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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**EDSEL BURTON a/k/a EDSEL CARL BURTON
a/k/a BURT**

APPELLANT

FILED

V.

AUG 31 2007

NO. 2007-KA-00212-COA

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COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

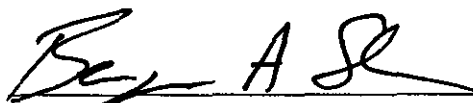
1. State of Mississippi
2. Edsel Carl Burton
3. Johnny Young, District Attorney
4. Honorable Paul S. Funderburk, Circuit Court Judge

This the 1st day of August, 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Edsel Carl Burton Anderson, Appellant

By:


Benjamin A. Suber, Counsel for Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
ISSUE: WHETHER THE TRIAL COURT ERRED IN REFUSING THE HEAT OF PASSION JURY INSTRUCTION	4
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

CASES

<i>Adams v. State</i> , 772 So.2d 1010, 1016 (Miss. 2000)	5
<i>Adkins v. Sanders</i> , 871 So.2d 732, 736 (Miss. 2004)	4
<i>Austin v. State</i> , 781 So.2d 186, 192 (Miss. 2001)	4
<i>Chinn v. State</i> , ___ So.2d ___, 2007WL1840388 (Miss.)	4, 5, 8
<i>Coleman v. State</i> , 697 So.2d 777, 782 (Miss. 1997)	4
<i>Gates v. State</i> , 484 So.2d 1002, 1004 (Miss. 1986)	6
<i>Graham v. State</i> , 582 So.2d 1014, 1018 (Miss 1991)	6
<i>Heidel v. State</i> , 587 So.2d Miss Code Annotated § 97-3-35. 835, 842 (Miss. 1991) ...	4
<i>Howell v. State</i> , 860 So.2d 704, 745 (Miss. 2003)	4
<i>Lancaster v. State</i> , 472 So.2d 363 (Miss. 1985)	5
<i>Mullins v. State</i> , 493 So.2d 971, 974 (Miss. 1986)	5
<i>O'Bryant v. State</i> , 530 So.2d 129, 133 (Miss. 1988)	5
<i>Phillipson v. State</i> , 943 So.2d 670, 671-72 (Miss. 2006)	5
<i>Pierce v. State</i> , 289 So.2d 901 (Miss. 1974)	5
<i>Ward v. State</i> , 479 So.2d 713 (Miss. 1985)	5

STATUTES

Miss Code Annotated § 97-3-35.	6
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IN THE COURT OF APPEALS IN THE STATE OF MISSISSIPPI

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APPELLANT

V.

NO. 2007-KA-00212-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUE

ISSUE

**WHETHER THE TRIAL COURT ERRED IN REFUSING THE HEAT
OF PASSION JURY INSTRUCTION**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Itawamba County, Mississippi, and a judgment of conviction for the crime of murder resulting in a life term in the custody of the Mississippi Department of Corrections following a jury trial on January 23, 2007, Honorable Paul S. Funderburk, presiding. Edsel Carl Burton is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Jewel M. Burton [hereinafter Mrs. Burton] was found dead on April 26, 2005, in Itawamba County, Mississippi. [T. 122]. Nancy Wheeler, who was Mrs. Burton's daughter, came to the house of her mother and Edsel Carl Burton [hereinafter Burton] to check on Mrs. Burton. [T. 121]. She entered the house after no one answered the door and found her mother laying in the bathroom floor. [T. 122].

Wheeler testified that Mrs. Burton and Burton have had an abusive relationship and Mrs. Burton would spend the night with Wheeler from time to time. [T. 121, 125]. Mrs. Burton went to stay with her daughter on April 24, 2005, and the next day she went back to her home where Burton and Mrs. Burton lived. [T. 121]. Wheeler never heard anything from her mother and after receiving a telephone call from a worried friend, she went to check on her mother. *Id.*

Burton told the court that he and Mrs. Burton have been getting into fights and fussing constantly. [T. 247]. He admitted that he has been drinking since he was a teenager and over three to four days prior to Mrs. Burton's death, Burton stated that he drank a half gallon of

hundred proof Smirnoff Vodka, Johnny Walker Red Whiskey, and at least one and a half cases of Miller's Natural Draft beer. [T. 245-47]. One officer even stated that he believes that Burton was drinking on the day of arrest. [T. 209]. Burton was confused on which days everything happened; however, he stated that Mrs. Burton came home to get some stuff to take back to Fulton. [T. 247]. He was trying to get her to stay home. *Id.* According to the defendant's statement marked State's Exhibit 3, Burton stated that Mrs. Burton was yelling at him and telling him that she was going to move out. R.E. 18.

According to the testimony of numerous police officers and investigators, Burton voluntarily gave them statements saying that he had done a bad thing and wanted to plead guilty. [T. 141, 177, 187, 205]. Burton testified that he vaguely remembers events around the day in question, and said he does not remember signing the waiver of rights form nor the voluntary statement. [T. 250-51]. He recognizes the signatures on the form, but it does not look like his normal signature, said it was rather ragged. *Id.*

Burton testified that he felt the effects of detoxification long after being in jail, he was having visualizations of fish on the cell floor, springs at the bottom of the walls, saw trees, and believed he could see through walls. [T. 253]. He does not recall shooting Mrs. Burton. *Id.* Burton was convicted by a jury of murder and sentenced to life with the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The jury should have been instructed on heat of passion manslaughter. Individuals have a fundamental right, even if there is minimal evidence, to have their theory of the

case presented to the jury. Denial of an accused fundamental right is a grounds for reversal.

ARGUMENT

ISSUE

WHETHER THE THE TRIAL COURT ERRED IN REFUSING THE HEAT OF PASSION JURY INSTRUCTION

“Jury instructions are to be read together and taken as a whole with no one instruction taken out of context.” *Chinn v. State*, ___ So.2d ___, 2007WL1840388 (Miss.) (quoting *Austin v. State*, 781 So.2d 186, 192 (Miss. 2001)). “A defendant is entitled to have jury instructions given which present his theory of the case, however this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, or is without foundation in the evidence.” *Howell v. State*, 860 So.2d 704, 745 (Miss. 2003) (citing *Heidel v. State*, 587 So.2d 835, 842 (Miss. 1991)). The Mississippi Supreme Court declared that “[w]e will not find reversible error ‘where the instructions actually given, when read together as a whole, fairly announce the law of the case and create no injustice.’” *Adkins v. Sanders*, 871 So.2d 732, 736 (Miss. 2004) (quoting *Coleman v. State*, 697 So.2d 777, 782 (Miss. 1997)). See also *Chinn v. State*, ___ So.2d ___, 2007WL1840388 (Miss.).

The Mississippi Supreme Court continued to express that “every accused has a fundamental right to have her theory of the case presented to a jury, even if the evidence is minimal.” *Chinn v. State*, ___ So.2d ___, 2007WL1840388 (Miss.) (*Emphasis added*). “It is, of course, an absolute right of an accused to have every lawful defense he asserts, even

though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction under the court. [The Mississippi Supreme Court] will never permit an accused to be denied this fundamental right.” *Id* (quoting *O’Bryant v. State*, 530 So.2d 129, 133 (Miss. 1988) (citing *Ward v. State*, 479 So.2d 713 (Miss. 1985); *Lancaster v. State*, 472 So.2d 363 (Miss. 1985); *Pierce v. State*, 289 So.2d 901 (Miss. 1974))). The Court stated that “[w]e greatly value the right of the defendant to present his theory of the case and ‘where the defendant’s proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error.’” *Chinn v. State*, ___ So.2d ___, 2007WL1840388 (Miss.) (quoting *Phillipson v. State*, 943 So.2d 670, 671-72 (Miss. 2006) (citing *Adams v. State*, 772 So.2d 1010, 1016 (Miss. 2000))).

First, the proposed jury instructions offered by Burton did properly state the law. Burton offered two instructions D-4 and D-5. R.E. 16,17. D-4 defined the term heat of passion and D-5 listed the elements of manslaughter.

The Mississippi Supreme Court defined “heat of passion” as:

... a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at a time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

Mullins v. State, 493 So.2d 971, 974 (Miss. 1986). Jury instruction D-4 defined heat of passion as did the Court in *Mullins*.

Miss. Code Ann. § 97-3-35 (1972) lists the definition of manslaughter as follows: The killing of a human being, without, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority if law, and not necessary self-defense, shall be manslaughter. Burton offered jury instruction D-5 which is almost verbatim to the Mississippi Statute.

The jury instructions offered by Burton properly stated the law, as stated in the Mullins case and Miss Code Annotated § 97-3-35.

Second, the jury instructions given did not cover Burton's theory of the case. The instructions that were presented to the jury did not set forth the elements of manslaughter. The State's instructions only contend with murder, and not manslaughter.

Finally, the court must look at whether there was sufficient foundation in the evidence for a manslaughter instruction. "[I]f there is any evidence which would support a conviction of manslaughter, an instruction on manslaughter should be given." *Graham v. State*, 582 So.2d 1014, 1018 (Miss 1991). The test to determine whether a lesser included instruction is required has been stated as follows:

[A] lesser included instruction should be granted unless trial judge - - and ultimately this Court - - can say, taking the evidence in the light most favorable to the accused, and considering all reasonable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge).

Graham, 582 at 1017 (citing *Gates v. State*, 484 So.2d 1002, 1004 (Miss. 1986)).

The trial court was wrong in refusing the jury instruction on the basis that there was no evidentiary basis to support Burton's theory on the case. Sufficient evidence was presented to the court from Burton, himself, and from Nancy Wheeler, Mrs. Burton's daughter.

Wheeler stated that Mr. And Mrs. Burton had been in an abusive relationship. [T. 121]. She continued that on and off it had been pretty rough the whole time. [T.121]. On cross Wheeler proceeded to state that Mrs. Burton had been staying at her house off and on for a while. [T. 125]. Also, that they were having martial problems at this time. [T. 125].

Burton testified that Mrs. Burton was going to move in with a friend. [T. 245]. Also, that she had been gone and came to the house to get some stuff around the time of the alleged incident. [T. 246-47]. Burton continued to testify that he and Mrs. Burton had been getting into arguments lately. [T.247]. Burton stated "we had been – that's – it was just fuss, fuss, fights constantly." *Id.* When asked if he was fussing that morning, he stated not really, but he did not remember whether he was mad or not. *Id.* Burton was just flustered and did not want her to leave. *Id.* However, Burton told the court that he had been drinking since he was a teenager and over the past few weeks, he had been drinking excessively because drinking had gotten to him. [T. 246]. Over the a three to four day period before Mrs. Burton's death, Burton had consumed a half gallon of hundred proof Smirnoff vodka, Johnny Walker Red Whiskey, and at least a case and a half, if not more of Miller's Natural draft beer. [T. 245]. Due to the amount of alcohol that he consumed, he testified that he was very confused and did not remember much else on the day before and after Mrs. Burton came to the house till seeing the police on the day he was arrested. [T. 246-248]. Burton was entitled to have his

theory of the case submitted to the jury under proper instruction from the court. The sufficient evidence to support the defendant's theory of the case was presented from both the State, through Wheelers testimony, and from Burton. Denial of Burton's fundamental right to present his theory of the case is grounds for a reversal. *Chinn v. State*, ___ So.2d ___, 2007WL1840388 (Miss.)


CONCLUSION

Edsel Carl Burton is entitled to have his conviction for murder reversed and rendered or reversed and remanded for a new trial.

Respectfully submitted,

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BY:


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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Edsel Burton, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge
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This the 1st day of August, 2007.


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