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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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ANTHONY THOMAS

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APPELLANT

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SUPREME COURT
COURT OF APPEALS**

VS.

NO. 2007-KA-1781

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. WHILE THE DEFENDANT DID OPEN THE DOOR TO CROSS EXAMINATION REGARDING HIS PRIOR CONVICTION, THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN ON THE RECORD ANALYSIS OF THE *PETERSON* FACTORS; HOWEVER, THE ERROR WAS HARMLESS IN LIGHT OF THE OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT AND AS IT DID NOT UNFAIRLY PREJUDICE THE DEFENDANT'S CASE.
- II. THE SECOND ISSUE RAISED BY THE DEFENDANT DOES NOT CONSTITUTE REVERSIBLE ERROR AS THE DEFENDANT SUFFERED NO PREJUDICE IN THAT THE JURY WAS ALLOWED TO HEAR TESTIMONY REGARDING THE VICTIM'S USE OF ALCOHOL AND MARIJUANA ON THE NIGHT IN QUESTION.
- III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO SEVER, NOR DID IT ERR IN REFUSING TO ALLOW THE DEFENDANT TO STIPULATE TO A PRIOR CONVICTION OF AGGRAVATED ASSAULT.

STATEMENT OF THE FACTS

Forty-four year-old Karen Burks moved to Jackson after Hurricane Katrina. (Transcript p. 212). She found a home and eventually allowed her boyfriend, the Defendant Anthony Thomas, to move in with her. (Transcript p. 213). On May 21, 2006, the two went grocery shopping. (Transcript p. 214). After unloading the groceries, Thomas left Ms. Burks at the house and returned several hours later. (Transcript p. 215). Shortly after, the two began to argue. (Transcript p. 215). At some point during the argument, Thomas put his hand over Ms. Burks' mouth, told her that he was going to kill her, and began stabbing her with a butcher knife from their kitchen. (Transcript p. 216 - 217). Ms. Burk was unable to defend herself as she weighed less than one hundred pounds and had lost the use of her left arm years earlier in a car accident. (Transcript p. 213 - 214). Thomas left the house and Ms. Burk made her way to her neighbor's house to get help. (Transcript p. 217).

When Officer Jerick Taylor arrived, he found Ms. Burk "lying on her back covered in blood, obviously in pain." (Transcript p. 189). Ms. Burk informed Officer Taylor that "her boyfriend had stabbed her" and that he had stabbed her "twice." (Transcript p. 191). Ms. Burk was able to give the officer Thomas' name and a description. (Transcript p. 192). Ms. Burk was taken to the hospital and was hospitalized for three and a half weeks. (Transcript p. 220).

Thomas was later arrested and charged with aggravated assault and possession of a weapon by a convicted felon. He was tried and convicted of both charges and sentenced to life in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

Thomas opened the door to cross examination regarding his prior conviction. While the trial court erred in failing to conduct an on-the-record *Peterson* analysis, the error was harmless in light of the overwhelming evidence of Thomas' guilt. Further, the error did not prejudice Thomas as there was already testimony before the jury regarding his prior conviction as part of the State's proof that Thomas was a convicted felon in possession of a weapon. Additionally, Thomas is not entitled to a new trial on the grounds that he was not allowed to cross-examine Ms. Burk regarding her drug and alcohol use on the night in question as the jury was allowed to hear testimony from both Thomas and Dr. Hunter Mafera regarding Ms. Burks alcohol and drug use on the night in question.

The trial court properly denied Thomas' motion to sever and properly refused to allow Thomas to stipulate to his prior conviction as Mississippi law clearly establishes that when a prior conviction is an element of a crime, the State is authorized to introduce evidence of the conviction and is not limited in its method of proof.

ARGUMENT

I. WHILE THE DEFENDANT DID OPEN THE DOOR TO CROSS EXAMINATION REGARDING HIS PRIOR CONVICTION, THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN ON THE RECORD ANALYSIS OF THE *PETERSON* FACTORS; HOWEVER, THE ERROR WAS HARMLESS IN LIGHT OF THE OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT AND AS IT DID NOT UNFAIRLY PREJUDICE THE DEFENDANT'S CASE.

Thomas first argues that "the trial court erred in permitting the prosecutor to inquire into details of a 1999 aggravated assault conviction." (Appellant's Brief p. 7). "The admissibility of evidence is within the discretion of the trial court, and absent abuse of that discretion, the trial court's decision on the admissibility of evidence will not be disturbed on appeal." *Porter v. State*, 869 So.2d 414, 417(Miss. Ct. App. 2004) (citing *McCoy v. State*, 820 So.2d 25, 30 (Miss. Ct. App.2002)).

Furthermore and most importantly, “the admission or exclusion of evidence must result in prejudice or harm, if a cause is to be reversed on that account.” *Id.* (emphasis added).

The Mississippi Supreme Court has held that “[w]hen a criminal defendant elects to take the witness stand in his own defense he is subject to being impeached under Rule 609 M.R.E., with evidence of prior convictions.” *Bogard v. State*, 624 So.2d 1313, 1316 (Miss. 1993) (quoting *Hawkins v. State*, 538 So.2d 1204, 1206 (Miss. 1989)). “It is well established that if a defendant opens the door to the admission of otherwise inadmissible evidence, the State then may proceed to question further into the matter.” *Moss v. State*, 977 So.2d 1201, 1210 (Miss. Ct. App. 2007). During his direct examination, Thomas testified that he “don’t carry pistols.” (Transcript p. 384). During cross-examination, Thomas was asked whether he testified that he did not carry a pistol. (Transcript p. 387). Thomas replied, “I don’t carry a pistol no more because I’m a convicted felon.” (Transcript p. 387). Thus, Thomas opened the door to be questioned regarding his prior conviction of aggravated assault for shooting a woman with a pistol. However, at this point, the trial court should have conducted an on-the-record analysis of the *Peterson* factors. *Peterson v. State*, 518 So.2d 632 (Miss.1987).

The trial court’s failure to conduct an on-the-record analysis is harmless error. This Court held the following in that regard in *Williams v. State*:

The Mississippi Supreme Court in *DeLoach v. State*, 722 So.2d 512(¶ 34) (Miss.1998), held that, although not completing the balancing test set forth in Mississippi Rules of Evidence 609 was an error, if the error were harmless based on the overwhelming evidence of the State, it would not constitute a reversible error. This Court finds that even though the trial judge was required to conduct a balancing test on-the-record, his failure to do so was harmless when viewed in connection with the overwhelming weight of evidence the State had prepared concerning [the defendant's] guilt.

819 So.2d 532, 541 (Miss. Ct. App. 2001) (*emphasis added*). In the case at hand, there was overwhelming evidence that Thomas stabbed Ms. Burks and that he was a convicted felon in possession of a weapon. Ms. Burks told investigators that Thomas was the person who stabbed her (Transcript p. 191 - 192), she identified him in a photo line up as the person who stabbed her (Transcript p. 284), and she specifically testified at trial that Thomas was the person who stabbed her (Transcript p. 216 - 217). Moreover, Thomas, while denying that he actually stabbed her, admitted that he was the only other person in the house at the time Ms. Burks was stabbed. (Transcript p. 381 - 382). Additionally, there was testimony that it was extraordinarily unlikely that Ms. Burks could have inflicted these life threatening wounds upon herself. (Transcript p.364 and 366). There was also more than sufficient evidence that Thomas was a convicted felon in possession of a knife. (Transcript p. 285 - 286, 298, and 390).

Furthermore, this Court has previously held that “to warrant reversal on an issue, a party must show both error and a resulting injury” and that “an error is only grounds for reversal if it affects the final result of the case.” *Vardaman v. State*, 966 So.2d 885, 891 (Miss. Ct. App. 2007). In this case, not only was there overwhelming evidence of Thomas’ guilt but the evidence which Thomas claims was prejudicial was already before the jury in that the jury had already heard testimony that Thomas was convicted in 1999 of aggravated assault. (Transcript p.298). Additionally, a limiting instruction was given instructing the jury that testimony that Thomas was a convicted felon “must not be used as evidence of guilt as to count one of the indictment, aggravated assault.” (Transcript p. 325). Accordingly, the trial court’s failure to address the *Peterson* factors on the record was harmless error and, as such, does not require reversal.

II. THE SECOND ISSUE RAISED BY THE DEFENDANT DOES NOT CONSTITUTE REVERSIBLE ERROR AS THE DEFENDANT SUFFERED NO PREJUDICE IN THAT THE JURY WAS ALLOWED TO HEAR TESTIMONY REGARDING THE VICTIM'S USE OF ALCOHOL AND MARIJUANA ON THE NIGHT IN QUESTION.

Thomas also alleges that the “the trial court abused its discretion when it barred inquiry by Mr. Thomas into the drug and alcohol use of Karen Burks, as it bore on her credibility and state of mind.” (Appellant’s Brief p. 14). Acknowledging that the jury was informed that Ms. Burks had used alcohol and drugs on the night in question during Dr. Mafera’s testimony, Thomas argues that he should have been allowed to cross-examine Ms. Burks regarding her alcohol and drug use on the night in question as “it is entirely possible that Burks would have been unable to recall for the jury the use of any alcohol or illicit drugs that night” and she was unable to “remember what the couple was arguing about May 21.” (Appellant’s Brief p. 15). However, as noted above, it is well established Mississippi law that “the admission or exclusion of evidence must result in prejudice or harm, if a cause is to be reversed on that account.” *Porter v. State*, 869 So.2d 414, 417(Miss. Ct. App. 2004).

In the case at hand, any error in not allowing the cross-examination of Ms. Burks regarding her drug and alcohol use on the night in question¹ cannot be reversible error as there was ample testimony before the jury regarding Ms. Burks alcohol and drug use on the night in question. First, Thomas himself testified that “I come back. She’s drunk, not drunk but over - - she ain’t over drunk, she’s more drunker - - she’s more higher than I am drunk, you know what I’m saying, done drunk more beers, you know, whatever.” (Transcript p. 381). Additionally, Dr. Hunter Mafera gave the

¹ The State is certainly not conceding that the trial court committed error. The State is simply pointing out that Thomas suffered no prejudice as a result of this ALLEGED error. In fact, the trial court stated on the record in ruling on the State’s Motion to Exclude Evidence that it was merely granting the motion “at least as of this time.” (Transcript p. 34). At the close of Ms. Burkes’ direct testimony Thomas never requested that the judge reconsider its ruling and allow him to cross-examine Ms. Burks about her alcohol and drug use on the night in question.

following testimony:

Q: In Ms. Burks' case who gave you the history?

A: Ms. Burks

* * *

Q: . . . And what kind of history was she able to give you as far as allergies and things like that?

A: . . . But the history that was given to us by her that there was alcohol and marijuana use. And this was confirmed also by the JPD officers that were there on the scene.

(Transcript p. 411 - 412). Again as noted above, "to warrant reversal on an issue, a party must show both error and a resulting injury" and that "an error is only grounds for reversal if it affects the final result of the case." *Vardaman v. State*, 966 So.2d 885, 891 (Miss. Ct. App. 2007). In this case, not only was there no error but there was certainly no resulting injury as there was ample testimony before the jury regarding Ms. Burks' alcohol and drug use on the night in question.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO SEVER, NOR DID IT ERR IN REFUSING TO ALLOW THE DEFENDANT TO STIPULATE TO A PRIOR CONVICTION OF AGGRAVATED ASSAULT.

Thomas asserts that the "trial court erred in denial of the Motion to Sever by Mr. Thomas, denying him his fundamental fair trial rights." (Appellant's Brief p. 16). "A trial court's denial of a motion to sever multiple counts in a single indictment is reviewed for abuse of discretion." *Dimaio v. State*, 951 So.2d 581, 585 (Miss. Ct. App. 2006) (citing *Rushing v. State*, 911 So.2d 526, 532 (Miss. 2005)). Mississippi Code Annotated §99-7-2(1) states that "[t]wo or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan." This Court addressed a similar issue in *Wright v. State*, a case in which the defendant sought to have the charge of armed robbery severed from the charge of felony in possession of a

firearm. 797 So.2d 1028, 1029 - 1030 (Miss. Ct. App. 2001). After quoting Mississippi Code Annotated §99-7-2, the Court held:

We find no authority limiting the applicability of this portion of the multi-count indictment statute simply because some element of the necessary proof as to one charge would be inadmissible on the other charge were it being tried separately. It is, in fact, difficult to envision a trial of multiple charges where some evidence relevant to one charge would not be subject to a Rule 404(b) challenge as to the other charge, no matter how closely related in time and circumstances the two alleged crimes might be. It is often the case that evidence is admissible for a limited purpose and inadmissible for some other purpose. In that case, the answer is not to exclude the evidence altogether, but to admit it subject to the jury being instructed as to the limited purpose for which the information is admitted.

Id. (emphasis added). In the case at hand, there is no dispute that Thomas' possession of the knife is interwoven in his stabbing Ms. Burks as the knife was used to stab her. Furthermore, the judge gave a limiting instruction just as the judge in *Wright v. State*. Thus, the court acted within its discretion in refusing to sever the counts as requested by Thomas.

Thomas further argues that the trial court erred in refusing to allow Thomas to stipulate to a prior conviction with regard to the charge of possession of a firearm by a convicted felon. (Appellant's Brief p. 16). Again, the trial court acted within its discretion in denying Thomas his request to stipulate to the prior conviction. See *Carter v. State*, 941 So.2d 846, 854 (Miss. Ct. App. 2006) and *Evans v. State*, 802 So.2d 137, 140 (Miss. Ct. App. 2001) (both holding that "[w]hen a prior conviction is an element of a crime, the State is authorized to introduce evidence of the conviction and is not limited in its method of proof"). Moreover, as noted above, the trial judge gave a limiting instruction charging the jury to consider the testimony regarding Thomas' previous felony conviction with regard only to the charge of possession of a firearm by a convicted felon and not as evidence of guilt as to the charges of aggravated assault. "Jurors are presumed to follow the instructions of the court." *Long v. State*, 934 So.2d 313, 316 (Miss. Ct. App. 2006) (citing *Grayson*

v. *State*, 879 So.2d 1008, 1020 (Miss.2004)). Thus, Thomas' third issue is without merit.²

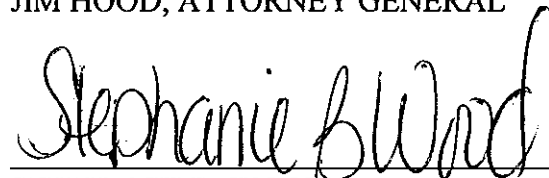
CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Anthony Thomas as he was not denied a fair trial and as there was overwhelming evidence of his guilt.

Respectfully submitted,

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² The State does recognize that this Court's decision in *Sawyer v. State*, 2007-KA-00136COA (July 1, 2008) is contrary to the position taken in this brief. However, the State is in the process of filing a motion for rehearing in *Sawyer v. State* in light of the numerous Mississippi cases supporting the position taken by the State in this brief, including but not limited to: *Wright v. State*, 797 So.2d 1028 (Miss. Ct. App. 2001); *Carter v. State*, 941 So.2d 846, 854 (Miss. Ct. App. 2006); *Evans v. State*, 802 So.2d 137, 140 (Miss. Ct. App. 2001); *Ferguson v. State*, 856 So.2d 334 (Miss. Ct. App. 2003) (trial court's decision to allow evidence of three prior felonies without limiting instruction in order to establish that defendant was a convicted felon in possession of a weapon was upheld); *Armstead v. State*, 978 So.2d 642 (Miss. 2008) (holding that "whenever a defendant is tried on a multi-count indictment, the possibility that a jury will infer guilt on all counts from guilt on one individual count does not warrant reversal so long as the jury is instructed that each count must be considered separately by substantial evidence and proven beyond a reasonable doubt"); and numerous DUI cases with similar circumstances such as *Smith v. State* 950 So.2d 1056, 1060 (Miss. Ct. App. 2007) (holding that "since the State is required to prove all the essential elements of the crime charged, it was not unfair prejudice to present evidence of prior DUI convictions").

CERTIFICATE OF SERVICE

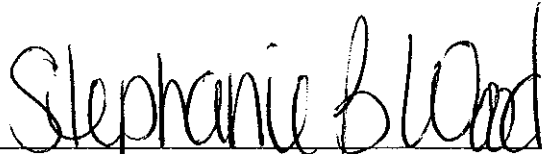
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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