

IN THE COURT OF APPEALS 05/07/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00007 COA

RODERICK DEWAYNE RICHARDS

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. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLARD L. MC ILWAIN, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF ATTORNEY GENERAL:

PAT FLYNN

DISTRICT ATTORNEY: FRANK CARLTON AND WIN PITTMAN

NATURE OF THE CASE: CRIMINAL: MANSLAUGHTER

TRIAL COURT DISPOSITION: SENTENCED TO 20 YEARS MDOC, PAY ALL COURT
COSTS \$192.50 INCLUDING JURY COST \$960.00; PAY TO LEGAL GUARDIAN OF
BROOKE RAGGS & BRANDY RAGGS SUM OF \$200 PER MONTH BEGINNING JAN.1, 1994
AS RESTITUTION UNTIL CHILDREN 18 YEARS OF AGE.

BEFORE THOMAS, C.J., DIAZ, AND PAYNE, JJ.

DIAZ, J., FOR THE COURT:

Roderick Dewayne Richards (Richards), was indicted and tried for manslaughter for the killing of Robera Raggs (Raggs). The jury convicted him of manslaughter. On appeal, he alleges the following errors: (1) the trial court erred in refusing to allow impeachment of a State's witness by use of a taped prior inconsistent statement and (2) the State did not establish a prima facie case against the defendant. We find that the trial court erred in this case when it refused to allow Richards to introduce a prior inconsistent statement made by the State's witness for impeachment purposes. Accordingly, we are forced to reverse and remand this case.

THE FACTS

Richards and Raggs had been living together for over a year. They had two children together. Eventually, as the relationship deteriorated, Richards tried to end it. The couple separated, and Richards moved out of their apartment the day before the incident. On January 5, 1993, Richards and a date were at a drive-thru convenience store, (the Barn). Raggs, who was there with her sister, saw Richards' truck, ran to it, and either leaned or jumped in the truck. Richards testified that Raggs reached for his gun that he had lying on his seat, and it went off when the two were struggling for the weapon. Raggs was hit by the bullet and died shortly thereafter. Several witnesses testified that Richards stood over Raggs with the gun and threatened other people around them.

Richards testified that he pointed the pistol at Raggs in self-defense, and somehow, it fired when Raggs either hit it or grabbed it. Richards contends that he had reasonable grounds to fear serious bodily harm from Raggs because he claims she had threatened him in the past.

DISCUSSION

I. PRIOR INCONSISTENT STATEMENT

Richards alleges that the trial court erred when it did not allow the defense to introduce taped testimony of a previous interview between Clay Pylate (Pylate), and Richards' attorney for impeachment purposes. Pylate is the owner of the Barn, and contends he saw the entire incident. There were some discrepancies between the taped interview and his testimony in court.

In the prior taped interview, Pylate stated that Raggs and Richards were arguing with each other before Raggs approached Richards' truck. Relevant portions of the interview are as follows:

Q: Okay. So, when she backed around, when was the next time you saw her?

A: I walked back to the front of the Barn and was standing in the area that we all usually stand in. And, I noticed a bunch of people at the window, which was normal because it was, like I say, my grand opening. Then he pulls up to the front of the door and that is when I was standing there with the employee that was giving him his stuff and that is when I saw her. She was standing at the

window and he pulled out of the Barn and went out there and that is when I sat there and watched her run out there to the truck, you know. . . .

Q: Did she say anything before she started running around away from the window?

A: I think they were arguing back and forth. He and her were arguing back and forth.

Q: Before she left the window?

A: Right. And, uh . . .

Q: He was talking to her at the window?

A: Yeah, I believe, they were hollering something at each other and that is why it got my attention. He pulled up to the highway and she took off running out there and opened the door and got inside. His windows are tinted, so I don't know what went on inside the truck, but we were watching. I was on my way out there to stop what was going on because, they were, whatever, she was getting in the truck and that is when he shot her.

Q: Okay, and let me back up just a minute. Are you saying that when he was in the Barn, getting his stuff, that he and she were having a conversation then?

A: Right, they were hollering back and forth.

During Pylate's trial testimony, he stated that he did not remember making the prior statement that Raggs and Richards were arguing before Raggs was shot. At that point, the defense wanted to play the tape of the prior conversation. When the State objected to this, the court sustained the objection stating that he had not denied making the statement, but that he only did not recall making the statement.

A witness' unsworn prior inconsistent statement may be used for impeachment of the witness' credibility regarding his testimony on direct examination. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 260 (Miss. 1993) (citations omitted). However, a prior statement made by a non-party may not be used as substantive evidence. *Sperry-New Holland*, 617 So. 2d at 260; *Moffett v. State*, 456 So. 2d 714, 719 (Miss. 1984). Impeachment can be accomplished through the introduction of extrinsic evidence. M.R.E. 613(b); *Harrison v. State*, 534 So. 2d 175, 179 (Miss. 1988).

We refer to the rule stated in *Harrison v. State* when determining the use of extrinsic evidence for impeachment purposes. In *Harrison*, a witness' testimony in court was different from his prior statements to the police. There were three statements in question. The first two statements, he denied ever making. He said that he did not remember making the third statement. Regarding the issue of a faulty memory, the supreme court differentiated the Mississippi rule from the federal rules. The federal courts are not consistent on whether a mere lack of memory can be impeached. *Harrison*, 534 So. 2d at 180. In *Harrison*, the court stated, "[O]ur Supreme Court has held that where a witness claims not to recall making a statement, the witness' lack of recognition is essentially a denial." *Id.* The rationale behind this rule was to prevent an unwilling witness from hiding behind a faulty memory. *Id.*

When a witness fails in any manner to acknowledge the making of a statement, the impeacher is obligated to offer proof establishing the making of that statement, assuming, of course, that the issue is relevant. The trier of fact must have a valid means to decide whether the witness' claimed lack of recollection is anything more than a 'refuge.' By being apprised of this prior statement, the trier has such a means.

Id.

In the present case, the trial court found that the tape was inadmissible because the witness had not denied making the statement. According to the rule stated in *Harrison*, this was incorrect. The trial court should have allowed the defense to introduce extrinsic evidence of prior inconsistent statements in order to impeach the State's witness. In fact, as stated above, the impeacher, which was the defense in this case, was *obligated* to offer proof that the statement was made, assuming the issue was relevant. *Id.* Only when the jury is apprised of the prior statement can it determine whether the witness' claimed lack of memory was merely a refuge.

The State conceded that the trial court applied the wrong rule when it decided not to allow the tape of the prior statement, but they argue that it still would have been correct to find the tape inadmissible on grounds of relevancy. Citing to *Puckett v. Stuckey*, the State contends that the supreme court has stated "On appeal, we will affirm a decision of the circuit court where the right result is reached even though we may disagree with the reason for that result." *Puckett v. Stuckey*, 633 So. 2d 978, 980 (Miss. 1993).

While this is a correct statement of the law, we do not think it is applicable in this instance. Although the statement could not have been introduced for its substantive meaning, the way the jury views the credibility of a State's witness affects the burden of proof the State faces in criminal cases. Had the jury been able to listen to the inconsistent statement, it may or may not have influenced the jury's

view of Pylate's credibility.

The State cites to the case *Wilkins v. State* and contends that in order for a prior inconsistent statement to be admissible for impeachment, the statement must be on a material, not collateral matter. *Wilkins v. State*, 603 So. 2d 309, 319 (Miss. 1992). As we stated above, we think the statement is clearly on a material matter in this case because it affects how the jury could consider the testimony of a State's witness.

Since we hold that it was reversible error not to have allowed Richards to introduce the prior inconsistent statement of the State's witness, we need not address the remaining issue raised on this appeal.

CONCLUSION

Applying the rule stated in *Harrison v. State*, this Court finds that the trial court's refusal to admit the tape of a witness' prior inconsistent statement was reversible error. The trial court should have allowed the defense to introduce the tape of the prior statement made by Pylate when he failed to remember his earlier statement. In light of this error, we are forced to reverse and remand this case to further proceedings consistent with this opinion.

THE JUDGMENT OF THE WASHINGTON COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER IS REVERSED AND THE CAUSE IS REMANDED TO THE CIRCUIT COURT OF WASHINGTON COUNTY FOR FURTHER PROCEEDINGS. COSTS OF THIS APPEAL ARE TAXED TO WASHINGTON COUNTY.

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

KING, J., NOT PARTICIPATING.