

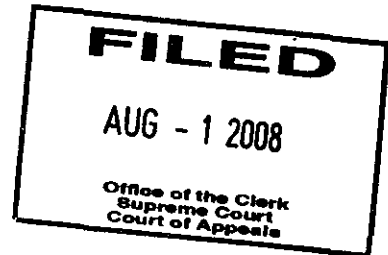
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SUPREME COURT OF MISSISSIPPI

DEWAUN O'SHA GRIFFIN

v.

STATE OF MISSISSIPPI



2007-KA-01768-COA

Appeal from Circuit Court of Leake County, Mississippi

BRIEF FOR APPELLANT

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Oral Argument IS Requested.

CERTIFICATE OF INTERESTED PERSON

DEWAUN O'SHA GRIFFIN

v.

STATE OF MISSISSIPPI

2007-KA-01768-COA

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

**Honorable Mark Duncan
District Attorney
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**Honorable Marcus D. Gordon
Circuit Court Judge
P.O. Box 220
Decatur, MS 39327**

**Honorable Jim Hood
Attorney General of MS
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**Dewaun O'Sha Griffin
APPELLANT**



Edmund J. Phillips, Jr.
Attorney of Record for Dewaun O'Sha Griffin

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STATEMENT OF THE ISSUES

1. The Court erred in denying Appellant's motion for directed verdict and further, the verdict is against the overwhelming weight of the evidence.
2. The Court erred in granting jury instruction S-4.

STATEMENT OF THE CASE

Dewaun O'Sha Griffin appeals his conviction from the Circuit Court of Leake County, Mississippi, for the charge of murdering Daphne Nicole Harper, and sentence to life in prison in the custody of the Mississippi Department of Corrections.

FACTS

There were two primary items of evidence against Appellant, his statement and the testimony of Willie Huffman. Two shots were fired and heard at Appellant's house at the time of the death of Daphne Nicole Harper. Huffman had been present at Appellant's home when the death occurred. He was outside the home, heard the first shot and ran in the house. He testified about the second shot for the prosecution (T-46, 47):

- Q. Okay. Now, when you saw your nephew, Dewaun Griffin, what was he doing?
- A. He was pointing a pistol and that's when I heard the shot.
- Q. All right. He was pointing a pistol
- A. Yes, sir.
- Q. What direction was he pointing it
- A. Straight ahead of him.
- Q. Straight ahead of him.
- A. Yes, sir.
- Q. And I don't guess you were straight ahead of him, were you?
- A. No, sir.

- Q. Okay. But you couldn't see what was on the other side of where the pistol was pointed.
- A. No, sir.
- Q. Now, you said you then heard another shot.
- A. That was the second shot I heard.
- Q. You saw him shoot the gun the second time?
- A. No, I didn't see him shoot it. I just heard the shot.

When Huffman was interviewed at the scene of the crime (Appellant's house) he told the police his name was Willie Griffin.

On cross-examination he testified (T-52):

- Q. All right. And you didn't see Dewaun - - well, you said you saw Dewaun and he had the gun out.
- A. Yes, sir.
- Q. But could you see the gun? Could you see the pistol?
- A. No.
- Q. You could just see his arm.
- A. Yes.
- Q. All right. And you couldn't - - but you don't know what else was going on in that room.
- A. No, sir.

His testimony that he could not see the pistol in Appellant's hand was directly in conflict with his direct examination testimony that he saw Appellant point the pistol and heard the shot. Note that he further testified on direct that he did not see Appellant shoot the pistol (T-47).

Huffman's testimony was further in conflict with the testimonial projections of Dr. Steven Hayne, Chief State Pathologist for the State of Mississippi, who performed the autopsy. Hayne testified (T-100) that there were two bullet wounds to the body of Daphne Nicole Harper, one to the nose from extremely close range and one beneath the

chin at a time when the firearm was in contact with the body. He opined that she was either sitting or standing at the first time she was shot because the bullet trajectory was nearly level through her head. He opined that she was lying down at the time of the below-the-chin shot. He testified (T-102):

- A. Counselor, as shown in another photograph, the blood essentially traveling across the neck, and, in addition, if the gunshot would were inflicted after the gunshot wound of the nose, she would be in a down or prone position.
- Q. You mean lying down?
- A. Yes, counselor. Either gunshot would have immediately incapacitated this individual upon receiving that gunshot. I don't see a downward trajectory of blood coming out of the gunshot wound to the chin. If one were in a standing position or upright position or seated position, I would expect to see blood coming down her neck, not going across and to the right,
- Q. So it's your testimony, as I understand it, is that the gunshot wound to the nose is consistent with her being seated or sitting up or standing.
- A. It would be consistent with that, yes, counselor.
- Q. And the gunshot wound to the chin consistent with her lying down or in a prone position.
- A. Yes, sir, it would be consistent having received that gunshot wound to the chin after receiving the gunshot wound to the nose.

Thus, if Hayne's opinion is accurate, the shooter was kneeling and the victim prone on the floor at the time of the second shot. (Further, the trajectory of the second or below- the-chin bullet was upward through the upper part of the brain) (T-103).

Leake County Sheriff's office investigator Michael Harper testified, introducing photographs of the decedent at the death scene, photographs of the death scene, a pistol found at the death scene and Appellant's confession. At the Jackson-Denno hearing out of the presence of the jury, (T-79) he testified:

- Q. What did he tell you?
- A. He stated to us that Daphne had come over to the trailer to retrieve her belongings. He stated that at first he stayed outside while she packed her stuff. He stated that he went into the trailer, went to the back bedroom where he stood while she was packing her stuff. He stated to us that he had his head in his hands. He looked up and saw what he thought was a barrel of a gun under some type maybe clothing. He stated to us that he panicked. He made a quick move, took the gun away from her, and at that point the Sheriff asked him why did he shoot, why did he shoot her, why didn't he back out, back out, walk away. He stated that he just pointed the gun and started shooting.

The Court denied Appellant's motion to suppress and the confession was introduced.

On redirect examination, Dr. Hayne testified (T-111):

- Q. Dr. Hayne, of the two gunshot wounds that were received by Ms. Harper, was each one in itself a fatal wound to her?
- A. It was counselor. Each one would produce death independent of any other injury.

After the state rested the Court denied Appellant's motion for a directed verdict.

Lisa Huffman testified for the defense that she heard the Appellant and the victim slamming doors in the back of his mobile home apparently arguing (T 149, 150) and then (T151, 152):

- A. It sounded like it was a struggle. It wasn't like normal when they were in the room. It was just moving around, a lot of stuff banging, you know, doors slamming and stuff like that.
- Q. All right. And you said that's not normal.
- A. That's not normal.
- Q. So did it sound to you like they were struggling in there?
- A. Yes.

She also testified (T-150):

- Q. What happened after he went to the bathroom?
A. He came back and stood by the dresser.
Q. What happened after that?
A. After that, that's when I heard the shots go off. They went back to back.
Q. When you say back to back, how close - - how far apart were these shots.
A. They went pow-pow. At first I thought it was a firecracker, but it wasn't.
Q. So if someone had said there was maybe 30 seconds between the shots, was it that?
A. No, they was back to back.

SUMMARY OF THE ARGUMENT

1. Killing in the heat of passion with no deliberation must be manslaughter rather than murder.

2. A Court may not instruct a jury to consider conviction of the crime of manslaughter only after it has acquitted the accused of murder, but must permit the jury to consider both at the same time to determine which crime best fits the evidence.

ARGUMENT

THE COURT ERRED IN DENYING APPELLANTS MOTION FOR DIRECTED VERDICT AND FURTHER THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

I.

From Appellant's statement (the only source of information about what happened in the room) he took the pistol away from her, pointed the gun at her and started shooting (T-79). Because the pistol was hers and he and she were struggling and because he took the pistol from her, the killing took place in the heat of passion and without the

deliberation required for deliberate design murder and was therefore manslaughter. *Windham v. State*, 520 So. 2d. 123, 126 (Miss. 1988).

In *Windham*, the Court held:

murder requires a “deliberate design to effect the death of the person killed.” As defined by dictionaries the word “deliberate” always indicates full awareness of what one is doing, and generally implies careful and unhurried consideration of the consequences. “Design” means to calculate, plan, contemplate. These are general and accepted meanings of these words.

The Mississippi Supreme Court has held that killing in the heat of passion is manslaughter rather than murder, even when deliberate design to kill is present. *Bangren v. State*, 17 So. 2d. 509 (Miss. 1944).

In the case before the Court, the Appellant’s confession is demonstrative of manslaughter, not deliberate design murder. In Mississippi, if the defendant or his witness is the only eyewitness to a murder, his or her version must be accepted, unless it is substantially contradicted by credible witnesses, physical facts, or facts commonly known. *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933). Appellant’s version of the killing in the confession must be accepted.

Because the killing in the case before the Court was done in the heat of passion and without deliberation, the conviction should have been for manslaughter not murder.

The verdict should be reformed to conviction of manslaughter and Appellant resentenced therefor.

II.

THE COURT ERRED IN GRANTING JURY INSTRUCTION S-4

Over objection, the Court granted Jury Instruction S-4, which reads as follows (c.p. 14):

The Court instructs you that if you fail to find the Defendant guilty of the felony crime of murder, then you should continue your deliberations to consider the elements of the felony crime of manslaughter.

If you find from the evidence in this case beyond a reasonable doubt that the defendant did kill Daphne Nicole Harper, a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon not in necessary self-defense and without authority of law, then you shall find the defendant guilty of manslaughter.

This instruction directed the jury to prefer murder to manslaughter and to consider manslaughter only if it rejected convicting Appellant of murder. *Bangren v. State*, 17 So. 2d. 599 (Miss. 1944) holds that killing in the heat of passion may be manslaughter rather than murder, even when the accused has deliberate design to kill.

In granting this instruction the Court denied the possibility that killing with deliberate design may be done in the heat of passion and therefore may be manslaughter.

In addition the Court's directing the jury to prefer murder to manslaughter is a violation of the due process clause of the Fourteenth (14th) Amendment of the United States Constitution.


The Court denying Appellant's objection to it was error.

The verdict should be reformed to conviction of manslaughter and Appellant should be resentenced therefor.

CONCLUSION

The verdict should be reformed to conviction of manslaughter and
Appellant should be resentenced therefor.


RESPECTFULLY SUBMITTED,


EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney, the Honorable Marcus D. Gordon, P.O. Box 220, Decatur, MS 39327, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: August 1, 2008.


EDMUND J. PHILLIPS, JR.
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