IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

IRBY MATTHEW TATE — **APPELLANT**

VS. — **NO. 2007-KA-0670-COA**

STATE OF MISSISSIPPI — **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Defendant Irby Matthew Tate was indicted by the grand jury of Holmes County for the Culpable Negligent Homicide in violation of *Miss. Code Ann.* § 97-3-47. (Indictment c.p.4). After a trial by jury, Judge Jannie M. Lewis, presiding, the jury found defendant guilty as charged. The trial court sentenced defendant to 20 years, 10 to serve, 5 years probation and 5 years post-release supervision. (Jury verdict & sentencing order, c.p. 64).

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

Defendant was driving (fast) and drinking (beer). He veered around a curve, crossed the center line hitting the car of Yvonne Brooks, killing her. Law enforcement arrived and found a cooler with iced beer and two beers in huggies between defendant's vehicle and the victim's car.

Cocaine was found in the victim's car and her blood showed a marked concentration at the time of her death. The jury also heard testimony that the victim was not wearing her seat belt and did not have a current drivers license.

Defendant was taken by ambulance to the hospital and asked to seek treatment and wait for law enforcement. Defendant's father picked him up at the hospital and it was over 24 hours before a blood alcohol could be taken.

SUMMARY OF THE ARGUMENT

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THERE WAS AMPLE, LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE FINDING OF CULPABLE NEGLIGENCE RESULTING IN DEATH.

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THE TRIAL COURT WAS CORRECT IN ALLOWING ADMISSION OF THE EVIDENCE OF ALCOHOL ON THE SCENE.

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Issue V.

DEFENDANT WAS NOT ENTITLED TO A CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

Issue VI.

THE PHOTO WAS NOT GRUESOME AND WAS FOUND TO BE MORE PROBATIVE THAN PREJUDICIAL BY THE TRIAL COURT.

ARGUMENT

Issue I.

THERE WAS AMPLE, LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE FINDING OF CULPABLE NEGLIGENCE RESULTING IN DEATH.

The standard of review for a conviction under *Miss. Code Ann.* § 97-3-47 challenging the weight and sufficiency of the evidence is, to wit:

> ¶ 7. We begin by addressing the law in Mississippi with regard to culpable negligence manslaughter in the course of operating a motor vehicle: "In order to obtain a conviction under § 97-3-47 for vehicular manslaughter, 'it must be proved beyond a reasonable doubt that the defendant was guilty of culpable negligence.' " Hopson v. State, 615 So.2d 576, 578 (Miss.1993) (quoting Stever v. State, 503 So.2d 227, 229 (Miss.1987)). Proof that Beckham "was guilty of such gross negligence ... as to evince on his part a wanton or reckless disregard for the safety of human life, or such an indifference to the consequences of his act under the surrounding circumstances as to render his conduct tantamount to wilfulness...." Hopson, 615 So.2d at 578 (quoting Dickerson v. State, 441 So.2d 536 (Miss.1983); Smith v. State, 197 Miss. 802, 20 So.2d 701 (1945)).
>
> ¶ 8. Moreover, "while driving ... under the influence of intoxicating liquor is a crime in and of itself.... [T]his in itself does not constitute culpable negligence, nor does it make what would otherwise be no more than a negligent act in operating a motor vehicle culpable negligence under the meaning of the statute." Hopson, 615 So.2d at 578 (quoting Craig v. State, 520 So.2d 487, 492 (Miss.1988)). However, the operation of a motor vehicle while under the influence of intoxicants may "be considered as an element constituting gross *1062 and careless disregard for the value of human life," and further, it may be a factor indicating criminally culpable negligence if the influence of intoxicants proximately contributed both to the negligence of the defendant and to the resulting death. Hopson, 615 So.2d at 578 (citing Gibson v. State, 503 So.2d 230, 233 (Miss.1987); Whitehurst v. State, 540 So.2d 1319, 1327-28 (Miss.1989)).

Beckham v. State, 735 So.2d 1059 (Miss.App. 1999).

It would appear defendant argues there was insufficient evidence of defendant driving at a high rate of speed on the wrong side of the road. The record is replete with evidence supporting just those very negligent acts.

Evidence was presented that defendant veered and crossed the center line colliding with another vehicle. The crash causing death. And, there was testimony about defendant driving above a speed for the road conditions (curve, cresting to a hill). (Tr.133) An eye witness to the crash stated he was traveling at a high rate of speed and didn't slow down as he went into the curve. (Tr. 68, 71, 75, 88) It was undisputed that defendant was driving. (Tr. 73). Further, all of the testimony and evidence pointed to the fact that it was defendant that left his lane of traffic and went into the on-coming lane. (Tr. 80, 157).

Other testimony concerning defendant was that his eyes were bloodshot. (Tr. 95). That defendant was nervous and apprehensive and went to his truck throwing the beer cooler and two beers into nearby bushes before law enforcement arrived. (Tr. 95). A trained law enforcement officer testified defendant smelled of alcohol and his speech was slurred like he had been drinking. (Tr. 29-30).

> ¶ 17. In the case sub judice, the jury heard evidence that Montgomery was driving at a high rate of speed, ran through a red light, and hit Mr. Roger's van without applying his brakes. The jury also learned Montgomery fled the scene of the accident, deliberately evaded the

> police, hid under a car, and refused to come out when the police found him. This Court finds such evidence to be sufficient to demonstrate a wanton disregard for the safety of human life. Part of the instructions to the jury stated that, in order to convict Montgomery, the jury must find that he was "negligent and that negligence was so gross as to be tantamount to a wanton disregard or an utter indifference to the safety of human life and that such negligence directly caused the death of Thomas Roger." The jury was properly instructed that Montgomery's conduct must rise to the level of culpable negligence in order to render a guilty verdict.
>
> *Montgomery v. State,* 910 So.2d 1169 (Miss.App. 2005).

It is the succinct position of the State there was an abundance of testimonial evidence supported by photos showing that defendant was driving too fast for conditions, lost control of his vehicle, crossed the center line into on-coming traffic causing a death.

No relief should be granted on this allegation of error.

Issue II.

THE TRIAL COURT WAS CORRECT IN ALLOWING ADMISSION OF THE EVIDENCE OF ALCOHOL ON THE SCENE.

Continuing his challenge to the conviction defendant next asserts the trial court erred in failing to suppress evidence of alcohol found on the scene.

First of all, there is no need to charge someone with an 'alcohol' related crime before such evidence may be used in a trial. There was evidence that regarding the smell of alcohol coming from defendant's truck and his person. (Tr. 29). Additionally there was evidence of defendant having slurred speech (acting slurry) – like someone who had been drinking. Tr.30.

As the reviewing courts of this State have noted, such evidence is relevant. Plus in the case *sub judice* such evidence is corroborates other evidence presented at trial. Additionally it was relevant as to contributing factors towards the proof of negligent behavior. Drinking alcohol is legal. Driving is a legal activity. However combining the two may lead to negligent behavior – which is relevant to the issue before the jury.

Further, similar cases have been upheld holding such evidence did have an evidentiary basis to the facts of the case:

> ¶ 18. In the instant case, there was evidence of cold beer in Abrams' pick-up and the smell of alcohol on his breath. In our opinion, evidence of possible alcohol consumption just prior to the accident was highly

> relevant and probative as to Abrams' credibility, his recollection of the accident since there were no other witnesses, and his contributory negligence.
>
> *Abrams v. Marlin Firearms Co.,* 838 So.2d 975 (Miss. 2003).

Accordingly, it is the position of the State the trial court heard the evidence, the purpose and facts it tended to prove. The court applied a correct balancing and denied the motion to suppress. There is evidence, and law, supporting the trial courts decision.

> ¶ 10. "When reviewing a trial court's ruling on a motion to suppress, we must assess whether substantial credible evidence supports the trial court's finding considering the totality of the circumstances." Shaw v. State, 938 So.2d 853, 859(¶ 15) (Miss.Ct.App.2005) (citing Price v. State, 752 So.2d 1070, 1073(¶ 9) (Miss.Ct.App.1999)). "The standard of review for the admission or suppression of evidence in Mississippi is abuse of discretion." Troupe v. McAuley, 955 So.2d 848, 855(¶ 19) (Miss.2007) (citing Poole v. Avara, 908 So.2d 716, 721(¶ 8) (Miss.2005)).
>
> *Vaughn v. State,* 972 So.2d 56 (Miss.App. 2008).

The State would ask that no relief be granted on this allegation of trial court error.

Issue III.
DEFENDANT WAS NOT DENIED HIS RIGHT TO MAKE HIS ARGUMENT BEFORE THE JURY.

Next, defendant asserts he was not allowed to make the type of argument he wanted before the jury. Defendant claims he was limited in his argument by a ruling of the trial court. Tr. 10-13.

Interestingly, a reading of the argument he made in those pages (tr. 10-13), is exactly the argument he made in closing. (Tr.226-229) Defendant's theory was it was just an accident and others were not prosecuted when they had 'accidents' – authorities just were going after his client.

Here are quotes from defense counsel made at trial, in closing, to the jury:

> "We don't know that the powers would be, are, that decided that they ought to prosecute this man for what's a normal accident." Tr. 226.
>
> "If you're going to prosecute somebody because they're going within the speed limit, something is wrong with that. Something is wrong with a system that will allow that." Tr. 227
>
> "They got this man indicted, accusing him of going too fast on the wrong side of the road, before they heard from this person they brought in here as an expert to tell you that he did something wrong." Tr.228
>
> "Whoever the powers that be decided that they wanted him indicted." Tr. 228.
>
> "But it was a simple accident. What brings this case within the realm of criminality where he has to go to jail?" Tr. 229.

It is the clear and obvious position of the State that defendant was not limited

in the argument he made to the jury. He was able to argue about the 'accident' and the 'powers' that wanted to prosecute this man, his innocent behavior, his legal driving and everyday activities.

> ¶ 14. Notwithstanding the wide latitude afforded attorneys in closing arguments, "[t]he standard of review that we must apply to lawyer misconduct during closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." Sheppard v. State, 777 So.2d 659, 661(¶ 7) (Miss.2000). The trial judge determined that the comments made by defense counsel were prejudicial and improper, and he ordered defense counsel to "get back to the issue." We find that the ruling of the trial court was proper and that the trial judge was well within his discretion in limiting the closing argument to the matters in evidence and, therefore, did not abuse his discretion.

There is no merit to this allegation of error, in point of fact, the trial court had the authority to limit the bounds of argument but in this case defense counsel was still able to present his theory and argument to the jury.

Consequently there is no merit to this allegation of error in fact or law and no relief should be granted.

Issue IV.

THE TRIAL COURT WAS CORRECT IN DENYING DEFENSE INSTRUCTION AS IT WAS AN IMPROPER COMMENT ON THE EVIDENCE. FURTHER THE JURY WAS PROPERLY INSTRUCTED ON CULPABLE NEGLIGENCE.

In this challenge to a ruling of the trial court defendant asserts it was error to deny his proffered instruction D-2. (C.p.49). The discussion in the record regarding this instruction is to be found at pages of the transcript 210-214.

The trial court relied upon the holding of *Smith v. State*, 197 Miss 802, 20 So2d 701 (1945) in denying the proffered instruction D-2. In essence the proffered instruction took a fact and would have it labeled and defined as *not* culpable negligence. The holding of *Smith* as further interpreted by *Jones v. State,* 244 Miss. 596, 145 So.2d 446 (Miss. 1962) make it clear that just such factual recitation and limitation are unfair, and improper. It does not matter whether the instruction is offered by the State or the defense.

The instruction must be read together and all the facts are to be considered by the jury. The attention of the jury cannot be focused on or define any one or two facts for more or less scrutiny. Culpable negligence arises for a totality of circumstances and it very well may include the fact defendant was on the wrong side of the highway.

Hence, the trial court was correct in denying the instruction and no relief should be granted.

Issue V.

DEFENDANT WAS NOT ENTITLED TO A CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

First and foremost this was not a wholly circumstantial evidence case. Period.

There was direct evidence presented at trial and eye-witness testimony. Consequently defendant was not entitled to a circumstantial evidence instruction.

> ¶ 20. Our review of the record supports the State's argument that part of the case against Brown is based upon the direct evidence of Danielle's in-court identification of Brown as the perpetrator. While some of the evidence against Brown is circumstantial in nature, Danielle's testimony as an eyewitness was direct evidence supportive of the jury's finding of his guilt. Danielle testified that she saw the individual, and could identify his shirt, hair, and body build. She also testified that, upon his apprehension by the police officers, she recognized the suspect in custody as the same individual she had seen in her backyard a few minutes before. ***Therefore, we find that, in this case, the State's evidence is not wholly circumstantial, but based on both direct and circumstantial evidence. For this reason, we find that Brown was not entitled to a circumstantial evidence jury instruction*** and thus no reversible error was committed by the trial court.

Brown v. State, 961 So.2d 720 (Miss.App. 2007)(emphasis added).

No relief should be granted on this allegation of error.

Issue VI.

THE PHOTO WAS NOT GRUESOME AND WAS FOUND TO BE MORE PROBATIVE THAN PREJUDICIAL BY THE TRIAL COURT.

The trial court when presented with State Ex. S-10 ruled that the autopsy photo was probative on the issue of identification.

> ¶ 19. In affirming the court's admission of the autopsy photographs in Bennett, the Mississippi Supreme Court explained:
>
> > Photographs that aid in describing the circumstances of the killing, the location of the body and cause of death, or that supplement or clarify a witness's testimony have evidentiary value and are admissible before a jury. Neal v. State, 805 So.2d 520, 524 (Miss.2002). Admission of photos of a deceased is within the sound discretion of a trial court and is proper so long as the photos serve some useful, evidentiary purpose. (citations omitted). The discretion of a trial judge to admit photos in criminal cases " 'runs toward almost unlimited admissibility regardless of gruesomeness, repetitiveness, and the extenuation of probative value .' " Woodward v. State, 726 So.2d 524, 535 (Miss.1997). *Id.* at 946(¶ 53).
>
> *Broadhead v. State*, 2007 WL 4237620 (Miss.App. 2007).

It was admitted for limited purpose and the trial court clearly showed an exercise of discretion in limiting such to just one photo.

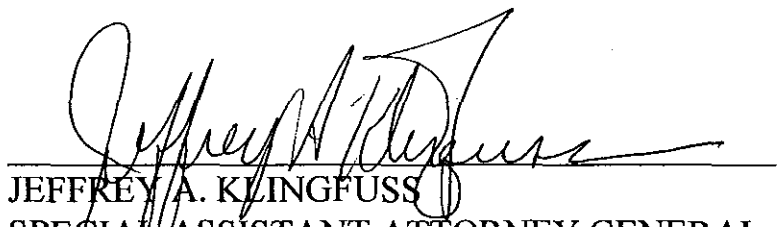
There being no abuse of discretion and having a probative evidentiary purpose there is no error and no relief should be granted.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the verdict of the jury and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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:

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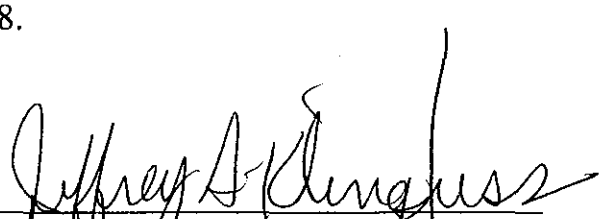
This the 21st day of March, 2008.



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