

COPY
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VICTOR LOWELL FRYOU

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APPELLANT

AUG 27 2007

V.

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SUPREME COURT
COURT OF APPEALS

NO. 2007-KA-0635-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VICTOR LOWELL FRYOU

APPELLANT

V.

NO. 2007-KA-0635-COA

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. Victor Lowell Fryou, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Stephen B. Simpson, Circuit Court Judge

This the 27th day of August, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii-iv
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	1
SUMMARY OF THE ARGUMENT	4
I. DID THE TRIAL COURT ERR IN FAILING TO GIVE A LESSER- INCLUDED OFFENSE INSTRUCTION ON SIMPLE MURDER.	4
II. DID THE TRIAL COURT ERR IN FAILING TO GIVE A LESSER-INCLUDED OFFENSE INSTRUCTION ON MANSLAUGHTER.	9
III. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE APPELLANT’S REQUEST FOR A JURY INSTRUCTION BASED UPON THE WEATHERSBY RULE.	13
CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

CASES

<i>Ballenger v. State</i> , 667 So.2d 1242, 1255 (Miss. 1995)	9
<i>Buchanan v. State</i> , 567 So.2d 194, 197 (Miss. 1990)	11
<i>Chandler v. State</i> , 946 So.2d 355, 360 (Miss. 2007)	10
<i>Chinn v. State</i> , 958 So.2d 1223 (Miss. 2007)	7, 9
<i>Conner v. State</i> , 632 So.2d 1239, 1254 (Miss. 1993)	9
<i>Harper v. State</i> , 478 So.2d 1017 (Miss. 1985)	4
<i>Hester v. State</i> , 602 So.2d 869, 872 (Miss. 1992)	7
<i>Love v. State</i> , 441 So.2d 1353, 1356 (Miss. 1983)	7
<i>Manuel v. State</i> , 667 So.2d 590 (Miss. 1995)	7
<i>McGowan v. State</i> , 541 So.2d 1027, 1028 (Miss. 1989)	10
<i>Murphy v. State</i> , 566 So.2d 1201, 1206-07 (Miss. 1990)	7
<i>Randall v. State</i> , 716 so.2d 584 (Miss. 1998)	9
<i>Reddix v. State</i> , 731 So.2d 591 (Miss. 1999)	7
<i>Sanders v. State</i> , 781 So.2d 114, 119 (¶ 16) (Miss. 2001)	4
<i>Sayles v. State</i> , 552 So.2d 1383, 1390 (Miss. 1989)	7
<i>Tait v. State</i> , 669 So.2d 85, 89 (Miss. 1996)	11
<i>Weathersby v. State</i> , 147 So. 481, 482 (1933)	12
<i>Welch v. State</i> , 566 So.2d 680, 684 (Miss. 1990)	4, 8, 10
<i>Wheeler v. State</i> , 536 So.2d 1341, 1344 (Miss. 1988)	4

STATUTES

Miss. Code Ann. § 97-3-19(e)	1
Miss. Code Ann. § 97-3-73 (1972)	1, 4
Miss. Code Ann. §97-3-19 (l)(a) (1972)	5
Miss. Code Ann. §97-3-35 (Rev. 2000)	11

STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON SIMPLE MURDER.**
- II. WHETHER THE TRIAL COURT ERR IN FAILING TO GIVE A LESSER-INCLUDED OFFENSE INSTRUCTION ON MANSLAUGHTER.**
- III. WHETHER THE TRIAL COURT ERRED IN FAILING TO APPLY THE WEATHERSBY RULE.**

STATEMENT OF THE CASE

During the November 2005 Term of the Grand Jury, for the Circuit Court for the First Judicial District, Harrison County, Mississippi, Victor Lowell Fryou was indicted for wilfully, unlawfully, feloniously and with or without design to effect death, kill and murder Patrick Devriendt, a human being, without authority of law, while in the commission of the crime and felony of robbery, as defined by Miss. Code Ann. § 97-3-73 (1972), contrary to and in violation of Miss. Code Ann. § 97-3-19(e) (1972, as amended). After a jury trial, Mr. Fryou was convicted of capital murder, the state having waived the death penalty, he was sentenced on February 8, 2007 to serve a life sentence without the benefit of parole or probation.

STATEMENT OF THE FACTS

Audrey Lee Ann Newsome (Ms. Newsome) and Victor Lowell Fryou (Mr. Fryou) lived together for many years and were the parents of a four year old daughter. Ms. Newsome had two children that were not Mr. Fryou's. They lost their trailer and were living with Mr. Fryou's sister, Valerie Fryou. On July 31, 2005, Mr. Fryou was in jail on a misdemeanor possession of paraphernalia charge and he was released on his own recognizance on August 8, 2005. T. 265. Prior to his release, Ms. Newsome

engaged in sexual intercourse with Patrick Devriendt (Mr. Devriendt) to get money to bond Mr. Fryou out of jail. Mr. Devriendt promised her one hundred dollars for sexual favors, but only gave her forty dollars. At one point in time, she and Mr. Fryou were neighbors with Mr. Devriendt and the two men worked roofing jobs together. However, they were no longer neighbors and lived approximately two and one-half miles apart. When Mr. Fryou was released from jail, he went to his sister, Valerie Fryou's home where Ms. Newsome and their children were. Once he arrived at his sister's house, she told him that Ms. Newsome and Mr. Devriendt had been messing around. T. 267. He confronted Ms. Newsome and she denied it. Mr. Fryou then went to see Mr. Devriendt and he denied having sexual intercourse with Ms. Newsome. However, Mr. Devriendt told him he loaned Ms. Newsome forty dollars and as soon as he could come back to work with him he owed him the forty dollars. They parted on that day on good terms. T. 268. When Mr. Fryou arrived home, he lied and told Ms. Newsome that Mr. Devriendt admitted she and he had had sexual intercourse. Ms. Newsome admitted it was true.

Mr. Fryou worked a job with his brother redesigning his brother's house up until the morning of August 20, 2007. His brother paid him at the completion of the job. On the morning of August 20, 2005, he went over to see Mr. Devriendt about a roofing job and to return his wallet that Ms. Newsome stole from him. He arrived early because the earlier you get to the job the cooler it is. T. 271. He borrowed Mr. Devriendt's truck to run to the Chevron on Canal Road to purchase some cigarettes. He had money his brother gave him and six hundred dollars Ms. Newsome gave him that she got from Mr. Devriendt. T. 272. He arrived back at Mr. Devriendt and they discussed the roofing job and watched the Weather Channel. When he and Mr. Devriendt were neighbors he would come over early and they would have coffee and watch the Weather Channel to see if rain, scattered showers or whatever.

Mr. Devriendt started pouring a cup of coffee and asked where Ms. Newsome was. Mr. Fryou told him he got rid of her. T. 275. At that point, Mr. Devriendt said something about Ms. Newsome that hurt his feelings. T. 276. Mr. Fryou let his emotions get the best of him and he took a swing at him because he was upset with the things Mr. Devriendt was saying he had done with Ms. Newsome. T. 305. After he took a swing at Mr. Devriendt, Mr. Devriendt grabbed him and slammed him to the floor and got on his back and began pounding his face into the floor. T. 276 and 305-306. Because Mr. Fryou weighed only one hundred thirty pounds and Mr. Devriendt was six feet tall and weighed two hundred twenty pounds it was difficult for Mr. Fryou to get loose from Mr. Devriendt. T. 276. and T. 195. Mr. Fryou was struggling to get Mr. Devriendt off his back and because of the pounding to his head, Mr. Fryou's nose and his mouth were busted. Blood was running down in his eyes. Everything was blurry and while Mr. Devriendt had him pinned to the floor, Mr. Fryou saw a knife on the floor and he picked the knife up and stabbed Mr. Devriendt with it. T. 276. He further testified that he told Investigator Pullen that after he killed Mr. Devriendt, he decided to steal his wallet to make it look like a robbery. T. 301. However, Mr. Fryou testified that he made up the story that he stole Mr. Devriendt's wallet to protect Ms. Newsome, who stole his wallet the day before. He stated that he did not want her to go to jail. T.302.

After Mr. Fryou killed Mr. Devriendt, he went home and told Ms. Newsome that he had killed him after they had gotten into a confrontation. She guessed over her. She testified that she did not steal Mr. Devriendt's wallet but that Mr. Fryou came in and had like a thousand dollars in paper money. She said he told her he got it from Mr. Devriendt. T.127. They later went to the Grand Casino Hotel in Gulfport and as soon as she could get free she went and reported the murder to security in the hotel lobby. T. 130.

Mr. Fryou was arrested after he went back to his sister's house and had her call the sheriff's department to tell them where he was. T. 307.

SUMMARY OF THE ARGUMENT

I. DID THE TRIAL COURT ERR IN FAILING TO GIVE A LESSER-INCLUDED OFFENSE INSTRUCTION ON SIMPLE MURDER.

Mr. Fryou contends that the trial court erred when it refused to grant him a lesser-included offense instruction on simple murder. He states that the evidence is insufficient to find he was engaged in the commission of robbery at the time he killed Mr. Devriendt. The indictment states in pertinent part: Victor Lowell Fryou did then and there wilfully, unlawfully, feloniously and with or without design to effect death, kill and murder Patrick Devriendt, a human being, without authority of law, while in the commission of the crime and felony of Robbery, as defined by Section 97-3-73, Miss. Code of 1972.

By its form, Miss. Code Ann. § 97-3-19, implicitly recognizes the established doctrine that simple murder is a lesser included offense of capital murder. Wheeler v. State, 536 So.2d 1341, 1344 (Miss. 1988).

"Lesser-included offense instructions should be given if there is an evidentiary basis in the record that would permit a jury rationally to find the defendant guilty of the lesser offense and to acquit him of the greater offense." Sanders v. State, 781 So.2d 114, 119 (¶ 16) (Miss. 2001) (quoting Welch v. State, 566 So.2d 680, 684 (Miss. 1990)). An evidentiary basis is established when a "rational" or "reasonable" jury could find the defendant not guilty of the principle offense charged yet find the defendant guilty of the lesser-included offense. Harper v. State, 478 So.2d 1017 (Miss. 1985).

The trial court denied jury instructions D-14 and D-15 which would have given the jury the option to consider simple murder and manslaughter as lesser included offenses of capital murder. RE 60-62. The only reasoning the trial court gave for denial of these instructions was that manslaughter and self defense are opposing defenses and that the trial court did not believe the defense was entitled to a heat of passion manslaughter instruction and a self-defense instruction. T. 334.

To find simple murder the evidence would have had to have shown the killing of a human being without the authority of law by any means or in any manner when done with deliberate design to effect the death of the person killed. Miss. Code Ann. §97-3-19 (1)(a) (1972).

There is substantial evidence in the record to support the giving of a murder instruction. First, Officer Kamien testified that Mr. Fryou confessed to killing Mr. Devriendt for having sexual intercourse with Audrey. T. 98-99. Next, Ms. Audrey Newsome testified that when Mr. Fryou left the morning of August 20, 2005 around 3:35 a.m. he had a knife with him and he told her he was going to the port to see if he could get a job throwing chicken. T. 121. When he came back he told her he went to Mr. Devriendt's to get work and they got into a confrontation over her and he killed him. T. 127-128. On cross-examination she admitted telling Captain Pullen that Mr. Fryou might have been going there to look for work. He might have gone to see if Mr. Devriendt would hire him back on. She also testified that Mr. Fryou had a lot of paper money when he came from Mr. Devriendt. T. 127-128, 146. Here, there is a dispute between Ms. Newsome and Mr. Fryou, who says Ms. Newsome stole Mr. Devriendt's wallet and gave him part of the money the day before he killed Mr. Devriendt. T. 302.

Candy Woodard testified that Mr. Fryou came by to borrow money to get gas and he told her that his girlfriend went to see his boss to borrow money to get him out of jail. She said he further stated that his boss told her he would not give her the money unless she slept with him. He was supposed to give her \$100 dollars but he only gave her \$45. When he got out of jail he went to talk

to his boss to try to let bygones be bygones and his boss started talking smack to him and he lost it and killed him. T. 151-152.

Mr. Fryou testified that he went to Mr. Devriendt's house to start back to work. Says Mr. Devriendt opened the door and invited him in and they discussed the job that he had available. He says they were in the kitchen and Mr. Devriendt started off by asking whether he got rid of his girlfriend. He asked him, "Kicked that bitch to the curb yet". Says he further said, "the only thing she is good for is giving head." State's Exhibit 27. At that time, he said he swung at him and missed, then he swung at him again and missed the second time. Then, Mr. Devriendt knocked him down and got on top of his back and started pounding his face into the floor. T. 276. He had Mr. Fryou pinned down on the floor because he was bigger than him. Mr. Devriendt was six feet and weighed 220 pounds and Mr. Fryou weighed 130 pounds. T. 276 and 195. There was a knife on the floor and he picked it up. He said he stabbed and kept stabbing to try to get loose from him. He said he did not bring a knife with him despite what Ms. Newsome stated. He testified that he saw a knife on the floor and grabbed it and that's how he got Mr. Devriendt off of him. Exhibit 27. The state displayed a photo showing knives that were in the kitchen and the holder with some knives missing. T. 301. During Mr. Fryou's audio statement, Captain Pullen remarked to him that he noticed that his chin was marked up. Exhibit 27. Mr. Fryou said he did everything to get away after the fight started. Says Mr. Devriendt kept fighting him and trying to get the knife from him. Say they fought and scuffled all of the way through the kitchen into the living room. Mr. Fryou stated that he lost his mind. He said he went off. After Mr. Devriendt felled down by the wall, he stabbed him a couple more times to make sure he couldn't get up. He said he did not plan or expect for it to go this way, because he did not go over there to kill him. He was suppose to have been over there a week before for a job. He also said that he tried to clean up any fingerprints of his and that he staged a robbery by taking Mr. Devriendt's

wallet. Exhibit 27. However, he testified during trial that Ms. Newsome stole Mr. Devriendt's wallet the day before and gave him \$600. He said he made up the story that he stole the wallet to protect Ms. Newsome because he did not want her to go to jail. T. 302. Mr. Fryou was very emotional during the interview. He was clearly upset over what Pat said he did with Ms. Newsome. Exhibit 27.

To support his version that Mr. Devriendt pinned him to the floor and was pounding his head to the floor and also that Mr. Devriendt kept fighting him, Mr. Fryou offered into evidence Exhibits 1-3 to show the injuries he received during the altercation with Mr. Devriendt. Exhibits 1-3 each has nine photos on one sheet. Exhibit 1 photos display cuts on Mr. Fryou's back, neck, arms, fingers and legs. Exhibit 2 display photos of Mr. Fryou's face, neck and arms. These photos display gashes on both of Mr. Fryou's eyebrows and the side of his face and other facial injuries. Finally, Exhibit 3 display photos of Mr. Fryou's body parts showing cuts, scratches and bruises to his legs, hands, arms and back. T. 287-290.

"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, 958 So.2d 1223 (Miss. 2007). "A criminal defendant has right to assert alternative theories of defense, even inconsistent alternative theories as long as there is an evidentiary basis in the record. Reddix v. State, 731 So.2d 591 (Miss. 1999)citing Love v. State, 441 So.2d 1353, 1356 (Miss. 1983). "In homicide cases, the trial court should instruct the jury about a defendant's theories of defense, justification, or excuse that are supported by the evidence, no matter how meager or unlikely, and the trial court's failure to do so is error requiring reversal of a judgement of conviction." Manuel v. State, 667 So.2d 590 (Miss. 1995) citing Hester v. State, 602 So.2d 869,872 (Miss. 1992)citing Murphy v. State, 566 So.2d 1201, 1206-07 (Miss. 1990); Sayles v. State, 552 So.2d 1383, 1390 (Miss. 1989).

“Defendants are entitled to instructions on their theory of the case for which there is foundation in evidence, even though evidence might be weak, insufficient, inconsistent, or of doubtful credibility and even though the sole support of defense is the defendant’s own testimony.” Welch v. State, 566 So.2d 680 (Miss. 1990).

In the present case, whether Mr. Fryou killed Mr. Devriendt is not at issue. The issue is whether the jury could have found Mr. Fryou guilty of killing Mr. Devriendt without Mr. Fryou being in the commission of a robbery. There was a dispute between Ms. Newsome and Mr. Fryou over who took the wallet. Ms Newsome admitted that she began a relationship with Mr. Devriendt while Mr. Fryou was incarcerated and it is reasonable that she went over to see him the day before the killing and took his wallet. All of the other evidence in the record clearly shows the killing took place because of the sexual relationship between Mr. Devriendt and Ms. Newsome and the fact that Mr. Devriendt bragged about it. Also, Mr. Fryou admitted that once Mr. Devriendt started pounding his head, he did anything he could to get free. He was clearly afraid and he got angrier after Mr. Devriendt held him down on the floor pounding his head. Finally, a review of the tape shows that the killing took place over Ms. Newsome because Mr. Fryou was very upset and that was obviously his reason for killing Mr. Devriendt. Also, there was not any evidence stated in the record of a problem between Mr. Fryou and Mr. Devriendt until the sexual relationship with Ms. Newsome.

Based on the testimony of the above witnesses there is an evidentiary basis in the record to support the giving of a simple murder instruction. Simple murder, a lesser-included offense instruction for capital murder, should have been granted because the trial judge and ultimately this Court cannot say, taking the evidence in the light most favorable to Mr. Fryou and considering all the reasonable inferences which may be drawn in favor of Mr. Fryou from the evidence, that no reasonable jury could find Mr. Fryou guilty of simple murder (conversely, not guilty of at least one essential element

of the principal charge) Randall v. State, 716 so.2d 584 (Miss. 1998), citing Ballenger v. State, 667 So.2d 1242, 1255 (Miss. 1995) (quoting Conner v. State, 632 So.2d 1239, 1254 (Miss. 1993)). cert. denied, 518 U.S. 1024, (1996).

II. DID THE TRIAL COURT ERR IN FAILING TO GIVE A LESSER-INCLUDED OFFENSE INSTRUCTION ON MANSLAUGHTER.

Mr. Fryou contends that the trial court erred when it refused to grant him a lesser-included offense instruction on manslaughter. The trial court denied jury instructions D-14 and D-15 which would have given the jury the option to consider simple murder and manslaughter as lesser included offenses of capital murder. RE 75-77. The only reasoning the trial court gave for denial of these instructions was that manslaughter and self defense are opposing defenses and that the trial court did not believe that the defense was entitled to a heat of passion manslaughter instruction and a self-defense instruction. T. 334.

The trial court also refused the definition of heat of passion jury instruction which was D-22. T. 336. Jury Instruction D-22 read: The court instructs the jury that “heat of passion” has been defined 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 or one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

“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, 958 So.2d 1223 (Miss. 2007). “Lesser included offense instructions should be given if there is an evidentiary basis in the record that would permit a jury

rationality to find the defendant guilty of the lesser offense and to acquit him of the greater offense. Chandler v. State, 946 So.2d 355 (Miss. 2007) citing Welch v. State, 566 So.2d 680, 684 (Miss. 1990).

A lesser-included offense instruction should be granted unless the trial judge and ultimately this Court can say, taking the evidence in the light most favorable to the accused and considering all the reasonable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of a simple murder([and] conversely, not guilty of at least one essential element of the principal charge) Chandler v. State, 946 So.2d at 360 citing McGowan v. State, 541 So.2d 1027, 1028 (Miss. 1989).

In the present case, Mr. Fryou testified that on the morning of August 20, 2005, he went over to see Mr. Devriendt about a roofing job and to return his wallet that Ms. Newsome stole from him. He arrived early because the earlier you get to the job the cooler it is. T. 271. He said after knocking on the door and windows Mr. Devriendt invited him in and they discussed the job that Mr. Devriendt had available. At some point, Mr. Devriendt provoked Mr. Fryou with the words that he spoke. He says they were in the kitchen and Pat started off by asking whether he got rid of his girlfriend. He asked him, "Kicked that bitch to the curb yet". Says he further said the only thing she is good for is giving head. State's Exhibit 27. At that time, he said he swung at him and missed, then he swung at him again and missed the second time. Mr. Devriendt made the first contact when he knocked him down and got on top of his back and started pounding his face into the floor. T.306. Mr. Devriendt had him pinned down on the floor because he was bigger than him. Mr. Devriendt was six feet and weighed 220 pounds and Mr. Fryou weighed 130 pounds. T. 276 and 195. There was a knife on the floor and he picked it up. He said he stabbed and kept stabbing to try to get loose from him. He said he did not bring a knife with him despite what Ms. Newsome stated. He testified that he saw a knife on the floor and grabbed it and that's how he got Mr. Devriendt off of him. Exhibit 5 was offered into evidence

to support Mr. Fryou's theory that he got the knife off the floor. Exhibit 5 has a photo showing knives that were in the kitchen and the holder with some knives missing. T. 301. During Mr. Fryou's statement Captain Pullen remarked to him that he noticed that his chin was marked up. Exhibit 27. Mr. Fryou said he did everything to get away after the fight started. Says Pat kept fighting him and trying to get the knife from him. Say they fought and scuffled all of the way through the kitchen into the living room. Mr. Fryou asserts that this is consistent with Dr. Paul McGarry's testimony that the wounds were administered in almost a frenzy. T. 198. Mr. Fryou stated that he lost his mind. He said he went off. Says Pat felled down by the wall and he stabbed him a couple more times to make sure he couldn't get up. He said he did not plan or expect for it to go this way. Says he did not go over to kill him. He was suppose to been over there a week before for a job.

Miss. Code Ann. § 97-3-35 (Rev. 2000) states: "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, shall be manslaughter." The Mississippi Supreme Court has 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 the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror. Tait v. State, 669 So.2d 85, 89 (Miss. 1996) citing Buchanan v. State, 567 So.2d 194, 197 (Miss. 1990).

There is an evidentiary basis in the record for a manslaughter "heat of passion" instruction. Mr. Fryou was invited into Mr. Devriendt's home by Mr. Devriendt, so he had a right to be where he was. The provocation in the present case was the words used to describe Ms. Newsome who Mr. Fryou had been with for nine years and had fathered a small child. Mr. Fryou contends the words, "kicked that

bitch to the curb yet”, and “the only thing she is good for is giving head”, was sufficient provocation to cause him to swing at Mr. Devriendt. Next, the pounding of Mr. Fryou’s face against the floor by Mr. Devriendt who weighed almost a hundred pounds more than he, coupled with the words Mr. Devriendt spoke caused the emotional state of Mr. Fryou to be such as he described, “ that he lost his mind and just went off”.

A manslaughter “heat of passion” instruction should have been granted because the trial judge and ultimately this Court cannot say, taking the evidence in the light most favorable to Mr. Fryou and considering all the reasonable inferences which may be drawn in favor of Mr. Fryou from the evidence, that no reasonable jury could find Mr. Fryou guilty of manslaughter (conversely, not guilty of at least one essential element of the principal charge).

III. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE APPELLANT’S REQUEST FOR A JURY INSTRUCTION BASED UPON THE WEATHERSBY RULE.

Mr. Fryou contends that the trial court erred in refusing to give jury instruction D-13 which reads: The Court instructs the jury that where the defendant is the only eyewitness to the alleged homicide, his 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 physical facts, or by facts of common knowledge. R.E. 59.

[Where] the defendant or the defendant’s witnesses are the only witnesses 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. Weathersby v. State, 147 So. 481, 482 (1933).

In Weathersby the only eyewitness to a homicide was the appellant and his wife. The appellant and his wife were considerably frightened as the deceased, who had already been to their home moments earlier and threatened both of them with death, and was particularly abusive to appellant's wife, again approached their home with a pistol and more threats. When he reached within a few feet of their home, he was shot by the appellant. Their testimony made out a case of self-defense. The Court found the only distinct contradiction of their version of the killing was some evidence by the state that the shot went through some growing corn in such a manner as to have shown that the defendant could not have been at the point where he said he stood and the deceased at the point where appellant placed him. Other witnesses for the state corroborated in this particular the locations insisted upon by the appellant.

Mr. Fryou was the only eyewitness to the homicide of Mr. Devriendt. The state has not offered any evidence to substantially contradict Mr. Fryou's testimony as to heat of passion manslaughter and self-defense. The killing took place after Mr. Devriendt provoked Mr. Fryou to swing at him after words he spoke about Mr. Fryou's girlfriend of nine years. Mr. Devriendt made the first contact by slamming Mr. Fryou to the floor and sitting upon his back and pounding his head to the floor. T. 306. He was 220 pounds and Mr. Fryou was 130 pounds and Mr. Fryou was afraid of being seriously injured or killed. Exhibit 2 display photos of the injuries Mr. Fryou received to his face. There are gashes on both of Mr. Fryou's eyebrows and the side of his face and other facial injuries. Also, during the taped interview Captain Pullen comments on the marks on Mr. Fryou's chin. Exhibit 27. These photos substantiate Mr. Fryou's contention that Mr. Devriendt was slamming his head into the floor. They were in the kitchen when the fight started and there are knives on the table and missing from the holder in the photo in Exhibit 5. He further testified that he could not get Mr. Devriendt to stop fighting him once the fight started, they fought and scuffled through the kitchen into the living room. He said Mr.

Devriendt kept fighting him, trying to take the knife. Dr. McGarry's testimony that it would be fair to say that the wounds were administered in almost a frenzy is offered to support Mr. Fryou's contention that they fought and scuffled from the kitchen through the living room and that he could not get Mr. Devriendt to stop fighting him and trying to take the knife from him. He says he lost his mind and just went off. He further stated in Exhibit 27 that once Mr. Devriendt fell he stabbed him a couple more times to make sure he couldn't get up.

Upon a careful examination of the whole record this Court should come to the conclusion that the peremptory instruction for Mr. Fryou should have been granted for manslaughter and self-defense.

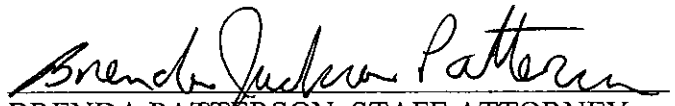
CONCLUSION

Based upon the testimony and other evidence in the record the trial court erred in failing to give both a simple murder and manslaughter instruction. Further, because Mr. Fryou was the only eyewitness to the homicide of Mr. Devriendt, and the state failed to substantially contradict it in material particulars by credible witnesses or physical facts or facts of common knowledge, then Mr. Fryou's version because it is reasonable should have been accepted as true and the trial court should have given a peremptory instruction for manslaughter and self-defense.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Victor Lowell Fryou, 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:

Honorable Stephen B. Simpson
Circuit Court Judge
Post Office Drawer 1570
Gulfport, MS 39502

Honorable Cono Caranna
District Attorney, District 2
Post Office Box 1180
Gulfport, MS 39502

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 27th day of August, 2007.


Brenda Jackson Patterson
COUNSEL FOR APPELLANT

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