

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-KA-02009-COA

NATHANIEL WALDEN

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

**Appeal from the Circuit Court of
Holmes County, Mississippi
Criminal Action No. 11,570**

REPLY BRIEF OF APPELLANT

(Oral Argument is Requested)

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STATEMENT REGARDING ORAL ARGUMENT

As the overall fairness of Nathaniel Walden's trial and the Jury Verdict herein are of critical importance in his appeal, Nathaniel respectfully requests oral argument in this case. Though not trial counsel, who with the argued constraints placed upon him by the trial court, did an admirable defense, Nathaniel's appellate counsel has, in the course of preparing the appeal, has discovered the numerous near errors that standing alone, would not justify reversal, but with the errors specifically complained of in this appeal, possibly contributed to an incorrect verdict on the murder charge.

Therefore, Nathaniel respectfully suggests that oral argument will be necessary and beneficial in its decision of his appeal. Noting the severity of his Sentence, under the credible facts and circumstances of this case, Nathaniel submits it would be a miscarriage of justice to compound the tragedy of Mary Walden's accidental death into a double tragedy in the affirming of his Sentence in this case.

Therefore, Nathaniel Walden respectfully requests oral argument in his case as permitted under **Miss.R.App.P., Rule 34(b)**.

FACTUAL REBUTTAL

Though the State's summary of the facts in this case largely tracks the record, and Nathaniel submits gives support to his general theory of the case, in his reply, Nathaniel will take exception to a factual allegation on the part of the State and an omission of a critical fact require attention.

Initially, during the April 28, 2005 confrontation between James and Nathaniel that resulted in the unfortunate death of Mary Walden, it is important to recognize that James was the initial aggressor in producing his weapon at the time Nathaniel was questioning about his saw part. (T-24) The fact James' shotgun was unloaded was unknown to Nathaniel, and afraid, he still needed his saw for his work. This was the primary reason for arming himself based largely on his past experiences with James.

Secondly, and of a critical nature, was the "but for" testimony of Nathaniel's sister, Mattie Brown, and the State's implication of Nathaniel's intent to kill someone. What was left out was the fact that at the time of the occurrence, and at trial, Mattie was under prescribed medication, and was extremely reluctant to testify. (T-131) A truthful woman, she perhaps knew both James and Nathaniel best.

SUMMARY OF THE REPLY ARGUMENT

Nathaniel Walden's reply will be concise and straightforward. He submits that in Issues 1. and 2., both he and the State have discussed the issues thoroughly and given this Court the full parameters on same for its decision. This is particularly true in Issue 2., the suggested criticism of trial counsel by the presiding Circuit Court Judge.

Nathaniel finds it instructive that in Issue 5., the fairness issue, the State chose but a generic argument with no authorities. The issue of fairness was not addressed at all. Nathaniel will submit his argument with no dispute from the State.

As to the denied Jury Instruction D-2 and the Jury Verdict there will be rebuttal on specific points. Both issues overlap in the apparent denial of Nathaniel's ability to present his theory of defense. Under recent decisions, the trial court's actions suggest reversal.

Nathaniel Walden's trial was basically unfair when reviewed as a whole.

REPLY ARGUMENT AND CITATION OF AUTHORITIES

1. The “hybrid” Jury Instruction D-2 should have been granted.

In borrowing the State’s designation of the proffered Jury Instruction D-2 as “hybrid”. (State’s Brief at Page 10), Nathaniel asserts that the Instruction, though in-artfully drafted, did stand alone as his principal theory of defense, the accidental homicide of Mary Walden. As such, Nathaniel did confess that in firing the shot at James’ feet, the shooting was not accidental.

However, as to the trial judge’s comment, there was no struggle, my goodness, when you have two men shooting at each other, this must be a struggle. Further, the trial judge’s comment, “James Walden admitted design”, (CP-64), does not suggest as admission by Nathaniel, only James. Nathaniel repeatedly denied any design to harm anyone.

This Court has again established its standard of review of jury instructions being considered as a whole, and the refusal of a proffered instruction must be reviewed on the announcement of the law on the instructions granted. *Ellis v. State*, 951 So.2d 581 (Miss.App. 2007). The denial of D-2 left a “hole” in the law for the Jury’s consideration of the applicable law in this case.

In his direct Brief, Nathaniel cited the recent case *Chinn v. State*, 958 So.2d 1223 (Miss. 2007). For purposes of comparison on this very narrow question, the record in *Chinn* was reviewed. As a part of this Reply Brief, Nathaniel attaches as an Appendix Chinn’s Instructions D-3, 5 and 7. From the record and the transcript, D-3 was granted, but D-5 and 7, were withdrawn after the trial judge announced in chambers he would

deny same. D-7, (Appx. 3), and its denial was the principal cause of the reversal of Chinn's conviction. However, when one looks objectively at D-3, (Appx. 1), the granted instruction, it too is "hybrid", and, as in Nathaniel's case, based upon the evidence adduced at trial. But the "hole" remained in Nathaniel's case.

As such, this Court must look carefully at its limitations announced in *Busby v. State*, 956 So.2d 1112 (Miss.App. 2007). In Nathaniel's case, it is apparent the trial court was not going to allow terms such as accidental or excusable see the light of day in respect to Mary Walden's death. This has been found reversible. *Chinn*, Ante.

2. The Jury Verdict as to murder in this case requires reversal.

Initially, Nathaniel agrees with the State in the Jury's Verdict as to the shooting into an occupied dwelling count. The murder verdict is another question. The State, at the last minute introduced the doctrine of transferred intent in the death of Mary Walden, and apparently the Jury bought it. The "but for" testimony of Mattie Brown was discussed extensively in Nathaniel's direct Brief as the only direct link to any intent of Nathaniel to kill anyone. He never conceded this. He just wanted to scare James.

To be sure, "transferred intent" is defined in **Black's Law Dictionary**. (7th Ed., Page 814). *Dobbins v. State*, 766 So.2d 29 (Miss.App. 2000), perhaps brought this doctrine to Mississippi; however its appearance is nowhere else to be found, and for good reason. This alleged doctrine is vague and subject to arbitrary application, i.e to shore up a weak case. This doctrine is also not found in statute. **Miss. Code 1972, Ann, Sec. 97-3-19 (Amend. 2004).**

Nathaniel takes great exception to the State's characterization of him as an

“unruly witness”, (State’s Brief at Page 8), during his withering cross-examination by the State at trial. A better word here would be just plain scared, just as he was on April 28, 2005 after James displayed his shotgun. Again, at this point, Nathaniel had never been charged with any violation of law, even traffic laws.

This is not a case of transferred intent, it is a case of a tragic accident. The poorly instructed Jury in this case was left only to speculate on the evidence. To allow the Jury Verdict to stand would sanction an unconscionable injustice. *Ross v. State*, 954 So.2d 968 (Miss. 2007).

CONCLUSION

Though it is well established that an accused is not guaranteed a perfect trial, the accused is guaranteed to a fair and impartial trial. As has been demonstrated above, and in the direct Brief herein, when the trial court basically did not allow Nathaniel Walden to fully present his theory of his defense, fairness in this trial, and the lessening of the State's burden of proof were the direct cause of an incorrect verdict on the Jury's part.

Nathaniel Walden submits that in his total argument, he has presented abundant grounds for this Court's reversal of the Jury Verdict and Sentence of the Holmes County Circuit Court. He respectfully requests this Court's decision to that effect.


Respectfully submitted this, the 25th day of January, 2008.

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CERTIFICATE OF SERVICE

I, George S. Shaddock, Attorney of Record for the Appellant, Nathaniel Walden, do hereby certify that I have filed the original and three (3) true and correct copies of the above and foregoing Reply Brief of Appellant with the Honorable Betty W. Sephton, Clerk of the Supreme Court and Court of Appeals of the State of Mississippi at Jackson, Mississippi.

I further certify that I have delivered a true and correct copy thereof by United State Mail, postage prepaid, to:

The Honorable Jim Hood, Attorney General
The Honorable John R. Henry, Special Assistant Attorney General
Post Office Box 220
Jackson, MS 39205-0220

The Honorable Mike Smith
Special Circuit Court Judge
Post Office Box 549
McComb, MS 39649-0549

The Honorable James H. Powell, III
District Attorney
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Durant, MS 39063-0311

CERTIFIED this, the 25 day of January, 2008.


GEORGE S. SHADDOCK

APPENDIX

IN THE CIRCUIT COURT OF JONES COUNTY, MISSISSIPPI

SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS

CAUSE NO. 2004-378-KR2

NOAH B. CHINN

JURY INSTRUCTION NO. D-3

The Court instructs the Jury that the killing of a human being by the act, procurement, or omission of another is sometimes an excusable homicide if the defendant's act which caused the death of the victim was a result of an accident and/or a misfortune in the heat of passion, upon any sudden and sufficient provocation. If you find from the evidence and testimony presented that the Shanika Chinn's death was caused by the discharge of the pistol accidentally and that Noah Chinn acted in the heat of passion, upon a sudden and sufficient provocation, then the homicide is excusable, and it shall be your sworn duty to find Noah Chinn "Not Guilty."

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APR 11 2005

LARRY ISHEE
CIRCUIT CLERK...
JONES COUNTY, MS

IN THE CIRCUIT COURT OF JONES COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS

CAUSE NO. 2004-378-KR2

NOAH B. CHINN

JURY INSTRUCTION NO. D-5

The Court instructs the jury that the killing of any human being by the act, procurement or omission of another shall be excusable:

- a) when committed by accident or misfortune in doing any lawful act by lawful means, with ordinary and usual caution, and without any unlawful intent, or
- b) when committed by accident or misfortune, in the heat of passion upon any sudden and sufficient provocation.

If you believe from the evidence that Noah B. Chinn killed Shanika Chinn by an act committed by accident and misfortune, or in the heat of passion upon sudden and sufficient provocation then you shall find Noah B. Chinn "Not Guilty."

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JONES COUNTY MS

IN THE CIRCUIT COURT OF JONES COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS

CAUSE NO. 2004-378-KR2

NOAH B. CHINN

JURY INSTRUCTION NO. D-7

The killing of a human being is an excusable homicide if the defendant's act which caused the death of the victim was a result of an accident and misfortune in doing a lawful act by lawful means with usual and ordinary caution and without unlawful intent. If the Shanika Chinn's death was caused by the discharge of the gun accidentally and that Noah B. Chinn had no unlawful intent, then the homicide is excusable.

W.P.

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