IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-KA-01939 COA

DAVID WELCH — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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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. David Welch

THIS 5 day of December, 2008.

Respectfully submitted,

DAVID WELCH

By: _____
JOHN R. McNEAL, JR., His Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES

OTHER AUTHORITIES

none

STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER THERE WAS SUFFICIENT EVIDENCE OF DELIBERATE DESIGN MURDER?

ISSUE NO. 2.: WHETHER THE WEIGHT OF EVIDENCE REQUIRES A JNOV OR NEW TRIAL?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Warren County, Mississippi where David Welch was convicted of murder in a jury trial conducted February 20- 23, 2007, with Honorable Frank G. Vollar, Circuit Judge, presiding. Welch was sentenced to life imprisonment and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Cedric Griffin was drug dealer who had been convicted of aggravated robbery in Texas in 2000. [T.389-92, 452; Ex. D-12]. The appellant, David Welch, was an unemployed respiratory therapist who lived in Warren County in a manufactured home at 330 Massey Drive. [T. 505-06]. Welch had purchased powder cocaine from Cedric on several occasions. [T. 485]. Cedric was shot and killed in Welch's trailer on the

morning of April 21, 2006. [T.434, 495-96]. There had been a "misunderstanding" about money. [T.486-88].

Cedric's body was found on the back steps of Welch's house with one gunshot wound to the chest and one to the head. [T. 221]. Welch gave three statements. [T. 365-379; Exs. S89-S94].

Initially, just after the incident, Welch told investigators that he did not know the anonymous black male intruder who accosted him with a shotgun as he exited the shower. [T. 211, 365, 368-69, 379-84, 482; Exs. S89-S94]. Later that same afternoon, in a third interview, Welch admitted otherwise, disclosing his drug use and that Cedric, a drug dealer, was trying to extort $800 from him. *Id.* Even with this change, Welch, nonetheless, consistently asserted self-defense. *Id.*

In all of his statements, Welch always said that the first shot occurred accidently during a struggle with Cedric with Cedric as the aggressor armed with the shotgun. *Id.* Welch also always consistently said that he impulsively reloaded the shotgun after it was relinquished from Cedric and shot Cedric again because Cedric continued to try and get up and fight. [T. 211, 214-15, 384, 495-96; Exs. S91, S94].

Two more persons are relevant to a recitation of this unfortunate chain of events. Bobby Miller was Welch's former roommate and a friend and customer of Cedric. [T. 430-31]. Tabatha Brooks was another "friend" and the person who introduced Welch to Cedric. [T. 485, 472-73].

Welch described for investigators and to the jury how Cedric had been trying to extort money from him, once holding a pistol to his head and threatening his family. [T. 487-88; Exs. S91, S94]. The shooting happened on a Friday. On the previous Wednesday, Welch said Tabatha and Cedric paid him a visit. [T. 383, 473-77, 485]. At this Wednesday meeting, Welch said he came home to find Tabatha and Cedric in his house "engaged in oral sex" and he asked them to leave.[T. 486]. They did not leave. *Id.*

Cedric told Tabatha to increase the volume on the radio and Cedric and Welch 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 money demanded on Friday. [T. 487].

Tabatha testified that she looked in the bedroom during this Wednesday confrontation and saw Cedric with the pillow and gun. [T. 474-77]. State witness Bobby Miller confirmed also that Cedric admitted pointing a pistol at Welch's head. [T. 461].

Welch said he knew of Cedric's prior robbery conviction and gang affiliation complete with pitch-forked tatoo [T. 346, 489], and was frightened, especially when Cedric threatened Welch's family. [T. 477, 487-89]. On Thursday, Welch obtained a loan of $1500.00 to pay Cedric and hopefully get rid of him. [T. 502-03; Ex. D-13].

On the next evening, which would have been Thursday, Welch told investigators

and testified that he came home to find Bobby Miller in his trailer with Cedric. [T. 491]. Bobby Miller confirmed this. Testifying for the state, Miller said had met Cedric at a convenience store and they drove to Welch's trailer in Cedric's Mazda. [T. 431-36]. Bobby, Welch's former roommate, said he still had a key to Welch's trailer, so he and Cedric went in and waited. *Id.*

Welch and Bobby concurred that the trio had some beer and smoked some marijuana. [T. 432]. Welch said Bobby and Cedric then left. [T. 494]. Bobby said they never left. [T. 432-34].

Nonetheless, Welch went to bed. *Id.* When Welch woke up about 7:30 a. m. on Friday April 21, 2006, Cedric and Bobby 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].

Soon thereafter, Welch said 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. *Id.*

Bobby Miller testified that he was asleep on a chair in Welch's living room and was awakened by a loud noise. [T. 434]. Bobby looked down the hall, saw Cedric fall from the bedroom. [T. 436-37]. Bobby described how he said he saw Welch reload the shotgun and shoot Cedric who was trying to crawl or get up. *Id.* Then Bobby left and went next door to his mother's house, fearing incrimination. *Id.* Bobby said he did not know what happened in Welch's bedroom before the shooting. [T. 455].

Initially Bobby said that Welch made a remark after the incident that Cedric should not have threatened his family. [T. 441]. At trial, Bobby commented on something not told to investigators, and that was another comment allegedly made by Welch that he waited to confront Cedric until no children were around. [T. 437, 442]. Welch firmly denied this comment. [T. 497]. Bobby 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].

Welch told investigators, and 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; Exs. S91, S94]. 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].

Investigation of the physical evidence showed that Cedric's body was found "on the steps on the North side of the trailer." [T.221; Exs. S-6, 7, 8]. The body had

obviously been moved and rolled over, as Welch had admitted. [T. 222, 228, 236, 499-500; Ex. S-16]. There was some blood on the Mazda which was parked outside. [T. 222, 263; Exs. S40-S47].

The state's pathologist concluded, consistent with the testimony, that Cedric's fatal chest wound, was suffered first. [T. 307-08]. The wound to the head did not result in as much bleeding as would be expected if Cedric's heart had been pumping at that time. *Id.*

The pathologist concluded that the shot into Cedric's chest resulted from the barrel being about a quarter (1/4) inch to eight (8) inches from the body. [T. 317-18, 335-36]. Without laboratory tests for powder residue, the pathologist could not tell if the 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.* Cedric's head wound was apparently close contact. [T. 321].

It is pertinent to note that the shotgun used in this case 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]. Welch had other weapons. [T. 276-77, 502]. Welch described how his little brother busted up the shotgun when their father, who has multiple sclerosis, threatened suicide. [T. 492].

SUMMARY OF THE ARGUMENT

The trial court should have granted a directed verdict of acquittal on the murder charge, or, alternatively, a judgment *non obstante veredicto* (JNOV) for acquittal or manslaughter, or otherwise granted a new trial.

ARGUMENT

ISSUE NO. 1: WAS THERE SUFFICIENT EVIDENCE OF DELIBERATE DESIGN MURDER?

The appellant respectfully asserts that the evidence was insufficient to support a deliberate design murder conviction. The trial court should have granted a directed verdict of acquittal or JNOV on the murder charge.

The first shot suffered by Cedric Griffin on April 21, 2006 was fatal. [T. 307-08, 321]. There were no other eyewitness, besides David Welch, to this first shot, not even Bobby Miller knew what happened up to the first fatal shot. [T. 284, 455]. Miller was a witness to the second shot. Miller's testimony as to the physical occurrences is not contradictory to Welch's. Both say after the first shot, Cedric fell from the bedroom, towards the kitchen, Cedric tried to get up, and was shot again. [T. 436-37, 495-96].

The only evidence of the events occurring just before the first shot was that Welch was starting to take a shower when he was accosted by Cedric pointing the loaded shotgun at him. [T. 495-96]. A struggle ensued and Cedric was shot. *Id.* The physical

evidence is consistent with Welch's testimony. Welch had defensive wounds, consistent with a fight or struggle. [T. 342-44; Exs. D1-D8]. Cedric had wounds which were not defensive. [T. 341, 347]. Welch was defending himself.

It is Welch's first position that, since his testimony is consistent with the physical evidence, he was entitled to a directed verdict of acquittal based on the principle set forth by the Mississippi Supreme Court in *Weathersby v. State*, 165 Miss. 207, 209, 147 So. 481, 482 (1933). In *Weathersby*, the Court held:

> [W]here the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge. *Id.*

Whenever the "*Weathersby* rule applies and the defendant's version affords an absolute legal defense, the defendant is entitled to a directed verdict of acquittal." *Green v. State*, 631 So.2d 167, 174 (Miss. 1994). If " the defendant's story is materially contradicted, the *Weathersby* rule has no application and the matter of conviction versus acquittal becomes a question for the jury." *Id.*

The *Weathersby* rule was recently applied by the Supreme Court in *Johnson v. State*, 987 So. 2d 420, 422 (Miss. 2008). In *Johnson*, the defendant was the only eye witness and described how he had to stab the victim in self-defense. Afterwards, Johnson tried to get help, to no avail. *Id.*

The *Johnson* court followed the rule from *Weathersby* and reversed the

manslaughter conviction and rendered an acquittal of the defendant. *Id.* 424-26. The *Johnson* court noted that it was required to apply the *Weathersby* doctrine because "Johnson's eyewitness account of the stabbing [was] reasonable ... and not 'substantially contradicted in material particulars[.]'" *Id.* The same principles apply here.

The Court was required to accept Johnson's testimony "as true". *Id.* It follows that the Court is here likewise required to accept Welch's testimony as true since neither the testimony nor physical evidence contradict his testimony on any material point. The evidence in *Johnson* "was insufficient to submit to a jury for verdict and [the defendant] was 'entitled to a directed verdict of acquittal.'" *Id.* As to the enduring viability of the *Weathersby*, see also: *Heidel v. State*, 587 So.2d 835, 839 (Miss. 1991), *Blanks v. State*, 547 So.2d 29, 33 (Miss.1989); *Lanier v. State*, 533 So.2d 473, 490 (Miss.1988).

The trial court in the present case should have granted the defendant's motion for directed verdict on the murder charge when requested. [T. 466-70, 554; Jury Inst. D-10]. It would not have been inconsistent for the trial court here to have submitted the case to the jury on the issue of manslaughter versus justifiable homicide after that if the court did not think the evidence justified a complete acquittal.

The trial court, not the jury, should "determine whether the defendant receives the benefit of the *Weathersby* rule." *Green v. State*, 631 So.2d 167, 175 (Miss. 1994). The remedy requested here is a reversal with acquittal based on justifiable self-defense, or reversal with remand for a new trial on the lesser included charge of manslaughter.

ISSUE NO. 2.: WHETHER THE WEIGHT OF EVIDENCE REQUIRES A JNOV OR NEW TRIAL?

During its long deliberation, the jury sent out several questions, indicating a hesitancy to convict. [T. 594-600]. The jury was eventually given a *Sharplin* charge before reaching its verdict . See, *Sharplin v. State*, 330 So.2d 591, 596 (Miss.1976).

In *Bush v. State*, 895 So.2d 836, 843 (Miss.2005), the Court recognized that, when considering a motion for directed verdict or JNOV, "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that accused committed the act charged," so that "every element of the offense exist[s]." *Id.* The key "question 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." If "reasonable men" could find proof of any one element lacking, the proper remedy is for a reviewing appellate court to reverse and render." *Id.*

Looking at the state's case in the best possible light here, the only reasonable conclusions are that this is either a case of justifiable homicide or manslaughter, not premeditated murder. Reliable proof of premeditation did not exist.

As stated, even if the court here does not apply the *Weathersby* rule from Issue No. 1, the evidence remains so lacking so as to not support a murder conviction and a JNOV of acquittal is required, or a remand for a new trial. The verdict of guilty was clearly contrary to the evidence here entitling David Welch to a reversal and rendering of acquittal. *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994), *Brown v. State*, 829 So. 2d

93, 103 (Miss. 2002).

Alternatively, a new trial was warranted. When a jury's verdict is so contrary to the weight of the credible evidence or is not supported by the evidence, a miscarriage of justice results and the reviewing appellate court must reverse and grant a new trial on the charge of manslaughter. *Kelly v. State*, 910 So. 2d 535, 539-40 (Miss. 2005).

Manslaughter is defined in MCA § 97-3-35 (1972):

> 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.

Murder requires premeditation or deliberate design. MCA § 97-3-19(1) (1972):

> Although our law has never prescribed any particular *ex ante* time requirement, the essence of the required intent is that the accused must have had some appreciable time for reflection and consideration before pulling the trigger. *Blanks v. State*, 542 So. 2d 222, 226-227 (Miss. 1989)

The 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. *Mullins v. State*, 493 So. 2d 971, 974 (Miss. 1986)

In the present case, even though Welch admits using the firearm, malice should not be implied since Cedric was the aggressor as confirmed in the physical evidence of

Wade's defensive wounds. *Turner v. State*, 773 So.2d 952, 954 (Miss. App. 2000)(citing *Wilson v. State*, 574 So.2d 1324, 1336 (Miss.1990)).

According to both of the disinterested witnesses, Bobby Miller and Tabatha Brooks, there was no dispute that Cedric Griffin held a pistol to David Welch's head and demanded money. [T. 461, 475-76]. Welch had classic "defense injuries." [T. 342-44; Exs. D1-D8].

To prove that there was no premeditation here, three key points of evidence stand out which lead the Court now to the proper result. First, if Welch had premeditated killing Cedric, he would not have gone to the trouble of getting a loan to pay Cedric and establish a "paper trail". Secondly, Welch would not have planned to commit the alleged offense with a broken, unreliable, and otherwise dangerous weapon. [T. 239-40, 289, 405, 526; Ex. S-58]. The gun was so dangerous to use, the crime lab witness said he placed a stock on the gun to test fire it to avoid injury from "sharp parts". *Id.* Thirdly, it is unreasonable to conclude that Welch would have planned to kill another man, whom he knew, in his own bedroom, with a witness present.

The physical evidence also demonstrates acts of exasperation and panic, not premeditation. [T. 498-500]. Welch said he hesitated in admitting knowing Cedric to protect his family from gang retaliation [T. 501]. Welch had defensive wounds. [T. 294-95, 342-44]. Cedric had cocaine in his system. [T. 334].

"Ordinarily, whether such a slaying is indeed murder or manslaughter is a

question for the jury." *Windham v. State*, 520 So. 2d 123, 127 (Miss. 1988). However, the Supreme Court has reversed jury verdicts of murder on more than one occasion remanding for sentencing only for manslaughter.

In *Dedeaux v. State*, 630 So. 2d 30, 31-33, (Miss. 1993) the court reviewed the facts of a barroom shooting where the Defendant was charged and convicted of murder for shooting his girlfriend's husband. Similar to this case, there was ongoing animosity. *Id.* The defendant Dedeaux shot the victim three times, twice while the victim was moving toward him, and a third time as the victim lay on the ground. *Id.* This is exactly what happened here in Welch's case; but, here Welch did not shoot a third time.

Even though the defense did not request a manslaughter instruction in the *Dedeaux* case, the Supreme Court found that the facts only supported a conviction for manslaughter because, "this clearly was a killing in the heat of passion" even though a "greater amount of force than necessary under the circumstances" was used. *Id.* The *Dedeaux* court reversed the murder conviction and remanded the case for re-sentencing for the crime of manslaughter. 630 So. 2d 31-33.

In *Clemons v. State*, 473 So. 2d 943 (Miss. 1985), the court pointed out that there was "such contradictory testimony that it is virtually impossible to reconstruct what actually happened". 473 So. 2d at 944. The *Clemons* case involved a barroom stabbing. The *Clemons* court pointed out "there is more than enough conflicting evidence to cast at least a reasonable doubt as to murder", then, reversed the murder conviction and

remanded for sentencing for manslaughter. *Id.* at 945. Here the only "conflict" in the evidence came from the unreliable Bobby Miller. Otherwise, evidence of premeditation was nonexistent.

In the case at bar, we see a similar factual scenario as in *Dedeaux* and *Clemons*. Namely, there is some sort of argument with provocation by the victim and reaction by the accused resulting in the unfortunate and unnecessary death of the victim.

The facts of this case interpreted most favorably to the state show a case of "imperfect self-defense" as described in *Wade v. State*, 748 So. 2d 771, 773-76 (Miss.1999). In *Wade*, the defendant was charged with killing her boyfriend with whom she was in business as co-owners of a bar. There was testimony, as there was here of prior physical aggression by the victim. *Id.*

On the day of the killing in Wade, the boyfriend was abusive, banging Wade's head against one of their pool tables, Wade went and retrieved a gun and said, "You ain't gonna hit me no more", the boyfriend moved toward Wade and she shot him.

As verified by two witness in the present case, prior to the shooting incident, Cedric Griffin had pointed a pistol at David Welch and demanded money. In *Wade,* the Supreme Court referencing the Court of Appeals stated:

> While Wade was undoubtedly mad, it is also clear that her ill will was engendered by the earlier unlawful acts of Simpson and what appeared to be a renewed attack. This clearly was a killing in the heat of passion and arguably a case of imperfect self defense, and as such, manslaughter was the appropriate verdict. 748 So. 2d at 773.

The important conclusion of the court in *Wade* was that there was insufficient evidence of "malicious intent"; and, the same can be said of David Welch's situation, as his "ill will" if any, was engendered by past physical threat, and a new attack by Cedric. 748 So. 2d 774.

The Supreme Court described the theory of "imperfect self-defense" reducing murder to manslaughter as "an intentional killing ... done without malice but under a bona fide (but unfounded) belief that it was necessary to prevent great bodily harm." *Id.* at 775. See also *Lanier v. State*, 684 So. 2d 93, 97 (Miss.1996).

Under this issue, the Court is asked in the alternative to a new trial, to reduce Welch's murder conviction to manslaughter and remand for resentencing.

Did he ask for manslaughter - cuz it self-defense?

CONCLUSION

David Welch respectfully requests to have his conviction reversed and rendered for acquittal. As a second alternative, Welch prays for a new trial on the charge of manslaughter only. As a third alternative, a rendered manslaughter conviction is requested with remand for resentencing.

Respectfully submitted,
DAVID WELCH

By: _____
JOHN R. McNEAL, JR., His Attorney

CERTIFICATE

I, John R. McNeal, Jr., do hereby certify that I have this the 10 day of December, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Frank G. Vollor, Circuit Judge, P. O. Box 351, Vicksburg MS 39181, and to Hon. G. Gilmore Martin, Dist. Atty. , P. O. Box 648, Vicksburg MS 39181, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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