

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED

NOV 06 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

ARDES LEE JOHNSON

APPELLANT

VS.

NO. 2007-KA-0159

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I.. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT AND THE DEFENDANT WAS NOT ENTITLED TO AN ACQUITTAL PURSUANT TO THE <i>WEATHERSBY</i> DECISION	3
II. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE	8
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

STATE CASES

<i>Buchanan v. State</i> , 567 So.2d 194, 196 (Miss. 1990)	5
<i>Carter v. State</i> , 858 So.2d 212, 215 (Miss. Ct. App. 2003)	6
<i>Davis v. State</i> , 891 So.2d 256, 258 (Miss. Ct. App. 2004)	5
<i>Ellis v. State</i> , 708 So.2d 884, 887 (Miss.1998)	7
<i>Holliday v. State</i> , 418 So.2d 69, 73 (Miss.1982)	7
<i>House v. State</i> , 735 So.2d 1128 (Miss. Ct. App.1999)	9
<i>Mallett v. State</i> , 606 So.2d 1092, 1094 (Miss. 1992)	5
<i>May v. State</i> , 460 So.2d 778, 781 (Miss. 1984)	3
<i>McClain v. State</i> , 625 So.2d 774, 781 (Miss.1993)	8
<i>Moody v. State</i> , 841 So.2d 1067, 1092 (Miss. 2003)	3
<i>Pearson v. State</i> , 428 So.2d 1361, 1364 (Miss. 1983)	3
<i>Phinisee v. State</i> , 864 So.2d 988, 992 (Miss. Ct. App. 2004)	3
<i>Pierce v. State</i> , 860 So.2d 855 (Miss. Ct. App. 2003)	8
<i>Smith v. State</i> , 945 So.2d 414, 420 (Miss. Ct. App. 2006)	7
<i>Stennis v. State</i> , 234 So.2d 611, 614 (Miss. 1970)	6
<i>Thomas v. State</i> , 754 So.2d 579, 582 (Miss. Ct. App. 2000)	9
<i>Ward v. State</i> , 935 So.2d 1047, 1055 (Miss. Ct. App. 2005)	3
<i>Weathersby v. State</i> , 165 Miss 207, 147 So. 481, 482 (Miss. 1933)	5
<i>Williams v. State</i> , 964 So.2d 541, 547 (Miss. Ct. App. 2007)	5

STATE STATUTES

Mississippi Code Annotated §97-3-35	3, 5
---	------

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ARDES LEE JOHNSON

APPELLANT

VS.

NO. 2007-KA-0159

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

- I. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT AND THE DEFENDANT WAS NOT ENTITLED TO AN ACQUITTAL PURSUANT TO THE *WEATHERSBY* DECISION.
- II. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF FACTS

The Defendant, Ardes Johnson, traveled back to his hometown, Shelby, Mississippi, to attend his grandmother's funeral. (Transcript p. 170). While in town, he ran into his former girlfriend, Shirley Landrum. (Transcript p. 172-73). The two had consensual sex even though Landrum was in a relationship with her live-in boyfriend, Terrell Davis. (Transcript p. 208).

On July 2, 2003, Landrum spent the majority of the day at Johnson's aunt's house assisting him with packing his aunt's belongings. (Transcript p. 121). Davis came by the house a number of times that day looking for her. (Transcript p. 126 and 174-77). Eventually, Landrum asked Johnson to lie to Davis and say that she was not there. (Transcript p. 85). Davis became angry and Johnson

called the police. (Transcript p. 178). When the police arrived, Davis was no longer at the house. (Transcript p. 31).

Later that evening, Johnson and Landrum decided to walk to the store to get beer. (Transcript p. 179). While on their way to the store, they saw Davis who was very upset. (Transcript p. 129-30 and 181). Davis hit Landrum in the face. (Transcript p. 130). She walked away and Johnson stabbed Davis in the abdomen. (Transcript p. 133-34 and 183). Johnson left the scene before the authorities arrived and disposed of the knife used to stab Davis. (Transcript p. 30 and 42). Johnson was later arrested at his home in Chicago. (Transcript p. 78).

Johnson was indicted for murder. He was first tried in May of 2004 and found guilty of deliberate design murder. However, the Mississippi Supreme Court reversed and remanded the case back to the trial court because of issues with the jury instructions. Johnson was tried again in November of 2005. A mistrial was declared as the jury was unable to reach a unanimous verdict. Johnson was then tried in December of 2006. He was convicted of manslaughter and sentenced to twenty years in the custody of the Mississippi Department of Corrections.

SUMMARY OF ARGUMENT

Johnson's conviction and sentence should be affirmed as there was sufficient evidence to establish each of the elements of manslaughter. Moreover, the *Weathersby* rule is inapplicable as Johnson is procedurally barred from raising the issue and as there were discrepancies between the defendant's testimony and the other evidence presented at trial. Furthermore, the verdict was not against the overwhelming weight of the evidence.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT AND THE DEFENDANT WAS NOT ENTITLED TO AN ACQUITTAL PURSUANT TO THE *WEATHERSBY* DECISION.

Johnson argues that the “evidence was insufficient to support the verdict.” (Appellant’s Brief

p. 6). The Court of Appeals set forth the standard regarding such arguments as follows:

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury’s verdict is quite limited. We proceed by considering all of the evidence - not just that supporting the prosecution - in the light most consistent with the verdict. We give the prosecution the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts and the inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, reversal and discharge are required. On the other hand, if there is in the record such substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fairminded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb. *Moody v. State*, 841 So.2d 1067, 1092 (Miss. 2003) In other words, once the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part that given the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty. *May v. State*, 460 So.2d 778, 781 (Miss. 1984) (citing *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983))

Phinisee v. State, 864 So.2d 988, 992 (Miss. Ct. App. 2004) (*Emphasis added*). With this standard in mind, there is sufficient evidence in the case at hand to prove each and every required element of manslaughter.

Johnson was convicted of manslaughter as defined by Mississippi Code Annotated §97-3-35. The elements of manslaughter are “(1) the killing of a human being, (2) without malice, (3) in the heat of passion, (4) but in a cruel or unusual manner, or by the use of a dangerous weapon, (5) without authority of law, (6) and not in necessary self-defense.” *Ward v. State*, 935 So.2d 1047, 1055 (Miss. Ct. App. 2005). Accordingly, in the case at hand, the State had the burden of proving that Davis was

killed by Johnson in the heat of passion with a dangerous weapon and without authority of law and not in necessary self defense. The evidence presented at trial establishes the following facts in this regard:

- a. Davis died as the result of a stab wound to the abdomen. (Transcript p. 67).
- b. Johnson admitted that he stabbed Davis with a knife. (Transcript p. 183).
- c. Davis's girlfriend, Shirley Landrum, spent the day prior to Davis' death with Johnson, her former boyfriend, helping him pack up his aunt's apartment. (Transcript p. 121).
- d. Johnson and Landrum had consensual sex a few days before Davis's death. (Transcript p. 208).
- e. Davis came to Johnson's aunt's apartment several times that day asking for Landrum. (Transcript p. 174, 175, and 177).
- f. Landrum asked Johnson to lie to Davis and say that she was not there the last time he came to the apartment looking for her. (Transcript p. 85).
- g. Johnson and Landrum were walking down the street when they were confronted by Davis. (Transcript p. 181).
- h. Johnson and Landrum testified that Davis hit Landrum with his hand. (Transcript p. 130 and 182).
- i. Investigators saw no visible injuries on Landrum. (Transcript p. 32, 41, and 52).
- j. Landrum testified that she walked away after Davis hit her. (Transcript p. 133 and 182).
- k. Johnson claims that Davis had a dark object in his left hand, but was unable to identify the object. (Transcript p. 182 and 195).
- l. Landrum claims that Davis had a dark object in his right hand, but was unable to identify the object. (Transcript p. 131).
- m. Both Landrum and Johnson testified that they never saw the alleged dark object after Davis was stabbed. (Transcript p. 138, 154, and 193).
- n. Investigators never found this alleged dark object at the scene of the crime. (Transcript p. 34).
- o. Johnson admits that Davis never struck him. (Transcript p. 96 and 195).
- p. Johnson told FBI Agent Araya that the knife "went all the way in cause [he] felt [his] hand against his body. (Transcript p. 90).
- q. Dr. Hayne testified that the stab wound "entered the body and traveled a distance of approximately eight plus or minus one centimeters." (Transcript p. 66).
- r. Johnson left the scene before police and emergency workers arrived and disposed of the knife used to stab Davis. (Transcript p. 42 and 200).

Further, no argument has been made and the evidence has not shown that Johnson was acting within the authority of law. Thus, there is sufficient evidence that Johnson is guilty of manslaughter as defined by Miss. Code Ann. §97-3-35.

Johnson further argues that he was “entitled to an acquittal pursuant to *Weathersby v. State*, 165 Miss 207, 147 So. 481, 482 (Miss. 1933).” (Appellant’s Brief p. 6). However, Johnson is procedurally barred from raising the issue as he “made no reference to insufficiency of the evidence based on the *Weathersby* rule” in his final motion for directed verdict or in his motion for J.N.O.V. See *Davis v. State*, 891 So.2d 256, 258 (Miss. Ct. App. 2004) (also holding that “[w]ithout specificity, a trial court will not err by denying the motion.”).

Notwithstanding the bar, Johnson was not entitled to an acquittal based on the *Weathersby* rule. The *Weathersby* rule states that “where the defendant or the defendant’s witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the State, or by the physical facts or by the facts of common knowledge.” *Williams v. State*, 964 So.2d 541, 547 (Miss. Ct. App. 2007) (quoting *Weathersby v. State*, 147 So. 481, 482 (Miss. 1933)). “When the evidence shows circumstances which materially contradict the defendant’s version of the facts, then the matter of guilt is properly an issue for the jury.” *Id.* (citing *Mallett v. State*, 606 So.2d 1092, 1094 (Miss. 1992)).

This Court has previously noted that “[d]efendants have often cited and argued application of the *Weathersby* Rule, but seldom have they prevailed. Usually, a factual issue is presented which requires submission of the case to the jury.” *Buchanan v. State*, 567 So.2d 194, 196 (Miss. 1990). That is the case here. In support of his *Weathersby* argument, Johnson asserts that he “only stabbed Davis because he was in fear for his life” and that he was “afraid for his life and that of Landrum that

he acted in self-defense to protect his own life and the life of Landrum.” (Appellant’s Brief p. 8 and 9). Mississippi law is clear that “because the assessments of the level and imminence of the threat to the defendant’s physical well-being and the appropriateness of the defendant’s level of response to the perceived danger require interpretation and analysis of the peculiar set of facts presented in a particular case, it is well settled that the reasonableness of the defendant’s actions is normally a matter for the jury sitting as finders of fact.” *Carter v. State*, 858 So.2d 212, 215 (Miss. Ct. App. 2003) (quoting *Meshell v. State*, 506 So.2d 989, 991-92 (Miss.1987)). Thus, the issue was properly before the jury.

The jury, by finding Johnson guilty of manslaughter, did not believe that Johnson acted on “a reasonable apprehension of a design or plan on the part of the deceased to kill him or to do great bodily harm, and . . . that there was imminent danger of such design being accomplished.” *Stennis v. State*, 234 So.2d 611, 614 (Miss. 1970). While, Johnson did testify that he was “afraid for his life,” the facts and circumstances surrounding the incident do not establish that Davis was threatening Johnson’s life. First, Davis was a smaller man than Johnson. Davis weighed approximately 170 pounds and Johnson weighed 225 pounds. (Transcript p. 59 and 199). Additionally, while Johnson testified that Davis had a dark object in his hand, there was no evidence that this dark object existed or that Davis used it to threaten Johnson. Johnson testified that Davis threatened him with his hand, yet could not give any details about the alleged dark object in Davis’s hand. Furthermore, Johnson was so close to Davis that he was able to put the knife eight centimeters into Davis’s body, but he never saw the alleged dark object in Davis’s hand. Further, Johnson admitted that he has never testified that Davis hit him. (Transcript p. 195). He testified that Davis “threatened [him] with his hand like this.” and asked “should I let him hit me?” (Transcript p. 195). This Court held in *Holliday v. State*, that “[i]t is not true that a party has a right

to kill another on the first appearance of danger. The rule is that to defend on alleged threats and apprehension of threats there must be a demonstration by the party making the threat which would induce a reasonable man to believe that there was danger of such threat being immediately executed.” 418 So.2d 69, 73 (Miss.1982) (citing *Bright v. State*, 349 So.2d 503 (Miss.1977)). This Court has also held that “[a] defendant is not entitled to use deadly force in self-defense based upon a subjective fear of great bodily injury unless it is determined by a jury that this fear is reasonable under the circumstances.” *Ellis v. State*, 708 So.2d 884, 887 (Miss.1998).

Additionally, the Court of Appeals noted in *Smith v. State*, that “[i]f [the defendant] had lawfully shot [the victim] in self-defense, the jury could have reasoned that he would have immediately contacted the authorities and would have been on the premises to explain the events when the authorities arrived.” 945 So.2d 414, 420 (Miss. Ct. App. 2006). Johnson left the scene before the authorities arrived and disposed of the knife used to kill Davis which further evidences that the stabbing was not in self defense. Moreover, there is absolutely no evidence that he acted in defense of Landrum as both Johnson and Landrum testified that Landrum walked away. (Transcript p. 133 and 182).

Johnson further argues that “his version of those events was not substantially contradicted in material particulars. . .” (Appellant’s Brief p. 10). However, the evidence at trial does not fully support Johnson’s version of how the incident in question occurred. First, no dark object was found at the scene of the crime. (Transcript p. 34). In fact, both Johnson and Landrum testified that they did not see this alleged object after Davis was stabbed. (Transcript p. 138, 154, and 193). Further, Johnson testified that the alleged object was in Davis’s left hand and Landrum testified that it was in his right hand. (Transcript p. 131, 182, and 195). Second, Johnson claims that Davis was drunk. (Appellant’s Brief p. 9). However, the toxicology test confirms that there were “no drugs or abuse

of medications identified and no alcohol identified” in Davis’s body. (Transcript p. 60). Lastly, Johnson first told FBI Agent Araya that he saw something out of the corner of his eye come out of the bushes and that it was Davis. (Transcript p. 90). He then testified at trial that Davis ran up behind them. (Transcript p. 181). Landrum’s version was very different. Landrum testified in detail regarding seeing Davis in the car with his brother, where the car with both Davis and his brother traveled, and how Davis jumped out of the car at the clinic and walked down Martin Luther King where she and Johnson were. (Transcript p. 129 - 130). She further testified that Davis was “bouncing around” and “leaping up on his feet.” (Transcript p. 130). Clearly, the evidence presented at trial “materially contradicted” Johnson’s version of how the killing occurred and therefore, the *Weathersby* rule is inapplicable.

As there was sufficient evidence to establish each of the elements of manslaughter and as the *Weathersby* rule does not apply, Johnson’s first issue is without merit.

II. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The appellate standard of review for claims that a conviction is against the overwhelming weight of the evidence is as follows:

[This court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an “unconscionable injustice.”

Pierce v. State, 860 So.2d 855 (Miss. Ct. App. 2003) (quoting *Smith v. State*, 802 So.2d 82, 85-86 (Miss. 2001)). On review, the Court must accept as true all evidence favorable to the State. *McClain v. State*, 625 So.2d 774, 781 (Miss.1993).

Johnson asserts that the facts surrounding the incident “demonstrate that the verdict was

CERTIFICATE OF SERVICE

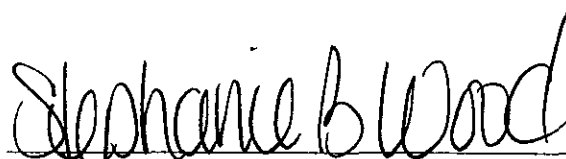
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Albert B. Smith, III
Circuit Court Judge
P. O. Drawer 478
Cleveland, MS 38732

Honorable Laurence Y. Mellen
District Attorney
P. O. Box 848
Cleveland, MS 38732

Benjamin A. Suber, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 6th day of November, 2007.



STEPHANIE B. WOOD

SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680