IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLES P. LEPINE — APPELLANT

VS. — NO. 2007-KA-2197

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

STATE RULES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLES P. LEPINE **APPELLANT**

VS. **NO. 2007-KA-2197**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

I. THE TRIAL COURT PROPERLY GRANTED THE STATE'S REQUEST TO AMEND THE INDICTMENT.

II. THE APPELLANT'S SECOND ISSUE REGARDING WHETHER THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR A CONTINUANCE FOLLOWING ALLEGED LATE DISCOVERY BY THE STATE IS MOOT.

III. A PROPER EVIDENTIARY BASIS WAS LAID FOR THE BLOOD ALCOHOL CONTENT TEST RESULTS.

IV. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ALLOWING THE STATE'S EXPERT WITNESS TO TESTIFY REGARDING WHETHER THE APPELLANT WAS IN THE ELIMINATION STAGE AT THE TIME HIS BLOOD WAS DRAWN.

V. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO QUALIFY THE APPELLANT'S EXPERT WITNESS IN THE AREA OF RETROGRADE EXTRAPOLATION.

VI. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL.

VII. THERE WAS SUFFICIENT EVIDENCE OF EACH OF THE ELEMENTS OF AGGRAVATED DUI AND THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

VIII. THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING THAT JURY INSTRUCTIONS-5 IS ERRONEOUS.

STATEMENT OF THE FACTS

On February 22, 2003, the Defendant Charles Lepine, wrecked his Chevrolet Station wagon on Highway 43 in Pearl River County while driving home from a Mardi Gras parade. There were a total of ten people in the vehicle at the time of the wreck. (Transcript p. 150). Four people died as a result, including Lance Lepine (7 months old), Kenneth Verrett, Jr. (1 month old), Kenneth Verrett Sr., and Frank Verrett. (Transcript p. 175).

Lepine's appearance at the scene of the accident was described by one of the investigating officers as: "it was disarray - the clothing was disarray. He had a very loud boisterous demeanor." (Transcript p. 115). The officer further testified that he could smell alcohol on Lepine and that he appeared to be under the influence. (Transcript p. 115). Joe Johnson of the Mississippi Highway Patrol testified that Lepine admitted that he had been drinking and that he had killed his baby. (Transcript p. 146). Lepine was taken to the hospital and had blood drawn at 9:35 p.m. and at 9:55 p.m. (Transcript p. 185). Both blood samples were found to have a blood alcohol content of .09 percent. (Transcript p. 219).

Lepine was arrested and charged with aggravated DUI and simple assault on a police officer. He was tried and acquitted of simple assault on a police officer but convicted of aggravated DUI. He was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections with five years of the sentence suspended.

SUMMARY OF THE ARGUMENT

The trial court properly allowed the State to amend the indictment as the amendment was one of form and not substance. Moreover, the amended indictment cannot be deemed duplicitous or multiplicitous as the statute in effect at the time of the crime proscribed the act of drunk driving and not the act of killing. The Defendant's second issue regarding whether the trial court erred in

denying his motion for a continuance following alleged late discovery by the state is moot as Lepine had approximately three months before trial to prepare for cross-examination of the State's expert regarding the alleged late discovery.

A proper evidentiary foundation was laid for the blood alcohol content results. Additionally, the trial court acted within its discretion in allowing the State's expert to testify regarding retrograde extrapolation as her testimony met the requirements of Mississippi Rule of Evidence 702 and in denying qualification of Lepine's expert in the field of retrograde extrapolation. Further, the trial court also acted within its discretion in denying Lepine's motion for mistrial.

There was sufficient evidence to support the verdict and the verdict was not against the overwhelming weight of the evidence. Lastly, Lepine is procedurally barred from raising his final issue on appeal as he did not specifically object to the instruction at issue.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED THE STATE'S REQUEST TO AMEND THE INDICTMENT.

Lepine first argues that the charges against him and his conviction should be dismissed as "both the original indictment and the amended indictment are defective." (Appellant's Brief p. 9). The original indictment charged Lepine with four separate counts of aggravated DUI under Mississippi Code Annotated §63-11-30(5). (Record p. 4). However, the indictment was the result of an incident which occurred on February 22, 2003. At that time the 2004 amendment to §63-11-30(5) which states that one shall "be guilty of a separate felony for each such death. . ." was not in effect. At the time of Lepine's incident, the version of §63-11-30(5) in effect "proscribe[d] the act of drunk driving, not the act of killing" pursuant to *Mayfied v. State*, 612 So.2d 1120, 1128 (Miss. 1992). Accordingly, the State sought to amend the indictment to allege only one count of aggravated

DUI as Lepine drove drunk only once.

Lepine first argues that the trial court should not have allowed the amendment as it was "one of substance, not form." (Appellant's Brief p. 5). Uniform Circuit and County Court Rule 7.09 states, in pertinent part that "[a]ll indictments may be amended as to form but not as to the substance of the offense charged. . . . Amendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised." Additionally, "[i]t is well settled ... that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case." *Wilson v. State*, 935 So.2d 945, 948 (Miss. 2006) (quoting *Miller v. State*, 740 So.2d 858, 862 (Miss.1999). The Mississippi Supreme Court held in *Swington v. State* that:

> [T]he test of whether an accused is prejudiced by the amendment of an indictment or information has been said to be whether or not a defense under the indictment or information as it originally stood would be equally available after the amendment is made and whether or not any evidence [the] accused might have would be equally applicable to the indictment or information in the one form as in the other; if the answer is in the affirmative, the amendment is one of form and not of substance.

742 So.2d 1106, 1118 (Miss.1999).

Lepine's defense to the prior indictment was equally available after the amendment. Lepine's defense that he had only had three beers hours earlier and that he was not negligently operating the vehicle did not change after the amendment of the indictment. Nonetheless, Lepine argues that he "knew that only one death could be the basis of the charge per *Mayfield*, but did not know which death he was going to have to defend." (Appellant's Brief p. 6). However, Lepine's defense was never that any one of the four people killed in the accident did not die. Death certificates and testimony clearly establish that all four people died as a result of the wreck. Thus, Lepine's defense

to the charge against him was never prejudiced. Just as the defendant in *Miller v. State*, Lepine cannot "claim the amendment did not afford him an opportunity to prepare and present a proper defense." 740 So.2d 858, 863 (Miss. 1999). Thus, the amendment was one of form and not substance and, therefore, properly granted.

Lepine also argues that multiplicitous and duplicitous. (Appellant's Brief p. 7 - 9). As noted by Lepine in his brief, "duplicity in criminal pleading is the joinder of two or more distinct and separate offenses in the same count of an indictment or information." (Appellant's Brief p. 8). However, the State would respectfully assert that the amended indictment was not duplicitous as it only charged one single crime. According to *Mayfield*, §63-11-30(5) prior to the 2004 amendment criminalized the act of drunk driving and not the act of killing as a result thereof. In fact, the *Mayfield* Court noted that "the emphasis [of the statute] is clearly on drunk driving, not the effect on 'another person'" and "the term 'violation' refers to the act of driving while under the influence of intoxicants." *Mayfield*, 612 So.2d at 1127. The Court further noted that "the phrase 'where violation causes injury or death' suggests that 'injury or death' constitutes an exacerbating circumstance, not a separate and independent crime." *Id.* Thus, a reading of *Mayfield* suggests that since Lepine only drove negligently while intoxicated one time, regardless of whether he caused one death or one hundred deaths, he can be guilty of only one crime. Therefore, the amended indictment cannot be deemed duplicitous or multiplicitous.

The trial court properly allowed the State to amend the indictment as the amendment was one of form and not substance. Moreover, the amended indictment cannot be deemed duplicitous or multiplicitous as the statute in affect at the time of the crime proscribed the act of drunk driving and not the act of killing. As such, Lepine is not entitled to a dismissal of the charges or conviction of aggravated DUI.

II. THE APPELLANT'S SECOND ISSUE REGARDING WHETHER THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR A CONTINUANCE FOLLOWING ALLEGED LATE DISCOVERY BY THE STATE IS MOOT.

Lepine's second issue on appeal is that the trial court erred in refusing to grant him a continuance after the late discovery from the State. (Appellant's Brief p. 10). On May 29, 2007, a hearing on various motions was held during which Lepine made an *ore tenus* motion to suppress certain testimony of the State's expert witness. (Supp. Tr. p. 2). Specifically, Lepine argued that the State notified him only days earlier that its expert intended to testify regarding retrograde extrapolation. (Supp. Tr. p. 5 - 6). Lepine argued that if the court denied the motion to suppress, he would need a continuance to allow him to have a toxicologist review the new information so that he could properly cross-examine the State's expert in this regard. (Supp. Tr. p. 9). After much discussion, the court denied the motion to suppress and the motion for continuance. (Supp. Tr. p. 22).

The State submits that this issue is moot as Lepine, by his attorney's admission, was given notice that the State's expert planned to testify regarding retrograde extrapolation on Friday, May 25, 2007 (Supp. Tr. p. 5) and as even though the trial was originally scheduled to begin on May 29, 2007 (Record p. 151), the actual trial on this matter did not begin until August 22, 2007. Thus, Lepine had approximately three months during which to consult with his toxicologist and prepare to cross-examine the State's expert. Accordingly, Lepine suffered no prejudice as a result of the trial court's denial of his motions. This Court has previously held that "to warrant reversal on an issue, a party must show both error and a resulting injury." *Vardaman v. State*, 966 So.2d 885, 891 (Miss. Ct. App. 2007). As such, this issue is moot.

III. A PROPER EVIDENTIARY BASIS WAS LAID FOR THE BLOOD ALCOHOL CONTENT TEST RESULTS.

Lepine also argues that an evidentiary basis for blood alcohol content test results was not laid. (Appellant's Brief p. 12). In support of this contention, Lepine relies on the holding of *Johnston v. State*, 567 So.2d 237 (Miss. 1990). However, as this Court noted in *Jones v. State*, the *Johnston* case is not "helpful to the resolution of the issue presented here because *Johnston* dealt primarily with compliance procedures for ensuring the accuracy of intoxilyzer machines." 881 So.2d 209, 216 (Miss. Ct. App. 2003). The *Jones* Court further noted that it should instead look to see "whether the procedures utilized were reasonable." *Id.* at 218. Furthermore, the Mississippi Supreme Court held as follows:

> We conclude that §63-11-19 is not a rule of evidence and evidence otherwise admissible will not be excluded because of failure to comply with its requirements. *Johnston v. State* is distinguishable as it dealt with an intoxilyzer, which must be tested at least quarterly by the State Crime Lab under §63-11-19, and not hospital procedures and personnel, as in this case.

Jones v. State, 858 So.2d 139, 143 (Miss. 2003). Just as in *Jones*, Lepine's blood alcohol content was not tested by an intoxilyzer, but was instead drawn by hospital personnel and tested by the Mississippi Crime Lab. Thus, the standard is whether the procedures utilized were reasonable.

In this case, the procedures were reasonable. First, Ms. Hathcock testified that she had been working at the Mississippi Crime Lab as a forensic toxicologist in the filed of alcohol analysis for six years and that she had tested over two thousand samples. (Transcript p. 206 - 207). She further testified that she had been qualified as an expert in this field in Mississippi courts on ten occasions. (Transcript p. 207). Similarly, in *Bearden v. State*, the Mississippi Supreme Court noted the following regarding Anna Ezell, a supervisor at the Mississippi Crime Lab's qualifications:

> While Ezell did not testify that she possessed a valid permit issued by the Crime Lab which would enable her to perform tests under § 63-11-19, she did state that she had

> been working for the State Crime Lab for 13 years and had analyzed thousands of blood alcohol samples, clearly establishing her expertise in this field, all without an objection from the defense. Unquestionably, she was qualified to perform these tests.

662 So.2d 620, 624 (Miss. 1995). Likewise, Ms. Hathcock was qualified to perform these tests. Secondly, Ms. Hathcock testified throughout her direct testimony regarding the crime labs protocol and procedures. (Transcript p. 216 - 218, 220, 222, and 227). During cross examination, she testified that she was aware of the crime lab's protocol and procedures and specifically testified regarding many of those procedures throughout her cross examination. (Transcript p. 240 - 250). Clearly, the procedures used to test Lepine's blood were reasonable. *See Bearden v. State*, 662 So.2d 620, (Miss. 1995); *Lawrence v. State,* 931 So.2d 600, 605-607 (Miss. Ct. App. 2005); *Jones v. State*, 858 So.2d 139 (Miss. 2003); and *Jones v. State*, 881 So.2d 209, 216 (Miss. Ct. App. 2003). As such, a proper evidentiary foundation was laid for the blood alcohol results.

IV. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ALLOWING THE STATE'S EXPERT WITNESS TO TESTIFY REGARDING WHETHER THE APPELLANT WAS IN THE ELIMINATION STAGE AT THE TIME HIS BLOOD WAS DRAWN.

Lepine further argues that the trial court erred in allowing opinion evidence from an unqualified witness. (Appellant's Brief p. 13). "The admission of expert testimony is within the sound discretion of the trial judge." *Smith v. State*, 942 So.2d 308, 315 - 16 (Miss. Ct. App. 2006) (quoting *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss. 2003)). "Therefore, the decision of a trial judge will stand 'unless [the Court concludes] that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion.'" *Id.*

Mississippi Rule of Evidence 702 states as follows:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts

> or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Lepine argues that "on the topic of human toxicological retrograde extrapolation of alcohol, [the State's expert, Wendy Hathcock] failed all three requirements of the enumerated principles of Miss. R. Evid. 702." (Appellant's Brief p. 14). Lepine specifically takes issue with Ms. Hatcock's opinion regarding whether Lepine was in the "elimination stage." (Transcript p. 13). Ms. Hathcock testified that the "elimination stage" is when you eliminate or get rid of alcohol in the body through either metabolism or through voiding it from your urine, sweat, or breath. (Transcript p. 232). She also noted that as a person is eliminating, their alcohol level decreases. (Transcript p. 232). She further testified that she could say with scientific certainty that within 45 minutes of a person's last drink that they are in the elimination phase. (Transcript p. 247). She also testified that the reason she could not testify with certainty regarding whether Lepine was in the elimination phase was because she was not at the scene of the wreck and therefore, could not know for certain that Lepine did not drink or eat after the wreck occurred. (Transcript p. 246). Whether he had eaten or drank could affect whether he was in the elimination phase. Of course, the evidence in this case, makes it clear that he had not; thus, Ms. Hathcock's "assumption" that he had not eaten or drank after the wreck was correct.

Based upon her testimony and her qualifications, the State contends that Ms. Hathcock's expert opinions regarding retrograde extrapolation were properly admitted. First, Ms. Hathcock was qualified as an expert witness by the trial court based on her education, experience, and training in the field of forensic toxicology specializing in alcohol analysis and the interpretation and analysis of the effect of alcohol on the body. (Transcript p. 210). Second, her testimony was based upon sufficient facts or data. She knew, among other things, the time of the accident, the time of the two

blood draws, and the BAC levels of each of the blood draws. She needed only this information and the reasonable assumptions based upon the average man in order to formulate her opinion regarding whether Lepine was in the elimination stage. (Transcript p. 246 - 247). Also, this Court in *Smith v. State*, upheld the trial court's determination that retrograde extrapolation was scientifically reliable. 942 So.2d at 318. Lastly, she applied the principles and methods reliably to the facts of this case. Her opinion ultimately, was that at the time of the blood draws it was possible[1] that Lepine was in the elimination phase and that if he was, in fact, in the elimination phase, his BAC level at the time of the accident would have been the same or greater than it was at the time of the blood draws. Moreover, the trial court's decision to allow this exact type of testimony was upheld in *Smith v. State*. Accordingly, the trial court properly allowed the testimony in question.

Furthermore, even if it were error to allow this testimony, it did nothing to prejudice Lepine's case in that the evidence already established that Lepine's BAC level was above the legal limit at the time of the draws and that he had not eaten or drank anything since the time of the accident. Additionally, there was ample testimony from the officers on the scene, which is discussed in more detail later in this brief, that Lepine was intoxicated. Thus, the first element of aggravated DUI was fully established even without this testimony in that it was clear that Lepine was driving a vehicle while intoxicated.

---

[1] Lepine also argues that Ms. Hathcock's opinion was not relevant because her opinion was that it was "possible" that he was in the elimination phase. He asserts "that which is merely possible is irrelevant." (Appellant's Brief p. 13). However, he cites to no authority to support this principle and there is clearly no such requirement in Rule 702. *See Brown v. State,* 690 So.2d 276, 290 (Miss. 1996).

V. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO QUALIFY THE APPELLANT'S EXPERT WITNESS IN THE AREA OF RETROGRADE EXTRAPOLATION.

Lepine's next issue concerns whether the trial court erred in refusing to qualify his expert in the field of retrograde extrapolation. (Appellant's Brief p. 16). The threshold question of whether a proposed expert witness has the requisite credentials to offer opinion evidence helpful to the jury, whether obtained through education or experience, lies with the trial court. *Langdon v. State,* 798 So.2d 550, 555(Miss. Ct. App. 2001) (citing *McBeath v. State*, 739 So.2d 451(Miss. Ct. App. 1999)). Mississippi Rule of Evidence 702 gives the trial judge "discretionary authority, reviewable for abuse, to determine reliability in light of the particular facts and circumstances of the particular case." *Jackson v. State,* 924 So.2d 531, 545 (Miss. Ct. App. 2005).

In this case, Lepine sought to have Dr. Olen Brown qualified as an expert in toxicology and specifically in the area of retrograde extrapolation. In that regard, the following testimony was given during both the State and the defense's voir dire of Lepine's proposed expert:

Q: Now, have you ever worked in a forensic laboratory specializing specifically in alcohol analysis?
A: No.

(Transcript p. 311).

Q: . . . can you tell me approximately how many times you've testified in court as to retrograde extrapolation, out of all this testimony, out of all this?
A: Retrograde for alcohol, is that your question?
Q: Yes.
A: Never.

(Transcript p. 311 - 312).

Q: Have you ever analyzed any blood samples?
A: No.
* * *
Q: What kind of studies have you been involved in that deal with alcohol?
A: I have no publications that deal with the subject of alcohol directly, ethanol.

(Transcript p. 316).

Q: Do you understand there is a forensic toxicology certification board?
A: There is.
Q: You're not currently certified with them, are you?
A: Yes, not currently.

(Transcript p. 319). This testimony fully supports the trial court's refusal to allow Dr. Brown to be qualified as an expert. The trial judge noted the following in support of his ruling:

> I don't doubt his intelligence, his qualification. I am restricting his testimony not to speak to retrograde extrapolation for alcohol because he responded on the stand under oath that he has never done that. And he said it a second time. He also said he never analyzed blood samples. He also said that he has never had publications that deal with alcohol.

(Transcript p. 330). As such, the record clearly establishes that the trial judge did not abuse his discretion.

VI. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL.

Lepine also argues that the trial court erred in denying his motion for mistrial. (Appellant's Brief p. 20). Whether to grant a motion for mistrial is within the sound discretion of the trial court. *Johnson v. State,* 914 So.2d 270, 272 (Miss. Ct. App. 2005) (citing *Caston v. State*, 823 So.2d 473, 492 (Miss. 2002)). The standard of review for denial of a motion for mistrial is abuse of discretion. *Id.*

In the case at hand, the State began questioning its accident reconstructionist about his expert opinion regarding the speed Lepine was traveling at the time of the accident. (Transcript p. 281). Lepine's counsel objected. After some discussion between Lepine's counsel, counsel for the State, and the trial court, in the presence of the jury, regarding the admissibility of this testimony, the trial judge sustained the objection. (Transcript p. 281 - 283). Counsel for the State then asserted one final argument for allowing the testimony. (Transcript p. 283). At this point, Lepine's counsel asked

that the jury be excused and moved for a mistrial. (Transcript p. 283). The trial court again held that the testimony regarding the speed of Lepine's vehicle was inadmissable and denied the motion for mistrial. (Transcript p. 285). The trial court offered to admonish the jury regarding the argument made by the State, but Lepine's counsel waived the admonishment. (Transcript p. 285).

On appeal Lepine argues that the "remark to the jury insinuated that the state had proper evidence and that the defendant was seeking to hide it from the jury" and relying on *Williams v. State*, 539 So.2d 1049 (Miss. 1989) further argues that it was reversible error for the trial judge to deny the mistrial. (Appellant's Brief p. 20 - 21). However, there is at least one major difference between the *Williams* case and the cast at hand. In the *Williams* case, the Court notes that after the trial court refused to allow the evidence in question into evidence and after the trial court admonished the jury to disregard the remarks regarding the evidence, "the prosecutors on numerous occasions moved for the introduction of the [evidence]." *Williams*, 539 So.2d at 1051 (*emphasis added*). In the case at hand, counsel for the State made only one more brief argument regarding the admissibility of the testimony immediately after the trial court sustained the objection and the argument was not addressed again after that. (Transcript p. 283). This is quite a different situation from that of *Williams*.

Furthermore, the entire discussion of whether or not the evidence was admissible took place in the presence of the jury. The jury could have certainly inferred long before the trial judge ruled that the State wanted evidence in that the defense did not. It is hard to imagine that one additional comment/argument made by the State immediately after this discussion had any lasting effect on the jury. Moreover, there is nothing in the record which evidences that this particular comment/argument unfairly prejudiced Lepine's case. "An error is only grounds for reversal if it affects the final result of the case." *Vardaman v. State,* 966 So.2d 885, 891 (Miss. Ct. App. 2007).

VII. THERE WAS SUFFICIENT EVIDENCE OF EACH OF THE ELEMENTS OF AGGRAVATED DUI AND THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Lepine also argues that the State failed to present sufficient evidence of each of the elements of aggravated DUI. (Appellant's Brief p. 22). Lepine specifically argues that "the state's case in chief contained no evidence of any negligent act on the part of Lepine." (Appellant's Brief p. 22). This Court has previously noted that "[w]hen on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, [the court's] authority to interfere with the jury's verdict is quite limited." *Phinisee v. State*, 864 So.2d 988, 992 (Miss. Ct. App. 2004) (*emphasis added*). The evidence which is consistent with the verdict must be accepted as true. *Lee v. State,* 469 So.2d 1225, 1229-30 (Miss.1985) (citing *Williams v. State,* 463 So.2d 1064, 1067 (Miss.1984); *Spikes v. State,* 302 So.2d 250, 251 (Miss.1974)). The State must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Id.* (citing *Glass v. State,* 278 So.2d 384, 386 (Miss.1973)). Basically, "once the jury has returned a verdict of guilty in a criminal case, [the court is] not at liberty to direct that the defendant be discharged short of a conclusion on [its] part that the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty." *Id.* (citing *Fairchild v. State,* 459 So.2d 793, 798 (Miss.1984); *Pearson v. State,* 428 So.2d 1361, 1364 (Miss.1983)) (*emphasis added*). With this standard in mind, there is sufficient evidence in the case at hand to prove each and every required element of aggravated DUI.

In order to establish that Lepine was guilty of aggravated DUI under Mississippi Code Annotated §63-11-30(5), the State had to prove that Lepine was driving under the influence of an intoxicating liquor in violation of §63-11-30(1) and that he performed a negligent act that caused the death of another. *See Campbell v. State,* 858 So.2d 177, 180 (Miss. Ct. App. 2003). Each of these

elements was established beyond a reasonable doubt based on the evidence at trial as set forth below:

a. Lepine was driving the vehicle in question on the night in question. (Transcript p. 117 and 358).
b. Lepine drank alcohol before driving the vehicle in question. (Transcript p. 347 - 348, 365, and 377).
c. A beer can was found on the floor board of the vehicle. (Transcript p. 137).
d. Lepine's blood alcohol level was .09 which is above the legal limit. (Transcript p. 219 - 220).
e. Lepine's appearance and demeanor shortly after the accident caused law enforcement officials working the scene to be of the opinion that Lepine was intoxicated. (Transcript p. 115, 145 and 176)
f. Lepine did not eat or drink anything between the time of the accident and the time his blood was drawn. (Transcript p. 117, 121, 148, 183 and 197).
g. Lance Lepine, Kenneth Verrett, Jr., Kenneth Verrett, and Frank Verrett were killed as a result of the one vehicle wreck. (Transcript p. 175 and Exhibits 32 - 35).
h. Lepine admitted guilt to officers on the scene. (Transcript p. 110 and 146 - admitted that he lost control of the vehicle and specifically stated that he had been drinking and now he had killed his baby).
i. Lepine failed to maintain proper control over the vehicle he was driving. A witness to the accident testified that she saw the vehicle veer off the road and then jerk. She further testified that they pulled over because they feared it would hit them. (Transcript p. 196). The witness also testified that she saw no other vehicles on the road in that area that night in direct conflict with Lepine's version of how the wreck took place. (Transcript p. 198).

Lepine specifically argues that there was no evidence that Lepine committed a negligent act. However, there was evidence that Lepine failed to maintain control over his vehicle which constitutes negligence. *See Fowler Butane Gas Co. v. Varner,* 141 So.2d 226, 230 (Miss.1962) (Transcript p. 146 and 196). As such, each of the required elements was proven beyond a reasonable doubt. Therefore, there was sufficient evidence to support the verdict.

Additionally, Lepine argues that the verdict was against the weight of the evidence. (Appellant's Brief p. 22). The appellate standard of review for claims that a conviction is against the overwhelming weight of the evidence is as follows:

> [This court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing

> to grant a new trial. A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an "unconscionable injustice."

Pierce v. State, 860 So.2d 855 (Miss. Ct. App. 2003) (quoting *Smith v. State*, 802 So.2d 82, 85-86 (Miss. 2001)). On review, the Court must accept as true all evidence favorable to the State. *McClain v. State*, 625 So.2d 774, 781 (Miss.1993). Lepine offered no specific examples of how the verdict was against the weight of the evidence but simply asserted it as a part of his argument that there was not sufficient evidence. With the above stated standard in mind as well as the extensive evidence presented at trial, the State respectfully submits that not only was there sufficient evidence to sustain the verdict but also that the verdict was not against the overwhelming weight of the evidence.

VIII. THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING THAT JURY INSTRUCTIONS-5 IS ERRONEOUS.

Lepine's final argument on appeal is that Jury Instruction S-5 was erroneous. (Appellant's Brief p. 23). However, Lepine is procedurally barred from raising the issue on appeal as he failed to specifically object to this particular instruction, as his general objection was not on the grounds argued on appeal, and as he did not raise the issue in his motion for new trial. After specifically objecting to the refusal of proposed instructions D-4 and D-13, Lepine's counsel raises the following objection:

> Now, I need to make some objections to the ones that were granted on the State's behalf. Well, the defendant would object to the submission of any of the instructions provided by the State that referred to negligent acts on his behalf, as there were no negligent acts proved.

(Transcript p. 406). First, Lepine's objection was a general objection to the jury instructions granted on the State's behalf. The Mississippi Supreme Court has held the following regarding general objections:

> An objection must be made with specificity, and failure to articulate the grounds for objection constitutes a waiver of the alleged error. *See, e.g., Latiker v. State*, 918 So.2d 68, 74 (Miss.2005) (failure to state a legal basis for objection waives right to appeal alleged error); *Irby v. State*, 893 So.2d 1042, 1047 (Miss.2004) (general objection that jury instruction is "prejudicial," without more, is insufficient to preserve for appeal); *Crawford v. State*, 787 So.2d 1236, 1246 (Miss.2001) (general objection that expert witness was "mistaken" insufficient to preserve issue for appeal).

Ross v. State, 954 So.2d 968, 987 (Miss. 2007). Second, Lepine's objection was simply that he objected to the instructions that referred to Lepine's negligent acts. (Transcript p. 406). However, he now argues on appeal that the instruction in question misstates the law. Mississippi law is clear that "an objection on one specific ground waives all other grounds." *Swington v. State,* 742 So.2d 1106, 1110 (Miss.1999). Moreover, the issue was not addressed in Lepine's motion for new trial. *See Alonso v. State,* 838 So.2d 309, 313 (Miss. Ct. App. 2002) (holding that the issue in question was procedurally barred even though an objection was raised at trial because the matter was not raised in the motion for new trial) and *Beckum v. State,* 917 So.2d 808, 813 (Miss. Ct. App. 2005) (holding that the issue in question was procedurally barred as it was not specifically raised in defendant's motion for J.N.O.V. or motion for new trial). Accordingly, Lepine's final issue is procedurally barred.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Charles P. Lepine as there were no reversible errors, there was sufficient evidence to support the verdict, and as the verdict was not against the overwhelming weight of the evidence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: Stephanie B Wood

STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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:

Honorable Prentiss Greene Harrell
Circuit Court Judge
P. O. Box 488
Purvis, MS 39475

Honorable Haldon J. Kittrell
District Attorney
500 Courthouse Square, Suite 3
Columbus, MS 39429

George T. Holmes, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 N. Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 1st day of August, 2008.

STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680