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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

REGINALD VERNELL ROGERS — APPELLANT

VS. — NO.: 2006KA-00064-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

1. Reginald Vernell Rogers, Appellant
2. G. Gilmore Martin, District Attorney, Warren County Mississippi
3. Judge Isadore Patrick, Circuit Judge, Ninth District
4. James L. Penley, Jr., Attorney for Appellant

RESPECTFULLY SUBMITTED
REGINALD VERNELL ROGERS

BY: _____
JAMES L. PENLEY, JR.

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STATEMENT OF THE ISSUES

1. The State proved the crime of murder, prejudicing the jury to find the defendant guilty of manslaughter.
2. That a juror was not in agreement with the verdicts.
3. Rogers right of self defense was terminated.
4. The State failed to prove all the elements of the crime of aggravated assault.
5. The verdict was contrary to the weight and sufficiency of the evidence.

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STATEMENT OF THE CASE

In the early morning hours of August 2, 2004, Reginald Rogers and Danny Woodland came to be in the same place in Vicksburg, Mississippi, through no intent of either of the parties. The chance meeting at the Hill Top Lounge put into motion a tragic chain of events.

Rogers and Woodland had a history of bad blood between them, though the basis for this dislike is unknown. They entered the bar at separate times and both were armed with .45 caliber semi automatic weapons. Depending on the witnesses, there was one, two or three confrontations between the two men prior to weapons being fired. Woodland was the aggressor, being lead away by associates each time. The last time, Woodland, as he walked away, turned, pulled his weapon and fired at least twice. One bullet struck Rogers in the chest. Two individuals were hit by bullets at the same time, one in a finger, the other in the rear end. These people were behind Rogers when shot.

As Woodland fumbled with his gun, Rogers drew his weapon in an effort to defend his person from further harm. He fired at Woodland, his focus being on the person that posed a great threat. Rogers continued to fire until the threat was no more. He then left the bar and had someone take him to the hospital.

Woodland, at some point, after firing, turned away from Rogers and later fell to

the floor. Witnesses, giving several versions, stated Rogers fired one to three more shots while in the vicinity of Woodland's fallen body. Evidence of this action and the location of the wounds was and continues to be disputed. Rogers denies any shot to the head of Woodland done in a deliberate calculating manner, and certainly not done while Woodland was on the floor of the club.

During the exchange of gunfire two other patrons were hit. Ms. Green received a wound to her hand and wrist and Christopher Henderson was wounded in the leg. No bullet was recovered from either of these victims. There were several witnesses stating that there were more than two weapons being fired in the club at the time of the exchange between Rogers and Woodland.

Rogers was arrested and initially charged with murder, four counts of aggravated assault and shooting in a building. A grand jury later returned a true bill on a charge of manslaughter and two counts of aggravated assault. Trial of the indicted charges was had and Rogers was found guilty on all counts. He was later sentenced by the trial judge and then perfected this appeal.

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SUMMARY OF THE ARGUMENT

1

The prosecution set out to prove the charge of murder. A willful, with malice aforethought or deliberate design killing, without any authority of law and not in necessary self defense is the case that was presented to the jury that heard this matter.

Rogers was originally charged with murder by the Vicksburg Police Department. A Warren County Grand Jury reviewed the case and returned an indictment of manslaughter. During its case in chief but especially at closing the prosecution advised the jury that the killing was not murder, therefore, Rogers was guilty of the lessor charge of manslaughter. In closing the district attorney told the jury that Rogers was justified in returning fire after being shot by Woodland. Then, taking the testimony of several witnesses that a shot or shots were fired while Woodland was on the floor, he tells the jury that Woodland was not killed in the first volley. The prosecutions expert Dr. Hayne testified that the stomach wound was a lethal gunshot. Woodland could only have received that wound while facing Rogers. The prosecution takes the position that the lethal shot was to the head of Woodland and was administered while Woodland was on the floor. The jury was told by the district attorney that Woodland was down and presented no danger to Rogers so Rogers just couldn't kill him like that.

That statement infers deliberate design or malice aforethought on the part of Rogers. Woodland was on the ground and he stood over him and fired. Deliberate design can be formed in a few moments. Certainly, a lull in gunfire with time for the parties to change positions could qualify as such. If the justification for self defense had passed so had the heat of passion. The State had two bites of the apple though Rogers was only indicted for the seeds.

Prejudice followed this orchestration of the facts by the prosecution. The jury was inflamed by the murder shooting scenario, and no witness, expert or lay could verify that Woodland, was shot in the head while on the floor.

The State set out to prove Rogers murdered Woodland in the Hilltop Lounge. Once their witness parade gave testimony that was uncorroborated Rogers self defense position was on thin ice.

2

Victoria Thomas Atkins was a juror on the panel that heard the Rogers' case. After trial and verdict Ms. Atkins contacted the Rogers' family with information she was confused and pressured into the verdict she returned. She may have even spoke out during the poll of the jury but later reverted her answer to the majority. Rogers is aware that a juror may not impeach her own verdict but the juror may let the Court know of misconduct.

A copy of Ms. Atkins' note to the Rogers family was attached to Rogers' Motion for New Trial and in the Alternative JNOV. She never came forward again to give sworn testimony concerning the incident. Such action diminishes the fairness of the trial

Rogers received. This is especially relevant in a case with pronounced issues for the triers of fact.

Any untoward activity that harms Rogers chances tends to lesson the burden shouldered by the State. Rogers has only one chance to make his impression the State will try another case the next week.

3

Rogers right, under the law of this state, to assert his defense against the charges for which he was indicted was undercut by the multi count indictment presented by the prosecution.

Every citizen of this state has a right to defend his person or other against the threat of bodily injury. Rogers exercised this right when he was shot in the chest by Woodland. The prosecution agreed that Rogers was justified in returning the fire after being wounded.

The inclusion of two counts of aggravated assault with extreme indifference to human life watered down Rogers self defense rights. The prosecution scenario could have found Rogers not guilty of two aggravated assaults. Was Rogers to stop and ponder the issue of hurting someone else while Woodland was unjamming his .45? Should Rogers have to be in fear of injury to a third party when he was just shot in the chest and two individuals near him were wounded by the same aggressor?

An unlevel playing field was constructed by the State. Rogers was originally charged with aggravated assault on everyone in the lounge that was wounded. The people shot by Woodland had no recourse.

6

4

All the elements of aggravated assault were not proved by the State of Mississippi.

The assault charges for Green and Henderson were a part of the trial. Green and Henderson both stated that Rogers shot them because they saw a gun in his hand and fire. There is no question, Rogers was firing a weapon. He was attempting to save his life. Rogers attention was focused on Woodland and his .45. Green and Henderson were in front of Rogers at the time so assumption may have come into play. Further, no bullet was extracted from either wound, therefore, no caliber, type or other factor was ever determined.

Several witnesses, Green being one, advised police that more than two guns may have been involved. The State fire arm expert could not put all the found shell casings in Rogers' gun.

The elements as given by the prosecution did not take into account accidental injury. A ricochet, for instance could have hit either Green or Henderson.

Medical records showed only fragments of a bullet in Green's wrist. A copper jacketed bullet would have passed through and not fragmented.

The Court allowed the lesser included charge of simple assault to be instructed to the jury. Questions about the assault charges required this action.

5

The verdict in this case rested on unstable ground. First, the prosecution put on a murder case in order to convict Rogers of manslaughter. Second, two counts of

aggravated assault were added to the mix to help insure that guilty was the only alternative for the jury.

Rogers right to defend his person was diluted with the aggravated assault charges. In the same circumstances no one would have a right of self defense against unknown individuals.

The expert testimony was not absolute as Dr. Hayne admitted the shot to Woodlands' head could just as well have happened when he was standing. The head shot would have put him in the ground, while he could still move with the stomach wound. Shell casings and bullets did not all conform to the same gun and not from the gun fired by Rogers. The angle of Woodlands head on the floor precluded a shot from Rogers.

The witnesses all told various stories. No one person knew exactly what happened because they were all ducking and fleeing to protect their person. Numerous guns being fired and shell casings kicked or moved by accident or on purpose. All the events lead to a crime scene that was less than pristine.

The evidence was not sufficient to support the verdict. Death could have been prevented had not Woodland fired first. Woodland is responsible for all acts that followed. To characterize Rogers as the bad guy is against the weight and sufficiency of the evidence.

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ARGUMENT

THE STATE PROVED THE CRIME OF MURDER, PREJUDICING THE JURY TO FIND DEFENDANT GUILTY OF MANSLAUGHTER

The killing of a human being without the authority of law by any means or in any manner shall be murder, when done with deliberate design to effect the death of the person killed. §97-3-19(1)(a) MCA as amended. With the addition of and not in necessary self defense, the state of Mississippi presented evidence against Rogers that proved murder as set forth in the statutes of this state. The act or acts as portrayed by the prosecution lead the jury to believe that a deliberate design murder had taken place. Since a grand jury had already indicted on manslaughter, the prosecution could present any evidence of the death in any manner or form, without qualms about evidentiary questions. This case was tried as if murder had been the charge faced by Rogers.

The killing of a human being, without malice, in the heat of passion, by the use of a dangerous weapon, without authority of law and not in necessary self defense, shall be manslaughter. §97-3-35 MCA as amended. (Record Excerpt 9) This was the charge faced by Rogers at trial. All the prosecution had to show was a killing of a human being, with a weapon, not in necessary self defense.

Self defense became the linchpin in this matter. The prosecution centered its

case of homicide on the lack of self defense. (R711) Woodland was shot in the head at some point in time. (R374, 455, 462) The point in time was at issue in the trial and remains so in this brief (R462 464) Once Woodland was on the floor, the State opines that he was not dead and a shot to the head administered by Rogers, while Woodland was on the floor, was the killing point. (R374, 711) Once the threat of harm to Rogers was on the floor dying, the need for self defense was erased. Loss of self defense was equated to homicide, "You just couldn't kill him like that". (R711) These words were used by the prosecutor to influence the jury. Woodland posed a threat while he still had breath in his body. When turned over by the police, Woodland had a loaded .45 in his left hand, cocked and a live round on the floor. (R496, 499-500) Hardly the picture of someone who was not a threat. The jury was lead to believe Woodland was alive on the floor of the Hill Top Lounge (R711) Dr. Hayne, the State's expert, testified that Woodland would have been alive for a period of time even after the shot to the head. (R457) Dr. Hayne maintained that the wound to the abdomen would not have effected Woodland's mobility. (R464, 466) Woodland would have been mobile and hostile even with a bullet to the mid section.

Lack of self defense in the words of the prosecutor becomes deliberate design. An intentional act on the part of Rogers to kill Woodland. Deliberate design can be found in moments. Just the scenario painted by the prosecutor. Deliberate indicates a full awareness of what one is doing. Design means to calculate, plan or contemplate. Deliberate design to kill a person as a matter of law may be inferred through the intentional use of any instrument which based on its manner of use is calculated to

produce death or serious bodily injury. Jones v. State, 710 So 2d 870, 877 (Miss. 1998)

Rogers had a hand gun and was firing at Woodland to protect his person. (R643) Inference could have been enough for the jury to believe Rogers acted deliberately and intentionally as jurors must have felt shots were fired at Woodland on the floor. Their only option was manslaughter.

> A person may be guilty only of manslaughter or justifiable homicide when slaying another even though the accused is mad and is bearing ill will toward his adversary at the time of the killing, if the act is done while resisting an attempt of the latter to do any unlawful act, or after such attempt shall have failed, of such anger or ill will is engendered by the particular circumstances of the unlawful act then being attempted or the commission of which is then thwarted and is non existent prior thereto. Each case must depend upon its own facts and circumstances. Harrell v. State 218 So 2d 883, 886 (Miss 1969) cited in Wade v. State 748 So 2d 771 (Miss 1999).

These words are prophetic as Rogers asserts that the death of Woodland was a justifiable homicide. It was a him or me situation that can't be properly explained in a courtroom or on paper.

Rogers just asks for a level playing field where the prosecution cannot spin a case that is far worse than that with which he was charged.

2

A JUROR WAS NOT IN AGREEMENT WITH THE VERDICT

Victoria Thomas Atkins was selected to serve on the jury that heard this matter at trial. Nothing in her demeanor pointed to any potential problems before or during the trial.

Some days after the trial but before sentencing, Ms. Atkins contacted the Rogers' family to inform them of problems with deliberations. She gave them a note alleging she was confused and pressured by conduct in the jury room and felt Rogers was innocent (Record Except 15) Jurors generally may not impeach their own verdict, jurors may testify about misconduct in their presence or about outside influences on the jury panel. Fairman v. State 513 So 2d 910, 915-916 (Miss 1987). Rogers is aware that Ms. Atkins can't impeach the verdict unless there was misconduct. For the juror to seek out the family was an unusual act that smacks of impropriety. This diminishes the fairness of the trial Rogers received.

Ms. Atkins testimony was never given as she could not be found. A handwritten note is the only remnant of her allegations. Obviously, there was enough of a problem for her to come forward at some point in time.

During the poll of the jury after the verdict was read one juror, identified as juror number three (3) in the record (R749) had reservations about the verdict and answered no when questioned by the clerk. (R749-750). Rogers is of the opinion that person was Ms. Atkins, though jurors did not have assigned seats so there is no actual way to know for sure. The trial judge changed the manner of polling and a unanimous response was gained. (R750-753). Perhaps, if the judge had employed this court's advise in Morgan v. State 370 So 2d 231, 232 (Miss 1979), and sent the jury back for further deliberation the outcome would have been different.

Rogers only had the one chance to make his impression, any untoward activity on the part of any of the players works against Rogers. Rogers was and is entitled to a fair trial by an impartial jury and that is all that he requests. Reed v. State, 764 So2d 496, 499 (Miss 2000)

3

ROGERS RIGHT OF SELF DEFENSE WAS TARNISHED

When self defense is raised, the State bears the burden of proving beyond a reasonable doubt that the defendant was not acting in necessary self defense Heidel v. State 587 So 2d 855, 843 (Miss 1991). Every citizen of these United States and the State of Mississippi has a right to defend his person against the theat of bodily harm. Rogers exercised his right and was charged with manslaughter and two counts of aggravated assault. (Record Excerpt 9) "Rogers was shot in the chest by Woodland. (R218, 250, 289 -290, 298) This was after one, two or three confrontations between the two, with Woodland always the aggressor. (R215, 217) Every witness that testified that was in the front location of the club stated that Woodland pulled his weapon and fired first. As previously stated he wounded three (3) people, one being Rogers. IF a party has an apprehension that his life is in danger and believes the grounds of his apprehension just and reasonable a homicide committed by that party is in self defense. These are the grounds upon which a claim of self defense must be predicated. Shinall v. State 199 So2d 251 (Miss 1967)

Rogers, shot by Woodland, and set for trial on manslaughter charge also found himself facing two aggravated assault charges. Two individuals unknown to Rogers

were wounded in the exchange of gunfire in the Hill Top Lounge. Rogers was faced with a perplexing situation whereby he could assert self defense in the charge concerning Woodland. Rogers would have to admit to shooting in the club to resist the weapon of Woodland. No such self defense carried over to Ms. Green and Mr. Henderson. (R308, 331)

Including the two counts of aggravated assault with extreme indifference to human life had the effect of watering down Rogers self defense. The prosecutor wanted to portray a scene of bullets flying everywhere and Rogers was a desperado with no remorse or worry about who suffered.

The police initially charged Rogers with aggravated assault of four people or everyone in the club that was shot but did not die. A Warren County Grand Jury changed this to the two people, due to the fact they were in front of and not behind Rogers. Hardly concrete evidence of a crime.

Hindsight is all knowing. Will a precedent be set that if an individual attempts to defend his person from bodily harm in a public place will he or she have to take into account the strangers in harms way? Should an individual be worried about collateral damage when he has taken a bullet in the chest. Had Woodland lived would the State have charged him for the person that was wounded by his bullet that passed through Rogers' body?

The multi count indictment served to bolster the State's advantage. Rogers could have been found not guilty of the manslaughter charge as he acted in necessary self defense. The State retained the opportunity to convict him on the aggravated

assaults, especially with his self defense claims and admission of firing his weapon numerous times in the club. (R642-644) The prosecution stated that Rogers was justified in returning fire with Woodland until Woodland was on the floor. (R711) However, no such self defense was applicable as to Green and Henderson (R715) Rogers had no intent and no idea that he may have shot these two (2) people. Rogers was focused on Woodland, the person that shot him. (R643)

The Court granted lessor included instructions as to the aggravated assault charges. (R681-687) The Court as well as Rogers struggled with the problem of intent as to Green and Henderson. Rogers had no ill will toward them and was not necessarily being reckless, he was protecting his person from further bullets from Woodland.

The water was muddied because of these two charges, once again a fairness issue to insure Rogers a tangible defense.

4

ALL THE ELEMENTS OF AGGRAVATED ASSAULT WERE NOT PROVEN

A person is guilty of aggravated assault if he 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. §97-3-7 (2)(a) MCA as amended. Rogers was faced with this wording in his indictment, times two.

The prosecution put on the individuals, Green and Henderson to illicit testimony that they were shot at the club. Henderson, a friend of Woodlands, stated that Rogers

was the person that shot him. Henderson related he saw fire coming from Rogers' gun and then he was hit. (R331) Obviously, the human eye cannot see a bullet in flight. There is no way Henderson could know Rogers was the shooter.

Several witnesses, including Green, testified to hearing more than two guns. (R284, 298, 308) Steve Byrd, fireman expert, form the Mississippi Crime Lab couldn't attribute all the shell casings to any of the several guns that may have been present. (R554) Green had fragments in her wound, not a full bullet. Henderson had whatever hit him, still in his leg. There was no determination of type of bullet, caliber or any forensic evidence to link these two people to Rogers.

The act of firing a weapon in a public place once you have been shot and are in the act of protecting your person, can not be recklessness. Woodland had numerous friends in the club including Michael Tyler, well known to the Vicksburg Police. (R316).

Green and Henderson could have been hit by a ricochet, which would clearly be an unfortunate accident.

The State failed to prove all the elements of aggravated assault other than having two of the four people shot testify and having placed before the jury that it was a crowded club.

5

THE VERDICT WAS CONTRARY TO THE WEIGHT

AND SUFFICIENCY OF THE EVIDENCE

Challenges to the weight and sufficiency of the evidence relates to Rogers' motion for a new trial and motion for JNOV. The trial court denied both filed on behalf

of Rogers. A motion for a new trial challenges the weight of the evidence. Sheffield v. State, 749 So 2d 123, 127 (Miss 1999). The evidence which supports the verdict must be accepted as true and a new trial will not be ordered unless the verdict, if allowed to stand would be an unconscionable injustice. Vaughn v. State, 928 So. 2d 269, 271 (Miss 2006)

A motion for JNOV challenges the sufficiency of the evidence. The Court will look to see if the evidence shows beyond a reasonable doubt that Rogers committed the charged acts and that every element of the offenses existed. Bush v. State, 895 So 2d 836, 843 (Miss. 2005).

Rogers asserts that his challenge is valid on both weight and sufficiency. The witnesses vary on the exact events that occurred at the Hill Top Lounge in Vicksburg,. Friends of Woodland claim Rogers displayed a weapon, either by pulling up his shirt or pulling the weapon from his pants. (R217, 393, 479) Others with no relationship, never saw Rogers with a weapon until he had been shot by Woodland. (R289-290, 374) Even one of the victims, Lakeia Green did not see Rogers weapon and she was in close proximity to both Roger and Woodland. (R307). The information gathered over the years as relates to eyewitness accounts hold true in this case. The individuals not directly involved were ducking for cover (R221, 251,308) With so many people streaming out of the club there was a lot of talk and this influenced people in what they perceived happened. This cannot form a basis for a conviction in a case such as the one before the Court.

There is one constant, not one witness, regardless of his or her slant, denied that

Woodland extracted his weapon and fired the first shots in the crowded Hill Top Lounge (R219, 250, 298). These first salvos his Rogers and at least two other people (R184) Woodland began this fiasco. He was walking away for the second or third time, when Michael Tyler patted him on the shoulder, as if to say I have your back, do it, he then purposefully turned and calmly fired his .45 into the chest of Rogers. (R219, 250, 298, 316, 317). Woodland showed no regard for the safety of the individuals in the Hill Top Lounge. The State brought charges against Rogers based on the same action. However, no person is required to stand there and take it once you have been wounded and you are staring at the barrel of a loaded gun ready to do more damage.

The State's experts don't support the position taken. Dr. Hayne described a lethal shot to the abdomen, which could have only been inflicted while the antagonists were facing each other. (R459, 463) He described the stomach shot as one of the causes of death. Woodland was a deadman walking even before the shot to the head. Dr. Hayne admitted that the shot to the head could have come from behind Woodland as he turned to get away from Rogers. (R462-463) Hayne further admitted that a shot to the head would have put Woodland on the floor (R463) Woodland would have been mobile after the abdomen wound, though, it was lethal. (R464) The medical evidence refutes any testimony that Woodland was shot in the head while on the floor.

Henderson gave testimony that Woodland while one the floor was facing to his left, looking toward the bar area. (R335) He also stated that he was prone on the floor next to Woodland with Eric Lewis on his other side, three bodies across the walkway. (R335-336) Rogers would have been precluded from standing over Woodland. With

Woodland's head turned to the left Rogers would have needed to lean over the body to shoot back for the correct angle. Dr. Haynes testimony is very plausible with the head wound being suffered when Woodland turned to leave after his gun jammed.

The weight and sufficiency of the evidence, even taken in favor of the State, tends to support Rogers self defense position. At the very least Rogers should be able to present his case without the unfairness that was rampant throughout this trial.

CONCLUSION

The verdict of the Warren County Circuit Court jury were based on prejudice, conjecture and sympathy. Rogers acted in a manner that was just under the laws of this state and should not be made to suffer for defending himself from deadly harm.

A tragedy occurred at the Hill Top Lounge and a life was lost, however, Rogers should not have to pay for the sins of Danny Woodland. Two wrongs do not make a right.

Reginald Rogers requests this Honorable Court to set aside his conviction and find him not guilty of the charges, or in the alternative, afford him a new trial with a level playing field.

RESPECTFULLY SUBMITTED
REGINALD VERNELL ROGERS

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CERTIFICATE OF SERVICE

I, James L. Penley, Jr., do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Motion for Extension of Time, to the following:

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DATED this the 9th day of March, 2007.

JAMES L. PENLEY, JR.

CERTIFICATE OF SERVICE

I, James L. Penley, Jr., do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief, to the following:

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