

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01368 COA**

EARL BATES

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

DATE OF JUDGMENT:	11/30/95
TRIAL JUDGE:	HON. MIKE SMITH
COURT FROM WHICH APPEALED:	PIKE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WILLIAM E. GOODWIN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS, JR.
DISTRICT ATTORNEY:	HON. DUNN LAMPTON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I MURDER: CT II & CT III AGGRAVATED ASSAULT: HABITUAL; CT I LIFE; CT II & CT III 20 YRS EACH CT; ALL COUNTS RUN CONSECUTIVELY; SENTENCES TO BE SERVED WITHOUT BENEFIT OF REDUCTION, SUSPENSION, PROBATION OR PAROLE; PAY COURT COSTS
DISPOSITION:	AFFIRMED - 10/7/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/28/97

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

DIAZ, J., FOR THE COURT:

Earl Bates was convicted of murdering his wife Martha Bates and was thereafter sentenced to life imprisonment without parole. He argues on appeal that the trial court erred in refusing to allow him

to develop evidence of his state of mind at the time of the incident by introducing evidence of prior acts of his victim. Finding his argument without merit, we affirm.

FACTS

On August 6, 1995, Earl Bates was at Sue's Place, a bar in Pike County, when his estranged wife, Martha, came in with Roger Dale Thomas and sat at a booth with her friend and owner of the bar, Sue Martin. Soon thereafter, Bates walked over to the booth where Martha and Sue were sitting. After exchanging words with Martha, he pulled out a gun and shot her in the throat, severing an artery and causing her death. He then turned the gun on Sue and tried to fire again, only to have the gun jam. After clearing the gun, he fired two rounds at Thomas, who was able to dodge the bullets and escape injury.

DISCUSSION

On appeal, Bates reiterates his trial argument that the State, by asking its witnesses whether Martha was armed, "opened the door" to Martha's background by offering evidence of Martha's character for peacefulness, as anticipated by Mississippi Rule of Evidence 404(a)(2). He argues that since the State "opened the door," he should have been allowed to ask one of the State's witnesses on cross-examination if the witness was aware that Martha had been convicted of a homicide. The State responds that by its asking witnesses at trial whether Martha was armed at the time she was murdered, the State was merely establishing that Bates had not acted in self-defense. We agree. Martha's character was irrelevant to Bates's defense in that there had been no attempt by the prosecution to show Martha's character, peaceful or otherwise.

M.R.E. 404(a)(2) provides:

(a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor

Ordinarily, the character of a murder victim is not at issue in a criminal case, and therefore, proof concerning that victim's character is inadmissible. *Shinall v. State*, 199 So. 2d 251, 257 (Miss. 1967). However, there are exceptions to the general rule.

The violent, dangerous and turbulent character of a deceased may be shown: (A) when, from the circumstances of the case, it is a part of the *res gestae*; (B) where the evidence of the homicide is wholly circumstantial; (C) where it is doubtful as to who the aggressor was at the time of the homicide; or (D) where the immediate circumstances of the killing render it doubtful as to whether or not the act was justifiable.

Id. (citations omitted). Before the bad character of the deceased may be admitted under one of the above exceptions, however, "the issue of self-defense must at least be in doubt." *Id.* In the case at bar, Bates does not claim that his action was justifiable self-defense. He acknowledges that he shot Martha, although he argues on appeal that the facts supported a manslaughter conviction rather than a murder conviction. "When the defendant relies on self-defense, his state of mind is relevant in an inquiry of whether or not he acted reasonably." *Daniels v. State*, 341 So. 2d 918, 922 (Miss. 1977). Alternatively, when the defendant admits that his actions were not wholly justifiable, as in the case now under consideration, the issue of self-defense is not in question, and thus, the bad character of the deceased may not be admitted.

Furthermore, Bates failed to argue at trial that evidence of Martha's prior bad acts should be admitted in order to show his own state of mind at the time of the murder. "Under Mississippi law, an appellant is not entitled to raise a new issue on appeal, since to do so prevents the trial court from having an opportunity to address the alleged error." *Dunn v. State*, 693 So. 2d 1333, 1339 (Miss. 1997) (quoting *Crowe v. Smith*, 603 So. 2d 301, 305 (Miss. 1992)). As a result, Bates is prohibited from now asserting that his state of mind was at issue at the time of the murder, and that therefore, evidence of Martha's prior bad acts was relevant.

This Court recognizes that "[t]he relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990). Accordingly, we find that the trial judge in the case at bar acted within his discretion and committed no error in denying Bates's request to present evidence of his victim's prior bad acts.

THE JUDGMENT OF THE PIKE COUNTY CIRCUIT COURT OF CONVICTION AS AN HABITUAL OFFENDER ON COUNT I OF MURDER AND SENTENCE OF LIFE IMPRISONMENT; COUNTS II AND III OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCES OF TWENTY (20) YEARS EACH, WITH SENTENCES TO RUN CONSECUTIVELY, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO PIKE COUNTY.

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