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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRADFORD STATEN — APPELLANT

VS. — NO. 2006-KA-1612

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

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STATEMENT OF FACTS

On May 28, 2005, Susan Russo, a 911 operator dispatcher, received a 911 call from Bradford Staten. Staten reported that his wife, Angela, had fallen and hit her head on the door. T. 200. Staten stated that Angela was unconscious, and he was unsure if she was breathing. T. 201-02. Russo and another dispatcher instructed Staten to perform CPR on Angela, and talked him through the process step by step until paramedics arrived.[1] T. 209-12.

Scott Alexander, an emergency medical technician who responded to Staten's 911 call, testified that when he arrived at Staten's home, Angela was lying on the floor near a pool of blood that appeared to be mixed with water or another liquid. T. 226. She was blue and had no pulse. T. 221. Alexander opined that Angela's appearance was inconsistent with Staten's story that she had merely fallen and hit her head because her body was covered with bruises, lacerations, and abrasions. T. 230. Alexander then directed dispatch to send law enforcement officers to the scene. T. 230.

Sheriff's deputy Adam Eubanks was dispatched to the hospital where Angela was transported. T. 252. Eubanks was met by Alexander and the chief deputy who informed Eubanks of his suspicion that Angela may have been the victim of domestic violence. T. 252. Eubanks met with Staten in the waiting room and asked him how Angela was injured. T. 254. Staten again stated that his wife simply fell and hit her head on the floor. T. 254. Eubanks asked who was present in the home when Angela fell, and Staten answered that he and Angela had been alone all day with their three-month-old twins. T. 255. Eubanks then asked Staten to accompany him to the sheriff's office to give a statement. T. 257. After speaking with Staten at the sheriff's office, Eubanks placed

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[1]During the 911 call, it appeared that Staten did not know how to check for a pulse, determine if Angela was breathing, or perform CPR. However, two cards indicating that Staten was certified to perform CPR and that he was trained in first aid were later found in his wallet.

him under arrest for domestic violence. T. 257. Angela died at the hospital later that night, and Staten was subsequently indicted for her murder.

During a search of Staten's home, blood stains were found throughout the living room, dining room, bathroom, and bedroom. See Exhibits 69, 70. A bloody, broken piece of a crutch was also found hidden in a baby stroller. T. 265.

At trial, pathologist Steven Hayne testified that Angela's cause of death was a combination of a closed head injury resulting in subdural hemorrhage and extensive hemorrhage of the neck suggestive of manual strangulation. T. 189. He further stated that Angela's injuries were inconsistent with her merely falling and hitting her head. T. 196. Four other witnesses agreed that Angela's injuries were inconsistent with Staten's claim. T. 230, 247, 265, 380.

On August 3, 2006, Staten was convicted by a Grenada County Circuit Court jury for the murder of his wife.

SUMMARY OF THE ARGUMENT

Because this was a circumstantial evidence case, the State was required to prove Staten's guilt to the exclusion of every reasonable hypothesis consistent with innocence. The only possible hypothesis consistent with innocence would be that someone else killed Angela, or that she simply fell and hit her head as Staten claimed. The former hypothesis was not a possibility because Staten admitted that no one else had been in their home that day. The jury ruled out the latter hypothesis after the abundance of physical evidence presented at trial proved that Angela had been beaten to death. The State presented legally sufficient evidence to support the jury's verdict. Further, the verdict was not against the overwhelming weight of the evidence.

A criminal defendant is incompetent to stand trial when he does not understand the nature of the charges against him, and he is unable to participate in his own defense. A trial court judge must order a psychiatric evaluation only when she has reasonable grounds to believe that the defendant is incompetent to stand trial. After Staten moved the court to order a psychiatric evaluation, the court held an evidentiary hearing in which Staten did not testify. Staten presented only the testimony of his mother and defense counsel which in no way provided reasonable grounds for the court to believe he was incompetent to stand trial. Accordingly, the trial court correctly denied Staten's motion.

Staten argues that the photographic evidence presented at trial was cumulative and that it was admitted only to inflame the jury. The photographs were in fact admitted to aid in describing the circumstances of Angela's murder, the location of the body, the cause of death, and to clarify witness testimony. The evidentiary value of the photographs far outweighed any potential prejudice. Accordingly, the photographs were properly admitted into evidence.

Staten utilizes an everything-but-the-kitchen-sink approach in arguing that the trial court

erred in instructing the jury. The instructions, when read as a whole, correctly stated the law and effectuated no injustice. Staten's proposed instructions which were refused by the trial court were either fairly covered elsewhere or lacked an evidentiary basis in the record.

Staten claims that he was unaware that he would have to defend against a charge of depraved heart murder because he was indicted for deliberate design murder. This argument has been repeatedly rejected by this honorable Court, because the two forms of murder have coalesced into one. Accordingly, any criminal defendant indicted for deliberate design murder is on notice that the State may request and receive an instruction on depraved heart murder.

Staten is not entitled to relief based on cumulative error because no individual error occurred at trial. Finally, his claim that his life sentence is unconstitutionally disproportionate to the crime of murder necessarily fails because life imprisonment is the only sentence available for one convicted of murder.

ARGUMENT

I. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT. FURTHER, THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In reviewing a claim of legal sufficiency, the Court must determine whether any rational juror could find that the State proved each element of the crime charged beyond a reasonable doubt. **Bush v. State**, 895 So.2d 836, 843 (¶16) (Miss. 2005) (citing **Jackson v. Virginia**, 443 U.S. 307, 315 (1979)). All evidence supporting the verdict must be taken as true, and the State is entitled to all inferences which may reasonably be drawn from the evidence. **Wash v. State**, 931 So.2d 672, 673 (¶5) (Miss. Ct. App. 2006). Additionally, in cases based on circumstantial evidence, the State must prove the defendant's guilt beyond a reasonable doubt and to the exclusion of all reasonable hypotheses consistent with innocence. **Qualls v. State**, 947 So.2d 365, 374 (¶28) (Miss. Ct. App. 2007) (citing **Fleming v. State**, 604 So.2d 280, 288 (Miss.1992)).

The State was required to prove that Staten killed Angela either with deliberate design or "in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life[.]" Miss. Code Ann. § 97-3-19(1). The following evidence adduced at trial supports the jury's verdict. When Staten was asked who was present in the home when Angela "fell", he replied that he and Angela had been at home alone all day with the twins. T. 255. Staten repeatedly maintained that Angela simply fell and hit her head. However, Dr. Hayne, Alexander, two sheriff's deputies, and the forensic scientist who conducted the blood spatter analysis opined that Angela's extensive injuries were inconsistent with Staten's claim. T. 196, 230, 247, 265, 380.

Among Angela's many injuries, she had several pattern injuries on her body where a small round object had cut into her skin. T. 338, Exhibits 111, 112, 113. A bloody, broken piece of a crutch was found hidden underneath a stack of newspapers in a baby stroller. T. 265. Forensic

scientist David Whitehead examined Angela's pattern injuries and compared them to a small round component of the crutch. T. 338. Whitehead determined that the round piece on the crutch corresponded exactly to Angela's patterned injuries. T. 342, Exhibit 116.

Dr. Hayne testified that the injuries on Angela's elbows, forearms, and hands indicated that she was in a defensive posture attempting to ward of blows. T. 184. The blows Angela received to her face and on the side of her head caused her brain to violently bounce back and forth, resulting in bruises on her brain and the tearing of veins and vessels which caused a subdural hemorrhage. T. 187. Additionally, Angela had internal bleeding around her neck, larynx, and hyoid bone suggestive of manual strangulation. T. 184-85. Dr. Hayne concluded that Angela's cause of death was the combination of the subdural hemorrhage and the extensive hemorrhage the neck. T. 189.

Mississippi Bureau of Investigations Senior Crime Analyst Grant Graham performed a blood stain pattern analysis on the blood stains found throughout the house. T. 366. After explaining to the jury how different types of blood spatters originate, Graham revealed that an examination of the multiple blood spatters throughout the house and the blood on the inside of the broken piece of crutch showed that the crutch was used to inflict blunt force trauma. T 376-77. Additionally, a bloody t-shirt found hidden underneath Staten's bed showed a cast-off pattern consistent with being worn by someone who had wielded a bloody weapon. T. 377-78, 379. Graham concluded ,

> Overall, all of these blood stain patterns that I examined in this case are inconsistent with the victim just falling to the floor in the doorway of bedroom number two and remaining motionless and not moving around within the scene. These stains are consistent with movement around in the scene and blood being spattered in different locations other than where she was lying down.

T. 380. Graham further debunked Staten's story that Angela simply fell and hit her head on the bedroom door by explaining that the blood swipe pattern on the door showed that Angela had already been actively bleeding by the time she reached the bedroom door. T. 381

On appeal Staten argues that his guilt was not proven to the exclusion of all reasonable hypothesis consistent with innocence because the subdural hemorrhage could have been caused by Angela falling and hitting her head on the door, as Staten repeatedly maintained prior to trial. Although Staten completely ignores Dr. Hayne's assessment that a concurrent cause of death was extensive hemorrhage of the neck suggestive of manual strangulation, the case of **Whittington v. State**, 523 So.2d 966 (Miss. 1988), is instructive on this point. Whittington was convicted for the murder of his wife. Although Whittington maintained that his wife died as the result of a single-auto accident, the evidence adduced at trial showed that she had been severely beaten and that the conditions at the scene were inconsistent with Whittington's claim. In discussing whether the State had proved Whittington's guilt to the exclusion of every reasonable hypothesis consistent with innocence, the court stated,

> There are but two hypotheses. First, [Mrs. Whittington] died solely as a result of the Lincoln automobile causing these wounds in some sort of accident, with Whittington playing no part in its causation, in which event he would be innocent. Or second, she did not receive these violent injuries in this manner. If she did not, then the jury was justified in finding Whittington had some hand in it. In this event, the jury was warranted in finding him guilty of murder. The question facing this Court, therefore, is not precisely the manner in which she was killed. Whittington being the only person present, this may never be precisely determined. Instead, the question is whether the jury was warranted in concluding it was not the first hypothesis, beyond all reasonable doubt and to the exclusion of every other reasonable hypothesis.

Whittington, 523 So.2d at 972. Similarly, in the case *sub judice*, there were only two possible hypothesis to explain Angela's death - Staten's story that she simply fell and hit her head on the bedroom door, or Staten beat her to death with blows so violent that she suffered a subdural hemorrhage and extensive hemorrhage of the neck. The answer to the pertinent question, "whether the jury was warranted in concluding it was not the first hypothesis, beyond all reasonable doubt and to the exclusion of every other reasonable hypothesis," is a resounding yes.

Viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved beyond a reasonable doubt that Staten murdered his wife. Moreover, the verdict was not against the overwhelming weight of the evidence. Therefore, Staten's claims regarding the weight and sufficiency of the evidence are without merit.

II. THE TRIAL COURT DID NOT ERR IN DENYING STATEN'S MOTION FOR A PSYCHIATRIC EVALUATION.

Staten filed a motion for a psychiatric evaluation, claiming that he was incompetent to stand trial. C.P. 24. The trial court held an evidentiary hearing on August 10, 2005 to determine whether reasonable grounds existed to order Staten to undergo a psychiatric evaluation. At the hearing, defense counsel called only himself and Staten's mother to testify. Defense counsel also presented an affidavit from his co-counsel who was not present at the hearing. Staten did not testify. The State presented testimony from two of Staten's former co-workers, Alexander, Deputy Eubanks, and a corrections officer. At the conclusion of the hearing, the trial court ruled that insufficient evidence had been presented to establish reasonable grounds for the court to believe that Staten was incompetent to stand trial. T. 58.

An appellate court will not disturb a trial court's denial of a motion for a psychiatric evaluation so long as the trial court's finding that insufficient evidence was presented to prove the defendant's inability to meaningfully participate in his own defense is not against the overwhelming weight of the evidence. **Benish v. State**, 733 So.2d 855, 856-57 (¶8) (Miss. Ct. App. 1999) (citing **Dunn v. State**, 693 So.2d 1333, 1341 (Miss. 1997)). The defendant carries the burden of persuading the trial court that a mental examination is warranted. **Id.** at 856. Mississippi Code Annotated § 99-13-11 and Rule 9.06 of the Uniform Rules of Circuit and County Court Practice require the trial court to order a psychiatric evaluation only when the court has reasonable grounds to believe that the defendant may be incompetent to stand trial. **Ficklin v. State**, 758 So.2d 457, 460 (Miss. Ct. App. 2000). "The evidence must show more than a possibility, it must show there is a probability that the defendant is incapable of making a rational defense with the judge weighing the evidence." **Richardson v. State**, 767 So.2d 195, 203 (¶41) (Miss. 2000) (citing **Evans v. State**, 725 So.2d 613,

661 (¶186) (Miss. 1997). A review of the transcript of the evidentiary hearing clearly illustrates that the trial court's decision to deny Staten's motion for a psychiatric hearing was not against the overwhelming weight of the evidence.

Staten's mother, Ada, testified that Staten had a master's degree and worked as a counselor at a mental health center. T. 9-10. Ada testified that her son had no history of mental illness. T. 11. Ada claimed, however, that Staten became "a completely different person" after being charged with his wife's murder; he became depressed, withdrawn, could not communicate, forgot neighbors and friends, did not call home, could not remember names and phone numbers, had a blank expression, and did not eat. T. 12, 16. Ada opined that Staten was not in a position to understand the charges against him or to assist in his own defense. T. 17. However, Ada stated on direct and cross that she had seen a vast improvement in his mental state over the past two weeks. T. 16, 21.

Defense counsel then submitted the affidavit of his co-counsel which merely stated a conclusory opinion that Staten could not understand the charges against him, nor assist in his defense. T. 23. The court noted that the affidavit included no factual basis for this assertion and, therefore, carried very little weight. T. 23.

Defense counsel testified that he believed that Staten needed a professional evaluation to determine whether he understood the charges against him and whether he could assist in his own defense. T. 26. Defense counsel also testified that Staten rambled, was unfocused, and did not give direct answers to his questions, but did understand that he was charged with murder. T. 25, 28, 30.

Two of Staten's former co-workers testified that he was a good employee and that there was no indication that he suffered from any type of mental disorder. T. 33, 35, 39. Additionally, Alexander and Deputy Eubanks testified that in their communications with Staten, he did not appear to be suffering from any mental infirmity. T. 43, 48.

Sylvia Whitley, a Grenada county jail corrections officer testified that she had interacted with Staten on a daily basis since he had been incarcerated. T. 52. She stated that Staten had no difficulty communicating with her, and that his interactions with others appeared normal. T. 52, 53. Whitley opined that Staten did not appear to be suffering from a mental infirmity, but that he was simply grieving. T. 54.

The meager evidence presented by Staten in no way illustrated a probability that he was unable to understand the nature of the proceedings against him, or that he was unable to participate in his own defense. Because the trial court's determination was not against the overwhelming weight of the evidence, Staten's argument necessarily fails.

III. THE STATE'S PHOTOGRAPHIC EVIDENCE WAS PROPERLY ADMITTED.

Staten's argument regarding the cumulative nature of exhibits 16, 19, 21-23, 26, 28, 48, 49, and 52-54 is procedurally barred. These exhibits were entered into evidence not only without objection, but also defense counsel and the prosecutor agreed in advance regarding the admissibility of these photographs. T. 251, 266-67. Likewise, exhibit 82 was offered without objection. T. 161.

Staten argues that Exhibit 76 was erroneously admitted because it depicts the same facial injuries depicted in Exhibit 82. Although Angela's facial injuries do appear in the background of Exhibit 76, the purpose and focus of the photo was to show the pattern injuries on her arm and forearm. T. 178-79. As such, it was not cumulative.

Staten also argues that much of the photographic evidence was admitted to simply inflame the jury. However, the trial court was very careful in admitting the photographic evidence. See T. 165-175. The admissibility of photographic evidence lies within the sound discretion of the trial court, and the court's decision to admit photographs is reviewed for abuse of discretion. **Jones v. State**, 920 So. 2d 465, 476 (¶35) (Miss. 2006). "Such discretion of the trial judge runs toward almost unlimited admissibility regardless of the gruesomeness, repetitiveness, and extenuation of probative value." **McGee v. State**, 907 So.2d 380, 382 (¶6) (Miss. Ct. App. 2005) (quoting **Martin v. State**, 854 So.2d 1004, 1007 (¶ 7) (Miss. 2003)). Further, "the fact that a photograph of the deceased in a homicide case might arouse the emotions of jurors does not of itself render it incompetent in evidence so long as introduction of the photograph serves some legitimate, evidentiary purpose." **Spann v. State**, 771 So.2d 883, 895 (¶31) (Miss. 2000) (quoting **May v. State**, 199 So.2d 635, 640 (Miss.1967)). Photographs have evidentiary value if they "(1) aid in describing the circumstances of the killing; (2) describe the location of the body and cause of death; (3) supplement or clarify witness testimony." **Id.** (quoting **Westbrook v. State**, 658 So.2d 847, 849

(Miss.1995)). The photographs in question did all of the above. Further, the trial court found that the probative value of the admitted photographs outweighed any potential prejudice. T. 175. Clearly, the photographs served a legitimate, evidentiary purpose, and they were properly admitted into evidence.

IV. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY

Staten argues that thirteen jury instructions were either erroneously granted or denied. The State contends that instructions correctly stated the law and effectuated no injustice. Jury instructions are to be read as whole, with no one instruction taken out of context. **McKlemurry v. State,** 947 So.2d 987, 990 (¶3) (Miss. Ct. App. 2006). There is no reversible error if the instructions, when read together, correctly state the law and produce no injustice. **Id.** Although a defendant is entitled to jury instructions which present his theory of the case, the court may refuse instructions which incorrectly state the law, are fairly covered elsewhere, or which lack foundation in the evidence. **Livingston v. State,** 943 So.2d 66, 71 (¶14) (Miss. Ct. App. 2006).

Instructions S-2 and S-4

Jury instruction S-2 instructed the jury that if it did not find that the State proved murder beyond a reasonable doubt, the jury should proceed to consider whether the State proved culpable negligence manslaughter. The instruction went on to explain that if the State also failed to prove culpable negligence manslaughter, the jury must find Staten not guilty. Staten argues that the word "elements" as well as the instruction's characterization of manslaughter as a "lesser crime" of murder were confusing to the jury. He also claims that use of the word "lesser" was somehow a comment on the evidence.

Staten does not explain, nor can the State fathom, how the word "element" could be confusing to any layperson. Similarly, Staten's claim that the jury could not be expected to understand the terms "lesser crime" or "lesser offense" as used in instructions S-2 and S-4 is disingenuous. When read as a whole, the jury instructions clearly define for the jury murder and manslaughter. In doing so, they explicitly distinguish manslaughter as a lesser offense. Staten's argument regarding instruction S-2 is without merit.

Jury instruction S-4 explained to the jury that it was charged with applying the law as explained by the court and may only consider a lesser offense if the State failed to prove murder beyond a reasonable doubt. Staten claims that the instruction was argumentative because it stated that the option of finding Staten guilty of a lesser offense was not designed to relieve the jury of an unpleasant duty. The supreme court has previously approved of such language in jury instructions sometimes referred to as "acquit first" instructions. **Walker v. State**, 671 So.2d 581, 607-08 (Miss. 1995) (citing **Carr v. State**, 655 So.2d 824, 848 (Miss. 1995)); **Chase v. State**, 699 So.2d 521, 545 (¶73) (Miss. 1997). Accordingly, Staten's argument fails.

Instructions D-1, D-2, and D-12

Staten's proposed instructions D-1, D-2, and D-12 were heat of passion manslaughter instructions, which were properly refused by the trial court as having no evidentiary foundation. Heat of passion manslaughter is "the killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense." Miss. Code Ann. § 97-3-35. Our courts have further defined "heat of passion" as,

> a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

Livingston v. State, 943 So.2d 66, 71 (¶15) (Miss. Ct. App. 2006).

There was simply no evidence presented at trial regarding "reasonable provocation." In fact, Staten stuck to the story that Angela merely fell and hit her head. His version of events alone support the denial of a heat of passion manslaughter instruction. The evidence also revealed that

Angela was in a defensive posture attempting to ward off blows as she was severely beaten, while there was no evidence that Staten had even a scratch on his body. T. 184.

Staten's assertion that Dr. Hayne characterized Angela's injuries as the type associated with passion is misleading at best. Appellant's brief at 22. On cross, when Dr. Hayne was asked if he was familiar with the term "overkill," he replied that he was and agreed that the term is associated with "extreme emotion producing multiple injuries" where "lots of passion [is] involved." T. 191-92. Dr. Hayne's response to defense counsel's question was in no way connected to his opinion of Angela's injuries.

Finally, Staten's claim that the size 5 panties found in Staten's pocket "suggested grounds for an altercation that would have supported a heat of passion instruction" completely ignores the fact that the very definition of "heat of passion" requires the guilty party to have been reasonably provoked, not the victim, as would be the case if Angela in fact knew of the panties in Staten's pocket.

Instruction D-7

Proposed instruction D-7 stated that if the jury found that Staten attempted to resuscitate Angela and obtain medical help, then it could not find that Staten intended to kill her. The instruction was properly refused as an improper comment on the evidence and because it was not a proper statement of law. T. 414. Mississippi Code Annotated § 99-17-35 prohibits the trial court from commenting on the evidence through jury instructions, and also provides that the court should "instruct the jury upon the principles of law applicable to the case." The instruction clearly singles out testimony regarding Staten's feigning to administer CPR to Angela, and the fact that he called 911 after he beat her to death. Furthermore, the instruction is devoid of any principal of law applicable to the case. As such, it was properly refused.

Instructions D-10A and D-10B

It is well-settled law that jury instructions need not define reasonable doubt, because reasonable doubt defines itself. **Jones v. State**, 912 So.2d 501, 507 (¶19) (Miss. Ct. App. 2005) (citing **Barnes v. State**, 532 So.2d 1231, 1235 (Miss.1988)). Refused instructions D-10A and D-10B contained language similar to the refused instructions in **Jones** which attempted to define reasonable doubt.

Instructions D-13 and D-14

Refused instruction D-13 began by offering a definition of culpable negligence. See **Gollott v. State**, 646 So.2d 1297, 1301-02 (Miss. 1994) (citing **Grinnell v. State**, 230 So.2d 555, 558 (Miss. 1970)). The instruction the concluded that if the jury did not find intent, it could not find Staten guilty of murder. C.P. 199. The instruction was properly refused as fairly covered elsewhere because instruction D-11 already defined culpable negligence, and the jury was given several instructions which explained what the State must prove in order for it to return a verdict of murder.

Likewise, instruction D-14 merely elaborated on the meaning of culpable negligence manslaughter, and was also properly refused as fairly covered by instruction D-11 and S-2.

Other Instructions

In his appellate brief, Staten simply summarizes the content of refused instructions D-1, D-3, D-6, and D-12B and concludes that they were erroneously refused, providing no citations or analysis of any kind. The appellant has the duty to cite legal authority to support his alleged assignments of error, and failure to do so serves as a procedural bar to consideration of the issues on their merits. **Young v. State**, 919 So.2d 1047,1049 (¶5) (Miss. Ct. App. 2005) (citing **Kelly v. State**, 553 So.2d 517, 521 (Miss.1989); **Brown v. State**, 534 So.2d 1019, 1023 (Miss.1988); **Harris v. State**, 386 So.2d 393 (Miss.1980); **Carter v. Miss. Dept. Of Corrections**, 860 So.2d 1187, 1193

(¶ 17) (Miss.2003)).

Finally, Staten incredulously argues that he was entitled to an accident instruction even though he did not offer such an instruction. "[A] trial court does not have a duty to instruct the jury *sua sponte*, nor is a court required to suggest instructions in addition to those which the parties tender." **Booze v. State**, 942 So.2d 272, 275 (¶15) (Miss. Ct. App. 2006) (citing **Wansley v. State**, 734 So.2d 193 (¶20) (Miss. Ct. App. 1999).

V. STATEN'S INDICTMENT SUFFICIENTLY PUT HIM ON NOTICE THAT HE WAS CHARGED WITH THE CRIME OF MURDER.

Staten's claim that he was entitled to a directed verdict at the close of the State's case has been addressed under the first issue. As to Staten's claim that he was unprepared to defend against a charge of depraved heart murder because he was indicted for deliberate design murder, this issue has long been resolved in our state's jurisprudence. While Mississippi Code Annotated § 97-3-19(1)(a) and (b) appears to create two distinct categories of murder, Mississippi case law has established that deliberate design murder and depraved heart murder have coalesced into one. **Catchings v. State**, 684 So.2d 591, 599 (Miss.1996) (citing **Mallett v. State**, 606 So.2d 1092, 1095 (Miss.1992)). Accordingly, this argument has been repeatedly rejected by this honorable Court. See **Chatman v. State**, 2005-KA-00031-COA (¶6) (Miss.Ct. App. 2006); **Davis v. State**, 914 So. 2d 200, 203-04 (¶¶15-16) (Miss. Ct. App. 2005); **Little v. State**, 883 So. 2d 120, 122-23 (¶6) (Miss. Ct. App. 2004); **Brown v. State**, 781 So. 2d 925, 928-29 (¶13) (Miss. Ct. App. 2001).

VI. STATEN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Staten points to at least fifteen acts and omissions of defense counsel in an attempt to support his claim that he received ineffective assistance. The alleged deficiencies include defense counsel's failure to (1) pursue an interlocutory appeal, (2) raise certain objections, (3) cross examine certain witnesses, and (4) request an accident instruction. Rather than rebutting Staten's claims point by point, the State submits that Staten does no more than attack defense counsel's sound trial strategy. Attacks on defense counsel's trial strategy do not give rise to an ineffective assistance of counsel claim. **Jackson v. State**, 815 So.2d 1196, 1200 (¶8) (Miss. 2002) (citing **Cole v. State**, 666 So.2d 767, 777 (Miss.1995)). Our appellate courts have held that defense counsel's decision "not to file certain motions, call certain witnesses, ask certain questions, or make certain objections," as well as the decision not to request a specific jury instruction, falls within the ambit of trial strategy. **Id**; **Smiley v. State**, 815 So.2d 1140, 1148 (¶¶ 31-33) (Miss. 2002). Accordingly, Staten's claim of ineffective assistance of counsel necessarily fails.

VII. STATEN IS NOT ENTITLED TO RELIEF BASED ON CUMULATIVE ERROR.

Staten alternatively argues that he is entitled to relief based on cumulative error. Our courts have repeatedly held that "[w]here there is no error in any one of the alleged assignment[s] of error[], there can be no error cumulatively." **Hughes v. State**, 892 So.2d 203, 213 (¶29) (Miss. 2004) (citing **Davis v. State**, 660 So.2d 1228, 1261 (Miss. 1995); **Wilburn v. State**, 608 So.2d 702, 705 (Miss. 1992)). Staten failed to show error in any of his alleged assignments of error and is, therefore, not entitled to relief based on cumulative error.

VIII. THE TRIAL COURT HAD NO DISCRETION TO SENTENCE STATEN TO ANYTHING LESS THAN LIFE IMPRISONMENT.

A conviction for murder carries only one sentence - life imprisonment. Mississippi Code Annotated §97-3-21. Reviewing courts will not disturb a sentence which does not exceed the statutory maximum. **Knox v. State,** 912 So.2d 1004, 1010 (Miss. Ct. App. 2005) (citing **Davis v. State**, 817 So.2d 593, 597(¶ 14) (Miss. Ct. App.2002)). Therefore, Staten's final issue also lacks merit.

CONCLUSION

For the foregoing reasons, the Appellee requests that this honorable Court affirm Staten's conviction of murder and sentence of life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable C.E. Morgan, III
Circuit Court Judge
Post Office Box 721
Kosciusko, MS 39090

Honorable Doug Evans
District Attorney
Post Office Box 1062
Grenada, MS 38902-1262

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This the 21st day of March, 2007.

La Donna C. Holland

LA DONNA C. HOLLAND
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