


FRED BEALE

APPELLANT

VS.

CAUSE NO. 2007--00190

STATE OF MISSISSIPPI

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF FOR THE APPELLANT
FRED BEALE

ORAL ARGUMENT REQUESTED

MICHAEL J. MALOUF, ESQ.


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Oral argument will ensure a thorough and effective presentation of this appeal to help bring a final conclusion to this matter.

I. The Trial Court Erred in Peremptorily Finding Fred Guilty of Burglary.

The State's only response to this critical issue is simply that Fred "did in essence admit to the burglary." To the contrary, Fred's undisputed testimony was that he did not enter the apartment with the intent to commit a crime, an essential element of burglary. (T 319) Further, Fred's testimony was supported by Ulander, who testified that Fred was allowed to enter the apartment. (T 212) Fred presented evidence upon which the jury may have found that no burglary occurred, however he was not granted the proper instructions which would have allowed the jury to consider such.

The State fails to point to any evidence or law which supports the lower court's refusal to allow the jury to decide whether Fred was guilty of burglary. Ironically, *Garrett v. State*, 956 So.2d 229 (Miss. 2006), the State's only legal authority on this issue, held: "A defendant is entitled to have jury instructions given which present his theory of the case. . . ." In spite of *Garrett* however, the lower court refused to allow Fred to present his theory of the case to the jury.

Somehow, the State tries to justify the lower court's error by referring to Jury Instruction S-1A which contained the language "...not in necessary self-defense." But as pointed out in Section III of Brief For The Appellant, the lower court subsequently instructed the jury that Fred could not claim self-defense. Contrary to the State's argument, the jury instructions were not "legally sufficient" to instruct the jury on this issue.

II. The Trial Court Erred in Not Allowing Fred to Argue Self-Defense.

The State relies on *Chandler v. State*, 946 So.2d 355 (Miss. 2006) which held:

While this is an accurate statement of the law, it is clearly distinguishable from the facts of this case. Whether or not Fred provoked a difficulty or was guilty of burglary was a question of fact. Fred denies he provoked the attack, but will not reargue these elements here, but relying on his Brief For The Appellant.

More importantly, there is no evidence that Fred armed himself in advance, intending to use his weapon to overcome his adversary. Fred and Ulander both testified that Fred always carried the gun into the apartment because of recent automobile burglaries. There was no proof that Fred "armed himself" with the intent to use the weapon to overcome his adversary. There was no testimony that he intended to shoot Ulander, and the testimony is unrefuted that he had no knowledge of decedent's being in the apartment. Fred simply lacked the requisite intent to become the aggressor, and should not be stripped of his self-defense claim and found guilty of this crime simply because he routinely carried a gun into Ulander's apartment.

In *Green v. State of Mississippi*, 28 Miss., 687 (Miss 1855) this Court recognized that possession of a weapon does not infer intent. Specifically, the Court held:

That if the Defendant entered into the conflict with a deadly weapon drawn, intending to use it, he is guilty of murder. But if he did **not** enter into the fight intending to use the weapon, and only resorted to it in the heat of conflict, he is only guilty of manslaughter. (emphasis added)

Fred testified that he did not intend to use the weapon upon entering the apartment, but only used the weapon in self-defense when he saw the decedent pointing a gun at him.

Fred respectfully submits that he was entitled to present his theory of self-defense and that the lower court erred in instructing the jury to disregard the fact that the decedent was

III. The Court Erred in Refusing to Allow Fred to Argue Self-Defense Pursuant to the State's Own Instruction.

In response to this error, the State reiterates its position that Fred was not entitled to self-defense because he was the aggressor. Again, Fred refers to his arguments in his Brief For The Appellant, and would further state that such issue of fact should have been presented to the trier of fact, rather than being decided by the trial court. Nonetheless, the State does not respond to the real issue of this critical error that the State's Jury Instruction S-1A is misleading and confusing to the jury. Said instruction clearly acknowledges Fred's legal right of self-defense, yet the lower court subsequently instructed the jury that Fred was not entitled to self-defense. It was improper for the lower court to grant said instruction, then admonish Fred's counsel for referring to the instruction. Additionally, the State failed to address the issue that there is no legal precedence which allows the trial court to interrupt Fred's closing argument and further instruct the jury that Fred was not entitled to self-defense.

IV. The Court Erred in Refusing Fred's Manslaughter Instructions.

The State argues Fred was not entitled to a heat of passion manslaughter instruction because it is inappropriate in some cases. Fred agrees that instructions must be based on facts and not abstract statements of law, however, the argument the State presents now is not consistent with its theory at trial and its remarks in closing argument. Based upon the State's own scenario presented at trial, Fred, while in a rage, broke into the apartment to do harm to Ulander and decedent. Such facts clearly necessitate a manslaughter instruction. The State provided no other motive for murder, such as rape, robbery, etc., other than Fred was angry

heat or passion instruction.

Inasmuch as the State failed to address the “imperfect self-defense” as set out in *Nelson v. State*, 850 So.2d 2001 (Miss. 2003), Fred assumes the State does not contest such error.

V. The Trial Court Erred in Showing Bias Against Fred.

The State’s reference to the recusal of a judge under Canon 3e(1) of the Code of Judicial Conduct is misplaced. Fred never asked the trial judge to recuse himself, but simply asked for a fair trial. The trial court’s continuous sustaining of unfounded objections, along with countless admonishments of defense counsel in the presence of the jury, denied Fred a fair trial.

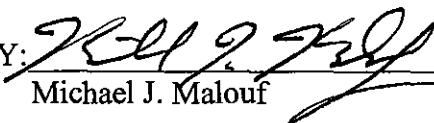
VI. Cumulative Effect of Errors Warrants Reversal.

Fred respectfully submits that the numerous errors enumerated in the Brief For The Appellant, each warrants a reversal of this conviction. Notwithstanding such, the cumulative effect of the aforementioned errors clearly deprived Fred of a fair hearing.

For the above and foregoing reasons, Fred Beale respectfully requests that the
judgment of the lower court be reversed.

RESPECTFULLY SUBMITTED this the 25th day of February, 2008.

FRED BEALE, Appellant

BY: 
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I, Michael J. Malouf, Attorney for Appellant, do hereby certify that I have this day mailed, by U. S. Mail, first-class postage prepaid, a true and correct copy of the above and foregoing **Brief of Appellant Fred Beale** to the following:

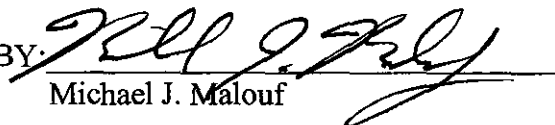
Honorable W. Swan Yerger
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DATED this the 25th day of February, 2008.

FRED BEALE, Appellant

BY: 
Michael J. Malouf

Check Out Date: **02/26/2008**

Due Date: **11/21/2008**

<u>Record Type</u>	<u>Qty</u>	<u>Description</u>	
Brief	1	Appellant's Brief	
Brief	1	Appellee's Brief	
Brief	1	Reply Brief	
Exhibit	8	See Exhibit list Original Photos	
		Package: Unknown Package	
Exhibit	1	See exhibit list	
		Package: Unknown Package	
Volume	1	Case Folder	Case Folder
Volume	1	Clerk Papers	Volume 1
Volume	1	Electronic Disk	Disk
Volume	1	Supplemental Volume	Vol 1(Agreed Order & Jury Instruction)
Volume	1	Supplemental Volume	Vol 1(Jury Instruction and Clerks Certi. to Suppl)
Volume	3	Transcript	Volumes 2-4

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Court Recusal Calendar

2007-KA-00190-COA

Draw: 02/26

Regular Calendar

ation: CRIMINAL - FELONY

Requested? Yes

2007-KA-00190-COA

Fred Henry Beale v. State of Mississippi

ale Charges:

	Side	Represented by		
ry Beale	Appellant	Malouf, Michael J. Malouf, Melissa Ann		
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ounty Circuit Court 1st District

dge W. Swan Yerger

Number of Volumes: 6

Briefs	# Issues
llant's Brief	5
llee's Brief	0
y Brief	0

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Court Recusal Calendar

2007-KA-00190-COA

Draw: 02/26/2008

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	Case Folder	WITH RECORD	U
s	Volume 1	WITH RECORD	I
	Volumes 2-4	WITH RECORD	I
isk	Disk	WITH RECORD	I
al Volume	Vol 1(Jury Instruction and Clerks Certi. to Suppl)	WITH RECORD	I
al Volume	Vol 1(Agreed Order & Jury Instruction)	WITH RECORD	I

Label	Exhibit Type	Description	Container	Location	Se
		See Exhibit list Original Photos	Plat	WITH RECORD	
		See exhibit list	9 x 12 Envelope	WITH RECORD	