IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY SNEED, et al — APPELLANT

VS. — NO. 2007-KA-0381-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE ANTHONY SMITH

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: LA DONNA C. HOLLAND
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

STATE CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY SNEED, et al **APPELLANT**

VS. **NO. 2007-KA-0381-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE ANTHONY SMITH

STATEMENT OF ISSUES

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING SMITH'S MOTION TO SEVER.

II. SMITH IS PROCEDURALLY BARRED FROM ATTACKING INSTRUCTION C-16 FOR THE FIRST TIME ON APPEAL.

III. THE JURY'S VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF FACTS

On August 11, 2006, Leanna Smith and her boyfriend Herman Fair had an altercation. T. 307. Ms. Smith's niece, Rotandria Foster, witnessed the altercation and would later testify that she saw Ms. Smith choking Fair, but did not see Fair "do anything" to Ms. Smith. T. 325-26. Foster then called her cousin, Anthony Smith, to tell him that his mother and Fair "had got into it." T. 307.

Anthony Smith and Jamario Brady were drinking at Johnny Bickham's house when Smith received Foster's telephone call. T. 389, 415. Smith went to check on his mother who told him to "leave it alone" and not confront Fair. T. 327, 389. Smith ignored his mother's advice and proceeded to Fair's apartment with Brady, Bickham, Thomas German, and Anthony Sneed. T. 308. Foster and Terinesia Burton also followed the group to Fair's apartment. T. 308. The gang waited at the bottom of a stairwell for Fair to emerge from his upstairs apartment. T. 311, 389. When Fair emerged from his apartment and descended the staircase, Smith punched Fair in the face, knocking Fair to the ground. T. 311, 389. All five defendants then kicked or stomped Fair as Brady proceeded to beat him with a golf club. T. 311-312,332. Fair died from blunt force trauma to the chest when his lungs were lacerated, causing them to bleed more than three quarts of blood into the chest cavity. T. 471. In addition to the lethal wounds, Fair also suffered a broken rib and multiple cuts and abrasions to the head, nose, ear, shoulder, and chest. T. 460, 471. Smith, Brady, Sneed, Bickham, and German were ultimately convicted by a Coahoma County Circuit Court jury for Fair's murder.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying Smith's motion to sever. The trial court carefully considered the *Duckworth* factors and found that neither weighed in favor of severance. Each defendant gave a statement to police admitting involvement in the fatal beating. No defendant's testimony was exculpatory, much less exculpatory at the expense of another defendant. The evidence also did not weigh more heavily against one defendant than another. Finally, Smith was not prejudiced by the trial court's denial of his motion to sever.

Smith is procedurally barred from attacking instruction C-16 for the first time on appeal. Additionally, his claim that this instruction is similar to the erroneous aiding and abetting instructions granted in *Hornburger* and *Berry* is wholly without merit. Instruction C-16 did not allow the jury to convict upon a finding that Smith committed only one element of the crime charged or without finding that the crime was ever completed.

Finally, the jury's verdict was not against the overwhelming weight of the evidence.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING SMITH'S MOTION TO SEVER.

Prior to trial, Smith, Sneed, and German each moved the court to sever their trials. The court denied the motions and entered an order with a thorough and well-reasoned analysis for its decision. C.P. 22A.

The decision to grant or deny a motion to sever lies within the sound discretion of the trial court judge. *Sanders v. State*, 942 So.2d 156, 158 (¶10) (Miss. 2006) (citing URCCCP 9.03). Reviewing courts will not reverse a conviction based on the denial of motion for severance unless the trial court clearly abused its discretion. *Id.* Both the United States Supreme Court and the Mississippi Supreme Court have expressed a preference for joint trials, as "joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability-advantages which sometimes operate to the defendant's benefit." Id. at (¶11) (quoting *Cavett v. State*, 717 So.2d 722, 727 (Miss. 1998)). The two factors, the *Duckworth* factors[1], that the trial court must consider when ruling on a motion to sever are (1) whether the testimony of one defendant tends to exculpate that defendant at the expense of another defendant and (2) whether the evidence of guilt preponderates more heavily against one defendant than another. *Id.* (citing *Hawkins v. State*, 538 So.2d 1204, 1207 (Miss. 1989)). Additionally, "the overarching consideration when evaluating these factors is whether the defendants would be prejudiced by a joint trial." *Id.* at 159 (¶15) (citing *Duckworth v. State*, 477 So.2d 935, 937 (Miss. 1985)).

Starting with the second *Duckworth* factor, Smith claims that the balance of the evidence tended to implicate Brady over the other defendants. Smith's attempt to show that the evidence

---

[1]*Duckworth v. State*, 477 So.2d 935, 937 (Miss. 1985).

preponderated against Brady more than the other defendants is contrary to the medical evidence presented at trial. It does appear from the record that Brady hit the victim more times with the golf club than the defendants kicked him. However, Foster testified that she only saw Brady hit Fair in the head and face with the golf club. T. 333, 338. Dr. Hayne testified that the lacerations on Fair's head could have been inflicted with a golf club, but that the lethal blows to Fair's chest would not be consistent with being beaten with a golf club. T. 469, 475. The lethal injuries to the chest, Hayne opined, were consistent with being kicked or stomped with a soft soled shoe. T. 473, 475.

The *Sanders* court explained that the second *Duckworth* factor weighs in favor of the moveant where defendants have inconsistent defenses. 942 So. 2d at 160 (¶20). The defendants in the case *sub judice* did not have inconsistent defenses. Rather, Brady's codefendants merely attempted to shift more of the blame to Brady, while at the same time acknowledging in their statements to police that they did participate in the fatal beating. The *Sanders* court noted that in only one case, *Patyon v. State*, 785 So.2d 267, 269-70 (Miss. 1999), has a reviewing court determined that mere blame-shifting necessitated severance. *Id.* at (¶21). *Payton*, however, is easily distinguishable because the *Payton* court found that Payton was prejudiced because his codefendant shifted most of the blame to him, thereby interfering with his defense of general denial of the allegations. Here, Smith and the other codefendants attempted to shift all of the blame to Brady, so Smith was certainly not prejudiced in the way Payton was, since his codefendants were not attempting to lay all of the blame on his doorstep. Further, Smith admitted in his statement to police that he participated in the beating, whereas Payton's defense was a general denial of the charges against him. Accordingly, Smith has failed to show that the second *Duckworth* factor supported his motion for severance.

As to the first *Duckworth* factor, Smith does not argue that any defendant's testimony

exculpated that defendant at the expense of another defendant. Of course Smith could not genuinely make such an argument because the only portions of the defendants' statements to police that were introduced at trial reflected nothing more than each defendant's admission that he participated in the fatal beating. As such, the only statements from the defendants were strictly inculpatory, and the first *Duckworth* factor weighs in favor the joint trial.

The trial court did not abuse its discretion in denying Smith's motion to sever. Neither *Duckworth* factor weighed in favor of severance. Additionally, Smith failed to show any prejudice from the trial court's denial of the motion to sever.

II. SMITH IS PROCEDURALLY BARRED FROM ATTACKING INSTRUCTION C-16 FOR THE FIRST TIME ON APPEAL.

Smith claims for the first time on appeal that instruction C-16 allowed the jury to find him guilty even if he committed only a single element of the crime charged. Smith failed to object to instruction C-16 at trial, and is therefore procedurally barred from attacking the instruction for the fist time on appeal. *Bynum v. State*, 929 So.2d 324, 333 (¶25) (Miss. Ct. App. 2005). Without abandoning its position that Smith's second assignment of error is procedurally barred, the State would also show that his argument is without merit.

Smith claims that instruction C-16 has been condemned by the Mississippi Supreme Court in *Berry v. State*, 728 So.2d 568 (Miss. 1999) and *Hornburger v. State*, 650 So.2d 510 (Miss. 1995). Instruction C-16 stated,

> The Court instructs the jury that each person present at the time, and consenting to and encouraging the commission of a crime, knowingly, willingly and feloniously doing any act which is an element of the crime or immediately connected with it, or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense. In this case the State has charged that these defendants aided and abetted one another in the commission of the crime charged. Aiding and abetting requires some participation in the criminal act and may be evidenced by work, overt act or deed. In order to be found guilty as aiders and abetters of a crime, those Defendants charged as aiders and abettors must possess the same intent as the person principally committing the crime charged. If you believe from the evidence, beyond a reasonable doubt, that the defendants, Jamario Brady, Anthony Sneed, Anthony Smith, Thomas German and Johnny Bickham, or any one of them, did willfully, knowingly, unlawfully and feloniously do any act which is an element of the crime of murder or manslaughter as you so find, immediately connected with such crime, or leading to its commission, and such defendant or defendants shared the same intent as the person principally committing the crime, then and in that event you should find the defendant or defendants guilty of murder or manslaughter, as you so find.

C.P. 113.

The problematic aiding and abetting instruction in *Hornburger* stated,

> The Court instructs the Jury that each person present at the time, and consenting to

> and encouraging the commission of a crime, and knowingly, willfully and feloniously doing any act which is an element of the crime or immediately connected with it, or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense; and if you find from the evidence beyond a reasonable doubt that the defendant, Gregory Hornburger, a/k/a Greg Hornburger, did willfully, knowingly, unlawfully and feloniously do any act which is an element of the crime of burglary of a building, or leading to its commission, then and in that event, you should find the defendant guilty as charged.

650 So. 2d at513-14. The problem with the aiding and abetting instruction in *Hornburger* was that the language after the semi-colon implied to the jury that it could convict if it found that the State proved even a single element of crime charged. However, the *Hornburger* court found that the error was harmless since other instructions provided that the State must prove each element of the crime charged.

The erroneous aiding and abetting instruction in *Berry* stated,

> The Court instructs the jury that each person present at the time, and consenting to and encouraging the commission of a crime, and knowingly, willfully and feloniously doing any act which is an element of the crime, or immediately connected with it, or leading to its commission, is a principal.
>
> One who aids, assists and encourages a transfer of cocaine is a principal and not an accessory, and his guilt in nowise depends upon the guilt or innocence, the conviction or acquittal of any other alleged participant in the crime. Therefore if you believe from the evidence, beyond a reasonable doubt, that Merlinda Berry did willfully, unlawfully and feloniously do any act which is an element of the crime of transfer of cocaine, as defined by the Court's instructions, or immediately connected with it, or leading to its commission, then and in that event, you should find Merlinda Berry guilty of transfer of cocaine as charged in the indictment.

728 So.2d at 570. The problem with this instruction was that it "appears to give the jury an additional option of finding the defendant guilty if she committed only one element of the crime without even finding that the crime was ever completed." Id. at 571. The court concluded that although other instructions explained that the State must prove every element of the crime charged, the error was not harmless since the instruction in question appeared to give the additional option

of conviction upon proof that a single element of the crime charged had been committed.

A plain reading of instruction C-16 in the case *sub judice*, compared to the aiding and abetting instructions in *Hornburger* and *Berry*, reveals that it in no way allows the jury to convict upon finding that the defendant committed only one element of the crime charged or without finding that the crime was ever completed. Instruction C-16 requires that an aider and abettor be present and actively assist the principal in completing the crime charged and possess the requisite intent to commit the crime charged. The *Hornburger/Berry* problem is absent and no reversible error exists where the aiding and abetting instruction does not give the jury the option of convicting the defendant without first finding that the crime was completed. *Brassfield v. State*, 905 So.2d 754, 757 (¶9) (Miss. Ct. App. 2004) (citing *Simmons v. State*, 805 So.2d 452, 475 (¶36) (Miss. 2000); *Mangum v. State*, 762 So.2d 337, 344 (¶20) (Miss. 2000); *Edwards v. State*, 737 So.2d 275, 305 (¶ 86) (Miss. 1999); *Armstrong v. State*, 771 So.2d 988, 1001 (¶52) (Miss. Ct. App. 2000); *Bland v. State*, 771 So.2d 961, 965 (¶10) (Miss. Ct. App. 2000); *Holmes v. State*, 758 So.2d 1056, 1058 (¶ 8) (Miss. Ct. App. 2000)). Additionally, the supreme court has also held that the *Berry* problem is not implicated when an instruction identical to instruction C-11 in the case *sub judice* has been granted. *Duncan v. State*, 939 So.2d 772, 781 (¶¶29-30) (Miss. 2006).

For the foregoing reasons, Smith's second assignment of error must fail.

III. THE JURY'S VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Smith frames the issue as one of weight of the evidence, but in arguing that he did not intend to kill Fair, he also advances an argument of legal sufficiency of the evidence. In determining whether the State presented legally sufficient evidence to support the jury's verdict, the reviewing court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005). This Court will not disturb a jury's verdict based on a claim that it was against the overwhelming weight of the evidence unless allowing the verdict to stand would sanction an unconscionable injustice. *Id.* at 844 (¶18). Additionally, the duties of assessing witness credibility and resolving conflicts in the evidence lie within the sole province of the jury. *Moore v. State*, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007). Further,

> Who the jury believes and what conclusions it reaches are solely for its determination. As the reviewing court, we cannot and need not determine with exactitude which witness(es) or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution.

Id. (quoting *Stephens v. State*, 911 So.2d 424, 436(¶38) (Miss. 2005)).

Smith claims on appeal that the State failed to prove the element of intent. He claims that his statement to Brady that he only wanted to hurt Fair, not kill him proves he did not intend to kill Fair. However, despite this statement, he participated in the fatal attack by kicking Fair in the chest with enough force to lacerate his lung. Because the jury was instructed that intent can be formed "very quickly, and perhaps only moments before the act of killing the person," the jury was free to find that Smith formed the intent to kill Fair after his admonition to Brady, but before delivering a

fatal blow. In addition to being proven by words of the defendant, intent can be proven by the defendant's actions and the surrounding circumstances. *Boyd v. State* , 977 So.2d 329, 335 (¶23) (Miss. 2008) (citing *Thompson v. State*, 258 So.2d 448 (Miss.1972)). Additionally, the question of a defendant's intent is a jury question, and the jury's determination will not be disturbed by reviewing courts so long as record evidence supports the jury's finding of fact. *Id.* at 336. The State provided the following evidence to establish Smith's intent to kill Herman Fair. Smith gathered four friends to confront Fair after receiving notice that his mother and Fair had an altercation. The group then went to Fair's apartment complex where they waited together underneath a stairway for Fair to emerge from his apartment. T. 312, 330. When Fair emerged from his apartment and descended the stairway, Smith hit him in the face, knocking him to the ground. T. 311,331. Everyone in the group then began kicking Fair as he lay on the ground. T. 332. Brady then proceeded to beat Fair with a golf club. T. 312,332. According to Foster, the beating lasted five or ten minutes. T. 317. Fair was unable to get up off of the ground after the defendants began kicking him. T. 318. Despite each defendant's best effort at trial and on appeal to characterize the brutal beating of Fair as consisting of five light kicks, the medical evidence proved otherwise. Fair's external injuries consisted of lacerations on the scalp, bridge of the nose, back of the head, left side of the head, and the left ear, and several contusions on the chest wall that each measured up to 6.5 inches. T. 460. Dr. Hayne testified that the lacerations were consistent with being hit with a golf club or similar object. T. 469. Dr. Hayne stated that prior to the internal examination, he believed that the head injuries would prove to be the cause of death. T. 484. However, the cause of death was determined to be blunt force trauma to the chest. T. 473. The surface of Fair's right and left lungs were bruised and lacerated, causing him to bleed out more than three quarts of blood into his chest cavity. T. 471. Fair had also suffered a broken rib. T. 471. Dr. Hayne opined that the lethal chest injuries were

consistent with being kicked or stomped with great force, as it would take a significant amount of force to compress the chest wall to the point of lacerating the lungs. T. 474. The aforementioned evidence of the defendants' acts and the surrounding circumstances is sufficient to support the jury's finding that each defendant intended to kill Fair.

Smith's claim that his actions of hitting Fair once and lightly kicking him are insufficient to support a murder claim fails to acknowledge that the jury could have found him guilty as either a principal or aider and abettor. This Court has stated the following regarding the accomplice liability concept of aiding and abetting.

> [O]ur supreme court [has] ruled that in order to be held criminally liable as an aider and abetter in the commission of a felony, one must "do something that will incite, encourage, or assist the actual perpetrator in the commission of the crime." And it has been further stated that "[i]f two or more persons enter into a combination or confederation to accomplish some unlawful object, any act done by any of the participants in pursuance of the original plan and with reference to the common object is, in contemplation of law, the act of all."

Scarborough v. State, 956 So.2d 382, 386 (¶21) (Miss. Ct. App. 2007) (internal citations omitted). Additionally, murder convictions on the theory of aiding and abetting have been upheld in cases where defendants physically participated in a killing to a much lesser extent than Smith in the present case. In *McDowell v. State*, Barbara Lynn Chapman claimed that her boyfriend, Marlon Maurice Davis, would beat her when he was drunk. 984 So. 2d 1003, 1008 (¶2) (Miss. Ct. App. 2007). The beatings led to the couple's eventual break-up. *Id.* On the day of Davis's murder, Chapman was attempting to remove her belongings from Davis's apartment when he cut her with a knife on the neck and face in the process of trying to cut off her ear. *Id.* at (¶3). Later that night, Chapman brought her seventeen-year-old son, Eric McDowell, to Davis's apartment. *Id.* at (¶5). Chapman parked her car down the street while McDowell banged Davis's door. *Id.* at (¶6). McDowell and Chapman waited for Davis to come home. Approximately thirty minutes later, Davis approached

and Chapman yelled to McDowell, "There's Maurice. Here he come." *Id.* at 1009 (¶9). McDowell beat Davis with a stick and stomped on him as Chapman looked on. *Id.* An unidentified male also approached and began kicking Davis repeatedly. *Id.* at (¶10). Davis died from a combination of blunt force trauma to the head and a lacerated liver. *Id.* at (¶11). Chapman admitted to police "that she had put her son up to it, but Davis was not supposed to die." *Id.* at 1011 (¶21). McDowell and Chapman were convicted for Davis's murder. On appeal, Chapman claimed that the State failed to prove that she intended to kill Davis. *Id.* at 1010 (¶20). This honorable Court found that the above-referenced facts were sufficient to support the jury's verdict on a theory of aiding and abetting. *Id.* 1011 (¶22).

The case of *Shumpert v. State*, 935 So. 2d 962 (Miss. 2006), is also instructive. In *Shumpert*, the victim approached Shumpert wanting to purchase cocaine. *Id.* at 965 (¶2). Shumpert told the victim to leave because too many police officers were around. *Id.* As the victim was walking away, Shumpert shouted to one of his friends to hit the victim. *Id.* at (¶3). The friend complied and the victim was ultimately beaten to death. *Id.* at (¶5). Shumpert would later testify that his involvement in the victim's beating was limited to hitting him one time, while another witness testified that Shumpert also kicked the victim in the head. *Id.* at 969 (¶22). The supreme court found that even if Shumpert had not participated in kicking the victim in the head, he was still guilty of murder for aiding and abetting in bringing about the victim's death. *Id.* In light of *McDowell* and *Shumpert*, Smith's claim that the State failed to provide legally sufficient evidence to support a murder conviction must fail.

Smith goes on to argue that although the State did not prove his intent to kill, there was ample evidence to support a manslaughter conviction. He urges this Court to remand for resentencing on the charge of manslaughter, citing *Wells v. State*, 305 So. 2d 333 (Miss. 1974) for

support. *Wells* is easily distinguishable. In *Wells*, no State witness saw or heard the altercation between Wells and the victim. The defendant and two defense witnesses testified that the victim had grabbed Wells's neck and choked him before Wells pulled out a knife. They further testified that the victim fell onto the knife in the affray. There was no evidence to dispute these assertions. The facts of *Wells* are a far cry from what occurred in the case *sub judice*. Smith banded together with the four codefendants to confront Fair. They waited for him to emerge from his apartment. When he did, Fair did not lay a hand on any of the defendants before they jointly beat him to death. Although he may have made a derogatory comment about Smith's mother, words alone are not adequate provocation to reduce a homicide from murder to manslaughter. *Fryou v. State*, 987 So.2d 461, 467 (¶28) (Miss. Ct. App. 2008).

The jury was clearly instructed on the requisite intent for murder. It was further given the option of finding Smith guilty of manslaughter if the State failed to prove that he intended to kill Fair. The fact that the jury declined to find Smith guilty of manslaughter is further evidence that the State proved that he intended to kill Fair.

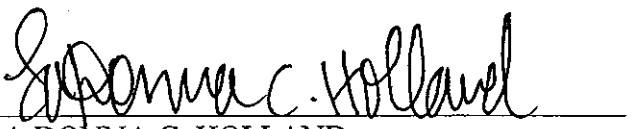
For the foregoing reasons, Smith's legal sufficiency argument must fail. To the extent that the jury was presented with conflicting evidence, as previously stated, it is enough that the conflicting evidence presented a factual dispute for jury resolution. Accordingly, Smith's claim that the verdict was against the weight of the evidence must also fail.

CONCLUSION

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

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

LA DONNA C. HOLLAND
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

CERTIFICATE OF SERVICE

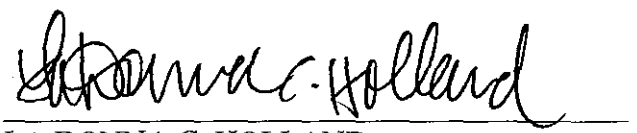
I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Charles E. Webster
Circuit Court Judge
Post Office Drawer 998
Clarksdale, MS 38614

Honorable Laurence Y. Mellen
District Attorney
Post Office Box 848
Cleveland, MS 38732

George S. Luter, Esquire
Attorney At Law
Post Office Box 3656
Jackson, MS 39207-3635

This the 17th day of November, 2008.



LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

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