IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FLOYD ROBINSON — APPELLANT

VS. — NO. 2007-KA-2202

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

On January 18, 2006, an indictment by the Grand Jury in Oktibbeha County was filed against Floyd Robinson for Willie Prater the murder of Bridget Moore, pursuant to Miss. Code Ann. § 97-3-19 [C.R. 5]. Robinson was subsequently convicted of the same crime by a jury of his peers in the Circuit Court of Oktibbeha County, honorable Lee J. Howard, presiding. [C.R. 64]. Robinson was sentenced on February 1, 2007 to serve the rest of his natural life in the custody of the Mississippi Department of Corrections without the possibility of parole. [C.R. 64]. Defendant filed a motion for Judgment NOV. [C.R. 66]. That motion was denied. [C.R. 99]. Defendant filed notice that he intended to appeal the final judgment and the denial of the motion. [C.R. 100].

STATEMENT OF THE FACTS

On November 30, 2005 officers of the Starkville Police Department responded to the home of Bridget Moore on a tip that Moore might be in some peril. [T. 131]. Indeed, Moore was found dead there at her home. [T. 131]. Dr. Steven Hayne, state pathologist, determined subsequently that Moore, in fact, died from a gunshot wound [T. 330] and that her death was a homicide [T. 336]. Soon, the police were interested in questioning the Moore's boyfriend, the defendant, Floyd Robinson. [T. 204]. Robinson, making his domicile in Columbus, was taken into custody by the Columbus Police Department after being initially unwilling to go and attempting to flee. [T. 204-208].

Once in custody, Robinson was read his Miranda rights and signed a waiver. [T. 208]. Over the course of a five-hour interrogation, Robinson disclosed more and more information surrounding the death of Moore until, finally, he claimed that he had shot her accidentally during the course of an argument. [T. 273]. In his statement, the defendant claimed that he kept a .25 mm at Moore's home, that she had retrieved it during the argument, and that the gun went off when at some point during the tussle he fell to the floor. [Exhib. 27]. There are a number of inconsistencies, however, between the defendant's initial account (videotaped and introduced as State's Exhibit 25), the defendant's signed statement (Exhibit 27) and the defendant's testimony at trial (see T. 355-438).

At trial, Robinson denied signing the statement admitted into evidence and disputed its veracity. [T. 386]. Robinson, nevertheless, was convicted and sentenced to serve the rest of his natural life in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The State preserved the defendant's Fifth Amendment rights because the challenged interrogation conforms to relevant state standards. The defendant's statements during the interview were ambiguous, giving the interviewers discretion to clarify his requests and continue explaining his *Miranda* rights. Furthermore, the defendant's challenge of the admission of this statement is procedurally barred.

Secondly, statements made in the video-tape interview shown at trial which referenced a prior history of domestic violence between the defendant and a third party were admissible to show absence of mistake and to clarify aspects of the defendant's statement and subsequent testimony. Nevertheless, this extremely brief reference in a five-hour interview tape was unlikely to have made an impression upon the jury and prejudiced the defendant.

Statements made during the video-recorded statement paraphrasing an unrelated police report were admitted because counsel did not offer a contemporaneous objection and the evidence was not testimonial in nature. This complaint is procedurally barred because the defendant did not make a specific contemporaneous objection. An objection on one or more specific grounds constitutes a waiver of all other grounds. *Stringer v. State*, 279 So. 2d 156, 158 (Miss. 1973). Without waiving the procedural bar, the objection of the defendant fails on the merits because the admitted evidence was not testimonial in nature.

Fourthly, the Brief for the Appellant argues that the trial court erred when it neglected to perform a balancing test on the record of the probative value of evidence of prior bad acts for impeachment purposes, pursuant to *Miss. Rule Evid. 609(a)(1)*. The State notes that the defendant made no contemporaneous objection to the impeachment line of questioning and urges the procedural bar.

Fifthly, the court ruled correctly in denying the defendant's jury instruction on self-defense. The defendant produced no evidence to indicate that he killed the victim by design in order to protect himself. He presented no dual theories, only that the killing was an accident.

Sixthly, the prosecution's closing arguments were legally correct and not prejudicial to the defendant. The prosecution did not attempt to define reasonable doubt, and so an objection would have been meritless. Furthermore, the defendant did not make a contemporaneous objection to the closing argument, and so this complaint is procedurally barred.

Lastly, the trial court did not commit cumulative errors sufficient to require a new trial. The overwhelming weight of the evidence against the defendant should deter this court from ordering a new trial under the cumulative error doctrine since, even assuming the court sustains all complaints here alleged by the defendant, the evidence is still sufficient to convince a trier of fact that the defendant committed the crime.

ARGUMENT

I. THE STATE PRESERVED APPELLANT'S FIFTH AMENDMENT RIGHTS BECAUSE THE CHALLENGED INTERROGATION CONFORMS TO RELEVANT STATE STANDARDS.

Robinson challenges the admissibility of statements made implicating himself during interview with local authorities. The brief alleges that Robinson invoked his right to counsel, that the *Miranda* waiver he signed was coerced, and that, in the alternative, the waiver was not signed knowingly and intelligently.

The State argues, first and briefly, that Robinson is procedurally barred from making this claim because he made no objection to its admission at trial. "[T]he failure to raise an issue in the trial court [requires] the appellate court to impose a procedural bar on appeal." *Evans v. State*, 725 So. 2d 613 (Miss. 1997). He relies, then, on the plain error doctrine in order to

proceed. This court will, when circumstances require, note plain errors not brought to the attention of the court that severely affect the constitutional rights of the appellant. *Grubb v. State*, 584 So. 2d 786, 789 (Miss. 1991). These are, however, always exceedingly plain. In *Grubb*, a trial judge mistakenly sentenced the appellant to a life sentence after misinterpreting the sentencing statute. *Id.* In *Williams v. State* (cited by appellant), the appellate court overturned a sentencing enhancement for a drug dealer convicted of selling within 1000 feet of school property when the uncontested testimony of the police was that the dealer was 1,105 feet from the school property. *Williams v. State*, 794 So. 2d 181, 187-88 (Miss. 2001). In these cases, appellate courts were not asked to sit as finders of fact under the plain error doctrine. There will be little left of the procedural bar if the court volunteers itself for this assignment.

Nevertheless, the merits of Robinson's contentions fail as well. First, Robinson never invoked his right to counsel. Four times Robinson did mention legal counsel. [Ex. 25 between approx. 0:00:00 and 0:03:00]. He asked, "Okay, well, I can't talk to a lawyer before I start answering questions?" *Id.* After repeating the waiver ["If you decide to answer any questions now without a lawyer present, you still have the right to stop answering at any time, you also have the right to stop answering any time until you talk to a lawyer"], he asked, "What I'm saying [is] why can't I have a lawyer present now? I don't know what's going on." *Id.* He repeated similar variations of this question. *Id.* He never, though, used any variation of "I want a lawyer."

This is not splitting hairs. It is an important distinction in both the law of Mississippi and the context of the interview as a whole.

Normally, the appellate court would ask whether the trial court applied the proper standard (finding voluntariness beyond a reasonable doubt) and then whether the trial court's

finding of fact was supported by substantial evidence. *Holland v. State*, 587 So. 2d 848, 855 (Miss. 1991). The appellate court's discretion under the plain error doctrine must, by common sense, be more limited. The right to have an attorney must be specifically invoked. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). This court though has taken seemingly equivocal or ambiguous utterances, which could be interpreted as invocations, and required the police to cease all inquiry except efforts to clarify the suspect's utterance and rights. *Holland*, 587 So. 2d at 856. In *Holland*, the suspect asked, "Don't you think I need a lawyer?" *Id.* at 855. The appellate court there determined that when suspects ask a question, as a matter of law, their statement is ambiguous and interrogators should be permitted to respond for purposes of clarification. *Id.* at 857. The only remaining question for validity is whether the government's behavior in clarification was permissible. *Id.* at 858. The "critical factor" in determining the validity of the government's behavior is whether a review of the whole event discloses the interviewer for the government has restricted the suspect's continuing option for counsel. *Nash v. Estelle*, 597 F.2d 513, 517-18 (5th Cir.1979). When Robinson asked about his rights pertaining to counsel, the interviewers did little more than repeat pertinent parts of the rights waiver.

ROBINSON: What I'm saying [is] why can't I have a lawyer present now? I don't know what's going on.

POLICE: Okay, there again, we're gonna get to that portion down there. You don't ... 'fore we even get further, you can see right here: 'sign waiving his rights, refuse to sign, wishes to speak and answer questions but prefers not to sign the form, prefers to speak with an attorney before making the decision.' We'll get to that. 'I have read this statement of my rights, I understand what my rights are, I'm willing to make a statement and answer questions, I do not want a lawyer at this time, I

understand and know what I'm doing, no promise or threats have been made to me, and no pressure or coercion - you understand what coercion means? That means somebody twisted your arm ...

ROBINSON: Um-hmm.

POLICE: ...of any king have been used against me.

ROBINSON: 'I have read this statement of my rights, I understand what my rights are, I'm willing to make a statement and answer questions, I do not want a lawyer at this time..." What I'm saying, I might want a lawyer. I don't know what's going on.

And later:

ROBINSON: I can't ... if I sign this here, I'm losing out what I'm (inaudible). I don't know what's going on. You see what I'm saying?

POLICE: No I don't.

ROBINSON: Okay, if I sign this, I'm letting all my rights go.

POLICE: No you're not because what does this say up here? "You have the right to remain silent." You don't have to say anything even after you sign this form. And you don't ... you can stop talking anytime you want to. You're in control.

With this reassurance, Robinson signed the form. A review of the whole event shows an interviewer that was not pushy, was not coercive, and was not aggressive, but rather was patient in explaining the waiver to the defendant within the bounds of the law. If the court sees the interview, the State posits that it will likely agree, and, even if it decides that it might have proceeded differently than the interviewers, that their conduct was a reasonable (if not admirable) effort to explain and protect the rights of the accused. Put another way, there is no plain error in their conduct

Second, Robinson alleges coercion. His brief alleges no specific act that constituted coercion. The closest thing is this exchange:

ROBINSON: Why should I sign this? And I don't know what's going on.

POLICE: Well, I'm going to tell you after you sign this form.

In some world where Robinson had been abducted clandestinely by the police without actual knowledge of the reasons for his detainment, this might come close to a promise or pressure. But in the real world, where Robinson's father had already called the police and told them that Robinson had found his girlfriend of two years shot dead that morning, it is hard to conceive that Robinson was being anything other than cagey.

If the defendant had raised this issue in the trial court, the State would have needed to show beyond a reasonable doubt that the defendant was not coerced. *Payton v. State*, 897 So. 2d 921, 935 (Miss. 2003). The testimony of an interviewing officer that the confession was made voluntarily makes the State's prima facie case on voluntariness. *Id.* Certainly, a videotape of this very tame interview meets and exceeds that burden.

Third, Robinson argues that the waiver was not knowingly and intelligently waived. In order to uphold this contention, the court would need, again, to act as a fact-finder and determine that when Robinson finally signed the waiver (referenced *infra*) the patient explanations given by the interviewers were not intelligently understood. The State does not attempt to contest the court's rule in *Neal v. State* that the State "shoulders a heavy burden to show a knowing and intelligent waiver." *Neal v. State*, 451 So. 2d 743, 753 (Miss. 1984). The State would contend that this is a trial court burden, and that the load is less weighty under the plain error doctrine. Nevertheless, the State asserts that the video shows a defendant who, after careful explanation, understands the rights that he might not have so clearly understood at the beginning of the

interview. It is this understanding that caused him to abandon his questions and sign the waiver. Further, the defendant's continued assertions that he "didn't know what's going" were clearly disingenuous. Just after he signed the waiver, police asked Robinson, "What happened in Starkville this morning?"

Instead of saying something like, "I found my girlfriend shot dead in her house. I understand my father has already mentioned this to you," Robinson replied, "I don't know." The clear thing in this interview is not error, it is the fact that the suspect was being strategically cagey (perhaps, intelligently and knowingly exercising his right to remain silent).

II. STATEMENTS MADE DURING THE VIDEO-RECORDED STATEMENT REFERENCES PRIOR BAD ACTS WERE ADMISSIBLE AS EVIDENCE OF ABSENCE OF MISTAKE OR ACCIDENT AND CLARIFICATION OF THE FACTS OF THE CASE.

Robinson challenges the admission of the complete video-taped statement he made to police on the grounds that during the interview, police referenced his prior conviction surrounding an act of violence against a previous girlfriend (the mother of one of his children). The court reviews this decision under an abuse of discretion of standard. *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990).

Mississippi Rules of Evidence provide that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Miss. R. Evid. 404(b) The Brief for the Appellant states, accurately, that the reasoning behind the trial court's decision to admit the entire video is unclear, however the State contends that the resulting decision was the correct one.

The defendant's history of domestic disturbances between himself and the victim is what led investigators initially to suspect his involvement in the death of the victim. [T. 204]. Mistake is a common excuse for domestic violence, and the investigators interviewing the defendant likely anticipated that the defendant might claim that the death of Bridgette Moore was just an unfortunate accident, as he did. [Exhib. 27]. In fact, the defendant claimed again at trial that the gun had gone off accidentally. [T. 374]. This assertion by the defense required rebuttal. The evidence of prior bad acts found objectionable by the defense was the interviewer's reference to a prior domestic disturbance between the defendant and Marilyn McKinney. [Exhib. 25]. The defendant had repeatedly taken McKinney to remote places and threatened her with a gun. *Id.* The defendant's history with gun-related domestic violence supported that State's rebuttal of defendant's testimony that this particular gun-related incident was an accident.

The appellate courts has respected trial court discretion when it decided that seemingly separate incidents were instructive regarding one of the exemptions in Miss. R. Evid. 404(b). In *Wilson v. State*, a defendant claimed that the shotgun discharge which fatally struck his girlfriend while they were in bed was an accident. *Wilson v. State*, 956 So. 2d 1044, 1046 (Miss. App. 2007) cert. dismissed *Wilson v. State*, 973 So. 2d 244 (Miss. 2008). There the trial judge admitted evidence that the defendant had been involved in previous gun-related crimes designed to refute his assertion of accident. *Id.* at 1047-48. The victim in *Wilson* was the victim of the defendant's previous instances of gun violence. *Id.* See *Moss v. State*, 727 So. 2d 720, 724 (Miss. 1998). The State admits that this is a bit of an "extension of the leash," however admission of prior evidence of domestic violence involving guns when the defendant claims that the shooting death of his romantic partner was an accident is a useful and limited extension.

Further, the repeated explanation of the defendant for not reporting the shooting of his

girlfriend was that he was on probation. [T. 374]. Evidence relating to Marilyn McKinney helped to explain why the defendant was on probation. This is likely what the trial court meant when it referenced the "completeness of the issue." [T. 230-31]. Evidence of prior bad acts is admissible to show the complete story of the crime, so as not to confuse the jurors. *Phinizee v. State*, 983 So. 2d 322, 330 (Miss. App. 2007). Without that evidence, jurors could not have understood why the defendant's probation restricted his ability to visit the victim.

In the alternative, the State would argue that evidence relating to the defendant's prior history with Marilyn McKinney was harmless error considering the weight of the evidence against the defendant. The basic test for whether error is harmless is not whether the jury considered the improper evidence at all, it is whether the error was important in relation to everything else the jury was considering on the issue. *Tanner v. State*, 764 So. 2d 385, 400. (Miss. 2000). The defendant was on probation for threatening and hurting the victim. [T. 378]. If the jury had never heard the name Marilyn McKinney, they still almost certainly would have concluded that the defendant was violent with the women he "loved."

The Brief of the Appellant cites indignantly an exchange between the prosecutor and the defendant that references the defendant's propensity for injuring his domestic partners. But, had defense counsel not repeatedly referenced Marilyn McKinney in direct [T. 378, 79], the jury might not have known any more about that previous victim of the defendant besides the passing reference buried in a five hour interview video.

III. STATEMENTS MADE DURING THE VIDEO-RECORDED STATEMENT PARAPHRASING AN UNRELATED POLICE REPORT WERE ADMITTED BECAUSE COUNSEL DID NOT OFFER A CONTEMPORANEOUS OBJECTION AND THE EVIDENCE WAS NOT TESTIMONIAL IN NATURE.

The defendant here claims that the paraphrased statement of Marilyn McKinney read by the interviewing officer during the defendant's interrogation and, thus, subsequently heard by the jury was inadmissible testimonial evidence in conflict with the Sixth Amendment Confrontation Clause.

First, this complaint is procedurally barred because the defendant did not make a specific contemporaneous objection. An objection on one or more specific grounds constitutes a waiver of all other grounds. *Stringer v. State*, 279 So. 2d 156, 158 (Miss. 1973). The defendant moved to suppress the entire video because there was allegedly "inadmissible information concerning a possible criminal background of the defendant." [T. 228]. Neither the defendant, the court, nor the prosecution referenced the Confrontation Clause. Because the defendant's objection was clearly based specifically in the "prior bad acts" rule, the objection brought here based in the Confrontation Clause was waived and is now procedurally barred.

Secondly, and without waiving the procedural bar, the objection of the defendant fails on the merits because the admitted evidence was not testimonial in nature. In *Smith v. State*, this court lately accepted the rule that statements are non-testimonial (and, thus, not subject to *Crawford* analysis) when circumstances objectively indicate that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. *Smith v. State*, -- So. 2d --, 2008 WL 2522467 (Miss. 2008). Because the defense did not make a contemporaneous objection based in the Confrontation Clause, the trial court did not have occasion to make a fact-based determination about whether or not the statement of Marilyn McKinney given to police

was to enable police assistance to meet an ongoing emergency, but a reasonable assumption by this court would be that the statement was for that purpose. The statement alleged that Robinson was "constantly" threatening to kill McKinney. [Exhib. 25]. Nothing seems more like an emergency than the constant threat of death. So, if the State had sought to admit the statement itself, it would not have been testimonial or subject to *Crawford* analysis.

But, the fact is that the statement not sought to be admitted. It was only referenced. Besides the brief reference of this non-testimonial statement in a five-hour-long video, the accusations of Marilyn McKinney were never again referenced. On the contrary, thereafter the State never referenced the specific allegations in McKinney's statement in its case-in-chief, cross-examination of Robinson, nor in its closing arguments.

That this is only a very brief reference is support for the State's contention that, even if the court waives the procedural bar and finds the evidence testimonial and subject to *Crawford* analysis, the brief reference was not sufficiently prejudicial to constitute reversible error. In *Cobb v. State*, the trial court overlooked a brief reference by a testifying officer to the defendant's prior record of arrest and no contemporaneous objection was made to the brief reference. *Cobb v. State*, 734 So. 2d 182 (Miss. App. 1999). Though the error was "clearly reversible," the court doubted in dicta that the one statement was so prejudicial to the defendant as to require a new trial and invoked the procedural bar. *Id.* Here, the court should consider the exceedingly low probability that the jury based its decision upon any information related to the defendant's history with Marilyn McKinney.

IV. THE PROBATIVE VALUE OF THE PRIOR ACTS OF VIOLENCE AGAINST THE VICTIM BY THE DEFENDANT OUTWEIGHED ANY POTENTIAL PREJUDICE AGAINST THE DEFENDANT.

The Brief for the Appellant argues that the trial court erred when it neglected to perform a balancing test on the record of the probative value of evidence of prior bad acts for impeachment purposes, pursuant to *Miss. Rule Evid. 609(a)(1)*.

First, the State notes that the defendant made no contemporaneous objection to the impeachment line of questioning and urges the procedural bar. *Evans*, 725 So. 2d at 613. Citing *Triplett v. State*, the defendant urges that the "trial judge must make an on-the-record finding that the probative value of admitting a prior conviction outweighs its prejudicial effect." *Triplett v. State,* 881 So. 2d 303, 305 (Miss. 2004). And that "an on-the-record finding that the probative value outweighs the prejudicial effect is not merely an idle gesture." *Id.* The State would not suggest such a thing, but would merely note that in the defendant's chief case in support, *Peterson v. State*, upon which *Triplett* is based, the defendant made the contemporaneous objection to the admission of the evidence. *Peterson v. State*, 518 So. 2d 632, 636 (Miss. 1987). In *Peterson*, the court issued its "on-the-record analysis" requirement because the trial court tersely overruled an objection to an impeachment inquiry without sufficiently balancing the interests. Clearly, then, neither *Peterson* nor *Triplett* can be construed to require an on-the-record analysis of an issue that the defendant has chosen not to raise. Such a requirement could often step on a defendant's trial strategy of abstaining from certain objections. This "failure" cannot be plain error.

However, without waiving the procedural bar or the argument that trial court cannot have erred here without the defendant having first raised an objection, the State would argue alternatively that the evidence was admissible to impeach the defendant. In *Moss v. State*, this

court respected a trial court's discretion to admit prior evidence of a defendant's acts of domestic violence against the victim in order to show premeditation where a defendant claimed the shooting to have been accidental. *Moss*, 727 So. 2d at 725. In *Taylor v. State*, the court allowed the State to introduce prior domestic violence complaints taken out by a murder victim against the defendant even though those complaints had been dismissed. *Taylor v. State*, 954 So. 2d 944, 948 (Miss. 2007). It seems clear to the State that the prosecution introduced this evidence of prior bad acts under Rule 404(b) and the precedent of *Moss* to show the escalating level of violence between the defendant and the victim. Impeachment of credibility was not the motivation of the State.

Despite such spot-on precedent, the State, nevertheless, will engage in the *Peterson* analysis to show that the evidence is even admissible under Miss. Rule Evid. 609(1). *Peterson* outlined five factors for the trial court to weigh in considering whether to admit the evidence of previous convictions at a subsequent trial for purposes of impeachment of credibility: (1) the impeachment value of the prior crime, (2) the point in time of the conviction and the witness' subsequent history, (3) the similarity between the past crime and the charged crime, (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue.

In *Hopkins v. State*, the Supreme Court scrutinized a trial court's *Peterson* analysis where the trial court, after a proper objection, had weighed the prejudicial and probative values of admitting a prior conviction of touching a child for lustful purposes against a defendant charged with sexual battery. *Hopkins v. State*, 639 So. 2d 1247. The court there was presented with an analogous situation (except that the defendant had objected and that court's standard of review was less strict), and affirmed the trial court decision. The impeachment value of the prior crime was immense. His history of violence contradicts both his assertions that this shooting was

accidental and his invocations of some deeply-felt religious principle. [T. 368]. While the "rule of thumb" may be that crimes involving deceit are better to impeach credibility, here the relation between the defendant's prior acts and the action in question speak to his credibility. The temporal proximity of the crime is unclear from the record. This lack of clarity must either be disregarded or assumed to be in favor of the State considering that the defendant's failure to object is the sole reason that the trial court did not engage in the fact-finding inquiry required by *Peterson*. The similarity between previous acts of domestic violence and the murder charged here is not sufficient to find clear error. This court cannot find clearly that a jury would have made the jump from "angry boyfriend" to "killer." Since the defendant was the only witness offered by the defense, his testimony was obviously important, but the fact that the defense decided to be the first to offer details regarding these prior bad act seems, reasonably, to weight against their prejudice. The final factor is the centrality of the credibility issue. The defendant made his credibility a key issue by testifying to his own moral character [T. 368] and by accusing the police department of falsifying his statement. [T. 397]. On review here, the appellate court can, at best, only look suspiciously upon some of these factors. There is, however, no clear error.

Finally, it is immaterial whether the defendant opened the door (though, the State notes that until the defendant displayed the details of these prior bad acts during direct, they had simply been brief, forgettable references in a five hour interview video). Regardless of who opened the door, there is no clear error to be found in the admission of the evidence, and, further, any mention of Marilyn McKinney was superfluous to the overwhelming weight of the evidence. If the court finds error with even the mention of Marilyn McKinney, it must find that the error was harmless.

V. THE COURT RULED CORRECTLY BY REFUSING TO GRANT THE DEFENSE COUNSEL'S SELF-DEFENSE JURY INSTRUCTION.

The Brief for the Appellant alleges that the trial court erred by refusing to grant jury instruction D1(a) which instructed the jury on self-defense. The trial judge refused on the basis that there was no evidentiary support for the instruction.

Defendants are entitled to instructions presenting their theory of the case, but not to jury instructions that either misstate the law or are not based in the evidence. *Howell v. State*, 860 So. 2d 704, 745 (Miss. 2003). No reversible error will be found if the jury instructions, taken as a whole, fairly announce the law and do not create injustice. *Adkins v. Sanders*, 871 So. 2d 732, 736 (Miss. 2004).

Taylor v. State is instructive in this case. There, the defendant had argued at trial, similarly to the case *sub judice*, that he and his romantic partner had engaged in an argument, that she had pointed a gun at him, that a struggle ensued, and that the gun went off without design or intent. *Taylor v. State*, 597 So. 2d 192, 193 (Miss. 1992). The court granted a defense instruction articulating an accident theory, but also instructed the jury that if they found that the defendant there had designed to effect the death of the victim, then he was guilty of murder "unless the jury entertain a reasonable doubt as to whether or not the killing was done in necessary self defense." *Id.* The most problematic part of that instruction for the court was that "Taylor made no claim of self-defense. No one offered evidence of self-defense. Taylor's theory of defense throughout was one of accident or excusable homicide." *Id.* at 194. A required element of self-defense is the design to effect the death of (or at least exercise some force over) that person who is threatening the accused. *Ford v. State*, 975 So. 2d 859, 864 (Miss. 2008).

Jury instruction D2(a), given by the judge, very accurately reflected both the law and the

facts as presented by the defendant. The defendant here prays that the accused has a fundamental right to present his theory to the jury, no matter how minimal the evidence, but there is no getting around the basic fact that the defendant never presented this theory until his counsel submitted jury instruction D1(a). In fact, the defendant presented far more testimony and evidence supporting his contention that the victim supernaturally maintained consciousness after being shot through the heart [T. 418-19] than evidence and testimony supporting a jury instruction on self-defense. Defendant presented more evidence supporting his contention that he had no clue the defendant had been shot at all [T. 427] than evidence and testimony supporting a jury instruction on self-defense. As the State said in Objections to Jury Instruction, "[T]here's no proof that this defendant did any intentnional act in necessary self-defense, either under the subjective belief that he had to or under the objective belief that he had to. There's no proof that he discharged the weapon intentionally, either under an objective or subjective belief of necessity." [T. 452].

VI. THE PROSECUTOR'S CLOSING ARGUMENTS WERE LEGALLY CORRECT AND NOT PREJUDICIAL TO THE DEFENDANT.

The defendant objects now, untimely, to the State's use of comparative allegory in illustrating the difference between reasonable doubt and other kinds of doubt as an unlawful attempt to define reasonable doubt.

First, the State notes that the defendant's failure to make a contemporaneous objection to the argument at trial is fatal to his contention before this court. *Mack v. State*, 650 So. 2d 1289, 1320 (Miss. 1994). Without waiving the procedural bar, the State argues on the merits that the prosecutor's analogy was lawful under this court's prior decisions regarding argumentative comment regarding the subject of reasonable doubt in closing arguments. The argument objected

to is an analogy of a man who wakes up to see snow on the ground outside his house. The prosecutor said that, for this man, a reasonable conclusion could be reached beyond all reasonable doubt that it had snowed the night before and not, for example, that the man had been visited by snow-exporting Eskimos.

The prosecutor here simply distinguished between reasonable doubt and all possible doubt in compliance with this court's decision in *Thorne v. State*. Prosecutors can comment argumentatively on the distinctions between reasonable doubt and all possible doubt in voir dire and closing arguments. *Thorne v. State*, 348 So. 2d 1011, 1015 (Miss. 1997). In *Gillum v. State*, the prosecutor told jurors in closing that, while the defense argued and the law required reasonable doubt, "it doesn't say beyond all doubt. It doesn't say beyond a shadow of a doubt." *Gillum v. State*, 468 So. 2d 856, 862 (Miss. 1984). The court approved this closing and affirmed the conviction. *Id.* at 863.

The types of arguments to which this court has objected might be called "you don't have to know" arguments. In *Edge v. State*, a closing that said explicitly that "The law doesn't require you to know that this man is guilty. All you have to do is believe it beyond a reasonable doubt." *Edge v. State*, 393 So. 2d 1337, 1340 (Miss. 1981). "You don't have to know" arguments are "palpably unfair and misleading. [They are obviously efforts] to placate the natural caution on the part of the jury to require satisfactory evidence of guilt." *Gillum*, 468 So. 2d at 862.

While the prosecutor here never used the terms "all doubt" and "shadow of a doubt," his analogy illustrated these concepts. The man in his analogy had not seen the snow fall during the night, and so might not have been able to eliminate all doubt or even the shadow of doubt that he had been visited by Eskimos, but because practically every other scenario was unreasonable, he could conclude, beyond all reasonable doubt the snow had fallen naturally. The prosecutor here

only suggested here that the jury need not accept as reasonable the defendant's more wild explanations for his suspicious behavior on the night of the murder. The State contends that such a suggestion was not objectionable because it did not soothe the jury into some lower burden of proof, but rather suggested that a great deal of the defendant's explanations were not at all reasonable.

However, even if this court were to find such a suggestion to be objectionable, it must further determine that it was sufficiently prejudicial. *Stigall v. State*, 869 So. 2d 410, 414 (Miss. App. 2003). Considering the overwhelming weight of evidence against this defendant and defense counsel's election to waive objection to the argument (presumed to be trial strategy), this court can safely conclude that this argument probably did not prejudice the jury.

VII. THE TRIAL COURT DID NOT COMMIT CUMULATIVE ERRORS SUFFICIENT TO REQUIRE A NEW TRIAL.

The defendant invokes the cumulative error doctrine, contending that a series of errors by the trial court, if not singularly sufficient to raise cause for a new trial, are enough cumulatively to constitute reversible error. The State contends, first, that for the reasons hereinabove stated no error has been committed at all. Should the honorable court disagree, the State argues in the alternative that errors, cumulatively, have so injured the defendant that he should be entitled to a new trial.

Factors that this court have considered in determining whether an accumulation of errors requires a new trial include whether the issue of guilt or innocence is close, the quantity and character of the error, and the gravity of the crime charged. *Ross v. State*, 954 So. 2d 968, 1018 (Miss. 2007). And in *McFee v. State*, the court said that where there is no reversible error in any part, there is no reversible error on the whole. *McFee v. State*, 511 So. 2d 130, 136.

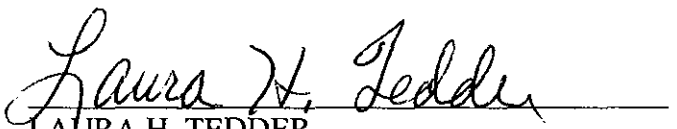
The Brief for the Appellant lists its complaints as if it were seeking some sanction against the State for grievances, as if it were asking this court to reign in the wayward prosecutors. That, however, is not the object of the cumulative error doctrine. The cumulative error doctrine is a little-used tool in the belt of the appellate court to give the benefit of the doubt to defendants who might very well have been wrongly convicted. Disregarding all contested evidence, the State presented evidence that the defendant was the violence-prone lover of the defendant [T. 106-09], that there was no sign of forced entry at the victim's home [T. 186], that the defendant fortified himself in his him and subsequently fled from police when they tried to question him the following day [T. 207], that the defendant was connected to a gun of the type that killed the victim [T. 242], that the victim would have died within minutes of being shot [T. 332] and become unconscious within three to fifteen seconds of being shot [T. 334], and that it would have been impossible for Moore to inflict that type of wound upon herself [T. 335]. The defendant's violent history with the victim, his admitted presence at her home on the night of her murder, and the medical and physical inconsistencies of his testimony (for example, the defendant claimed the victim had been shot but was conscious when he left [T. 382]) would have been enough to convince the rational trier of fact of the defendant's guilt.

CONCLUSION

For the reasons herein expressed, the State respectfully requests that the judgment and sentence of the lower court be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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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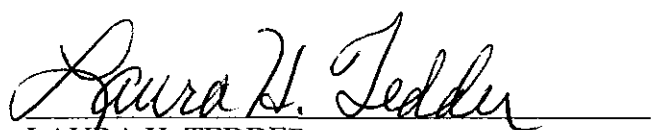
This the 2nd day of September, 2008.



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