IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEWAUN O'SHEA GRIFFIN — APPELLANT

VS. — NO. 2007-KA-1768

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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DEWAUN O'SHA GRIFFIN **APPELLANT**

vs. **CAUSE No. 2007-KA-01768-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Leake County, Mississippi in which the Appellant was convicted and sentenced for his felony of **MURDER**.

STATEMENT OF FACTS

Kenyada Harper testified that her sister, Daphne Nicole Harper, the victim in the case at bar, lived with the Appellant for a long period of time. The victim and the Appellant resided at 308 Smith Lane, Carthage, Leake County, Mississippi.

Things apparently soured for the victim, for on 28 March 2007 she was in the process of leaving the Appellant. Her sister, Kenyada Harper, went to the residence to assist the victim in packing her things. While at the residence, Kenyada Harper sat on a couch, waiting for the

victim to bring her belongings out of a bedroom. The Appellant was present, as well as a Willie Huffman, a Lisa Huffman and a lady who might have been the Appellant's mother. The Appellant and the victim were in the bedroom. At some point, the victim brought her belongings out and gave them to Kenyada Harper, who took them to her truck.

While she was loading the victim's belongings into the truck, Kenyada Harper heard a gunshot. When she heard this gunshot, she ran back into the residence. As she reached the door of the house, she heard another gunshot. She thought that there might have been thirty seconds between the first shot and the second one. She went into the residence, but not into the bedroom. In response to something Willie Huffman said to her, this Huffman being in the residence at the time of the gunshots, Kenyada Harper screamed and then rang emergency services. (R. Vol. 2, pp. 35 - 42).

Willie Huffman was then brought round to testify. He stated that the Appellant was a nephew of his and that he, Huffman, also lived at 308 Smith Lane. The Appellant lived there as well, and the victim had lived there for some six years prior to 28 March 2007.

At between seven and eight o'clock on the evening of 28 March 2007, Huffman was at the residence, as well as the victim and her sister and the Appellant. At that time, Huffman said he was outside the residence. He heard a gunshot and went into the residence to see what was going on. After waking his fourteen-year-old son, who was asleep on a couch, he saw his sister standing at the doorway of the bedroom. Huffman went to her and pulled her away from the doorway. After he did so, he saw the Appellant in the bedroom with a pistol, pointing it. Huffman then heard another shot. He did not see the Appellant fire the shot, but he heard the report of the pistol. Prior to hearing the second shot, he did see the Appellant attempting to "rack" the pistol. Huffman could not give an estimate of the time between the first and second

shot, but there was enough time for him to get into the house and observe the Appellant.

Huffman went out of the trailer but stayed on the property around it until law enforcement arrived. The Appellant disappeared. On cross-examination, the witness stated that, while he did not actually see the gun that the Appellant was pointing, he did see the Appellant point it and heard it fired. He further stated that he called out to the Appellant before the Appellant fired the second shot. (R. Vol. 2, pp. 43 - 58).

Michael Harper, an investigator with the Leake County Sheriff's department, testified that he was sent out to Smith Lane at about 7.53 o'clock on the evening of 28 March 2007. The trailer at 308 Smith Lane had been secured by other law enforcement officers by the time he arrived. Harper, after speaking to Willie Huffman, went into the trailer and into the bedroom within it and found the body of the victim, lying on the bed. He also observed a handgun, a Cobra semi -automatic .32 caliber pistol. He also saw a live bullet and a spent round on the bed. The victim appeared to have suffered a gunshot wound beneath her chin. He later thought he observed another gunshot wound to the face of the victim.

The witness then testified as to how the pistol operated. He stated that guns of that type were capable of becoming jammed. The remedy in such an instance would be to "ratch" the slide to eject the jammed bullet.

The gun, the spent and live round found on the bed, as well as another three live rounds were taken as evidence and sent to the Mississippi Crime Laboratory for examination.

The Appellant was not present at the residence when Harper arrived. At some point, though, the Appellant came out of a wood and yelled. Other officers went to him and placed him into custody. Harper later interviewed the Appellant. (R. Vol. 2, pp. 58 - 74).

The Appellant was given his *Miranda* rights. The Appellant indicated that he understood

his rights but wished to waive them. He signed a waiver. With respect to the death of the victim, the Appellant stated that, while the victim was packing her clothes, he thought he saw the barrel of a pistol in some of her clothes. He said he seized the pistol, pointed it, and started shooting. (R. Vol. 3, pp. 112 - 119). This testimony concerning the Appellant's statement was corroborated by the Sheriff of Leake County. (R. Vol. 3, 126 - 132).

Dr. Steven Hayne performed an autopsy upon the body of the victim on 29 March 2007. He found that the victim suffered a gunshot wound to the nose. There was gunpowder residue around this wound, indicating that the victim had been shot at very close range. There was another gunshot wound to the chin. He found gunpowder residue and flame injury around this wound, which indicated that the weapon was in contact with the skin when fired. A third injury was found – a fracture of a small bone above the top part of the eye, this injury having been cause by the bullet that penetrated the victim's nose.

The trajectory of the wound to the nose was consistent with the victim having been standing or sitting when the shot was fired; the trajectory of the bullet and the blood flow from the wound to the chin indicated that the victim was lying down when that shot was fired. Both bullets entered the victim's brain. These injuries were the cause of death, and either bullet would have caused her death. Both bullets were recovered, and they were sent to the crime laboratory. (R. Vol. 2, pp. 95 - 111).

The gun and bullets found at the death scene were examined by the Mississippi Crime Laboratory, as well as the bullets taken from the victim's head. The bullets found in the victim's head were fired from the gun found at the death scene. (R. Vol. 3, pp. 134 - 144).

The defense produced a case - in - chief. First called to testify was Linda Huffman. She was one of those who lived in the trailer located at 308 Smith Lane. She had known the victim

since 2001, which was when the victim began her relationship with the Appellant. The Appellant was a nephew of hers. The Appellant and the victim had one child, a boy of three years of age at the time of trial.

The Appellant and the victim were wont to argue from time to time, and the victim would move out of the trailer from time to time. On 28 March 2007, at about 7.30 in the evening, the victim and her sister came to the trailer. The victim began collecting her belongings. The Appellant was with the victim as she did so. Huffman believed that the Appellant and the victim were arguing since she heard doors being closed in a loud fashion. At one point she saw the Appellant and noticed that he was crying.

At some point the Appellant left the bedroom and went to the bathroom. He then returned to the bedroom and stood by a dresser. At that point Huffman heard the sound of gunshots. She claimed that the second shot was fired in immediate succession to the first shot. Huffman did not see a gun in the Appellant's hand. She did say that she thought that the victim and the Appellant were having a "struggle," this on account of the doors being slammed. (R. Vol. 3, pp. 147 - 154).

Yet another occupant of the trailer at 308 Smith Lane testified, this being one Angela Smith. She is the Appellant's mother. The Appellant and the victim began living together at the residence at 308 Smith Lane in 2001. According to Smith, the victim was like a daughter to her.

On the day of the victim's death, Smith told the victim not to return to the trailer and not even to call. Smith did this, she said, because she was tired of the "up and down" of the victim's habit of leaving and then returning to the trailer. She said she told the victim that she would bring her belongings to her. Nonetheless, the victim did return, and, when she arrived at the trailer, Smith was sitting at a table outside the trailer. The victim arrived, said nothing to Smith,

and entered the trailer. Smith did not hear any gunshots. She did not hear any arguing either. (R. Vol. 3, pp. 155 - 160).

STATEMENT OF ISSUES

1. WAS THE VERDICT SUPPORTED BY THE EVIDENCE; WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

2. DID THE TRIAL COURT ERR IN GRANTING INSTRUCTION S-4?

SUMMARY OF ARGUMENT

1. THAT THE VERDICT WAS SUPPORTED BY THE EVIDENCE; THAT THE VERDICT IS NOT OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE

2. THAT THE SECOND ASSIGNMENT OF ERROR IS NOT PROPERLY BEFORE THE COURT; THAT THERE IS NO MERIT ARGUMENT RAISED IN THE SECOND ASSIGNMENT OF ERROR

ARGUMENT

1. THAT THE VERDICT WAS SUPPORTED BY THE EVIDENCE; THAT THE VERDICT IS NOT OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE

In the First Assignment of Error, the Appellant contends that the verdict of murder was not supported by the evidence, or, alternatively, was opposed by the great weight of the evidence. Upon reading his argument, however, it does not appear that he actually believes that the State failed to prove him guilty of a homicide. His argument appears to be a contention that he was guilty at most of manslaughter. In considering his contention, we bear in mind the standards of review appurtenant to sufficiency and weight of evidence claims. *May v. State*, 460 So.2d 778 (Miss. 1984).

At the close of the State's case - in - chief, the Appellant moved for a directed verdict. He asserted that, since the Appellant and his victim were the only ones who were present in the bedroom when he shot her, his statement as to what transpired there "[bore] great weight of

credibility due to the Weatherly rule (*sic*)." (R. Vol. 3, pg. 146). This motion was denied, and the Appellant then went on to present a case - in - chief. At the conclusion of the case, the Appellant submitted a peremptory instruction, which was denied (R. Vol. 1, pg.8; Vol. 3, pg. 163). However, there was no further argument in support of the notion that the State had failed in its proof of murder. The motion for a new trial or for judgment notwithstanding the verdict contained no further argument. (R. Vol. 1, pg. 27).

Consequently, with respect to the assertion that the evidence was insufficient to support the verdict, it does not appear that the Appellant actually asserted that the evidence was sufficient only for manslaughter. His argument was that he should have been acquitted altogether, apparently on the basis of *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933). Consequently, the Appellant is in no position now to assert that he should have been convicted of manslaughter. *Riley v. State*, 2007-KM-00953-COA (Decided 27 May 2008, Not Yet Officially Reported).

The *Weathersby* rule, or *Weatherly* if the Appellant should prefer it, is a familiar one: Where an accused or his witnesses are the only witnesses to a homicide, their version must be accepted unless it is contradicted in material particulars by credible witnesses, physical facts or facts commonly known.

It seems an odd thing that the Appellant would invoke this hoary rule of Mississippi criminal law. The Appellant's witnesses, "ear" and eyewitnesses, corroborated the Appellant's statement to law enforcement, which, it will be recalled, was to the effect that he picked up the gun and started shooting the victim. He gave no reason for his action in his statement, and he did not testify in his trial. In actual fact, the Appellant's statement and his witnesses' testimony corroborated the State's witnesses, or at least did not contradict the State's witnesses.

The evidence in this case concerning the Appellant's guilt is not in conflict. Briefly summarized, the facts showed that the victim came to his residence to retrieve her belongings and that as she did so he took up a pistol and shot her. He gave no reason for having done so. There is no suggestion of self - defense in this case, not so much as a hint of self - defense, quite unlike what was shown in *Weathersby*. There was simply no basis for an acquittal on the charge of murder. The Appellant shot the victim twice. Malice aforethought may be proved by or inferred from the fact that a deadly weapon was used. *Higgins v. State*, 725 So.2d 220 (Miss. 1998).

It is true that one witness tried to suggest that the Appellant was upset, in that he was wiping tears from his eyes and that he went to a bathroom to get tissue with which to dry his eyes. But this testimony, such as it was, was not to be considered by the trial court when it considered whether the evidence was sufficient to allow a verdict of murder. When considering the sufficiency of the evidence for a particular charge, a trial court is to disregard any evidence and inferences arising therefrom which oppose the verdict. *May, supra.* The evidence in support of the charge of murder were that the Appellant picked up a gun and shot the victim to death. This is clearly murder.

As for the suggestion that the Appellant was guilty of no more than manslaughter, there was an instruction on the "heat of passion" variety of manslaughter given at the behest of the State. (R. Vol. 1, pg. 14). However, insofar as the testimony showed, the only passion alluded to was that the Appellant might have been wiping tears from his eyes.

The phrase "heat of passion," in the context of this form of manslaughter, has been defined to mean:

[a] state of violent and uncontrollable rage engendered by a blow or certain other provocation

given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some *immediate and reasonable provocation, by words or acts of one at the time.* The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

E.g. McCune v. State, 989 So.2d 310, 319 (Miss. 2008). Here, there was simply no proof that the Appellant was in a "violent and uncontrollable rage," much less that such was caused by a blow or other sufficient provocation. There was nothing to show that the Appellant's state of mind was one of rage, hatred, furious resentment or terror. He did not mention such a state of mind, or what provocation was involved, when he told law enforcement that he picked up the gun and began shooting. There was no testimony at trial by the Appellant, no testimony to the effect that he killed the victim in the heat of passion.

There was testimony that the Appellant might have been crying, but this, of itself, hardly showed "heat of passion" as defined in this State. There is no evidence at all that the victim in any way provoked the Appellant. There was no evidence show that this homicide was manslaughter, rather than murder.

There was no evidence that the victim provoked the Appellant or committed some unlawful act against him. The facts in *Bangren v. State*, 196 Miss. 887, 17 So.2d 599 (1944), discussed *infra*, are entirely different from those in the case at bar.

As for the Appellant's claim that the verdict was contrary to the great weight of the evidence, we think that what we have just pointed out with respect to the sufficiency - of - the - evidence claim is largely sufficient to address the question of whether the trial court abused its discretion in refusing a new trial. We will simply point out that there was practically no evidence at all in opposition to the verdict to suggest that the verdict returned constituted an unconscionable injustice. As the Appellant himself put it, he picked up the gun and began

shooting. This was murder.

The First Assignment of Error is without merit.

2. THAT THE SECOND ASSIGNMENT OF ERROR IS NOT PROPERLY BEFORE THE COURT; THAT THERE IS NO MERIT ARGUMENT RAISED IN THE SECOND ASSIGNMENT OF ERROR

In the Second Assignment of Error, the Appellant says that it was error on the part of the trial court to give instruction S-4. (R. Vol. 1, pg. 14). The instruction's vice, it is said, was that it directed the jury to prefer murder to manslaughter and to consider manslaughter only if and after the jurors rejected murder.

During the trial court's consideration of the proposed jury instructions, the Appellant, through counsel, stated that he had no objection to instruction S-4. We do not find that the Appellant ever entered an objection to the instruction. (R. Vol. 3, pg. 162; 164; 166). This being so, the claim advanced in the Second Assignment of Error is not properly before the Court. *McDowell v. State*, 948 So.2d 1003, 1013 (Miss. Ct. App. 2007). Here, not only was there not a contemporaneous objection, with specific grounds asserted in support of an objection, counsel clearly stated that he had no objection to the instruction. Counsel's claim here that the instruction was objected to is simply incorrect.

Assuming that the Second Assignment of Error is before the Court notwithstanding the foregoing reasons why it is not, and not intending to waive those reasons why it is not, there is no merit in it.

While the trial court expressed doubt as to whether a sufficient evidentiary basis existed to support the giving of a "heat of passion" manslaughter instruction, it nonetheless gave one. It may have been that its decision was influenced by the fact that the State and the defense wanted the instruction. (R. Vol. 3, pg. 164). The instruction, though, did not "direct" the jury to

"prefer" murder over manslaughter; all the instruction did was to inform the jury that it should consider manslaughter if it found the evidence insufficient to support a verdict on murder. There is nothing unusual about this. Since manslaughter is an inferior offense with respect to murder, it was only logical that the court instruct the jury to consider the charge of the indictment first and to consider the lesser offense if it found the evidence insufficient to support murder. The instruction did not require the jury to return a verdict of murder; nor did the instruction suggest what verdict the jury should have returned. We have, over the years, seen this form of instruction used in many, many cases in which an instruction on manslaughter was given in a murder case.

The Appellant, citing *Bangren v. State*, 196 Miss. 887, 17 So.2d 599 (1944)[1], says that the instruction was substantively deficient because it failed to instruct the jury that a killing in the heat of passion may be manslaughter, and not murder, even if the accused has malice at the time of the killing.

In *Bangren*, the facts were that the accused kept what was apparently a bawdy house in the City of Corinth. A gentleman caller had a dispute of some kind with a sixteen-year-old girl who was in the house, so he retrieved his three dollars that he had paid her. The defendant ordered the caller out of the house; he demanded a retraction of an insult the sixteen-year-old girl had given him. Satisfaction secured, he then left the house only to return a short while later to retrieve a quantity of whiskey he had left in the house. At that point, the defendant and the gentleman exchanged words, which led to an attempt by the gentleman to strike the defendant.

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[1] To the extent that *Bangren* held that a person could be convicted of manslaughter or justifiable homicide, that holding has been overruled. *Ferrell v. State*, 733 So.2d 788 (Miss. 1999).

This blow the defendant repelled. She then reached for a gun. The gentlemen pulled her out to the porch of the house, where she shot and killed him. There was evidence that the defendant, after ejecting the gentleman from the house, indicated that she would kill him if he attempted to re-enter the house However, she did not do so when he did re - enter the house. On the other hand, there was other testimony that this sentiment on the part of the defendant was expressed only after the shots were fired. The defendant was convicted of murder.

The Court held that the evidence presented a case no greater than manslaughter. In its discussion of malice and malice aforethought, the Court's statements were in the context of a killing committed in the course of repelling an unlawful act. The Court stated that, in such an instance, a person may be guilty of a homicide no greater than manslaughter even if the proof show that he was mad or bearing ill will at or toward his adversary, so long as such ill will was occasioned by the conduct of the victim and non-existent prior to that conduct. 17 So.2d at 600. In other words, the Court stated that where a decedent brings on some difficulty by committing or attempting to commit an unlawful act, the person against whom that act is committed has the right to repel it with reasonable force. Should it be that the one against whom the act is committed is angry or bears malice against the one committing the unlawful act, on account of the fact that the unlawful act was committed, this fact alone will not raise the degree of homicide to murder.

The Appellant did not request an instruction based upon the language in *Bangren.* Consequently, he may not complain of the lack of such an instruction here. *Miller v. State*, 748 So.2d 100 (Miss. 1999). But even had he done so, there was no evidence to support such an instruction. There was no evidence that the victim in the case at bar was committing an unlawful act against the person of the Appellant, and there was no evidence that the Appellant was

repelling any such unlawful act. In *Bangren*, the accused had every right to eject the gentleman from her home, and every right to use reasonable force to repel his assault upon her. There are no facts in the case at bar to suggest anything remotely similar to those in *Bangren*. Here, the victim was simply attempting to gather her things and leave the Appellant. She was perfectly within her rights to do so, and the idea that simply because the Appellant might not have wanted her to leave gave him a license of some kind to just up and shoot her is certainly not supported by *Bangren*. There was, then, no evidence to support such an instruction, even if the Appellant had sought it.

The Appellant claims that the absence of this instruction was a violation of the due process clause of the Fourteenth Amendment to the United States Constitution. However, this assertion is neither argued nor supported with authority. That being so, it is abandoned. *Puckett v. State*, 879 So.2d 920, 932 (Miss. 2004).

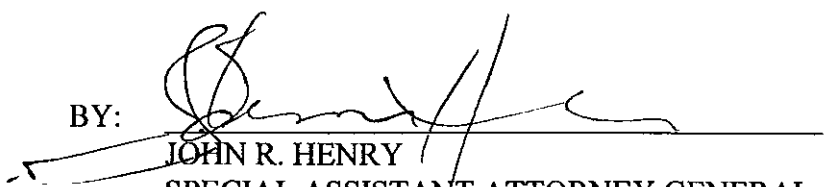
The Second Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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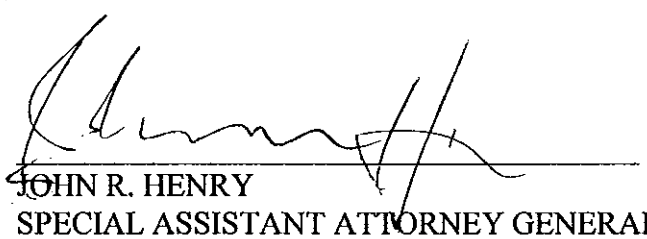
This the 28th day of October, 2008.



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