

v.

STATE OF MISSISSIPPI

NO. 07-CR-0016-NS-G

FILED

JAN 07 2008

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Appeal from Circuit Court of Neshoba County, Mississippi

REPLY BRIEF TO APPELLEE'S BRIEF

Edmund J. Phillips, Jr.
Attorney at Law
P. O. Box 178
Newton, MS 39345
Telephone 601-683-3387
Facsimile 601-683-3110
MS Bar No. [REDACTED]
COUNSEL FOR APPELLANT

Agee v. State, 185 So. 2d 671, 673 (Miss. 1966)	Page 1
Beck v. Alabama, 447 U.S. 625, 637 (1980)	Page 4 & 5
Blanks v. State, 547 So. 2d 29, 33 (Miss. 1989)	Page
Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, <u>17 L. Ed. 2d 705 (1967).</u>	Page 2
Hester v. State, 602 So. 2d 869, 872 (Miss. 1992)	Page 4
Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)	Page 1
Keeble v. United States, 412 U.S. 205, 212-213 (1973)	Page 4
Manuel v. State, 667 So. 2d 590, 593 (Miss. 1995)	Page 4
Pritchett vs. State, 560 So. 2d 1017, 1019 (Miss. 1990)	Page 2
<u>Rhone v. State, 254 So. 2d 750, 754 (Miss. 1971)</u>	Page 1
Tait v. State, 669 So. 2d 885 (Miss. 1996)	Page 5

1.

**THE COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING
ON THE VOLUNTARINESS OF APPELLANT'S FIRST CONFESSION**

Separate from the substantive question of the constitutional standards for the admissibility of confessions, the procedure by which admissibility is determined is also a constitutional issue. In *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) and *Agee v. State*, 185 So. 2d 671, 673 (Miss. 1966), the Courts held that the admissibility of a confession must be determined by the trial judge prior to its submission to the jury. A hearing is held in the absence of the jury to determine the admissibility of a confession with particular emphasis on its voluntariness. At this hearing, the Mississippi prosecutor has the burden of proving beyond a reasonable doubt that the statement was freely and voluntarily given and was otherwise admissible. *Rhone v. State*, 254 So. 2d 750, 754 (Miss. 1971).

Appellee asserts that the right to the Jackson-Denno hearing is identical to the right to be given Miranda warnings before a confession is admissible (thus melding the substantive and procedural standards for admissibility) and thus that, because Appellant was not in custody when he was asked the questions, he was not entitled to a hearing to determine whether the confession was admissible (p. 11, 12, Brief for the Appellee).

Appellee cites no authority for this proposition, but cites substantial authority for the proposition that Appellant's receiving the Miranda warnings was not prerequisite to admissibility of his confession. Whether Appellant received or was entitled to receive the warnings was not an issue, and the Court's denial of Appellant's objection without holding the hearing was error.

Per *Jackson v. Denno*, (supra), and *Agee*, (supra), the hearing must be held upon objection to admission of a confession and is itself a constitutional right as a matter of due process. The accused is entitled to a separate hearing on the issue of admissibility out of the presence of the jury, without being subject to cross-examination on other

Appellate suggests that the failure to hold the hearing might have been harmless error, because Appellant, in the presentation of his case-in-brief, testified that he was the shooter (p.14, 15, Brief for the Appellee). Harmlessness must be demonstrated to the reviewing Court beyond a reasonable doubt, in the circumstance of constitutional error, i.e. “that the error did not contribute to the verdict obtained.” Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Had the confession not been introduced into evidence the thinness of the proof might have directed the trial in a different direction, and to a different result. Certainly, without the confession, the result was not predictable beyond a reasonable doubt.

Failure to hold the Jackson-Denno Hearing was reversible error.

The verdict should be overturned.

II.

THE TRIAL COURT ERRED IN DENYING APPELLANT’S REQUEST FOR PEREMPTORY INSTRUCTIONS, MOTION FOR A NEW TRIAL OR OTHER RELIEF (JUDGMENT NOT WITHSTANDING THE VERDICT) WHERE THE APPELLANT WAS THE ONLY EYE WITNESS AND HIS TESTIMONY ESTABLISHED A CASE OF SELF DEFENSE AND HIS TESTIMONY WAS NOT SUBSTANTIALLY CONTRADICTED BY OTHER EVIDENCE OR OTHER PHYSICAL FACTS SURROUNDING THE ALLEGED OFFENSE

Appellee first claims that this issue is not reviewable for defect in the motion for a new trial and in the motion for a directed verdict in that they failed to refer expressly to the Weathersby rule. Appellee makes no reference to the request for a peremptory instruction which the Mississippi Supreme Court has held presents the issue of applicability of the Weathersby Rule to a particular case. Pritchett vs. State, 560 So. 2d 1017, 1019 (Miss. 1990). In the case before the Court the trial Court refused proposed peremptory instructions on both counts (c. p. 24, 25). The issue was thereby preserved for appeal.

would prey upon the weak.

The two men he later shot beat him, kicked him, struck him with a pistol, refused to let him leave and restrained him from doing so, and discussed the need to kill him to keep him from going to the police to report their drug trade and their treatment of him.

His testimony provided comprehensive and explicit detail about his ordeal and the shooting.

Appellee admits that there was no conflict between Appellant's pretrial statements and his testimony at trial (Brief for the Appellee, p. 20).

Appellee asserts that the rifle and pistol were easily accessible to Boyd and Peebles. The pistol was beneath the edge of a cushion on a couch on which one of the young men was lying and the rifle was under the edge of a couch where the other young man was.

Appellant's disability left him no choice. When they reached for the firearms, they were going to shoot him if he did not shoot them.

Appellee states (p. 22, Brief for the Appellee) that Dr. Hayne testified that the wound to Peebles was inflicted from a distance of 2 to 2 ½ feet, implying that this distance was too close to corroborate Appellant's version of the events. In fact Dr. Hayne testified (T-125) that the wound was "distant" from the firearm and that

- A. In this particular instance, the projectile appeared to be a thirty-eight caliber fired from a revolver, and that would indicate to me that the muzzle of the weapon was no closer than approximately two to two and a half feet. That's from the end of the muzzle to the entrance gun shot wound. It could be greater than that but I didn't think it was any closer than that.

Thus Appellee's assertion is simply untrue.

Appellee asserts that Appellant made no attempt to leave the mobile home(p. 23, Brief for the Appellee). In fact when Appellant tried to leave (T-160), he was beaten, his wallet was taken and he was forced to set still in a certain chair. He was struck in the head with a pistol to emphasize his status as a captive.

substantially contradicted by credible evidence, physical facts or fact of common knowledge. The Weathersby doctrine is substantial Mississippi law grounded in reason and justice. This is an ideal case to apply it.

The verdict should be overturned.

III.

THE COURT ERRED IN FAILING TO GRANT APPELLANT'S REQUESTS FOR MANSLAUGHTER INSTRUCTIONS.

Appellee asserts that Appellant relied on the wrong theory of the case in presenting his case, i.e. instead of relying on self defense he should have asserted justifiable homicide (as the victim of crime) (p. 28, Brief for the Appellee, that Appellant was not impelled by “uncontrollable passion” required to justify a manslaughter instruction.

Here a manslaughter instruction was warranted. Appellant had been beaten, kicked, and struck in the head with a pistol and had heard the young men he later shot discuss whether to kill him. He was physically unable to escape. His fear of death was reasonable and sufficiently emotional motive for the jury to consider manslaughter instead of murder.

“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 judgment of conviction. (Emphasis supplied).

Manuel v. State, 667 So. 2d 590, 593 (Miss. 1995) (citing Hester v. State, 602 So. 2d 869, 872 (Miss. 1992).

The failure to permit a jury to consider liability of a less serious offense can create strong pressure to convict an accused of the more serious crime. Due process requires a lesser included offense instruction in murder prosecutions to avoid the risk of wrongful conviction from a jury faced with an all-or-nothing choice. Beck v. Alabama, 447 U.S. 625, 637 (1980). In Keeble v. United States, 412 U.S. 205, 212-213 (1973), the United

assault.


Culpable negligence manslaughter in particular and manslaughter in general have a much broader application than would at first seem appropriate. In *Blanks v. State*, 547 So. 2d 29, 33 (Miss. 1989), the Mississippi Supreme Court affirmed a conviction of manslaughter rather than murder in a case in which the defendant claimed he shot and killed by accident. The Court opined that the evidence was sufficient to sustain either a manslaughter or murder conviction.

In *Tait v. State*, 669 So. 2d 885 (Miss. 1996) the Court reversed a murder conviction, where the defendant held a cocked gun to the victim's head, and remanded for sentencing for manslaughter. The defendant had not requested a manslaughter instruction and none had been given.

In the case before the Court a manslaughter instruction was requested and the evidence warranted it.

The verdict should be overturned.

RESPECTFULLY SUBMITTED,
PAUL M. NEESE, APPELLANT

BY: 
EDMUND J. PHILLIPS, JR.
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, EDMUND J. PHILLIPS, JR., Attorney for Paul M. Neese, Appellant, do hereby certify that on this date a true and exact copy of the Reply Brief to Appellee's Brief was mailed to:


Philadelphia, MS 39330

Honorable Marcus D. Gordon
Circuit Court Judge
P.O. Box 220
Decatur, MS 39327

Honorable Jim Hood
Attorney General of MS
P.O. Box 220
Jackson, MS 39205

Paul M. Neese
APPELLANT

DATED, this the 7th day of January, 2008.


EDMUND J. PHILLIPS, JR.
Attorney for Appellant