

IN THE MISSISSIPPI COURT OF APPEALS

COPY

No. 2005-KA-01618-COA

KENNETH READUS

APPELLANT

FILED

VS.

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SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

Appeal from the Circuit Court of Madison County, Mississippi

Julie Ann Epps (MS Bar No. [REDACTED])
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

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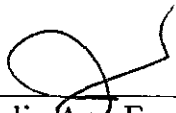
David Clark
District Attorney

Jim Hood
Attorney General

The State of Mississippi
Appellee

Honorable William E. Chapman III
Madison Circuit Court Judge

SO CERTIFIED, this the 3rd day of July, 2007.



Julie Ann Epps

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STATEMENT OF ISSUES

- 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.**
- 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.**

STATEMENT OF THE CASE

Kenneth Readus was indicted for the murder of his wife Sherry and aggravated assault of his stepson Marlow Jackson. CP. 1; RE. 10. Kenneth and Sherry lived in an apartment in Canton with their two children (Kentrell and Aurelia, approximately seven and five years of age in March, 2002), and her two children from a previous marriage, fifteen-year-old Yuvonda and seventeen-year-old Marlow.

On the night of March 29, 2002, Kenneth came home between 11 and 12 p.m. after completing his shift at Choctaw Maid. T. 68. Sherry, at that time, was working the 3-11 shift at St. Dominic Hospital but had not come home yet. T. 68, 85. Kenneth asked Yuvonda where her mother was and Yovonda replied that she thought her mother was still at work. T. 68. Kenneth left and Yuvonda called her mother who would say only that if Kenneth needed her, he could call her on her cell phone. T. 68.

Sherry Readus did not come home until the next morning around seven-twenty a.m. T. 84. According to Yovonda, when Kenneth asked where Sherry had been, she told him not to worry about where she had been, it was none of his business. T. 69, 86. At that point, they started arguing. T. 86. Kenneth had his hand on the front door getting ready to go. T. 70. Sherry called for her son Marlow to come into the room. T. 86. Marlow got out of the shower and came

into the room, grabbing a broom that was by the front door and swinging at Kenneth. T. 69, 87, 106, 108. Kenneth said he was tired of this mess and drew a gun out of his pocket. T. 70. At some point, there was a struggle between Sherry and Kenneth with Marlow trying to get Kenneth's gun. T. 87. While Marlow was trying to grab the gun, he got shot. T. 88, 90. Yuvonda left the room and did not see what happened next. However, she heard a second shot just after the first one. T. 90.

According to Marlow, when he entered the room, Kenneth was standing over Sherry with his fists balled up and she was on the ground holding her face. T. 97. Marlow told Kenneth to get out. T. 98. Marcus testified that Kenneth turned as if to go out the door. The next think he knew, Kenneth had a gun pointed at his chest. T. 98. According to Marlow, Kenneth shot three times – at him, his mother and then into the kitchen. T. 100. According to Yuvonda, there were only two shots and deputies recovered only two shell casings. T. 71, 89, 113.

However, Marlow admitted that when he gave a statement to law enforcement, he did not tell them that Kenneth was standing over Sherry as if he had just hit her. He told investigators that when he entered the room, the two were tussling around. T. 106. He also admitted that he had swung the broom at Kenneth. T. 106.

Kenneth Readus testified that when his wife finally came home, he ordered her to go back where she had come from. He no longer wanted to support her if she was cheating on him. T. 185, 195. He and Sherry began struggling when Marlow ran charging into the room with a broom. T. 187. Kenneth was about to exit the apartment when Sherry hit him on the head with the broom. T. 187. Kenneth pulled his gun out in order to shoot into the air when six-foot-three-inch Marlow grabbed the gun. T. 99, 187. In the struggle over the gun, Marlow got shot. T. 187. Then a second shot was fired. Kenneth testified he doesn't even remember the second shot. T. 187.

The jury was instructed that it could find Kenneth guilty of murder (based on deliberate design or a depraved heart) or manslaughter in the death of Sherry and aggravated assault in the shooting of Marlow. CP. 22, 23, 25; RE. 16, 17, 18. Kenneth, who had never been in any trouble with the law previously, was found guilty of murder and aggravated assault. CP. 29-30; RE. 12-13. He was sentenced to concurrent prison sentences of life (on the murder charge) and twenty years (on the aggravated assault). CP. 32; RE. 15.

SUMMARY OF THE ARGUMENT

Kenneth Readus was indicted for deliberate design murder but his jury was allowed to consider both deliberate design murder and depraved heart murder without being instructed that they needed to agree unanimously on one or the other (or none). This meant that the jury did not necessarily agree on the elements that comprised the murder conviction. This deprived Kenneth Readus of his right to a unanimous jury.

Given that the jurors were not instructed in such a way as to require them to agree on the elements of murder, it is not surprising that they found Kenneth guilty despite the paucity of evidence supporting either deliberate design or depraved heart murder. Kenneth testified, and the state's eye-witnesses agreed, that the shootings occurred when the defendant and the victims were "tussling".¹

Marlow got shot when he grabbed for Kenneth's gun. If anything, Marlow's getting shot was the result of an accident and did not constitute the crime of aggravated assault.

¹ The state's eyewitness were, of course, Yuvonda and Marlow Jackson. Yuvonda was present when Marlow got shot and she testified that Marlow got shot when he tried to grab the gun. Marlow gave a statement to law enforcement that Kenneth and Sherry were tussling when he entered the room

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.**

Instruction S-7 (CP. 22) allowed the jury to find Kenneth Readus guilty of murder if the jury found the elements of deliberate design murder or of depraved heart murder. The jury, however, was not told that they must unanimously agree on one or the other. The jury verdict of guilty, then, does not mean that the jurors were unanimous as to the elements supporting their verdict of murder. As far as we know, six of the jurors considered Kenneth guilty of deliberate design murder and six voted for murder based on the definition of depraved heart murder.

The Sixth Amendment guarantees a criminal defendant the right to a unanimous verdict. *Andres v United States*, 333 US 740, 92 L Ed 1055, 68 S Ct 880 (1948). As the Fifth Circuit stated in *U.S. v. Gipson*, 553 F.2d 453 (5th Cir. 1977):

Like the “reasonable doubt” standard, which was found to be an indispensable element in all criminal trials in *In re Winship*, 1970, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, the unanimous jury requirement “impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue”. 397 U.S. at 364, 90 S.Ct. at 1072, 25 L.Ed.2d at 375. The unanimity rule thus requires jurors to be in substantial agreement as to just what a defendant did

as a step preliminary to determining whether the defendant is guilty of the crime charged. 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.

Gipson, 553 F.2d at 457-458.

In *Hayes v. Com.*, 625 S.W.2d 583, 585 (Ky. 1981), the jury, as in this case, was given an instruction that allowed the jury to find the defendant guilty of murder under alternative theories of either intent or wantonness. The Kentucky Supreme Court reversed and remanded for a new trial on the grounds that the instruction denied the defendant his right to a unanimous verdict.

The instruction combining deliberate design murder and depraved heart murder and allowing the individual jurors to choose one or the other without being unanimous was especially harmful here where the evidence supporting either theory was weak. As discussed below, there was no evidence that Kenneth formed an intent to kill before shooting Sherry. Nor was there any evidence that he was acting with depraved indifference.

Kenneth Readus was denied his right to a unanimous jury. The denial of this important right requires that his conviction for murder be reversed.

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.

In the case sub judice no reasonable fair minded juror could find Kenneth Readus guilty of murder. The evidence presented by the State was insufficient as a matter of law to support a conviction and the jury's verdict was not supported by the overwhelming weight of the evidence.

Kenneth described the shooting as having occurred in a fight over the gun. The only two other witnesses to the shooting also described the participants as tussling. In the statement that Marlow gave to investigators, he stated that Kenneth and his mother were struggling. At trial, his self-serving testimony left out these facts in order to render Kenneth a cold-blooded killer. But Yuvonda's statement to police and her testimony at trial had the first shot occurring while Sherry and Kenneth struggled and Marlow was trying to get the gun from Kenneth. T. 87.

Where the evidence is insufficient, the court must vacate the conviction. Where the verdict is against the overwhelming weight of the evidence, the conviction must be reversed and the case remanded for a new trial.

Evidence is insufficient where the evidence "viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt." *Clark v. Procnier*, 755 F.2d

394, 396 (5th Cir. 1985); *United States v. Sacerio*, 952 F.2d 860, 865-66 (5th Cir. 1992) (a “plausible, rational, innocent explanation for almost every action, thus [lends] reasonable doubt to an inference of guilt”). If a reasonable jury would doubt whether the evidence proves an essential count, reversal is required. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Onick*, 889 F.2d 1425 (5th Cir. 1989).

In *Carr v. State*, 208 So.2d 886 (Miss.1968), the Mississippi Supreme Court stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows “beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.” *Carr*, 208 So.2d at 889.

The Mississippi Supreme Court has stated on numerous occasions that when determining whether a verdict should be overturned that the “Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial.” *Dudley v. State*, 719 So.2d 180, 182 (Miss. 1998). Under this standard, the prosecution is given “the benefit of all favorable inferences that may reasonably be

drawn from the evidence.” *Griffin v. State*, 607 So.2d 1197, 1201 (Miss. 1992). When making this review, the Court will reverse only if the jury’s verdict is “so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” *Dilworth v. State*, 909 So.2d 731, 737 (Miss. 2005). The evidence is weighed “in the light most favorable to the verdict.” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005).

As the Mississippi Supreme Court noted in *Ross v. State*, “[t]hough the standard of review in such cases is high, ‘[t]his Court has not hesitated to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury’s determination of guilt to be based on extremely weak or tenuous evidence [,] even where that evidence is sufficient to withstand a motion for a directed verdict.’” *Ross v. State*, 954 So.2d 968, 1016 (Miss. 2007) quoting *Lambert v. State*, 462 So.2d 308, 322 (Miss.1984) (Lee, J., dissenting).

When reviewing the sufficiency of evidence in a case, the Court must determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Gray v. State*, 926 So.2d 961, 968 (Miss.App. 2006).

Mississippi Code Annotated section 97-3-19(1)(b) (Rev.2006) states that a person is guilty of murder “[w]hen done in the commission of an act eminently

dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual.” Manslaughter is defined as all other killings of a human being “by the act, procurement, or culpable negligence of another, and without authority of law....” Miss.Code Ann. § 97-3-47 (Rev.2006).

The facts of this case certainly don’t support a verdict of deliberate design murder. Deliberate design is defined as an “intent to kill, without authority of law and not being legally justifiable, legally excusable or under circumstances that would reduce the act to a lesser crime.” *Wortham v. State*, 883 So.2d 599, 604 (Miss.App. 2004). While it is noted that deliberate design “is often not capable of direct proof,” it must still be “proven by the inferences **reasonably drawn** from the **objective facts** of the incident” *Coffield v. State*, 749 So.2d 215, 218 (Miss.App. 1999) (emphasis added). The State presented no objective evidence from which an inference could be reasonably drawn by the jury that Kenneth killed Sherry Mitchell with deliberate design.

When only circumstantial evidence exists as to an essential element of the crime charged, “the State is required to prove the defendant guilty not only beyond a reasonable doubt but to the exclusion of every reasonable hypothesis consistent with innocence.” *Montgomery v. State*, 515 So.2d 845, 848 (Miss. 1987); *Barclay v. State*, 43 So.2d 213, 215 (Miss. 1949) (holding that this standard can apply to

"any essential element" of an offense). The trial court is required "to accept as true all the evidence favorable to the state, together with reasonable inferences." *Montgomery, supra*, at 848. The Court must find from this evaluation that "the facts...consistently point to but one conclusion, that is to say guilty." *Hester v. State*, 463 So.2d 1087, 1091 (Miss. 1985). The State in this case has failed to eliminate every reasonable hypothesis consistent with innocence of the charge of deliberate design murder, namely the deliberate design to kill.

Nor do the facts of this case support a verdict of depraved heart murder which is described in the murder statute as a killing of a human being without the authority of law "[w]hen done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, without any premeditated design to effect the death of any particular individual" Miss. Code Ann. § 97-3-19(1)(b). Depraved heart murder evidences a greater degree of recklessness than manslaughter. *Steele v. State*, 852 So.2d 78, 80 (Miss.Ct.App.2003).

In *Dedaux v. State*, 630 So. 2d. 30 (Miss. 1993), an angry confrontation between men who had been drinking sparked a killing at a club. Both murder and manslaughter instructions were given the jury. Dedaux was convicted of murder and appealed. The Supreme Court reviewed the evidence and found that it supported only a conviction for manslaughter, and remanded the case for re-

sentencing. In doing so, the Court found that even though the defendant retrieved a gun in the parking lot with the intention of confronting and shooting the victim, the facts clearly supported a conviction for manslaughter, not murder. *Id.* at 33. The Court found that the shooting occurred in the heat of passion of the bar room argument and, although Dedeaux used more force than necessary, the evidence showed that he shot the husband without malice or premeditation. *Id.* See also *Sadler v. State*, 728 S.W.2d 829, 831 (Tex.App. 1987) (evidence sufficient to prove involuntary manslaughter where death resulted when husband and wife struggled over firearm).

Similarly, in *Wade v. State*, the defendant was a wife who had been repeatedly abused by her husband. *Wade v. State*, 748 So.2d 771 (Miss 2000). One night, after he had abused her in the bar that they owned, she left the bar and retrieved a gun. She then returned to the bar and shot her husband *Id.* at 772-73. The Defendant in *Wade* was convicted of murder by the jury, but the Court of Appeals reduced her conviction to heat of passion manslaughter and remanded the case for re-sentencing. The Court of Appeals decision was affirmed by the Mississippi Supreme Court. *Id.* at 773.

The facts in this case do not support a verdict of murder whether murder by deliberate design or depraved heart. The jury's ability to reach a unanimous verdict on murder despite the paucity of evidence was no doubt greatly assisted by

the fact that the murder instruction did not require the jurors to unanimously agree on one theory or another. For these reasons, Kenneth's sentence for murder must be vacated or reversed for a new trial.

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.

Just as there was a dearth of evidence to support the murder conviction in this case, so, too, was there no evidence to support the verdict of aggravated assault where the evidence was almost uncontroverted that Marcus' wound was caused by a struggle over the gun. Of all the eyewitness, Kenneth, Marlow and Yuvonda, Yuvonda was the only one who did not have any need to justify her own actions and she testified unequivocally that Marlow got shot while he was trying to get the gun from Kenneth. T. 87.

"A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm." M.C.A. § 97-3-7. In order to convict Kenneth of aggravated assault, a jury would have to find that he meant to shoot Marlow or, at the very least, he

acted recklessly “under circumstances manifesting extreme indifference to human life.” Kenneth was not guilty of aggravated assault if the shooting was an accident. *Biggers v. State*, 741 So.2d 1003, 1007 (Miss.App. 1999).


The **only** witness who denied that Marlow was shot while Marlow and Kenneth were struggling over the gun was Marlow. Given Marlow’s inherent self-interest in minimizing his involvement, his self-serving testimony, most of which was impeached by an earlier statement, should be disregarded. The evidence clearly shows that Marlow’s shooting was an accident and, thus, the conviction for aggravated assault should be vacated or, at the very least, reversed.

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 SERVICE

I, Julie Ann Epps, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing document to the following:

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Hon. William E. Chapman
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This, the 3d day of ^{July}~~June~~, 2007.



Julie Ann Epps