IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANTONIO KNOWLES — APPELLANT

V. — NO. 2007-KA-1786-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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ANTONIO KNOWLES	**APPELLANT**
V.	**NO. 2007-KA-1786-SCT**
STATE OF MISSISSIPPI	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Antonio Knowles, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Albert B. Smith, III, Circuit Court Judge

This the 11th day of February, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Brenda Jackson Patterson

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STATEMENT OF THE CASE

Antonio Knowles was indicted by a Quitman County Grand Jury for unlawfully, wilfully and feloniously, without the authority of law, and with deliberate design to effect death, kill and murder John Paul Roberson, a human being, in violation of Section 97-3-19 of the Mississippi Code of 1972. After a jury trial, Mr. Knowles was convicted of Murder and on September 13, 2007, was sentenced to serve a term of life under the control and custody of the Mississippi Department of Corrections.

STATEMENT OF FACTS

Antonio Knowles, Damion Harper and Wayzo Moore were at a club called The Palace. Mr. Moore testified that he did not arrive at the club with Mr. Knowles and Mr. Harper but met up with them there. He caught a ride with them because it was drizzling when he was leaving the club. Mr. Moore was riding in the front passenger seat and Mr. Knowles was driving and Mr. Harper was on the back seat when they arrived at the Smoke House Grill. It was Mr. Moore's belief that Mr. Knowles was going to take them home instead of to the Smoke House Grill. T. 98. Once they arrived at the Smoke House Grill Mr. Knowles was the only person in the car to go inside. Mr. Moore and Mr. Harper were still inside the car when Mr. Moore heard a gunshot. He thought it came from the left of him. Then he heard another gunshot and he turned to his front where he knew the shot came from. T. 99-101.

Mr. Moore testified that the car they were riding in was parked slanted away from the front door at the Smoke House Grill. T. 102. After the second shot, he could see Mr. Knowles standing and John Paul Roberson lying on the ground with his arms stretched out. Mr. Knowles made a motion as if he was putting something away and came to the car. Mr. Moore knew Mr. Roberson because Mr. Roberson had been his barber when he was younger. However, he was not aware at the time that

it was Mr. Roberson lying on the ground, but found out the next day. T. 103. Mr. Knowles took Mr. Moore home immediately after the incident and when he asked him what happened he said, "It wasn't nothing. Ain't nothing." T. 106.

Mr. Moore said that he never saw Mr. Knowles shoot Mr. Roberson , nor did he see him with a gun at any time. However, after Mr. KNOWLES dropped him off at his house, he saw him stop in front of his neighbor's residence and motion as if he threw something. He could not see what he threw or if he threw anything. T. 108.

Lapraie Taper was the fourth witness called by the state. She and John Paul Roberson lived together and had been riding around the night he was killed. She wanted a smoke sausage sandwich from the Smoke House Grill and that is why they stopped there. She saw Mr. Roberson and this guy she later identified as Antonio Knowles walk out of the door of the Smoke House Grill. They were standing there talking. They proceeded to the right and started talking and she saw Mr. Knowles shoot Mr. Roberson T. 119. She heard two shots. The first shot went down and the second shot hit Mr. Roberson in the head. She said that the shooter just put the gun back in his britches and just walked off. T. 122. He went and got in a dark colored Toyota and drove off. T. 122. During the entire incident, she was sitting in a car directly in front of the door at the Smoke House Grill and when the two men walked out they were facing her. T. 123. She further testified that she gave several statements of the incident to several different people because they wanted to make sure she was telling the same story. T. 127.

The description given to Officer Michael Self of the Marks Police Department of the person who shot Mr. Roberson was that he was a black male, of slender build and approximately 6' 6 ½" tall, driving a dark colored Toyota with out of state license. Once Officer Self saw a vehicle matching the above description and a man matching the description given, he stopped the vehicle and he along with

Deputy Pratcher arrested Mr. Knowles and charged him with murder. T. 65 and 75.

STATEMENT OF THE ISSUES

I. WHETHER MR. KNOWLES TRIAL COUNSEL WAS INEFFECTIVE IN NOT LAYING THE FOUNDATION TO HAVE AN EVIDENTIARY BASIS IN THE RECORD TO REQUEST A LESSER INCLUDED OFFENSE MANSLAUGHTER JURY INSTRUCTION?

SUMMARY OF THE ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Knowles contends that he was denied his Sixth Amendment right to the effective assistance of counsel during his murder trial. He asserts that his attorney had a duty to prepare a defense and question witnesses, Wayzo Moore and Lapraie Taper, in such a manner which would have provided an evidentiary basis in the record to at least entitle him to a manslaughter jury instruction. He asserts that his lawyer was ineffective in his failure to lay the foundation for a heat of passion manslaughter defense and therefore, ineffective in failing to request an heat of passion manslaughter jury instruction.

The touchstone for testing a claim of ineffective assistance of counsel must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Irby v. State, 893 So.2d 1042, 1048 (Miss. 2004) (citing Strickland v. Washington, 466 U.S. 668, (1984). The standard of review for a claim of ineffective assistance involves a two-prong inquiry: (1) The defendant must demonstrate that his counsel's performance was deficient and (2) the deficiency prejudiced the defense of the case. Irby v. State, 893 So.2d at 1042. (citing Carr v. State, 873 So. 2d 991, 1003 (Miss. 2004); Walker v. State, 863 So.2d

1, 12 (Miss. 2003) (citing Strickland, 466 U.S. at 687, 2064). Although it need not be outcome determinative in the strict sense, Ferguson v. State, 507 So.2d 94 (Miss. 1987) (citing Strickland, 466 U.S. at 687 (1984), it must be grave enough to "undermine confidence" in the reliability of the whole proceeding. 466 U.S. at 694. " This requires that the defendant show that his attorney's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Walker 863 So.2d at 12. (citing Strickland, 466 U.S. at 687).

To establish deficient performance, a defendant must show that his attorney's representation fell below an objective standard of reasonableness. Ross v. State, 954 So.2d 968, 1003 (Miss. 2007) (citing Davis v. State, 897 So.2d 960, 967 (Miss. 2004) (citing Williams v. Taylor, 529 U.S. 362 (2000)). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. See Ross, 954 So.2d at 1003. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 1004.

The following testimony is offered to show that the shooting took place very quickly after Mr. Knowles and Mr. Roberson came out of the Smoke House Grill.

DIRECT EXAMINATION - WAYZO MOORE - DIRECT

T. 109

Q. So - - well, did you see Antonio Knowles when he walked out of Smoke House Grill?

A. Did I see him when he walked out of the Smoke House Grill?

Q. Uh-huh.

A. No, ma'am.

Q. Did you hear him talking to somebody?

A. No, ma'am.

Q. But you saw him standing kind of in front of the vehicle, kind of within your sight after you heard the shots?

A. Yes, ma'am.

DIRECT EXAMINATION - LAPRAIE TAPER

T. 118

Q. Okay. So that evening, had y'all gone to Smoke House Grill?

A. That night.

Q. That night?

A. Yes, ma'am.

Q. What were y'all going to do there?

A. He was going in to get me a smoke - - a hot dog, smoked sausage.

Q. Is that his only reason for stopping there?

A. Yes, ma'am.

Q. Had y'all been out that night?

T. 119.

A. We had been riding around. But we hadn't - - you know, we didn't go out.

Q. So, had you seen him go into the Smoke House Grill?

A. Yes, ma'am.

Q. Ms. Taper, is that the same building that's shown in this photograph?

A. Yes, ma'am.

Q. So he went into the door depicted in that photograph?

A. Yes, ma'am.

Q. Do you know how long he was in there, inside the grill?

A. He was probably in there about - - about ten minutes.

Q. Did you see him come out?

A. Yes, ma'am.

Q. So, maybe still waiting?

A. Yes, ma'am.

Q. Did you see where he went when he came out?

A. Well, him and this guy walked out the door, and they was standing in front of the door talking. All of a sudden, they went to the side of Paul's, like it would be to my right. Then they was standing over there talking. And then after that, that's when he got shot.

Q. Well, let me back up and - - did you see them talking?

T. 120.

A. Yes, ma'am.

Q. Clearly?

A. Yes, ma'am.

Q. Okay. And you saw them talking?

A. Yes, ma'am.

Q. Had you heard any unusual sounds at that time?

A. No, ma'am. To me - - okay, I couldn't hear you know what they was saying to each other. But to me, it seemed like they was just, you know, basic conversation.

Q. Okay. Not an argument?

A. Huh-uh. It didn't look like they were arguing, to me.

Q. What did you observe then?

A. Okay. Then it looked like Paul had said well, just forget it, man.

MR. TISDELL: Object to what it looked like he said. If she couldn't hear him saying it, then - -

A. I'm saying - - I'm just talking about visual, like he just threw his hands up, like you know what I'm saying. Then he had started to walk from back there. And then that's when the boy pulled the gun on him.

Miss. Code Ann. § 97-3-35 (Rev. 2000) defines manslaughter as: "The killing of 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, without authority of law, and not in necessary self-defense, shall be manslaughter." The Mississippi Supreme Court has defined "heat of passion" as 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. Tait v. State, 669 So.2d 85, 89 (Miss. 1996). citing Buchanan v. State, 567 So.2d 194, 197 (Miss. 1990).

"By statue 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." Shipp v. State, 847 So.2d 806, 812 (Miss. 2003).

"Words of reproach, criticism or anger do not constitute sufficient provocation to reduce an intentional and unjustifiable homicide from murder to manslaughter." Johnson v. State 416 So.2d 383, 387 (Miss. 1982) citing Richardson v. State, 85 So. 186 (Miss.1920); Williams v. State, 26 So.2d 174 (Miss. 1946); McLaurin v. State, 37 So.2d 8 (Miss. 1948).

From the above testimony and a review of the entire record there is nothing to indicate that Mr. Knowles knew Mr. Roberson would be in the Smoke House Grill. As a matter of fact, Mr. Knowles was already in the Smoke House Grill when Mr. Roberson stopped there to buy Ms. Taper a smoke sausage sandwich. T. 118. Ms. Taper estimated that Mr. Roberson had been inside the Smoke House Grill approximately ten minutes when he and Mr. Knowles exited. The state never offered any evidence to show that there had not been a confrontation between Mr. Knowles and Mr. Roberson prior to their walking out of the restaurant. Her testimony was that they appeared to be just talking, however, she could not hear the conversation and apparently she could not see the demeanor of either man because she never testified to facial expressions. In the ten minutes time they were present together in the restaurant there is a strong probability that there was a confrontation between these two men. Mr. Knowles is not required to prove his innocence. Rigby v. State, 826 So.2d 694, 707 (Miss.2002). The evidence presented by the state is not inconsistent with the shooting of Mr. Roberson by Mr. Knowles taking place in as little time as a few seconds to a minute after they walked out of the restaurant. It is only prudent to believe that something transpired in the restaurant. Once defense counsel raised the issue of "heat of passion" manslaughter, the state has the burden of proving that Mr. Roberson did not strike, threaten, or provoke Mr. Knowles in any way so as to produce the type of immediate and reasonably anticipated anger required to rise to the level of "heat of passion" manslaughter.

There is no evidence in the record of any efforts by Mr. Knowles' defense counsel to present any type of defense for him. There were not any questions addressed to Mr. Wayzo or Ms. Taper nor to the police officers who took the stand concerning Mr. Roberson provoking Mr. Knowles while in the restaurant. At the very least, Mr. Knowles contends that his attorney should have tried to lay a foundation so that there would have been an evidentiary basis in the record for a manslaughter instruction. The state has the burden of proving its case and in this case their burden was to prove that Mr. Knowles committed deliberate design murder. Because there was not any evidence presented by the state concerning what happened between him and Mr. Roberson while in the restaurant, defense counsel should have used that opportunity to lay the foundation for a "heat of passion" manslaughter instruction.

In the present case, Mr. Knowles and Mr. Roberson were both inside the Smoke House Grill Restaurant. After exiting the restaurant, they talked or argued briefly outside. Neither Ms. Taper nor Mr. Wayzo could testify as to what their conversation was or the tone of their voices. Neither could hear their conversation. Further, neither witness testified to either of these two men's demeanor during their talking or arguing. T. 109 and 120.

Mr. Knowles submits that his attorney could have asked the following questions of witnesses Wayzo Moore and Lapraie Taper to lay a foundation for a manslaughter instruction.

1. Isn't it true that you were not inside the Smoke House Grill while Mr. Knowles and Mr. Roberson were present?
2. Isn't it true that you cannot testify that Mr. Roberson did not strike or threaten Mr. Knowles?
3. Isn't it also true that you did not hear the conversation between Mr. Roberson and Mr. Knowles and you therefore cannot testify that Mr. Knowles was not in a state of

violent and uncontrollable rage when he shot Mr. Roberson?

4. If someone testifies that Mr. Roberson struck Mr. Knowles or that they fought while they were in the restaurant, you cannot say that did not happened can you?

5. Isn't it also true that you cannot testify that Mr. Roberson did not provoke Mr. Knowles in some way to cause him to shoot him?

6. Isn't it true that you also cannot testify as to what the conversation was between the two when they walked outside of the restaurant?

7. Isn't it true that you cannot dispute that Mr. Knowles was telling Mr. Roberson don't put your hand on me again?

8. Isn't it true that you cannot testify as to what the two of them were saying because you did not hear one word that they were saying?

"Lesser-included offense instructions should be given if there is an evidentiary basis in the record that would permit a jury rationally to find the defendant guilty of the lesser offense and to acquit him of the greater offense." Sanders v. State, 781 So.2d 114, 119 (¶ 16) (Miss. 2001) (quoting Welch v. State, 566 So.2d 680, 684 (Miss. 1990)). An evidentiary basis is established when a "rational" or "reasonable" jury could find the defendant not guilty of the principal offense charged yet finds the defendant guilty of the lesser-included offense. Harper v. State, 478 So.2d 1017 (Miss. 1985).

Mr. Knowles contends that the above questioning would have placed an evidentiary basis in the record for his counsel to have requested a lesser included manslaughter instruction. Once defense counsel raised the above questions or similar questions the burden would have been placed on the state to prove that this was not a "heat of passion" manslaughter case.

Common sense dictates that there had to have been some kind of confrontation between Mr. Knowles and Mr. Roberson that would have caused Mr. Knowles to shoot him so shortly after exiting the restaurant. The state failed to give an estimate as to how long of a conversation took place between these two men once they exited the Smoke House Grill however, from a review of the record the discussion leading to the shooting could have transpired in as short a time as thirty seconds to a minute. Therefore, a rational or reasonable jury could find Mr. Knowles not guilty of deliberate design murder and find him guilty of "heat of passion" manslaughter.

"Defendants are entitled to instructions on their theory of the case for which there is foundation in evidence, even though evidence might be weak, insufficient, inconsistent, or of doubtful credibility and even though the sole support of defense is the defendant's own testimony." Welch v. State, 566 So.2d at 680.

"Every accused has a fundamental right to have her theory of the case presented to a jury even if the evidence is minimal." Chinn v. State, 958 So.2d 1223 (Miss. 2007). "A criminal defendant has the right to assert alternative theories of defense, even inconsistent alternative theories as long as there is an evidentiary basis in the record. Reddix v. State, 731 So. 2d 591 (Miss. 1999), citing Love v. State, 441 So.2d 1353, 1356 (Miss. 1983). "In homicide" cases, the trial court should instruct the jury about a defendant's theories of defense, justification, or excuse that are supported by the evidence, no matter how meager or unlikely, and the trial court's failure to do so is error requiring reversal of a judgement of conviction." Manuel v. State, 667 So.2d 590 (Miss. 1995) citing Hester v. State, 602 So.2d 869, 872 (Miss. 1992) citing Murphy v. State, 566 So.2d 1201, 1206-07 (Miss. 1990).

Mr. Knowles contends that not only was his counsel's performance deficient for failing

to lay a foundation for "heat of passion" manslaughter instruction, but his performance prejudiced his right to a fair trial. Strickland v. Washington, 466 U.S. at 687. But for his counsel's failure to lay a foundation for a manslaughter instruction and afterwards his failure in requesting a manslaughter instruction, it would have been reasonable for a jury to rationally acquit Mr. Knowles of deliberate design murder and convict him of manslaughter instead. Especially, with there not being any evidence in the record that these two men were even aware of the other's presence in the restaurant prior to Mr. Roberson entering the restaurant.

CONCLUSION

Defense counsel's failure to lay a foundation or even attempt to lay a foundation for "heat of passion" manslaughter cannot be considered reasonable given the fact that neither person knew the other was going to be at the restaurant. The record is void of any attempt of defense counsel to assert any type of defense for Mr. Knowles. This failure falls below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's failure to lay a foundation for a "heat of passion" manslaughter defense there would have been an evidentiary basis in the record for an "heat of passion" manslaughter instruction. The failure of defense counsel to lay a foundation for a "heat of passion" manslaughter instruction undermines the reliability of Mr. Knowles having had a fair trial, and therefore constitutes ineffective assistance of counsel.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Antonio Knowles, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 11th day of February, 2008.

Brenda Jackson Patterson

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