

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

THOMAS E. DAVID

APPELLANT

VS.

NO. 2008-KA-1593

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The trial court was within its discretion to admit the testimony of Mrs. Hancock.
- II. The trial court correctly refused jury instruction D-5.
- III. David's sentence was not excessive.

STATEMENT OF THE CASE

On or about January 11, 2007, a Tate County Grand Jury indicted Thomas E. David for the aggravated assault of William Hancock by pointing a gun at William Hancock and threatening him, in direct violation of 97-3-7(2)(a), Mississippi Code 1972 Annotated, as amended. (C.P. 005) David waived arraignment and entered a plea of not guilty. (C.P. 006) He was tried on Wednesday, June 18, 2008, and was convicted of aggravated assault. He was sentenced to 15 years in the custody of the Mississippi Department of Corrections and five years post-release supervision. The instant appeal ensued.

STATEMENT OF THE FACTS

On or about October 21, 2006, Will Hancock was driving his tractor. A car came up fast behind him and whipped around him, narrowly missing an oncoming vehicle. The vehicle (driven by David) that passed him then stopped in his lane without pulling off to the side of the road. Mr. Hancock pulled over to check on the driver of the stopped vehicle, assuming the driver was shaken up by the narrowly missed collision. When Mr. Hancock pulled over to the shoulder of the road, David got out of his vehicle and went into a rage of insults and cursing. He asked Mr. Hancock what he was doing there and Mr. Hancock replied that he was feeding hay. David continued to become more enraged. Mr. Hancock got down off his tractor in order to attempt to calm David and when he turned around David had unholstered his gun and aimed it at Mr.

Hancock's face. David had his finger on the trigger and told Mr. Hancock, "Back off. I'll blow you away. Back off." Mr. Hancock attempted to remain calm although David continued to threaten to shoot him. David held the gun about a foot and half from Hancock's face. He had both fingers on the trigger and was trembling. David continued to tell Mr. Hancock, "Back off. Back off." Hancock complied until he was standing against the tractor tire. David continued shaking and pointing the gun at Hancock's face. Hancock testified that he realized that David was beyond reason and determined that if David was going to shoot him, it would have to be in the backside while he got back on his tractor. Hancock got back on the tractor and looked down and David was still trembling and still had his weapon out. Hancock put his tractor in reverse, backed up a foot or two, and wrote down David's tag number.

Other than to tell David that he was putting out hay for his cows, Hancock did not speak to David. He testified that he did not brandish or display a weapon and that he did not threaten David in any way.

SUMMARY OF THE ARGUMENT

The circuit court properly allowed Mrs. Hancock to testify concerning her encounter with David subsequent to the incident of assault against her husband for which David was charged. Her testimony was not so prejudicial as to outweigh its probative value. Accordingly, the circuit court's admission of the testimony should be affirmed. This issue is without merit.

The trial court correctly refused jury instruction D-5. This issue is procedurally barred for failure to cite authority. However, even if the court were to reach the merits, the trial court ruled correctly, as David's self-defense theory was adequately covered in instruction D-2 and instruction D-5 was an improper comment on the evidence.

David offers the bare assertion that his sentence of 15 years in the custody of the Mississippi Department of Corrections and a term of five years of reporting post release supervision was excessive and fails to cite to any authority to support his claim. Further, his sentence is within the statutorily prescribed maximum for assault and is therefore not excessive.

ARGUMENT

I. The trial court was within its discretion to admit the testimony of Mrs. Hancock.

A circuit court judge “enjoys a considerable amount of discretion as to the relevancy and admissibility of evidence.” Shearer v. State, 423 So.2d 824, 826 (Miss.1982). reverse the circuit court judge unless he abused his discretion and caused Robinson to experience prejudice. Id.

Pursuant to Mississippi Rule of Evidence 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Mississippi Supreme Court has held that Rule 404(b) “exists to prevent the State from suggesting that, since a defendant has committed other crimes previously, the probability is greater that he is also guilty of the offense for which he is presently charged.” Jasper v. State, 759 So.2d 1136, 1141 (Miss.1999). “[E]ven when other-crimes evidence is admissible under M.R.E. 404(b), it must pass through the ‘ultimate filter’ of M.R.E. 403.” Id. Additionally, “when other-crimes evidence is admitted under M.R.E. 404(b) a limiting instruction is required[.]” Id.

In the event that “404(b) evidence is offered and there was an objection which is overruled, the objection shall be deemed an invocation of the right to [an] M.R.E. 403 balancing analysis and a limiting instruction.” Id. “The court shall conduct [a Rule 403 balancing test] and,

if the evidence passes that hurdle, give a limiting instruction unless the party objecting to the evidence objects to giving the limiting instruction.” *Id.*

David filed a Motion in Limine to exclude the testimony of Joanne Hancock, the wife of the victim, Will Hancock, to a conversation she had with David after the assault occurred. Joanne Hancock testified that in August of 2007, as she was taking her daughter to school, she pulled out to the driveway at about 7:40 a.m. After going about a quarter of a mile, she saw someone pulling up behind her. Mrs. Hancock was driving about 40 miles per hour and kept going. David pulled up beside her and they were both driving forward. Mrs. Hancock was unsure as to whether she perhaps had car trouble or that she might have hit a dog. She didn’t stop because she had on her pajamas, slowed to about 30 miles per hour and rolled down the window to see what David wanted. He asked her, “Are you kin to the Hancocks?” Mrs. Hancock told him that they were the Hancocks. David then told her, “Well, you guys have caused me a lot of grief and it will not go unnoticed.” Mrs. Hancock then realized that the man was David. Instead of pulling in front of her and going on, he got behind her and followed her all the way to her daughter’s school. When Mrs. Hancock turned off to drop her daughter at school, David kept going. She interpreted David’s behavior and words as threatening. (Tr. 108-113)

The trial court ruled that this testimony was admissible pursuant to Rule 404(b), as the testimony was relevant due to David’s theory of self-defense. The testimony tends to show that David did not fear the Hancocks and was not acting in self defense. While Rule 404(b) generally provides that evidence “of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith,” it excepts from the exclusion

those instances in which the evidence is offered to show, among other things, intent or absence of mistake or accident. See also Jones v. State, 904 So.2d 149, 152 (Miss.2005); Simmons v. State, 813 So.2d 710, 716 (Miss.2002). The State presented the testimony of Mrs. Hancock to rebut David's claim of self defense. Further, while the circuit court did not provide an on-the-record Rule 403 analysis, the court did hear arguments concerning the issue from both sides. From that, the circuit court ultimately found that allowing the witness to testify outweighed any prejudicial effect. The trial court did note during the proceedings, that it was David's burden to establish that evidence he moved to exclude was more prejudicial than probative. It is clear from the record that the trial court made a thorough review of the issue, hearing arguments from the lawyers on both sides

The circuit court properly allowed Mrs. Hancock to testify concerning her encounter with David subsequent to the incident of assault against her husband for which David was charged. . Her testimony was not so prejudicial as to outweigh its probative value. Accordingly, the circuit court's admission of the testimony should be affirmed. This issue is without merit.

II. The trial court correctly refused jury instruction D-5.

David offers the bare assertion that the trial court erroneously refused jury instruction D-5 and fails to cite to any authority to support his claim. "[F]ailure to cite any authority may be treated as a procedural bar, and we are under no obligation to consider the assignment [of error]." Turner v. State, 721 So.2d 642, 648 (Miss.1998) (citations omitted). "A party's failure to cite authority in support of an argument precludes consideration of the issue on appeal." Griffith v. Griffith, 997 So.2d 218, 225 (Miss.Ct.App.2008) (citing Boutwell v. Boutwell, 829 So.2d 1216, 1223 (Miss.2002)). Therefore, this issue is procedurally barred.

Without waiving the State's position that this issue is procedurally barred, should the Court determine to reach the merits of the issue, the State asserts that the trial court correct denied jury instruction D-5, which stated:

The Court instructs the jury that if you believe from the evidence that Mr. Hancock was a much larger and strong person than that of the Defendant, and was capable of inflicting great and serious bodily harm upon the Defendant with his hands, and that the Defendant had reason that he was then and there in danger of such harm at the hands of Mr. Hancock, and used a pistol with which he pointed at Mr. Hancock, to protect himself from such harm, then the Defendant was justified, and your verdict shall be "not guilty" even though Mr. Hancock may not have been harmed.

(C.P. 111)

A defendant is entitled to submit instructions that present her theory of the case. Henry v. State, 816 So.2d 443, 447 (Miss.Ct.App.2002). "[W]here there is serious doubt as to whether a requested instruction should be given, doubt should ordinarily be resolved in favor of the accused." Lenard v. State, 552 So.2d 93, 96 (Miss.1989). We will not reverse based on the denial of an instruction if "the jury has been properly, fully, and fairly instructed by other instructions." Henry, 816 So.2d at 447.

Jury instruction D-5 is an improper comment on the evidence relating to the alleged disparity in size of David and his victim. An instruction should not single out certain parts of the evidence to the point that it amounts to a comment on the evidence. Manuel v. State, 667 So.2d 590, 592 (Miss.1995).

David's theory of self defense was covered in jury instruction D-2, which was given to the jury, and stated:

The Court instructs the jury that to make an assault justifiable on the grounds of

self-defense, the danger to the Defendant, Thomas Eugene David, must be either present or urgent, or the Defendant must have reasonable grounds to apprehend design on the part of the victim, Mr. Hancock to kill him or to do some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the grounds upon which the Defendant acts.

(C.P. 106)

Jury instruction D-2 is a correct statement of the law of self defense and was sufficient to instruct the jury as to David's theory of justifiable assault. If one instruction is denied, and the essence of the rejected instruction is granted via another instruction, then the issue has been fairly presented to the jury. Cook v. State, 467 So.2d 203, 208 n. 2 (Miss.1985); Keys v. State, 635 So.2d 845 (Miss.1994). Therefore, this issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

III. David's sentence was not excessive.

David offers the bare assertion that his sentence of 15 years in the custody of the Mississippi Department of Corrections and a term of five years of reporting post release supervision was excessive and fails to cite to any authority to support his claim. "[F]ailure to cite any authority may be treated as a procedural bar, and we are under no obligation to consider the assignment [of error]." Turner v. State, 721 So.2d 642, 648 (Miss.1998) (citations omitted). "A party's failure to cite authority in support of an argument precludes consideration of the issue on appeal." Griffith v. Griffith, 997 So.2d 218, 225 (Miss.Ct.App.2008) (citing *Boutwell v. Boutwell*, 829 So.2d 1216, 1223 (Miss.2002)). Therefore, this issue is procedurally barred.

Without waiving the State's claim that this issue is procedurally barred, should the Court determine to reach the merits of the issue, David's sentence is within the maximum period

allowed by law and is not excessive. “As a general rule, a sentence that does not exceed the maximum period allowed by statute will not be disturbed on appeal.” Towner v. State, 837 So.2d 221, 227 (Miss.Ct.App.2003) (citing *Wallace v. State*, 607 So.2d 1184, 1188 (Miss.1992)). “A sentence is subject to review, however, where it is alleged that the penalty imposed is disproportionate to the crime charged.” Williams v. State, 784 So.2d 230, 236 (Miss.Ct.App.2000). However, in the case at bar, David does not allege disproportionality of his sentence, but merely charges that his sentence is “excessive.”

David was convicted of the aggravated assault of William Hancock by pointing a gun at him and threatening him, in violation of § 97-3-7(2)(a), Mississippi Code 1972 Annotated, as amended, which provides:

A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life . . . and, upon conviction, he shall be punished by imprisonment in the county jail for not more than one (1) year or in the Penitentiary for not more than twenty (20) years.



David was sentenced to fifteen (15) years in the custody of the Mississippi Department of Corrections with five years post-release supervision. This sentence is well within the maximum sentence provided pursuant to § 97-3-7(2)(a), Mississippi Code 1972 Annotated, as amended. Therefore, this issue is without merit and the jury’s verdict and the rulings of the trial court should be upheld.

CONCLUSION

The assignments of error presented by the Appellant are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

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By: 
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CERTIFICATE OF SERVICE

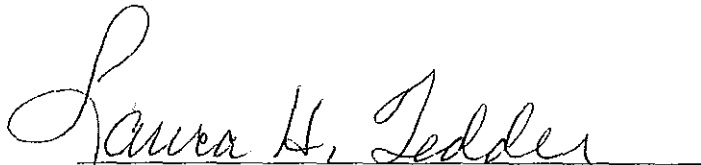
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 4th day of September, 2009.



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