2008-KA-00968 SCTR+

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES:

ARGUMENT

I. WHETHER THE LOWER COURT ERRED IN NOT GRANTING A MISTRIAL AND BY NOT DISMISSING THE JURY VENIRE

During voir dire, a female member of the venire expressed to the lower court and the entire venire that she could not be impartial and called the Defendant an "abortionist". The Defendant moved for a mistrial due to these highly prejudicial and inflammatory remarks.

The State cites to *Davis v. State*, 850 So.2d 176, 179 (Miss. App. 2003) in asserting that the trial Court did not err in denying Defendant's Motion for Mistrial during jury selection. In *Davis*, a member of the venire merely stated the he knew the alleged victim and found him to be a credible person. The lower court polled the jury and overruled the defendant's motion for mistrial.

The mere acknowledgment of a witness in *Davis* can hardly be said to be prejudicial and inflammatory, especially in comparison to the present case where the Defendant was called an "abortionist". Therefore, *Davis* is inapplicable to this case. It goes without saying that many equate abortion with murder. As a murder case, the juror's comment in the present case prejudiced the jury pool by placing a label upon the defendant that carries with it a "pattern of deep and bitter prejudice." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). Where such comments are made, the prejudicial effect to the jury will not be cured even by polling or admonishing the jury:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father...You can't forget what you hear and see.

Irvin v. Dowd, 366 U.S. 717, 728 (1961).

Therefore, the lower court erred in overruling Defendant's motion for mistrial and motion to have the venire dismissed, and the Defendant should have had a jury that did not possess "a belief in his

guilt". *Id.*

II. WHETHER THE LOWER COURT ERRED IN ALLOWING THE TESTIMONY OF DR. PATEL

Defendant asserts on appeal that the lower court erred in allowing Dr. Patel to testify over objection as to statements allegedly made by the Defendant to the alleged victim, Nyasha DeHenre (Ms. DeHenre) at a meeting where Dr. Patel counseled the Defendant and Ms. DeHenre, on the basis that: 1. said information was protected by the physician patient privilege, and 2. that the alleged threat was too remote in time.

II. A. DID DR. PATEL IMPROPERLY TESTIFY AS TO INFORMATION PROTECTED BY THE PHYSICIAN PATIENT PRIVILEGE?

As to the claim of privilege, the State on appeal does not respond to this alleged assignment of error, with any facts or authority. The only thing provided by the State on this issue is a one sentence statement that "[t]here was no medical privilege regarding the statement." Appellee Brief. P. 8.

An appellee is required to provide to the Court authorities and facts in support of its argument. *Steadham v. State*, 995 So.2d 835, 837 (Miss. App. 2008). It is the duty of the State and not for this Court to "brief the appellee's side of the case." *Turner v. State*, 383 So.2d 489, 490 (Miss. 1980). Since the State fails to make any response to this assignment or error, other than a mere declaratory statement devoid of reasoning or supported by facts or authority, the "failure to respond is tantamount to confession of error." *Id.*

Instead of addressing the issue of the patient client privilege, the State curiously argues that the aforementioned information was admissible since it was not hearsay and was not

protected by the marital privilege. [Appellee Brief. 7-8] Said argument by the State is irrelevant and completely unrelated to this assignment of error (i.e. issue of patient client privilege).

The State's failure and inability to respond on this issue indicates that the information is indeed protected by the patient client privilege. Moreover, the testimony of Dr. Patel clearly and unambiguously sets forth facts demonstrating that the alleged statements made by the Defendant were protected by the patient client privilege.

Pursuant to Mississippi Rule of Evidence 503, a "patient" has a privilege to refuse to disclose and to prevent any other person from disclosing knowledge derived by a "physician" by "virtue of his professional relationship with the patient."

The first element of this privilege is whether the Defendant was a "patient", which is defined as a person who consults or is examined or interviewed by a physician or psychotherapist. Therefore, it must also be determined whether Dr. Patel is a "physician", defined as a person authorized to practice medicine in any state. The record clearly indicates that Dr. Patel was acting as physician at the aforementioned session since he counsels as part of his profession as a physician licensed in the State of Mississippi. [T. 164-166]. In fact, Dr. Patel twice admitted that he called the meeting to specifically counsel the Defendant and Ms. DeHenre. *Id.* Moreover, Dr. Patel utilized his professional skills and abilities to counsel the Defendant and Ms. DeHenre at this meeting. *Id.*

Therefore, the Defendant was clearly a patient and the aforementioned information was learned by Dr. Patel as a physician by virtue of his education training and experience in counseling the Defendant and Ms. DeHenre. As such, the lower court erred in overruling Defendant's objection to prevent Dr. Patel from testifying about said privileged information.

MRE 503. This error is also confessed by the State, due to the fact that the State failed to make any response or cite to any facts or authority on this issue. See above, *Steadham v. State*, 995 So.2d 835, 837 (Miss.App.2008); *Turner v. State*, 383 So.2d 489 (Miss.1988).

II. B. WHETHER DR. PATEL'S TESTIMONY INVOLVED MATTERS TOO REMOTE IN TIME

On February 5, 1997, within two weeks of Nyasha's death, Dr. Patel gave a detailed, two-page, written, statement to the police about facts that he knew at that time [T. 165-166]. The statement was also signed by Dr. Patel. No where, in this two page statement, did Dr. Patel mention this very highly prejudicial statement allegedly made by Dr. DeHenre. *Id.*

The State cites to *Stallworth v. State*, 797 So.2d 905 (Miss. 2001) and *Webster v. State*, 755 So.2d 451 (Miss. Ct. App.) in arguing that the lower Court did not err in finding that this statement was admissible. *Webster* and *Stallworth* are inapplicable to the present case in that they address the admissibility of prior convictions that were so related to the charged crime that they are "interconnected." Specifically, the *Stallworth* Court held that a domestic violence conviction was admissible since it was supported by the following facts that were held to be so "interconnected" to form a single transaction:

> the victim of the two crimes was the same, a knife was involved in both crimes, Stallworth was alleged to have committed the murder within two hours of his release from prison on the domestic violence conviction, and an allegation had been made that Stallworth expressed his intention to seek revenge upon his victim while in prison. Given these facts, the trial judge did not abuse his discretion by ruling that Stallworth's prior conviction was "interconnected" with the charged crime and was therefore admissible.

Stallworth v. State, 797 So.2d 905, 910 (Miss. 2001)

In contrast, the present case deals with an alleged threat that is completely *isolated* and unsubstantiated by any other facts. Moreover, the alleged threat itself, unlike the convictions in *Stallworth* and *Webster*, are not only unconnected to any other facts but are also at best suspect in that the alleged threat mysteriously appeared approximately twelve years later and presented by a witness who admits to have had a close relationship with the alleged victim [T. 163]. As such, there is a separation of time and motive between the alleged threat in this case and the charge, and is therefore, highly prejudicial and too remote in time to be relevant and admissible. *West v. State*, 463 So.2d 1048 (Miss. 1985); *Stewart v. State*, 226 So.2d 911 (Miss. 1969).

III. WHETHER THE COURT ERRED IN ALLOWING DR. HAYNE TO TESTIFY

In this assignment of error, Defendant contends that the lower Court erred in overruling Defendant's objection to Dr. Hayne testifying as to his opinion on the cause and manner of death in the case. Defendant further raised this issue in his Appellant Brief. Defendant has demonstrated that the autopsy in this case is fraught with mistakes and that Dr. Hayne's opinions are unreliable as has been observed in other cases. Specifically, Dr. Hayne's opinion is based on his conclusion that the gunshot in this matter was a "distant gunshot" because there was an absence of certain marks around the entrance wound (i.e. tattooing and stippling). However, said conclusion is unreliable in that Dr. Hayne failed to take into account the presence of hair as an intervening object that can effectively prevent tattooing and stippling in close range gunshots. Dr. Hayne's opinion is additionally unreliable in that he failed to microscopically examine the inside tract of the wound. [R. 55-56].

The State's Appeal Brief fails to address these gross inadequacies in Dr. Hayne's opinion. Instead, the State attempts to gloss over them by citing to a case holding that Dr. Hayne is

qualified as an expert in pathology. Even assuming arguendo that Dr. Hayne is qualified to testify as an expert, his opinions must still be reliable to be admissible, under the following criteria:

> if (1) the [opinion] is based upon sufficient facts or data, (2) the [opinion] is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Treasure Bay Corp. v. Ricard, 967 So.2d 1235 (Miss. 2007).

The Court in *Treasure Bay* held that Dr. Hayne's opinion was unreliable even though he was qualified to testify as an expert. *Id.* In that matter, Dr. Hayne opined that a patron was visibly intoxicated when he left *Treasure Bay*. However, Dr. Hayne did not know how much the patron had consumed while at *Treasure Bay* or prior to arriving at *Treasure Bay*, nor was there any other evidence to indicate that the patron was intoxicated when he left *Treasure Bay*. Therefore, the Court held that Hayne's opinion was baseless in fact and therefore unreliable. *Id.*

Likewise, it was held in *Edmonds* that; "[w]hile Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert carte blanche to proffer any opinion he chooses." *Edmonds v. State*, 955 So.2d 787, 792 (Miss.2007) (Dr. Hayne offered off-the-cuff" opinion that murder weapon may have been fired by two people having their finger(s) on the trigger at same time).

Dr. Hayne's conclusion in this matter as to homicide is another example of his "off-the-cuff" opinions. His conclusion was based on his opinion that the fatal gunshot was from a distant range. Hayne claims that it was "distant" because he did not see any tattooing or stippling around the entrance wound. However, Dr. Hayne failed to take into account the presence of hair as an intervening object that can effectively prevent tattooing and stippling even in close range

gunshots. Additionally, he did not microscopically examine the inside tract of the entrance wound. Therefore, as in *Edmonds* and *Treasure Bay*, Dr. Hayne's opinion in the present case "is not based upon the facts" and should not have been admitted, even assuming as argued by the State that Dr. Hayne is qualified to testify as an expert in this matter. *Treasure Bay Corp. v. Ricard*, 967 So.2d at 1242 (Miss. 2007); *Edmonds*, 955 So.2d at 792 (Miss.2007).

IV. DID THE COURT ERR IN ALLOWING DR. BADEN TO TESTIFY?

Likewise, the Defendant on appeal asserted that the lower Court erred in allowing, over Defendant's objection, Dr. Baden to testify in this matter as to the causation and manner of death, on the basis that Dr. Baden's opinions were unreliable and inadmissible. The Defendant additionally argued that the testimony of Dr. Baden was inadmissible as a needless presentation of cumulative evidence. The State once more failed to address the specific factual allegations made by the Defendant on this issue. Instead, the State merely restates general law as to the admissibility of expert testimony. The aforementioned facts, cited by the Defendant at pretrial, during trial, and on appeal, clearly demonstrated that Dr. Baden's testimony is unreliable and therefore inadmissible. The State's response on appeal is ineffectual since it failed to address any of these facts.

Specifically, Dr. Baden testified that the death in this matter was caused by homicide. Dr. Baden also ruled out self-defense. This opinion was based on his conclusion as to spread of particulates from the gun. Dr. Baden conceded that his conclusion as to the spread of particulates was inconclusive and did not make sense in light of the fact that gun particle residue was observed on the nightgown that was worn by Ms. DeHenre on the night of the shooting and on Ms. DeHenre's right hand, as follows:

> Baden: I couldn't figure that out because I know that there was also a description of a gunshot particle on the right hand that didn't make since. And I don't know..I

can't interpret that because it doesn't quite indicate how much the spread, what the particulate matter was

Defense Counsel: That's right. And when you say you can't make sense of that, you can't make sense of it in view of the opinion you've rendered?
Baden: No. I don't know as far as that goes what that means.

[T. 391-2].

As demonstrated by Dr. Baden's own words, his opinion as to homicide is unreliable "and didn't make sense". Therefore, his opinion as to homicide was unreliable in that it was not based on sufficient facts and data, nor were his opinions based on reliable principles and methods, and Dr. Baden did not apply principles and methods to the facts of this case (i.e. the presence of gun powder particulate on the gown and Ms. DeHenre's hand). (See above *Edmonds* and *Treasure Bay*).

The State also made no response on appeal as to Defendant's assertion that Dr. Baden's testimony was inadmissible as a needless presentation of cumulative evidence due to the fact that Dr. Baden testified as to the same facts and opinions that Dr. Hayne also testified about at trial. Defendant cited the Court to Mississippi Rule of Evidence 403 and to *Jackson v. State*, 684 So.2d 1213 (Miss. 1996) on the issue of cumulative evidence. However, no authority was cited by the State on this issue. The State's failure to respond is tantamount to confession of error. See above, *Turner v. State*, 383 So.2d 489 (Miss. 1980).

V. SHOULD THIS CASE BE DISMISSED AS A RESULT OF DESTRUCTION OF EVIDENCE IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS

The State concedes on appeal that it was unable provide to the Defendant crucial evidence (i.e. hair of Ms. DeHenre and night gown) that was collected by the State in its investigation of this matter. This destruction of evidence is a violation of due process where: (1)

the evidence in question possesses an exculpatory value that was apparent before the evidence was destroyed; (2) the evidence was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means; and (3) the States destruction of the evidence was in bad faith. *State v. McGrone*, 798 So.2d 519 (Miss. 2001).

In the Appellee Brief, the State does not dispute that the first two parts of this test have been demonstrated by the Defendant. The State's sole argument on this issue is that the destruction of this exculpatory evidence was not a violation of due process because it was not committed in "bad faith."

Defense counsel sought to obtain the aforementioned exculpatory evidence and what might have happened to said evidence prior to trial. However, the State of Mississippi failed to provide any explanation or evidence whatsoever as to the location of the aforementioned evidence. [T. 528-532]. It is undisputed that the State accumulated the evidence and it was the State that last possessed the evidence. It is further uncontradicted that somewhere, along the way, whether it was a past administration with the Jones County Sheriff's Office or some other agent on behalf of the State, the evidence was destroyed by the State. Moreover, it was action by an agent of the State (not sure which agent or agency or when it was done) that has prevented the Defendant from knowing anything as to why the evidence was destroyed. Without such evidence, the Defendant has no way to even discover if there was bad faith or otherwise. Therefore, as stated in *State v. McGrone*, 798 So.2d 519 (Miss. 2001), the issue of "bad faith" has been proven; "where the State's actions absolutely prevents proof on this issue, we will consider the requirement of bad faith to have been proven." *Id.* at 523.

VI. and VII. A. THE ALLEGED STATEMENTS SHOULD NOT HAVE BEEN ADMITTED DUE TO LACK OF PERSONAL KNOWLEDGE.

In this assignment of error, the Defendant demonstrates that the statements of Nyasha DeHenre (daughter) were inadmissible due to lack of personal knowledge on behalf of the declarant (the daughter). Defendant incorporates by reference all arguments as to this assignment of error as stated in Defendant's Appeal Brief. The State fails to make any response to this issue as to lack of personal knowledge. As stated throughout this document, the State's failure is tantamount to confession of error. (See above, *Steadham v. State*, 995 So.2d 835, 837 (Miss. App. 2008); *Turner v. State*, 383 So.2d 489 (Miss. 1980)).

CERTIFICATE OF SERVICE

I, JOHN A. PIAZZA and DAVID M. RATCLIFF, Attorneys for the Malachy Dehenre, do hereby certify that we have this day mailed by United States mail, postage prepaid, a true and correct copy of the foregoing Brief of the Appellant, to J. Ronald Parrish, Assistant District Attorney at his usual mailing address of Post Office Box 313, Laurel, Mississippi 39441-0313, and Honorable Billy Joe Landrum at his usual address of Post Office Box 685, Laurel, Mississippi 39441-0685.

This the 23 day of October, 2009.

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