

CERTIFICATE OF INTERESTED PERSON

ARCHIE HALL

v.

STATE OF MISSISSIPPI

NO. 2008-KA-01719-COA

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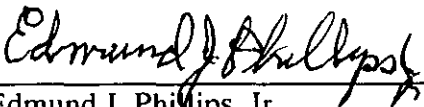
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

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**Archie Hall
APPELLANT**



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STATEMENT OF THE ISSUES

1. The Court erred in denying Appellant's hearsay objection to the testimony of Dawn Biggart.
2. The Court erred in denying Appellant's request for a peremptory instruction.
3. The Court erred in refusing jury instruction D-6.

STATEMENT OF THE CASE

Appellant appeals his conviction of the crime of manslaughter by the Circuit Court of Leake County, Mississippi and sentence to a term of eighteen (18) years confinement by the Mississippi Department of Corrections.

Leake County Sheriff's Office Chief Deputy Sheriff Mike Williams testified for the prosecution that he was summoned to a mobile home residence in Leake County, that Shirley Jobe was inside, she having been wounded with a bullet in her chest, that an unloaded pistol with a magazine beside it was on top of an ice chest in the corner of a large room on the floor of which Ms. Jobe lay with Appellant holding her shoulders (T-29).

Dr. Stephen Timothy Hayne, pathologist, testified that the cause of death was a gunshot wound to the upper left chest (T-36, 40), that she weighed three hundred pounds, that because of the absence of smudging or tattooing at the wound (T-37):

The weapon was no closer than a foot and a half away when the weapon was fired.

He further testified that the bullet struck her third rib, fragmented and deflected downward. He testified that there was also a small abrasion on Ms. Jobe's nose, which abrasion was consistent with the type injury she might receive from falling to the ground (or floor) (or placing of breathing apparatus on her nose by medical personnel) (T-47).

Willie Mae Jobe, mother of Shirley Jobe, testified that she lived with Appellant, Shirley Jobe, and her six children in Willie Mae Jobe's mobile home. The day of the shooting Shirley had gone to pick up Appellant at Vaiden, Ms (T-55), where he was returning from "offshore" employment, that they returned about 9:00 p.m.; that thirty minutes later Shirley told her she was going to bed, that Shirley and Archie had not been arguing (T-57), that she was in her bedroom when she heard her daughter say (T-50), "Willie, Archie shot me", that Shirley's sons told her "Yeah, she been shot", that she went in the living room, Appellant told her to call 911, that she did so and Shirley Jobe was taken to Carthage Hospital and later to the University Medical Center in Jackson.

Michael Harper, Sheriff's department investigator, testified that he spoke to Appellant at a hospital emergency room where Ms. Shirley Jobe was receiving treatment, and Appellant told him that he had given Ms. Jobe the pistol and had tried to teach her to shoot it, and that night she had the pistol out and "it went off" (T-67). Although the prosecutor tried to leave the impression that Appellant claimed to have given her the gun that night and tried to teach her to shoot it then, it was obvious from the testimony of others that she had had possession of the pistol before then and Appellant had tried to teach her to shoot in the past. The short time from their arrival home until the shooting

and the virtual absence of time when they were alone until the moments before the shooting, made it clear that he had been referring to teaching her in the more distant past.

He further testified about a more formal statement Appellant made after his arrest and several days interrogation. The Court held an Agee (Jackson-Denno) hearing out of the presence of the jury to determine if the statement should be suppressed. The trial court held the statement admissible (T-86), the jury was returned to the courtroom, and the written statement (State's Exhibit 6) was admitted into evidence. The only part of the three page statement that described the events surrounding the shooting read as follows:

I, Archie Hall, upon being in the bedroom room with Shirley Jobe had a discussion about all my money being gone from my account on a regular base, caused her to lose it and grab the gun from the closet, cocked it and pointed it at me and I scrambled toward her from the bed which I was laying in and pushed the gun away from me while grabbing it from her hand and by the way I was holding it and the excitement the gun went off, I was only trying get the gun, not get the gun and shoot it. I was defending myself not trying to take a life. This money secret caused this drama to unfold.

Sheriff, Greg Waggoner, who had been present during the interrogation of Apellant, identified the statement.

Over objection overruled (T-106, 111,) Dawn Biggart testified for the State that she worked in a convenience store on August 28, 2007 when Shirley Jobe entered the store and told her that she had won a lot of money at a casino and lost it all back, that Archie had told her that he was going to kill her because she lost the money, that Shirley's conversation with Archie might have taken place a month prior to Shirley telling Dawn Biggart about it.

Steve Byrd, forensic scientist with the Mississippi Crime Laboratory, testified that the bullet from Shirley Jobe's body was fired by the pistol earlier identified (T-125), that it could be fired by pulling the trigger alone (T-127):

Q. Would you care to be in the same room with somebody that fell down with a cocked automatic like that?

A. No, sir.

Appellant moved (T-129) for a directed verdict asserting that the Weathersby rule required that Appellant's version be accepted. The Court denied the motion (T-130).

Davonta Jobe testified for Appellant that she had been Shirley Jobe's daughter, that on the day of her mother's death she and Tia Hall (Archie's daughter) had accompanied Shirley Jobe to Vaiden, Mississippi to pick up Appellant who had been working and had ridden with someone to Vaiden and testified that Appellant and Shirley Jobe did not argue on the way back.

Appellant testified that he worked for Ingram Barge Co., twenty-eight to forty days consecutively and then was off ten days to two weeks, that on the day of Shirley Jobe's death, he had ridden with his captain to Vaiden, that after Shirley picked him up he had a small amount of alcoholic beverage to drink but was not approaching intoxication, he went to the bedroom he shared with Shirley and then to bed, that she came in the bedroom, became angry when he cautioned her about overspending money, that she became angry, took the pistol from the bedroom closet, ""racked"" the pistol and pointed it at him, that he got out of bed quickly, grabbed the pistol and it discharged accidentally, that he took the clip out of the pistol and set it on a cooler in the living room, that he put pressure on her wound until the paramedics arrived, that

after they took her, he drove to the hospital, that after Shirley died he began to drink beer.

SUMMARY OF THE ARGUMENT

1. For a declaration to come within the present sense impression exception to the hearsay rule it must occur at the time of the event or condition or immediately thereafter.

2. If a defendant or his witnesses are the only eyewitnesses to a homicide, their version must be accepted, unless it is substantially contradicted by credible witnesses, physical facts or facts commonly known.

3. A circumstantial evidence instruction should be given when the prosecution can produce neither eyewitnesses nor a confession. A statement that essentially tracks a defendant's testimony and does not admit the crime charged is not such a confession.

ARGUMENT

I.

THE COURT ERRED IN DENYING APPELLANT'S HEARSAY OBJECTION TO THE TESTIMONY OF DAWN BIGGART

On hearsay objection by the Appellant to the testimony of prosecution witness Dawn Biggart, the trial court held a suppression hearing out of the presence of the jury. In the hearing she testified on direct examination that she had been employed by a convenience store in Madison County and (T-107, 108):

Q. All right. Now, did you know Shirley Jobe during her lifetime?

A. Yes, sir.

Q. Was she a customer of yours there at Michael's 16?

A. Yes sir.

Q. Did you have the occasion to see her there at the business on

August 28th, which would have been two days before she died?

A. Yes, sir.

Q. Okay. And while she was there, did you and her have a conversation?

A. Yes, sir.

Q. What did she tell you in that conversation?

A. She took me outside and she told me that she had went to the casino and that she had won a lot of money and she played it all back. Then she said that Archie said that he was going to kill her because she lost all that money. I told her, you know, that that wasn't going to happen; Archie wasn't going to do nothing like that because I know Archie and I know Shirley.

She just looked at me, and she said, "Dawn, he is." And, you know, we just talked and, you know, just went on about it. She said, "Dawn, he's going to kill me."

I said, "Shirley, he's not going to kill you."

On cross examination she testified (T-109):

Q. Did she normally win that kind of money?

A. I don't know.

Q. Do you know when they had that conversation?

A. No.

Q. That conversation - -

A. She told me this on a Tuesday.

Q. Okay. But as far as you know, that conversation might have taken place a month prior to. Right?

A. As far as I know. All I know is what she told me.

The Court denied the objection (T-112), holding that the testimony came within the present sense impression exception to the hearsay rule. This ruling was error.

MRE 803(1) defines a present sense impression as:

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

In the case before the Court, the requirement that the declaration be made while the declarant was perceiving the event or condition or immediately thereafter was not met. As the official comment to the rule suggests, the rule is based on the idea that a contemporaneous or nearly contemporaneous occurrence of an event and a statement about it made it likely that the statement was spontaneous and thus “render it unlikely that the declarant made a deliberate or conscious misrepresentation.” *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W. 2d. 474 (1942).

In the case before the Court the “declarant” referred to in MRE 803 (1) was Shirley Jobe. The “event” was the alleged statement by Appellant that he was going to kill Shirley Jobe. Ms. Biggart testified that as far as she knew (T-109), from what Ms. Jobe had told her, Appellant’s said statement may have been made a month before the day Ms. Jobe told Ms. Biggart about it. Ms. Jobe’s statement was not a present sense impression because it did not occur at the time of Appellant’s alleged statement or immediately thereafter.

No one had been present in the room with Appellant and Ms. Jobe when she was shot. Appellant claimed Ms. Jobe had pulled out and pointed at him the pistol she was shot with, that he grabbed it and they struggled over it when it discharged. Thus direct evidence of his guilt of any crime was scarce without this testimony by Ms. Biggart.

This hearsay error was formidably prejudicial because Ms. Biggart’s testimony was like an accusation from the grave of Ms. Jobe. Even with it before them the jury had

a difficult time arriving at a decision to convict Appellant of manslaughter (he had been charged with murder and the jury was divided three ways [T-177]). Thus the error was not harmless.

The verdict should be overturned.

II.

THE COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A PEREMPTORY INSTRUCTION

If a defendant or his witnesses are the only eyewitnesses to a homicide, their version must be accepted, unless it is substantially contradicted by credible witnesses, physical facts or facts commonly known. *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933).

In the case before the Court, the written statement and Appellant's testimony largely coincide and do not substantially contradict each other. Appellant and Ms. Jobe were the only persons in the room at the time of the shooting. The decedent leaning forward at a small angle as would necessarily happen during a struggle for possession of a pistol would cause the twenty to forty degree angle of descent of the bullet (T-39) at entry.

Thus the physical evidence is not inconsistent with Appellant's account of Ms. Jobe's death.

Because the Appellant's account is reasonable, it should have been believed, and the Court erred in not granting his request (c.p. 10; T-160) for a

peremptory instruction. *Johnson v. State*, 987 So. 2d 420 (Miss. 2008).

The verdict should be overturned.

III.

THE COURT ERRED IN REFUSING JURY INSTRUCTION D-6

In *Gilleylen v. State*, 255 So. 2d 661 (Miss. 1971) the Court held:

Before a person charged with crime can be convicted, it is essential that every element of the crime must have been established by either direct or circumstantial evidence. If one element of the crime essential to the conviction of the defendant is established by circumstantial evidence, it is necessary that it be proven to the exclusion of every reasonable hypothesis other than that of guilt.

Accord: *Love v. State*, 208 So. 2d 755 (Miss. 1968); *Westbrook v. State*, 202 Miss. 426, 32 So. 2d 251 (1947).

In the case before the Court, Jury Instruction D-6 read as follows (c.p. 11):

The Court instructs the jury that if there is any fact or circumstances in this case susceptible to two interpretations, one favorable and the other unfavorable to the accused, that, when the jury has considered such fact or circumstance with all the other evidence, there is reasonable doubt as to the correct interpretation, the jury must resolve such doubt in the interpretation favorable to the accused.

The Court explained the refusal of the instruction as follows (T-161):

INSTRUCTION NO. D-6: BY MR. BROOKS: Your Honor, we object. We don't think this is a circumstantial evidence case.
BY THE COURT: It's not. There's a confession in this case.
Refused.

A circumstantial evidence instruction should be given only when the prosecution can produce neither eyewitnesses nor a confession to the offense charged. *Stringfellow v. State*, 595 S. 2d 1320 (Miss. 1992); *McNeal v. State*, 551 So. 2d 151, 157-159 (Miss. 1989).

The Court's explanation that there was a confession was based on the belief that Appellant's statement was a confession. The pertinent part of the statement read as follows (State's Exhibit 6):


I, Archie Hall, upon being in the bedroom room with Shirley Jobe had a discussion about all my money being gone from my account on a regular base, caused her to lose it and grab the gun from the closet, cocked it and pointed it at me and I scrambled toward her from the bed which I was laying in and pushed the gun away from me while grabbing it from her hand and by the way I was holding it and the excitement the gun went off, I was only trying get the gun, not get the gun and shoot it. I was defending myself not trying to take a life. This money secret caused this drama to unfold.

This essentially tracks his testimony and in no way constitutes a confession. The trial court was mistaken in finding that this was a confession and its refusing circumstantial evidence instruction was reversible error. *Stringfellow v. State*, 595 So. 2d 1320 (Miss. 1989); *Gilleylen v. State*, 255 So. 2d 661 (Miss. 1971).

CONCLUSION

The verdict should be overturned.


RESPECTFULLY SUBMITTED,


EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney, the Honorable Marcus D. Gordon, P.O. Box 220, Decatur, MS 39327, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: September 3, 2009.


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