IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DESMOND KEYS — APPELLANT

VS. — NO. 2007-KA-2221

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JOHN R. HENRY
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

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DESMOND KEYS **APPELLANT**

vs. **CAUSE No. 2007-KA-02221-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Jones County, Second Judicial District, in which the Appellant was convicted and sentenced for his felony of **MURDER.**

STATEMENT OF FACTS

The Appellant beings no challenge as to the sufficiency of weight of the evidence concerning his guilt for the murder of a five - year old child, so we consider it unnecessary to set out the details of his crime at length. Stated generally, the State demonstrated that the Appellant encountered one William Tucker. The Appellant was drinking. While the Appellant and Tucker and a third individual chatted, the Appellant began bragging about what a big man he was, what a big dope dealer he was. Tucker indicated that he thought that the Appellant was overestimating his importance. This led to an increasingly heated exchange, which soon enough developed into

a minor physical altercation. The third person present managed to separate the Appellant and Tucker, but the Appellant threw his cell telephone at Tucker, telling him that he would be back. The Appellant then left. Tucker and his friend then left as well, fearing that the Appellant might return and resume the difficulty. They remained away for about forty - five minutes; when they returned they were told that Tucker's little girl had been shot.

The Appellant, armed with a pistol and a semi - automatic assault weapon, did return and opened fire on Tucker's residence. Some thirty - three shell casings were found outside the apartment. The apartment itself had been struck or penetrated by 43 bullet holes. On the interior there were some 112 defects resulting from the bullets flying about the apartment. The victim, five - year old Marianna Marie Tucker, was shot through the back of her head as she lay in her bed, the bullet traveling through her head and the into the chest cavity, where it broke a rib and punctured a lung, and then into her liver before exiting the right buttock.

After the Appellant shot up Tucker's apartment, he was seen leaving the area. He was carrying a "rife like machine gun." When asked what he was doing, he replied that everything was under control. He was not running and did not appear to be scared. He told that witness that she would be coming to get him out of jail in about fifteen minutes.

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN FAILING TO INSTRUCT THE JURY ON THE APPELLANT'S THEORY OF THE CASE?

2. DID THE TRIAL COURT ERR BY REFUSING TO GRANT A CULPABLE NEGLIGENCE MANSLAUGHTER INSTRUCTION?

3. DID THE TRIAL COURT ERR IN PERMITTING THE FORENSIC PATHOLOGIST TO TESTIFY TO A MATTER OUTSIDE HIS AREA OF EXPERTISE; DID THE TRIAL COURT ERR IN ALLOWING THE FORENSIC PATHOLOGIST TO TESTIFY

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING INSTRUCTIONS ON HEAT OF PASSION MANSLAUGHTER AND CULPABLE NEGLIGENCE MANSLAUGHTER

2. THAT THE THIRD ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT THE THIRD ASSIGNMENT OF ERROR IS WITHOUT MERIT

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING INSTRUCTIONS ON HEAT OF PASSION MANSLAUGHTER AND CULPABLE NEGLIGENCE MANSLAUGHTER[1]

The Appellant sought an instruction on culpable negligence manslaughter and heat of passion manslaughter. Both were refused by the trial court, it finding, in effect, that there was no evidence to support those instructions.

As to the culpable negligence instruction, the prosecutor pointed out to the trial court that the evidence showed that the Appellant pulled the trigger of his gun a minimum of thirty - two times and perhaps as many as forty - two times. It was the prosecutor's view, one with which we agree, that the sheer number of shots fired toward or into the Tucker home completely negated any notion that the shooting might have been culpably negligent. (R. Vol. 3, pp. 252 - 253). The Appellant, it will be recalled, did not testify, and there was no evidence presented by the defense to support a theory of culpable negligence manslaughter. On the other hand, besides the ample testimony concerning the Appellant's action in shooting up the home, he told one person after the shooting that he had "got every thing under control." (R. Vol. 3, pg. 238). His actions and statement are wholly against any notion that he was culpably negligent. One discharge from a

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[1] We will respond to the Appellant's First and Second Assignments of Error in this response.

firearm might, in certain circumstances, be characterized as culpably negligent, but the firing of this many shots cannot possibly be thought to have been the consequence of any kind of negligence.

It is difficult indeed to imagine how this case could possibly be characterized as a possible culpable negligence case. There was not a single item of evidence or testimony to suggest it. Certainly the Appellant does not cite any. While it may be that an accused has the right to have the jury instructed on his theory of the case, that rule of law presumes that there is evidence to support such instructions. *Bright v. State*, 986 So.2d 1042 (Miss. Ct. App. 2008). Here there was no such evidence and no reasonable jury could have found the Appellant not guilty on the charge of the indictment, yet guilty of culpable negligence manslaughter. Consequently, the trial court committed no error in refusing a culpable negligence manslaughter instruction.

The Appellant then notes that the distinction between depraved heart murder and culpable negligence manslaughter is that depraved heart murder involves a higher degree of recklessness from which malice aforethought may be implied, citing *Windham v. State*, 602 So.2d 798, 801 (Miss. 1992). Perhaps this is so, but the point avails the Appellant nothing. An unjustified act of shooting into an occupied house, which results in the death of one of the occupants, is a familiar example of depraved heart murder. *Windham*, at 802. Again, in the case at bar, the Appellant did not fire one shot into the house. He did not present evidence that what he did was a negligent act. What the Appellant did was fire into the house at least thirty - two times.

In *Chandler v. State*, 946 So.2d 355 (Miss. 2006), the evidence was that the accused in that case deliberately carried a gun with him and deliberately fired three shots, killing the victim. The Court held that the trial court in that case correctly refused a culpable negligence

manslaughter instruction, there being no evidence in support of one. The same result should obtain here. The Appellant left the area, went to get two guns, returned, and opened fire. The placement of his shots clearly showed that he was aiming his shots. His actions were deliberate, not culpably negligent.

Nor was there evidence to support a heat of passion manslaughter instruction. It may be that the Appellant became upset because Tucker did not take his boasts of being a big shot seriously, but this was no provocation within the meaning of the heat of passion form of manslaughter. The record indicates that the Appellant was the one who became upset. He was the one who provoked a difficulty with Tucker, simply because of Tucker's word to the effect that he did not believe that the Appellant was what he claimed to be.

In *Alford v. State*, No. 2007-KA-OO241-COA (Miss. Ct. App., Decided 26 August 2008, Not Yet Officially Reported), the Court defined this form of manslaughter:

> Heat of passion" has been defined as "[a] state of violent and uncontrollable rage engendered by a blow or certain other provocation given.... 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" and "would produce in the minds of ordinary men 'the highest degree of exasperation.' *Phillips v. State,* 794 So.2d 1034, 1037 (¶¶ 9-10) (Miss.2001) (citations omitted). Importantly, words alone, even if provocative, or disagreements between people are insufficient to satisfy the "heat of passion" requirement and, thus, "reduce an intentional and unjustifiable homicide from murder to manslaughter." *Id.* at (¶ 10) (quoting *Gates v. State,* 484 So.2d 1002, 1005 (Miss.1986)).

Alford, at 5.

The Appellant may have been annoyed, perhaps highly annoyed, that he was not taken seriously. But, if so, this state of affairs resulted solely from Tucker's verbal response to the Appellant's boasting. Nothing Tucker said could have reasonably been seen as sufficient to cause a violent or uncontrollable rage. In any event, as we have pointed out, mere words are

insufficient, in contemplation of law, to reduce murder to manslaughter.

There was testimony that the Appellant and Tucker got into a "scuffle", after Tucker remonstrated with the Appellant about the language he was using. (R. Vol. 3, pg. 199). However, it has been held that evidence of a minor physical altercation such as a "scuffle" is, of itself, an insufficient evidentiary basis to require the granting of a manslaughter instruction. *Cooper v. State*, 977 So.2d 1220 (Miss. Ct. App. 2007). The Appellant was not in an uncontrollable rage. He had the presence of mind to leave the scene of the argument, arm himself, return, and then begin firing at the Tucker residence, taking care to place his shots. After he finished firing, he showed no sign of anger. There was simply no evidence that the Appellant was in a state of violent and uncontrollable rage.

Nor did the killing occur immediately at the time of any provocation. The Appellant left the scene to arm himself, telling Tucker he would be back. Tucker and his friend left the scene. When the Appellant returned, he opened fire on the residence, not upon Tucker.

The Appellant apparently engaged in two separate shootings on the night he killed the child. (R. Vol. 3, pg. 172; 181)

The Appellant notes that the trial court found that since the he had the time to go and arm himself and return to the scene of the argument, he had the time to reflect upon his actions. However, the Appellant claims that the jury should have been given the task of determining whether there was a sufficient "cooling off" period, and he cites *Haley v. State*, 123 Miss. 87, 85 So. 129 (1920) in support of his argument.

The Appellant's argument fails to take into consideration that Tucker's words to the Appellant did not constitute a provocation for purposes of the heat of passion form of manslaughter. In *Booze v. State*, 942 So.2d 272 (Miss. Ct. App. 2006), the appellant in that case

was insulted by the decedent. The insults there, arguably, were more provocative than anything Tucker said in the case at bar. Booze thereupon went to his car, retrieved a gun and then shot the person who insulted him some eight times.

Booze asserted that he should have been granted a manslaughter instruction. This Court, however, held that mere words may never constitute a sufficient provocation. It also noted that several minutes passed between the time of the insults and Booze's act of killing the decedent. *Booze* is analogous here.

Haley, supra, does hold that it is for the jury to determine whether there was a sufficient "cooling off" period in which an accused in a homicide case had time for his passion to subside. But that rule is not applicable here in view of the fact that there was never a sufficient provocation in the case at bar. In *Haley* the Court found that there was a sufficient provocation: Haley had been told by his wife that she had been unfaithful to him. It then turned to the question of whether the passion aroused by that provocation had spent its force by the time the homicide occurred. In contrast, the issue in the case at bar is not simply whether the Appellant had a sufficient period of time to "cool off"; it is more fundamentally whether he had been provoked. He was not, at least not within the meaning of heat of passion manslaughter, as *Booze* illustrates.

The trial court did not clearly give this reason for its reason in refusing the heat of passion manslaughter instruction. It refused it because there was time between the alleged provocation and the shooting which would have permitted the Appellant to "cool off", as in *Booze*. We submit, though, that in addition to the trial court's reason, there was no sufficient provocation made by Tucker.

The First and Second Assignments of Error are without merit.

2. THAT THE THIRD ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT THE THIRD ASSIGNMENT OF ERROR IS WITHOUT MERIT

In the Third Assignment of Error, the Appellant contends that the forensic pathologist who testified in the case at bar should not have been permitted to testify, this being because he was not qualified to testify as a forensic pathologist and because he was not certified by the American Board of Pathology. The Appellant also complains that the pathologist was not qualified to give an opinion that the victim was killed by a high velocity bullet.

The Appellant admits that there were no objections made in the course of trial on these points. That being so, the Third Assignment of Error is not before the Court. Nor may these issues be resurrected under a theory of "plain error". *Dixon v. State*, 953 So.2d 1108, 1116 (Miss. 2007).

Assuming for argument that the Third Assignment of Error is before the Court, there is no merit in it.

The forensic pathologist who testified in the case at bar, Dr. Steven Hayne, has been qualified as a forensic pathologist and been permitted to testify as such in many, many criminal cases in this State. This Court has held that Dr. Hayne is "unquestionably" qualified to testify in the field of forensic pathology in the courts of this State. *Duplantis v. State*, 708 So.2d 1327, 1329 (Miss. 1998).

Dr. Hayne may not be certified by the American Board of Pathology, but, on the other hand, Dr. Hayne did not testify that he was the State's Medical Examiner. Only the State Medical Examiner is required to have such a certification. Miss. Code Section 41-61-55 (Rev. 2005). Pathologists appointed or employed under the supervision of the Commissioner of Public Safety are not required to have that certification. Miss. Code Ann. Section 41-61-77(3) (Rev.

2005). The very most that might be said of Dr. Hayne's lack of such certification, then, is that it was a matter for the jury to consider in weighing the worth and weight of his testimony.

The Appellant makes much of the number of autopsies performed by Dr. Hayne. He did not do so at trial. But again, whether Dr. Hayne could reliably perform such a number of autopsies was a matter for the jury to consider.

The Appellant claims that Dr. Hayne was impermissibly allowed to testify the field of terminal ballistics. It is said that the State failed to lay a predicate for such testimony from a forensic pathologist.

The Appellant did object to a question put to Hayne concerning whether the bullet that killed the victim was a high or low velocity bullet, asserting that it was "speculation" on Hayne's part. (R. Vol. 3, pg. 231). However, before the trial court ruled on the objection, the prosecutor offered to and did rephrase the question. There was no objection to the rephrased objection and Hayne answered it and several follow - up questions. (R. Vol. 3, pg. 232). Since the Appellant did not obtain a ruling on his objection, and since he did not object to the rephrased question, the issue may not be considered here. *Brown v. State*, 965 So.2d 1023, 1029 (Miss. 2007).

In any event, Hayne had previously testified that terminal ballistics is a field reserved to forensic pathology. (R. Vol. 3, pg. 223). He further stated how and why he concluded that the bullet was a high velocity bullet and that it is possible to determine the kinetic energy of a bullet. (R. Vol. 3, pp. 232 - 233). There was nothing put into evidence to put this testimony in issue. The physical facts concerning the injuries caused to the victim fully corroborated Hayne's opinion that the fatal wound was cause by a high velocity bullet. There is, then, nothing similar here to the facts in *Edmonds v. State*, 955 So.2d 787 (Miss. 2007), a case, incidentally, in which a proper objection was contemporaneously entered.

The Appellant asks this Court to take judicial notice that Dr. Hayne, subsequent to the trial in this case, was removed from the list of approved pathologists. This is not a proper subject for judicial notice. Beyond this, the Appellant utterly fails to demonstrate any relevance of this alleged fact to the case - at - bar. This allegation is to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983).

Finally, even if by some stretch of the imagination the Third Assignment of Error was properly preserved in the trial court, and that the allegations made in it were to be found to have some merit, any error in admitting Hayne's testimony would be harmless error. There is simply no question that the child was killed by a bullet and that the Appellant fired bullets into her home. There was ample evidence for the jury to find that the cause of death was from a bullet wound aside from Hayne's testimony.

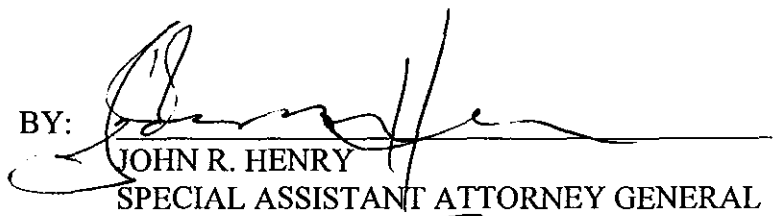
The Third Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

JOHN R. HENRY
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

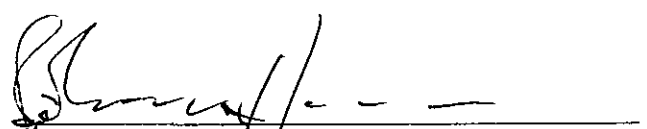
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Billy Joe Landrum
Circuit Court Judge
P. O. Box 685
Laurel, MS 39441

Honorable Anthony J. Buckley
District Attorney
P. O. Box 313
Laurel, MS 39441

Leslie Roussell, Esquire
Attorney At Law
Post Office Box 2940
Laurel, Mississippi 39442-2940

This the 5th day of January, 2009.



JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

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