

**IN THE COURT OF APPEALS 12/03/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 93-KP-01427 COA**

**TIMOTHY EDWARDS A/K/A TIMMY EDWARDS AND TOMMY EDWARDS A/K/A  
TOMMY L. EDWARDS A/K/A TOMMY LEE EDWARDS**

**APPELLANTS**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-

TRIAL JUDGE: HON. HONORABLE ROBERT WALTER BAILEY

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

PRO SE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

NATURE OF THE CASE: CRIMINAL - MANSLAUGHTER AND AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: TIMOTHY EDWARDS FOUND GUILTY OF AGGRAVATED  
ASSAULT & SENTENCED TO 15 YEARS; TOMMY EDWARDS FOUND GUILTY OF  
MANSLAUGHTER & SENTENCED TO 20 YEARS.

MANDATE ISSUED: 6/19/97

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

SOUTHWICK, J., FOR THE COURT:

Timothy Edwards and his brother, Tommy Edwards were indicted for aggravated assault and murder, respectively. Timothy was found guilty of aggravated assault and Tommy was found guilty of manslaughter. The Edwards brothers were tried together. They appeal their convictions arguing twelve points of error. Finding all of their issues without merit, we affirm.

### FACTS

On May 13, 1993, two brothers, Timothy and Tommy Edwards, were at a barber shop in Meridian. Reginald and Eric Naylor, also brothers, stopped for a haircut. Reginald leaned in through the door of the shop, but did not enter, apparently because it was too crowded to wait. Timothy Edwards was in the barber's chair, while Tommy waited. Eric called Tommy out of the shop and began to question him about whether he was the person who had shot into Eric's house and car. After Tommy declared that he knew nothing about the shootings, Eric took a swing at Tommy. Thereafter, Tommy shot Eric twice, killing him. After Reginald Naylor saw that his brother had been shot, he fled the scene. Tommy and Timothy followed him, shooting at him as he ran down the street. Eric and Reginald had no weapons on them.

### DISCUSSION

The appellants allege twelve points of error. In summary form, these arguments deal with jury instructions; the denial of motions for directed verdict, a new trial, and for a mistrial; alleged prosecutorial misconduct in closing arguments; exclusion of evidence of the deceased's prior violent behavior; sequestration of the jury; alleged deprivation of fundamental rights to a fair trial; and ineffective assistance of counsel. We will group the arguments for discussion purposes.

#### *1. Were jury instructions D-2, D-3, and D-7 properly denied?*

Jury instructions are to be granted only where evidence has been presented which support the instruction. *Lenard v. State*, 552 So. 2d 93, 96 (Miss. 1989). There is objection to the denial of three different instructions.

##### a. Instruction D-2

Tommy Edwards argues that instruction D-2 should have been granted and that the trial court's explanation for the refusal of instruction D-2 "constituted plain error." Instruction D-2 states:

Evidence has been presented that the defendants acted in ignorance or on mistake of fact. "Ignorance" or "Mistake of Fact" is a defense to the commission of a crime provided that:

1. The mistaken belief is honestly held; and
2. the belief is of such a nature that the conduct would have been lawful and proper, had the facts been as they were believed to be; and
3. the mistaken belief is not the result of the negligence or fault of the defendants.

If the State has failed to prove from the evidence in this case beyond a reasonable doubt that the defendants acted with the knowledge of the true facts, then you shall find the defendants not guilty.

The State objected to the instruction, stating that it was not supported by the evidence and that the final paragraph of the instruction did not designate what counts were involved. The court refused the instruction because it did not accurately state the law. Tommy Edwards argues that this instruction should have been given in light of the fact that the State charged that he did "wilfully, unlawfully, feloniously and of malice aforesaid kill and murder James Naylor." Tommy argues that he mistakenly believed that the deceased was carrying a weapon. The court allowed instruction S-2 which states:

The Court instructs the Jury that to make a killing or an assault with a deadly weapon justifiable on the grounds of self defense, the danger to the Defendant must be either actual, present and urgent, or the Defendant must have reasonable grounds to apprehend the design on the part of the Victim to kill him or to do him some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the Defendant acts.

The supreme court has stated that "[w]here one jury instruction adequately covers the defendant's theory of self-defense, the trial court may properly refuse to grant a second instruction on the grounds that it is redundant or cumulative." *Gossett v. State*, 660 So. 2d 1285, 1295 (Miss. 1995); *see also Cook v. State*, 467 So. 2d 203, 210 (Miss.1985); *Evans v. State*, 457 So. 2d 957, 959 (Miss.1984). Jury instruction S-2 adequately instructed the jury that if it found Edwards was reasonable in fearing imminent danger, then killing with a deadly weapon was justifiable. The instruction given in the present case "did make self-defense applicable in the situation where [defendant] possessed a reasonable apprehension of imminent danger and the victim had the apparent ability to inflict harm." *Gossett*, 660 So. 2d at 1295. We find that the granted instruction adequately informed the jury of the consequences if Tommy had reasonably apprehended imminent danger, and that D-2 was unnecessary.

#### b. Instruction D-3

Tommy argues that instruction D-3 should have been granted as a proper excusable homicide instruction. Instruction D-3 states:

The court instructs the jury that the killing of any human being by the act of another shall be excusable when committed by accident and misfortune or in the heat of passion or upon any sudden and sufficient provocation.

In this case if you shall find from the evidence, or have a reasonable doubt therefrom, that Tommy Lee Edwards in the heat of passion, brought on by sudden and sufficient provocation by James Eric Naylor, then it is your sworn duty to acquit Tommy Lee Edwards.

The acts that allegedly require the giving of such an instruction must fall within the requirements of Section 97-3-17, which defines three ways a homicide can be excusable:

The killing of any human being by the act, procurement, or omission of another shall be excusable:

- (a) When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent;
- (b) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation;
- (c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.

Miss. Code Ann. §97-3-17 (1972).

"Case law indicates that these three sections need not be taken as a whole, but may be read and applied separately." *Miller v. State*, 677 So. 2d 726, 730 (Miss. 1996). In *Miller*, the court clarified its earlier cases which seemed to have held that a homicide could never be excusable when a gun or other deadly weapon was used. The supreme court stated that this was not the law and that its earlier cases involved situations where the facts did not fit into either of the three excuses. *Id.*

The court stated that "[t]he clear language of the statute and its application by this court shows that the only time a homicide cannot be excusable when a dangerous weapon is used is when it takes place during sudden combat." *Id.* This is the exact situation that we face. The undisputed evidence shows that Tommy intentionally pulled the gun and fired more than one shot into the deceased. Tommy testified that he felt that his life was in danger and therefore, he had to shoot his gun to defend himself. The self-defense instruction that was given adequately covered Tommy's own accounts of what happened the day in question. The elements of excusable homicide accident do not apply in this case.

Defense instruction also was denied:

The court instructs the jury that if you find that there was a reasonable cause to apprehend danger of the part of Tommy and Timmy Edwards, then you should put yourself in the place of defendants at the time of the shooting and view the situation as it appeared to the defendants at that time with the same state of mind of defendants at that time.

The language of this instruction comes from *Stoop v. State*, 531 So. 2d 1215, 1219-20 (Miss. 1988). An instruction such as D-7 was not at issue in *Stoop*, but the court was only making an observation about the purpose of instructions. The requested instruction would have been confusing to the jury. The self-defense instruction that was given adequately instructed the jury on what was necessary for them to find a killing or an assault with a deadly weapon justifiable. Furthermore, instruction D-1-A also made instructions such as D-7 unnecessary. Instruction D-1-A instructed the jury to "determine the reasonableness of the ground upon which the defendants act."

## 2. Evidence to support verdict and deny motion for a new trial

The fourth and fifth points of error questions the sufficiency of the evidence and the denial of the motion for a new trial.

### a. Sufficiency of the Evidence

The supreme court has stated that "[w]here a defendant has moved for j.n.o.v., the trial court must consider all of the evidence -- not just the evidence which supports the state's case -- in the light most favorable to the state." *May v. State*, 460 So. 2d 778, 781 (Miss. 1984).

If the facts and inferences so considered point in favor of the defendant with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight, that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand."

*Tait v. State*, 669 So. 2d 85, 88 (Miss. 1996) (citing *May*, 460 So. 2d at 781)).

Tommy was indicted for murder, but was convicted of the lesser offense of manslaughter. Instruction S-4A instructed the jury that if the state failed to prove all the essential elements of murder, then it could consider manslaughter. The manslaughter instruction set out three elements that must be proven beyond a reasonable doubt before Tommy could be found guilty of manslaughter. The instruction's elements were these:

1. On or about the 13th day of May, 1993, in Lauderdale County, Mississippi;
2. The defendant, Tommy Edwards, did wilfully, unlawfully kill James Eric Naylor, a

human being, by shooting him with a handgun, a deadly weapon;

3. Without authority of law and not in necessary self-defense, and without any deliberate design to cause his death and without malice aforethought.

The instruction concluded by stating that if the State failed to prove any one or more of the elements beyond a reasonable doubt, then the jury should find Tommy not guilty of manslaughter. Element number one -- date and place of incident-- is undisputed. Element number two was satisfied not only with State witnesses, but also from Tommy's testimony showing that he intended to shoot the deceased with the gun. Finally, there was sufficient evidence to support element number three. The jury received, in addition to this instruction, an instruction on self-defense. There was sufficient evidence presented to show that Tommy's belief that he was defending himself was unreasonable. He testified that he heard the victim ask his brother to hand him the gun and that this caused Tommy to fear for his life. It was for the jury to give credibility to the testimony given at trial. We refuse to take that duty away from the jury. The evidence supported each element of the manslaughter instruction.

#### b. Denial of Motion for a New Trial

The supreme court has stated that "[t]he burden of proof in a criminal case never shifts from the State to the defendant. The State is required to prove every material element of the indictment beyond reasonable doubt." *Sloan v. State*, 368 So. 2d 228, 229 (Miss. 1979). The court further stated that "the defendant is not required to prove that he acted in self-defense, and, if a reasonable doubt of his guilt arises from the evidence, including evidence of self-defense, he must be acquitted." *Sloan*, 368 So. 2d at 229. The State elicited testimony that appellants never actually saw Eric or Reginald with a gun; that Eric was shot more than once causing his death; and that witnesses saw Timothy running after Reginald shooting at him. All of this evidence could be taken by the jury to disprove the self-defense theory.

The supreme court has stated that the lower court's denial of a motion for new trial will be reversed only if, by denying it, the court abused its discretion. *Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992). Furthermore, the court stated that a new trial should only be granted when "the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice." *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983). There was no abuse of discretion in denying the motion for a new trial.

#### 3. Evidence of Prior Bad Acts

Evidence of Tommy's prior bad acts was admitted into evidence. The relevant testimony was elicited through Reginald. Reginald testified that Eric believed that Tommy had shot into his car earlier that year. The appellants argue that the problem with Reginald's testimony is that Tommy was never arrested nor convicted of that act and, therefore, testimony of that prior bad act should have been excluded. However, this testimony was necessary to inform the jury of the circumstances surrounding the whole incident. The supreme court has held that such evidence may be necessary to understand a

chain of events, but the evidence still must pass the balancing test of Rule 404(b):

Even where evidence of other crimes is admissible as an exception to M.R.E. 404(b), it can not be admitted if its probative value is substantially outweighed by the risk of undue prejudice.

*Duplantis v. State*, 644 So. 2d 1235, 1247 (Miss. 1994) (citations omitted).

The prior incident between Tommy and Eric was necessary to understand the reason for the altercation that led to the shooting. This information was not only brought out during the direct examination of Reginald, but was first mentioned in defense counsel's opening statement. The appellants cannot now complain of evidence that was first brought up by their counsel. Furthermore, as in *Duplantis*, "this is not a case where the other crimes evidence is similar or identical to the crime with which the defendant is currently charged, thereby making it likely that the jury would find him guilty this time simply because he had done it before." *Id.* We find that the trial court was within his discretion in determining that the risk of unfair prejudice was minimal and the probative value of the other crimes evidence outweighed its prejudicial effect.

#### 4. Comments in Closing Arguments

##### a. Statements on Failure to Testify

In the State's closing argument, this was said:

Ladies and gentlemen, there was not much talk about Timothy Edwards in this trial but I hope you see that Timothy Edwards is a dangerous man.

It is argued that this statement was a "comment, innuendo or insinuation reflecting upon and going to Timothy's failure to testify in the case." No objection was made at trial. The supreme court has stated that "[f]or this Court to consider claims of alleged erroneous comments of the prosecuting attorney in closing arguments, a contemporaneous objection must have been made; otherwise, the point is deemed waived." *Handley v. State*, 574 So. 2d 671, 679 (Miss. 1990). However, "if a comment is so inflammatory that the trial court should have objected on his own motion, the point may be considered." *Id.* (quoting *Gray v. State*, 487 So. 2d 1304, 1312 (Miss. 1986)).

The comments were not inflammatory, and only with great effort could be seen as an allusion to anyone's failure to testify. The prosecution's comment in this case referred to the lack of a defense generally and not to any specific person's failure to testify.

##### b. Statements by Counsel Appealing to Jury's Conscience

It is also complained that the statements made by the prosecutor in his closing argument were improper in that they indicated that the jury should convict in order "to deter future law breaking."

The relevant statements are:

Ladies and gentleman, what is this world coming to if this is justified what these two people did.

...

Ladies and gentlemen, let me start off by telling you that you don't need to make any mistake. If you say that what Tommy Edwards did and what Timothy Edwards did in this case was perfectly all right under these facts, then you will have just, basically, opened the door for any sort of acts like this anywhere, anytime. Because these kind of facts, ladies and gentlemen, can be applied anywhere: in a barroom, in a home, in a convenience store, in a grocery store, in a law office, in a courtroom. Anywhere two people have a disagreement and they have had a little bad blood between them for a period of time and one of them swings out at the other one, it is all right to kill him. Don't make any mistake about that. This is your call. You are the law in this case because you determine what the facts are. And without facts to be applied there, then the law is just something written down on paper.

Because these statements did not elicit objections at trial, we will not consider the argument here. Had there been any impropriety to these arguments, the excesses could have been corrected at the time. The argument is waived.

##### *5. Admissibility of Prior Bad Acts of Deceased*

The Edwards' argue that evidence that the deceased was prone to violence should have been allowed by the court. At the time that this testimony was sought through Reginald Naylor, the State objected. The court ruled that pursuant to *Stoop v. State*, 531 So. 2d 1215 (Miss. 1988), the testimony was not relevant until the defense proved that Tommy was actually aware of the prior violent behavior of Eric. Several witnesses testified that Eric may have swung at and/or hit Tommy. The jury was given an opportunity to hear this evidence. Furthermore, the court did not preclude the defense from using other evidence of Eric's past behavior, but just required that Tommy show his personal awareness of this behavior. In the absence of such awareness, the self-defense argument would not be enhanced by evidence of Eric's past behavior.

##### *6. Sequestration of the Jury*

The appellants argue that the jury should have been sequestered in that Tommy was charged with the capital crime of murder. They rely on several cases that have held that the jury shall be sequestered where the crime punishable is capital and punishable by life imprisonment or death. *See Cox v. State*, 365 So. 2d 627, 629 (Miss. 1978); *see also, Wilson v. State*, 248 So. 2d 802 (Miss. 1971). More recent case law and Uniform Criminal Rule of Circuit Court Practice 5.07, however, limit automatic sequestration to that narrow class of cases in which the State actually seeks the death penalty. *Griffin v. State*, 492 So. 2d 587, 588 (Miss. 1986). Rule 5.07 provides:

In any case where the defendant is charged with a crime punishable by death and the state



seeks to impose the death penalty, the jury shall be sequestered during the entire trial.

In all other criminal cases, the jury may be sequestered upon request of either the defendant or the state made at least 48 hours in advance of the trial. The trial judge may, in the exercise of sound judicial discretion, either grant or refuse the request to sequester the jury. In the absence of a request, the trial judge may, on his own initiative, sequester a jury at any stage of a trial.

Unif. Crim. R. Cir. Ct. Prac. 5.07.

Although Tommy was charged with murder, he was convicted of the lesser offense of manslaughter. The supreme court has stated that "[i]f a right attaches by virtue of a charge being capital in nature, then for that reason alone, no cognizable prejudice sufficient to require reversal may be found where the jury in effect acquits on the capital charge." *Griffin*, 492 So. 2d at 589.

#### *7. Cumulative Error*

The appellants argue that even if this Court does not find that each of their issues, standing alone, constitute reversible error, then the cumulative effect of each deprived the appellants of their constitutional right to a fair trial. Because we have found each allegation of error to be without merit, we reject this complaint as well.

#### *8. Ineffective Assistance of Counsel*

The appellants argue that the attorney representing them in the lower court should not have represented both of them in that there was a conflict of interest between the parties. The appellants contend that because they were charged with two separate crimes in this case, they should have had separate counsel. They also contend that the conflict was obvious in that Tommy testified and Timothy did not. They argue that they were never asked if a conflict existed or if they were satisfied with their counsel's representation.

In order to succeed with an ineffective assistance of counsel claim, the complaining party must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063 (Miss. 1984). They must prove (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* "The burden of proving both prongs of the test is on the defendant." *Id.* "Furthermore, the defendant must show that there is a reasonable probability that but for the errors, the outcome of the case would have been different." *Blue v. State*, 674 So. 2d 1184, 1195 (Miss. 1996). (citing *Nicolaou v. State*, 612 So. 2d 1080, 1086 (Miss. 1992)). The appellants have failed to prove either of the two-prongs set out in *Strickland*. Therefore, this issue is without merit.

**THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT OF  
CONVICTION OF TIMOTHY EDWARDS OF AGGRAVATED ASSAULT AND  
SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI**

**DEPARTMENT OF CORRECTIONS IS AFFIRMED. THE CONVICTION OF TOMMY EDWARDS OF MANSLAUGHTER AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS ARE ASSESSED TO LAUDERDALE COUNTY.**

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