed to be the victim of an assault, rather than the perpetrator of an assault. He used the exact same photographs 3, 4, 5, 6, 9 and 10 his counsel complains of on appeal in his own testimony in support of his account of what happened. R. 129-130.

ARGUMENT

PROPOSITION I

THIS ISSUE WAS WAIVED AND IT IS LACKING IN MERIT.

Hicks' appeal counsel believes that the trial court erred during his trial. She believes that the trial court erred in allowing Officer J. G. Kufel to testify as an expert witness rather than as a lay witness. She believes he was permitted to do so although he was never identified as an expert witness in discovery, and he was never qualified for such testimony before the Clarke County jury that found him guilty of aggravated domestic assault. Appellant's brief page 4-9.

To the contrary, the Appellee would submit that this issue was waived for failure to raise it with the trial court. The record reflects that it was not raised on the same grounds being raised on appeal.

The record reflects that the only objection raised during the testimony of Officer Kufel was that he was "not qualified." R. 106. Nor was the issue of Kufel allegedly improperly testifying as an "expert witness" mentioned in Hicks' Motion for a JNOV. C.P. 40.

In **Spicer v. State**, 921 So.2d 292, 305 (¶22)(Miss. 2006), the Court found that failure to make "a specific" contemporaneous objection waives an issue on appeal. An objection on one ground waives all other grounds on appeal.

Because Spicer did not object to testimony giving evidence of his fleeing from law enforcement officials, he is procedurally barred from appealing the issue. Failure to make a contemporaneous objection waives an issue for purposes of appeal. **Williams v. State**, 684 So.2d 1179, 1203 (Miss.1996) (contemporaneous objection rule is applicable in death penalty cases). Spicer claims that he made an objection; however, it is clear that the objection which he made merely challenged Sergeant Whites testimony on the basis that the events to which he was testifying were beyond the res gestae of the charged crime. An objection at trial on one or more specific grounds constitutes a waiver of all other grounds. **Doss v. State**, 709 So.2d 369, 379 (Miss.1996).

Without conceding that this issue was waived, the Appellee will also consider the merits. The record reflects that this issue is also lacking in merit. Officer Kufel testified about the wounds he saw on the alleged victim and assailant. This was based upon photographs he took the day of the incident. R. 106. He was also cross examined by the defense as to how he arrived at his conclusions concerning the comparative severity of the wounds and abrasions shown in these sets of photographs. R. 110-111.

The record reflects that during the testimony of Officer Kufel he was questioning about the photographs that he took of the crime scene, as well as of the alleged victim, Hick's 71 year old mother and Hicks himself. The mother, Ms. Villa Hicks, had already testified of being beaten by Hicks with an aluminum ironing board. R. 66-68. She identified photographs of the bent up ironing board streaked with blood, her blood stained gown, as well as photographs showing cuts, nicks and bruises to her head, neck and shoulders. The deep, irregular cut on her head was particularly noticeable as shown in exhibit 5 and 6. She testified that the blood seen on the ironing board was hers. R. 70. Ms. Hicks testified that as a result of the beating she had permanently lost sight in one of her eyes. R. 68. She also testified that she did not struggle with Hicks or strike him at any time. This was when she was unexpectedly attacked with the ironing board. R. 71-91. She testified that prior to the attack she did not have any of the injuries visible in the photographic exhibits. R. 77-78.

Ms.. Follins testified that Villa Hicks came to her house. She saw her standing at her door "bleeding" from her head. There was so much blood on her gown that it was "clinging to her body." She testified that she could see a visible injury "up by her head." R. 95.

Officer Kufel testified that he took photographs 2 through 10 as part of his investigation. R. 98-104. Kufel testified that when he arrested Hicks as a suspect, he informed him that he was defending himself. Hicks told Kufel that Villa "had got after him with a knife." R. 102. Kufel

photographed the scene of the alleged attack. He also took photographs of both Ms. Villa Hicks and her son, Mr. Hicks.

In connection with exhibit 9 and 10, Kufel testified that "small abrasions" appeared on Hicks' hands and his left knee. R. 105. These photographs were taken after Hicks claimed that "Ms. Hicks had attacked him." R. 105.

When Kufel was asked to compare "the injuries" from exhibits 9 and 10 (the photographs of the alleged injuries to Hicks' hand and knee) to the wounds of Ms. Villa Hicks there was an objection. The general objection was that Kufel was "not qualified" to compare the wounds of Ms. Villa Hicks to those of Mr. Hicks. However, the trial court overruled an objection to testimony about whether Kufel would expect to see the type of abrasions shown on Hicks' hand if he was defending himself "in a knife altercation." R. 106. Kufel answered that under those conditions, he would expect to see "a lot more severe injury." R. 107.

Q. All right. But let me ask you this: If someone was defending themselves in a knife fight from someone with a knife, defending themselves, would you expect to see the kinds of wounds that are associated with the pictures on pages 9 and 10 or something worse than that?

Falgout: Same objection, Your Honor.

Court: Overruled. I will let him answer. The photographs speak for themselves. He will be subject to cross examination.

A. If they were defending themselves from a knife wound, I would expect to see a lot more severe injury.

Q. Okay. And in 18 years, have you been associated with cases where people were defending themselves from knife attacks?

A. Yes, ma'am. R. 107.

On cross examination Officer Kufel was questioned about how he arrived at his conclusions. This was about the severity of Mr. Hicks wounds as shown on the photographic exhibits.

Q. Officer Kufel, I want to show you what has been previously marked into evidence as Exhibits 9 and 10 and we have got these as 4-A, 4-B, 4-C and 4-D, as to exhibit 9 and then also 5 A, B, C and D as to 10. As to what has been listed as 4-D, what does that picture portray?

A. It is what appears to be a scuff mark on a hand.

Q. As to picture 4-A there, what is that on Mr. Hicks' shirt, if you know?

A. It appears to be a blood stain.

Q. Okay. I show you exhibit 10 that has already been introduced into evidence and indicate to you picture 5-B. What does that show you in that picture?

A. It appears to be a scuff mark on the knee. R. 110.

On redirect, Officer Kufel testified that he did not know whether the alleged wounds on Mr. Hicks hand and knee were there prior to this incident. He testified that the abrasions on Hicks could have been the result of his using the metal ironing board to strike his mother. He testified that the spot of what appeared to be blood could have come from blood splatter coming off his mother when struck by the ironing board.

Q. Okay. Now, what you had termed as "scuff marks" on the hands and knees of Stacy Hicks on October 28th, do you have any way to know that those wounds were not there on October 27th of 2005?

A. No, ma'am.

Q. And when I referred to the exhibit 2, the ironing board, could these wounds on Stacy have been caused from that ironing board?

A. Yes, ma'am.

Q. Mr. Falgout showed you a picture 4-A and you talked about the blood stains on Mr. Hicks' shirt; is that correct?

A. Yes, ma'am.

Q. Okay. Could that have been from the blood on Ms. Villa Hicks?

A. That's what I believe it came from. R. 117.

Hicks testified in his own behalf. R. 125-143. He testified, in keeping with his pre-trial statement, that he was attacked by his mother. Hicks testified that the abrasions or scrapes on his hand and knee were cuts from his mother's knife. He denied hitting her with the ironing board. Rather he used it for "pushing her away" from him.

Q. Is it your testimony to this jury that all the wounds exhibited or portrayed in exhibit 8 and 10 were inflicted by your mother?

A. Yes, sir. R. 130.

...

Q. How many times do you think you hit your mother with the ironing board?

A. I never struck her with no ironing board. I was like this with it. I never did come over.

Q. So you weren't even hitting her with it. You were just pushing her away from you?

A. I was putting force behind it now, by me (unintelligible) I was putting force behind it. I ain't fixing to say she didn't get a few nicks or cuts from it. R. 143.

In **Newsom v. State** 629 So. 2d 611, *614 (Miss. 1993), the Mississippi Supreme Court found failure to admit testimony by the trial court was "harmless error." When viewed in light of the whole record, the court found that this failure did not affect "a substantial right" of the appellant.

This was under M. R. E. Rule 103(a) and the precedent of **Ponthieux v. State, infra**.

The trial court erred in excluding Holliman's testimony that he had seen Ternoir in fights before. However, we are not required to reverse a case based solely upon the showing of an error in evidentiary ruling. A denial of a substantial right of the defendant must have been affected by the evidentiary ruling; in this case, that right is the accused's right to a fair trial. **Ponthieux v. State**, 532 So. 2d 1239, 1248 (Miss.1988), Rule 103 (a), M. R. E.

Since the right to a fair trial, a constitutional right, is involved, reversal is required unless "on the whole record, the error was harmless beyond a reasonable doubt." **Hoover v. State**, 552 So. 2d 834, 840 (Miss.1989).

[3] On the whole record this error by the trial judge was harmless

The **Ramos v. State**, 710 So. 2d 380 (Miss. 1988), **Sample v. State**, 643 So. 2d 524 (Miss 1974), and **Frierson v. State**, 606 So. 2d 604 (Miss 1992) cases are distinguishable from the instant cause. In the instant cause, Officer Kufel testified about photographs that he took. They were provided in discovery. This was in addition to his personally observing the injuries when he took the photographs. These photographs clearly show differences between the size and shape of injuries to the hand and knee of Hicks as compared to the injuries to the head, neck and shoulder of Ms. Villa Hicks. These photographs show the relatively minor abrasion on Hicks' hand and knee compared to the obviously more serious injury particularly to the head of Ms. Villa Hicks. It was uncontested that Ms. Hicks lost use of one of her eyes from the beating. R.68.

Officer Kufel's testimony was based upon inferences from these photographs and his first hand knowledge of what these injuries looked like when he took them. Kufel was cross examined about how he made this inference, and interpreted what is shown on the photographs. In addition, Hicks' testimony was also directed at his own interpretation of what is seen on these photographs. R 129-130..

The Appellee would submit that from the record cited it can be seen that this issue was waived. It was waived for failure to make a specific objection or even to raise the issue with the trial court. R. 106; C.P. 40.

In addition, the record reflects that it was lacking in merit. No "substantial right" of Mr Hicks to a fair trial was violated. Mr. Hicks cross examined Officer Kufel about his conclusions, based upon facts in evidence. And he testified before the jury about these same photographs and other facts in his own self serving and uncorroborated testimony. This made issues about the nature and origin of Ms. Hicks injuries a jury question. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984).

CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 7th day of November, 2007.



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