

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**MARY C. COOPER**

**APPELLANT**

**VS.**

**NO. 2007-KA-0009-COA**

**FILED**

**JUN 09 2007**

**OFFICE OF THE  
SUPPORTS  
COURT OF APPEALS**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF ISSUES**

- I. COOPER WAS NOT ENTITLED TO A HEAT OF PASSION MANSLAUGHTER INSTRUCTION.
- II. THE CULPABLE NEGLIGENCE MANSLAUGHTER AND DEPRAVED HEART MURDER INSTRUCTIONS CORRECTLY STATED THE LAW AND WERE NOT CONFUSING TO THE JURY.
- III. THE JURY'S VERDICT IS SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE.
- IV. COOPER'S ARGUMENT REGARDING OFFICER CLARK'S TESTIMONY IS PROCEDURALLY BARRED.

**STATEMENT OF FACTS**

On September 5, 2004, Vincent Hudson, Derrick Edwards, and Joe Mack Speight spent the morning drinking alcohol and shooting pool. T. 68. Later that afternoon, the trio drove to the home of Mary Cooper, Hudson's girlfriend. T. 68. Cooper's niece, Lee Hardy, was present when the trio arrived. T. 69, 117, 149. According to Hudson, Speight, and Hardy, Hudson and Cooper began arguing. T. 68, 117, 149. As a result, Hudson, Edwards, and Speight proceeded to leave. T. 68,

118.

Edwards was sitting in the driver's side and Speight in the back seat when Hudson got in the front passenger's side of the Ford Explorer in which they were traveling. T. 118. Speight and Hudson testified that they heard several shots being fired after they entered the vehicle. T. 70, 119. A bullet hit Edwards in the head. T. 119. Speight testified that he turned and saw Cooper standing in the door of her mobile home firing shots toward the vehicle. T. 70. Hudson claimed that he did not see his girlfriend shooting at the vehicle. T. 132. Cooper's own niece, however, testified that she saw Cooper shoot Edwards, and that Cooper asked her to put the murder weapon in her pocket and take it to her mother's house. T. 152. Hardy complied. 153. Hardy's mother testified that Hardy came home and threw the gun on the floor. T. 159. Hardy's father later retrieved the gun, took it to his house, and buried it in his back yard. T. 163. When police arrived at his house, he directed them to the murder weapon. T. 163.

Cooper testified in her own defense. Not only did she deny shooting Edwards, but also she denied shooting a gun at all on the day in question. 203, 206. She also denied arguing with Hudson, denied that Hardy was even at her home, and denied that she gave Hardy a gun to hide. T. 204-206. Cooper claimed total ignorance of what transpired in her front yard when Edwards was shot. T. 208. She claimed that she thought the trio had left, and she went to lie down in her bedroom. T. 209. She testified that she then heard four shots and looked out of her window and saw Hardy running down the driveway, although she had just testified that Hardy was not present on the day of the murder. T. 209. In sum, Cooper utilized the "it wasn't me" defense and attempted to relate some incoherent conspiracy theory involving the police, her own family, Hudson, and Speight. T. 205.

After weighing the testimony, the jury found Cooper guilty of murder.

## **SUMMARY OF ARGUMENT**

Cooper was not entitled to a heat of passion manslaughter instruction. The argument that transpired between she and Hudson would not constitute adequate provocation even if she had killed Hudson. There is no basis in Mississippi law to support her proposition that the argument between she and Hudson could somehow mitigate her act of shooting and killing Edwards from murder to manslaughter. Furthermore, heat of passion manslaughter was not part of the defense theory. Cooper testified that she had no involvement in the killing. Defense counsel, during opening and closing statements, asked the jury to believe that Hudson was the murderer and that everyone involved in the case was part of a conspiracy against Cooper. Finally, even if it could be said that Cooper's theory of the case hinged on heat of passion manslaughter, the trial court properly rejected the proposed instruction because it incorrectly stated the law, was without foundation in the evidence, and was fairly covered elsewhere. When read as a whole, the jury instructions correctly stated the law and effectuated no injustice.

The murder and manslaughter instructions correctly stated the law and were not confusing to the jury. The murder instruction tracked the language of the murder statute, and the manslaughter instruction utilized language approved by the supreme court. There was nothing inherently confusing about these instructions.

The jury's verdict was supported by legally sufficient evidence, which included testimony from two witnesses who saw Cooper shoot and kill Edwards.

Cooper's argument regarding the testimony of Officer Greg Clark is procedurally barred, as defense counsel raised no contemporaneous objection during his testimony.

## ARGUMENT

### I. COOPER WAS NOT ENTITLED TO A HEAT OF PASSION MANSLAUGHTER INSTRUCTION.

“In reviewing jury instruction issues, this Court reads the instructions together as a whole. No reversible error will be found to exist if, when read together, the instructions correctly state the law and effectuate no injustice.” **McKlemurry v. State**, 947 So.2d 987, 990 (¶3) (Miss. Ct. App. 2006) (quoting **Miller v. State**, 919 So.2d 1137, 1141(¶ 12) (Miss. Ct. App. 2005)).

Cooper believes that she was entitled to a heat of passion manslaughter instruction based on an altercation that allegedly occurred between she and Hudson prior to her shooting and killing Edwards. Although a defendant is entitled to have jury instructions which present his theory of the case, a trial court properly refuses jury instructions which are fairly covered elsewhere, are without foundation in the evidence, or incorrectly state the law. **Livingston v. State**, 943 So.2d 66, 71 (¶14) (Miss. Ct. App. 2006). Although Cooper requested a heat of passion manslaughter instruction, it was certainly not her theory of the case. Defense counsel’s opening and closing arguments focused on an “it wasn’t me” defense, claiming that Hudson robbed and killed Edwards, and that everyone involved in the case was part of a conspiracy against Cooper. T. 62, 63, 243, 243-47. Defense counsel argued that Cooper did not witness, much less participate in the killing. T. 245-47. Cooper also testified in her own defense that she did not participate in nor witness Edwards’ murder, and that Hudson had not argued with her nor provoked her in any manner on the day of the murder. T. 203, 204, 205, 206, 208, 209, 215. Therefore, it would be disingenuous at best for Cooper to now assert that she was entitled to a heat of passion manslaughter instruction because it was her theory of the case. Even if by some stretch of the imagination one could say that this was her theory of the case, the instruction was properly denied as it incorrectly stated the law, was without foundation in

the evidence, and was fairly covered elsewhere.

Incorrect statement of law

Cooper admits in her appellate brief that she was unable to locate a Mississippi case which stands for the proposition that a defendant's alleged altercation with one person prior to the defendant shooting and killing another person could be considered heat of passion manslaughter through the theory of transferred intent. Appellant's brief at 8. The reason is clear. Mississippi does not and should not recognize the theory of transferred intent in the context of heat of passion manslaughter.<sup>1</sup> As such, the trial court certainly cannot be held in error for refusing an instruction which has absolutely no basis in Mississippi law.

**Dobbins v. State**, 766 So. 2d 29 (Miss. Ct. App. 2000) is analogous to the case *sub judice*. In **Dobbins**, the defendant and an individual named Coleman began arguing outside a nightclub after each had displayed opposing gang signs. *Id.* at 31 (¶2). During the argument, Dobbins threatened to "blow [Coleman's] brains out." *Id.* However, the two never engaged in a physical altercation. Shortly thereafter, two other men began shoving Dobbins. *Id.* at (¶3). Dobbins then fired a handgun, and an errant bullet struck and killed an individual who had no involvement in the altercation. *Id.* Dobbins was subsequently tried and convicted of murder. On appeal, Dobbins argued that he was entitled to a heat of passion manslaughter instruction, although the adequate provocation, if any, was not caused by the victim. *Id.* at 33 (¶11) The Court disposed of the issue by finding that Dobbins' intent to kill was obvious from his threat to blow Coleman's brains out, and that intent transferred to the victim. *Id.* at (¶12). In so holding, the Court implicitly found that Dobbins' contention that the subsequent physical altercation initiated by two other individuals which

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<sup>1</sup>A Westlaw search using the search terms "transferred intent" & (homicide murder manslaughter) yields fourteen Mississippi cases, none of which support Cooper's proposition.



resulted in Dobbins shooting an unintended victim could not serve as the basis for a heat of passion manslaughter instruction.

In addition to there being no controlling legal authority to support Cooper's proposition, the idea that transferred intent is somehow applicable to heat of passion manslaughter situations lacks legal and common sense. "The chief distinction between murder and manslaughter is the presence of deliberation and malice in murder and its absence in manslaughter." **Moody v. State**, 841 So.2d 1067, 1096 (¶ 96) (Miss. 2003) (quoting **Carter v. State**, 199 Miss. 871, 879, 25 So.2d 470, 473 (1946)). Mississippi Code Annotated §97-3-35 clearly states that a heat of passion killing is committed without malice. In the context of criminal homicide, the term malice is synonymous with deliberate design, premeditation, and intent to kill. **Carter v. State**, 845 So.2d 748, 750 (¶9) (Miss. Ct. App. 2003) (citing **Hawthorne v. State**, 835 So.2d 14, 19-20 (¶¶ 21-22) (Miss.2003)). Because heat of passion manslaughter is committed without malice or an intent to kill, the theory of transferred intent simply cannot apply because there is no intent which can be transferred.

#### No foundation in the evidence

Should the Court find that the theory transferred intent is compatible with heat of passion manslaughter, the State would also argue there was no foundation in the evidence for such an instruction. Cooper denied having any involvement in the shooting, claiming that she was in her bedroom when she heard the shots being fired outside. T. 203, 206, 208, 209. This honorable Court has previously held that a heat of passion manslaughter instruction is not warranted where the defendant denies killing the victim. **Turner v. State**, 773 So.2d 952, 953-54 (¶¶5-8) (Miss. Ct. App. 2000). The **Turner** Court further stated that although there was evidence that the victim had pushed Turner over a table, that fact did not "support a finding of 'violent and uncontrollable rage' absent some testimony from someone that rage appeared to exist." **Id.** at (¶8).

“[A] necessary component of ‘heat of passion’ is ‘a state of violent and uncontrollable rage.’” **Thomas v. State**, 818 So.2d 335, 350 (¶55) (Miss. 2002). The record is simply devoid of any evidence that Cooper was in a state of violent and uncontrollable rage. In fact, Cooper maintained throughout her testimony that she and Hudson had not even argued on the day in question. T. 204, 205, 215. It is true that Speight, Hudson, and Hardy testified that Cooper and Hudson had argued about a cell phone. T. 68, 117, 149. However, “mere words, no matter how provocative,” do not constitute the adequate provocation required for heat of passion manslaughter. **McClendon v. State**, 748 So.2d 814, 818 (Miss. Ct. App. 1999) (citing **Gates v. State**, 484 So.2d 1002, 1005 (Miss. 1986)). Hudson did also testify that at the conclusion of the argument, he pushed Cooper. T. 117. According to **Turner**, this would not constitute adequate provocation.

#### Fairly covered elsewhere

Although Cooper was not entitled to a heat of passion manslaughter instruction, the jury did receive a culpable negligence manslaughter instruction. As such, the jury was given the option of convicting Cooper of something less than murder. Accordingly, the refused manslaughter instruction was fairly covered elsewhere.

The jury instructions read as a whole correctly stated the law and effectuated no injustice. Accordingly, Cooper’s first argument must fail.

## **II. THE CULPABLE NEGLIGENCE MANSLAUGHTER AND DEPRAVED HEART MURDER INSTRUCTIONS CORRECTLY STATED THE LAW AND WERE NOT CONFUSING TO THE JURY.**

Instruction S-3, a culpable negligence manslaughter instruction, was granted without objection by defense counsel. T. 229, C.P. 148. Therefore, Cooper is procedurally barred from arguing any alleged errors regarding the culpable negligence manslaughter instruction. **Gross v. State**, 948 So.2d 439, 444 (Miss. Ct. App. 2006). Without abandoning the State’s argument that

Cooper's second issue is procedurally barred, the State will also briefly address its lack of merit.

Cooper claims that instructions S-1 and S-3 incorrectly state the law. Instruction S-1, the deliberate design and depraved heart murder instruction, tracks the statutory language of Mississippi Code Annotated §97-3-19. "[T]his Court has 'consistently held that instructions in a criminal case which follow the language of a pertinent statute are sufficient.'" **Rubenstein v. State**, 941 So.2d 735, 772 (¶155) (Miss. 2006) (quoting **Byrom v. State**, 863 So.2d 836, 880 (Miss.2003)). As such, instruction S-1 correctly stated the law.

Cooper also argues that the jury was confused by instructions S-1 and S-3, claiming that there is no distinguishable difference between depraved heart murder and culpable negligence manslaughter. Our reviewing courts have repeatedly held that the two crimes are distinguishable by the degree of mental culpability, the determination of which is an issue properly resolved by the jury. **Shumpert v. State**, 935 So.2d 962, 967 (¶14) (Miss. 2006) "In short, depraved-heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied." **Windham v. State**, 602 So.2d 798, 801 (Miss.1992). This honorable Court has approved of the State's routine submission of a murder instruction along with an instruction for manslaughter as a lesser-included offense, and further stated that there is nothing inherently confusing about such submissions. **Lett v. State**, 902 So.2d 630, 637-38 (¶25) (Miss. Ct. App. 2005).

Finally, Cooper contends that jury instruction S-3 improperly utilized the phrase "tantamount to willfulness." The supreme court recently defined culpable negligence manslaughter as follows,

Thus, culpable negligence is defined as 'the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the wilful creation of an unreasonable risk thereof.' This Court more recently defined manslaughter by culpable negligence as 'such gross negligence ... as to evince a wanton or reckless disregard for the safety of human life, or such an indifference to the consequences of an act under the surrounding circumstances as to render such conduct tantamount to willfulness.'

**Chandler v. State**, 946 So.2d 355, 361 (¶22) (Miss. 2006) (quoting **Evans v. State**, 562 So.2d 91, 94 (Miss. 1990); **Shumpert v. State**, 935 So.2d 962, 967 (Miss. 2006)). Instruction S-3 utilized almost verbatim the culpable negligence manslaughter definition approved by the supreme court in **Chandler**.

The Appellant's second issue is both procedurally barred and without merit.

### **III. THE JURY'S VERDICT IS SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE.**

In reviewing issues of legal sufficiency, the reviewing court does not "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." **Bush v. State**, 895 So.2d 836, 843 (¶16) (Miss. 2005) (quoting **Jackson v. Virginia**, 443 U.S. 307, 315 (1979)). Rather, the Court will view the evidence in the light most favorable to the State and determine whether any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Id.*

Cooper was indicted for deliberate design murder. C.P. 4. The jury, which was instructed on both deliberate design and depraved heart murder, returned a verdict of guilty of murder. C.P. 146, 161. The following evidence supports the jury's verdict. Speight testified that after he, Edwards, and Hudson entered the Explorer to leave Cooper's property, he heard at least four gunshots. T. 70. He turned and saw Cooper aiming at the Explorer from the front door of her mobile home and firing shots. T. 70,72. One of the bullets struck Edwards in the head. T. 119. Hardy also testified that she saw her aunt shoot Edwards from the front door of her mobile home. T. 151. Hardy further testified that she complied with her aunt's request to take and hide the murder weapon. T. 152-53. Hardy's mother and father corroborated this account, and Hardy's father eventually turned the gun over to authorities. T. 159, 163. From this evidence, a reasonable juror

could have found Cooper guilty beyond a reasonable doubt of Edwards' murder, either of the deliberate design or depraved heart variety.

Additionally, the classic example of depraved heart murder is one shooting into crowd. **Lett v. State**, 902 So.2d 630, 637 (¶21) (Miss. Ct. App. 2005). This paradigm has been extended to one shooting into a hotel room occupied by several people. **Id.** The State submits that shooting into a vehicle which the shooter knows is occupied by several people also satisfies the classic depraved heart murder example.

Cooper's legal sufficiency argument is without merit.

#### **IV. COOPER'S ARGUMENT REGARDING OFFICER CLARK'S TESTIMONY IS PROCEDURALLY BARRED.**

Greg Clark, a Louisville Police Department Investigator, was dispatched to investigate the crime scene. At trial he testified that he attempted to determine from which direction the bullets were fired. T. 97. In describing this process, Clark testified that he measured the distance from the Explorer to front door of the mobile home, and then pointed a laser from the bullet hole in the Explorer toward the center of the front door of the mobile home. T. 97-98. No objection was made during this testimony. Photographs which depicted this process were also entered into evidence without objection. T. 98. Cooper now argues that Clark presented expert testimony without being tendered as an expert. However, defense counsel's failure to make a contemporaneous objection serves as a procedural bar to Cooper's attempt raise this issue on appeal. **Dixon v. State**, 953 So.2d 1108, 1116 (¶¶21-22) (Miss. 2007).

In addition to Cooper's claim being procedurally barred, it also lacks merit. It does not take an expert to use a tape measure or point a laser beam, nor to testify about doing so. Furthermore, even if the admission of Clark's testimony could somehow be found erroneous, a harmless error

analysis applies due to the overwhelming evidence of guilt, including the testimony of two eyewitnesses to the murder.

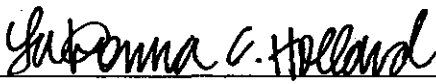

### CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Cooper's conviction and sentence.

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:

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