

CASE NO.: 2007-KA-01268-COA

IN THE SUPREME COURT OF MISSISSIPPI

EDGAR LEE COMMODORE, JR.,)	
)	
Defendant - Appellant,)	
v.)	ORAL ARGUMENT REQUESTED
)	
STATE OF MISSISSIPPI,)	
)	
Plaintiff - Appellee.)	


CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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TABLE OF AUTHORITIES

CASELAW

<u>McGowen v. State</u> , 859 So.2d 320 (2003)	1
<u>Jackson v. State</u> , 551 So.2d 132 (Miss.1989)	1
<u>Whittington v. State</u> , 523 So.2d 966 (Miss.1988)	1

MISSISSIPPI RULES OF EVIDENCE

Rule 701	1, 2
Rule 702	1

ARGUMENT AND CITATION OF AUTHORITY

Appellant stands on the arguments and citations of authority as set forth in his initial brief. However, Appellant presents the following argument in reply to the State's responsive brief.

VI. THE CIRCUIT COURT ERRED WHEN, DESPITE OBJECTION BY DEFENDANT, IT ALLOWED TESTIMONY AS TO DEFENDANT'S INTENT

The State argues that, pursuant to Mississippi Rule of Evidence 701, the testimony of Brian Hill as to Defendant's intent was admissible opinion testimony. Defendant acknowledges that Rule 701 governs the testimony of lay witnesses, and in pertinent part it limits such testimony "to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." However, "Rule 701 does not open the door to any and all opinion testimony." McGowen v. State, 859 So.2d 320 (2003) citing Jackson v. State, 551 So.2d 132, 144-45 (Miss.1989) As this Court stated in Whittington v. State, 523 So.2d 966 (Miss.1988), a lay witness may not express his or her opinion on the ultimate issue being determined in a case.

Here, the trial court allowed Brian Hill and Roosevelt Hill to testify as to an ultimate issue in the case, to wit: whether Defendant's intent was to strike Hill with his vehicle, whether Defendant would have made an attempt to run over Hill with his vehicle after he left the driveway and whether Hill would have been injured had he been struck with Defendant's vehicle.

Additionally, Defendant asserts that Hill's testimony does not meet the criteria set forth in Rule 701. While Defendant concedes that the contested testimony was not based on scientific, technical, or other specialized knowledge within the scope of Rule 702, thus satisfying Rule 701(c), Defendant asserts that the testimony was neither (a) rationally based on the perception of the witness or (b) helpful to the clear understanding of the testimony or the determination of a fact in issue.

First, Brian Hill's testimony that he "fired one shot at the back tire of the vehicle. I ...did not hit the tire because I was worried that the vehicle was going to come back and try to run over me again." Is not based on any rational perception of the witness. There is no testimony that Defendant make any attempts to back the vehicle up such that he could attempt to strike Brian Hill. There was no testimony that Defendant made any turns which would indicate that the Defendant was attempting to strike Brian Hill with the vehicle. Hill does not testify

that the vehicle slowed or stopped, or that break or reverse lights came on as if Defendant were attempting to reverse or turn the vehicle around. The evidence indicates only that Defendant, who was unarmed and taken by surprise, was attempting to flee from a man armed with a firearm who was firing said firearm at the Defendant. Thus, Brian Hill's testimony that the Defendant's intent was to try and come back and hit him with the vehicle was not based on any rational perception. Brian Hill's testimony was also not helpful to the understanding of the testimony or the ultimate issue. Hill's opinion that the Defendant's intent was to come back and strike him with the vehicle only served to bolster the state's argument as to the Defendant's initial intent.

Likewise, Roosevelt Hill's testimony that the Defendant was trying to run Brian Hill over with the vehicle was not based on rational perception. Roosevelt Hill had already left the scene when Defendant was attempting to leave the premises. (T. 110, 154, 189, 200) Roosevelt Hill's perception that Brian Hill was standing in front of the vehicles in the driveway is insufficient to support a rational perception that the Defendant was trying to strike Brian Hill when Defendant drove away from the house.

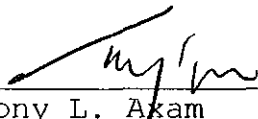
Defendant reasserts that his intent was a material issue in the case and it was error to allow witness opinion and speculative testimony, as to a material issue in the case.

CONCLUSION

For the reasons discussed above, and in the interest of justice, Defendant's judgment, conviction and sentence should be vacated or reversed.

This the 2nd day of June 2008.

Respectfully submitted,



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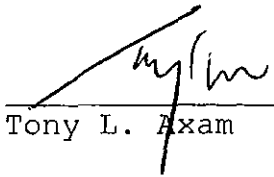
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply Brief Of Appellant Edgar Lee Commodore, Jr. upon opposing counsel by depositing a copy of the same in the United States Mail in an envelope with sufficient postage affixed thereto and properly addressed to ensure delivery to the following:

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This 2nd day of June 2008.

Respectfully Submitted,



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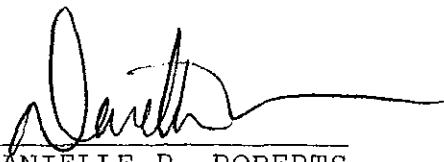
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CERTIFICATE OF FILING

I hereby certify that I, DANIELLE P. ROBERTS, an associate attorney at AXAMLAW, did this day, cause the Reply Brief of Appellant Edgar Lee Commadore, Jr. to be filed in the Supreme Court of Mississippi by depositing the original and five (5) copies in the United States Mail in an envelope properly addressed to ensure delivery to the Clerk of the Supreme Court of Mississippi and that I caused the envelope to be date stamped by the United States Postal Service.

This 2nd day of June 2008.


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