

NO. 2007-KA-00381

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

ANTHONY SNEED *A/K/A TRIGGER*,;
ANTHONY SMITH *A/K/A STICKY*,;
THOMAS GERMAN *A/K/A TOMMY C*,;
JAMARIO BRADY *A/K/A MARIO A/K/A*
TURTLE AND JOHNNY BICKHAM

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT,
ANTHONY SMITH *A/K/A STICKY*
ORAL ARGUMENT REQUESTED

GEORGE S. LUTER

MSB # [REDACTED]

405 Tombigbee Street

Post Office Box 3656

Jackson, Mississippi 39207-3656

Telephone: (601) 948-0021

Facsimile: (601) 948-0093

GEOLAW1502@AOL.COM

Attorney for Appellant ANTHONY SMITH, A/K/A STICKY

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

ANTHONY SNEED *A/K/A TRIGGER*;
ANTHONY SMITH *A/K/A STICKY*;
THOMAS GERMAN *A/K/A TOMMY C*;
JAMARIO BRADY *A/K/A MARIO A/K/A*
TURTLE AND JOHNNY BICKHAM

APPELLANTS

VS.

No. 2007-KA-00381

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 disqualification or recusal.

1. Anthony Smith, Appellant;
2. George S. Luter, Attorney for Appellant;
3. Honorable Laurence Y. Mellen, District Attorney; and
- 4.. Hon. Charles E. Webster, Coahoma County Circuit Judge.

Respectfully submitted,

GEORGE S. LUTER


ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

	PAGE(S)
CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT REGARDING ORAL ARGUMENT.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE FACTS.....	2-3
SUMMARY OF THE ARGUMENTS.....	4
ARGUMENTS.....	4-8
1. The trial court erred in denying the appellant's Motion for Severance.	
2. The trial court erred in granting the aiding and abetting Instruction C-16.	
3. The verdict was against the overwhelming weight of the evidence.	
CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Berry v. State, 728 So. 2d 568 (Miss. 1999)	6
Crawford v. State, 133 Miss. 147, 97 So. 534 (1923)	7
Forbes v. State, 771 So. 2d 942, 952 (Miss. Ct. App. 2000)	4
Hicks v. State, 419 So. 2d 215 (Miss. 1982)	4
Hornberger v. State, 650 So. 2d 510 (Miss. 1995)	3
Payton v. State, 785 So. 2d 267 (Miss. 1999)	4
Phillips v. State, 794 So. 2d 1034 (Miss. 2001)	7
Scarborough v. State, 893 So. 2d 265 (Miss. Ct. App. 2004)	4
Wells v. State, 305 So. 2d 333 (Miss. 1974)	8
 <u>OTHER AUTHORITIES</u>	
Miss. Code Ann. 97-3-35	7

IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

ANTHONY SMITH, A/K/A/ *STICKY*

APPELLANT

VS.

NO. 2007-KA-00381

STATE OF MISSISSIPPI

APPELLEE

I.

BRIEF OF APPELLANT

STATEMENT REGARDING ORAL ARGUMENT

The appellant Anthony Smith requests that oral argument be granted since such may be helpful to the Court in considering the issues raises in this case.

STATEMENT OF THE CASE

Anthony Smith, a/k/a *Sticky* (hereafter "Smith") was indicted along with codefendants Jamario Brady a/k/a *Mario* a/k/a *Turtle*, Thomas German a/k/a *Tommy C.*, and Johnny Bickham by the Coahoma County Grand Jury on November 28, 2006 for the murder of Herman Fair on August 11, 2006. (R. 8, RE 3, Tab 2). After a jury trial, Smith and all codefendants were convicted of murder and sentenced to life in the custody of the Mississippi Department of Corrections. Smith is in the custody of the Mississippi Department of Corrections.

II.

STATEMENT OF THE ISSUES

1. The trial court erred in denying the appellant's Motion for Severance.
2. The trial court erred in granting the aiding and abetting Instruction C-16.
3. The verdict was against the overwhelming weight of the evidence.

III.

STATEMENT OF THE FACTS

The facts of this case began around August 11, 2006 when the Coahoma County Sheriff's Department received a call from the Friars Point Police Department requesting assistance. (R 4-5). Upon arrival, the victim, Herman Fair was found near the Yates Street Apartments dead with multiple head trauma and a lot of blood around him. (R 5).

Investigation revealed that an altercation started between Fair and defendant Anthony "Sticky" Smith's mother. (R 7) Further investigation revealed Smith received a call regarding the altercation against his mother, Leanna "Baddy" Smith, and headed to the victim's apartment to discuss the matter. (R.311). Apparently, Smith was joined by the other defendants, Jamario Brady, also known as "Mario" or "Turtle", Anthony Sneed, also known also as "Trigger", Thomas German, also known as "Tommy C.", and one Johnny Bickham.

Enroute to the Fair's apartment, Smith's mother implored the group not to go to the Fair's apartment, but Smith responded that it just wanted to talk to talk to him. (R 311).

Once at Fair's apartment, the group waited for a while whereupon Fair came downstairs and asked "Where that bitch ass Baddy at?" (R 311). Fair then repeated the question, after which Smith hit Fair and Fair went down. (R 311).

At that point, defendant Brady started hitting Fair with a golf stick. Smith intervened, telling Brady not to kill Fair, that he wasn't trying to kill Fair, but just hurt him. At that point, all of the five defendants kicked Fair. (R 312).

After the encounter, Smith, Sneed, German, and Bickham left, joined shortly by Brady and the group went to a nearby apartment where Brady stated "My name is Turtle Squirtle. Yeah, I tried to kill the bitch." (R 315).

The defendants were later arrested and the golf club recovered from a soy bean field three

days later after Brady carried law enforcement officials to the location. (R 380-381).

After being arrested, all defendants gave statements to law enforcement authorities. (R 385-392).

Trial was had in Coahoma County Circuit Court before the Honorable Charles E. Webster on February 21, 22, and 23, 2007, after the Court denied the defendants' Motion to Sever the trials. (R 22-A-22-H, RE 7-14, Tab 4). After deliberations the jury found all defendants guilty of Murder (R 652, RE 19-20). The defendants were sentenced to life imprisonment. (R 31-33, RE 21-23, Tab 8). Post trial motions were denied and Smith timely filed to the Supreme Court which assigned this case to the Court of Appeals.

SUMMARY OF THE ARGUMENTS

The appellant Anthony Smith would assert the Circuit Court erred it denied his Motion to Sever since co defendant Jamario Brady was the defendant who most likely delivered the most lethal blows against the deceased, Herman Fair. Smith even implored Brady to stop. Trying Smith with Brady prejudiced Smith before the jury when the jury heard testimony of Brady's actions.

Smith would further assert the Circuit Court erred in giving jury instruction C-16. This instructions has been condemned by the Mississippi Supreme Court since it improperly give the jury instruction to find a defendant guilty if he committed only one element of a crime. *See Hornberger v. State*, 650 So. 2d 510 (Miss. 1995).

Smith would finally assert that the verdict of the jury was against the overwhelming weight of the evidence. The evidence shows that Smith hit Fair once whereupon Brady delivered likely fatal blows with a golf club while Smith told him to stop that he was not trying to kill Fair, but to hurt him. (R 312). Brady later bragged that he tried to kill Fair. (R. 315). Smith would assert that the evidence at best only warrants a conviction for manslaughter since no evidence of intent to kill was shown by Smith.

IV.

ARGUMENT

1. The trial court erred in denying the appellant's Motion for Severance.

Appellant would admit the standard of review of the granting or denying of a severance is "abuse of discretion." See *Hicks v. State*, 419 So. 2d, 215 (Miss. 1982) ["A trial court's ruling denying a motion for a severance will not be disturbed unless there is a positive showing of an abuse of discretion."]. However, "A severance is required when one codefendant seeks to exculpate himself at the expense of the other, and when the evidence at trial disproportionately is relevant to the guilt of only one of the defendants." *Forbes v. State*, 771 So. 2d 942, 952 (Miss. Ct. App. 2000) See also *Scarborough v. State*, 893 So. 2d 265 (Miss. Ct. App. 2004), *Payton v. State*, 785 So. 2d 267 (Miss. 1999).

In *Payton, supra*, the Supreme Court reversed the Court of Appeals citing *Duckworth v. State*, 477 So. 2d 1204 (Miss. 1989) in finding the severance was improperly denied:

"In *Duckworth v. State*, [citation omitted] this Court state that there are a number of criteria to be used to determine if the denial of a motion for severance is proper. These criteria are whether or not the testimony of one codefendant tends to exculpate that defendant at the expense of the other defendant and whether the balance of the evidence introduced at trial tends to go more to the guilt of one defendant rather than the other. Absent a showing of prejudice, there are no grounds to hold that the trial court abused its discretion."

In the case at bar, Smith would assert that the evidence weighed heavily to the guilt of codefendant Jamario Brady than Smith since it was Brady who viciously attacked the deceased with a golf club even after Smith implored him to stop and then later bragged about the killing stating, "My name is Turtle Squirtle. Yeah, I tried to kill the bitch." (R 315). Being tried with Brady could only prejudice Smith before the jury and taint him with imputed guilt for Brady's wrongdoing. Finally, the Court's ruling that the use of the defendants' statements would be

limited at trial by the defendants effectively denied the defendant Smith's right to cross examination yet allowed the State to taint Smith with the actions of the worst offender, Brady. (See court's ruling. R 26-27, RE 16-17).

Therefore, Smith would assert that the trial court abused its discretion in not severing his trial and allow him to be tried separately from the other defendants and this Court should reverse and remand for a new trial separately.

2. The trial court erred in granting the aiding and abetting Instruction C-16.

The trial court gave instruction C-16 which is as follows:

"The Court instructs the jury that each person at the time, 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 word, overt act or deed. In order to be found guilty as aiders and abettors 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 that such defendant or defendants shared the same intent as the person principally committing the crime, then and in that event you should find such defendant or defendants guilty of murder or manslaughter, as you so find." (R 118, RE 18, Tab 6).

Smith would assert that the trial court committed reversible error by giving the above instruction particularly. when the Court also gave instruction C-11 which is as follows:

"The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense charged. The law recognized that, ordinarily, anything a person can do for himself may also be accomplished by that person acting in concert with, or aiding or abetting another persons or persons in a joint effort or enterprise.

If a defendant is acting in concert with or aiding or abetting another person and performs acts with the intent to commit a crime, the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts of engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others it is necessary that the defendant deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either acted in concert or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that a defendant voluntarily participated in its commission with the intent to violate the law.” (R 107).

It should be apparent that read together the two instructions could only serve to confuse the jury. One (C-11) does not define participation in the crime, but states a defendant can be found guilty if he aided and abetted the crime, while C-16 states a defendant can be found guilty if he did any act which is an element of murder or manslaughter. Such could only leave the jury confused and unsure how to proceed other than to convict.

Confusing instructions have been condemned many times by the appellate courts in Mississippi. *Berry v. State*, 728 So. 2d 568 (Miss. 1999) recognized the problem of confusing instructions as to the elements of crimes:

“In this case, however, we find that reading the instructions as whole did not cure the error resulting from the improper instruction. The jury was in fact informed of elements of transfer of cocaine and the State’s burden of proof in this case in instructions other than S-3. The problem with the offending instruction is 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. Even if the jury read all of the instructions together, they could still be misled into believing that Instruction S-3 was merely another option in addition to the choice finding that Berry committed all of the elements of the crime herself. We find that the instruction on an accessory in this case was confusing and misleading, and there-

requires reversal. *Brazile v. State*, 514 So. 2d 325, 326 (Miss. 1987) (“inaccurate and confusing nature” of instructions requires reversal and remand for new trial).”

Smith would assert that the Court should follow the Court in *Berry, supra*, and reverse and remand his case for a new trial with the jury properly instructed.

3. The verdict was against the overwhelming weight of the evidence.

Smith would assert that the evidence shows that he struck the deceased, knocking him down, and lightly kicked him. When codefendant Brady began to hit the deceased with a golf club, the evidence shows he intervened, telling him not to kill the deceased. (R 3120). Further Rotandria Foster testified that the other defendants besides Brady just kicked the deceased one time mainly to urge the deceased to “Get up. Come on. Get up.” (R 340).

Further, the state’s own witness, pathologist Dr. Steven Haynie testified it was his opinion that death blows would be hard to cause death from lateral kicks to the chest side. (R 482).

Smith would assert that he can only be found guilty of murder as a matter of law if the evidence establishes beyond a reasonable doubt that he aided and abetted the murder of the deceased. In *Crawford v. State*, 133 Miss. 147, 97 So. 534 (1923) the Supreme Court held an aider and abettor must “do something that will incite, encourage, or assist the actual perpetrator in the commission of the crime.” The evidence firmly establishes that Smith’s intent was only to hurt the deceased, not stay at the scene and beat him down as Brady did.

Alternatively, the Court should consider whether the evidence only supported a verdict of manslaughter. Mississippi Code Ann. 97-3-35 defines manslaughter as “the killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self defense...” Manslaughter has been defined in *Phillips v. State*, 794 So. 2d 1034 (Miss. 2001) 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 the time. That term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.” [Citations omitted].

Further, *Phillips* notes that the passion required for manslaughter is:

“...an emotion brought about by some insult, provocation, or injury, which would produce in the minds of ordinary men “the highest degree of exasperation.” *Graham*, 582 So. 2d at 1018 (citing *Barnett v. State*, 563 So. 2d 1377 (Miss. 1990)).

In a similar case, *Wells v. State*, 305 So. 2d 333 (Miss. 1974), the Supreme Court reversed and remanded the defendant’s murder conviction and remanded it for sentencing as manslaughter after the deceased grabbed the man’s throat and the defendant pulled a knife to scare the deceased and cut his throat killing him.

In the case at bar, there is ample evidence of manslaughter. The deceased took action against Smith’s mother that would enrage or cause a family member to investigate such actions such as Smith did. The deceased upon the group showing up at his residence again insulted Smith’s mother when he stated ““Where that bitch ass Baddy at?” (R 311) Smith only hit the deceased once and told Brady to stop beating the deceased with the golf club and stated he did not want to kill the deceased. (R 311). Conversely, it was Brady who bragged “My name is Turtle Squirtle. Yeah, I tried to kill the bitch.” (R 315). Therefore, Smith would argue that as a matter of law the evidence does not prove the crime of murder and the Court should reverse and remand this case for resentencing or a new trial for manslaughter.

CONCLUSION

The Court should reverse and remand this case for a new trial for its error in denying Smith’s Motion for Severance, for improperly granting instruction C-16, or for a new trial on the charge of manslaughter.

Respectfully submitted,

Anthony Smith, a/k/a Sticky, Appellant

BY: George A. Luter
GEORGE S. LUTER, His Attorney

GEORGE S. LUTER
MSB# [REDACTED]
ATTORNEY FOR APPELLANT
405 TOMBIGBEE STREET
POST OFFICE BOX 3656
JACKSON, MS 39207-3656
TELEPHONE 601-948-0021
FAX 601-948-0093
GEOLAW1502@AOL.COM

CERTIFICATE OF SERVICE

I, George S. Luter, attorney for Appellant, hereby certify that I have mailed postage prepaid a copy of the foregoing Brief of Appellant to the following:

Hon. Charles E. Webster
Coahoma County Circuit Court
Post Office Box 428
Clarksdale, MS 38614

Leslie Lee, Esq.
Office of Indigent Appeals
301 North Lamar, Suite 210
Jackson, MS 39201-1005

Charles Maris, Esq.
Special Assistant Attorney General
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205-0220

Mr. Anthony Smith, MDOC #127402
Mississippi State Penitentiary
Post Office Box 1057
Parchman, MS 38738

SO CERTIFIED this the 28th day of February, 2007.



GEORGE S. LUTER, Attorney for Appellant