

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAVAN YANKTON

APPELLANT

V.

NO. 2009-KA-1075-COA

STATE OF MISSISSIPPI

APPELLEE

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 this court may evaluate possible disqualifications or recusal.

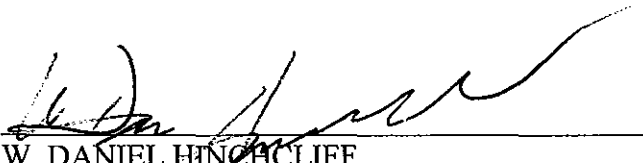
1. State of Mississippi
2. Lavan Yankton, Appellant
3. Honorable John Mark Weathers, District Attorney
4. Honorable Robert Helfrich, Circuit Court Judge

This the 16th day of March, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


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ISSUES

STATEMENT OF THE ISSUES

ISSUE NO 1: WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PUT ON EVIDENCE OF OTHER BAD ACTS TO SHOW THAT APPELLANT ACTED IN CONFORMITY WITH SAID ACTS AND WHERE THE TRIAL COURT DID NOT PERFORM A BALANCING TEST.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Forrest County, Mississippi, and a judgement of conviction against Lavan Yankton for the crime of aggravated domestic violence and a sentence of twenty (20) years following a jury trial commence on April 28, 2009, Honorable Robert B. Helfrich, Circuit Judge, presiding. Lavon Yankton is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

Prior to trial, the defense brought on a motion to dismiss, arguing lack of prosecution. The motion was denied and the State's motion for a continuance was granted. The trial court held stating it was the courts fault for not bringing a jury in for the scheduled trial date in February. Trial was commenced 424 days from the date of the indictment.

Cynthia Bessie Yankton married Lavan Yankton on December 6, 1989 in a tribal ceremony on the Indian reservation in South Dakota. She was pregnant at the time with the first of their six offspring. (T. 78-79) Due to Lavan's job in the cable industry, it was necessary that the couple move frequently. On September 26, 2007, they lived in Hattiesburg, Mississippi. (T. 80) Cynthia reported, over objection that the relationship "wasn't the greatest", that Lavan often got mad. She denied, again over objection that Lavan had "ever hit [her]." (T. 82-83) Several days before the date alleged in the indictment, Lavan lost money she had earned while gambling and Cynthia said she was upset. So she left for two days. When she came back, she wrapped up in a dog blanket on the back porch. (T. 83-85) Contradicting her previous testimony, she said she stayed on the porch because she was scared, that he had previously "hurt" her. An objection to prior bad acts was not ruled on, the court advising the State that it was "treading on thin ice" and to "move along." (T. 86) On the Wednesday, Lavan came home from work and told her they needed to talk. According to Ms. Yankton's testimony, Lavan then grabbed her by the hair, threw her down and kicked her. Then he picked up a chain and beat her. After throwing her into their bedroom, Ms. Yankton claimed her husband then picked up a hatchet and struck her, blunt-side to the head. According to Cynthia Yankton's testimony, Yankton then requested Cynthia lay down next to him, and disrobe. (T. 88) He then placed handcuffs on her.

While Yankton slept, she arose, shimmied into some shorts and called the police. She testified she had been taken to the hospital. Photographs, taken at the hospital were identified by Cynthia and admitted into evidence. (T. 93-103) After returning home that evening, Cynthia Yankton claimed Lavan Yankton had come to the apartment. She then left and went to the salvation Army. Afterwards, she returned to South Dakota.

While in South Dakota, she was presented with several letters (C.P. Exhibits 33,34,35) One, addressed to "Whom it May Concern" and another to "Mr. Hedgepeth" were signed by her. One letter was notarized. The letters contradicted her testimony at trial, relating that she was unaware of the identity of her attacker. At the urging of the prosecutor, she explained that the letters had been given to her by her nephew, who claimed her signing the letters would help her get her kids back. She explained that she did not even know how to type. (T. 106-109)

Cross examined by attorney Grant Hedgepeth, she told him she did not remember speaking with him on the telephone. She recalled vaguely a conversation with someone from another state. Ms. Yankton could not deny she originally told the police that her injuries were the result of a bicycle accident. (T. 112) She admitted that she did not tell the police anything about being smothered with a pillow, even though, at trial, she claimed Yankton had tried to smother her with a pillow. (T. 113) The letters (C.P. Exhibits 33,34,35) were offered and admitted into evidence and published to the jury. Ms. Yankton said she did not read the letters. Cynthia Yankton admitted that she had, in fact, been in a bicycle accident the week before.

Redirect testimony explored past violence between Lavan and Cynthia over objection of the defense. The defense objected that this redirect was beyond the cross examination, and was a change in her previous testimony to no previous violence. Again the trial court appeared to sustain the motion by advising the State to "move along." The State then coaxed an agreement from Cynthia that there had been prior violent acts by Lavan. No balancing test was made as to the probity versus prejudice of the admission of these prior bad acts. (T. 127-130)

Hattiesburg police officer Herbert Cocroth responded to a 911 call and found Cynthia Yankton answering the door in handcuffs. She asked for assistance in removing the handcuffs. Cocroth called in another officer. When that officer arrived, he removed the cuffs. (T. 133-136)

Officer Cocroth inquired about abrasions and bruises he observed and was informed by Cynthia that she had fallen off her bicycle. Cocroth did not believe and asked Cynthia Yankton again what had happened. The over objection, she claimed to be the victim of domestic abuse. Cocroth called in an ambulance and additional police. He entered the residence, where he observed a chain and hatchet. (T. 137-148)

The emergency room doctor who treated Ms. Yankton, was accepted as an expert and testified he examined Cynthia Yankton. He found multiple bruises and a laceration on her scalp. She claimed she had been assaulted by her husband¹ and that he had struck her with the blunt edge of a hatchet. The State solicited an opinion as to the cause of the head wound and the defense objected that such an opinion was outside his expertise. The court held that “as an emergency room doctor” he could opine as to the cause of the head injury.

Witness Latasha Meyers, a Hattiesburg police woman was called by the State with the intention of establishing a factual basis for a flight instruction, but in a hearing outside the presence of the jury, the court ruled such testimony would not support a flight instruction. During her testimony the trial court found that the defense had opened the door to her testimony concerning what Cynthia Yankton said at the hospital regarding how she received her injuries. (T.185-200)

Upon these proofs the state rested. Yankton was advised of his *Culverson* rights and chose to not testify. The motion for a directed verdict was denied. Objections to instructions were resolved outside of the record by the attorneys. After closing argument, the jury retired. A verdict of guilty was returned, a poll showing the verdict was unanimous.

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A hearsay objection to the doctor’s repeating what Cynthia Yankton told him was overruled as medical history.

SUMMARY OF THE ARGUMENT

The jury was allowed to hear evidence of other bad acts, clearly intended as evidence to show Lavan Yankton had acted in conformity with said prior acts. The trial court failed to exclude such evidence, nor did it conduct a balancing test.

ARGUMENT

ISSUE NO 1: WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PUT ON EVIDENCE OF OTHER BAD ACTS TO SHOW THAT APPELLANT ACTED IN CONFORMITY WITH SAID ACTS AND WHERE THE TRIAL COURT DID NOT PERFORM A BALANCING TEST.

The State, in its re-direct examination of Cynthia Yankton, was allowed over objection to introduce prior bad acts of Yankton hitting her, contrary to her previous testimony, and with the clear intention that the jury consider the prior instances of hitting as evidence that Lavan Yankton acted in conformity with the prior acts. This was readily apparent in the record:

REDIRECT EXAMINATION BY MS. COLEMAN:

Q. Cynthia, defense counsel asked you several times if Lavan had never hit you, why were you afraid of him.

A. Because of the things he did to me in the past.

Q. What kind of things?

A. Put me in the trunk of a car.

MR. HEDGEPEETH : Your Honor, I object. She had already testified that there's never been any violence in this home, and now she's trying to change her testimony again.

MS. COLEMAN : Your honor, he crossed her repeatedly about - -

THE COURT : Go ahead.

MS COLEMAN : Thank you.

BY MS COLEMAN

Q. You may go ahead, Cynthia.

A. When we lived in Lincoln, Nebraska with his mom, I broke my collar bone riding a bike. We were coming back from a bar. I don't know what I was thinking riding that bike, but I rode it. He was riding one too. **And I did the same thing there. I just left for a couple of days.** I came back he was mad. His mom owned a blue Cadillac that he bought for her for helping us take care of our kids. And I walked away. I walked to this store called Russ' that had pay phones there. I went to use the pay phone, and I happened to turn my head, and he was standing there. He told me to get in the car. I got in the car, and he pulled over. He was with another guy. He told me to get in the trunk. And he just hit me real hard while I was in the trunk of the car...So we went home. He took me out of the trunk, sat me in the front, and he took me out to this park, and just started hitting on me. His mom- - I mean, she was alive at the time, but when they pulled in at her house - - she had a garage. We pulled in right there. He backed in. He grabbed my glasses and threw them and was just - -

MR. HEDGEPEETH : Your Honor, I'm going to object to all this again. This is prior bad acts. I was going into what the State had brought out, cross-examining her about - - stated there had been - -

THE COURT : Let's move along, Ms. Coleman.

THE COURT : Thank you.

MR. HEDGEPEETH : And now she's trying to change it all up.

THE COURT : Let's move along.

(T. 127-128) Cynthia's testimony was clearly a comparison, when I left for two days in the past, Lavan confined me and hit me, just like now. Three attempts to object to this highly prejudicial evidence which was obviously a surprise to the defense, were simply disregarded by the trial court. Cynthia Yankton was allowed to prove the alleged crime with prior nearly identical acts which is strictly prohibited by Mississippi Court Rules, Rule of Evidence:

Rule 404. Character Evidence Not Admissible to Prove Conduct;
Exceptions; Other Crimes

(a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. 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.

M.R.E. Rule 404 . Such testimony was purely intended to prove conformity, that Yankton did it before, and therefore, he did it again. "This rule 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) And, where an objection has been entered to other crimes evidence, MRE 403 and a balancing test are automatically invoked:

"[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.* at (¶ 24). 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]..

Robinson v. State, ___ So3d ___, 2009 WL 1524913 (Miss. App. June 2, 2009) Thus, even though the trial judge admitted this errant and prejudicial evidence, it was still required to conduct a balancing test.

The State had, even before re-direct attempted to push evidence of prior bad acts. While asking about the incident the following questions and ruling transpired:

BY MS. COLEMAN

Q. You may go ahead. When you came into the house, go ahead.

A. Well, he approached me. He just looked at me . Just gave me this look cause I'm scared of him, but i can't even talk to him.

Q. Can you tell the jury why you were scared of him?

A. Because in the past he did hurt me before, and I know what he was capable of doing.

Q. What do you mean by he hurt you before?

MR. HEDGEPEETH : Your Honor, I'm going to object as going into prior bad acts.

MS. COLEMAN: He just said she had no basis for fear. I'm asking her to explain that to the jury.

THE COURT: You're treading on thin ice, Ms. Coleman. Can't you go on with the question about what happened here?

MS. COLEMAN: I'm sorry.

THE COURT: Let's move along and find out what happened in this incident.

(T. 86) This objective of the State, to use prior incidents of any hurting, as evidence of Yankton's

acting in conformity with the prior acts, began almost at the onset on the questioning of Cynthia Yankton, and it is critical to note, initially Cynthia Yankton denied that her husband had ever struck her previously.

Q. Was he ever physical with you; ever hit you?

MR. HEDGEPEETH : Object, your Honor. Irrelevant.
She's trying to get into prior bad acts.

THE COURT : Overruled.

Ms. Yankton then testified that she had never been hit by Lavan Yankton. Yet as seen above the State persisted in it's quest to portray Lavan Yankton as a serial abuser. And the reason this tactic was necessary was obvious, Ms. Yankton had impeached herself from the onset. Her multiple explanations; that she fell off her bike, that she was not sure who hit her, that she was not conscious. The State needed more, and broke the rules to show that Yankton had hit Cynthia before when she disappeared for days, and that he had done it again. And the trial court committed reversible error when it permitted the State to do so. Further, the error was compounded when the trial court not only ruled this improper evidence was admissible, but failed to weigh it's prejudicial nature against it's probative value.

Where proof of other crimes or acts of the defendant is offered into evidence pursuant to Rule 404(b), it is still subject to the requirement that its probative value substantially outweigh the danger of unfair prejudice under Rule 403. *Adams v. State*, 794 So.2d 1049, 1055 (¶ 14)(Miss.Ct.App.2001).

Jones v. State, 913 So.2d 436, 439 (Miss. App. 2005) The error of admission of the prior bad acts and the failure to weigh the evidence as required by long standing precedent, requires reversal of this case.

CONCLUSION

Appellant Lavan Yankton respectfully submits that premised upon the foregoing argument, the judgement of the lower court must be reversed and rendered or in the alternative remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


W. DANIEL HINCHCLIFF, MS BAR NO [REDACTED]
STAFF ATTORNEY

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Lavan Yankton, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Robert Helfrich
Circuit Court Judge
Hattiesburg, MS 39403-0309

Honorable John Mark Weathers
District Attorney, District 12
Post Office Box 166
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Honorable Jim Hood
Attorney General
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This the 16th day of March, 2010.



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