IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAVON YANKTON — APPELLANT

VS. — NO. 2009-KA-1075

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAVON YANKTON **APPELLANT**

vs. **CAUSE No. 2009-KA-01075-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Forrest County, Mississippi in which the Appellant was convicted and sentenced for his felony of **AGGRAVATED DOMESTIC ASSAULT.**

STATEMENT OF FACTS

The Appellant does not challenge the weight or the sufficiency of the evidence of his guilt. For that reason it will not be necessary to set out at length the facts of his guilt.

The victim in the case at bar, Cynthia Yankton, married the Appellant in 1989 on an Indian reservation when she was eight months pregnant. The marriage was a fruitful one in that she went on to conceive and bear six sons. The family moved about often on account of the Appellant's work.

In September of 2007, the victim found herself in Hattiesburg with three of her sons, living behind the Harley - Davidson store. The Appellant was there as well. The Appellant and the victim argued often. On the 26th of that month, the victim gave some money to the Appellant. The

Appellant left and came back late and said he had been to a casino. The victim was upset that the Appellant spent her money so, money that was intended to support the family. She was aware of what the Appellant could do when he became angry with her, so she left and stayed with a friend.

The victim returned two days later, sitting at the back door of the apartment, her dead dog's blanket about her person on account of the rain and the cold. One of her sons invited her inside, but she declined, initially, on account of her fear of her husband. At some point she decided to enter the apartment. Her sons and the Appellant were present. She expected to be slapped by the Appellant but he just looked at her.

On the following Wednesday, the sons were in school and the Appellant had gone to Labor Ready, seeking employment. At some point the victim heard the sound of the Appellant's truck and heard the Appellant come into the apartment. The victim went to the bathroom and sat on the toilet. The Appellant came into the bathroom, saw her sitting there, and told her that he needed to speak with her. The victim left the bathroom, and, rather than leaving the apartment as she thought to do, she went to the front of the apartment. The Appellant grabbed her hair and threw her down to the floor and began kicking her. Then he grabbed a chain and whipped her with that. The Appellant told the victim to shut up while she screamed for help.

The Appellant then threw the victim into the room in which they slept. He got a pillow and tried to smother her. The victim resisted, so the Appellant got a hatchet and slowly moved the blade across her neck. The victim continued to resist. The Appellant then slapped her, pulled her hair, and tried to turn her over on her stomach. After he turned her over, the Appellant struck her head with the hatchet.

The Appellant was tired after he struck the victim with the hatchet, so he laid himself down and asked the victim to lie down with him, telling the victim to take off her clothes. The victim did

this and the Appellant then put handcuffs on her. The victim lay next to the Appellant, waiting for him to go to sleep from the effects of alcohol. After awhile, she managed to grab a pair of blue shorts with her feet and drag them up her legs until she could reach them with her hands. She then got up, got the Appellant's cell phone and called emergency services.

The victim told the police in this call that the Appellant and she had been playing and that the Appellant handcuffed her. When law enforcement arrived, she "tippy -toed" to the door to let them in. She said she initially lied because she did not think the officers would see bruises. When the officers did arrive, and saw a gash in her head and the handcuffs, she told them that the Appellant had tried to kill her.

The victim went to hospital. Photographs were made of her various injuries, injuries resulting from having been beaten, kicked, whipped with a chain, and struck and cut with a hatchet.

After being treated at the hospital, the victim returned to the apartment to be with her sons. The Appellant was not present. Her sons and she used candles in the apartment. At some point they heard a sound without the apartment; one son looked out of a window and saw the Appellant. The Appellant began kicking the back door. The victim and her sons called emergency services again and ended up staying the night at the Salvation Army. The victim and her sons then stayed in a motel room in Hattiesburg for another four days, and then left the State for South Dakota.

On cross-examination, the victim admitted that she did not tell law enforcement that the Appellant tried to smother her with a pillow. She admitted that she told her treating physician that there was no violence in her home. She admitted that she had testified that the Appellant had not struck her before. She said she had signed some letters but that she did not know what the contents were. In those letters, Exhibits 33, 34, 35, the victim indicated that she was not sure who had attacked her. She was in the company of the Appellant's relatives when she signed at least one of

them. She said she signed them to keep the Appellant's brother from bothering her.

On re-direct examination, the prosecutor asked the victim why she was afraid of the Appellant if the Appellant had never assaulted her in the past. The victim then related an incident in which she left the Appellant for two days, returned, and was then put into the trunk of a car by the Appellant, taken to a park, and beaten. She also stated that there had been incidents of violence in the past. (R. Vol. 2, pp. 78 - 130).

Herbert Cocroth, a police officer with the Hattiesburg police department on 26 September 2007, responded to a call for assistance made from the victim's apartment. When he arrived, the victim put her hands out of the front door. She was partially undressed and in a pair of handcuffs. She said her husband and she "did some activities with some handcuffs." He called for assistance

After the second officer arrived, Cocroth and he approached the apartment. The victim opened the door a little more. Cocroth saw bruises and abrasions on her person. He asked the victim about them, and she told him that she had fallen off a bicycle. Cocroth asked her again about her injuries. At that point she told him that she and her husband "had been in a domestic abuse."

An ambulance was summoned for the victim. After a third officer arrived, the Cocroth and the second officer to arrive went through the apartment. They did not find the Appellant there, but they did find a chain and a hatchet. There were blood stains everywhere. There were several windows open. The officers believed that Appellant left the apartment through one of them. (R. Vol. 2, pp. 133 - 140; Vol. 3, 141 - 149).

Another officer testified that he was sent to the apartment later that day to investigate a report that the Appellant was attempting to break into the victim's apartment. 149 - 154).

The victim's treating physician detailed the victim's injuries, which included a large laceration to her scalp, and many bruises to her chest arms and legs. She was in great pain at the

time of treatment. She reported that she had been hit by her husband with an ax and with his fists. (R. Vol. 3, pp. 177 - 184).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE OF PRIOR BAD ACTS UNDER M.R.E. 404(b) AND WITHOUT CONSIDERING M.R.E. 403?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING PRIOR BAD ACT EVIDENCE

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING PRIOR BAD ACT EVIDENCE

The Appellant asserts that the trial court erred in admitting testimony by the victim that the Appellant had assaulted her on prior occasions. It was error, says this Appellant, because it was not admissible under M.R.E. 404(b) or because the trial court failed consider M.R.E. 403 in the course of admitting the testimony under Rule 404(b).

The standard of review concerning the admission or exclusion of evidence at trial is a familiar one. A trial court enjoys a great deal of discretion as to the relevancy and admissibility of evidence. This Court will not disturb a trial court's rulings in this regard unless the trial court has abused its discretion to the prejudice of an accused. *Liddell v. State*, 33 So.2d 524 (Miss. Ct. App. 2010).

FACTS

In the course of the victim's testimony on direct examination, the victim was asked whether the Appellant had ever struck her. There was an objection as to "possible prior bad acts," which was overruled. The victim then testified that the Appellant never hit her. (R. Vol. 2, pg. 82). Further on, though, the Appellant testified that she was frightened of the Appellant. When asked why, she

stated that he had hurt her before and that she knew what he was capable of doing. There was an objection to this testimony. The trial court indicated to the prosecutor that he was treading on thin ice and instructed the prosecutor to move along and concentrate on the incident for which the Appellant was being tried. (R. Vol. 2, pg. 86).

On cross-examination, the victim admitted, more or less, that she had originally told the police officers that she received her injuries in consequence of having fallen off a bicycle. She admitted that she told the treating physician that there was no history of violence in her home. Yet, she also stated that she was scared of the Appellant. She then testified that the Appellant had struck her in the past.

The victim admitted having signed Exhibits 33, 34, and 35, but she stated that she did not read them and did not know their contents. She said that the Appellant's relative typed them and that she signed them to keep him from bothering her. (R. Vol. 2, pp. 110 - 126).

On re-direct examination, the prosecutor elicited testimony from the victim about the incident in which the Appellant forced her into the trunk of a car and then beat her. There was an objection. However, the ground of the objection was that "She had already testified that there's never been any violence in this home, and now she's trying to change her testimony again." The trial court responded, "Go ahead." (R. Vol. 2, pp. 127). After the victim related the incident, the defense objected again, asserting that the testimony was "prior bad acts." The trial court responded, "Move along." (R. Vol. 2, pp. 127 - 128).

ARGUMENT

During the State's direct examination of the victim, in response to a question by the prosecutor, the victim testified that the Appellant had not hit her before the assault involved in this case. While the Appellant would say that this was an attempt to inject prior bad acts into the case,

the answer cured any such alleged improper attempt by the prosecution. The victim did not testify to any prior bad acts at that point.

Later in the direct examination, when the victim testified that she was scared of the Appellant, the prosecutor asked the victim why she was scared. The victim testified that the Appellant had hurt her before and that she knew what he was capable of doing. When the prosecutor asked the victim what she meant by having been hurt before, the defense objected. The trial court admonished the prosecutor and instructed her to "move along." The prosecutor then moved on to something else, the victim never answering that last question.

As to this latter instance cited by the Appellant (Brief for the Appellant at 8), the Appellant did not secure a ruling on his objection. The phrase "move on" is not a ruling. The failure to secure a ruling works a waiver of the objection. On the other hand, should it be that this Court should find that the trial court did actually rule on the objection, and in effect sustained the objection, the Appellant failed to request a limiting instruction. This failure also works a waiver of the issue. *Snider v. State*, 755 So.2d 507, 510 (Miss. 1999). In any event, the victim did not testify as to what she meant by having been hurt before.

While it may be that the State, during the direct examination of the victim, asked two questions that might have received answers which possibly would have disclosed prior acts of abuse, the fact is that the State did not get any such testimony into evidence. However, during cross - examination, the defense asked a number of questions about prior instances of domestic abuse and why the victim was frightened of the Appellant. (R. Vol. 2, pp. 114 - 116). Regardless of the question of whether prior instances of abuse were relevant under Rule 404(b), these questions by the defense surely opened the door to the issue of prior instances of abuse. *Martin v. State*, 970 So.2d 723, 725 - 726 (Miss. 2007). Once the defense put questions to the victim as to prior acts of abuse

and why she was afraid of the Appellant, the State legitimately followed those questions up with its own questions. Since the door was opened to the issue of why the victim was afraid of the Appellant, the trial court committed no error in permitting the State to explore the matter on re-direct examination. We also note that the defense did not make a object on "bad act" grounds until after the victim had testified about the car trunk incident. (R. Vol. 2, pg. 128). The objection made prior to the relation of that incident was not an objection under Rule 404. The Appellant's "bad act"objection as to the car trunk incident was too late. *Hodges v. State*, 14 So.3rd 786, 789 (Miss. Ct. App. 2009). We also note that the trial court's response to the prior bad act objection did not constitute a ruling.

As for whether the evidence of a prior act of domestic abuse was admissible under M.R.E. 404(b) we submit that under the circumstances of this case that evidence was admissible. The victim gave one or two stories to the police officers as how she had been handcuffed or injured before she told them the truth. She also later wrote letters or affidavits, at the behest of the Appellant's relative, in which she indicated that she was not sure who had attacked her. Her trial testimony was at times somewhat contradictory. She was considerably upset at trial. The evidence would have been useful in explaining the victim's statements and behavior. It would not have been admitted to prove the Appellant's character.

The purposes set out in Rule 404(b) for which prior bad acts may be admitted are not exhaustive. *Liddell v. State*, 33 So.3rd 524, 530 (Miss. Ct. App. 2010). The Appellant's prior act of abuse was relevant and admissible to explain the victim's actions subsequent to the assault the Appellant committed in the case at bar.

As for the Appellant's complaint concerning the lack of a M.R.E. 403 analysis, the record is quite clear that the Appellant never objected on the basis of that rule or requested the trial court

to conduct such an analysis. That being so, he may not be heard here to complain that no such analysis was performed. *McLaurin v. State*, 31 So.3rd 1263, 1269 - 1270 (Miss. Ct. App. 2009). While the Appellant relies upon *Robinson v. State*, 2009 WL 1524913 (Miss. Ct. App. 2 June 2009)(Rev. *Robinson v. State*, WL 1909559 (Miss. 13 May 2010), for the proposition that admission of evidence under Rule 404(b) requires, with or without the request of the opposing party, an analysis under Rule 403, *McLaurin*, which was decided in November of 2009, clearly rejects any such requirement. To the extent that there was a requirement that a trial court conduct a 403 analysis, regardless of a specific request therefor, *McLaurin* is clearly a change in the law on the point.

In the event, however, that this Court should find that the admission of a prior act of domestic violence was error, any such error should be considered harmless. The victim's testimony clearly proved the Appellant's guilt. Her testimony concerning what the Appellant did to her was corroborated by the photographs of her injuries, the testimony of the police officers and the testimony of the treating physician. There was no testimony evidence opposed to the State's case. Quite simply, the Appellant's guilt was overwhelmingly proved, and the verdict of the jury would not have been different had the prior bad act been admitted. Under these circumstances, should the Court find that it was error to admit the prior bad act evidence it should also find that it was harmless. *Baldwin v. State*, 732 So.2d 236, 245 (Miss. 1999)(Erroneous admission of evidence under Rule 404(b)); *Sims v. State*, 928 So.2d 984 (Miss. Ct. App. 2006)(Failure to perform Rule 403 balancing test).

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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