

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEITH JOHNSON

APPELLANT

VS.

STATE OF MISSISSIPPI

FILED
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SUPREME COURT
COURT OF APPEALS

NO. 2007-KA-01687-COA

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF MONROE COUNTY, MISSISSIPPI

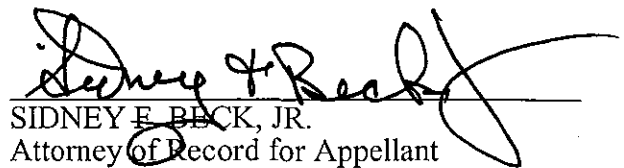
BRIEF OF APPELLANT
(Oral Argument Requested)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies the following listed persons having interest in the outcome of this case. The representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Keith Johnson
2. Sidney F. Beck, Jr., Attorney at Law
3. Honorable James Clayton Joyner, Assistant District Attorney
4. Honorable Larry Baker, Assistant District Attorney
5. Honorable Jim Hood, Attorney General
6. Honorable Thomas J. Gardner, III., Circuit Court Judge



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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Trial Transcript

CASES:

Alvin Robinson, a/k/a Alvin Lenard Robinson, a/k/a Bernard Hill v. State of Mississippi, 858 So.2d 887 (Miss.2003);

Manual v. State, 667 So.2d 590, 593 (Miss.1995);

Ardes Johnson v. State of Mississippi, 2005 So.2d (2004-KA-01202-SCT) (Miss.2005);

Tabitha Yolanda Miller, a/k/a Tab v. State of Mississippi, 956 So.2d 221(Miss.2007);

Noah Brent Chinn v. State of Mississippi, 2007 MSSC 2005-KA-02231 - 062807 (Miss.2007).

STATEMENT OF ISSUES

1. Whether the Court erred in failing to sustain the Motion For Directed Verdict at the close of the State's case in chief and at the conclusion of the trial;
2. Whether the Court erred in overruling the Motion For J.N.O.V., Or In The Alternative, Motion For New Trial;
3. Is the verdict of the Jury against the great weight of the evidence?

STATEMENT OF CASE

This case is coming before this Court as a result of the indictment and trial of Keith Johnson, for the killing by Culpable Negligence (Manslaughter) of Shane Johnston.

The State's proof as to this case comprised testimony by Tavia Wade, Sammy Mitchell, Haley Goode, William Alexander Parker, Harold Lance Schrock, Kelly Hall, Curtis Knight and Steven T. Hayne, Coroner. None of these people, with the exception of Harold Lance Schrock and William Alexander Parker, observed any part of the events leading up to the death of Shane Johnston. The State attempted to put the blame for the cause of this incident on Patrick Forrester. The only statement in the entire State's evidence, other than statements given by this Appellant and his family as to what happened, was given by William Alexander Parker and Harold Lance Schrock, who testified that they went with Shane Johnston to the Forrester residence to fight Patrick Forrester and the fight started, but when the Appellant fired a gun into the air, telling them to leave, they went to their car and left, but came back later, after Johnston had been shot.

It is uncontroverted that Parker, Schrock and Shane Johnston were the aggressors, inasmuch as they came to the Forrester home, wherein the lot on which it is situated is fenced in, with a gate bolted shut, and a "No Trespassing" sign on it, but they trespassed anyway, and started the fight.

The Appellant, at the request of Patrick Forrester, had come out into the yard when he found out that Shane Johnston, Schrock and Parker, were coming down to whip Patrick. Unarmed, he met them in the yard, requested they leave, asking them why they wanted to pick on a sixteen year old boy. After this was said, Shane Johnston started to fight with Keith Johnson and in the melee, Schrock and Parker started to join in the fight. While warding them off, Shane Johnston hit the Appellant in the jaw, loosening a tooth, whereupon the Appellant went into the house to check the damage done to his tooth.

In the meantime, Johnston, Schrock and Parker continued the melee, by hitting Jerry Forrester, a man in his 50's, in the nose causing it to bleed, and kicking Ivy Nicole Forrester, a thirteen year old female, in the abdomen.

Upon hearing the melee, the Appellant got his cousin's, Jerry Forrester's, pistol out of a drawer, loaded it, and came outside. Standing on the porch of the Forrester residence, he fired the gun into the air, telling them to leave, saying, "You have won, if you want to think of it that way. Just leave", whereupon Schrock and Parker did leave. Shane Johnston, stated that he was a soldier and that he was not afraid and that he was going in the house and getting Patrick Forrester, who had gone inside, and kill him; whereupon this Appellant raised the pistol to fire it into the air, and it is unknown whether he deliberately fired the gun, which has a light pull to the trigger, or whether it accidentally went off. At any rate, the shot hit the deceased in the forehead, above the eyebrows.

It is very clear from the record that Shane Johnston, Harold Lance Schrock and William Alexander Parker, came to the Forrester residence to fight, as stated in the testimony of Lance Schrock. Further, there is no question that this Appellant was defending his cousin, his home, and himself, in taking the action that he took.

STATEMENT OF FACTS

About the 15th day of June, 2005, Keith Johnson moved from Oakland, TN to Amory, MS, to live with his cousin, Jerry Forrester, on Becker Bottom Road in said City, because he had become addicted to, and had went through treatment for addiction to, methamphetamine, and came to Amory to get away from the crowd he would be encountering in Tennessee.

Mr. Johnson's cousin, Patrick Forrester, was sixteen (16) years old at the time, and had quit school and had lived for a year with Tavia Wade, who's proclaimed fiancé was in the State penitentiary. Tavia Wade and the deceased had a baby together. She testified that she told Patrick Forrester that when Shane Johnston came home from the penitentiary that she would go with him, and their relationship would be over.

On the evening of June 24, 2005, Tavia Wade, Shane Johnston, Lance Schrock, and Haley Goode, were at the Schrock house on Becker Bottom Road, which is located about 1/4 of a mile from where the Forrester's lived. Shane Johnston came in while a conversation between Lance Schrock and Patrick Forrester was in progress, and as they put it, there was a lot of hollering and cursing going on. The upshot of it was that Shane Johnston took the phone from Lance and he and Patrick Forrester cursed at each other for awhile. Their story was that Patrick had been calling all evening, cursing and hollering and inviting Lance Schrock and Shane Johnston, if they wanted to fight, to come on down to his place, which Patrick Forrester denies vehemently. After hanging up the phone, Shane Johnston said that he and Lance were going down to talk to Patrick and Jerry Forrester, about Patrick's conduct. According to Tavia Wade, when Shane Johnston told her where they were going, she tried to talk him out of it, and told him that they had "No Trespassing" signs. Alex Parker came in shortly thereafter. They told Patrick Forrester they were coming down and would whip him, whereupon he went into the house and told his cousin, the Appellant herein, Keith Johnson, that three (3) guys were coming to his house to whip him, and asked for help, whereupon the Appellant went into the front yard of the Forrester home with Patrick. Alex Parker, Lance

Schrock and Shane Johnston parked their car on the edge of the road, next door to the Forrester house and came back and entered the Forrester yard, even though the gate was locked and there was a "No Trespassing" sign on the gate, but they persisted and came in the yard, where they were met by Patrick Forrester and Keith Johnson. They came up, announcing vehemently what they were going to do to Patrick Forrester. When Johnston started toward Patrick Forrester, the Appellant stepped between them and attempted to talk Johnston into dropping it, stating that Patrick was only sixteen years old and that he wanted no trouble. At that point, Shane Johnston attacked the Appellant and they fought. When the Appellant noticed that Lance Schrock and Alex Parker started to come toward him, he was trying to keep them from getting behind him, and while he was maneuvering, Shane Johnston hit him in the mouth, knocking a tooth loose, whereupon the Appellant went into the house, to the bathroom, to try to put his tooth back in. While he was in the house, Shane Johnston, started to come up on the porch of the Forrester house to confront Jerry Forrester, and picked up a set of bolt cutters. Jerry called for Patrick, who snatched the bolt cutters from Shane Johnston hands and threw them away, and threw Johnston across the car and then off the car and across a barbeque pit. Shane Johnston and Lance Schrock attacked Nicky Forrester, a thirteen year old girl, kicking her in the stomach and hitting her. Inside, hearing the commotion, the Appellant got Jerry Forrester's pistol, loaded it, and came out on the porch and shot it into the air, telling Shane Johnston, Lance Schrock and Alex Parker, to leave. Schrock and Parker left at this time, getting into Shane Johnston's car and driving down to the Schrock house, and then went riding around for awhile, and then decided to go back to the Forrester house to see about Johnston. Upon arriving they saw Shane Johnston was on the ground and was unconscious, having been shot in the head. It is uncontroverted that the Appellant was raising the pistol to fire a second shot into the air, trying to get Shane Johnston to leave, even though Shane Johnston was standing there, screaming he was not afraid, that he was a soldier, and that he was going into the house and kill Patrick Forrester.

In their testimony, as will be quoted later in this brief, both Schrock and Parker said that they, along with Shane Johnston, the deceased, went to the Forrester house to fight. They started the fight, they were there to hurt someone, and grossly outnumbered anyone at the Forrester house that was able to fight, Jerry Forrester being a man in his 50's, who didn't fight at all even though he was punched in the nose by Lance Schrock; Nicky Forrester, who was a thirteen year old child at the time; Sibyl Forrester, who stayed on the phone trying to call 911 during the whole incident; leaving Patrick Forrester and the Appellant as the only people there to defend themselves, their family and their home.

The Appellant had gone so far as to tell Shane Johnston and the other two men, that they had won and to please leave, and that he did not want any trouble.

It is unclear whether the pistol used by the Appellant went off as he raised the gun to make a second shot in the air, or whether the Appellant was firing in necessary self-defense of himself and the Forrester family.

John Patterson, Sibyl Forrester's son by another marriage, was there and helped get Nicky away from Shane Johnston, but otherwise, took no part in this fight, but took Nicky and went back in the house and stayed there.

The State made much of the supposition that Patrick Forrester had started the whole thing, by calling and making a nuisance of himself, and supposedly stating that Schrock's girlfriend was making advances to him, and that Tavia Wade's child was not legitimate. It is true that he is not legitimate, because his father and mother were not married. Tavia Wade, a self-confessed sexual batterer, tries to lay the blame on Patrick Forrester for the start of the fight, and tries to absolve Shane Johnston from any responsibility therefor.

The Court, in issuing its instructions, refused most of the instructions tendered to the Court by the Appellant; however, it rewrote one instruction tendered by the Appellant, which combined the refused instructions partially, following an instruction drawn and tendered to the Court by the

Appellant. What was more detrimental to the defense was instructions C-5, C-6 and C-7, given at the request of the State, inasmuch as it detracted, weakened, and took away from the Appellant his ability to rely on self-defense.

SUMMARY OF ARGUMENT

The argument in this case is that the verdict is against the great weight of the evidence, and that the Motion For Directed Verdict and Motion For J.N.O.V., Or In The Alternative, Motion For New Trial, should have been sustained, and that the refusal to sustain same was an error on the Court's part.

ARGUMENT

This cause came before the Court on an indictment for the Culpable Negligent Manslaughter of Shane Johnston. The evidence presented at trial clearly shows that Shane Johnston, William Alexander Parker and Harold Lance Schrock, came from the Schrock home, about 1/4 of a mile down the road from the Forrester home, and entered the yard, even though the yard was fenced, the gate was closed securely and there was a "No Trespassing" sign on the gate, and started a fight with Keith Johnson, who was attempting to talk to them, requesting that they leave and not pick on a sixteen year old boy; namely, Patrick Forrester.

It is clear from the law in this State that everyone has the right to protect his home, himself, and members of his family, when he perceives himself or members of his family to be in imminent danger of death or great bodily harm. In Alvin Robinson, a/k/a Alvin Lenard Robinson, a/k/a Bernard Hill v. State of Mississippi, 858 So.2d 887 (Miss.2003), where the Defendant had been charged with murder and convicted of manslaughter for the use of a knife in self-defense, the Court held,

"that a "homicide with a deadly weapon is justifiable when the deceased assaults another with only his hands," if the hands are used in a manner likely to cause death or serious bodily injury."

and further, the Court held,

"no error would exist here unless there was evidence introduced to support this defense. Even if there was contrary evidence, the defendant would be entitled to an instruction on his principal theory if there is some evidence to support it. Robinson testified that he feared for his life from the moment a stranger began chasing him through the streets of Tupelo, honking the car horn and flashing headlights. He testified that the driver of the vehicle was unknown to him; he could not even tell if the driver was a man or woman. Robinson also testified that he was completely

unaware he was under attack until his car door was suddenly wrenched open and he was violently dragged out of his vehicle. By that time, he must already have gotten the knife since he stated that he never returned to the car to get it."

The Court quoted from Manual v. State, 667 So.2d 590, 593 (Miss.1995), showing that a person is justified in using a deadly weapon when he is reasonably fearful of serious bodily injury from the larger man. In the case at bar, this Appellant had been attacked by one man, and then subjected to two other men approaching him, with the idea of assisting Shane Johnston in his attack upon Keith Johnson, and did assist him in attacking Jerry Forrester and Ivy Nicole Forrester. It is not whether the person actually intended to do great bodily harm, or to kill the person using deadly force, but that the defendant in such a case, as in the instant case, thus be fearful himself and does not have to prove it, but it only has to exist in his mind. On Page 244, Lines 7 through 29, and Page 245, Line 1, of the trial transcript, where Keith Johnson is testifying, it clearly shows that Johnson was not the aggressor, but that Shane Johnston, the deceased, Schrock and Parker were the aggressors, with Keith Johnson testifying as follows:

"A. Yes, sir, I tried to. When Shane walked up, all three of them walked up, and I was standing up against the truck. And when Shane walked up, he was fixing to jump on Patrick, so I stepped in between them. And I was going to try to stop them. You know, I tried to talk sense into him. And that's when we got into, and he swung at me, and we started fighting and stuff. And I don't know how long we started fighting. I don't know how long we was fighting or nothing. And that's when Patrick ran in, I think and - - whew.

Q. Was that before you went in the house and got a pistol?

A. It was before. I'm sorry. We went - - Patrick came in and got me. I was inside watching TV. When I came - - we walked outside and two boys, they pulled. I mean, three boys pulled up. And we sat right by the truck. And Shane walked up

to Patrick, and he was fixing to jump on him, so I stepped in front of him. I tried to talk to him. I told him why are you trying to jump on him for, you know, a kid. And I tried to talk sense into him. And he asked me who I was, and he started hitting his chest and saying, I'm a soldier and stuff. Who are you? And I said, Man, I don't want to fight you because I don't know you."

After talking to them, the fighting started, and as he and Shane Johnston were fighting, he states on Page 245, Lines 4 through 19,

"Them other two boys came up behind me, and I was trying - - I was turned around. I was trying to, you know, keep them off of me. That's when I turned back around and Shane caught me in my mouth. And that's when I was trying to get away, I was running from them, and I got on the front porch right there. And I finally got away from them, and that's when I ran inside the house. And I went to the bathroom. And I was trying to put my tooth back in my mouth because I didn't want to lose it. And that's when I heard hollering and screaming. And I went back there, and I got the pistol, and I did, I loaded it up and everything, and came out on the front porch. And I aimed it out, and I pulled the trigger, and it didn't do nothing. So I cocked it back and shot it again. And I told everybody to leave. Whew. Then them other two boys ran off."

This is when he got hit and went in the house and got the pistol, coming back out and shooting in the air. Further, on Page 245, Lines 20 through 27,

"Then that's when Shane said he wasn't going nowhere, and I walked up toward him, and I told him, I said, Man, would you please just leave. And I - - when I raised the gun up, I was raising the gun up, and when I did, I barely had my hand on the trigger. And I was raising it up, it went off. That's the honest to god truth. I didn't mean to kill that boy. I swear I didn't. I swear I didn't mean to."

This clearly shows that there was never an intent to kill or do great bodily harm to the deceased. He was acting in self-defense, as he had every right to do, and he did not know the deceased or his accomplices, and as the appellant was merely trying to get them to leave and to protect his family, as he stated on Page 246, Lines 1 through 16.

"A. I never met a person like that before. He was pretty crazy.

Q. Okay. Did you think you were in danger of harm?

A. Yes, sir.

Q. Did you think any of your family was?

A. Yes, sir.

Q. What was your purpose in firing the shot in the air?

A. I just wanted everybody to leave. I'm an easy going person. I don't cause no problems for nobody. I don't like fighting or nothing. I just wanted everybody to go away. I just - - I was - - I shot up in the air. I told them several times to leave. Them other two boys - - the first one I shot, I did, those two boys ran off. And he said he wasn't going nowhere. That's the honest to god truth."

After the shooting, he went back in the house and put the gun up, being extremely nervous and as he put it, "freaked out". There is nothing in the trial transcript that states that there is anything going on here, except the Appellant protecting himself and his family, which he had every right to do.

In the case of Ardes Johnson v. State of Mississippi, 2005 So.2d (2004-KA-01202-SCT) (Miss.2005), the defendant was in Shelby, Mississippi to attend his grandmother's funeral. After the funeral, he stayed with his aunt to help her pack for a move, when an old friend, Shirley Landrum came over. Throughout the day, Shirley Landrum's live-in-boyfriend, Dennis Davis, came by the apartment, becoming more irate, and finally causing the defendant to call 911 to report the incidents.

"When Officer Russell left, Landrum and Johnson continued to pack and later took a break for dinner. Around midnight, the two decided to walk to the store to get a few beers. Johnson suggested walking instead of driving because it was a nice night outside. As Johnson was leaving the apartment, he put the folding knife in his pocket. While Landrum and Johnson were walking down the street, Johnson stopped at the corner to talk to a few friends. While they were on the street corner, Davis appeared from around a dark corner and ran towards Landrum calling her a liar and yelling obscenities. Davis approached Landrum hitting her in the chest with both hands and then hit her in the face. However, the number of times Davis actually struck Landrum is disputed. Upon seeing Davis hit Landrum, Johnson walked over to them and told Davis to stop hitting her. At this point, Landrum walked away from Davis, claiming that she did not want to get into a fight in the middle of the street. Both Johnson and Landrum testified that Davis had a black object in his hand, however, no object was ever recovered. Johnson claims that Davis then turned towards him, as if to hit him, and Johnson stabbed Davis once in the abdomen with the knife. When Landrum realized that Davis had been stabbed, she ran to a neighboring house to get a towel for the wound. Johnson threw the knife in some bushes and fled the scene."

In the case at bar Mrs. Sibyl Forrester spent the entire time after the disturbance, until it was over, attempting to get help from the police. When they arrived, this unfortunate incident had reached its conclusion, in the death of Shane Johnston. At no time was Keith Johnson ever in the position of the aggressor, even after he fired the gun in the air, he still attempted to get Shane Johnston to leave. In view of the fact that there had been an attack by three different men, ranging in age from seventeen (17) or eighteen (18), to thirty (30), Shane Johnston being thirty (30) years old, who came there to attack a sixteen (16) year old boy, the damage to the Appellant's mouth and the deceased's

refusal to leave and him trying to at the time he was shot to get into the Forrester home to get Patrick Forrester, could only lead the Appellant to believe that he and his family were in imminent danger of great injury or death. This is not conjecture, inasmuch as Shane Johnston was yelling, "I am going in and kill him."

In the case of Tabitha Yolanda Miller, a/k/a Tab v. State of Mississippi, 956 So.2d 221(Miss.2007) where the deceased had come in the house attacking the defendant, and had done so on previous occasions, the Court, in granting her a new trial, stated,

"Lewis testified that James threatened Miller earlier in the day, stating that "she got death around her[;]" and Miller testified that James punched her in the face and was about to stab her with a butcher knife when she stabbed him. "[W]here any doubt exists as to who was the aggressor in an incident which results in the death of a participant or where a defendant claims self-defense, evidence of a deceased's previous threats and harassments against defendant ... is admissible." *Day v. State, 589 So.2d 637, 642 (Miss.1991)*. The importance of admitting such evidence lies in the fact that it "enables jurors to put themselves in the defendant's place at the time of the killing and view the situation as it appeared to him."

The Appellant testified that he did not know whether he pulled the trigger, or the gun went off. This would support Appellant's theory of accident, which this Court, in the case of Noah Brent Chinn v. State of Mississippi, 2007 MSSC 2005-KA-02231 - 062807 (Miss.2007) showed that where there is an accident, the accident should be considered even though the evidence is weak or sparse.

In the case at bar, the Appellant didn't know whether he had pulled the trigger or not, thus the possibility of an accident must be considered.

CONCLUSION

In view of the testimony herein, and the deceased and his accomplices being the only aggressors in this case, and did come to the Forrester residence, threatening to kill one person and injuring the Appellant, the Court should render a decision, dismissing all charges, or in the alternative, grant the Appellant a new trial.

RESPECTFULLY SUBMITTED, this the 24th day of March, 2008.



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CERTIFICATE OF SERVICE

I, Sidney F. Beck, Jr., Attorney at Law, certify that I have this date mailed, postage prepaid,
a true and correct copy of the foregoing Brief Of Appellant to the following:

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This the 24th day of March, 2008.



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