

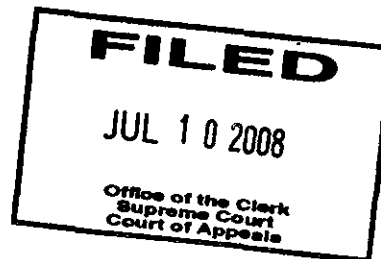
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DAVID WELDE

APPELLANT

VS.



NO. 2007-KA-1686

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. Testimony of Welde's acts immediately prior to the murder were correctly admitted pursuant to MRE 404(b) since they were so interrelated with the charged crime as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences and the evidence was more probative than prejudicial.
- II. The Trial Court correctly denied Welde's Motion for Change of Venue since the presumption that Welde could not receive a fair trial in Itawamba County was clearly rebutted in voir dire due to the very few jurors who had heard, read or watched any media coverage about the case.

SUMMARY OF THE ARGUMENT

Testimony of Welde's acts immediately prior to the murder were correctly admitted pursuant to MRE 404(b) since they were so interrelated with the charged crime as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences.

Welde's threat spoken to Hughes when he took Gillard to Power's house to try to collect a debt from Powers and the shot he fired into the sofa in Powers' home are highly probative to Welde's motive, intent, plan and identity as the murderer of Gillard. These crimes are far less heinous than the murder of Gillard. The Trial Court correctly determined that this evidence was more probative than prejudicial and allowed it into evidence. This assignment of error is without merit and the Trial Court should be upheld.

The Trial Court correctly denied Welde's Motion for Change of Venue since the presumption that Welde could not receive a fair trial in Itawamba County was clearly rebutted in voir dire due to the very few jurors who had heard, read or watched any media coverage about the case. The State can rebut the presumption that the defendant could not receive a fair trial by proving from voir dire that the trial court impaneled an impartial jury. *Holland v. State*, 705 So.2d 307, 336 (Miss.1997). During voir dire, the trial judge questioned the prospective jurors concerning whether they heard anything about this case in the news or from any other source. Welde's trial attorney also had the opportunity to inquire about the pre-trial publicity during voir dire. At the close of voir dire, the circuit judge again asked the prospective jurors whether anyone knew about the facts of this case from any source of information. The circuit judge was satisfied that Welde could receive a fair trial; therefore, he denied the motion for change of venue.

ARGUMENT

I. Testimony of Welde's acts immediately prior to the murder were correctly admitted pursuant to MRE 404(b) since they were so interrelated with the charged crime as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences.

~~"[W]hen the evidence is so interrelated as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences proof of the other crime or act is admissible."~~ *Hall v. State*, 760 So.2d 817 (Miss. Ct. App. 2000) (citing *Ballenger v. State*, 667 So.2d 1242 (Miss. 1995)). ~~It is not the purpose of MRE 404(b) to~~ so as not to confuse the jury, evidence of other crimes or bad acts is admissible. *Id.* The State has "a legitimate interest in telling a rational and coherent story of what happened." *Hall v. State*, 760 So.2d 817 (Miss. Ct. App. 2000) (citing *Mackbee v. State*, 575 So.2d 16, 28 (Miss. 1990)).

Evidence of other wrongful acts may be admitted for evidentiary purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident pursuant to M.R.E. 404(b). ~~Evidence of other crimes or bad acts is admissible if the present case and the other offense are "so interrelated as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences."~~ *Ott v. State*, 742 So.2d 1197 (Miss. 1999) (citing *Neal v. State*, 451 So.2d 743, 759 (Miss. 1984)). The rationale for admitting evidence of certain closely related acts is that the State "has a legitimate interest in telling a rational and coherent story of what happened." *Ott v. State*, 742 So.2d 1197 (Miss. 1999) (citing, *Brown v. State*, 483 So.2d 328, 329 (Miss. 1986)). It is in the trial court's discretion to determine the relevancy of the evidence, and his decision will not be reversed unless there is a clear abuse of discretion. *Ott v. State*, 742 So.2d 1197 (Miss. 1999).

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The events on the morning of the murder of Donald W. Gillard, II, involving Welde and other persons were so interrelated with the incident with Gillard as to constitute a single transaction or occurrence, or at least a closely related series of transactions or occurrences. The testimony indicated and was material to proving knowledge and motive, intent and planning on the part of Welde and there was an apparent relationship or connection between those actions and the murder of Gillard. These events were closely related in time and place with the murder of Gillard.

The Trial Court carefully considered and found that the testimony related to Gillard's statement and the other related events were relevant and that pursuant to Rule 403, that the probative value of the evidence was not substantially outweighed by its prejudicial effect.

The evidence at trial showed that on December 31, 2004, Donald Gilliard was murdered by David Welded and Charles Miles. Gilliard owed Welde money and on the morning of December 31, 2004, Welde went to Gilliard's home. Gilliard's roommate, Doyle Higgins opened the door. Welde told him that the best thing he could do would be to go back to bed. Higgins refused, saying it was his own house. Welded handed him a bullet and told him that "You are a good man. You need to stay that way." Gilliard was afraid of Welde and asked Welde whether or not he was going to ambush him, but Welde gained Gilliard's confidence, telling him, "Let's go down to the Huddle House and drink a cup of coffee. We'll get this all straightened out." Instead, Welde took Gilliard to the home of co-conspirator Charles Miles. Welde and Miles then took Gilliard to the home of Mr. Powers who also owed Welde money. Powers was afraid of Welde and hid in the back room. Gilliard went into the house and talked with Ashley Hughes, Powers' girlfriend. Welde came in the front door with a pistol, stated that he wanted his money

from Powers and that if he can't get it one way, he'll get it another. Welde then shot the pistol into the couch. Miles and Welde then drove away with Gillard.

Miles was driving, Gillard was in the passenger seat and Welde was in the backseat behind Gillard. Miles gave Welde a sign in the rearview mirror. Miles and Welde pulled out their guns. Welde handed his gun to Miles and held Gillard while Miles shot him in the face. Miles then handed the gun back to Welde who then shot Gillard in the base of his neck. Miles reached over and opened the car door and Welde then slid Gillard out of the car onto the side of the road.

Welde argues that Hughes' testimony that Welde returned to her house about an hour later with Gillard, that Welde pulled out a gun and stated "you see this right here? I was told to take this and put it to your forehead and pull the trigger" and that Welde then put the gun to the couch and pulled the trigger, shooting a hole in the couch was inadmissible as prior bad acts testimony. This is an integral part of the sequence of events during which Welde was moving down the path of gathering and threatening each person who owed him money. This is part of the stream of events that was used to terrorize Gillard immediately prior to his murder. Further the bullet that was recovered from the couch matched the bullet that killed Gillard and was therefore a necessary part of the prosecution's proof. The prosecution is entitled to tell a complete, rational and coherent story of what happened in the course of the crime. These events are close in time to the crime, the murder of Gillard, and involve both the victim and the two co-conspirators. They are related to the same subject matter of debts owed to Welde, since Powers and Gillard both owed Welde money which he was apparently attempting to collect by violence on that morning. These events are clearly linked by motive, intent and planning.

Welde also argues that this evidence fails the 403 test and that the evidence is more prejudicial than probative. However, these events are clearly probative, since they reveal Welde's intentions and motive for killing Gillard and they prove that Welde murdered Gillard, since the bullet from the couch matches the bullets that killed Gillard. The value of this evidence clearly outweighed the prejudicial effect, since if the defendant were presumed to act in conformity with this evidence, it would have been presumed that he would not kill Gillard, but threaten and frighten him. These acts are far less heinous than the crime that Welde committed against Gillard and therefore cannot be more prejudicial than probative to the murder of Gillard.

The trial court was correct in allowing this evidence. This issue has no merit and the decision of the trial court should be upheld.

II. The Trial Court correctly denied Welde's Motion for Change of Venue since the presumption that Welde could not receive a fair trial in Itawamba County was clearly rebutted in voir dire due to the very few jurors who had heard, read or watched any media coverage about the case.

Welde argues that because of the publicity and media coverage, the judge should have granted his request for a change of venue. Welde's amended motion for a change of venue was supported by affidavits from two citizens, employees at the local Subway sandwich shop, who stated that Welde could not receive a fair and impartial trial in Itawamba County. Welde also called a pizza restaurant employee in Itawamba County to testify that she came in contact with many people who had heard about the case. Area newspaper articles and several videotapes containing news reports regarding the case were introduced into evidence at the trial. There was one article in the Itawamba County Times, dated January 5, 2005, stating that Welde was in custody. The sheriff was quoted as saying "We feel confident we have the suspects responsible

for Mr. Gilliard's death in jail." Another article in the Itawamba County Times indicated a continuing investigation and stated that Welde and two other suspects were in jail on a million dollar bond. There were two Daily Journal articles entered into evidence as well, citing the same quote from the Sheriff.

At a the pre-trial hearing, the state presented five witnesses, Itawamba County Supervisors from different districts, who testified that Welde could receive a fair trial in Itawamba County. After hearing the arguments of both parties and reviewing the news articles and videotapes, the circuit judge took the matter under advisement.

~~The State argues that the presumption that the defendant could receive a fair trial by~~
~~proceeding in Itawamba County is rebutted by the trial court's finding of prejudicial publicity. *Holland v. State*, 705~~
~~So.2d 307, 336 (Miss.1997). The trial judge, in the trial judge's opinion, the prospective jurors~~
~~could not have been impartial because they had seen or read about this case in the news or from any other source.~~
~~The State also argues that the publicity was not prejudicial because the trial judge, during voir~~
~~dire. At the close of voir dire, the trial judge asked the prospective jurors whether anyone~~
~~known about the facts of this case from any source of information. The trial judge testified~~
~~that the prospective jurors first in the jury pool had seen the news coverage.~~

Motions for a change of venue are left to the trial court's sound discretion. *Davis v. State*, 767 So.2d 986, 993 (Miss.2000); *Hickson v. State*, 707 So.2d 536, 542 (Miss.1997). Based upon a review of the record, Welde could and did receive a fair trial in Itawamba County. This case passes the two-part test found in *Holland* which looks at the extent of media coverage and its inflammatory nature, as well as the effect upon the prospective jurors. *Holland*, 705 So.2d at 336-37. ~~The jury was sworn and the trial proceeded and the effect the verdict were removed, and~~

those jurors who remained stated that their knowledge would not prevent them from serving impartially. *Id.*

Based upon a review of the record, the news coverage appears objective. As for the extent of the coverage, there was a sprinkling of newspaper articles and television news coverage at the time of the murder and arrest of the suspects and then at the beginning of trial. However, there was little or no coverage between initial reports of the murder the beginning of the trial.

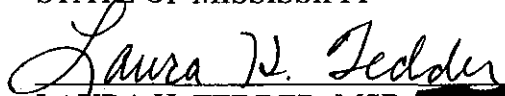

~~Furthermore, the trial judge's decision to deny the motion for a change of venue was not an abuse of discretion.~~
~~Id.~~ *Box v. State*, 610 So.2d 1148, 1153 (Miss.1992). Based upon a review of the record, Welde received a fair and impartial jury. Therefore, this assignment of error is without merit and the circuit judge did not abuse his discretion in denying the motion for a change of venue.

CONCLUSION

Welde's assignments of error are without merit and the rulings of the Trial Court should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

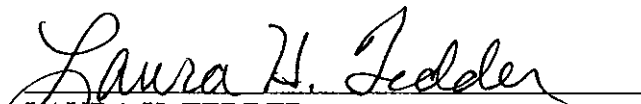
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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