

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

**ROBERT MCKINNEY**

**APPELLANT**

**VS.**

**NO. 2007-KA-1734-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

**BY: LISA L. BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680**

## **TABLE OF CONTENTS**

<b>TABLE OF AUTHORITIES .....</b>	<b>ii</b>
<b>STATEMENT OF THE CASE .....</b>	<b>1</b>
<b>FACTS .....</b>	<b>2</b>
<b>SUMMARY OF THE ARGUMENT .....</b>	<b>10</b>
<b>ARGUMENT .....</b>	<b>11</b>
<b>I.    THE DEFENSE WAS NOT PREVENTED FROM ADEQUATELY DEVELOPING ITS THEORY OF THE CASE. ....</b>	<b>11</b>
<b>II.   ROBERT MCKINNEY RECEIVED A FAIR TRIAL. THE TRIAL JUDGE’S COMMENTS WERE NOT INAPPROPRIATE AND DID NOT DIMINISH THE SOLEMNITY OF THE PROCEEDINGS. ...</b>	<b>15</b>
<b>CONCLUSION .....</b>	<b>17</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>18</b>

## TABLE OF AUTHORITIES

### STATE CASES

<b>Beale v. State, -- So.2d -- , 2008, WL 4140084</b>	<b>13</b>
<b>Bradford v. Barnett, 615 So.2d 580, 583 (Miss.1993)</b>	<b>12</b>
<b>Comby v. State, 901 So.2d 1282, 1288 (Miss.Ct.App.2004)</b>	<b>12</b>
<b>Cotton v. State, 933 So.2d 1048, 1051 (Miss.Ct. App.2006)</b>	<b>12</b>
<b>Ladnier v. State, 182 So.2d 389 (Miss.1996)</b>	<b>15</b>
<b>Kirk v. Pope, 973 So.2d 981 (Miss.2007)</b>	<b>16</b>
<b>Porter v. State, 749 So2d 250 (Miss.Ct.App.1999)</b>	<b>15</b>
<b>Jones v. State, 776 So.2d 643 (Miss.2000)</b>	<b>11</b>
<b>Wilkins v. State, 264 So2d 411, 423 (Miss. 1972)</b>	<b>11</b>
<b>Farmer v. State, 770 So.2d 953, 958 (Miss.2000)</b>	<b>11</b>
<b>Kimble v. State, 920 So.2d 1058, 1060 (Miss.Ct.App. 2006)</b>	<b>15</b>
<b>Hicks v. State, 973 So.2d 211 (Miss.2007)</b>	<b>16</b>

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

**ROBERT MCKINNEY**

**APPELLANT**

**VS.**

**NO. 2007-KA-1734-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

Robert McKinney, drove from Memphis, Tennessee to Lambert, Mississippi to see Marvella Taper and their baby. Shang Taper, Marvella's father, and Tony Taper, her brother, argued with McKinney about being late on furniture payments. The father and son were walking away from McKinney when McKinney pulled a gun and started shooting at Shang, Tony, and Lynn Huddleston. Huddleston, an innocent bystander, died from a gunshot to the back of his head.

A Quitman County Grand Jury indicted McKinney on two counts of aggravated assault, one count of murder and possession of a firearm by a convicted felon. On September 11, 2007, a jury convicted McKinney of the aggravated assault of Shang Taper, the murder of Lynn Huddleston and possession of a firearm by a convicted felon. The jury acquitted McKinney on the aggravated assault of Tony Taper. The court sentenced McKinney to twenty years for aggravated assault, life for the murder, and three years for the possession of a firearm by a convicted felon. McKinney appealed.

## FACTS

Hessie Taper (Hessie) owned PDR Grocery, a small convenience store in Lambert, Mississippi. Hessie, her daughter Marvella Taper (Marvella) and granddaughter, lived in an apartment attached to the store. William "Shang" Taper, (Shang), Hessie's ex-husband, and their son Antonious "Tony" Taper (Tony), stopped by the store and apartment regularly.

On April 3, 2006 , Robert McKinney (McKinney), the father of Marvella's baby, went to to see Marvella and their child. Upon arrival, McKinney went in the store and then on to the apartment through an interior door. Shang, seeing McKinney, took the opportunity to talk to him about being behind on some furniture notes. Marvella and McKinney, who previously lived together, purchased furniture in Shang's name. McKinney had the furniture and was to pay the notes but was behind on his obligation.(T 117-28).

Hessie was in the store when she heard gun shots outside. She looked out and saw McKinney shooting across the street and aiming the gun at her son Tony. (T117-19). Hessie testified Tony was moving around trying not to get shot and did not have a gun.(T119). She saw McKinney toss the pistol in his car, get in and then drive away (T 135). Hessie never saw Tony or Shang with a gun. (T126 ).

Shang testified he encountered McKinney outside the apartment and talked to him about making payments on some furniture. (T146). They went inside the apartment and talked, then outside again. (T 149). The discussion became louder. (T 154) Shang admitted being scared of McKinney because McKinney was a large man and Shang was a small man. (T153-54). Shang testified McKinney walked toward his car that was parked in front of the store, "... he went back in his back some kind of way like this, and he come out-." (T149). "...I thought he was fixing to leave. He walked north- to the north end of the store and went back in his back and turned and shot.(T154).

Shang testified there were several people standing around outside talking, Lynn Huddleston, the individual shot and killed, and Lee Stevenson (also known as Tony) had been standing by the garbage. McKinney was the only person shooting and the only person with a gun. (T 157).

Jeannette Willis, (Willis), Shang's sister, testified she was parked across the street waiting for Shang to bring her some money. (T182-84). She observed the talk over the furniture payments and that a group of people gathered. (T187-88). She saw McKinney draw a gun and shoot. (T189). McKinney then walked toward a blue car, shot down twice, and people yelled for Tony to run. (189-90; 199). McKinney stopped turned back and shot four times (T189-90; 199). Lee Stevenson was outside his blue car. (187-88). She saw McKinney put the gun in his car, get in and drive away. Willis saw McKinney shoot at Shang and at Tony. (T193-96). McKinney was the only person she saw with a gun and the only person shooting. (T196; 205). She did not observe the crowd as threatening to McKinney. (T206).

Tony Taper then testified to his version of the events. He had been outside talking when he observed McKinney talking "rough" about the furniture to his father, Shang. (T215-16). Tony and McKinney mumbled something to each other. (Other testimony would indicate this is where Tony and McKinney made comments about "pistol play.") Tony denied that he and his friends threatened McKinney. (T222; 238). Lynn Huddleston (Lynn) had just come out of the store and was standing around talking to Austin Weathersby. (T246-47). Lynn did not have a weapon. (T246). Tony testified McKinney and Lynn did not know each other and to his knowledge had not even spoken to each other. (T222). Tony was walking toward Lee Stevenson's car with his back to McKinney when the shooting started. (T217-18). He "turned around, the gun was pointed at [him]." Tony ducked down by the car and heard his father yell for him to run. McKinney continued to shoot. He saw Lynn on the ground. (T216-21). Tony denied having a gun that day. He testified if he had one,

the outcome might have been different. (T221).

At this point in the trial, defense counsel requested a bench conference, seeking to impeach Tony by asking “if he ever carried a gun.” Tony had a conviction for felon in possession of a firearm that was more than 10 years old. (T223). The trial judge allowed the defense to ask Tony about carrying a gun on the day of the shooting, saying that asking about any other time would be a “red herring” (T224). Defense counsel reserved the right to make a proffer. (T224).

Lee “Tony” Stevenson (Stevenson) testified he had been hanging around outside the store with friends and had just walked around the side of the building to urinate. (T248-49 and 278). Stevenson had a 1980 blue Chevrolet parked next to the garbage dump. Lynn Huddleston was standing at Stevenson’s car door. Stevenson testified that nobody gave McKinney a reason to start shooting. (T261). Stevenson saw McKinney shooting and took off running. After the shooting, Stevenson observed his driver side window shot out. (T258).

After a bench conference (T259-261) and argument of counsel the court ruled that defense could ask Stevenson if he had a gun at the shooting. (T266) Defense counsel admitted he didn’t know if Stevenson’s pistol was there during the shooting. (T264). Stevenson testified once the shooting started, he ran and got a pistol, returned to the site of the shooting, got in his car and drove away. When he returned McKinney was gone. (T 266-70). On cross examination Stevenson testified that to his knowledge McKinney was the only one with a gun when the shooting started. (T273). He also testified if he had a gun at the time of the shooting he wouldn’t have run. (T274 ).

The defense proffered that Stevenson had a 9mm weapon confiscated the day of the shooting in the investigation. (T282) The defense also argued that they should have been allowed to ask Tony Taper whether he ever carried a firearm. In the event he answered yes, the defense could impeach his testimony with the old felon in possession of firearm conviction. (T285-86).

Cornelius Conley, a police officer with the Lambert Police Department, testified he was patrolling when he "...heard several shots, three rapid shots, followed by a single shot." (T289) He stopped his car and through his side mirror, observed McKinney, standing beside a blue pickup holding a handgun and shooting. (T290). When McKinney drove away from the scene, Conley followed and observed McKinney toss a weapon out of the passenger car window. Conley eventually initiated a "felony stop" pulling his car in front of McKinney.(T292-304). Conley and Mississippi Bureau of Investigation officer Milton Williams retrieved McKinney's gun.

Thomas Simpson, a Lambert supervisor, first testified at the request of the defense, outside the presence of the jury to determine the extent of his knowledge. Simpson testified he drove up to the scene of the shooting. He observed the gunshots, the victim fall (T305-312) and a man, later identified as McKinney, shooting and running to his green car and leave. (T306). At the time of the shooting, Simpson saw only one person with a gun and that was McKinney. Minutes after McKinney left, Simpson saw another man come up to the scene with a pistol, get into a blue car and leave. (T310; 320). Simpson thought the man came from the alley behind him. Simpson thought the man came from the alley behind him. Simpson told the man in the blue car not to leave, saw the pistol and then backed off. Simpson radioed the police units and requested that they stop the person with a gun leaving the scene in a blue car, which they did.. (T307-310). Simpson was unable to identify Lee Stevenson as the person in the blue car. (T311). The court then ruled Simpson could testify to the jury and he did. Simpson related the same testimony. (T312). Simpson didn't see anyone else shooting. (T314, 316). He saw Len Huddleston immediately loaded in a black vehicle and taken from the scene. (T318). After the shooter left the scene and Huddleston transported away, a man with a pistol came from behind Simpson, got in a blue car and left. (T320).

Investigator Milton Williams with the Mississippi Bureau of Investigation testified that he



assisted in the arrest of Robert McKinney and conducted the investigation of the shooting. Williams testified that during the course of his investigation he retrieved a 9mm pistol that belonged to Lee Stevenson. Williams submitted Stevenson's pistol to the Mississippi Crime Lab for testing. His investigation and test results showed that Stevenson's pistol was not involved in the shooting. (T373-74; 376).

Through the testimony of Investigator Milton Williams and Chuck Poe with the Mississippi Bureau of Investigations, and the expert testimony of pathologist Dr. Steven Hayne and Mississippi Crime Lab forensic analyst Starks Hathcock the State established that Lynn Huddleston was shot in the back of the head with McKinney's 9 mm pistol. Authorities recovered shell casings from in front of PDR Grocery (S-7); one projectile from the hood of Shang's pickup truck (S-8); one projectile from the driver's door of Lee Stevenson's blue car (S-9) (T346-57). The State established that the bullet removed from Lynn Huddleston's head and the bullets and casings found at the scene of the shooting were all from McKinney's gun. (T395).

The State rested; the defense moved for a directed verdict which was denied. (T409-411).

The first defense witness was Marvella Taper. Marvella gave her account of events. She testified Tony was agitated and calling McKinney names. (T421). Tony told McKinney, " Pull it, pull it out bitch" and motioned under his shirt. McKinney went up under his shirt and pulled out a gun; Marvella ran in the apartment. (T421-27). On cross examination she testified, people were standing around outside her door, but they were not intimidating. (T436)

Defense witness Latteria Joy (Joy) testified she was present in the apartment when McKinney came to visit Marvella and their child. (T447). Joy testified Shang and McKinney discussed the payment of the furniture. Tony came in the apartment arguing with McKinney. They went outside, came back in the apartment and then outside again. Shang was going to his truck. (T453). Tony

indicated he wanted to “pistol play” and made motions to his side but didn’t have a gun. (T453). Joy testified while in the apartment with Marvella, Joy saw McKinney had a gun in his “necessary pocket.” (T456). Before the shooting began Joy saw Tony and “...two people standing behind Tony Taper and the one guy that was standing off from them at the garbage dump, and Mr. McKinney.” (T453) Joy quickly got her children inside the Taper apartment, closed the door and the shooting began. (T453-54).

LaKizzy Ransom was a Liberty police officer at the time of the shooting. Ransom was parked down the street and observed the shooting. (T466-57). She testified that there were “a lot of people out there,” but that was not unusual. (T467). Ransom heard shooting and saw a man, later identified by his clothes as McKinney, standing in the road shooting. “And people was running everywhere.” (T467).

Defense counsel attempted to ask Ransom about a statement McKinney made to her later in the day about his firing the gun in self defense. The State objected arguing the statement was self-serving and hearsay. The court agreed with the State and sustained the objection. (T471).

Robert McKinney testified to his version of events. When the discussion went back and forth between defendant Shang, Marvella kept telling her father he was wrong. Tony kept interceding (T479). They took the discussion outside and voices were raised; people started gathering around. McKinney told Marvella he was leaving. (T481-82). McKinney testified that while at the door Shang approached him “arguing at me” and Tony walked up threatening him and reaching up under his clothing. McKinney claimed he felt threatened and saw a guy with a gun and another guy going in a blue Chevrolet car. He pulled his gun and shot at the person that was threatening him and the guy going in the car. (T.485)

The jury acquitted McKinney on the charge of aggravated assault against Tony Taper but

convicted him of the aggravated assault of Shang Taper, the murder of Lynn Huddleston and possession of a firearm by a convicted felon. Feeling aggrieved, McKinney appealed.

## ISSUES

- I. WHETHER THE DEFENSE WAS PREVENTED FROM ADEQUATELY DEVELOPING ITS THEORY OF THE CASE.
- II. WHETHER MULTIPLE EXTRANEIOUS AND INAPPROPRIATE COMMENTS BY THE TRIAL COURT DIMINISHED THE SOLEMNITY OF THE PROCEEDINGS THEREBY DENYING DEFENDANT ROBERT MCKINNEY A FAIR TRIAL.

### **SUMMARY OF THE ARGUMENT**

Robert McKinney was afforded a fair trial. McKinney's conviction for the aggravated assault on William "Shang" Taper, the murder of Len Huddleston and possession of a firearm by a convicted felon should be affirmed. The court properly limited cross examination of Tony Taper on whether he ever carried a gun and properly excluded Tony Taper's conviction for felon in possession of a firearm. The trial court properly excluded evidence of there being a second weapon at the crime scene prior to or during the shooting. There was no evidence, other than McKinney's unsubstantiated allegations, that another weapon was at the scene prior to the shooting. All other testimony indicated after the shooting started that Lee Stevenson went to retrieve a gun and returned after the shooting was over. The trial court properly denied McKinney's "heat of passion" jury instruction and "lesser included offense" jury instruction because there was no evidentiary support.

The comments of the trial judge did not distract from the solemnity of the murder and aggravated assault charges. The actions of the trial judge did not prejudice the jury and did not amount to plain error.

## ARGUMENT

### **I. THE DEFENSE WAS NOT PREVENTED FROM ADEQUATELY DEVELOPING ITS THEORY OF THE CASE.**

In this first issue, McKinney contends the trial court committed reversible error by preventing him from adequately developing his theory of self defense. The State contends this argument is without merit.

First defendant argues that the court improperly restricted cross examination of Tony Taper when it ruled the defense could not ask Tony whether he ever carried a gun. A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. *Farmer v. State*, 770 So.2d 953, 958 (Miss.2000). The fact of whether Taper ever carried a gun is irrelevant and too far removed to have a bearing on the issue of whether he had a gun at the time of the shooting. M.R.E. 402 McKinney also complains the court improperly excluded Taper's conviction for felon in possession of a firearm that was more than ten years old. Pursuant to M.R.E. 609 the trial court ruled Taper's conviction time barred and inadmissible. The court is correct. There is no probative value as to whether Taper ever carried a gun and whether he had been convicted of carrying a gun more than ten years ago. The prejudicial effect of admitting Taper's conviction substantially outweighs its probative value. The Mississippi Supreme Court held in *Jones v. State*, 776 So.2d 643 (Miss.2000), that in order for convictions more than ten years old to be used for impeachment evidence, the burden is on the moving party to establish that the prior conviction has probative value. McKinnon failed to meet that burden.

Next, McKinney argues the trial court improperly excluded Lee Stevenson's gun and cites *Wilkins v. State*, 264 So2d 411, 423 (Miss. 1972) in support. However, in *Wilkins*, there was evidence that an axe and burglary tools found 100 feet from a burglary were evidence of the commission of a crime and therefore admissible. The appellate court in *Wilkins* held "It is within sound discretion of trial judge to determine whether burglary tools found near scene of burglary are near enough in time and place to be of probative

evidentiary value.”

In the case *sub judice*, there was no evidence Stevenson had a gun at the scene prior to the shooting. All evidence directs to the fact that Stevenson got the weapon after McKinney began firing. Even Shang’s somewhat confusing testimony, as cited by the defendant, places Stevenson in the alley getting the gun after McKinney began shooting. How can it be self defense if Stevenson didn’t have possession of the gun until after McKinney began shooting? The jury heard testimony that Stevenson’s 9mm gun was at the scene **after** the fact. They heard expert witnesses testify that all the projectiles and casings recovered from the scene came from the defendant’s gun. Admission of Stevenson’s gun would have been prejudicial and inflammatory and the court properly excluded admission pursuant to M.R.E 403. Relevant evidence may be excluded when its probative value is outweighed by its tendency to mislead, to confuse, or to prejudice the jury.

McKinney further claims he was not allowed to develop his self defense theory when the court rejected jury instructions D-6 and D-15. The State contends the jury was adequately instructed on self defense in other instructions given by the court. McKinney finally contends the refusal to give jury instructions D-11 and D-12 denied him the right to assert alternative theories.

When considering challenges to jury instructions, this Court’s standard of review avoids considering instructions in isolation, but rather the court should consider them as a whole for determining whether the jury was properly instructed. *Cotton v. State*, 933 So.2d 1048, 1051 (Miss.Ct. App.2006) citing *Comby v. State*, 901 So.2d 1282, 1288 (Miss.Ct.App.2004). Defects in specific instructions do not require reversal “where all instructions taken as a whole fairly-although not perfectly-announce the applicable primary rules of law.” *Burton e rel. Bradford v. Barnett*, 615 So.2d 580, 583 (Miss.1993) (*citations omitted.*)

Under the ruling in *Cotton v. State*, 933 So.2d 1048 (Miss.Ct. App.2006) while a defendant is entitled to have the jury instructed regarding his theory of the case, the court may properly refuse an instruction if it states the law incorrectly, is covered elsewhere in the instructions or is without an evidentiary foundation.

Instructions D-6 and D-15 were covered in other instructions.

McKinney argues that the court erroneously rejected Jury Instruction D-11, his proposed heat of passion manslaughter instruction and D-12, his proposed reckless provocation instruction. The testimony in the case *sub judice* simply does not support heat-of-passion theory or reckless provocation theories. The argument or loud exchange of words between Shang Taper, Tony Taper and McKinney is a far cry from evidence amounting to heat of passion.

In the case of *Beale v. State*, -- So.2d -- , 2008, WL 4140084 (Miss.App.) the trial court properly refused a heat of passion jury instruction where there was simply “pushing or shoving” between the defendant and victim. This Court held “pushing or shoving” is insufficient to require the heat-of-passion-manslaughter instruction absent testimony that the defendant was acting out of violent or uncontrollable rage. If “pushing and shoving” are insufficient, surely a loud exchange of words over payment of a furniture note would be insufficient.

The trial court properly rejected McKinney’s proposed jury instruction marked D12 because there was no evidence to support an instruction on manslaughter by reckless provocation. McKinney stated he intentionally shot “the guy going in the Chevy,” who turned out to be Lynn Huddleston. McKinney testified

Q. And then what did you do next?

A. Well, first of all, Tony threatened me that he had the gun.

Q. What did you do next?

A. After that, when I seen the other guy with a gun, and I seen the other guy going in the Chevy, it was a blue Chevy out there. He was going inside the car door. By that point in time, my alert was up and I was terrified.

Q. Is that why you did – is that why you did what you did?

A. Yes, sir.

Q. What did you do when you were terrified?

A. Well, after I seen the gun and after the threat was directed towards me about another gun, I **seen the other guy going in the car, and I just pulled out my gun.**

Q. And shooting – **who did you shoot at specifically**, if anyone?

A. The person that was directing a threat at me, the guy that had a gun, and **the other guy going in the car.** (T 485). (*Emphasis added by Appellee.*)



With the exception of McKinney's allegations, the record is void of evidence that anyone other than McKinney had a gun before the shooting began. Hessie Taper, Jeanette Willis, Tony Taper, Lee Stevenson, Officer Cornelius Conley, Thomas Simpson, Marvella Taper, Latteria Joy, and Lakizzy Ranson all testified McKinney was the only person they saw with a gun during the shooting. Witnesses testified that after the shooting started Lee Stevenson went down the alley beside PDR Grocery and returned with a gun. Thomas Simpson, the Lambert supervisor, testified that Lee Stevenson returned to the scene with a gun after McKinney had driven away and Len Huddleston had been loaded in a black car and taken away. This assignment of error is without merit.

**II. ROBERT MCKINNEY RECEIVED A FAIR TRIAL. THE TRIAL JUDGE'S COMMENTS WERE NOT INAPPROPRIATE AND DID NOT DIMINISH THE SOLEMNITY OF THE PROCEEDINGS.**

In his second assignment of error, McKinney is asking the court to apply the “plain error” rule in reviewing comments of the trial judge. McKinney contends he was denied a fair trial because the judge made multiple extraneous comments, which detracted from the solemnity of the murder and aggravated assault charges and thereby, influenced the jury.

The State contends the trial judge did not make inappropriate remarks so as to deny McKinney a fair trial. The plain error doctrine has been construed to include anything that seriously affects the fairness, integrity or public reputation of judicial proceedings. The error of which defendant complains does not rise to the level of plain error. See *Porter v. State*, 749 So2d 250 (Miss.Ct.App.1999).

Defense first complains of the trial judge’s statements during voir dire. When reading the judge’s statements in context with the his examination of the jury during voir dire, the statements complained of by the defense were not prejudicial. The judge explained he was inquiring whether jurors had been contacted by anyone concerning the case. There was no implication of there being a gang involved in McKinney’s trial. The State contends the judge’s comments were not likely to prejudice the jury against defendant.

Next, defense contends the trial court’s admonishment to Tony Taper to sit up in the witness chair “lessened the gravity of a trial for murder and manslaughter.” The judge was giving direction to a witness who obviously exhibited disrespectful behavior while testifying. Under *Ladnier v. State*, 182 So.2d 389 (Miss.1996), a trial court must maintain good order and suppress unseemly conduct. The State argues that Taper’s “laying back” in the witness chair “like he’s in the back seat of a car” while testifying would certainly qualify for unseemly conduct. The judge handled it appropriately.

McKinney acknowledges that no contemporaneous objections to the judge's statements were made by the defense. The failure to make a contemporaneous objection waives the issue on appeal. *Kimble v.*

*State*, 920 So.2d 1058, 1060 (Miss.Ct.App. 2006). However, he contends that it was plain error for the court to make the statements in the first place.

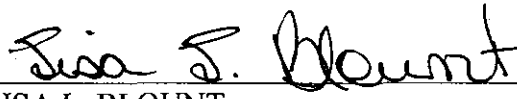
Plain error may be invoked where (1) a party has failed to preserve an error for appellate review and (2) a substantial right is affected. *Kirk v. Pope*, 973 So.2d 981 (Miss.2007). This is not a case in which plain error should apply. To prevail under the doctrine of plain error, a defendant has the burden of proving that there was error, that the error resulted in manifest injustice, and that it affected the defendant's fundamental rights. *Hicks v. State*, 973 So.2d 211 (Miss.2007). In the case at hand, there was no error that resulted in manifest injustice and there was no fundamental right affected. McKinney did not meet his burden of proof of plain error.

**CONCLUSION**

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's conviction of Robert McKinney for aggravated assault, murder and possession of a firearm by a felon.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:   
LISA L. BLOUNT  
ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR # 

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680

## CERTIFICATE OF SERVICE

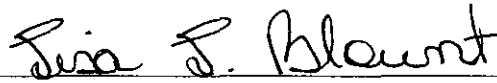
I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Albert B. Smith, III  
Circuit Court Judge  
Post Office Drawer 478  
Cleveland MS, 38732

Honorable Laurence Y. Mellen  
District Attorney  
Post Office Box 848  
Cleveland, MS 38732

W. Daniel Hinchcliff, Esquire  
Attorney At Law  
301 North Lamar St., Ste. 210  
Jackson, MS 39201

This the 10th day of October, 2008.

  
\_\_\_\_\_  
LISA L. BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MISSISSIPPI 39205-0220  
TELEPHONE: (601) 359-3680