

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01093 COA**

TERRY EUGENE EDWARDS

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:	10/04/95
TRIAL JUDGE:	HON. L. BRELAND HILBURN JR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DONALD W. BOYKIN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	PATRICIA BENNETT
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	MANSLAUGHTER: SENTENCED TO SERVE A TERM OF 20 YRS IN THE MDOC
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	11/24/97
CERTIORARI FILED:	2/10/98
MANDATE ISSUED:	4/16/98

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

DIAZ, J., FOR THE COURT:

Terry Eugene Edwards was convicted of manslaughter and sentenced to twenty years in the custody of the Mississippi Department of Corrections. He makes the following arguments on appeal: (1) that the trial court erred in excluding evidence of the victim's blood alcohol content and the presence of cocaine in the victim's blood, (2) that the trial court erroneously refused Edwards's request to call a co-defendant's attorney as a witness, (3) that the trial court erred in denying the introduction into evidence of a co-defendant's sentencing order, (4) that the trial court improperly excluded from evidence a co-defendant's petition to enter a plea of guilty and his attorney's time sheet, (5) that the trial court erred in excluding the testimony of the victim's friend concerning the victim's drug use, (6) that the trial court erred in not allowing Edwards to cross-examine the victim's cousin concerning the victim's drug use, (7) that the trial court erred in allowing a photograph of the victim's body into

evidence, (8) that the trial court improperly prejudiced the jury by allowing the pathologist to testify concerning the conduct of his autopsy, and (9) that the trial court erred in allowing a photograph of the victim's head into evidence. Finding all his issues without merit, we affirm.

FACTS

On May 27, 1994, as Jessie Cutley was walking home from his cousin's house, he was approached by Kevin Smith. Smith punched Cutley in the face with his fist and knocked him to the ground. Terry Edwards and several others ran to Cutley and began kicking and stomping him. The group continued to kick Cutley until he died on the street.

DISCUSSION

1. Did the trial court err in excluding evidence of the victim's blood alcohol content and the presence of cocaine in the victim's blood?

Edwards claims that the trial court committed reversible error when the judge excluded evidence of Cutley's blood alcohol content and evidence of cocaine in Cutley's blood. Edwards claims that Cutley was the initial aggressor against Kevin Smith, and therefore evidence of Cutley's blood alcohol content was relevant to the issue of whether or not Edwards was provoked to hit Cutley. Cutley's blood alcohol and drug content is only relevant if the facts suggest that Edwards acted in self-defense or in the defense of Smith. Although Edwards suggests that Cutley's actions provoked him, he does not maintain that he acted to protect himself or another. The defense of provocation only exists when the killing was committed upon *sufficient* provocation. **Miss. Code Ann. § 97-3-17 (b) (Rev. 1994)**. Even if Cutley had taken the first swing at Smith, Edwards was not sufficiently provoked to run to where Cutley lay on the ground and kick and stomp him until he died. The decision as to whether or not evidence is relevant is left entirely to the discretion of the trial judge, whose determination will not be reversed absent clear abuse. **Bounds v. State, 688 So. 2d 1362, 1369 (Miss. 1997)**. Clearly the facts in the present case do not constitute sufficient provocation to kill another human being. Accordingly, the trial judge committed no error in ruling that the evidence of Cutley's blood alcohol content and the presence of cocaine in his blood was irrelevant and thus inadmissible.

2. Did the trial court erroneously refuse Edwards's request to call a co-defendant's attorney as a witness?

Jeffery Myers was one of the co-defendants indicted with Edwards for the crime of murder. Edwards called Myers's attorney as his first witness, and the State objected. Edwards claims that Myers's attorney would have testified that he told Myers about the maximum sentence he could receive for the crimes of murder and manslaughter and that he provided Myers with a copy of the discovery, which would have included Edwards's statement implicating Myers. Edwards claims that each of these issues would have raised a possible motive for Myers to testify against Edwards. The trial judge sustained the State's objection, citing the attorney-client privilege. Mississippi's attorney-client privilege provides in part: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative" **MRE 502 (b)**. Only after the client effectively waives the privilege is the attorney a competent witness concerning matters within the scope of the privilege. *Barnes v. State*, **460 So. 2d 126, 131 (Miss. 1984)**. Edwards did not attempt to have Myers waive the attorney-client privilege, and in the absence of a waiver, the attorney-client privilege remained intact. Thus, the trial court committed no error in refusing Edwards's request to call Myers's attorney as a witness.

3. Did the trial court err in excluding from evidence a co-defendant's sentencing order?

Edwards argues that the trial court erred by sustaining the State's objection to Edwards's entering a copy of Myers's sentencing order. Edwards claims that the purpose of introducing of the sentencing order was to show that part of the plea bargain involved Myers testifying truthfully *against* Edwards. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . needless presentation of cumulative evidence." MRE 403. In the present case, Myers had already testified that his lawyer told him he had to testify against his co-defendants in order to receive a plea bargain. Therefore, the sentencing order was cumulative. Accordingly, this Court does not find that the trial court abused its discretion in excluding Myers's sentencing order from evidence.

4. Did the trial court improperly exclude from evidence a co-defendant's petition to enter a plea of guilty and his attorney's time sheet?

Edwards argues that the trial court committed reversible error by excluding from evidence Myers's petition to enter a plea of guilty and his attorney's time sheet. The petition set out the maximum penalty for manslaughter, and the time sheet provided that Myers agreed to testify against his co-defendants. Edwards claims that the two documents proved that Myers had a motive to testify against Edwards. However, the trial judge allowed Edwards to cross-examine Myers about his knowledge of the maximum sentence of manslaughter, and Edwards brought out that Myers was not serving the maximum sentence when Myers testified that five years of his sentence was suspended. The decision as to whether or not evidence is relevant is left entirely to the discretion of the trial judge, whose determination will not be reversed absent clear abuse. *Bounds*, **688 So. 2d at 1369**. Whether or not Myers remembered that he was told the maximum sentence for manslaughter was completely irrelevant to the facts of this case; therefore, the trial judge committed no error in excluding from

evidence Myers's petition to enter a guilty plea. Neither did the trial judge err in excluding Myers's attorney's time sheet from evidence. Mississippi Rule of Evidence 403 provides in part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . needless presentation of cumulative evidence." In the case at bar, Myers had previously testified that his lawyer told him he had to testify against his co-defendants in order to receive a plea bargain. Therefore, the time sheet was cumulative evidence, and the trial judge correctly refused to allow its introduction into evidence.

5. Did the trial court err in excluding the testimony of the victim's friend concerning the victim's drug use?

Edwards argues that the trial court erred in excluding testimony by Mary Jiles (Cutley's friend) about Cutley's drug use. Much like his argument in proposition one, Edwards claims that Cutley's drug use was relevant to the issue of whether or not Edwards was provoked to hit Cutley. We reiterate that the defense of provocation only exists when the killing was committed upon *sufficient* provocation. **Miss. Code Ann. § 97-3-17 (b) (Rev. 1994)**. The supreme court has held that a person cannot resist an unarmed man's attack by slaying him. ***Reed v. State*, 197 So. 2d 811, 814 (Miss. 1967)**. The facts of this case show that Cutley was killed in a cruel and violent manner without sufficient provocation to constitute excusable homicide. Accordingly, the trial judge committed no error in ruling that testimony as to Cutley's drug usage was irrelevant and thus inadmissible.

6. Did the trial court err in not allowing Edwards to cross-examine the victim's cousin concerning the victim's drug use?

In his sixth assignment of error, Edwards raises no additional issue for our consideration. Rather, he makes an argument indistinguishable from the one he made in proposition five. The testimony was on the same subject, but with a different witness. Edwards again refers to proposition one as the basis for his claim. Therefore, we decline to re-address his concerns and find again that the trial court committed no error.

7. Did the trial court err in allowing a photograph of the victim's body into evidence?

Edwards next argues that the trial court erroneously admitted a gruesome photograph of Cutley's body into evidence. He maintains that any probative evidence the photograph had was substantially outweighed by the danger of unfair prejudice. The admission of photographs rests within the sound discretion of the trial judge, and his decision will not be overturned unless there has been an abuse of discretion. ***Jackson v. State*, 672 So. 2d 468, 485 (Miss. 1996)**. "[T]he discretion of the trial judge runs toward almost unlimited admissibility regardless of the gruesomeness, repetitiveness, and the extenuation of probative value." ***Williams v. State*, 544 So. 2d 782, 785 (Miss. 1987)**. Although the photographs at issue in this case were by no means pleasant, the fact remains that the trial judge exercises broad discretion over the admission of photographs. Consequently, we refuse to hold the

trial court in error on this issue.

8. Did the trial court improperly prejudice the jury by allowing the pathologist to testify as to how he conducted the victim's autopsy?

Edwards argues that Dr. Rodrigo Galvez should not have been allowed to testify as to how he conducted Cutley's autopsy. Edwards claims that Dr. Galvez's testimony was so graphic and unfairly prejudicial as to substantially outweigh any probative value the testimony may have had. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." **MRE 702**. The supreme court has held that "[t]he relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where the discretion has been abused." ***Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992)**. Clearly, the State had a legitimate reason for calling Dr. Galvez to testify in that Dr. Galvez explained to the jury the manner in which Cutley died. Therefore, we refuse to hold the trial judge in error for allowing Dr. Galvez to testify as to how he conducted the autopsy.

9. Did the trial court err in allowing a photograph of the victim's head into evidence?

In his final assignment of error, Edwards raises no additional issue for our consideration. Rather, he makes an argument indistinguishable from the one he made in proposition seven. The photograph at issue in proposition seven depicted Cutley's body, while the photograph at issue in this proposition depicted part of Cutley's head as well as blood stains on the ground. Therefore, we decline to re-address his concerns, finding again that the trial court committed no error.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER AND SENTENCE TO TWENTY YEARS IN THE CUSTODY OF

THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.

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