

IN THE COURT OF APPEALS

5/20/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01260 COA

ROBERT CLAUDE SAUNDERS II

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. JERRY OWEN TERRY SR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

STEPHEN J. MAGGIO

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUARTDISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: FELONY-AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: AGGRAVATED ASSAULT - SENTENCED TO SERVE 5 YRS
IN MDOC 4 YRS SUSPENDED LEAVING 1 YEAR TO SERVE

MOTION FOR REHEARING FILED:6/3/97

MANDATE ISSUED: 8/19/97

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

BRIDGES, C.J., FOR THE COURT:

Robert Claude Saunders II (Saunders) was indicted, tried and convicted of aggravated assault in the Harrison County Circuit Court, and sentenced to serve a term of five years in the custody of the Mississippi Department of Corrections, four years suspended and one year to serve. On appeal, he presents the following issues:

I. WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF TAMMY MARIN ON THE ISSUE OF WHETHER FRANCIS R. MARIN, THE VICTIM, WAS USING ILLEGAL DRUGS DURING THE DAYS PRECEDING THE ALLEGED ASSAULT AND WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF TAMMY MARIN ON THE ISSUE OF DOMESTIC ABUSE BY FRANCIS R. MARIN DURING THE DAYS PRECEDING THE ALLEGED ASSAULT?

II. WHETHER THE TRIAL COURT ERRED IN COMMUNICATING AND/OR INSTRUCTING THE JURY AFTER IT HAD INDICATED THAT IT WAS DEADLOCKED AND AFTER THE COURT HAD INSTRUCTED THEM VIA AN APPROVED *SHARPLIN* INSTRUCTION?

These issues are without merit, and we affirm.

FACTS

Just after midnight on April 28, 1993, Francis R. "Rudy" Marin (Rudy) was beaten so severely that his injuries required almost an entire month's stay in the hospital. Rudy was awakened by a knock at his Gulfport apartment, and arose from bed to open the front door for his house guests, Troy and Terry Ann Hughes (Troy and Terry). Troy and Terry entered the apartment and followed Rudy to his bedroom, and stood in the doorway talking to Rudy while he got back in bed. Suddenly, two people

burst through the bedroom door, toppling the door on top of Terry. Terry and Troy fled the room, but not before they saw the assailant beating Rudy. Rudy identified Saunders as the assailant. Saunders burst through the bedroom door with a companion, and began beating Rudy with a stick of some sort. Accompanying Saunders and his companion was Tammy, Rudy's ex-wife with whom Rudy was living in an attempt to reconcile. Saunders and Tammy worked together at McDonald's and had begun an intimate relationship.

According to Rudy, Saunders began attacking him with a bat or some sort of stick, shouting, "I'm going to teach you for hitting Tammy." All Rudy could do was to curl up in a ball and try to defend himself from the blows by blocking them with his hands. After the attack, all Rudy remembered was lying on the floor, with the mattress pulled off the bed, and being aware that several of his bones were broken. His injuries were as follows: all the fingers on his left hand were broken; his arm was broken at the elbow; his jaw was fractured; the orbits behind his eyes were injured; his femur was broken in half; and he had numerous cuts and bruises on his body.

Saunders told a different story. He stated that he befriended Tammy while they worked at McDonald's, and they became intimate. On the night of the assault on Rudy, Tammy came to work in a neck brace and a leg brace, and told Saunders that Rudy had beaten her. Tammy asked if Saunders would help her move her things out of the apartment she was sharing with Rudy. Saunders, Jeff Six (Six), and Tammy went to the apartment. According to Saunders, the bedroom door was already off its hinges when they arrived, and Rudy was awake and extremely aggressive. Saunders testified that Rudy began yelling at him and then arguing with Tammy. Then Rudy picked a stick or a metal pipe and began swinging at Saunders. Saunders stated that Rudy appeared intoxicated and was having a difficult time maintaining his balance while swinging the pipe or stick at him. Nonetheless, Saunders said that he beat Rudy in self-defense, and that he was not the aggressor. Tammy and Six both testified to their version of the events, which conflicted with one another and contained various inconsistencies.

I. WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF TAMMY MARIN ON THE ISSUE OF WHETHER FRANCIS R. MARIN, THE VICTIM, WAS USING ILLEGAL DRUGS DURING THE DAYS PRECEDING THE ALLEGED ASSAULT AND WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF TAMMY MARIN ON THE ISSUE OF DOMESTIC ABUSE BY FRANCIS R. MARIN DURING THE DAYS PRECEDING THE ALLEGED ASSAULT?

During the trial, the state made a motion in limine to exclude testimony from Tammy that Rudy had beaten her and taken drugs in the days prior to his assault. The state argued that the Tammy was not able to recall the time and/or place of these events with any definiteness, and additionally, the alleged events were too remote in time to be of any relevance. Saunders argued that testimony about Rudy's drug use and beating of his ex-wife was admissible character evidence to show that Rudy had a propensity towards violence, therefore justifying Saunders' attack. The trial court granted the state's motion in part, excluding testimony about any physical abuse or drug use occurring before the day of the assault as being too remote in time and possibly misleading the jury to conclude that Rudy got what he deserved. However, the trial court held that it would allow evidence of domestic abuse if it occurred on the evening before the assault and ultimately led Saunders to the apartment.

Additionally, the trial court held that it would allow testimony of the police officer on the scene that Rudy smelled of alcohol.

On appeal, Saunders claims that excluding Tammy's testimony about the prior drug use and physical abuse denied him his defense of self-defense. He argues in his brief that introducing the prior acts of domestic violence against Tammy would prove "evidence of a character trait which results in domestic problems being solved by physical violence," therefore making Rudy the aggressor. Without Tammy's testimony, argues Saunders, "[t]he jury could have easily concluded that Saunders over-reacted and that his actions were not justified." However, the trial court noted, and we agree, that past domestic abuse visited upon Tammy alone was too remote and therefore insufficient to justify Saunders' attack on Rudy. The trial court seriously questioned the relevancy of Rudy's past abuse of Tammy to Saunders' claim of self defense. In response to Saunders' motion to reconsider the evidence, the trial court stated, "if you have to weigh the probative value of the testimony and its relevance you come back to the situation of where the victim is being placed on trial because of an alleged abuse of his wife when the wife was not the victim at all in the matter." The trial court harbored serious concern that if the jury heard testimony about remote, past domestic abuse, it would ignore the other evidence and view the victim only as a wife-beater who got what he had coming: "the prior domestic violence would be too far removed to do anything other than to create in the minds of the jurors that whatever happened and under whatever circumstances it happened, that the victim basically got what he deserved." This is a legitimate ground for excluding evidence under Mississippi Rule of Evidence 403: ". . . evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" We agree with the trial court that the evidence of past spousal abuse and drug use was too remote and was too different in nature to be probative on the issue of Saunders' claim that he was only defending himself from an assault by Rudy.

The trial court is afforded broad discretion in the admission and exclusion of evidence. *Foster v. State*, 508 So. 2d 1111, 1117 (Miss. 1987). It is the trial court's province to determine the probative value of the evidence, if any, and factors that may outweigh the probative value. *Id.* As an appellate court, we are not afforded the opportunity to reweigh the evidence, but merely sit to determine whether the trial judge abused his discretion in admitting or excluding the evidence in question. *Id.* at 1118. After reviewing the briefs and the record, we are unable to say that the trial judge abused his discretion in finding that Tammy's testimony about past spousal abuse and drug use was too remote. The trial court did not err, and this issue is meritless.

II. WHETHER THE TRIAL COURT ERRED IN COMMUNICATING AND/OR INSTRUCTING THE JURY AFTER IT HAD INDICATED THAT IT WAS DEADLOCKED AND AFTER THE COURT HAD INSTRUCTED THEM VIA AN APPROVED *SHARPLIN* INSTRUCTION?

The record is unclear about the events surrounding the *Sharplin* instruction and the subsequent note to the jurors. The record reflects that the jury went out to deliberate at 5:16 P.M., and at some later time something was handed to the judge in chambers. The following exchange is recorded in the record:

THE COURT: Mr. Maggio, this was handed to us back in chambers there. I don't know whether you

reviewed it or not.

MR. MAGGIO: I have not had an opportunity.

THE COURT: Here. Let's be sure that you don't have any objections to the instruction itself.

MR. MAGGIO: Thank you, Judge. I have no objection to that, Your Honor.

THE COURT: All right.

MR. MAGGIO: It's a standard instruction.

The jury penned a note saying that it was having a difficult time coming to a unanimous decision. The trial court gave the jury a standard *Sharplin* instruction to which the defense posed no objection. The jury returned to the jury room to continue deliberating. The record reflects that the trial court voiced some concern about the jury being in deliberations so long, and that some of the members may need to make phone calls to their family members. The following instruction to the jury from the trial court is included as an exhibit:

Since your last note to the Court and after further deliberations, is the jury closer to reaching a unanimous verdict?

yes X

no

Do not reveal your numerical vote.

Judge Terry

Please continue

The jury returned the note indicating that it was closer to reaching a unanimous verdict. However, the record is devoid of any discussion about this note sent to the jury. While it does reflect the trial court's concern about the jurors' ability to contact their families, the next recorded colloquy is the trial court preparing to bring the jurors in to deliver the verdict.

On appeal, Saunders contends that the note sent to the jury subsequent to the *Sharplin* instruction was coercive and therefore reversible error. However, faced with an incomplete record, we do not know if Saunders even objected to the note at the time it was given, or if the trial court consulted him about it prior to sending it, as it had done previously with the *Sharplin* instruction. It is well settled that a party cannot complain on appeal of error that was not brought before the trial court's attention. "It is elementary that a party seeking reversal of the judgment of a trial court must present this court with a record adequate to show that an error of reversible proportions has been committed and that the point has been procedurally preserved." *Chase v. State*, 645 So. 2d 829, 845 (Miss. 1994), *cert.*

denied, 115 S.Ct. 2279 (1995). Moreover, Saunders has failed to demonstrate how this particular note to the jury is coercive. Finding no error, we affirm.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF ROBERT CLAUDE SAUNDERS II OF AGGRAVATED ASSAULT AND SENTENCE TO SERVE A TERM OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, FOUR YEARS SUSPENDED, ONE YEAR TO SERVE AND PAY \$5,000 IN RESTITUTION, IS AFFIRMED. COSTS OF THIS APPEAL TAXED TO HARRISON COUNTY.

McMILLIN, P.J., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., AND HINKEBEIN, J., NOT PARTICIPATING.