IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00519 COA

TOMMY JAMES GILLENTINE

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. THOMAS J. GARDNER III

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

SHELLY NICHOLS ELLIS

MELVIN C. ELLIS III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: ROWLAND GEDDIE

NATURE OF THE CASE: FELONY-AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: SENTENCED TO SERVE 20 YEARS IN THE CUSTODY OF MDOC, 10 YEARS SUSPENDED PENDING GOOD BEHAVIOR; SENTENCE TO RUN CONCURRENT WITH SENTENCE IMPOSED IN #CR085-001B

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

FRAISER, C.J., FOR THE COURT:

Tommy James Gillentine (Gillentine) was tried, convicted and sentenced by a jury in the Lee County Circuit Court for aggravated assault. He was sentenced to serve twenty years in the Mississippi Department of Corrections, with ten years suspended pending good behavior. On appeal, he presents the following issue:

> I. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF CERTAIN WITNESSES, AS SUCH EXCLUSION OPERATED AS A BAR TO THE PRESENTATION OF A MEANINGFUL DEFENSE.

Finding no error, we affirm.

FACTS

On the evening of January 31, 1992, Bobby Gillentine (Bobby), uncle of the appellant, was standing in his store, The County Line Grocery and Bait Shop. With Bobby were his wife, Kay, and their son, Adam. Bobby was standing behind the counter eating dinner; Adam was standing next to him; and Kay was a few feet away at the cash register. Suddenly shots rang out and the window on the front of the store was pierced by flying bullets. Much to his amazement and that of his family, Bobby realized that he had been shot in his upper body. Bobby ordered Adam to lock the door of the store, and told Kay to call 911. The paramedics arrived, and Bobby was transported to North Mississippi Regional Medical Center by Helicopter. His doctor, Jimmy Hamilton, testified at trial that Bobby had been severely wounded by "a gunshot wound that entered in his right shoulder and had traveled posteriorly toward his back. It hit his shoulder blade back posteriorly and apparently the bullet fragmented. He had several exit wounds at his back. Also he had about a 40 to 50 percent collapse of his right lung." Hamilton classified Bobby's wound as life threatening. Bobby remained in intensive care and was hospitalized for several days.

Bobby testified that earlier the same evening of the shooting, between 4:30 and 5:00 P. M., he received a threatening phone call from his nephew, Gillentine. Bobby testified that he knew it was Gillentine because he recognized the voice. According to Bobby, Gillentine said, "I'm going to burn you out and kill you, you son-of-a-bitch, mother------." Bobby explained that he and Gillentine had recently disagreed over the disposition of certain pizza ovens that Bobby owned.

At trial, Angie Guin testified that she was at the County Line Grocery and Bait Shop at about 8:00 P. M. on January 31, 1992. She saw a car pull up on the shoulder of the road and gunshots being fired from the car. She identified the car as a black Camaro. While she testified that she saw two people in the car, she was unable to describe them.

Norman Shierling (Shierling) testified about the events that took place January 31, 1992, that led up to the shooting. Shierling testified that Gillentine showed up at the house he shares with his girlfriend on the evening of the 31st, and asked Shierling to go with him and shoot a gun he had to scare somebody. Gillentine put his gun , some clips and some bullets in Shierling's girlfriend's black Camaro. Gillentine and Shierling drove toward Bigbee. Once on Highway 371, Gillentine asked Shierling to pull over. He did and Gillentine proceeded to fire the gun about fifteen rounds. After Gillentine was through firing the gun, he directed Shierling to keep driving on Highway 371. As they crossed the Lee County line, Shierling followed Gillentine's directions to pull into a gas station and purchase some beer. They sat in the car in the gas station parking area drinking beer for about fifteen minutes. Gillentine told Shierling to get back on the highway toward Amory, the direction from which they had come. Shortly after they were back on the highway, about fifty yards according to Shierling, Gillentine asked that they pull over on the shoulder. Shierling testified that he asked Gillentine why he wanted to pull over again, but Gillentine would not answer. There was a store across the road from them on the other side of 371. Shierling testified that the shooting occurred as follows:

> Q. Now what happened after you came to a stop on the shoulder of the road?
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> A. He opened the door and got out, and I didn't know if he was going to, you know, take a leak or whatever he was going to do again because, you know, he was pretty drunk, I guess, or whatever you would call it. I don't know. And he got out of the car, and then he reached in and got the gun and I asked him what he was doing. He throwed it on the top and, you know, that was it.
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> . . . .
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> Q. Now after he put the gun--the rifle on top of the car, what happened?
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> . . . .
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> A. He fired a couple of rounds.
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> . . . .
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> A. I told him what was he doing, and he just jumped in and said, Go. Go. Go. And I didn't know what to do. I drove off and the door was still open. He just had got in the seat. And then he hung the gun out the window and fired another shot up in the air.

After Shierling and Gillentine took off in the car, they were stopped by police. Shierling was arrested for driving without a license, and Gillentine was arrested for public drunkenness. At the time Gillentine and Shierling were being detained at the car, police found the gun and the spent shells in the back seat of the Camaro. Additionally, a report came over the radio that a drive by shooting had occurred at the county line, and the suspects were in a black Camaro. Gillentine was charged with the shooting and three counts of aggravated assault.

At trial, the State moved in limine to exclude certain extraneous and irrelevant testimony regarding

the state of affairs between Gillentine's family. Gillentine objected and stated that the testimony he sought to present about the feud between his father and his uncle Bobby, the divorce of his parents, and the affair between his father and Gillentine's ex-wife, was relevant and constituted his defense. Gillentine sought to admit the evidence of bad blood between his family members to prove that his father had more of a motive to shoot Bobby than Gillentine himself had. Gillentine's counsel argued to the trial judge the reason sought for admitting the

evidence as follows:

> It [the evidence] was being offered to show that there was at least one other individual who had a motive to have committed this crime.

In *Moore v. State*, 179 Miss. 268, 175 So. 183, 184 (1937), the appellant, Moore, complained of the exclusion of testimony that the victim had several enemies, had been shot at before, and had even killed a man in the line of duty as a police officer. *Id.* Moore sought to include such testimony at his trial to prove that there were others that had the motive, purpose, and opportunity to commit the murder Moore was charged for. *Id.* Like Gillentine, Moore offered no authority to support his position that such testimony was admissible. *Id.* The Mississippi Supreme Court responded as follows:

> In Wharton's Criminal Evidence, vol. I, par. 274, it is said that: "The accused cannot prove that another person had a motive for committing the crime, or show, by mere inference, that some other person had the means or opportunity to commit it. The accused cannot prove by hearsay that another person committed that crime, as by testimony of witnesses who heard another admit that he committed the offense. It has been said that evidence incriminating another must relate to the res gestae, or directly connect the other person with the corpus delicti. In any event, before such testimony can be received, there must be such proof of connection with the crime or such a train of facts or circumstances as tends to point out someone other than the accused as the guilty party. Remote acts, disconnected from and outside the crime itself, cannot be separately proved for such a purpose."
>
> In the case of *Lindsay v. State*, 69 Fla. 641, 68 So. 932, 933, it was held that: "It is no defense on the part of one charged with crime to show merely that another person possessed that means or opportunity to commit the offense."
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> In *State v. Caviness*, 40 Idaho, 500, 235 P. 890, 892, it is said: "This proof was offered upon the theory that it was within the right of appellant to show that some one other than himself committed the crime. It is well established that, before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances, as tend clearly to point out some one besides the accused as the guilty party. Remote acts, disconnected and outside of the crime itself cannot be separately proved for such a purpose." Again in *State v. Moon*, 20 Idaho, 202, 117 P. 757, Ann. Cas. 1913A, 724, it was held that: "A defendant in a criminal trial is not permitted by way of defense to show by conjectural inferences that some other person other than himself is

more probably guilty."

Moore, 175 So. at 184. Gillentine argues that he was denied a meaningful defense because he could not put on evidence that his father had a motive to shoot Uncle Bobby. In his appellate brief, Gillentine cites *Hentz v. State*, 542 So. 2d 914, 915 (Miss. 1989), which addresses the Sixth Amendment right of compulsory process:

> In *Roussell v. Jeane*, 842 F.2d 1512 (5th Cir.1988), the Fifth Circuit Court of Appeals reiterated the parameters of a criminal defendant's right to compulsory process under the Sixth and Fourteenth Amendments to the United States Constitution: In pertinent part, the Sixth Amendment provides that in all criminal prosecutions the defendant shall "have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.... In *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), the Supreme Court held that this clause prohibits a state from arbitrarily denying a defendant "the right to put on the stand a witness ... whose testimony would have been relevant and material to the defense." 87 S.Ct. at 1925. Like many other constitutional rights, the right to call witnesses is not absolute. See Id. at 1925 n. 21; *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982). "[T]he right to present relevant testimony ... may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973)). ***Most obviously, the right to call witnesses is limited to relevant and material testimony***. *Washington*, 87 S.Ct. at 1925; *See Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (due process required admission of certain critical hearsay testimony): *See also, Ashley v. Wainwright*, 639 F.2d 258, 261 (5th Cir.1981) ***(no Sixth Amendment right to witness who cannot aid the defense)***; [*United States v. Melchor Moreno*, 536 F.2d [1042] at 1045-46 [(5th Cir.1976)] (district court must have some justification for excluding material witness).

Hentz, 542 So. 2d at 915 (emphasis added). It is paramount that the right to call witnesses is limited by their relevant and material testimony. The trial court did not abuse its discretion in excluding collateral, irrelevant evidence of Gillentine's family squabbles. The evidence was properly excluded as inadmissible testimony of another's motive to commit the crime with which Gillentine was charged. Finding no error, we affirm.

THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF 20 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, 10 YEARS SUSPENDED PENDING GOOD BEHAVIOR, SENTENCE TO RUN CONCURRENTLY WITH SENTENCE IMPOSED IN #CR085-001B U.S. DISTRICT COURT, IS AFFIRMED. COSTS TAXED TO LEE COUNTY.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.