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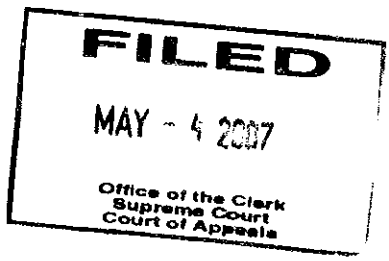
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-KA-01612-COA

BRADFORD STATEN — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE



APPEAL FROM THE CIRCUIT COURT OF GRENADA COUNTY

REPLY BRIEF OF THE APPELLANT BRADFORD STATEN

Oral Argument Is Not Requested

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CASES:

RULES, RULES, STATUTES and CONSTITUTIONAL PROVISIONS:

NOTE: Copies of the above rules, statutes, and constitutional provisions are appended to initial Brief of Appellant.

III. ARGUMENT

A. THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

1. Jury failed to consider hypothesis consistent with innocence.

As the state admits, in cases of purely circumstantial evidence such as this one, Mississippi law requires a jury, as a prerequisite to returning a verdict of guilty, to find for the state on each element of the crime to the exclusion of every reasonable hypothesis consistent with innocence. *Brown v. State*, 556 So. 2d 338, 340 (Miss. 1990). In this case, the state's own expert, Dr. Steven Timothy Hayne, physician and Chief Pathologist for the State of Mississippi, [T 156] testified that, although Angela had sustained multiple injuries at "or about the time of death," [T 164] she did not die from those injuries in general. Rather, the actual cause of death was a closed head injury [T 188] and internal bleeding [T 185] in the neck "suggestive of manual strangulation." T 189. Dr. Hayne, on cross-examination, altered that testimony by admitting that he could not say which injury occurred first. T 189. Moreover, he further admitted that Angela's body did not show the signs that indicate death from strangulation: her eyes, lungs, and heart lacked the "Tardieu spots," or petechiae, indicative of such a cause of death. T 192-93.

Bradford said Angela fell and hit her head on the door. T 201, T 255. The State says it proved otherwise because the "blood swipe pattern on the door showed that Angela already had been actively bleeding" before she reached the bedroom door. T 381. No doubt she was. She suffered multiple injuries at "or about the time of death," as the autopsy revealed. T 164. But, again, the lack of petechiae ruling out death from strangulation, it was the blow to the head that must have caused her death. T 189; T 192-93. The state's evidence presents no other option. Bradford said that blow to the head came when she fell against the door. State pathologist Hayne admitted such a fall could

have caused the injury. T 194. Even if the blood on the door was from an already bleeding wound, it still proves that Angela fell against the door, just as Bradford said. T 201, T 255.

The jury obviously ignored Bradford's explanation, which, was not only reasonable, but was entirely supported by the evidence. The state invokes *Whittington v. State*, 513 So. 2d 966 (Miss 1988), in justification of the jury's failure. *Whittington* is not analogous. In that case, the evidence proved the deceased could not have been killed in a car wreck, as the defendant claimed, for the reasons, among others, that the deceased's injuries and the damage to the vehicle were totally inconsistent with a fatal car crash. 513 So. 2d at 973. The defendant's theory in *Whittington* was totally counter to the evidence in that case. In the instant case, on the other hand, the defense theory was entirely consistent with the state's evidence: the state's own evidence demonstrated that Angela's death could have been caused by a single blow to the head, which is exactly what Bradford said happened. T 194.

Bradford advanced a hypothesis supported by evidence that was consistent with innocence. The jury should have acquitted Bradford instead of convicting him. Accordingly, this case must be reversed. *Brown v. State*, 556 So. 2d 338, 340 (Miss. 1990).

2. There Was Insufficient Evidence of Deliberate Design or "Depraved Heart."

The state likewise failed to prove any "deliberate design," "premeditated design," or "malice aforethought" on Bradford's part.[1] The state's expert, Dr. Hayne, in fact, testified that "multiple injuries" of the type sustained by Angela are "usually associated with extreme emotion," or passion, [T 192] quite the opposite of premeditation or deliberate design.

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[1]"Deliberate design" means the same thing as "premeditated design" and "malice aforethought." *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Absent evidence of deliberate design, the state had to prove Bradford killed Angela while committing an act "eminently dangerous to others and evincing a depraved heart, regardless of human life . . . ." Miss. Code Ann. § 97-3-19. Bradford's actions in calling 911 and his dealings with the emergency response personnel certainly did not evidence a "depraved heart . . . regardless of human life." That such is the correct interpretation of the facts is clear from our Supreme Court's holding in *Tait v. State*, 669 So. 2d 85 (Miss. 1996), cited in Appellant's initial Brief. Based on *Tait*, at minimum, this case should be remanded for resentencing as a manslaughter case.

B. TRIAL COURT ERRED IN DENYING THE MOTION FOR PSYCHIATRIC EVALUATION.

Appellant adequately advanced his arguments on this issue in his Brief of Appellant and here adopts and reasserts those arguments in response to the state's Brief of Appellee. Suffice it to say that the test is whether the evidence before the court should "reasonably have raised a doubt about defendant's competency to stand trial." *Howard v. State*, 701 So. 2d 274, 280-81 (Miss. 1997); *Conner v. State*, 632 So. 2d 1239 (Miss. 1993); Uniform Rules of Circuit and County Court Practice, Rule 9.07 (May 1, 1995). The trial court had before it the testimony of Bradford's mother and the affidavit and testimony of his two lawyers, which, if objectively considered, should have raised such doubts. After all, it is also the law of this state that trial counsel is in the best position to understand his client's mental condition, *Howard v. State*, 701 So. 2d 274, 280-281 (Miss. 1997). Both of Bradford's lawyers at trial believed a mental examination was needed. The trial court erred in failing to order the requested mental evaluation. That failure requires reversal.

C. THE PHOTOGRAPHIC EVIDENCE ADMITTED WAS CUMULATIVE, INFLAMMATORY, AND UNNECESSARY.

Appellant adequately advanced his arguments on this issue in his Brief of Appellant and here adopts and reasserts those arguments in response to the state's Brief of Appellee.

D. TRIAL COURT ERRED IN GIVING INSTRUCTIONS S-2 and S-4.

Appellant adequately advanced his arguments on this issue in his Brief of Appellant and here adopts and reasserts those arguments in response to the state's Brief of Appellee.

A few comments in response to the state are warranted, nonetheless. The state questions how the term "elements" of a crime could be confusing to a jury. That question only confirms how much lawyers often assume without reason. The fact that "deliberate design murder" and "depraved heart murder" may have "coalesced" to some degree demonstrates that the law is not always clear about what elements are and are not. Courts should not assume juries understand legal terms of art, or even common terms, when used in a legal context. That is especially true when a man's freedom is in the balance.

S-2 and S-4 instructions were confusing to the point of depriving the defendant of a fair trial. *Johnson v. State*, 908 So. 2d 758, 764 (Miss. 2005) (the giving of confusing and conflicting instructions is error).

E. TRIAL COURT ERRED IN DENYING APPELLANT'S PROFFERED INSTRUCTIONS.

Appellant adequately advanced his arguments on these issues in his Brief of Appellant and here adopts and reasserts those arguments in response to the state's Brief of Appellee.

Appellant would emphasize that the lower court erred in neglecting its duty to instruct the jury concerning defendant's theories of the case. *Manuel v. State*, 667 So. 2d 590 (Miss. 1995), specifically its "heat of passion" theory, which the trial judge rejected on the ground that it was unsupported by evidence. T 413. In this case there existed at least a scintilla of evidence to support Defendant's theory of the case. That instruction should have been granted. The Court's failure to do so was reversible error. *Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995).

Appellant Bradford Staten further emphasizes that his instruction D-13 was absolutely necessary to the jury's understanding of the difference between depraved heart murder and manslaughter. The jury needed it in order to distinguish between manslaughter [whether by heat of passion or by culpable negligence] and depraved heart murder. Its refusal was error.

Finally, the state's assertions notwithstanding, Appellant did cite authority for each of his assignments of error. While the state may not have agreed with the authority, that certainly does not render the assignment unsupported by authority and procedurally barred, as the state argues.

F. THE COURT ERRED IN FAILING TO GIVE AN ACCIDENT INSTRUCTION.

Appellant adequately advanced his arguments on these issues in his Brief of Appellant and here adopts and reasserts those arguments in response to the state's Brief of Appellee.

G. THE COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE AS TO DELIBERATE DESIGN MURDER AND PERMITTING STATE TO PROCEED UNDER A THEORY OF DEPRAVED HEART MURDER.

Appellant understands that opinions of our state appellate courts have blurred the distinction between deliberate design and depraved heart murder. Given this Court's historic deference to the will of the people as expressed through the legislature, Appellant is reluctant to believe that this Court intended to abolish entirely the distinction between the two offenses.

Given a distinction between the two crimes, and the legislature clearly intended a distinction, the rationale of *State v. Berryhill*, 703 So. 2d 250 (Miss. 1997) requires a reversal for the reasons stated in the Brief of Appellant and reasserted here by reference. To the extent the appellate courts of this state have erased the line between deliberate design murder and depraved heart murder, Appellant respectfully suggests that the line intended by the legislature should be reestablished and this case reversed and remanded for further proceedings consistent with such line.

H. APPELLANT WAS DENIED ADEQUATE ASSISTANT OF COUNSEL.

The state misconstrues the decisions of our appellate courts in response to Appellant's claim regarding ineffective assistance of counsel. While it is true that a defense counsel's failure to "file certain motions, call certain witnesses, ask certain questions, or to make certain objections," do not in and of themselves give rise to an ineffective assistance claim, *Smiley v. State*, 815 So. 2d 1140, 1148 (¶¶), Appellant never made that argument. Rather, Appellant cited his counsel's omissions as evidence of counsel's deficiencies. Having listed "at least fifteen [such] acts and omissions," according to the state's count, the only question that remains is this: if counsel had not been deficient in the foregoing respects, would the outcome have been different?[2] *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985).

[2]As this Court knows, it is not necessary that appellant would have been acquitted. It would be sufficient if the jury might well have convicted of manslaughter, rather than murder.

Appellant laid out a clear case for an affirmative response to that question. Appellee's response consisted simply of misconstruing Appellant's argument. Viewing the totality of the circumstances, but for the inadequate and ineffective representation of trial counsel, there is a reasonable probability that the outcome of the trial would have been different. Consequently, Appellant Bradford Staten was denied his right to adequate and effective assistance of counsel and is entitled to a new trial.

I. CUMULATIVE ERROR REQUIRES REVERSAL.

Appellant adequately advanced his argument on this issue in his Brief of Appellant and here adopts and reasserts that argument in response to the state's Brief of Appellee.

J. THE COURT'S SENTENCE WAS GROSSLY DISPROPORTIONAL AND UNCONSTITUTIONAL AND IMPROPER ON THE EVIDENCE.

Appellant adequately advanced his argument on this issue in his Brief of Appellant and here adopts and reasserts that argument in response to the state's Brief of Appellee.

IV. CONCLUSION.

Appellant Bradford Staten prays that this Court will reverse his conviction and render judgment finding him not guilty. In the alternative, he prays that this Court will reverse his conviction and remand for new trial and/or resentencing.

This the 4th day of May 2007.

Respectfully submitted,

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V. PROOF OF SERVICE

I, the undersigned counsel of record for the Appellant certify that I have this day caused to be served by United States Mail, postage prepaid, a copy of the foregoing to the following persons:

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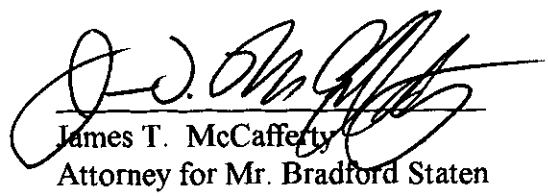
This the 4th day of May 2007.

Respectfully submitted,



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