

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID WELCH

APPELLANT

VS.

NO. 2007-KA-1939-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Warren County, Mississippi wherein a jury convicted David Welch of the murder of Cedric Griffin, in violation of Miss. Code Ann. § 97-3-19. Frank G. Vollar, Circuit Judge, sentenced Welch to life imprisonment. CP 91;93. After denial of post-trial motions Welch appealed raising the following issues:

STATEMENT OF THE ISSUES

- ISSUE I: WHETHER THERE WAS SUFFICIENT EVIDENCE OF DELIBERATE DESIGN MURDER?
- ISSUE II: WHETHER THE WEIGHT OF EVIDENCE REQUIRES A JNOV OR NEW TRIAL?

FACTS

On the morning of Friday, April 21, 2006, Cedric Griffin (Cedric) was shot and killed in David Welch's trailer at 330 Massey Drive, Vicksburg. T 434, 495-96. Welch called 911 claiming that he did not know the black male intruder who accosted him with a shotgun as he exited the shower. T. 211, 365, 368-69, 379-84. Authorities found Cedric's body on the back steps of Welch's house with one gunshot wound to the chest and one to the head. T. 221.

Deputy Jay Ghrigsby testified that after responding to the call of a shooting at Welch's trailer, he advised Welch of his Miranda warnings before questioning him. Welch then told the deputy that "when he got out of the shower he noticed a black male standing in his bedroom brandishing a shotgun. He then stated a struggle ensued, and the gun went off. He was able to get the shotgun back from the black male, load it, and shoot him again." T. 211

Randy Lewis, a criminal investigator with the Warren County Sheriff's Office testified to his findings and extensive investigation of the crime scene. T. 228-94; Exhibits S 1-75. Investigation of the physical evidence showed that Cedric's body had obviously been moved from inside the house. In addition to the extensive amount of blood in the house, there was some blood on the Mazda which was parked outside. The 20 gauge single action shotgun used to shoot Cedric was missing its stock, such that, in shooting it, one risked injury to the hands from "sharp" parts. [T. 239-40, 289, 405, 526; Ex. S-58]. Lewis found the shotgun sitting in blood in the kitchen. When he picked up the gun a clear liquid that appeared to be water came out of the barrel. T. 292-94. No fingerprints were found on the shotgun. *Id.*

During a search of the residence authorities found a 12 gauge shotgun, Marlin .35 rifle, pellet

pistol and muzzle loader, all belonging to Welch, but did not find any ammunition for the other weapons. T. 274-77, 502.

Dr. Steven Hayne performed the autopsy on Cedric and testified the cause of death was “two gunshot wounds.” T. 307; 332; Exhibits S 77-81. Hayne concluded the first wound was a gunshot wound to the mid right chest that entered the body at a ten to fifteen degree downward trajectory. T. 307-08; Welch was six inches shorter than Cedric. T. 341.

Without laboratory tests for powder residue, the pathologist could not tell if the chest wound was contact or not. T. 285-86, 335-36, 354; Ex. S-51. Gun shot residue, which was indicated, is different from powder residue for the pathologist’s purposes of a more reliable barrel distance estimate, but the powder residue analysis was not available. *Id.* However, Hayne testified:

- Q. So is it your opinion then that the muzzle of the shotgun could have been as close as four inches to the body at the time of the shot?
- A. It would be possible, counselor. Up to a distance of eight inches or so, though, I think it would be more consistent with a distant gunshot wound, but I cannot exclude a contact gunshot or a near-contact gunshot wound from four to about six -- four to six inches further away from the entrance gunshot wound. T. 336

Cedric could have maintained consciousness for up to 15 seconds after receiving the gun shot wound to the chest; with death taking no more than three minutes. T. 361

The second lethal gunshot wound was located on the right side of the head. Dr. Hayne testified the bullet traveled from the back of the head through the skull to the front, in a 60 degree downward trajectory. T. 307, 314, 321. In Hayne’s opinion, Cedric was alive when he received the lethal gunshot wound to the head.

Hayne testified that powder residue and white dots of material present at the gunshot wound

to the head were consistent with the victim wearing a hat at the time of being shot in the head. T. 313-14; S Exhibit 79. Hayne also testified there was dried blood and what appeared to be tissue on the inside of the hat. T. 315.

Hayne further testified that "... most importantly the only injuries, other than two gunshot wounds, are the abrasions to the face and to the right back. And those would be consistent with an individual falling. I have no other injuries indicative of a struggle. I can't exclude it, but I don't have evidence to support the struggle." T. 341.

Deputy Mike Traxler testified that Welch made several statements on the day of the shooting. T. 365-379; Exhibits S89-94. In his **first statement** to him, Welch told investigators he was by himself at the trailer during the night. " When I come out of my bathroom and there was a black man standing in my bedroom with a shotgun and he pointed it at me and I grabbed it and we tussled and spun around. The gun went off and we tussled some more. Then we got back in the living room. A shell fell out. He just kept waylaying me, you know. And you know me, I reloaded the son-of-bitch and headed toward the back door and I shot him with it." Welch denied knowing the intruder and denied having ever seen the sawed off shotgun before. Welch said "He was trying to go out the back and I shot him a second time." (Exhibit S-92).

In his **second statement**, Welch continued to maintain he had never met the intruder and that he was by himself at the trailer. When confronted with conflicting evidence, Welch said when he came home from the hospital that Bobby Miller and a man named "Travis" were there but he ran them off because they were smoking crack. Welch denied dragging the body to the backdoor. He claimed while sitting on the floor he shot the intruder in the back of the head as the intruder was crawling to the backdoor. (Exhibit S-93).

Later that same afternoon, in a **third interview**, Welch made conflicting statements. He admitted his drug use and that Cedric, who previously sold him drugs, was trying to extort \$800 from him. In his final statement Welch said when he arrived home from work Thursday night around 11:30 to midnight Miller and Spook were in his trailer. Welch didn't really know Spook personally, he just knew of him. Welch initially said he stayed at home by himself that night but finally admitted that Miller and Spook slept in the living room. Apparently, Spook was going to wait at Welch's until morning so he could go with Welch to get the \$800 Welch owed him. The trio used drugs and then Miller and Spook left and came back. The next morning when Welch came out of the bathroom Spook had the shotgun that he kept under the bed. Welch didn't know how Spook found the gun and didn't really know how the gun got loaded with the two bullets. Welch and Spook scuffled in the bedroom, the gun went off and they fell into the living room. Welch knew Spook was hit somewhere in the front. Welch then loaded the gun and shot at Spook. When asked if he and Spook had words before Welch fired the second shot Welch replied "I don't think because when he was...I mean he just kept waving at me and I couldn't get away from him." According to Welch, Miller slept through the shooting and didn't see it. Welch denied moving the shotgun after the incident. He did admit to using a T-shirt to wipe off some of the blood. He dragged the body outside and opened Spook's car door because he was scared and didn't know what to do. (Exhibit S-94).

Byron McIntire with the Mississippi State Crime Lab testified to the loading and firing of the single barrel, single shot shotgun used to kill Cedric. T. 404-418.

Bobby Miller was the State's final witness. Miller was the son of Welch's neighbors. Welch grew up with Miller's father; Miller considered Welch to be like a big brother. T. 508-09; Miller testified he and Welch had been close for years; he lived with him for a few months before finding

his own place; he and Welch used drugs together. Miller testified on cross examination that earlier on the day of the shooting, Cedric told him he held a gun to Miller's head because Miller owed him money. T. 461. Miller testified that on Thursday night he met Cedric at a convenience store and they drove to Welch's trailer in Cedric's Mazda. T. 431-36. Miller still had a key to Welch's trailer, so he and Cedric went in and waited for Welch to come home. *Id.* Miller testified after Welch came home the three drank beer and used drugs. T. He and Cedric never left the trailer that night. Miller testified he was asleep on a chair in Welch's living room and was awakened by a loud noise. T. 434. Miller saw Cedric fall face down from the bedroom to the door to the living room floor. T. 436-37. Miller described how he saw Cedric trying to get up and crawl toward the backdoor. Welch walked out of the bedroom reloaded the shotgun and shot Cedric who was still crawling on his hands and knees toward the back door. *Id.* According to Miller, Welch and Griffin were not fighting when Griffin fell out of the bedroom. *Id.* Then Miller left and went next door to his mother's house, fearing incrimination. *Id.* After waiting for authorities to arrive at Welch's house, Miller went to the sheriff's office to give a statement. *Id.*

Miller said he did not know what happened in Welch's bedroom before the shooting. T. 455. Initially Miller said that Welch made a remark after the incident that Cedric should not have threatened his family. T. 441. At trial, Miller testified that Welch told him that he waited to confront Cedric until no children were around, referring to his parents house next door. T. 437, 442. Miller testified there were no cross words between Welch and Cedric before the shooting. T. 464. Miller admitted that he lied to investigators initially when he told them he arrived at Welch's house alone and did not come with Cedric. T. 447.

Tabatha Brooks, Welch's "friend of about two months," testified for the defense. T. 472-73.

Brooks, Cedric and Welch used to hang around together. Brooks testified a few days before the shooting, she and Cedric were at Welch's trailer. Cedric told Brooks to go to the other room and turn up the radio. T. 475. Cedric went into David's room with an automatic gun, not the shotgun later used to kill Cedric. T. 475, 478. Brooks went into the bedroom and witnessed Cedric holding a gun in one hand and a pillow in the other. T. 476. He didn't have it pointed at anyone. *Id.* Brooks testified Cedric told her that Welch was suppose to go to the ATM that afternoon and get the money Welch owed him. T. 478. Brooks dropped Cedric off and never saw him again. *Id.*

Welch testified in his own defense. T.472-543. Welch testified on direct examination that Cedric had been trying to extort \$500 from him, however on cross examination Cedric changed the amount back to \$800. T. 488, 524. Welch testified that on the previous Wednesday, he came home to find Tabatha and Cedric in his house and he asked them to leave. T. 486. They didn't. *Id.* Welch confirmed Brooks' testimony that Cedric told her to increase the volume on the radio and the two men went into Welch's bedroom. T. 474-77, 487. There, Welch reported that Cedric put a pistol to Welch's head while holding a pillow and demanding money for alleged "stolen" cocaine. *Id.* Welch denied this theft accusation; but, told Cedric he would pay him the demanded money on Friday. T. 487.

Welch testified he knew of Cedric's prior robbery conviction and gang affiliation and was frightened, especially when Cedric threatened Welch's family. T. 477, 487-89. On Thursday, Welch obtained a loan of \$1500.00. Welch testified the money was for "trouble with his car" and to pay Cedric and hopefully get rid of him. T. 502-03; Ex. D-13.

Welch testified that he came home Thursday night to find Miller in his trailer with Cedric. T. 491. Welch testified that the trio had some beer and smoked some marijuana and then Bobby and

Cedric then left. T. 494 . Bobby said they never left. T. 432-34. Nonetheless, Welch went to bed. *Id.* Welch testified when he woke up about 7:30 a. m. on Friday April 21, 2006, Cedric and Miller were in the living room asleep. *Id.*, T. 494. Welch said he made some coffee and went back to his bedroom, waiting for the banks to open so he could get some cash, pay Cedric and hopefully get rid of him. T. 495. Welch testified on direct that Cedric came to the bedroom demanding money since it was Friday. T. 383, 495-96. Welch said he told Cedric he had the money but needed the banks to open to get the cash. *Id.* Welch said he then got ready to take a shower. *Id.* While looking for a towel, Welch said he turned and saw Cedric pointing a shotgun at him. *Id.* Welch reacted by grabbing the barrel and pushing. *Id.* A tussle ensued, and the shotgun discharged unintentionally. *Id.* Cedric kept fighting, then tried to crawl or get up. *Id.* Welch noticed a shotgun shell on the floor, impulsively grabbed the broken shotgun, which was a single shot, reloaded it and shot Cedric in the back of the head. *Id.*

On cross examination, Welch somewhat confusing and conflicting at times and added facts not told before.

Q. Well, let me ask you this. What had you done that morning when you got up? You said you made some coffee.

A. Yeah.

Q. Did you drink it in your room?

A. Yes, sir.

Q. Did you smoke any cigarettes?

A. Yeah.

Q. Watch some TV?

A. Yes, sir, the TV was on.

Q. Okay. And you're saying that he fell back on this bed here?

A. Yes, sir.

Q. How long had you been up?

A. At that time it was -- I don't know. Maybe 30, 45 minutes.

Q. And how long had you known that he was there?

A. About that long.

Q. And during that period of time you smoked some cigarettes.

A. Yes, sir. When he come -- when he woke up and walked in the bedroom, I was actually sitting there on the bed on the phone with a friend of mine telling her what room my daddy was in.

Q. Who were you on the phone with?

A. A friend of mine, ex-girlfriend, name of Robin Mixon.

Q. Okay. Did you say, hey, this dude -- you know, call the police; this dude has got a gun on me?

A. No, sir. He didn't have a gun on me at that point.

Q. So you weren't very alarmed by this whole thing, by him being there.

A. Well, yes, sir, I was, but I didn't know what was going to happen. Really, I didn't expect anything to happen. I thought I was going to go to the bank and get him the money and then everything would be all right.

Q. So you're saying he came in. Did he speak to you? Into your room. You're sitting on the bed talking on the phone; is that correct?

A. Yes, sir.

Q. And you're talking to your girlfriend, but nothing that you bothered to tell her about.

A. No.

Q. All right. So what did he say?

A. Nothing. Nothing when I was on the phone.

Q. What did he do?

A. Just stood at the end of the bed and waited till I got off the phone.

Q. And then what did he say?

A. He asked me, Are we going to be able to get the money this morning? I told him yes. I said, But I've got to go to the hospital first.

Q. Told him you had the money.

A. Yes.

Q. No problems.

A. No problems.

Q. Now, then you said that you were struggling over the gun, and that's how that all happened, like we just went through before.

A. Yes, sir.

Q. And are you saying that when he was shot he was on the bed?

A. Not on it. He was like sitting on the foot of it, like right here in this area.

Q. I thought when we were talking before you said that he was laid back on the bed, and you jerked on the gun.

A. No, sir, that's not what I said.

Q. Well, tell me what you said.

A. I said he lost his balance when he hit the footboard, and he sat down on the bed, I believe is what I said.

Q. Okay. Is that where you shot him?

A. Yes, sir. When I jerked back -- I jerked back this-a-way toward the door, and that's when the gun went off.

Q. So your back was towards the door?

A. Yes, sir.

Q. Huh. Okay. Now, then what happened?

A. Well, like I said, when I jerked back and the gun went off, I fell on the floor, went down right in front of the doorway of the bedroom.

Q. I thought you were -- he was sitting on the bed. How did you fall all the way back there?

A. Because I jerked on the gun. When it come loose, that's where I landed. And like I said, he screamed, "no," and come at me swinging. I commenced to getting up, was trying to get to my feet, and he come down on top of me. And me and him both fell into the living room.

....

A. And like I say, he fell on top of me, still swinging and hitting at me, and I managed to get my feet up between me and him, and I kicked him off of me. And then he landed on the kitchen floor, half way on the carpet and half way on the kitchen floor.

Q. Face up or face down?

A. Face down.

Q. So y'all were facing each other, and you got your feet up and kicked him?

A. No. I was on the floor. He was on top of me.

Q. So how is it he ended up way over there on the floor by the kitchen face down?

A. It's not way over there. It's right there. It's right outside the door.

Q. He's face down on top of you; is that right?

A. Yes, sir.

Q. And you kicked. Both feet or one foot?

A. Both feet.

Q. Okay. And so where did he end up?

A. On -- I kicked him off of me.

Q. Uh-huh. (Affirmative Response.)

A. He was right there.

Q. So he fell over right next to you is what you're saying?

A. Kind of.

Q. Kind of? Okay. Then what happened?

A. Well, he commenced, like I said, trying to get up, and he was actually trying to get up with one hand and was reaching in his pants with the other hand.

Q. Oh. He was?

A. Yes, sir.

Q. Well, when did you tell the police that?

A. I'm not sure. I don't even know if I ever did. I don't believe.

Q. So this is the first time?

A. Well, I've told my lawyers about it. I haven't talked to anybody, any police, since the day I talked to Mike.

Q. But you talked to them about five times, right?

A. Who?

Q. The police. Between the 911 call and the deputy that showed up and three statements to

Mike Traxler.

A. Yeah.

Q. And you testified on direct examination when your lawyer was talking to you.

A. Yes, sir.

Q. You didn't say it then either, did you?

A. No, sir, I don't -- I don't think I did.

Q. Well, when were you going to tell --

A. I don't recall saying that.

Q. I'm sorry. Go ahead.

A. I said I don't recall saying it.

Q. But you're saying it now.

A. Yes, sir.

Q. Okay. Now, in several of your statements, the last two, you talked about him crawling to the back, towards the back door.

A. Yeah.

Q. And Bobby said that, too, didn't he?

A. Yes, sir.

Q. And that's when you shot him again.

A. Yes, sir.

Q. Okay. Now, I'm going to remind you that you already said a couple of times you never meant to kill him.

A. No, sir.

Q. Where was he when you shot him the second time?

A. Trying to get up.

Q. He was trying to get up.

A. Yeah.

Q. Where were you?

A. In the living room behind him.

Q. Behind him?

A. Yes, sir.

Q. How far behind him?

A. Oh. It was like here maybe to the floor right there.

Q. So you're standing up now.

A. Well, getting up, yes, sir.

Q. You were getting up?

A. Yes, sir.

Q. When did you reload the gun?

A. As I was -- when I was on my knees.

Q. Okay. And where did you get that other bullet?

A. It was on the floor.

Q. Who put it there?

A. I'm assuming he had it.

Q. Okay. All right. So you're on your knees now, right?

A. Yes, sir.

Q. And is that when you shot him the second time?

A. No, sir. I think I had stood all the way up.

Q. You think?

A. I'm not real sure, Mr. Bonner, I mean, everything happened so fast.

Q. Okay. Did you or did you not put the gun to his head?

A. No, sir.

Q. -- and shoot him the second time?

A. No, sir, I did not. I heard the doctor say that, and I've been discussing that with my attorneys. I don't know how he come to that assumption because that -- that never happened. I don't understand that.

Q. Now, why would he lie?

A. I'm not saying he's lying, Mr. Bonner. I don't understand. Maybe -- maybe he -- I don't know. I mean, I know he's a chief pathologist and all that, but maybe he made a mistake. I mean, I don't know, but I know I did not put the barrel of the gun to his head and pull the trigger. I did not do that.

Q. The evidence shows that you were standing over him.

A. Yes, sir, I was. I was standing -- he was on the floor in front of me trying to get up.

Q. And the evidence shows that -- well, let's look what the evidence shows. This is State's Exhibit 22. See that?

A. Yes, sir, I see it.

Q. That hole in the floor?

A. Yes, sir.

Q. Do you know what that hole is?

A. Well, from all the discussing here, I mean, it's where the bullet was, I imagine.

....

Q. Were you there?

.....

A. Yes, sir, I was there.

Q. And you don't disagree with the physical evidence or the science that says that there's a bullet in that floor?

A. No, sir.

Q. Now, you said that you were standing up.

A. Yes, sir.

Q. And he's on, what, his one hand and his knees?

A. Yes, sir.

Q. And the physical evidence shows that there is a contact wound to his head that went straight into that floor (demonstrating).

A. That's what it shows.

Q. Bang (demonstrating). But you never meant to kill him. Is that what you're telling me?

A. I'm telling you that I never intended for none of this to happen, the shot in the bedroom, the shot to the head, none of it. I was scared to death, Mr. Bonner. I don't know -- I didn't plan this. I didn't intend for none of this to happen, and I don't really know how to

answer what you're asking me other than that.

Q. Did you not intend -- after you put the second shell in there (demonstrating) and closed it up and cocked it and put it to his head and pulled the trigger (demonstrating), didn't you intend to kill him?

.....

A. At that point in time I guess maybe I did, you know. I don't know. I don't know what I was thinking at that time. I'm not saying I didn't do it because I did it, but I never intended for it to happen. That's all I'm saying.

Q. He didn't have his hands on the gun that second shot, did he?

A. No, sir.

Q. He was face down on the floor, wasn't he?

A. Not face down. He was getting up.

.....

Q. I'm going to hand you State's Exhibit 93.

.....

Q. Are you on Page 6?

A. Yes, sir.

Q. When he said, "How did he get out the back door of the house?"

A. Yes, sir.

Q. Where it says, "That's where he was heading when I shot him"?

A. Yes, sir.

Q. He indicates that the blood looked like somebody dragged him to the back door, and you said what?

A. I said, "No, he was like crawling to the back door."

Q. Okay. And Mike said, "Like crawling to the back door?" This is after you shot him, right, is what your statement says?

A. Yes, after the first shot, not after I shot him.

Q. And then on the top of you said that you were sitting on the floor in the living room when you shot him the second time.

A. Well, yes, sir, that's what it reads.

Q. So you agree with me that you made a bunch of statements about this, and not all of them are the same?

A. Yes, sir.

T. 531-42

Welch testified, that he moved Cedric's body in a panic, not knowing what to do, and was trying to get it to the Mazda. T. 498-500. When Welch realized the magnitude of what had happened, he acquiesced to the futility of trying to cover up. *Id.* Afterwards, Welch called 911 and sat on his porch awaiting authorities. T. 210, 500; Ex. S-53.

SUMMARY OF THE ARGUMENT

Welch's conviction for murder was based upon legally sufficient evidence. The *Weathersby* rule is not applicable in the case *sub judice*. The jury's verdict was not against the overwhelming weight of the evidence.

ARGUMENT

PROPOSITION I: THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT OF DELIBERATE DESIGN MURDER.

In considering whether the evidence is legally sufficient to sustain a conviction in the face of a motion for JNOV, “[T]he critical inquiry is whether the evidence shows ‘beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed.’ ” *Id.* at 843-44(¶ 16) (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). The key question in this analysis is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* If the evidence against the defendant is such that “reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense,” we will deem the evidence sufficient. *Id.*

In Welch’s first assignment of error he contends that under the holding in *Weathersby v. State*, 147 So. 481, (1933), he was entitled as a matter of law to a directed verdict. Appellant relies on *Johnson v. State*, 987 So.2d 420 (Miss.,2008) wherein the Mississippi Supreme Court held that defendant’s eyewitness account of victim’s stabbing, and the defense witness’s eyewitness account of events leading up to the altercation and its aftermath were reasonable and not substantially contradicted in material particulars, and thus applied the *Weathersby* rule to require that defendant’s version of the killing, that it was in self-defense, be accepted as true, and defendant was entitled to directed verdict of acquittal. Welch’s reliance on *Johnson* is misplaced. The *Johnson* court stated

[W]e are fully cognizant that there can be circumstances when the defendant

and/or defendant's witnesses are the only eyewitness to the homicide and the *Weathersby* rule would not apply. For example, if the defendant or the defendant's eyewitnesses' testimony satisfies all the elements of murder or manslaughter, the defendant would not be entitled to a directed verdict of acquittal, as their testimony would be the basis for a valid conviction.

Furthermore: this rule has no application where the defendant's version is patently unreasonable, or contradicted by physical facts. Where the defendant is the only eyewitness to a slaying, his version must be reasonable and credible before he is entitled to an acquittal under the rule.

And, there is still another circumstance which still precludes the application of the *Weathersby* rule, and that is where the accused, following the slaying, gives conflicting versions of how the killing took place, or initially denies the act....

In those cases in which the defendant is the only eyewitness to the slaying, and in which the *Weathersby* rule is inapplicable (i.e., the defendant does not secure a directed verdict of acquittal), it then becomes a jury issue as to whether to believe or not believe the defendant's testimony of how the slaying occurred, and to either convict or acquit. *Blanks*, 547 So.2d at 33-34 (citations omitted).

Johnson 987 So.2d at 426.

The *Weathersby* rule clearly does not apply to the case *sub judice*. The only consistency in Welch's statements and testimony was that Griffin was shot and killed in Welch's trailer with a sawed off shotgun. Not only did Welch give more than one version of the shooting, the evidence does not support his many versions of events.

The fact that the shotgun was under the bed and the box of shells were in a closed drawer does not go along with Welch's version that Cedric had the gun when Welch came out of the bathroom looking for a towel. The made up bed with the housecoat, ashtray and remote control sitting on top of the bed and the blood spattered hat hanging on the bedpost are inconsistent with Welch's story that Cedric stumbled backwards over the footboard onto the bed and they tussled. Also, the state of the bed is inconsistent with Welch having slept in it 30 minutes before the shooting. The blood spatters in the bedroom, on the bedroom door, the living room and kitchen are inconsistent with Welch's version of events, specifically that he was standing with his back to the

bedroom door when the first shot was fired. Bobby Miller's testimony was not consistent with Welch's many versions.

Authorities found the shotgun on the floor sitting in blood. Welch testified he grabbed the barrel of the gun during the scuffle and denied moving the gun after the shooting. The crime scene investigator testified the gun had no fingerprints on it as if wiped clean. A clear substance like water came out of the barrel when the investigator picked it up.

The physical evidence from the crime scene, Bobby Miller's statement and Welch's own inconsistent statements are sufficient evidence of Welch's design to shoot Cedric in his bedroom. Dr. Haynes' testimony that although Cedric was still alive when he received the second gunshot, coupled with Miller's testimony and Welch's own admissions that he intended to kill Cedric when he reloaded the shotgun and shot him in the back of the head are sufficient to establish that Welch formed a deliberate design to kill Cedric. There was sufficient evidence that Welch did not act in necessary self-defense when he shot Cedric in the back of the head, because, at that time, Cedric did not present a reasonable threat to Welch's life. See *Moore v. State*, 891 So.2d 256, 259(¶ 8) (Miss.Ct.App.2004) "A reasonable, hypothetical juror could have been convinced that there was no need to continue aiming the shotgun at [the victim], as he presented no reasonably imminent threat in his unarmed, prone, and seriously wounded state."

A directed verdict in the case *sub judice* was not warranted. Whether the first shot was fired by accident during a scuffle or whether Welch intentionally shot Cedric were facts in dispute and questions to be submitted to the jury. Deciding whether Welch acted reasonably in necessary self-defense when he shot Cedric in the head as he attempted to crawl away was also a question for the jury. Welch's conviction for murder was based upon sufficient evidence and was not against the

overwhelming weight of the evidence, despite Welch's claim that the trial court was under a duty to direct a verdict in his favor based on a theory of self defense or "imperfect self defense." See *Moore v. State*, 859 So.2d 379 (Miss. 2003).

**PROPOSITION II: THE WEIGHT OF EVIDENCE REQUIRES A JNOV
OR NEW TRIAL?**

Welch's final challenge to his conviction alleges that the jury's verdict was contrary to the overwhelming weight of the evidence. When reviewing the denial of a motion for new trial based on an objection to the weight of the evidence, this Court will only reverse a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Bush v. State*, 895 So.2d 836, 844(¶ 18) (Miss.2005). In analyzing such a claim of error, we are required to view the evidence in the light most favorable to the verdict, and we will grant a new trial "only in exceptional cases in which the evidence preponderates heavily against the verdict." *Id.*

Appellee asserts that Welch did not have to have the murder planned for a significant length of time; he could have developed the design after Cedric entered his bedroom. "[D]eliberate design to kill a person may be formed very quickly, and perhaps only moments before the act of consummating the intent." *Brown v. State*, 965 So.2d 1023, 1030(¶ 28) (Miss.2007) (quoting *Gossett v. State*, 660 So.2d 1285, 1293 (Miss.1995)).

The issue of self defense in the case *sub judice* is analogous to the issue of self defense in *Rogers v. State*, 994 So2d 792, (Miss.App.2008). In that case, Rogers and the victim were in an altercation; the victim shot Rogers in the chest; Rogers returned fire with his own weapon hitting innocent bystanders. Additionally, Rogers shot the victim six times with the final shot being to the

back of the victim's head as he lay helpless on the floor. Dr. Hayne, the forensic pathologist, testified, as he did here, that although the first shot to the victim was lethal, the victim was still alive when the defendant shot him in the back of the head. The jury found Rogers guilty of manslaughter. This Court affirmed the conviction on appeal rejecting Rogers' argument of self defense. This Court found the sequence of shots was critical concluding that Rogers, in firing the final shot at the victim's head, was not acting reasonably in necessary self-defense.

To support his argument that the verdict was against the overwhelming weight of the evidence, Welch first argues that if he "premeditated killing Cedric, he would not have gone to the trouble of getting a loan to pay Cedric and establish a "paper trail." Appellee would submit the flaw in this argument is that Welch may have intended at one time on paying Cedric and then changed his mind. Almost 24 hours passed between the time of signing the loan papers and shooting Cedric, more than sufficient time for Welch to decide to kill Cedric. Additionally, Welch could have borrowed the money for something totally unrelated to paying off Cedric. Welch testified he was borrowing \$1,500.00 because he was having trouble with his car and to pay Cedric. As previously argued, Welch need not have planned this murder days in advance for there to be deliberate design. Additionally, in the time between the first gun shot to the chest and the fatal gunshot to the head, Welch took the shell off the ground, loaded it in the shotgun and intentionally shot Welch in the back of the head.

Welch next asserts that he "would not have planned to commit the alleged offense with a broken, unreliable, and dangerous weapon." Obviously, the 20 gauge sawed off shotgun worked well enough to kill Cedric. Also, the shells for the shotgun were readily available in the dresser drawer. Investigator Lewis testified that although there were several firearms found in the trailer,

there was no ammunition for them. T. 274-48.

Finally, Welch argues that it is unreasonable to conclude that he would have planned to kill Cedric, whom he knew, in his own bedroom, with a witness present. Appellee would submit that just because an individual premeditates to kill does not mean the individual has an intelligent, well-thought-out plan. When Welch got the gun out from under the bed and loaded the first bullet, he formed a design to kill.

While the jury was given the option of convicting Welch of manslaughter or murder, it found evidence beyond a reasonable doubt for murder. “Whether a homicide is classified as a murder or manslaughter is ordinarily an inquiry to be made by the jury.” *Hodge v. State*, 823 So.2d 1162, 1166(¶ 16) (Miss.2002).

In affirming the murder conviction in *Moore v. State*, 859 So.2d 379, 385 (Miss. 2003), the Mississippi Supreme Court held

When a defendant has been found guilty by a jury, appellate court authority is limited, and the verdict should not be overturned so long as there is “credible evidence in the record from which the jury could have found or reasonably inferred each element of the offense.” *Davis v. State*, 586 So.2d 817, 819 (Miss.1991). The reviewing court is to examine all of the evidence in a light most favorable to the verdict. *Washington v. State*, 800 So.2d 1140, 1144 (Miss.2001). In the case at bar, the jury was instructed on murder, manslaughter and self-defense. The question of self-defense, in conjunction with Moore's full testimony, exhibits and facts were heard and considered by the jury. The record contains credible evidence from which the jury could have found or reasonably inferred each element of the offense of murder. Therefore, the circuit court did not err in denying Moore's JNOV motion.

Viewing the evidence in the present case in the light most favorable to the verdict, the verdict is not so contrary to the overwhelming weight of the evidence that to allow it to stand would be an unconscionable injustice. The evidence against Welch, as summarized above, is substantial, and in

no way preponderates against the guilty verdict. Likewise, the evidence against Welch was sufficient to sustain his murder conviction. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that Welch acted with deliberate design in the killing of Cedric Griffin. The evidence established that Welch was the only one who knew the shotgun was under the bed and the shells in a closed drawer, a juror could infer that Welch got the gun out from under the bed and loaded it. The evidence showed that after the first shot to the Cedric's chest, Griffin was still alive and conscious, Welch reloaded the shotgun and shot Griffin in the back of the head as he was trying to crawl away. Such conduct evinces a deliberate design to kill. It is the position of the State that there has been no miscarriage of justice. The jury found and the facts absolutely support the murder conviction.

CONCLUSION

Based upon the arguments presented herein as supported by the rulings of the trial court, exhibits and record on appeal the State would ask this reviewing Court to affirm the verdict and sentence of the lower court.

Respectfully submitted,

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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:

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