

**COPY**

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

**KEITH JOHNSON**

**APPELLANT**

**VS.**

**NO. 2007-KA-1687-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**BRIEF FOR THE APPELLEE**

**PROCEDURAL HISTORY:**

On September 10-13, 2007, Keith Johnson, "Johnson" was tried for culpable negligence manslaughter of Mr. Shane Johnston under M. C. A. §97-3-47 before a Monroe County Circuit Court jury, the Honorable Thomas J. Gardner, III., presiding. R. 1. Johnson was found guilty of manslaughter and given a fifteen year sentence with eight years suspended in the custody of the Mississippi Department of Corrections. R. 356 : C.P. 80. From that conviction, Johnson appealed to the Supreme court. C.P. 88.

**ISSUES ON APPEAL**

**I.**

**WAS THERE SUFFICIENT, CREDIBLE EVIDENCE FOR  
ESTABLISHING THE SUFFICIENCY OF THE EVIDENCE?**

**II & III.**

**WAS THERE SUFFICIENT, CREDIBLE EVIDENCE FOR  
ESTABLISHING THE WEIGHT OF THE EVIDENCE?**

### STATEMENT OF THE FACTS

On February 8, 2005 , Johnson was indicted for culpable negligence manslaughter of Mr. Shane Johnston on June 25, 2005 under M. C. A. §97-3-47 by a Monroe County Grand jury. C.P. 10-11.

On September 10-13, 2007, Johnson was tried for culpable negligence manslaughter of Mr. Shane Johnston before a Monroe County Circuit Court jury, the Honorable Thomas Gardner , III., presiding. R. 1. Johnson was represented by Mr. Sidney Beck, Jr.. R. 1.

Mr. William Alexander Parker testified that he saw Johnson holding a gun to Shane's head. R. 127. This was just prior to hearing a shot. When he looked again, he saw Shane laying on the ground.

Parker also testified that when fatally shot in the forehead, Shane's hands were "down by his side." R. 126-127. He was not armed, or trying to fight anyone. He had no weapon in his hands.

Parker also testified that while Johnston had fought with Johnson previously, when Johnson came out of the house with a handgun, the fighting between them was over. R. 133.

Officer Curtis Knight testified that he recovered two spent .22 caliber shells as well as the .22 caliber revolver at the scene of the crime. R. 164-165. See State's photographic exhibit 1 for photograph of .22 caliber revolver. The cylinder was removed. Two spent .22 caliber shells, and one live round are visible. See manila envelop marked "Exhibits."

Officer Knight testified that the revolver Johnson used had to be cocked prior to pulling the trigger for it to fire. R. 173. Knight also testified that his interview with Johnson and other witnesses indicated that neither the victim, nor any of his friends were ever armed with any weapons. R. 169. The only person with a fire arm was Johnson.

The trial court admitted State's Exhibit 3A, the signed, dated and witnessed **Miranda** rights

waiver. He also admitted 3B, Johnson's accompanying voluntary statement about the circumstances involved in the slaying of Mr. Shane Johnston. R. 177-178. In Johnson's statement, he stated the following:

I walked over to where Shane was and pointed the gun at him and was going to tell him to leave when the gun went off. The gun was two or three feet from Shane's head when it went off.

Mr. Lance Schronk testified that he was present when Shane Johnston was shot. R.142 . He saw what looked like a gun in Johnson's hand. R. 142. Schronk testified that neither he, or the victim, Johnston, were armed. R. 139.

At the conclusion of the prosecution's case, the trial court denied a motion for a directed verdict. R. 214-215.

Johnson testified in his own behalf. R. 243-272. Johnson testified that after firing a warning shot in the air, he raised the gun up and "it went off." He admitted that he cocked the gun, and pointed it at the victim's forehead. R. 245; 269-270. He admitted that pointing a loaded and cocked revolver at someone's head was an extremely dangerous action. R. 270-271.

Johnson testified that he shot the victim not because he was afraid of him but because he did not leave when requested to do so. R. 270.

While Johnson claimed to have been struck by Johnston in the mouth, he admitted on cross examination that he did not seek any medical attention for his alleged injury. R. 257.

Johnson was given jury instructions that dealt with self defense and accident. C.P. 52- 55.

Johnson was found guilty of culpable negligence manslaughter. He was given a fifteen year sentence with eight years suspended in the custody of the Mississippi Department of Corrections. R. 356 ; C.P. 80. His motion for a new trial or JNOV was denied. C.P. 87.

From this conviction, Johnson appealed to the Mississippi Supreme Court. C.P. 88.



## SUMMARY OF THE ARGUMENT

1. The record reflects there was sufficient, credible substantial evidence in support of the trial court's denying all peremptory instructions. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993). When the evidence presented by the prosecution was taken as true with reasonable inferences, there was sufficient credible, corroborated evidence for allowing the case to be presented to the jury for their deliberation.

In **Lester v. State** 862 So.2d 582, 585 (¶11) (Miss. App. 2004), the Court of Appeals stated that a home owner can not kill a trespasser with impunity merely because he does not leave the property as soon as the owner feels reasonable. The record reflects that Johnson was a guest not a home owner. R. 243.

There was sufficient evidence for determining that Johnson was not defending himself from Johnston when he shot and killed him. And there was sufficient evidence for determining that the slaying was not the result of an accident. Rather it was the result of "culpable negligence." **Shirley v. State** 942 So.2d 322, 328 (¶20-¶21) (Miss. App. 2006).

There was evidence that the victim was not armed. R. 169. Johnson admitted that neither Johnston nor any of his friends were ever armed at any time while present. R. 264. The record reflects that when shot in the forehead, Johnston was not threatening, or approaching Johnson. Johnson testified that he shot the victim not because he was afraid of him but because he did not leave when requested to do so. R. 270. The record also reflects that revolver used by Johnson must be cocked and the trigger must be pulled before it will fire. R. 173. It does not just "go off."

Johnson admitted to retrieving a revolver from inside his friend's home. He loaded it. He took it outside and fired it in the air. He then cocked it again. He admitted that he pointed it at victim's forehead. It was only a few feet from his forehead. He admitted these were very

dangerous actions. R. 270-271. Johnston died from a gunshot wound to his head from the handgun Johnson used. R. 207.

From this evidence, it was reasonable to infer that Johnson both cocked the hammer and pulled the trigger. The revolver did not accidentally fire of its own accord. The record reflects that Johnson was not defending himself or anyone else from any threat to his, or their lives or persons ,when he fired the handgun.

2 &3. There was no “unconscionable injustice” involved in denying a motion for a new trial. **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994). Johnson is not entitled to give himself the benefit of favorable inferences consistent with his innocence on a motion for a new trial. His testimony about the killing being an accident or done in self defense or confusion merely created a factual and credibility issue the jury was responsible for resolving.

While there was testimony about an initial fight, there was credible, corroborated evidence indicating that when Johnston was shot he was not armed, or fighting with Johnson. R. 125-133. Eye witnesses testified that the victim was not armed or fighting with Johnson when shot. Johnson admitted that the victim was neither armed, fighting with him, or threatening him when he was shot. R. 264-272. Johnson testified that he pointed the gun at the victim because he did not leave quickly enough to suit him. R. 270. This issue is also lacking in merit.

**ARGUMENT**  
**PROPOSITION I**

**THERE WAS CREDIBLE, SUBSTANTIAL CORROBORATED  
EVIDENCE IN SUPPORT OF DENYING ALL PEREMPTORY  
INSTRUCTIONS.**

Johnson believes that there was insufficient evidence in support of his conviction. Johnson believes that he was never shown to be the aggressor. He believes he had a right to defend himself, and that the death of Mr. Johnston was an accident, rather than something that he consciously did. Appellant's brief page 1-16.

The record reflects that there was sufficient credible, corroborated evidence in support of Johnson's culpable negligence manslaughter conviction. While Johnson testified that "the gun went off," this was contradicted by testimony, and physical evidence. Johnson admitted that he loaded the gun, cocked the gun, and pointed it at Mr. Johnston's head. R. 170-171. These are all intentional, reckless actions. They are extremely dangerous actions, showing indifference to the threat to the life of another human being. Under the circumstances, they indicate "culpable negligence."

Mr. William Alexander Parker testified that he saw Johnson holding a gun to Shane's "forehead." R. 127. This was just prior to hearing a shot. When he looked again, he saw Shane laying on the ground. Parker also testified that when fatally shot in the forehead, Shane's hands were "down by his side." R. 126-127. He was not armed, or trying to fight anyone. He had nothing in his hands.

Parker also testified that "the confrontation" between Johnson and Johnston was over prior to Johnston's being shot and killed. R. 132.

Q. So before turning around and seeing Shane on the, laying on the ground, the last thing you saw was the defendant holding a gun to Shane's forehead?

A. Yes.

Q. And then you heard the gunshot?

A. Yes.

Q. And Shane's to the ground?

A. And I turned back around and Shane was laying on the ground. R. 127.

...

**Q. Prior to being shot in the forehead, did Shane have anything in his hands?**

A. No.

Q. Type of gun?

A. No.

Q. A stick?

A. Nothing.

Q. Set of hedge clippers?

A. Nothing.

**Q. Was Shane attempting to jump on anybody?**

A. No.

**Q. He was just standing there?**

**A. His hands were down, just standing there.**

**Q. His hands were down by his side?**

A. Yes. R. 126-127.

...

Q. Prior to that (Johnson holding a hand gun to Johnston's head) Shane hadn't done anything. **The whole entire confrontation was over?**

A. Yes. R. 133. (Emphasis by Appellee).

This testimony indicates that the victim was not armed or threatening Johnson when he was shot. R. 126-127. In his own testimony Johnson admitted that neither Johnston nor any of his companions were ever armed. R. 264.

Officer Curtis Knight testified that he recovered two spent .22 caliber shells as well as the .22 caliber revolver at the scene of the crime. R. 164-165. See State's photographic exhibit 1 for photograph of .22 caliber hand gun. The cylinder was removed. Two spent .22 caliber shells, and one live round are also present. See manila envelop marked "Exhibits."

Officer Knight testified that the revolver used in the killing had to be cocked prior to pulling the trigger for it to fire. R. 173. Knight also testified that his interview with Johnson and other witnesses indicated that neither the victim, nor any of his friends were ever armed with any kind of weapon. R. 169.

Q. Now, anywhere in that initial statement that you took from the defendant, does he say anything about any of these guys that are outside having weapons?

A. **No, sir, I asked—everyone that was questioned we asked that, and the statement or response was no one else had any weapons.** R. 169. (Emphasis by Appellee)

...

Q. **And what did he tell you at that point?**

A. **He said he cocked the gun and pointed it towards him.**

Q. Said he cocked the gun?

A. Yes, sir.

Q. Did he tell you whether or not he meant to pull the trigger?

A. He stated that he didn't and that it was an accident. **He didn't mean to pull the trigger, that it had a light trigger pull.**

Q. **But he did tell you that he meant to load it?**

A. Yes.

Q. And he did tell you that he meant to pull the hammer back?

A. Yes, sir.

Q. Did he say whether or not he meant to put it to his head?

A. He just said that he pointed it towards his head, said it was about a foot, maybe two feet from him, but his intentions were, you know, he pointed it at him.

Q. But anywhere in this statement is there anything that says anything about anybody else having any weapon?

A. No, sir. R. 170-171. (Emphasis by Appellee).

...

Q. Let's talk about that for just a minute. You said that he told you in the second interview that the pistol, that pistol right there, was a double action. What did you say that that meant?

A. You could either pull the trigger and fire it or either cock the hammer back and fire it.

Q. Okay. And you said that's not the case.

A. No, sir.

Q. And why is that?

A. **It's a single action pistol. The only way to fire it is actually cock the hammer back.** R. 173.

Q. ...So if you would, demonstrate for the jury in the position that it is—hold the gun up so they can see it. The position that the gun is in right now, describe that to the jury.

A. Okay. It's just in a safe mode. **If you pull the trigger, it's not going to fire. It's a single action pistol. You have to cock it back to make it fire.** R. 174. (Emphasis by Appellee).

Dr. Steven Hayne testified that he conducted an autopsy on Mr. Shane Johnston. He found

that the cause of his death was a gun shot wound to his forehead.

Q. ...were you able to determine in your expert opinion the cause of death in this case?

A. **He died from a gunshot wound to the forehead.** I described it as distant and also penetrating, that the bullet entered the body and did not exit. There's injury to the brain and there's also a fracture of the skull. R. 207. (Emphasis by Appellee).

The bullet went through his brain and lodged inside his skull. Dr. Hayne located the lead projectile and removed it.

Q. Do you recall what they were? (the damage caused by the gunshot wound to the head)

A... So the lethal injury was the gunshot wound to the forehead, going through the brain itself. The bullet was recovered on the back right side of the skull inside the cranial vault. A small caliber lead bullet was recovered at that point. R. 203.

Jury instruction C-3 instructed the jury on the elements of culpable negligence manslaughter.

C.P. 52.

- 1) On or about the 25<sup>th</sup> of June, 2005 in Monroe County, Mississippi
- 2) that Randall Shane Johnston was a human being; and
- 3) that the defendant Keith Johnson, without authority of law, and not in necessary self defense of himself or others or as a result of accident or misfortune, did kill Randall Shane Johnson.
- 4) with culpable negligence, by shooting Randall Shane Johnston in the forehead, then you shall find the defendant guilty as charged. C.P. 52.

From the evidence cited, it was reasonable to infer that Johnson not only cocked the hammer but also pulled the trigger. The revolver did not accidentally fire. Johnson admitted that prior to the gun allegedly "going off," he had fired it in the air. And the record reflects that Johnson was not defending himself from any threat to his life or person when he fired the handgun. He was not defending anyone else from any threat of harm. Johnson admitted that he cocked the gun a second time prior to pointing it at Johnston's head. R. 270.

There was testimony indicating that the revolver used by Johnson must be cocked prior to pulling the trigger in order for the revolver to fire. R. 173. In addition, it is uncontested that neither Mr. Johnston, the victim, nor any other persons present at the scene of the shooting were ever armed with any weapon. R. 126-127.

The trial court admitted State's Exhibit 3A, the signed, dated and witnessed **Miranda** rights waiver. He also admitted 3B, Johnson's accompanying voluntary statement. This was his statement about the circumstances involved in the slaying of Mr. Shane Johnston. R. 177-178. In Johnson's statement, he stated that:

I walked over to where Shane was and pointed the gun at him and was going to tell him to leave when the gun went off. The gun was two or three feet from Shane's head when it went off.

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not an appellate court.

The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808, **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);...We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded



jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

When the evidence presented by the prosecution was taken as true with reasonable inferences, there was more than sufficient evidence for denying all peremptory instructions. The record reflects that the victim was not armed, nor were any of his friends. The record also reflects that Johnson left the scene of the earlier fight when he was not being threatened or harmed. He went into a house, and retrieved a fire arm. He loaded it. He took it outside. He fired it once above everyone's head. He then cocked it and pointed it at the victim's head. The revolver was only some two feet from the victim's forehead.

It is reasonable to infer that Johnson pulled the trigger. The shot struck the victim in the forehead. Mr. Johnston died in the hospital from the shot to his head. R. 207.

The record reflects that Johnson's life was not in danger. He was not defending himself from anyone. No one was approaching him in an aggressive or threatening manner. R. 126-127. While Johnson testified that the gun just "went off," there was testimony indicating that the revolver, exhibit 2b, had to be cocked and the trigger pulled for it to fire. R. 173.

As to Johnson's other claims about the victim being the initial aggressor, hitting him, and his fear of harm from threats coming from the victim, the record indicates that at the time Johnson shot him, the unarmed victim was not threatening him, advancing toward him or anyone in his family. His hands were "down by his side" when Johnson pointed the revolver at his head and pulled the trigger. R. 127.

While Johnson claimed the trigger was a "hair trigger," he admitted that he cocked it, and pointed it to Johnston's head when it fired. And even if it were a hair trigger, someone would still have to pull the trigger for it to fire. A handgun does not fire without someone's specific intentional

actions.

On cross examination Keith Johnson admitted that neither the victim nor his two friends were ever armed. R. 264. This corroborated the testimony of Officer Knight. R. 169. Johnson also admitted that it was risky and dangerous to hold a gun to a man's head. He admitted to pulling the hammer of the gun back, and pointing the gun directly at the victim's forehead. R. 270. Johnson also admitted that he cocked the gun prior to pointing it directly at Johnston's forehead. As he stated, "I cocked it again." R. 270.

**Q. At what point did you cock it when you were coming up with it?**

**A. It was already cocked. I just made a warning shot. I cocked it again.**

...

**Q. Have you ever had a gun that just shot without somebody pulling the trigger?**

**A. Some guns out there that have hair triggers on them.**

**Q. What happens when you cock a hammer and put a gun to somebody's head?  
Is that kind of risky?**

**A. Yes, sir.**

**Q. Is that dangerous?**

**A. (No response.)**

**Q. If you cock a gun and put it to another human being's head, is that a situation that is absolutely fraught with danger? If you'll acknowledge that?**

**A. Yes, sir, but I wanted him to leave. That dude, he was, he was crazy man. He wasn't in his right self. R.. 270. (Emphasis by Appellee).**

Johnson's testimony about his motivation for firing the weapon was that he wanted Johnston to leave. R. 264-272. There was no claim that the victim was armed, fighting or trying to threaten or fight him when he was shot.

**Q. And you came up to him and you did what with the gun?**

**A. I raised it up, and I asked him one more time to leave.**

**Q. And then the gun just went off. Your finger didn't do anything with the trigger?**

**A. No, sir. R. 270. (Emphasis by Appellee).**

In **Lester v. State** 862 So.2d 582, 585 (¶11) (Miss. App. 2004), the Court of Appeals stated a home owner can not kill a trespasser with impunity merely because he does not leave the property as soon as the owner feels reasonable. In the instant cause, the record reflects that Johnson was not an owner but a guest in someone's else's home. R. 243.

¶ 11. The law regarding defense of habitation is not such that a mere trespasser, having been once warned to vacate the premises, may thereafter be killed by the premises' owner with impunity if he fails to leave the property soon enough to satisfy the desires of the owner. The law contemplates, rather, that deadly force may only be employed to repel a trespasser who demonstrates the apparent purpose of assaulting or offering violence to an occupant or committing some other crime on the premises. **Bowen v. State**, 164 Miss. 225, 227, 144 So. 230, 232 (1932).

In **Shirley v. State** 942 So.2d 322, 328 (¶20-¶21) (Miss. App. 2006), the Court of appeals found sufficient evidence for denying a directed verdict. This was in another culpable negligence homicide case. Shirley, like Johnson, claimed self defense or accident but witnesses did not see the victim defending himself when he was beaten to death by Shirley.

¶ 20. Mississippi Code Annotated Section 97-3-47 (Rev.2006) provides, 'Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter.' In **Smith v. State**, 197 Miss. 802, 814-15, 20 So.2d 701, 704-05 (1945), the Court opined that, "[N]egligence, to become criminal, must necessarily be reckless or wanton and of such a character as to show an utter disregard of the safety of others under circumstances likely to cause injuries."

¶ 21. Based on the record before us, the evidence was sufficient to allow the case to go to the jury. Nelson testified that he saw Roberts exit the omelet house, yell at Shirley across the parking lot, and then Shirley and Roberts began a verbal confrontation. Nelson told Shirley to leave, saying that it was not "worth it" to fight

Roberts, but Shirley would not back down. Nelson got into his vehicle, and thereafter heard the sound of a fist hitting something. When he looked up, Nelson saw Shirley standing over Roberts, hitting him. At no time did Nelson see Roberts raise a fist, nor did he see Roberts attempt to defend himself against Shirley's blows.

On a motion for a directed verdict, Johnson is not entitled to give himself the benefit of favorable inferences from any conflicting facts or testimony. His testimony merely created a factual issue which the jury did not resolve in his favor. While Johnson claimed to have intentionally cocked and pointed the handgun directly at the victim's forehead, he would not fully admit to consciously pulling the trigger. R. 270. However, it was reasonable to infer from the testimony that the revolver used by Johnson did not just "go off." Johnson not only cocked it, he also intentionally pulled the trigger.

In **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993), this Court stated that when the sufficiency of the evidence is challenged the evidence favorable to the State must be accepted as true with all reasonable inferences. Evidence favorable to the defense must be disregarded.

In judging the sufficiency of the evidence on a motion for a directed verdict, or request for peremptory instruction, the trial judge is required to accept as true all of the evidence that is favorable to the state, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant. **Clemons v. State**, 460 So. 2d 835 (Miss. 1984)

The Appellee would submit that based upon the record cited above there was sufficient credible, corroborated evidence for the trial court to have denied Johnson's peremptory instructions. There was evidence of intentional actions committed while Johnson was not fighting, threatened or even confronted by the unarmed victim. A previous confrontation with the victim was over. R. 132. Johnson testified that he shot the victim not because he was afraid of him but because he did not leave when requested to do so. R. 270.

The Appellee would submit that this issue is lacking in merit.

## **PROPOSITION II & III**

### **THERE WAS CREDIBLE, SUBSTANTIAL CORROBORATED EVIDENCE IN SUPPORT OF THE SUFFICIENCY OF THE WEIGHT OF THE EVIDENCE.**

Johnson believes that his conviction was against the weight of the evidence. He believes that there was evidence that he was not the aggressor, and that he somehow accidentally fired the revolver that resulted in the victim's death. Appellant's brief page 1-14.

The appellee would submit that the evidence cited under proposition I indicates that at the time of the slaying, the victim was not fighting or attempting to fight with Johnson. R. 126-127. Johnston had nothing in his hands. He was neither armed nor an aggressor. Johnson admitted that the handgun was held to the victim's head because the victim did not leave soon enough to suit him. R. 270.

The revolver used by Johnson had been retrieved after a fight was over. The record reflects that Johnson deliberately retrieved it. He loaded it. He took it outside. He fired it into the sky. He then approached Johnston. He cocked it, pointed it at his forehead. This was when Johnson admitted the gun "went off." All of these actions were deliberate. Johnson admitted on cross examination that pointing a loaded and cocked handgun at someone's forehead was an extremely dangerous action. R. 270.

While Johnson claimed to be defending himself and that the gun accidentally "went off," this merely created factual issues for the jury to resolve. The jury were instructed both on self defense and accident in jury instructions. C.P. 52-55.

In *Robinson v. State*, 858 So. 2d 2d 887 (Miss. 2003), relied upon by Johnson, the case was reversed for failure to give a self defense instruction. In the instant cause, self defense instructions were provided. C.P. 52-55.

In that case, there was evidence that Robinson used a knife to stab the victim many times. The victim had no weapon but was using his hands in a street fight. It was allegedly provoked after Robinson's car had "cut off" the victim's car. The Court also found that there was sufficient, credible corroborated evidence to support Robinson's conviction for manslaughter.

In **Miller v. State** 956 So.2d 221, 223 (Miss. 2007), relied upon by Johnson , there was evidence that Miller stabbed James while defending herself from his knife. This was after he had not only hit her in the face but was also advancing toward her with a knife. He was also abusive toward her verbally and physically.

At that point, James began pushing and shoving her, telling her "[l]et's go." She then called 911. James continued to curse Miller. She initially did not respond because she "kn[e]w how he is[,] but then told him to leave her alone. He then punched her in the face. When she warned him to get back, James grabbed a butcher knife and drew it back.FN5 Afraid that James was going to stab her, Miller stabbed him in the chest. James began approaching her again and Mary pulled him back. He then collapsed on the living room floor.

In **Noah Chinn v. State**, 958 So. 2d 1223, 1227 (¶ 17) (Miss. 2007), another case relied upon by Johnson, the court found some faint evidence of "a struggle" between Chin and his girl friend. This was when the hand gun retrieved from Chinn's car fired. It struck Chinn's girl friend in the chest, resulting in her death.

In addition, there was forensic expert testimony that the automatic weapon used by Chinn could fire if two persons were pulling on it in different directions.

There was also a strong dissent by Judge Easley, in keeping with the state's position, that there was insufficient evidence for establishing that any struggle ever occurred. Based upon the record, this was speculative. The two eye witnessed testified that they did not see any struggle, and Chinn did not testify in his defense.

In **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983), the Court stated that any conflicts

in the evidence created by testimony from defense witnesses was to be resolved by the jury. What the jury believes and who the jury believes as to what piece of evidence presented is solely for their determination. As stated:

Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into finding of fact sufficient to support the verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. **Shannon v. State**, 321 So. 2d 1 (Miss. 1975) 373 So. 2d at 1045.

In **Jones v. State**, 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion challenging the weight of the evidence was in the trial court's discretion. However, it should be denied except to prevent "an unconscionable injustice."

Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent "an unconscionable injustice." **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987). We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict." **Jackson v. State**, 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

The Appellee would submit that the record cited, under proposition I, indicates that there was more than sufficient credible evidence for denying a motion for a new trial. While Johnson claimed that the revolver accidentally fired, this merely created a conflict in the evidence the jury was responsible for resolving. There was credible, corroborated evidence indicating that the revolver Johnson used would not fire unless it was loaded with .22 caliber bullets.

It would not fire unless the hammer was deliberately cocked or pulled back. R. 170-171.

Once the hammer is pulled back, then the trigger must be pulled. By Johnson's own admission, his actions in cocking it, and pointing it at the victim's head were all deliberate and extremely dangerous actions. R. 270-271.

There was credible eye witness testimony indicating that the victim was not armed, he was not fighting with Johnson, advancing on him, threatening him. He had nothing in his hands He had no weapon, or even a stick to use against Johnson. R. 126-127. Johnson testified that he shot the victim not because he was afraid of him but because he did not leave when requested to do so. R. 270.

Johnson was a guest in someone else's home. R. 243. He was not justified in killing Johnston merely because he did not leave quickly enough to suit him. **Lester v. State** 862 So.2d 582, 585 (¶11) (Miss. App. 2004).

In short, the testimony of Johnson about the firing of the weapon being self defense an accident was contradicted by an abundance of evidence, including his own admissions. Therefore, the appellee would submit that this issue is also lacking in merit.



**CONCLUSION**

Johnson's conviction for culpable negligence manslaughter should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 May, 2008.



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