

IN THE COURT OF APPEALS 09/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00588 COA

RAY E. HALES

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. B. J. LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ANTHONY J. BUCKLEY (ON APPEAL)

ATTORNEY FOR APPELLEE:

OFFICE OF THE STATE ATTORNEY GENERAL BY W. GLENN WATTS

DISTRICT ATTORNEY: JEANNENE T. PACIFIC

NATURE OF THE CASE: CRIMINAL - AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: GUILTY -- SENTENCED TO TWENTY YEARS IN THE
CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., COLEMAN, AND KING, JJ.

COLEMAN, J., FOR THE COURT:

A Jones County jury convicted the Appellant, Ray E. Hales, of the felony of aggravated assault, pursuant to which the Circuit Court of Jones County sentenced him to serve a term of twenty years in the state penitentiary in the custody of the Mississippi Department of Corrections. Hales has appealed to question the trial court's refusal to accept his challenge of one juror for cause and to assert that the trial court erred when it refused to grant his request for a jury instruction on self-defense. We find no error in either of Hales' issues; therefore, we affirm.

I. Facts

Late in the afternoon of November 17, 1993, Hales drove to Sylvina's Hair Emporium in Laurel, where his wife of twenty five years, Donna Elaine Hales, worked as a cosmologist, to drive her home after work. After they left Ms. Hales' place of employment, they first stopped at the grocery store, which Hales and his wife entered together and bought groceries for their family. Of the Haleses' four children, two of them, a son, Reginald Jerome Hails, who was twenty four years old when this case was tried, and Ray Edward Hales, Jr., who was thirteen years old when this case was tried, lived at home with their parents. This family of four lived in an Apartment No. 9, 1516 Hoy Road, in Laurel.

From the grocery store, Hales drove to a gas station where they got some gas for the car. On the way from the grocery store to the gas station, the Hales began to argue about money. Hales demanded that his wife give him some money; but his wife refused because she thought that her husband, who had a history of alcoholism for which he had been treated at a hospital in Jackson, wanted it to buy whiskey. Ms. Hales testified that she could tell that her husband had been drinking when he came for her at work because she could smell alcohol and experienced his change in attitude which always accompanied his drinking. Hales' only source of income was social security disability benefits to which he was entitled because, according to his testimony, he suffered from a heart disease.

The Haleses' argument continued and probably intensified after they left the gas station and were on their way home to their apartment. Once they arrived at their home, Ms. Hales got out of the car and began to unload the groceries. She testified that she had asked her husband to help her carry the groceries into the apartment, but, according to Ms. Hales' testimony, he replied that "he wasn't going to help me do nothing." As she exited the car, so did Hales. After Hales refused to help his wife take in the groceries, she started to take them inside by herself. She had noticed that her oldest son, Reginald, had come to the front door of their apartment, but did not come outside to help his mother as was his usual custom.

Hales and his wife continued their verbal altercation over Hales' demand that she give him some money, which she continued to refuse, while she was preparing to carry the groceries into their apartment. We resort to portions and abridgements of Ms. Hales' testimony to relate what happened next:

A. He kept telling me he wasn't playing with me, that he was serious, He pulled the gun out of the glove compartment and shot in the air twice.

. . . .

Q. And where were you when he shot the gun in the air twice?

A. I was by the car getting the groceries. I had opened the back door of the car to get the groceries out.

Q All right. And then what happened?

A. Well when I started getting the groceries out, that's when he shot in the air twice. We were still arguing, of course. . . . And the only thing I remember, I tried talking to him, you know. I asked him why would he shoot in the air like that, and what was he doing, trying to scare me or what, which I was getting scared. . . . Well I thought I could like scare him into putting the gun away and I said, "Well if you're not going to put the gun away, I know what I'll do, I'll just go and call the police because I ain't scared of you. And I don't know why you are doing this." You know, I didn't have nothing to protect myself and I didn't know what to do. I was just scared, so I tried to talk him into putting the gun away.

. . . .

I was going to Mrs. Waters' -- Mr. and Mrs. Waters' house [right next door] because we didn't have a telephone. . . . I started going to her house to use her phone, and when I turned to go to her house to use the phone, he shot me [one time] in the back. . . . I continued to go on into my neighbor's house. I didn't knock [but went right on in].

After these events as Ms. Hales described them, Hales laid his gun down on the top of his car, sat down outside their apartment, and waited for the police to arrive. An ambulance arrived at the scene, and took Ms. Hales to the hospital. Marvin Smith, a Jones County deputy sheriff, arrived on the scene a little after 5:54 p. m., and arrested Hales. On March 28, 1995, a jury convicted Hales of aggravated assault because of his having shot his wife one time; and the Jones County Circuit Court sentenced him to serve a term of twenty years in the state penitentiary in the custody of the Mississippi Department of Corrections. Hales appealed *in forma pauperis* pursuant to an order declaring the indigence of Defendant for purpose of appeal which the trial court entered on May 4, 1995.

II. Issues and the law

In his appeal, Hales submits to this Court for its consideration and determination the two following issues, which we quote as we find them written in Hales' brief:

I.

The trial court erred in not excusing for cause a potential juror who had links to the alleged victim.

II.

The trial court erred in refusing defense instruction D-6(A) on self-defense.

A. Issue I. The trial court erred in not excusing for cause a potential juror who had links to the alleged victim.

During defense counsel's voir dire of the venirepersons, Tammy Buckley a/k/a Tammy Estus, gave the following answers to Hales' defense counsel's following questions:

Q. How do you know Ms. Hales?

MS. BUCKLEY: Where I get my hair fixed. She's a beautician and she works there.

Q. What's the name of the beautician place, please?

MS. BUCKLEY: Sylvina's Hair Emporium.

Q. So, would it be fair to say that you're familiar with certain facts of this case?

MS. BUCKLEY: No.

Q. Have you had --

MS. BUCKLEY: -- just hearsay --

Q. -- oh, I'm sorry.

MS. BUCKLEY: Just hearsay.

Q. Right. I understand that it may be just hearsay, but you still heard some of the facts of this case then, ma'am. And has Ms. Hales talked to you at all about this case?

MS. BUCKLEY: No.

Q. Do you feel that you can be fair and impartial in this trial today?

MS. BUCKLEY: Yes.

Q. Do you feel because she cuts your hair you would rather not be serving here today?

MS. BUCKLEY: No, I don't feel that way.

Q. Do you feel -- if it was unpleasant, or pleasant or whatever reason -- if you

would return a verdict of not guilty, do you feel like you would be very awkward the first time you looked Donna Hales in the eyes?

MS. BUCKLEY: I'd still be her friend.

THE COURT: Did you say that Donna Hales cuts your hair?

MS. BUCKLEY: No. Where I get my hair fixed, she works there.

THE COURT That's what I thought you said. Don't assume facts that are not being stated.

Q. I'm sorry, your Honor. Pick up on the last word. You said she was your friend also though?

MS. BUCKLEY: Yes, sir, I did.

From its perusal of the foregoing voir dire examination of venireperson Buckley, this Court determines that Buckley acknowledged that she regularly had her hair done at Sylvina's Hair Emporium where Donna Hales worked as a cosmetologist. Although she admitted that she had heard something about the shooting, she denied that she had discussed the incident with Ms. Hales. Buckley answered that she would be a fair and impartial juror if she was selected to serve on the jury. She further stated that she would remain friends with Ms. Hales.

We initiate our analysis of Hales' first issue by noting that at the beginning of the selection of the jury, the State challenged for cause two members of the venire panel, one of whom was a lawyer, which the trial court sustained, and to neither of which Hales objected. Hales challenged five members of the venire panel for cause. The five challenged members of the venire panel were (1) Rudolph Ishee, (2) Tammy Buckley [Estus], (3) Rhonda Smith, (4) James Bush, the Chief of Police for the City of Laurel, and (5) Wanda Barnes. The trial court denied Hales' challenges for cause on jurors Ishee and Buckley, granted his challenges for cause on Smith and Barnes, and deferred Hales' challenge on Bush because of the unlikelihood of reaching his name on the venire list.

The State then offered to Hales the first twelve names which remained on the venire list without exercising one of its six peremptory challenges. Tammy Buckley was the eighth name on the list of venirepersons whom the State tendered to Hales. By the time Hales had reached her name, he had already exercised only two of his peremptory challenges on venirepersons whose names had been fourth and sixth in order from the top of the list. Thus, Hales' peremptory challenge of Tammy Buckley was only his third peremptory challenge. After he exercised it, he still had three more peremptory challenges to exercise. Hales in fact exercised his three remaining peremptory challenges on jurors whose names were in eleventh and twelfth place on the original list of names whom the State had tendered to Hales, and he exercised his sixth and final peremptory challenge on the thirteenth name which had been added to the list after Hales had exercised his first peremptory challenge. Hales exercised his first peremptory challenge on the fourth name on the State's initial list

of twelve names.

Hales refers to two cases in his argument on this issue, *Capler v. City of Greenville*, 207 So. 2d 539 (Miss. 1968), and *Scott v. Ball*, 595 So. 2d 848 (Miss. 1992). In *Capler*, the defendant had been convicted of driving under the influence in the municipal court of the City of Greenville. *Id.* at 339. He appealed to the County Court of Washington County, where he was again convicted in a trial *de novo*. *Id.* *Capler* -- and for that matter, the city -- objected to any woman's serving on the jury, but the county court announced at the beginning of the trial that no woman would be excused from jury service only because she was a woman. *Id.* The city exercised all six of its peremptory challenges against women and tendered twelve names to *Capler*, only one of which was a woman. *Id.* *Capler* challenged the woman for cause only because she was a woman; the trial court denied his challenge; but *Capler* declined to challenge the woman peremptorily. *Id.* When he declined to challenge the woman peremptorily, *Capler* had three remaining peremptory challenges, which he never used. *Id.* In response to *Capler's* argument that the trial court erred when it refused to grant his challenge of the woman juror for cause, the supreme court opined:

Where a party chooses not to challenge a juror peremptorily when he has challenges that are unused, he may not thereby put the court in error because the court declined to permit the juror to be challenged for cause.

Id. at 341 (citations omitted). Thus, even though the supreme court also held in *Capler* that it was against the law for women to serve on the jury contrary to the trial judge's refusing to excuse them as both the City of Greenville and he had *requested*, *Id.*, it concluded that *Capler* "[might] not complain of the fact that a woman served on the jury." *Id.* at 341.

Hales referred to *Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992), to support the proposition that, "When a rational challenge is made by a party to a prospective juror, and other jurors against whom no challenge is made are available, the circuit court judge should ordinarily excuse the challenged juror." This Court finds that statement in *Scott* to be dicta. Relevant to the issue in the case *sub judice* are these facts in *Scott*: *Scott* exercised peremptory challenges on prospective jurors Thaggard and Munford, but rather than exercise a peremptory challenge on Cobb, whom she also challenged for cause, *Scott* chose to exercise her fourth and final peremptory challenge on prospective juror Powell, No. 15, whom she had not challenged for cause. *Id.* at 851. *Scott* argued that the trial court erred in denying her challenge for cause of prospective juror Cobb. The supreme court replied to *Scott's* argument as follows:

We need not address whether the circuit judge committed error in his refusal to excuse the remaining three challenged for cause, namely: Thaggard, Munford and Cobb, because *Scott* exercised peremptory challenges on Thaggard and Munford, and rather than exercise a peremptory challenge on Cobb, chose to exercise it on prospective juror Powell, No. 15, whom he [sic] had not challenged for cause.

Id. at 851.

We emphasize that Hales complains about no member of the jury who convicted him of aggravated assault. He only disapproves of the trial court's denial of his challenge for cause of venireperson Tammy Buckley. *Berry v. State*, 575 So. 2d 1, 8 (Miss. 1990), succinctly states: "Denial of challenge for cause is not error where it is not shown that the defense has exhausted peremptory challenges and is thus forced to accept the juror." In the case *sub judice*, Hales had three more peremptory challenges when he peremptorily challenged Tammy Buckley. Pursuant to all three of the cases which we have discussed or cited in this portion of this opinion, we resolve this issue adversely to Hales and hold that he cannot put the trial court in error because it denied his challenge for cause of venireperson Buckley if Hales had three peremptory challenges left after he peremptorily challenged her. Especially is this correct in the absence of any complaint from Hales' about another member of the jury whom he was compelled to accept after he had exhausted all six of his peremptory challenges.

B. Issue II. The trial court erred in refusing defense instruction D-6(A) on self-defense.

Hales requested the trial court to grant the following instruction on self-defense:

INSTRUCTION # D-6A

The Court instructs the Jury that to make a shooting justifiable on the grounds of self-defense, the defendant must either actually be in present danger of death or serious bodily harm at the hands of the victim, or must have reasonable grounds to presently fear death or serious bodily harm at the hands of the victim, and mere belief of death or serious bodily harm at the hands of the victim, however, sincerely entertained in insufficient.

It will be for the jury to determine whether the defendant was in actual present danger for his life, or had reasonable grounds to fear death or serious bodily harm at the hands of the victim.

Before the trial court decided whether to grant or deny Instruction # D-6A, the following colloquy occurred between the trial judge and Hales' defense counsel:

THE COURT: Do you claim self-defense in this case?

MR. BUCKLEY: I'm just -- for the record -- note that I'm submitting the self-defense instruction, your Honor. It's for the Court's discretion to --

THE COURT: -- in defense of what?

MR. BUCKLEY: If Mr. Hales reasonably believed he was in danger, then he's entitled to one. I'm just saying that I've prepared one because certain facts can't, you know, no one told me --

THE COURT: -- it will be refused. It will be refused.

MR. BUCKLEY: Okay. Just for the record, your Honor, I submitted one, that's all. Thank you.

Hales' argument that the trial court erred when it denied Instruction # D-6A follows:

It is of course a fundamental right for an accused to have every lawful defense he asserts. even though based upon a meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instructions of the court. *See O'Bryant v. State*, 530 So. 2d 129 (Miss. 1988).

Mr. Hales had testified during the trial to the years of physical abuse he had suffered at the hands of his wife and child, Reginald Hales. . . . Both Donna Hales and Reginald Hales had admitted that they had struck Ray on different occasions in the past Ray also testified that his family knew that he had a bad heart condition.

Under these circumstances, counsel submits that the trial court should have allowed Defense Instruction D-6A to be submitted to the jury. The refusal of which denied Ray Hales a fair trial. *See, Lenard v. State*, 552 So. 2d 93 (Miss. 1989), *citing Wadford v. State*, 385 So. 2d 951, 955 (Miss. 1980), "[w]here there is serious doubt as to whether a requested jury instruction should be given, doubt should ordinarily be resolved in favor of the accused." *See also, Patrick v. State*, 285 So. 2d 165 (Miss. 1973).

In response to Hales' argument, the State includes in its brief, the following excerpts from Hales' direct examination:

Q. Has [your wife] ever threatened you?

A. Not to my knowledge.

....

Q. Okay. So then what happened in the car then when you felt like you weren't going to go in at this time because of what may have occurred in there?

A. We fought out of the car. I come out of that car shooting. I sure did.

Q. Where did you get the gun from?

A. Out of the glove compartment. That's where I had it. I kept it there.

Q. How many times did you shoot in the air?

A. I didn't shoot in the air.

Q. Where did you shoot?

A. I come out of the car shooting.

Q. In what direction, if any?

A. In the direction of my wife.

Q. Do you recall striking your wife?

A. When she -- I had heard, "Baby, don't shoot me no more." I quit. Those are the exact words that she said.

....

Q. Were you aware that you had struck your wife in the side?

A. Not really. Because she -- I guess when she realized that I was serious, she turned and ran. And if she hadn't said, "Baby, don't shoot me no more," I probably would have kept shooting.

....

Q. Did you see your son standing at the screen porch door when you drove up?

A. No. The only time I saw him was when he came up with -- I had handcuffs on

....

Q. She didn't have a gun, did she?

A. No, she did not.

At no time did Hales testify that he feared for his life when he began shooting; neither did he testify to the jury that he shot his wife in self-defense. He testified that when his wife saw that he was serious, she turned and ran toward their neighbors' apartment. He shot his wife in the back as she was running to call the police at her neighbors' apartment. Hales never saw his son Reginald until after the deputy sheriff had arrived, arrested him, and placed him in handcuffs. When Hales requested Instruction # D-6A, the trial court inquired in defense of what was he acting, to which Hales' counsel replied, "If Mr. Hales, reasonably believed he was in danger, then he's entitled to one." After the trial court refused to grant this instruction, Hales' counsel replied, "Just for the record, your Honor, I submitted one, that's all. That's all."

In response to Hales' argument on this issue, the State first cites *Buchanan v. State*, 567 So. 2d 194, 198 (Miss. 1990), in which the Mississippi Supreme Court affirmed Buchanan's conviction of manslaughter. In its *Buchanan* opinion the supreme court stated:

Regardless of how bona fide (in good faith) the belief of appellant was as to danger of great bodily harm to herself, the test is whether or not a reasonable person under the same or similar circumstances would have considered herself to be in such danger and would have thought there was reasonable cause to kill . . . for her own protection.

Id. The State then cites *Taylor v. State*, 597 So. 2d 192 (Miss. 1992), in which the appellant, Mitchell Taylor, attempted to defend the charge of having murdered his one-time girlfriend on the ground that the killing was an accident. *Id.* at 192 Our supreme court wrote this about the necessity of claiming self-defense:

The problem, rather, is that Taylor made no claim of self-defense. No one offered evidence of self-defense. Taylor's theory of defense throughout was one of accident or excusable homicide.

Id. at 194. While the supreme court reversed and remanded Taylor's conviction of murder because the State's instruction which defined the crime of murder also referred to self-defense and thus, in the opinion of the supreme court, deflected the jury's attention from his real defense, which was justifiable homicide because of accident, *Taylor* supports the proposition that a defendant must claim self-defense during the trial if he expects the trial court to submit that defense to the jury. In the case *sub judice*, Hales did not claim the defense of self-defense during his testimony.

Rule 5.03 of the Mississippi Uniform Criminal Rules of Circuit Court Practice requires that an attorney "shall dictate into the record . . . specific objections to the requested instructions and specifically point out the grounds for objection." We interpret the quoted phrase to include counsel's objections to the trial court's refusal to grant a requested instruction. Hales' counsel response to the trial court's refusal to grant his requested Instruction # D-6A was little more than to advise the trial court that he had requested it "[j]ust for the record . . . that's all."

As a general proposition, "It is . . . an absolute right of an accused to have every lawful defense he asserts, even though based upon a meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court." *O'Bryant v. State*, 530 So. 2d 129, 133 (Miss. 1988), However, the Mississippi Supreme Court in *Wadford v. State*, 385 So. 2d 951, 955 (Miss. 1980) explained the prerequisites for a defendant's assertion of a plea of self-defense as follows:

Self defense is a legal concept which must be supported by evidence to be available to a defendant The plea of self defense must be supported by evidence of *facts and circumstances* from which the jury may conclude that a defendant was justified in having committed . . . [the crime] because he was, or had reasonable grounds to believe that he

was in imminent danger of suffering death or great bodily harm at the hands of the person . . . [assaulted].

Wadford requires that there must be evidence in the record to support the defense of self-defense. In the case *sub judice*, there was no evidence to support Hales' assertion of self-defense. All that Hales could muster to support his request for his self-defense instruction was that "If Mr. Hales reasonably believed he was in danger, then he's entitled to [the instruction]." *Buchanan v. State* instructs that "reasonable belief of danger" alone is insufficient to warrant the grant of an instruction on self-defense. Nowhere in Hales' testimony can this Court find that he testified that he shot his wife while acting in self-defense

Finally, consistent with our previous observations about the state of the record on this issue, Hales' counsel was unable to urge upon the trial court any reason that it should grant this requested instruction on self-defense other than "just for the record." For all of these reasons, we conclude that the trial court did not err when it denied Hales' requested Instruction # D-6A on self-defense.

III. Summary

Because Hales had three peremptory challenges left when he peremptorily challenged Tammy Buckley after the trial court had denied his challenge of her for cause, precedent prevents us from putting the trial court in error for so denying it. Because Hales failed to offer any evidence that he shot his wife in her back while she was retreating from him while she was carrying a sack of groceries, the trial court did not err when it refused Hales' requested instruction on self-defense. Thus, this Court affirms the trial court's judgment of Hales' guilt of aggravated assault and its sentence of Hales to serve twenty years in the state penitentiary in the custody of the Mississippi Department of Corrections.

THE JUDGMENT OF THE CIRCUIT COURT OF JONES COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ARE AFFIRMED. COSTS ARE ASSESSED TO JONES COUNTY.

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