IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

PATRICIA L. SIMPSON — APPELLANT

V. — NO. 2006-KA-1366-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Glenn S. Swartzfager, MS Bar No. [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Patricia L. Simpson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICIA L. SIMPSON **APPELLANT**

V. **NO. 2006-KA-1366-COA**

STATE OF MISSISSIPPI **APPELLEE**

REPLY ARGUMENT

In its brief, the State argues that the constitutional issue raised by the Appellant is procedurally barred for failure to properly preserve the issue for appellate review. The State alternatively argues that all of the issues are without merit. The Appellant respectfully disagrees with the State's position for the reasons which will be delineated *infra.*

I. THE APPELLANT WAS ENTITLED ACQUITTAL PURSUANT TO *WEATHERSBY V. STATE*, 165 MISS. 207, 209, 147 SO. 481, 482 (1933).

The Appellant asserts that she was entitled to an acquittal based on the rule set forth by the Mississippi Court in ***Weathersby v. State***, 165 Miss. 207, 209, 147 So. 481, 482 (1933), and the State has not shown otherwise in its brief. ***Dew v. State***, 309 So.2d 857 (Miss. 1975), is a case that is directly on point with the present case, and demonstrates that Patricia is entitled to be discharged under the ***Weathersby*** rule.

In ***Dew***, "The evidence of the state is that the appellant fatally shot his wife about midnight on April 11, 1972, when no others were present and that immediately thereafter he notified the sheriff's department and summoned an ambulance." ***Dew***, 309 So.2d at 857. In the present case, Patricia's husband was shot at night when no others were present, and she

immediately called 911. (Tr. 839-41).

In ***Dew***, "The officers testified that when they arrived at the Dew home, the appellant told them that he had shot his wife and led them to a bedroom where her near-lifeless body was found. While awaiting the ambulance, these officers gave what aid they could to Mrs. Dew and to the appellant who lapsed into shock as a result of the occurrence." ***Dew***, 309 So.2d at 857. In the present case, Patricia immediately called 911, and she pleaded with the paramedics to come inside to treat her husband before the police arrived. (Tr. 603).

In ***Dew***, the Court noted:

> An autopsy revealed that the decedent had died of a wound from a bullet which had entered her body behind the left shoulder, had traveled downward through the left lung and had come to rest in the twelfth thoracic vertebra. The pathologist found no evidence of powder burns which would have been present, in his opinion, had the weapon been fired within two feet of the victim's body. He testified concerning bruises of recent origin on Mrs. Dew's body which could have formed to a limited degree after death. Of particular significance was a bruise or abrasion to the left knee. In the opinion of the pathologist none of these discolorations was inconsistent with a struggle and fall prior to death. His examination also revealed that the decedent was under the influence of alcohol at the time of her death.

Dew, 309 So.2d at 858. In this case, the evidence showed a similar type of trajectory where the bullet traveled in a downward angle. However, unlike ***Dew***, there were no bruises or signs of a struggle which took place. (Tr. 301, 701-712).

In ***Dew***, the defendant testified that "the fatal shot was accidentally fired in a struggle with his wife while he was attempting to disarm her after she had threatened to kill him." ***Dew***, 309 So.2d at 858. Here, the testimony was that Patricia was upstairs when the shooting occurred. If anything, this lends more credence to Patricia's story.

The Court in ***Dew*** held:

> The appellant's testimony, as we review it, is not controverted in its **material particulars** by either the physical facts or those of common knowledge.

> **The contradictions, if there be such, are related to *slight discrepancies* regarding the time the appellant returned from riding around with Vaughn or the reputation of the defendant.** Numerous witnesses testified that defendant's reputation for peace and violence was very good, but this was disputed on rebuttal by the mother of Mrs. Dew who, after acknowledging that the defendant loved his wife, gave evidence that he had nevertheless months before struck her, leaving bruises upon her body.
>
> The remaining issue is whether the defendant's version of the affray is reasonable. The path of the bullet from its entry point behind the left shoulder to the twelfth vertebra corroborates the appellant's testimony that his wife was somewhat below him when the shot was fired. The bruise upon the left knee of Mrs. Dew is not inconsistent with the appellant's testimony that the shot was fired from above her body. **The absence of powder burns is explained, we think, *or at least is not unreasonable*, when thought is given to the fact that the extended arm of the normal adult is around two feet or more, the critical distance, according to the pathologist, for the presence of powder burns.**

Dew, 309 So.2d at 859 (emphasis added).

In this case, the evidence was not contradicted in material particulars. Furthermore, unlike Dew, there was no evidence of any discord between Patricia and her husband on or before the night in question. Indeed, they had just been to a marriage encounter weekend. (Tr. 565). And in fact the morning before Mr. Simpson's death on December 22, 2004, he had left Patricia a note saying that he loved her. (Tr. 583-85; Def. Ex. 28).

The Court in ***Dew*** concluded that the operation of the safety mechanism of the gun lent "a degree of authenticity to the defendant's version of the occurrence which, when considered in its entirety, is **not unreasonable**, though tragic." ***Id.*** The Court reverse and rendered Dew's conviction. ***Dew***, 309 So.2d at 859. The facts of ***Dew*** are so striking similar to the present case, the Appellant asserts that it controls the outcome, and the Court should reverse and render her conviction, just as the Court did in ***Dew***.

The State argues that Patricia's version of the events was inconsistent enough to take this case out of the ***Weathersby*** rule. The State points out what it alleges to be seven inconsistencies

that bring the case outside of the ***Weathersby*** rule. However, all of those alleged inconsistencies are either simply not present and/or are immaterial even if they are present.

First, the State argues that two of the pathologists testified that there was no charring of the t-shirt, no gunpowder residue at and in the wound, and no discoloration of the skin. (Appellee's brief at p. 17). However, it is significant to note that, contrary to the State's assertion, Dr. Riddick did not testify with absolute certainty that the gun was fired from three or more feet away from Mr. Simpson. Rather he testified that it was **probably** fired from three or more feet from Mr. Simpson. (Tr. 303)(emphasis added). Also of great importance, Dr. Hayne testified that the shot came from no closer than two feet from Mr. Simpson's body. (Tr. 510). Dr. Riddick measured the length of Mr. Simpson's arms to be twenty-eight inches -- easily outside of the two foot range testified to by Dr. Hayne and nearly outside of the three foot possible range testified to by Dr. Riddick.[1,2] Dew stated that the absence of to three feet range testified to by Dr. Hayne and Dr. Riddick. (Tr. 301). Finally, Dr. McGarry testified that there had been a one millimeter collar of abrasion around the wound which indicated to him that the

---

[1]Recall that in Dew, the Court found, "The absence of powder burns is explained, we think, or at least is not unreasonable, when thought is given to the fact that the extended arm of the normal adult is around two feet or more, the critical distance, according to the pathologist, for the presence of powder burns." ***Dew***, 309 So.2d at 859.

[2]In response tot he question of how far the shot was fired from, Dr. Riddick testified, "The only thing I can tell you, it was probably fired greater than three -- three feet or greater." (Tr. 303). Thus, it is clear that Dr. Riddick on was not entirely certain of the distance from which the gun was fired.

wound was consistent with suicide.[3,4] (Tr. 701-712).

Furthermore, the track of the wound would be impossible for Patricia to have fired the gun. The record shows that she was four feet eleven inches tall. (Tr. 735). Her husband was five feet, eleven inches tall. (Tr. 734). The bullet traveled in a downward direction, and because a handgun is usually fired from shoulder level, so the wound would have been traveling in an upward direction instead of the downward direction it would found to have traveled. In other words, the gun was held above the wound, and not below it, and clearly, Patricia was a foot shorter than her husband, so it the angle of the wound makes no sense with the State's version of the events. (Tr. 737-39). Accordingly, the absence of the physical evidence the State so vehemently argues should be present is easily and reasonably explained by the scientific evidence elicited at trial.

Furthermore, even though Dr. Hayne testified that he observed no powder on the t-shirt and opined that there was none on the t-shirt, it is critically important to note that Dr. Hayne never physically examined the t-shirt or Mr. Simpson's body. Rather, Dr. Hayne formulated this particular opinion from viewing a video tape of the autopsy. In fact, on cross-examination, Dr. Hayne admitted that he could not determine if there was residue on the t-shirt. (Tr. 470-72). He further admitted on cross-examination that the blood coming from the aorta could have

---

[3]Dr. McGarry also testified that the direction of the wound described was consistent if "a gun is in the right hand of an individual and the muzzle of that gun comes to the center of the chest and the gun discharges against the skin, the movements of the right should, right elbow, right wrist griping a gun puts the muzzle of the gun exactly over that spot and put the track of the wounds directly as described in the autopsy report . . . ." (Tr. 701). Dr. McGarry also testified that these types of wound are difficult to diagnose. (Tr. 710).

[4] It is of interest to note that Dr. McGarry, who has been a pathologist for over forty years, felt so strongly about the evidence, he came and testified voluntarily and did not charge any fee for his testimony. (Tr. 720, 729).

washed out some of the powder. (Tr. 468).

Moreover, Dr. Riddick testified that Mr. Simpson's hands showed no "gross" powder residue. He only made visual examination of Mr. Simpson's hands. His hands were not bagged, nor was there a gunshot residue test run on his hands, or Patricia's hands. (Tr. 349-50). Dr. Riddick also testified that Mr. Simpson's body was washed before the autopsy. (Tr. 355). Dr. Riddick admitted on cross-examination that misinterpretations can occur by experienced, trained pathologist if this type of wound is judged solely on the basis of its external characteristics. (Tr. 360). He further admitted that more should be done than look at the external characteristics since the body had been washed. (Tr. 362). Again, the lack of physical evidence the State so vehemently argues should be present is easily and reasonably explained by the scientific evidence elicited at trial.

Next, the State argues that Patricia's account of finding her husband face up on the floor was inconsistent with the paramedic's testimony that he was face down when the arrived. The State's point being that she did not do anything to aid her husband before the paramedics arrived. (State's brief at 18). However, that is reasonably explained by the fact that Patricia was performing CPR and rolled him on his side because he was vomiting. It is also important to remember that Patricia removed her husband's dentures as instructed by the 911 operator. (Tr. 174; 602). Even the State admits this fact to be true. (Appellee's brief at p. 12). Furthermore, there was blood on the telephone where Patricia call 911. (Tr. 174). There can be not but that Patricia attempted to aid her husband. Finally, Patricia was hysterical, so much so that the paramedics asked her to go to another room of the house, and she had to take a tranquilizer

before going to the hospital.[5] (Tr. 166, 176). Obviously, the fact that Patricia had removed her husband dentures and attempted to perform CPR is a reasonable explanation regarding the position of her husband's body.

The State next asserts that Patricia's version of the events changed from an accidental shooting to a theory of suicide at the time of trial.[6] (Appellee's brief at p. 18). Dr. Riddick testified at trial that "a lot of times when there is a wound in which there's a claim of an accident in which people have been – particularly cleaning a weapon, it often arises that this was a self-inflicted wound intentionally and, therefore was suicide." (Tr. 303). Thus, even according to the State's own expert, it is common mistake to assume a gun-cleaning accident when in all reality it was suicide.[7] It is of interest to note that the emergency room nurse told Patricia, "Honey, your husband didn't die of a heart attack. These things just happen at Christmas, around Christmastime." (Tr. 610). This again, easily explains any alleged discrepancy set forth by the State.

Finally, the State attempts to make an issue out of the fact regarding how Patricia

---

[5]The State unsuccessfully tried to paint a picture that Patricia was calm when the paramedics arrived. However, Henderson, the paramedic who testified, admitted on cross-examination that Patricia was hysterical upon arrival and fell apart when a neighbor arrived at the scene. (Tr. 164-66).

[6]The State points out that Patricia's son stated that Patricia's husband was trying to pry a bullet out with a screwdriver, and that if that was true, her son would have been present to testify at trial. First, Patricia testified that she did not shake her head in agreement when her son stated that, but rather she was upset. (Tr. 665). Additionally, the availability of her son for the State to subpoena for trial has nothing to do with her version of the events on the night in question and cannot be imputed as a discrepancy in her version of the events.

[7]The State attempts to argue that Patricia's husband did not have any troubles at work. (Appellee's brief at p. 18). However, the record clearly shows that his income was down some $40,000 from the years past. (Tr. 209-214). The State admits as much. (Appellee's brief at p. 10). This however contradicts the State's theory at trial, which was completely unsupported by any evidence whatsoever, that Patricia must have been mad with her husband because he had said something to her about spending too much money. (Tr. 661).

acquired the gun some twenty-six years earlier. However, first, that has absolutely nothing to do with her version of how the events happened on the night in question. Certainly it is not relevant as to whether *vel non* Patricia shot her husband, intentionally or otherwise. As for how Patricia acquired the gun, she never waivered from the fact that her father bought the gun for her. (Tr. 625-26). Patricia testified at trial that her father bought the gun for her, but it was registered in her name since it was going to be in her possession. That testimony was uncontroverted. (Tr. 625-26). Thus, any alleged inconsistencies, even though minuscule and immaterial, were cleared up at trial.

The Appellant strongly asserts that ***Weathersby*** and is progeny, including ***Dew***, control here, and the Court should reverse and render her conviction.

II. DUE PROCESS WILL NOT ALLOW THE CONVICTION FOR MANSLAUGHTER TO STAND.

The State first argues that this issue is procedurally barred because it was not sufficiency raised at trial. However, the State's assertion is clearly belied by the record which shows that the issue was raised not only in the post trial motions, but also at the oral argument on the post trial motions. (Tr. 883; C.P. 120-21). Additionally, the trial court certainly found that the issue had been raised, as it felt it necessary to address it in its order denying the post trial motions. (C.P. 133). Generally, when the specific ground for an objection at trial is apparent from the context, the issue is preserved for appeal. M.R.E. 103(a)(1). *See also* ***Kolberg v. State***, 829 So.2d 29 (Miss. 2002), ***Barnette v. State***, 478 So.2d 800, 803 (Miss. 1985), and ***Carter v. State***, 722 So.2d 1258, 1261-62 (Miss. 1998). Moreover, this Court has previously explained that asserting a procedural bar is a reasonable and legitimate interest of the State, but not a "right." ***Read v. State***, 430 So.2d 832, 840-41 (Miss. 1983). The interest the State has in promoting judicial efficiency is not meant to override an accused's constitutional rights. ***Id.*** (citing ***Brooks***

v. State, 46 So.2d 94, 97 (Miss. 1950)). Although the ***Read*** Court was addressing the necessity of raising the issue of ineffective assistance of counsel for the first time on appeal, the point was that applying the procedural bar to thwart a defendant's constitutional rights should not be allowed. "Constitutional rights in serious criminal cases rise above mere rule of procedure." ***Id.*** The State's assertion of a procedural bar is without merit.

In ***Jackson v. State***, 551 So.2d 132 (Miss. 1989), the Court observed that Jackson pointed out that "in a murder case our law allows the prosecution to obtain a manslaughter instruction, almost willynilly, but that the defendant is not always so entitled, pointing to a number of our cases wherein we have upheld a Circuit Court's refusal to grant the defendant's request for a manslaughter instruction. *See* ***Reed v. State***, 526 So.2d 538, 540 (Miss.1988); ***Fairchild v. State***, 459 So.2d 793, 800-02 (Miss.1984). Candor requires concession that Jackson has accurately described the current state of our law. *See* ***Mease v. State***, 539 So.2d 1324, 1338 (Miss.1989) (Hawkins, P.J., specially concurring)." ***Jackson v. State***, 551 So.2d 132, 146 (Miss. 1989).[8]

The law still appears to be in the same state as it was in ***Jackson***. *See c.f.* ***Phillips v. State***, 794 So.2d 1034, 1037 (Miss.2001)(stating the high standard required for a manslaughter instruction); ***Turner v. State***, 773 So.2d 952, 954 (Miss.App. 2000)(stating angry or reproachful words and shoving were an insufficient basis to support a manslaughter instruction absent testimony that violent and uncontrollable rage appeared to exist); ***Gaddis v. State***, 207 Miss. 508,

---

[8]The State argues that the facts of Jackson are directly on point. However, it is easily distinguishable. First, the instrumentality was a coke bottle which generally is not used as a deadly weapon. A gun, as was the instrumentality of death here, is generally used a as a deadly weapon. Therefore, malice is imputed. We have held that "malice, or deliberate design, may be inferred from use of a deadly weapon. ***Phillips v. State***, 794 So.2d 1034, 1037 (Miss. 2001). Furthermore, ***Jackson*** appears to be an anomaly, and certainly if a defendant requested a manslaughter instruction under such circumstances today, he or she would not be entitled to one under the current state of the law. *See* ***Moody v. State***, 841 So.2d 1067 (Miss. 2003).

514-16, 42 So.2d 724, 726 (1949) (an early holding that words of reproach, criticism, or anger are insufficient to reduce murder to manslaughter).

In ***Moody v. State***, 841 So.2d 1067 (Miss. 2003), the Court held:

> The granting of a manslaughter instruction in this case, based on the record, **would have been purely speculative and not supported by the evidence.** We have held, regarding heat of passion, that the test is whether the defendant acted in the heat of passion and without malice. In ***Taylor v. State***, 452 So.2d 441, 449 (Miss.1984), we held that **the question is an objective one**, being whether a reasonable person would have been so provoked. **There is nothing in the record which reveals that Moody's violent behavior in this case was provoked.**
>
> This issue is without merit.

Moody v. State, 841 So.2d at 1096-97 (Miss. 2003)(emphasis added).

The law is presently extremely lopsided in favor of the state in this instance. It is extremely unjust to allow the state to get an instruction on manslaughter when there is no evidence to support it, and then bar an appellant from seeking review from the appellate courts on that issue merely because he or she has allegedly been done a favor.***Jackson v. State***, 551 So.2d 132 (Miss. 1989); ***Mallette v. State***, 349 So.2d 546, 550 (Miss. 1977). Contrast this with the fact that if a defendant requests a manslaughter instruction and there is no evidence to support it, then the defendant is not entitled to it, as mercy does not play a role in the granting of lesser-included offense jury instructions. ***In re Hill***, 467 So.2d 669, 672 (Miss. 1985)(citing ***Colburn v. State***, 431 So.2d 1111 (Miss.1983)).

First, it is nothing more than speculation that the defendant was done a service when such a verdict is rendered. It is all too often that a compromise verdict happens. ***Jackson v. State***, 551 So.2d 132 (Miss. 1989); ***Mallette v. State***, 349 So.2d 546, 550 (Miss. 1977). *See also* ***Cichos v. State of Indiana***, 385 U.S. 76, 87 S.Ct. 271, 17 L.Ed.2d 175)(Fortas, J. dissenting)). The United States Supreme Court has held that uncertainty in jury deliberation process is

intolerable. *See* ***Beck v. Alabama***, 447 U.S. 625, 100 S.Ct. 2382 (1980); ***Spaziano v. Florida***, 468 U.S. 447, 456-457, 104 S.Ct. 3154, 3160 (1984); ***Hopper v. Evans***, 456 U.S. 605, 610, 102 S.Ct. 2049, 2052 (1982); ***Roberts v. Louisiana***, 428 U.S. 325, 96 S.Ct. 3001(1976) . Moreover, this case is very unique in that it was a bench trial, and the trial court specifically entered an order finding Patricia not guilty of murder. Thus, there can be no assumption that the trial court found the defendant guilty of committing an unlawful killing, but then decided to show mercy.

Additionally, the United States Supreme Court in ***Garner v. State of La.*** held, "[W]e cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." ***Garner v. State of La.***, 368 U.S. 157, 163, 82 S.Ct. 248, 251 (1961)(citing ***Thompson v. City of Louisville***, 362 U.S. 199, 206, 80 S.Ct. 624, 629 (1960)).

The State suggests, without citation to any authority, that because these cases were decided under the "death is different" mentality of the United States Supreme Court, they are not applicable to the present case. Such an argument clearly misses the mark. When a liberty interest is at stake, uncertainly in jury deliberations should not be tolerated regardless of the fact it is not a death penalty case. Such is the entire foundation of the United States and Mississippi Constitutions. Indeed, the Mississippi Supreme Court has held:

> A trial for murder is the most serious matter any court may entertain. Where, as here, the evidence is somewhat circumstantial and inconclusive, and where the Court has substantially instructed the jury that it consider a matter extraneous to the process, the risk of a misdirected verdict becomes intolerably high.

Taylor v. State, 597 So.2d 192, 195 (Miss. 1992).

Lest we forget, it has been held, "The power of the factfinder to err upon the side of

mercy, however, has never been thought to include a power to enter an unreasonable verdict of guilty." ***Jackson v. Virginia***, 443 U.S. 307, 318, 99 S.Ct. 2781, 2788 n.10 (1979)(*citing* ***Carpenters & Joiners v. United States***, 330 U.S. 395, 408, 67 S.Ct. 775, 782, 91 L.Ed. 973 (1947); ***Capital Traction Co. v. Hof***, 174 U.S. 1, 13-14, 19 S.Ct. 580, 585-586, 43 L.Ed. 873 (1899)).

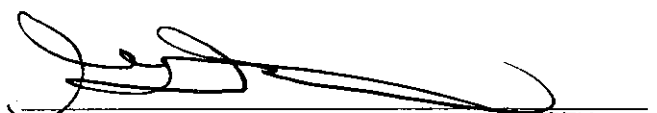
Therefore, the Appellant respectfully asserts that to uphold her conviction under these circumstances would be a violation of due process, and thus the Court should reverse her conviction. With regard to the remaining points, issues and other arguments, the Appellant rests on her initial brief and authorities therein.

CONCLUSION

Based upon the foregoing, as well as the issues and arguments raised in her initial brief, the Appellant, Patricia Simpson, contends that her conviction should be reversed.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

GLENN S. SWARTZFAGER, MSB# [redacted]
COUNSEL FOR PATRICIA SIMPSON

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: (601)-576-4200
Facsimile: (601)-576-4205

CERTIFICATE OF SERVICE

I, Glenn S. Swartzfager, Counsel for Patricia L. Simpson, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **REPLY BRIEF** to the following:

Honorable Dale Harkey
Circuit Court Judge
Post Office Box 998
Pascagoula, MS 39568

Honorable Anthony (Tony) Lawrence, III
District Attorney, District 19
Post Office Box 1756
Pascagoula, MS 39568

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 27th day of August, 2007.

GLENN S. SWARTZFAGER