# IN THE COURT OF APPEALS 8/6/96

# OF THE

# STATE OF MISSISSIPPI

## NO. 92-KA-01144 COA

**SHELLEY L. WADE**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. KENNETH COLEMAN

COURT FROM WHICH APPEALED: LAFAYETTE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

AMY D. WHITTEN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: JIM HOOD

NATURE OF THE CASE: MANSLAUGHTER

TRIAL COURT DISPOSITION: CONVICTED OF TWO COUNTS OF MANSLAUGHTER AND SENTENCED TO SERVE TWO CONCURRENT TERMS OF FIFTEEN YEARS, WITH SEVEN YEARS SUSPENDED, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Shelley Wade was convicted of two counts of manslaughter. Feeling aggrieved, Wade appeals assigning four issues as error. Finding no merit to these issues, we affirm.

FACTS

Shortly after 10:00 P.M., on the night of January 26, 1991, Wade was driving down Hathorn Road in Oxford when her car collided with a car driven by Scott Tallant. Both Tallant and the passenger in Wade's car, Shelly Hull, were killed in the collision. Although Wade denies that she was intoxicated, there was evidence presented at trial that Wade had been drinking during the afternoon and evening hours and that her blood alcohol level was .20, above the legal limit of .10, when tested at the hospital where Wade was taken for treatment of serious injuries sustained in the collision.

Wade testified at trial that her last memory on the night of the collision was of getting into her car and closing the door. The collision occurred in Tallant's lane of traffic.

ISSUES

Wade asserts the following issues as error on the part of the trial court : (1) whether the trial court erred in admitting into evidence the result of the blood alcohol test which she alleges was conducted without probable cause and in violation of her right to freedom from unreasonable search and seizure; (2) whether the trial court erred in failing to grant a new trial because a juror allegedly withheld information during voir dire which she then shared with other jurors during deliberations; (3) whether the trial court improperly qualified a police officer as an expert witness and further erred in allowing the witness to testify concerning a legal question; and (4) whether the trial court erred in refusing to grant a mistrial after improper closing argument by the prosecution.

ANALYSIS

I. ADMISSION OF THE BLOOD ALCOHOL TEST

Wade contends that her blood was taken without probable cause or a warrant, and, therefore, the trial court erred in admitting into evidence the results of a test of her blood alcohol content which was taken in violation of her right to freedom from unreasonable search and seizure under the Fourth Amendment to the United States Constitution and Article 3, Section 23 of the Mississippi Constitution of 1890. Wade filed a motion to suppress the blood test, and the trial court, after a hearing, denied the same. We will reverse such a decision by a trial court only where there is an absence of substantial credible evidence supporting the ruling. *Sills v. State*, 634 So. 2d 124, 126 (Miss. 1994); *West v. State*, 463 So. 2d 1048, 1056 (Miss. 1985).

Since the blood sample was taken in the absence of an arrest or consent, we must determine whether there was sufficient probable cause to justify the warrantless search. *Ashley v. State*, 423 So. 2d 1311, 1314 (Miss. 1982). Such a determination is made on a case by case basis, and we are,

therefore, required to consider the facts which led the investigating officers to request the blood test. *Cole v. State*, 493 So. 2d 1333, 1335 (Miss. 1986).

Three police officers were involved in the taking of the blood sample from Wade: Lieutenant Barry Gossett, who arrived on the scene within minutes of the collision; Captain Steve Bramlett, who was the superior officer in charge of the scene upon his arrival approximately twenty-five minutes later; and Patrolman Alvis Lewis, who was instructed by either Bramlett or Lewis to take a blood test kit to the hospital in order to recover a blood sample from Wade.

Gossett testified at the hearing that he did the initial investigation of the accident scene. Gossett noted upon arrival at the scene that the head-on collision occurred in Tallant's lane of traffic. Wade's vehicle, which was northbound, was situated in the southbound lane. Gossett also noted a number of empty beer cans and an empty vodka bottle in Wade's car. Wade was unconscious, and Gossett discovered that Shelly Hull was dead at the scene. Gossett testified that he told Captain Bramlett immediately upon his arrival to the scene that he believed that alcohol contributed to the accident. Gossett also testified that either he or Captain Bramlett instructed Lewis to get the blood sample.

Captain Bramlett testified that although he did not see Wade at the scene of the accident, he was informed by one of his officers that alcohol was involved in the accident. Bramlett was also aware that there was a fatality and that the collision occurred Tallant's lane of traffic. Bramlett testified that he saw a beer can in Wade's car and that it was department policy to order a blood test if an accident involved a fatality. Bramlett did testify that he had not seen Wade when he ordered the test.

Patrolman Alvis Lewis drove to the scene of the accident but was then instructed to locate a blood sample test kit and take it to the hospital in order to get a sample from Wade. Lewis testified that he talked to Captain Bramlett and that he knew that the accident involved a fatality and that there were beer cans and a liquor bottle in Wade's car. Lewis also testified that he had no personal knowledge of whether Wade was intoxicated at the time of the accident or when she was being treated in the emergency room.

The Mississippi Supreme Court recognized in *Ashley v. State*, 423 So. 2d 1311, 1313 (Miss. 1982) that a suspect's blood may be taken for analysis without a warrant if probable cause exists for the search. In the instant case, we find that there was sufficient probable cause for taking Wade's blood. Officer Gossett saw empty beer cans and a vodka bottle in Wade's car. The collision occurred around 10:00 P.M. while her vehicle was in the wrong lane of traffic. The accident involved fatalities. Gossett had no opportunity to observe Wade's behavior for physical signs of intoxication, as Wade incorrectly asserts was necessary in order to uphold taking the blood test, because she was unconscious. Gossett also testified that his first priority was taking care of the serious injuries sustained by Tallant, who was still alive at the scene, and by Wade.

Wade asserts that since Patrolman Lewis, who actually brought the blood test kit to the hospital and requested that the test be given, did not have any personal knowledge of her condition, there was no probable cause to justify the search. We decline to follow this rationale. Although the Mississippi Supreme Court has not explicitly adopted the collective knowledge principle which provides that the collective knowledge of all the police officers involved in an investigation is assessed to determine whether probable cause exists, we find this principle appropriate in the instant case. *See United States v. Trabucco,* 424 F.2d 1311 (5th Cir. 1970).

The Mississippi Supreme Court has implicitly adopted this principle when it recognized that the police officer who ordered the blood test in *Ashley* made his initial request for the test "[b]ased on information he received from other officers who preceded him to the scene, about [Ashley's] involvement in the collision and [Ashley's] behavior. *Ashley*, 423 So. 2d at 1312. The court further recognized such a principle in *Cole v. State*, 493 So. 2d 1333, 1335-36 (Miss. 1986) when it noted that, unlike *Ashley*, "the investigating officer had no information-obtained on his own or provided by others-which indicated that alcohol was the cause of the fatal accident. . . ."

There was sufficient credible evidence to uphold the trial court's denial of the motion to suppress the blood test results. There is no merit to this issue.

II. DENIAL OF THE MOTION FOR NEW TRIAL

Wade contends that the trial court improperly denied her motion for new trial, which was based on the following grounds : (1) Juror Sammye Baker failed to respond truthfully to certain voir dire questions, and (2) the jury was exposed to prejudicial matter by Juror Baker. She also asserts that the trial court improperly prohibited her from calling a juror to testify at the motion hearing as to Baker's conduct during jury deliberations. We address these points individually.

Wade objected to Baker's presence on the jury after discovering following trial that Baker's son was murdered approximately ten years earlier and her daughter-in-law was tried and acquitted of the murder. Wade alleges that Baker lied during voir dire in response to the following questions: (1) whether any juror had been the victim of a crime; (2) whether anyone had any bias in favor of the State because of such an experience; and (3) whether any juror had been a victim where the matter went to trial. Wade asserts that Baker failed to respond to these questions. The record does not support this contention. Instead it indicates that an "unidentified female" in the forth row responded that her son had been killed eleven or twelve years before this trial. At the hearing on the motion for new trial, Baker testified that she was the unidentified female. She also stated that she did not respond to the question regarding bias because she had no preconceived bias either way and that her verdict was based on the testimony she heard at trial. Baker further testified that she raised her hand in response to the question of whether anyone had been a victim where the matter went to trial but that Wade's counsel never asked her anything else.

Wade further alleges that during jury deliberations, Baker "led the jury's discussion with an emotional appeal that they consider her experience and the feelings of the victim's mother in returning a verdict." Wade filed a motion for new trial on these grounds. At the motion hearing, the trial court refused to allow Wade to call another juror to testify to Baker's comments during deliberations. Wade proffered the following statement regarding the other juror's testimony :

Baker told the other jurors about her own loss with her son, the void she felt because of his death, and that she would tilt the scale in favor of hanging Shelly Wade. She explained to them that they owed it to Mrs. Cane to convict the defendant; and that is from another juror; and then she lead the discussion in deliberations of the jury.

1. DID BAKER RESPOND UNTRUTHFULLY DURING VOIR DIRE ?

Following a jury verdict, if a party can show that a juror withheld substantial information or misrepresented material facts in a situation where a complete response would have provided a valid basis for a challenge for cause, the trial court must grant a new trial. *Myers v. State*, 565 So. 2d 554, 558-59 (Miss. 1990); *Odom v. State*, 355 So. 2d 1381, 1383 (Miss. 1978). Wade's argument fails because she has not shown that Juror Baker withheld substantial information. The record and testimony reflect that Baker responded truthfully. Had the attorneys questioned Baker further regarding her responses that she had been a victim of a crime and that the crime had proceeded to trial, then a challenge for cause may have been proper. The only error here is by the defense in not noting Baker's responses and eliciting further information from her.

2. WAS THE JURY EXPOSED TO PREJUDICIAL MATTER?

In general, jurors will not be heard to impeach their own verdict by testifying to the motives and influences which affected their decision. *Fairman v. State*, 513 So. 2d 910, 915-16 (Miss. 1987). However, under Mississippi Rule of Evidence 606 (b), "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon the jury." M.R.E. 606 (b).

Wade asserts that Baker's feelings which resulted from the death of her son comprised prejudicial information and outside influence on the jury. We do not agree. We fail to see how Baker's personal thoughts and life experiences, which every juror brings with them into the jury room, are prejudicial or exert any type of outside influence on the jury. Matters resting in the personal consciousness of a juror are not sufficient to overturn a verdict. *Sprinkle v. State*, 102 So. 844, 845 (Miss. 1925); *see also Fairman*, 513 So. 2d at 915-16; *Bickcom v. State*, 286 So. 2d 823, 825 (Miss. 1973); *McInnis v. State*, 57 So. 2d 137, 140 (Miss. 1952).

3. DID THE TRIAL COURT IMPROPERLY PROHIBIT WADE FROM CALLING ANOTHER JUROR TO TESTIFY AT THE NEW TRIAL HEARING REGARDING BAKER'S CONDUCT DURING JURY DELIBERATIONS ?

As stated above, jurors generally will not be heard to impeach their own verdict except on the question of whether extraneous prejudicial information or outside influence was improperly brought to bear upon the jury. M.R.E. 606 (b). Since there was no extraneous prejudicial information or outside influence allegedly exerted by Juror Baker, the trial court properly prohibited Wade from calling another juror to testify regarding what occurred during jury deliberations.

III. ADMISSION OF THE EXPERT WITNESS TESTIMONY

Wade asserts that the trial court erred in (1) qualifying Captain Steve Bramlett as an accident reconstructionist under Mississippi Rule of Evidence 702 and (2) allowing Bramlett to testify concerning a legal conclusion. Rule 702 provides that :

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

M.R.E. 702.

Accident reconstruction has been recognized by this State as a field in which one may be qualified as an expert witness. *Wilson v. State*, 574 So. 2d 1324, 1335 (Miss. 1990); *Moffett v. State*, 540 So. 2d 1313, 1314 (Miss. 1989); *Whittington v. State*, 523 So. 2d 966, 975 (Miss. 1988). The qualification of an expert witness is left to the sound discretion of the trial judge, and his determination will not be reversed unless it clearly appears that the witness was not qualified. *Wilson,* 574 So. 2d at 1334; *Smith v. State*, 530 So. 2d 155, 162 (Miss. 1988).

Captain Bramlett had been a police officer for fourteen years and had investigated several hundred automobile accidents when he was qualified as an expert. Bramlett had also received almost two hundred hours of training in accident investigation and reconstruction through the Mississippi Law Enforcement Officers' Training Academy. The trial court did not abuse its discretion in allowing Bramlett to testify as an expert witness in the field of accident reconstruction. Furthermore, even if the trial court erred in admitting Bramlett as an expert witness, there is no merit to this issue. Sergeant David Shaw of the Mississippi Highway Patrol was admitted as an expert witness in accident reconstruction without objection from Wade, and Wade does not now assert any error in the admission of Shaw's testimony. Since Shaw's testimony was substantively the same as Bramlett's, any error in allowing Bramlett to testify would be harmless. *Whittington,* 523 So. 2d at 975.

Wade further argues that the trial court erred in allowing Bramlett to testify as follows :

Q. [By District Attorney] All right, what level of intoxication--at what point, what level, would a person possess before they would be ticketed by the City of Oxford for driving DUI ? . . .

A. [Bramlett] A person would be issued a citation for the offense of DUI if the blood alcohol content shows that it is .10 or greater.

Q. Zero point one zero or greater.

A. Zero point one zero or greater.

Although Bramlett did not technically and explicitly state that a level of .10 or greater of

alcohol content constituted, for legal purposes, driving under the influence, the questions and answers leave little room for doubt. However, the error, if any, in the admission of this testimony clearly evaporated by the trial court's granting instructions D-4 and S-6. D-4 stated:

The Court instructs the jury that the Defendant is not being tried for the misdemeanor of driving under the influence of alcohol. The Defendant is being tried for manslaughter by culpable negligence.

The Court further instructs the jury that in order for the Defendant's driving while under the influence of alcohol to be a factor in this case which involves manslaughter by culpable negligence, that the Defendant's driving under the influence of alcohol must create an abnormal mental and physical condition which would have deprived Defendant Shelley Wade of the clearness of intellect and control of herself which she would have otherwise possessed.

The Court further instructs the jury that in order for the influence of intoxicating alcohol to be a factor in showing criminally culpable negligence, it must contribute proximately both to the establishment of such negligence and to the resultant death.

S-6 stated:

The Court instructs the jury that whether the defendant, SHELLEY L. WADE, may have been under the influence of intoxicating liquor while she was driving or operating her Datsun 280 ZX automobile on January 26, 1991, does not, in and of itself, constitute culpable negligence under the law, nor does it make what would otherwise by no more than a negligent act in operating a motor vehicle culpable.

However, if you find from the evidence in this case beyond a reasonable doubt, and to the exclusion of every other reasonable hypothesis consistent with innocence, that the defendant, SHELLY L. WADE, was under the influence of intoxicating liquor while operating or driving her Datsun 280 ZX automobile on January 26, 1991, you may consider this fact, together with all the other evidence in this case, in determining whether the actions of the defendant, SHELLY L. WADE, were culpably negligent.

The jury was free to disregard the statutory limit of driving under the influence in its deliberations as a basis for making its decision, and the defense embraced its opportunity to prove that, despite the fact that her alcohol level was twice the legal limit, Wade was not under the influence of alcohol at the time of the accident. The defense developed proof that the blood alcohol test results were likely inaccurate, that Wade had really not had that much to drink, and that Wade was not negligent in her operation of her car. It is essential to understand that, in the context of the contested facts and the instructions given, the evidence of the statutory level of intoxication was not an opinion on whether Wade was under the influence of alcohol or was culpably negligent at the time of the accident. This issue is without merit.

V. DENIAL OF MISTRIAL

Wade asserts that the trial court erred in denying her motion for mistrial when the State, during closing argument, made the following comment : "We've got to quit driving on the roads and disregarding the rights of people, and you have a chance to speak to that in this case."

A denial of a motion for mistrial is within the sound discretion of the trial court. *Johnson v. State,* 666 So. 2d 784, 794 (Miss. 1995); *Brent v. State*, 632 So. 2d 936, 941 (Miss. 1994). The failure to

grant a motion for mistrial will not be overturned absent a finding that the trial court abused its discretion. *Johnson,* 666 So. 2d at 794; *Bass v. State*, 597 So. 2d 182, 191 (Miss. 1992).

Parties are given wide latitude in closing argument. *Ballenger v. State*, 667 So. 2d 1242, 1270 (Miss. 1995); *Davis v. State*, 660 So. 2d 1228, 1250 (Miss. 1995). We find nothing improper about the above statement. The trial court properly denied Wade's motion for mistrial. This assignment is without merit.

**THE JUDGMENT OF THE CIRCUIT COURT OF LAFAYETTE COUNTY OF CONVICTION OF TWO COUNTS OF MANSLAUGHTER BY CULPABLE NEGLIGENCE AND SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH SENTENCES TO RUN CONCURRENTLY AND SEVEN YEARS SUSPENDED, IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**