

IN THE MISSISSIPPI COURT OF APPEALS

No. 2005-KA-01618-COA

KENNETH READUS

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

REPLY BRIEF OF APPELLANT

Appeal from the Circuit Court of Madison County, Mississippi

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LAW AND ARGUMENT

1. **The trial court erred in giving the jury an instruction on depraved heart murder and deliberate design murder that did not require the jury to be unanimous in determining the elements supporting their verdict of murder.**

The State argues only that it was proper, based on the facts, to instruct the jury on depraved heart murder. The State **never** addresses the problem that the instruction, as given, gave the jury two theories of murder in such a way that it did not require the jurors to be unanimous.

The United States Supreme Court in *In re Winship*, 397 U.S. 358 (1970), held that the prosecution bears the burden of proving every element of the crime beyond a reasonable doubt, including the *actus reus*, or the guilty act, and the mental component known as the *mens rea*. Thus, in order to convict a defendant of premeditated first-degree murder, the prosecutor must prove that the defendant had the requisite *mens rea* of intending to kill the victim, that the defendant harbored malice in reflecting upon his desire to kill the victim, and that he physically performed the *actus reus* of killing the victim.

In *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), the federal government charged Franklin Delano Gipson with violating 18 U.S.C. § 2312, which prohibits knowingly “receiving, concealing, storing,

bartering, selling or disposing” of any stolen vehicle or aircraft moving in interstate commerce. At trial, the Government presented evidence to support all six prohibited acts. *Id.* at 459. After an hour of deliberation, the jury requested additional instructions. *Id.* at 455. The district court responded by charging the jury that it could find Gipson guilty without agreeing unanimously as to which of the six prohibited acts he had committed. *Id.* at 455-56. The jury convicted the defendant based upon a general verdict of guilty. *Id.* at 455. On appeal, the Fifth Circuit unanimously reversed. *Id.* The court reasoned that although a person may violate a statute by distinct acts, mere agreement on guilt would not preserve the accused's right to a unanimous verdict “unless this prerequisite of jury consensus as to the defendant's course of action is also required.” *Id.* at 548.

Without a doubt, the *actus reus* constitutes an essential element of every crime. *Id.* at 547. As the *Gipson* court stated: “requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required.” *Id.* at 458. Accordingly, the court held that the jury must “be in substantial agreement as to just what a defendant did” in order to satisfy a defendant's Sixth

Amendment right to a unanimous verdict. *Id.* at 547.

The court analyzed its “substantial agreement” requirement by looking to the alternatives. The court surmised that the six prohibited acts fall loosely into “two distinct conceptual groupings” with receiving, concealing and storing constituting the “housing” of stolen goods, and bartering, selling, and disposing constituting the “marketing” of stolen goods. *Id.* at 458. The court found those acts comprising each group to be “sufficiently analogous” to justify relaxing the specificity requirement. *Id.* Within these two distinct conceptual groupings of “housing” and “marketing,” therefore, the jury need not agree about which particular act the defendant committed. The facts of *Gipson*, however, did not permit the court to relax the specificity requirement as the Government had presented evidence to satisfy all six prohibited acts. This “joinder” in a single count of “two distinct conceptual groupings”--housing and marketing--impaired *Gipson*'s right to a unanimous verdict. *Id.* at 456-59. As a result, the court found the possibility of “significant disagreement among the jurors as to what [Gipson] did.” *Id.* at 458-59. See also *United States v. Peterson*, 768 F.2d 64, 65-68 (2d Cir. 1985) (holding that specific unanimity instruction required when single count included two discrete instances of drug possession: three glassine envelopes found on defendant's brother and glassine envelope stored in nearby wall); *United States*

v. Duncan, 850 F.2d 1104, 1113 (6th Cir. 1990) (holding that specific unanimity instruction required when single count contains two alleged false representations).

In this case, the jury instruction did not require the jurors to be unanimous on whether Kenneth committed deliberate design murder or depraved heart murder denying Kenneth his right to a unanimous jury.

- 2. The evidence is insufficient to support the verdict of murder or, in the alternative, the verdict is against the overwhelming weight of the evidence.**
- 3. The evidence is insufficient to support the verdict of aggravated assault or, in the alternative, the verdict is against the overwhelming weight of the evidence.**

All of the evidence at trial points toward the events culminating in the death of Sherry Readus and the shooting of Marlow s having started with an argument between Kenneth and Sherry after she spent the night out and refused to provide an explanation for her failure to come home. According to Sherry's own daughter, when Sherry told Kenneth that it was none of his business where she had been, the two started to argue. Kenneth was prepared to leave when Sherry's son Marlow came into the room brandishing a broom. When Kenneth drew a pistol from his pocket, a struggle ensued and first Marlow and then Sherry were shot. Marlow was shot while trying to wrestle

the gun from Kenneth. 88, 90. A second shot, in quick succession, hit Sherry. T. 90. This is not just Kenneth's version of the events. This is what Sherry's daughter told the police and testified to at trial. Marlow also told the police that the shootings occurred while they were struggling over the gun. At trial he changed his testimony to make Kenneth look as culpable as possible. The weight of the evidence clearly supports that the shootings occurred while Kenneth, Sherry and Marlow were struggling for the gun.

Where someone is shot in a struggle for a gun, "there exists no valid line of reasoning that could support the jury's conclusion that defendant possessed the mental culpability required for depraved indifference murder." *People v. De Capua*, 829 N.Y.S.2d 799, 800 (N.Y.App. 2007). At most, the defendant acted recklessly and is guilty of manslaughter. *Id.*

Likewise, for a shooting to qualify as aggravated assault, the defendant must have intentionally shot the gun. *Lackie v. State*, 2007 WL 1248194, *4 (Miss.App.). Aggravated assault is not demonstrated where, during a struggle with a victim, the defendant's gun goes off. *Commonwealth v. Savage*, 418 A.2d 629, 632 (Pa. 1980).

The facts in this case do not support a verdict of murder whether by deliberate design or depraved heart. Nor do they support a verdict of guilty of aggravated assault.

Conclusion

For these reasons, Kenneth Readus's convictions and sentences must be vacated or reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Julie Ann Epps, hereby certify that I have this day mailed by first-class mail, postage prepaid, the original and three copies of the foregoing Reply Brief (and a copy on CD) to the Clerk of the Mississippi Supreme Court, P.O. Box 249, Jackson, Mississippi 39205.

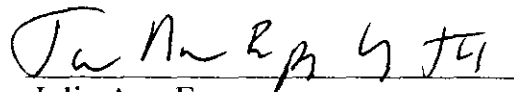
And a true and correct copy of the foregoing document to the following:

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This, the 1st day of October, 2007.


Julie Ann Epps