

**IN THE COURT OF APPEALS**

**7/29/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-KA-00977 COA**

**JOHNNY RAY HICKINBOTTOM**

**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. HENRY L. LACKEY**

**COURT FROM WHICH APPEALED: CIRCUIT COURT OF LAFAYETTE COUNTY**

**ATTORNEY FOR APPELLANT:**

**TIMOTHY R. BALDUCCI**

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY PAT FLYNN

DISTRICT ATTORNEY: LARRY LITTLE

NATURE OF THE CASE: CRIMINAL--MURDER

TRIAL COURT DISPOSITION: APPELLANT FOUND GUILTY OF LESSER INCLUDED OFFENSE OF MANSLAUGHTER; SENTENCED TO FIFTEEN (15) YEARS IMPRISONMENT, TEN (10) YEARS SUSPENDED AND FIVE (5) YEARS TO SERVE

MANDATE ISSUED: 8/19/97

BEFORE BRIDGES, C.J., COLEMAN AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

Pursuant to an indictment for the murder of Clarence E. Alexander, said to have occurred on October 1, 1994, a jury in the Lafayette County Circuit Court returned a verdict of "Guilty of manslaughter" in the death of Clarence E. Alexander" against the Appellant, Johnny Ray Hickinbottom, at the conclusion of a trial of two days. Pursuant to that verdict, the trial court entered its judgment of sentence in which it sentenced Hickinbottom "to serve a term of 15 years in an institution to be designated by the Mississippi Department of Corrections with 10 years suspended and 5 years to serve for the crime of manslaughter." Hickinbottom has appealed to argue that pursuant to the *Weathersby* rule, the trial court erred when it denied his motion "to dismiss the indictment against [him] . . . ," which he made after the State had rested on its offer of rebuttal evidence." We find the *Weathersby* rule to be inapplicable to the evidence in this case, and we therefore affirm the trial court's judgment of sentence.

### **I. Facts**

Johnny Ray Hickinbottom, twenty six years old, was a native of Lafayette County, Mississippi. After he graduated from high school in 1988, he joined the army, where he served for four years, most of which were spent at Fort Ord in California. After his discharge from active duty with the army, Hickinbottom ultimately returned to Oxford, where he became employed by Georgia Pacific in one of its plants "working on a machine." Since April of 1993, Hickinbottom occupied a mobile home in which his brother, McArthur Hickinbottom, and McArthur Hickinbottom's wife, Juanita Hickinbottom, and their three children lived. The Hickinbottoms' mobile home was located in the McPhail Trailer Park, which was located south of Oxford on Mississippi State Highway No. 7.

Johnny Ray Hickinbottom returned to his brother's mobile home at about 11:30 p.m. on the night of October 1, 1994, after he had completed working the second shift at Georgia Pacific earlier that night. About 2:30 a.m. that same night, after Hickinbottom had gone to bed, Stephanie Alexander began to "beat" on the mobile home's front door. After Juanita Hickinbottom arose from her bed to answer the door, her husband, McArthur Hickinbottom, asked her who was at the door. When

Juanita Hickinbottom replied, "Stephanie," McArthur Hickinbottom also went to the door. Stephanie asked to see Johnny Ray Hickinbottom, and McArthur Hickinbottom let her inside. Once inside, Stephanie went to the Appellant's bedroom, where she remained with him for about fifteen minutes.

Stephanie Alexander complained that she was cold in Hickinbottom's bedroom, so Hickinbottom and Stephanie Alexander went to her father's house to get a heater. While they were at Stephanie Alexander's father's house, Clarence Alexander, the estranged husband of Stephanie Alexander who would become Hickinbottom's victim later that morning, drove up to her father's house.

Hickinbottom entered the father's house and got a heater from him. Hickinbottom and Stephanie Alexander then returned to McArthur Hickinbottom's mobile home with the heater, took it inside into the living room where the Hickinbottoms' three children were asleep on the couch, and "set it up." Johnny Ray Hickinbottom and Stephanie Alexander then retired to Hickinbottom's bedroom where they went back to bed. These events were over by about 4:15 a.m.

Approximately forty five minutes later, Johnny Ray Hickinbottom was awakened by the noise of a car, which was driving around in the mobile home park. When the car reached the Hickinbottoms' mobile home, it began to "spin gravel," and its driver began to blow the car's horn. The car left, only to return very shortly. This time, the driver, Clarence Alexander, parked the car in the back yard of the Hickinbottoms' mobile home. According to Hickinbottom's testimony, Alexander got out of the car, walked over to Stephanie Alexander's car, tried to open the door of her car, and then returned to his car. Alexander then began to blow the horn of his car and started "yelling and cussing." Alexander made his way to the front door of the Hickinbottoms' mobile home, yelling and cussing all the way. Once Alexander got to the front door, he started "beating and pulling and jerking on the door."

Johnny Ray Hickinbottom heard his brother holler, "Who is it?" McArthur Hickinbottom then went to the front door and opened it. When McArthur Hickinbottom opened the front door, Johnny Ray Hickinbottom got out of bed and went into the living room. Once Hickinbottom was in the living room, he heard Clarence Alexander ask, "Where's Stephanie?"

The exact sequence and nature of the events which followed are uncertain, but Hickinbottom admitted that he fired a .25 caliber automatic pistol twice, after which Clarence Alexander retreated into his car. Once in his car, Alexander started it and drove away. However, he drove only a very short distance down the road before his car left the road and collided with the corner of another mobile home. When Lafayette County deputy sheriffs responded to investigate what had been reported as a motor vehicle accident, they discovered that the driver, Clarence Alexander, appeared to be dead. The deputies were compelled to break out the window on the driver's side of the car because the doors were locked. They retrieved a knife from inside Alexander's car. However, it was not until after he had been taken to the hospital by ambulance that the physician who examined Alexander there, Dr. Lovelace, determined that Alexander had been shot twice.

Armed with the information that Alexander had been shot twice, Lafayette County Sheriff Buddy East contacted Sammy W. Aldridge, an officer assigned to the Criminal Investigation Bureau of the Mississippi Department of Public Safety who also lived in Lafayette County, to request his assistance in investigating Alexander's shooting. East and Aldridge traveled to the Hickinbottoms' mobile home, where they found Hickinbottom. Hickinbottom told East about what had happened between Alexander and him earlier that morning. Hickinbottom professed surprise that Alexander had been

killed because, as he explained to Sheriff East after Investigator Aldridge had read him his *Miranda* rights, he, Hickinbottom, had fired the gun twice into the ground to scare Alexander off from the Hickinbottoms' mobile home.

## II. Trial

Because Hickinbottom argues that the *Weathersby* rule entitled him to a directed verdict of "not guilty," this Court reviews in some detail the testimony of the witnesses during Hickinbottom's trial. Lafayette County Sheriff East, the State's first witness, testified that when he was at the Hickinbottoms' mobile home, Hickinbottom told him, "I shot down at the ground twice, but I didn't shoot him." Investigator Sammy Aldridge testified that Hickinbottom told him a slightly different version of his firing the two shots. In that version, when Hickinbottom pushed Alexander out the front door, McArthur Hickinbottom pulled his brother, Johnny Ray Hickinbottom, around, and Johnny Ray Hickinbottom then shot twice out the door with the .25 caliber pistol which he was already holding. Hickinbottom also told Aldridge that he then went back to bed and heard Alexander's car crank up and leave.

Appellant Hickinbottom's testimony during his trial established the following chain of events. When Hickinbottom went into the living room after his brother had opened the door in response to Alexander's cussing and beating on the front door, he heard Alexander ask, "Where's Stephanie?" McArthur Hickinbottom told Alexander that Stephanie did not live there. Alexander then tried to push McArthur from in front of him and enter the mobile home. All the while Alexander appeared drunk, and he was holding a "small, half-pint" bottle in one hand with his other hand in his pocket. When Johnny Ray Hickinbottom witnessed these events, he approached the front door, stepped in front of his brother, and told Alexander that he, Alexander, would have to leave. According to Johnny Ray Hickinbottom, Alexander told him, "I'll kill you and her too."

McArthur Hickinbottom then told his brother, "[J]ust close the door and go back to bed." As the Appellant closed the door, Alexander jerked the door open real hard, and this hard jerk on the door brought "me [Hickinbottom] up close to him [Alexander]." Alexander then shoved the Appellant "back pretty hard." We quote from the record to relate what happened next:

I fell on my back, flipped over the chair, and hit my back on the entertainment center. As I looked up, he was walking. He had made a couple of steps, and he was trying to walk through the house, so I jumped up and shoved him on the table with the heater, and the heater fell off the table. He jumped up. When he jumped up, both of us jumped up; and we just ran and jumped each other and started wrestling each other. We fell on the couch with the kids, I believe. When we fell on the couch, I rolled over. I landed on top of him on the floor; so I jumped up real quick and pushed him down because I wanted to get up before he did; and when I got up, he raised up and looked down at the ground. When he looked down at the ground, I seen he had dropped something out of his pocket.

When Alexander reached down to pick up what Hickinbottom thought was a knife, Hickinbottom reached under the cushion of the couch where he kept his pistol, grabbed the pistol, and fired it one time as Alexander was raising up with the object in his hand. Alexander "jumped from the sound of

the gun . . . , turned around and looked at" Hickinbottom. Hickinbottom grabbed Alexander by the chest and "slammed him out the door." After Hickinbottom had thrown Alexander outside the door, Alexander again dropped the object he had been holding, and while Hickinbottom continued to point the gun at Alexander, he told Alexander, "Clarence, get away from my house."

Perhaps because of all the commotion, McArthur emerged for a second time from his bedroom, and walked over to his brother, Johnny Ray. When Alexander saw McArthur Hickinbottom, he turned around and started walking off. McArthur then grabbed his brother around the shoulders as though he was wrestling with him. When McArthur grabbed Johnny Ray Hickinbottom around the shoulders, Johnny Ray Hickinbottom went down, and the gun which he had been pointing at Alexander discharged a second time. Johnny Ray Hickinbottom did not again see Alexander after the gun discharged this second time. About three seconds after the second shot, the Appellant heard the car door open and slam. The car started up and drove away. Hickinbottom ran to the window to look to be sure that Alexander had driven away, and when he no longer saw Alexander's car parked in the back of the mobile home, Hickinbottom went back to bed and resumed his night's sleep. According to Hickinbottom, Alexander never acted nor sounded as though he had been shot. Instead, Alexander continued to walk around, to curse, and to scream and holler after Hickinbottom had fired both shots from his .25 caliber pistol.

Stephen Timothy Hayne, M. D., a forensic pathologist, had performed an autopsy in the Rankin County morgue located in Brandon on Alexander's body on the day of his death. Hayne testified that he found two gunshot wounds in the body. He described one as lethal and the other as non-lethal. The lethal wound was located in Alexander's back slightly to the left of the midline at a point approximately fourteen inches below the top of his head and approximately an inch and a half to the left of the midline of the back. The bullet traveled upward slightly at approximately ten to twenty degrees without significant deviation right or left while it was going from the back towards the front. The bullet did not exit the front of Alexander's body. Inside Alexander's body, the bullet perforated the aorta and the left lung. Consequently, blood filled the space that holds the left lung and the plural cavity on the left side of the chest cavity. Dr. Hayne categorized the lethal wound as a distant gunshot wound because of "the absence of any powdered residue, tattooing, smudging, other physical factors usually found on the skin surface [of the wound]."

The non-fatal wound was located near the left buttocks approximately twenty eight to twenty nine inches below the top of the head and less than one inch to the left of the midline. This bullet traveled markedly to the left almost at right angles to the buttocks going slightly down at approximately ten degrees.

Dr. Hayne also described various cuts, scrapes, bruises, and abrasions located on Alexander's face to include the forehead, nose, and the right eyebrow. He found a laceration on the back of Alexander's right hand. He also found about one-half quart of blood in the abdominal cavity, bruises to the liver, and lacerations to the spleen. While all of these injuries were non-lethal, Dr. Hayne opined that they were the types of injuries commonly seen in a person who had sustained injuries from a motor vehicle crash such as the one in which Alexander's car crashed into the mobile home located near the Hickinbottoms' mobile home. The abdominal injuries would have resulted from the impact between the lower part of steering wheel and Alexander's abdominal area.

Relevant to Hickinbottom's claim that he shot Alexander in self-defense was the following testimony from Dr. Hayne:

Q. Is there anything on those injuries that would be consistent with a fight or an altercation, any of those type of injuries, as opposed to or in contrast to injuries to a car wreck?

A. They would not be consistent to injuries with a fight involving a direct blow, which would normally produce a pattern injury or a series of bruises or contusions. There are no defensive posturing injuries that are classic in the locations of the injuries that I saw.

Q. When you say "no classic defensive posturing injuries," could you explain what you mean by that?

A. Those are injuries that are commonly found consisting predominantly of bruises located over the back of the hands, the back of the fingers, the palm of the hand, the front part of the fingers, as well as the back of the forearm; and those injuries at that location are commonly associated when an individual is trying to protect the individual's face, neck, and upper part of his chest, which is almost an instinctual response from one's being assaulted.

Under Hickinbottom's counsel's cross-examination, Dr. Hayne testified that Alexander's blood alcohol concentration was 0.25 percent ethyl alcohol, which was two and one-half times greater than "what the legal percentage is to be allowed to drive a vehicle" in Mississippi. On the State's re-direct examination, Dr. Hayne opined as follows about how this level of intoxication would have affected Alexander's ability to fight:

[Alexander] would have less physical coordination, demonstrable strength, as well as other variables to inflict signature injury, though the emotional component would present another variable.

Q. If someone was pushed or shoved or spun around and they were at this level of intoxication, would they be more likely or less likely to recover in a normal way?

A. I think they would be far less likely to remain stable, to avoid falling, to regain an erect posture.

In rebuttal, the State recalled Investigator Sammy Aldridge, who testified that on the morning of the homicide when he questioned Hickinbottom, Hickinbottom said nothing about Alexander's having a knife earlier that morning. Aldridge noted that inside the living room, where Hickinbottom testified he had "wrestled" with Alexander before he threw him out the front door, nothing appeared to be broken and that it did not look like there had been any fighting in the living room. Aldridge added that when Hickinbottom opened the door, he was wearing a only a pair of boxer shorts. When the district attorney inquired of him, "Did you notice any marks or scratches or scrapes on his face or anywhere that lead you to believe he had been in a fight?," Aldridge replied, "No, Sir."

The trial judge instructed the jury on Hickinbottom's right to defend himself against Alexander's aggression, but the jury rejected that defense and returned a verdict that Hickinbottom was guilty of manslaughter.

### III. Resolution of Hickinbottom's *Weathersby* rule issue

In his brief, Hickinbottom frames the issue as follows: "Whether the trial court erred in refusing to grant the defendant a directed verdict in light of the *Weathersby* [r]ule?" In *Weathersby v. State*, 165 Miss. 207, 147 So. 481, 482 (1933), the Mississippi Supreme Court opined:

[W]here the defendant or the defendant's witnesses to the homicide are the only eye witnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

In his brief, Hickinbottom reviews his testimony as we have previously done in this opinion to argue that when he saw "what he believed to be a knife fall from out of [Alexander's] pocket and [Alexander] reach down to retrieve the knife," he, Hickinbottom, "[a]cting in self-defense . . . reached under the couch cushion and grabbed his gun and fired it once." He then explains the second shot as a "mishap" in which the gun was "mistakenly" discharged when he fell to the ground after his brother, McArthur Hickinbottom, grabbed him at the front door "to prevent any other problems." He then summarizes, "The first shot was in the ground, and the second shot was by mistake."

Hickinbottom then complains that on its cross-examination of him, "the State attempted to confuse the defendant and get him to contradict himself." He notes that "the State next tried to find inconsistencies with the gun shots and the issue of self-defense." Hickinbottom concludes his argument as follows:

Therefore, since [Hickinbottom's] version is reasonable and not substantially contradicted, the last issue is whether the defendant's version creates an absolute legal defense. The record is clear that [Alexander] was drunk. [Hickinbottom] believed that [Alexander] was carrying a knife and further believed that his life was in danger when [Alexander] shoved him down and reached for [the] knife. The law is clear that this was "justifiable" homicide under the theory of self-defense. Therefore, the judge erred when he did not follow the *Weathersby* [r]ule and direct a verdict of acquittal for [Hickinbottom].

In *Blanks v. State*, 547 So. 2d 29, 34 (Miss. 1989), the Mississippi Supreme Court reminded the trial bench and bar that: "The *Weathersby* rule . . . is not a jury instruction, but a guide for the circuit judge in determining whether a defendant is entitled to a directed verdict."

The Mississippi Supreme Court has established the following standard of review for determining whether the trial judge erred in denying a motion for a directed verdict:

In considering a motion for directed verdict, the reviewing court must consider evidence introduced in light most favorable to the State, accepting all evidence introduced by the State as true, together

with all reasonable inferences therefrom; if there is sufficient evidence to support a guilty verdict, motion for directed verdict must be overruled. If the evidence presents an issue for determination by the jury, then the case must be submitted to the jury and will not be disturbed, if evidence and those inferences support the guilty verdict.

. . . .

In reviewing the question of whether a verdict is sufficiently supported by the evidence, the Supreme Court is required to look at the totality of the circumstances, and "[o]ur concern here is whether the evidence in the record is sufficient to sustain a finding adverse to [the defendant] on each element of the offense. . . . [W]ith respect to each element, of the offense, [we must] consider all of the evidence -- not just the evidence which supports the case for the prosecution -- in light most favorable to the verdict."

*Yates v. State*, 685 So.2d 715, 718 (1996) (citations omitted).

The State's theory of Alexander's homicide, as the district attorney expressed it in his closing argument, was that Hickinbottom shot Alexander in the back as Alexander was running from the front door of the mobile home in a slightly crouched position to get back to his car. This theory is consistent with Dr. Hayne's testimony that he could not determine whether the wound in Alexander's back or the wound in his left buttock occurred first. However, even if the first bullet had penetrated Alexander's left buttock, Dr. Hayne opined that the wound in Alexander's left buttock was not fatal. Hickinbottom had consistently admitted that he had fired his .25 caliber pistol twice. Unless we find that the *Weathersby* rule requires us to reverse Hickinbottom's conviction because nothing contradicted his claim that he had fired at Alexander in self-defense, we would hold that the evidence was sufficient to support the jury's verdict that Hickinbottom was guilty of manslaughter.

A return to *Blanks* becomes beneficial at this point as we review this issue. About the relationship between the *Weathersby* rule and a defendant's prior inconsistent statements, the Mississippi Supreme Court opined in *Blanks*:

And, there is still another circumstance which precludes the application of the *Weathersby* rule, and that is where the accused, following the slaying gives conflicting versions of how the killing took place, or initially denies the act.

*Blanks*, 547 So. 2d at 33. We recall that after Investigator Aldridge had "*Mirandized*" Hickinbottom, Hickinbottom told Sheriff East that he had fired twice into the ground. Hickinbottom's counsel did not object to this testimony from Sheriff East. We further recall that Aldridge testified that Hickinbottom described his shooting the pistol as follows: "[Hickinbottom] took and pushed [Alexander] out the door, outside the mobile home; and as he pushed him, McArthur pulled [his brother] around; and [Johnny Ray Hickinbottom] had a .25 automatic in his hand; and [Johnny Ray Hickinbottom] shot twice out the door . . . ." At trial Hickinbottom testified that he retrieved the pistol from beneath the cushion of the couch where his brother's three children were sleeping and fired it once after Alexander had dropped and retrieved something that looked like a knife. His



testimony about the second shot was consistent with what he had told Aldridge, but it remained inconsistent with what he had told Sheriff East, *i. e.*, he had fired the gun twice into the ground.

Moreover, Hickinbottom's testimony about the scuffle in the living room after Alexander entered it, presumably in search of his wife, was contradicted by Investigator Aldridge's testimony that he saw nothing broken in the living room later that same morning of the homicide and that the living room contained no evidence of a fight's having occurred in it. Dr. Hayne's opinion that none of Alexander's superficial wounds were "defensive in nature" contradicts Hickinbottom's plea of self- defense.

Of course, the fact that Alexander's lethal wound occurred near the mid-line of his back contradicts Hickinbottom's assertion that he felt compelled to shoot at Alexander in self-defense. In *Buchanan v. State*, 567 So. 2d 194, 195 (Miss. 1990), Buchanan testified that she shot and killed her boyfriend, Norman Boykin, as he was facing her and coming toward her. However, the pathologist who had performed an autopsy on Boykin's remains testified that Boykin had been shot in the back. *Id.* at 197. On appeal, Buchanan raised the issue of the *Weathersby* rule, but the Mississippi Supreme Court rejected her argument. The supreme court explained: " The testimony of the pathologist showing that the victim was shot in the back substantially contradicts the testimony of [Buchanan] and her self-defense theory." *Id.* at 197.

This Court has reviewed the evidence in the case *sub judice* to demonstrate that Hickinbottom's claim that he fired his .25 caliber automatic pistol twice in self-defense was contradicted by his previous explanations of what had occurred which he made to Sheriff East and Investigator Aldridge and by the location of the lethal gunshot wound in Alexander's back. Hickinbottom's testimony about the fight between Alexander and him in the living room of the mobile home where his brother's three children were sleeping on the couch from beneath the cushion of which he retrieved his pistol was questioned by Investigator Aldridge's rebuttal testimony that he saw no signs of broken furniture or of a fight in the living room. This Court has already found that the evidence which the State adduced was sufficient to support the jury's verdict of Hickinbottom's guilt of manslaughter. We further find that the State's evidence presented questions of whether Hickinbottom was guilty of murder or of manslaughter or was not guilty because he acted in self- defense. Thus, this Court concludes that the *Weathersby* rule affords Hickinbottom no relief from the trial court's judgment of his guilt of manslaughter and its sentence, which it now affirms.

**THE LAFAYETTE COUNTY CIRCUIT COURT'S JUDGMENT AND ITS SENTENCE OF THE APPELLANT TO SERVE FIFTEEN YEARS IN AN INSTITUTION TO BE DESIGNATED BY THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH TEN YEARS SUSPENDED AND FIVE YEARS TO SERVE FOR THE CRIME OF MANSLAUGHTER ARE AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO LAFAYETTE COUNTY.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**