

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COPY

THOMAS E. DAVID A/K/A
THOMAS EUGENE DAVID

APPELLANT

VS.

DOCKET NO. 2008-KA-01593-COA

STATE OF MISSISSIPPI

APPELLEE

An Appeal from the Circuit Court
Of Tate County, Mississippi

FILED

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COURT OF APPEALS

BRIEF OF THE APPELLANT

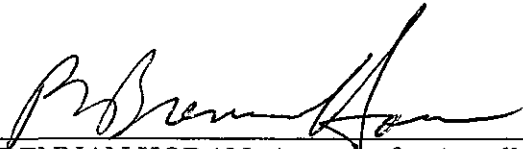



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CERTIFICATE OF INTERESTED PERSONS

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. THOMAS E. DAVID A/K/A THOMAS EUGENE DAVID
2. STATE OF MISSISSIPPI



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STATEMENT OF ISSUES

1. Whether or not the trial court committed reversible error in allowing the testimony of Mrs. Hancock.
2. That the Defendant should have been allowed Jury Instruction D-5.
3. Defendant asserts that the trial judges was excessive in the sentencing of the Defendant.

STATEMENT OF THE CASE

This is an Appeal from a jury trial wherein the Defendant, Thomas David was found Guilty of Aggravated assault.

The case was tried before a jury on June 18, 2008. The state called Will Hancock, the victim in the case, Shane Brewer Deputy Sheriff Tate County, Joann Hancock, wife of the victim. The defense called as their witnesses Elree Faulkner and the defendant Thomas Eugene David.

The Defense filed for the Courts consideration a Motion In Limine concerning the States witness Joann Hancock. The Defense adequately showed to the court that Mr. David did not know Mr. Hancock on the date of the alleged aggravated assault of October 21, 2006. The record shows that Mr. David met Mrs. Hancock for the first time in August 2007 at which time she had a conversation with Mr. David at approximately 7:40 a.m. on a day she was carrying her daughter to school. The Court over ruled the Motion and Mrs. Hancock's testimony was allowed. The defense further objected to her testimony when she attempted to take the stand at trial.

The case centers around an incident where Mr. David was on his way home, in his vehicle and upon approaching Mr. Hancock at dusk or slightly thereafter, avoided a collision with Mr. Hancock while he was driving his tractor without headlights. Mr. David pulled over and had a conversation with Mr. Hancock concerning the dangerous condition that he caused on the road. The testimony between Mr. David and Mr. Hancock differs at this point wherein Mr. David alleged, which is substantiated by Mr. Elree Faulkner, Mr. Hancock exited his tractor with something in his right hand which

apparently was a wrench. Mr. Elree Faulkner testified that Mr. Hancock had told him after the incident that he had gotten off the tractor with a wrench in his hand. Mr. David, asserts that he was in a defensive posture at that time and drew his weapon to prevent any further advancement of Mr. Hancock. Mrs. Hancock testified that Mr. David, in August, some 10 months after the alleged assault on her husband, confronted her after she exited her driveway on Wall Hill Rd., Tate county. She states that Mr. David after pulling next to her said "well you guys has caused me a lot of grief, and it will not go unnoticed". Mr. David's testimony varies from Mrs. Hancock in that he asserts Mrs. Hancock was not traveling down the road at 40mph but that she was at the end of her driveway when he pulled up to her. He states the conversation was not threatening. Both the Hancock's and Mr. David live on Wall Hill Road however neither of the Hancock's or Mr. David had ever met.

The case went to the jury and after deliberation and a note from the jury the jury returned a verdict of guilty for aggravated assault.

From said jury verdict the defendant appealed.

SUMMARY OF ARGUMENT

That the Trial Court erred in denying the defendants Motion In Limine concerning the testimony of Joann Hancock. The testimony should of been excluded according to Miss Rule of evidence 404(b) the testimony of Mrs. Hancock proved to be inflammatory to the jury and its probative value was greatly out weighed by the prejudicial effect it had on the jury. Additionally, the Court should have allowed the defense jury instruction D-5. Finally, the defendant asserts that the sentence of a trial court was excessive and should be reexamined by the Supreme Court.

ARGUMENT

1. WHETHER OR NOT THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE TESTIMONY OF MRS. HANCOCK.

Mississippi Rule of Evidence 404(b) states "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." Mrs. Hancock testified about events which occurred 10 months after the alleged aggravated assault on her husband. None of the exceptions to 404(b) are present in the case sub judice. The testimony of Mrs. Hancock (J. Hancock p. 109, L 25-27) and that of Mr. David (T. David p. 157 L. 22-27) made the record clear that Mr. David and Mrs. Hancock never met until August of 2007. The testimony of Mrs. Hancock should have been excluded.

The standard of review employed by the Supreme Court regarding the admissibility of evidence is well settled. The trial judge enjoys a great deal of discretion as to the relevance and admissibility of evidence. Unless the judge abuses this discretion as to be prejudicial to the accused, the court will not revise its ruling. *Thomas vs. State* 2009 WL 921092 (Miss. app). The court citing *Robinson vs. State*, 947 So 2nd 235, 238 (Miss 2006). Where evidence of other crimes is admissible under M.R.E. 404(b), it can not be admitted unless it also passes muster under M.R.E. 403. that is, the risk of undue prejudice must not substantially out weigh its probative value. *Ballenger vs. State* 667 So.2nd 1242, 1257 (Miss. 1995). Evidence of other crimes wrongs or acts is admissible if the offense being tried and the other act “are so interrelated as to constitute a single transaction or a closely related series of transactions or occurrence”. *Welde vs. State* 3 So.3rd 113,117 (Miss. 2009). Further this court has applied a two part test to determine admissible evidence under rule 404(b) the evidence 1) be relevant to prove a material issue other than the defendants character: and 2) the probative value of the evidence must out weigh the prejudicial effect . The second part of this analyses is required by M.R.E. 403 as rule 403 is the ultimate filter through which all otherwise admissible evidence must pass. Thus evidence which passes the two part test shall be admissible under both rule 404(b) and 403 Id. At 117.

Defense argues that the evidence of Mrs. Hancock passes neither test. First and foremost, it is not evidence that should have been included under 404(b) and arguendo if that test is passed the prejudicial effect it had on the jury out weighed its relevance.

The defendant again points out that alleged act was subsequent to the alleged crime for which the defendant was indicted.

2. THAT THE DEFENDANT SHOULD HAVE BEEN
ALLOWED JURY INSTRUCTION D-5

D-5. The proposed defense instruction D-5 states.

“the court instruction to the jury that if you believe from the evidence that Mr. Hancock was a much larger and stronger person than that of the Defendant, and was capable of inflicting great and serious bodily harm upon the defendant with his hands, and the defendant had reason that he was then and there in danger of such harm at the hand of Mr. Hancock, and used a pistol with which he pointed at Mr. Hancock, to protect himself from harm, then the Defendant was justified, and that the verdict shall be “not guilty” even though Mr. Hancock may not have been armed. (clerks papers p. 111)

The record shows that Mr. Hancock was in fact 6ft 6in. nearly 6ft.7in. tall bare footed and Mr. David was a substantial smaller man.(Hancock p. 81 L. 8-19)

The cross examination of Shane Brewer shows it was at dusk or slightly thereafter when the altercation of October 21st occurred. (Brewer p. 105 L. 18-28). The considerable size of Mr. Hancock coupled with the darkness that existed on that date are facts enough to substantiate the instruction as proposed by Mr. David.. Certainly, Mr. David’s testimony that it appeared Mr. Hancock had something in his hand(David p. 126 L 24 – p. 127 L. 4) (David p. 128 L. 18 and L. 26-29) coupled with the testimony of Elree

Faulkner(Faulkner, p. 118-125) would have allowed the jury to consider self defense as a defense of Mr. David's actions. Mr. David thought Mr. Hancock was a weapon in himself. (David p. 129, L. 3.) Mr. David always felt Mr. Hancock the aggressor. (David, p. 129, L. 9-15) The defendant should have been granted defense instructions D-5 .

3. DEFENDANT ASSERTS THAT THE TRIAL JUDGES WAS
EXCESSIVE
IN THE SENTENCING OF THE DEFENDANT.


Mr. David was given a sentence of 15 years in the Department of Corrections and a term of 5 years of reporting post release supervision.(clerks p. 122-124) In light of the fact that Mr. David pulled a weapon but never discharged the weapon and since he did not put the victim in any more fear then has been shown on the record the sentence is excessive and should be re-examined by the Supreme Court.

CONCLUSION

Mr. David asserts that testimony of Mrs. Hancock should have been excluded and the case should be remanded for rehearing or the case should be reversed and rendered for Mr. David. Her testimony was irrelevant and prejudicial. Further the jury instruction D-5 should have been granted by the Court. Mr. David's state of mind as stated on the record entitled him to instructions concerning the relative size of the victim. Finally, the Trial Judges sentence in this case of 15 years at the Mississippi Department of Corrections with 5 years reporting post release supervision was excessive in light of the facts and circumstances of the case.

Respectfully submitted,
Thomas E. David

By: 

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