

IN THE COURT OF APPEAL  
STATE OF GEORGIA

FILED BY CERTIFIED MAIL

CASE NUMBER A08A0453<sup>342</sup>

DEC 21 2007

CLERK COURT OF APPEALS OF GA

JAMES MOSS, SR.,

Appellant

v.

STATE OF GEORGIA,

Appellee

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ON APPEAL FROM THE SUPERIOR COURT

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OF TROUP COUNTY

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Attorneys for Appellee:

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**PART I**

**STATEMENT OF THE CASE**

Appellee accepts appellant's Statement of the Case.

**PART II**

**STATEMENT OF FACTS**

Appellee accepts appellant's Statement of the Facts.

**PART III**

**ARGUMENT AND CITATION OF AUTHORITY**

**A. THE TRIAL COURT PROPERLY ADMITTED PRIOR DIFFICULTIES OF APPELLANT UPON THE VICTIM.  
(ENUMERATION OF ERROR NO. 1)**

The State's introduction of prior incidents of violence by appellant against the victim is admissible because they are relevant to demonstrate a pattern of domestic violence between appellant and his wife, Betty Ann Moss. Evidence of prior acts by a defendant against a victim are admissible at trial when the defendant is accused of a criminal act against the same victim regardless of whether the prior act is a threat, quarrel, or assault. Wall v. State, 269 Ga. 506, 509 (1998).

Prior acts are evidence of the relationship between the victim and the defendant and may show the defendant's motive, intent, and bent of mind in committing the criminal acts against the victim at trial. Id. For example, where the State charged a defendant with violent felonies including rape and aggravated assault, the court admitted into evidence at the defendant's trial prior difficulties between the defendant and his ex-girlfriend that demonstrated the defendant's practice of threatening her and using physical violence against her. Campbell v. State, 278 Ga. 839, 840 (2005).

Like the court in Campbell, the trial court here properly admitted appellant's prior acts of violence against Betty Ann Moss because those acts demonstrated a pattern of physical violence by appellant against her.

Additionally, the trial court properly admitted the prior difficulties by appellant against his wife because they show that the shooting was not an accident. Like the court in Wall, which properly admitted evidence that the defendant previously threatened his girlfriend, despite the fact that the evidence placed the defendant's character at issue, because the evidence was relevant to show the relationship between the defendant and the victim, here, the court properly admitted past acts of violence by appellant against Betty Ann Moss despite the fact that the evidence placed appellant's character at issue because the evidence shows the shooting was not an accident based on the past difficulties in their relationship. Such evidence was necessary to establish lack of mistake or accident.

**B. THE TRIAL COURT PROPERLY EXCLUDED APPELLANT'S ATTEMPT TO INTRODUCE A PRIOR ACT OF VIOLENCE BY THE VICTIM AGAINST APPELLANT BECAUSE APPELLANT FAILED TO MAKE A PRIMA FACIE SHOWING OF JUSTIFICATION.  
(ENUMERATION OF ERROR NO. 2)**

The trial court properly excluded appellant's attempt to introduce an incident of violence by the victim against appellant because the introduction of past violent acts by a victim against a defendant at trial are inadmissible unless necessary to prove the defense of justification. A victim's prior acts are not relevant in a criminal proceeding, unless the defendant pleads justification as a defense. Peterson v. State, 274 Ga. 165, 167 (2001).

A defendant can introduce prior violence by the victim against the defendant only if he meets the procedural requirements, can prove the prior acts by competent evidence,

and can establish a prima facie showing of justification. Knight v. State, 271 Ga. 557, 561 (1999). To make this prima facie showing, the defendant must show that the victim was the aggressor, the victim assaulted the defendant, and the defendant was honestly trying to defend himself. Id.

The trial court properly excluded appellant's attempt to introduce an incident of violence by the victim against appellant occurring approximately three years prior to her death, as there was no prima facie showing of justification. Defense counsel clearly acknowledged that appellant did not intend to use the defense of justification when he said, "[w]e're not claiming this was an affirmative act, that he shot her in self-defense." (T. 26). In pre-trial hearings, defense counsel asserted that appellant got the gun "to calm her down as to what he was concerned about, that she might actually go ahead and do what she was saying she was going to do that evening [slash his tires]. (T. 25).

Defense counsel further stated that appellant's main contention in the case was what appellant "told the investigator that night is what happened. And that is that he had a gun because he [sic] was threatening to slash the tires on his truck." (T. 29). When defense counsel stated that appellant "thought she was going to do this," the court asked, "[d]o what?" (T. 30). Counsel for appellant responded, "[t]hat she was going to actually go out and slash his tires." (T. 30). Nowhere was it ever argued that appellant was honestly trying to defend himself. In fact, appellant's counsel unambiguously told the court "it's not that he's saying that, I was using this as an affirmative defense because she was using eminent force against me." (T. 32.)

Furthermore, counsel for appellant acknowledges that appellant does not contend that the victim was the aggressor. In response to the prosecutor's recitation of the rule of

justification, counsel for appellant responds, “[t]hat rule is only applicable when, as he says we’re saying that the victim is aggressor. We’re not saying that.” (T. 33.) Counsel further explains, “[w]hat we’re saying is, you can explain his conduct and justify his conduct and the gun in trying to calm her down by explaining her prior history. ‘Don’t go out there. Don’t do this.’” (T. 33). Once again, this clearly shows that appellant’s main concern was his tires.

Appellant never testified at the trial. The jury heard appellant’s version of the events that night through the testimony of Chief Investigator Willis Grizzard. In appellant’s initial statement to law enforcement, taken at the hospital, appellant spoke over and over about the victim cutting his tires. (T. 431.) According to appellant, this occurred prior to him getting the gun. (T. 431.) Appellant stated he got the gun to scare her, make her leave him alone, cause she’s always cussing him out and calling him names. (State’s Ex. 19.) He said she was sitting in the chair watching tv and drinking beer when he got the gun, asking her why she wants to call him names. (State’s Ex. 19.) Again, when asked what made him get the gun, appellant responded, “I was trying to make her be quiet and quit calling me all kind of names.” (State’s Ex. 19.) Appellant never expressed any fear for his safety.

In a later statement to law enforcement, appellant again told Chief Investigator Grizzard that he and his wife were fussing and cussing and that she went outside, telling him that she was going to cut the tires on his truck so that he would not be able to go to work the next day. (State’s Ex. 21.) He said she went outside and came back in; he looked and the tires were still up. (State’s Ex. 21.) He said he did not know what she did with the knife. (State’s Ex. 21.) Again he explained that they were in the bedroom, he

was smoking a cigarette and she was drinking a beer. (State's Ex. 21.) He said she continued to cuss him and he got the gun, saying to her, "Betty Ann you know I got a gun and you raising hell at me." (State's Ex. 21.) She told him that he wasn't gonna do nothing with it. (State's Ex. 21.) Appellant told Chief Investigator Grizzard, "I pulled it back and it wouldn't come back so I pulled the clip on there and pulled back then then I pointed it at her and she stood up right there by the chair and when I pointed it at her she grabbed it and when she grabbed it me and her was tussling over it and it went off." (State's Ex. 21.) Later in the interview, appellant states, "I was gonna scare her with it, pretend, that's all." (State's Ex. 21.)

There was no evidence offered that appellant was in fear that his wife was going to hurt him; appellant's main concern appears to be his wife cussing him and calling him names, as well as his concern for the tires on his truck . Clearly such admitted concern is not a threat of force against appellant or another person that requires lethal force, and there can be no claim of justification. Appellant's second enumeration of error is without merit.<sup>1</sup>

**C. THE TRIAL COURT DID NOT ERROR IN FAILING TO GIVE A CHARGE ON JUSTIFICATION. (ENUMERATION OF ERROR NO. 3)**

As previously argued in the preceding section, appellant did not assert that he shot his wife in self-defense. Nor was any evidence presented that appellant was in fear for his safety. Appellant did not testify at trial. The only evidence presented established that appellant was angry because his wife was cussing him, calling him names, and went

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<sup>1</sup> Appellant's equal protection argument regarding use of prior difficulties by the victim on appellant is wholly without merit. Appellant was not denied equal protection of the laws. The "imbalance of forces" cited by appellant and referred to in Owens v. State, 270 Ga. 199 (1998), pertained to the 10-day notice rule. Appellant is comparing apples and oranges. To allow a victim's prior bad acts into evidence without requiring a claim of justification would simply allow a defendant to bring a victim's character into issue in every case. In other words, every trial would be an opportunity to "trash" the victim.

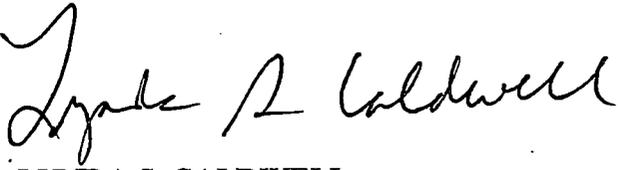
outside claiming to have slashed the tires on his truck.<sup>2</sup> Clearly the trial court properly denied appellant's request for a justification charge.

**PART IV**  
**CONCLUSION**

For the reasons set forth herein, the State respectfully requests this Honorable Court to not disturb the jury's verdict and to affirm appellant's convictions for voluntary manslaughter, aggravated assault, and possession of a firearm during the commission of a crime.

Respectfully submitted,

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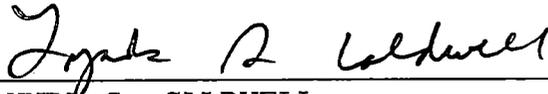
<sup>2</sup> In Koritta v. State, 263 Ga. 703 (1994), cited by appellant, the victim ignored the defendant's pleas to put down a gun, a gun which the victim was spinning the chamber and aiming at the television. The defendant's three year old son was asleep in a chair in the same room, and his three daughters were watching tv in an adjoining room. After wrestling the victim for the gun, and taking the gun away from the victim, the victim verbally threatened him. As the victim was coming at the defendant, the defendant turned his body, the gun fired, killing the victim. Unlike Koritta, where the defendant believed his and his children's lives were in danger, no evidence was presented that appellant was ever in fear for his safety.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing brief, prior to filling the same, by depositing a copy thereof, postage prepaid, in the United States mail, properly addressed upon:

Ms. Maryellen Simmons  
Public Defender  
Coweta Judicial Circuit  
306 Tanner Street  
Carrollton, Georgia 30117

This day 21<sup>st</sup> of December , 2007.



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justification because the evidence shows that he was not defending himself when the weapon discharged.

We do not authorize the reporting of this opinion because it does not announce a new rule or policy, or involve an interpretation of law that is not already precedent.

*Judgment affirmed. Johnson, P. J., and Phipps, J., concur.*

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