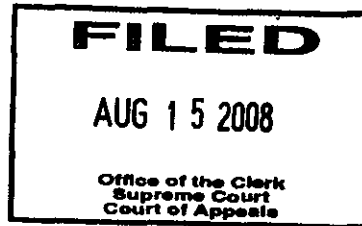


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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01201-COA

DARRIUS EUBANKS



APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT
OF
HINDS COUNTY, MISSISSIPPI

BRIEF ON THE MERITS BY APPELLANT

OFFICE OF THE PUBLIC DEFENDER,
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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 the Supreme Court and the judges of the Supreme Court may evaluate possible disqualification or recusal.

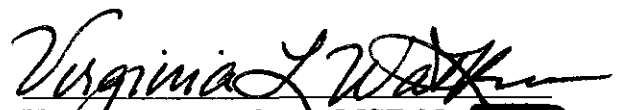
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So certified, this the 15th day of August, 2008.


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Darrius Eubanks v. State of Mississippi

2007-KA-01201-COA

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STATEMENT OF THE ISSUES

I. The trial court erred in permitting the otherwise inadmissible hearsay testimony regarding alleged statements by the sole witness, Inecia McNeil, a two-year-old child, as an excited utterance. The trial court further abused its discretion by failing to ascertain the competency of the child regarding the alleged statements that identified Mr. Eubanks as the perpetrator, thus denying his fundamental right to confront witnesses against him, and

II. The trial court erred in granting the state's *Motion in Limine* as to prior abuse of the children by their mother, Deyasha Johnson, for it essentially deprived Mr. Eubanks of his fundamental right to present a defense.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Darrius Eubanks was arrested and charged with capital murder in connection with the death of Daviyon Johnson, 4, on November 21, 2003. CP 6. The underlying felony was commission of the murder while engaged in felonious child abuse, all in violation of MISS. CODE ANN. § § 97-3-19 (2) (f) and 97-5-39(2). CP 6.

Mr. Eubanks was subsequently tried by a jury of his peers on July 25, 2005, before the Hon. Tomie T. Green, Circuit Judge. On July 26, 2005, the jury found Mr. Eubanks 'Guilty' of capital murder. CP 100; 101; RE 11; 12; T. 334. The trial court then sentenced Mr. Eubanks to life imprisonment without possibility of parole in the custody of the Mississippi Department of Corrections. RE 12; CP 100; T. 335.

Following denial of all post-trial motions, Mr. Eubanks sought appellate review of his conviction and sentence which is now before this honorable Court for evaluation. CP 107; 116.

B. STATEMENT OF FACTS

On the morning of November 19, 2003, both Deyasha Johnson, and her companion of nearly six months, Darrius Eubanks, were off from the jobs at the International House of Pancakes, and looking forward to a day catching up on household chores and moving furniture into their apartment at 1595 West Highland Drive at Highland Square Apartments. T. 174; 177; 178. Mr. Eubanks' name was on the lease for the apartment, which he shared with Johnson and her two children, Daviyon Johnson, 4, and Inecia McNeil, two (2) years and eleven (11) months old. T.

174; 200. Mr. Eubanks was not related by blood or marriage to the children, although they referred to him as “daddy.” T. 189.

The pair, in the apartment for about a month, had no telephone. T. 174; 179. Therefore, after doing laundry, Johnson telephoned her aunt about the availability of a family member’s truck to move furniture later in the day. T. 178. Johnson discovered, however, that her grandmother was critically ill at Central Mississippi Medical Center, less than ten minutes away from her new home. T.178; 179. Johnson found a friend to drop her off at the hospital, then returned to their apartment to change clothes and ask Mr. Eubanks to watch the children as he had so often before. T. 179. Eubanks agreed and Johnson left for the hospital. She was gone six hours, finally returning to the apartment about 6 P.M. T. 181.

Johnson testified that she entered the apartment and called to her children, going up the hallway to their bedroom. There she found Daviyon lying on the floor, Mr. Eubanks beside him and her daughter, Inecia, standing against the wall, “scared,” Johnson testified. T. 182. She asked Mr. Eubanks what was wrong and he said “I don’t know.” T. 182. Johnson walked on into their bedroom, telling her son to get up. T. 182. When Daviyon failed to respond, Johnson went back into the bedroom of her children. T. 182. Mr. Eubanks picked Daviyon up and the child was, as Johnson put it, limp “like a raggedy ann doll.” T. 182. Johnson testified she took Daviyon and into the bathroom, where she saw bruises on him. T. 182. Johnson then she went to the apartment of a neighbor, to telephone her mother and aunt and asked them to take her and Daviyon to CMMC. T. 182.

During this time, Johnson testified she asked Mr. Eubanks what had happened. He told Johnson that the children had both reverted from their potty training and fouled their clothing. T. 182. Johnson also testified that Mr. Eubanks told her Inecia had hit Daviyon with a stick used to secure the apartment patio door before maintenance personnel repaired the door. T. 183; 195.

Johnson testified that Daviyon had feces all over him, although he was fully dressed. T. 183. She removed his pants, underwear, socks and shoes and washed him thoroughly, wrapped him in a blanket and threw on a coat to meet her mother at the door. T. 183; 184-185. Mr. Eubanks, she testified, said he would remain and clean up the apartment; he did not accompany them to the hospital. T. 184. Johnson took her daughter to an upstairs neighbor, Emma Robinson, and left for the nearby CMMC. T. 183.

Once there, Johnson testified CMMC could not stabilize Daviyon and about an hour later sent him by ambulance to the University of Mississippi Medical Center (UMC). T. 185. On her way to UMC, Johnson went to pick up her daughter, Inecia. T. 186. During the ride to the hospital, nearly two hours after Johnson had returned home, she testified she asked Inecia what happened. T. 188. Johnson testified at trial, over vehement objections regarding hearsay from the defense, that Inecia responded Mr. Eubanks hit "Doc" [Daviyon's nickname] with a stick and that he had hit her as well. T. 188 -189. Johnson testified Daviyon's heartbeat was maintained by machine at UMC; on Nov. 21, 2003, she removed her son from life support. T. 190. The cause of death was closed head injury as a product of blunt

force trauma, according to Dr. Stephen Hayne, who conducted the autopsy. T. 263; 285

Jackson Police Department child protection officers were called to investigate suspected abuse of Daviyon on November 19 and observed the boy at UMC as medical personnel worked with him. T.205; 221. Police returned to the West Highland Square apartment that night with Johnson, who gave written permission to conduct a search. T. 225. During the search, Johnson identified a stick in the living room as having been used to reinforce the patio door lock. T. 195. The stick was recovered as evidence on Nov. 21, 2003. T. 255. Also based on conversation with Johnson, police issued a warrant for the arrest of Mr. Eubanks, who voluntarily came to police for an interview. T. 224; 226; 229.

Law enforcement officials' testimony of Mr. Eubanks' oral statements differs markedly, however. Officer Harvey Davis of the child protection unit testified that Mr. Eubanks said first that he heard a loud scream and went in to find Inecia hitting Daviyon with the stick. T. 208. Davis testified Mr. Eubanks told them that he had hit Daviyon with a belt because he had written on the wall, and then that he confessed he did not know what had happened because he had smoked marijuana and drank beer. T. 208; 212-213. Davis testified that Mr. Eubanks said he had been playing with the children, tossing Daviyon into the air and allowing him to fall back onto the mattress. T. 211. But, Davis testified, the child's mattress was on the floor and testing it later said that such play would result in a hard landing. T. 211. Mr. Eubanks also explained that he and Daviyon had played a punching game with Mr.

Eubanks punching the child in the shoulder area, but not anywhere below the shoulder. T. 211.

Davis was forced to acknowledge on cross-examination however, that he failed to include several statements by Mr. Eubanks, including reference to the supposed statement that he did not know what had happened because he was smoking marijuana and drinking beer. T. 214, *Exhibit D-9*.

Detective Eric Smith, who was present during virtually the entire interrogation, also denied in his testimony that Mr. Eubanks said he could not remember what happened. T. 244. Smith did, however, recall Mr. Eubanks said he was under the influence of beer while watching the children.

Although police recovered the stick which appeared to have stains resembling blood and although police made numerous photographs of the stains in the children's bedroom, there was no testimony at trial as to whether samples were taken of substances on stick or substance on the walls or whether, when, where and by whom such samples may have been tested or any results of such testing. T. 239. No fingerprint evidence was introduced, nor any other potential weapon used to inflict many of the injuries upon Daviyon, including any object such as a coat hanger capable of making the "linear strikes" Hayne referred to in his testimony. T. 273.

SUMMARY OF THE ARGUMENT

Mr. Eubanks respectfully submits that the trial court erred three ways in admitting hearsay statements allegedly made by a nearly three old child to her mother in which the child identified Mr. Eubanks as the one who beat her brother on Nov. 19, 2003. The statements were not spontaneous, the touchstone of what constitutes an excited utterance. Even if the statement was found to be an excited utterance, the trial court abused its discretion when it failed to make any preliminary evaluation of Inecia's competence, nor even to compel the appearance of the child for an assessment of her ability to remember and discern the distinction between right and wrong. Finally, the child never appeared to testify, so Mr. Eubanks was denied his right to confront the statements made against him, an error of fundamental constitutional proportions.

Mr. Eubanks also contends it was an error of fundamental proportions to grant the prosecution's *Motion in Limine* that barred him for demonstrating to the jury that Deyasha Johnson, mother of Daviyon Johnson, could have been responsible for injuries to her son. The inability to demonstrate prior bad acts of the mother regarding possible prior abuse of the children deprived him of his right to a meaningful opportunity to present a defense.

ARGUMENT

Cases of violent death, in which someone has been killed either deliberately or negligently, always present difficult circumstances for courts who must maintain objectivity in the face of human emotion. In such instances, it may be especially difficult to maintain the necessary objectivity when the death involved is that of a small child; however, it is incumbent upon trial courts in our system of justice that they maintain neutrality and enforce adherence to the rules in spite of any circumstances.

Mr. Eubanks respectfully asks this honorable Court to review the matters assigned as error herein, as he believes the trial court committed fundamental and reversible error that require a new trial on the charge lodged against him.

Before trial, defense counsel filed a *Motion for Competency Hearing and Motion in Limine* to ascertain the competence of Inecia McNeil, the only eyewitness to the events of Nov. 19, 2003. CP 19; 32-33. At a pre-trial hearing on the issue, despite objection by Mr. Eubanks as to the use of highly suspect statements of a two year old child, the prosecution did not make available the child to the trial court nor, apparently, did the trial court even require the presence of the child. T. 7; 47; 187; RE 14; 16.

The trial court's error in admitting "back door hearsay" through the mother, Deyasha Johnson is a three-fold error. First, the alleged statements failed to meet the spontaneity requirement of Mississippi Rule of Evidence [MISS.R.EVID] 803(2) as Inecia volunteered nothing, but only responded to her mother's question. T. 41. Second, the trial court abused its discretion by failing to ascertain the competency

was no testimony that Inecia volunteered the statements. In *Brooks v. State*, 903 So.2d 691, 698 (Miss. 2005) our Mississippi Supreme Court reversed and remanded a murder conviction due to the admission of witness testimony that the mother of Brooks told a witness three days after the murder her son had confessed committing the crime on the night of the murder. In holding that the trial court abused its discretion in admitting the double hearsay testimony as an excited utterance, the Court found the three-day span between the son's alleged confession and the mother's statement to the witness removed it from consideration as an excited utterance. The Court quoted the *Comment to MISS.R.EVID. 803(2)*: "The essential ingredient is spontaneity." *Id.* at 698. In contrast, when finding the statements qualified as "excited utterances," the trial court declared that neither spontaneity nor excitement was required in order to meet the excited utterance standard. Instead, the exception merely required that the child be under stress and that fact was established by the testimony of the mother.T.49.

Even if the statement rose to the level of an excited utterance, Mr. Eubanks contends the trial court was under a duty to determine the competency of the child and her recollection of events. Mr. Eubanks acknowledges that under MISS.R.EVID. 601, all persons are presumed competent to give evidence. Mr. Eubanks also acknowledges the determination of whether a child is competent to testify is a matter of court discretion. Nevertheless, Mr. Eubanks argues the trial court erred in relying upon the testimony of a psychologist who had not seen Inecia since Dec. 8, 2003, who opined that requiring the child to appear in court to testify would be "fairly anxiety producing." T. 19; 23. According to *Woulard v. State*, 832 So.2d 561, ¶

11 (Miss.Ct.App. 2002), questioning a seven-year-old witness to establish “a present ability to remember events, to understand and answer questions intelligently and to comprehend and appreciate the importance of testifying truthfully” satisfied the trial court’s responsibility under MISS.R.EVID. 601. *Id.* In so doing, this Court relied upon *Bailey v. State*, 729 So.2d 1255 (¶ 20) (Miss.Ct.App. 2001) as requiring the prosecution to satisfy competence concerns by asking the child preliminary questions which did not go to the substance of the child’s proposed testimony. *Woulard*, 832 So.2d 561 (¶9).

But perhaps most analogous to the case at bar is *Bell v. State*, 928 So.2d 951 (Miss.Ct.App. 2006). In *Bell*, the two daughters of David Bell did not testify at the trial of their father for the stabbing death of their mother, Charity Ishman. The trial court permitted police officers who questioned the girls after their mother’s body was found to testify as to what the girls said and their identification of their father as the assailant under the excited utterance exception.

The *Bell* case was reversed because Bell was unable to confront his daughters who identified him as the assailant and placed him at the scene of the crime under the authority of *Crawford v. Washington*, 541 U.S. 36 (2006). Bell did not confess to killing the mother of his children. The prosecution had no other eyewitnesses. This Court found the statements of Bell’s daughters were testimonial in nature, given in response to police interrogation during investigation of the crime and therefore, the Sixth Amendment right to confront witnesses, applicable to the states through the Fourteenth Amendment, required reversal and remand.

In the case at bar, Inecia McNeil, four and a half years old at the time of trial, did not testify, nor did she even appear for a hearing to determine competency. The statements admitted through her mother Deyasha Johnson were in response to questions to the child and therefore, were not spontaneous or otherwise volunteered under immediate stress as the rule requires.

Mr. Eubanks would thus respectfully move this honorable Court to reverse and remand his conviction based on the fatally prejudicial admission of statements by Inecia McNeil through testimony of her mother which failed to meet any applicable hearsay exception and violated his fundamental right to confront witnesses presented against him.

The trial court erred in granting the state's *Motion in Limine* as to prior abuse of the children by their mother, Deyasha Johnson, for it essentially deprived Mr. Eubanks of his fundamental right to present a defense.

The Constitution guarantees citizens accused of crimes "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683 at 689-690 (1986). In *Holmes v. South Carolina*, 547 U.S. 319 (2006), the U.S. Supreme Court held that South Carolina evidentiary rules could not be applied to bar Holmes, accused of capital murder, from presenting evidence that a third party may have confessed to the crime of which he was accused. The rule at issue was the South Carolina practice of prohibiting evidence a third party was criminally responsible in the face of strong forensic evidence indicative of the defendant's culpability. In the case of Holmes, DNA evidence suggested his guilt and the trial court barred testimony showing another could have committed the crime.

In this case, the trial court granted the prosecution's *Motion in Limine* (CP 27-28) to bar as irrelevant any mention of prior accusations against Johnson for abusing her children. T. 65; RE 15. Mr. Eubanks respectfully suggests the trial court erred, for it is entirely possible that presented with evidence of past abuse, the jury might have found that Daviyon's injuries were incurred *before* 11 A.M. the day of Nov. 11, 2003, when his mother was still present. This is a logical inference to draw, as the trial court also granted the prosecution's *Motion in Limine* to bar any mention of the fact that Johnson no longer had custody of her daughter. CP 27; 40; T.62; 65; RE 15. In fact, Inecia McNeil was in foster care and had been since the death of her brother. T.32-33. Johnson had apparently not seen her surviving child since the November 2003.

Relevant evidence is such evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." MISS.R.EVID. 401. The *Comment* to the rule states, "[i]f the evidence has any probative value at all, the rule favors its admission."

In this instance, Mr. Eubanks would humbly assert that it was an abuse of discretion to grant the *Motion in Limine* by the prosecution to bar exploration of whether Johnson may have participated in the abuse of her child. The jury never heard such facts and contrary to contention by the prosecution, it is particularly relevant when dealing with the guilt or innocence of one accused of a capital crime. Any possible confusion of the issues could easily have been cured by appropriate limiting instructions by the trial judge.


Therefore, Mr. Eubanks would move this honorable Court to reverse and remand his case for a new trial in order to admit such evidence.

CONCLUSION

Mr. Eubanks respectfully asserts that the trial court committed grievous error, fatally prejudicial to his fundamental right to a fair trial, when it failed to determine the competency of the child, Inecia McNeil, as to statements allegedly given the night of Nov. 19, 2003. In addition, it was error to find that Inecia's statements in response to questions from her mother were excited utterances admissible through an exception to the ban against the use of hearsay. Finally, the trial court in admitting the statements violated the right of Mr. Eubanks under both Sixth and Fourteenth Amendments to confront witnesses against him. The trial court also abused its discretion in granting a *Motions in Limine* that prevented Mr. Eubanks for presenting any evidence of prior bad acts of the mother, Deyasha Johnson, in abuse of the children.

On the basis of the authority cited herein, Mr. Eubanks humbly beseeches this honorable Court to reverse and remand this cause for a new trial.

Respectfully submitted,


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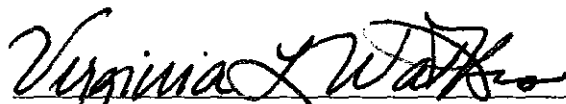
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