

IN THE MISSISSIPPI SUPREME COURT

CASE NUMBER 2007-KA-2221-COA

DESMOND KEYS

Appellant

vs.

STATE OF MISSISSIPPI

Appellee

APPELLANT'S BRIEF

LESLIE ROUSSELL,
ATTORNEY FOR APPELLANT,
DESMOND KEYS

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Mr. Desmond Keys - Appellant

District Attorney, Anthony Buckley - The States trial attorney.

Judge Billy Joe Landrum - Trial Judge.

Vivian Tucker - Mother of the deceased, witness for the State.

Mike Sumrall - Officer who testified at trial for the State.

Stacy Smith - Investigator who testified for the State.

Starks Harthcock - ballistics expert testified for State.

Kametra Leggins - Lay witness for the State.

Donna Wilson - Lay witness for the State.

Arianna Wilson - Lay witness for the State.

Mary Moffett - Lay witness for the State.

Tawana Campbell - Lay witness for the State.

Vernon Washington - Lay witness for the State.

William Tucker - Father of the deceased and witness for the State.

Dr. Stephen Hayne - doctor who did the autopsy for the State.

Bethany Trotter - Lay witness for the State.

Leslie Roussell - Attorney for the Defendant/Appellant.

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STATEMENT OF ISSUES

- I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON THE DEFENDANT'S THEORY OF THE CASE.

- II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ALLOW THE JURY TO BE INSTRUCTED ON THE CRIME OF CULPABLE NEGLIGENCE MANSLAUGHTER X

- III. DR STEVEN HAYNE SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY IN THE AREA OF TERMINAL BALLISTICS AS THERE IS NO EVIDENCE HE HAS ANY EXPERTISE IN THAT AREA; AND HIS TESTIMONY AS TO MANNER AND CAUSE OF DEATH SHOULD BE EXCLUDED AS HE IS NOT PROPERLY CERTIFIED BY THE AMERICAN BOARD OF PATHOLOGY

STATEMENT OF THE CASE

On or about July 27, 2006, Maryianna Tucker was lying in her bed inside her apartment at the Lone Oaks Apartments in Laurel, Mississippi. Gunshots were fired and one bullet went through her body causing her death (R. 51-53, 229).

According to witnesses, there was an earlier altercation between Desmond Keys and Maryianna's father, William Tucker (R. 195, 199, 214). It is alleged that once the fight was over, Desmond Keys left the scene, returned with a gun and began shooting into the Tucker apartment. It was a shot fired by Desmond Keys which the state contends killed Maryianna Tucker.

The State found .38 caliber projectiles (usually fired from a hand gun) as well as .30 caliber projectiles (which are usually "high velocity" and fired from a semi automatic weapon (R. 73-76; 129; 143-146)). Dr. Steven Hayne testifying as an expert in the field of terminal ballistics, testified that he believed it most likely that Maryianna was killed by a "high velocity" bullet more consistent with the .30 caliber bullet. However, when asked if Maryianna's death was caused by the .38 caliber bullet he could not say yes or no (R. 232-234). Further, Dr. Hayne testified as to cause and manner of death even though he is not certified in Forensic Pathology by the American Board of Pathology.

All of the lay witnesses in this case claim to have seen Desmond Keys with a long rifle/semi automatic type gun. Two witnesses also stated that Desmond Keys had a second hand gun, but noone testified that they saw him shoot a handgun. Also interesting is that none of the other witnesses saw a handgun, and one witness even testified that she just "came up" with the second gun story a couple of hours before walking into the courtroom to testify (R. 159).

Most of the lay witnesses did testify that Desmond Keys shot into the Tucker apartment. However there was absolutely no testimony that Desmond Keys knew anyone was at home or that he saw anyone inside, nor that Desmond Keys intended in any way to harm anyone. Desmond Keys requested a Culpable Negligence manslaughter instruction and a heat of passion manslaughter instruction (R. 252-255; 258), both represented alternative theories of defense which there was evidence to support. The Court refused the defendant's instructions and the defendant was found guilty of murder and sentenced to life imprisonment (R. 256-261; 284-285). The Jury was not even allowed to consider the Defendant's theory of the case.

The events that took place on July 27, 2006, lead to the tragic loss of life of a five year old girl. However, that tragedy cannot relieve this Court of its duty to ensure that her accused receives a constitutionally fair trial. He did not.

SUMMARY OF THE ARGUMENT

This case can be summed up very briefly. After a jury deliberated for a mere twenty minutes, Desmond Keys was convicted of murder. The trial court allowed his case to go to the Jury without any instruction on the defendant's two theories of the case, culpable negligence manslaughter and heat of passion manslaughter. You simply cannot prohibit a citizen of the United States of America a constitutionally fair trial by refusing to allow the Jury to consider his defense.

The testimony from the State's witnesses clearly establish that there was a fight between Desmond Keys and William Tucker (R. 195; 199; 214). Physical blows were exchanged in that fight (R. 214). At some point after the fight other witnesses claim that Desmond Keys came back with a gun. Noone testified whether that was 10 seconds after the fight or 10 hours. We simply do not know what period of time had passed and whether or not Desmond keys had time to "cool". Desmond Keys was entitled to have the jury determine whether or not Desmond Keys acted in the heat of passion. Desmond Keys requested a jury instruction which would have informed the jury of that theory of defense (R. 258-260). The Judge refused it stating that, " if he was in a rage and he had time to go get a gun and come back, he should have had time to deal with his rage where he wouldn't come back" (R. 258; 260). The Judge simply invaded the fact finding province of the jury and substituted his personal opinions and findings of fact for those of the jury. The Judge overstepped his authority and committed reversible error.

Further, the State's witnesses claim that Desmond keys was shooting into an apartment. It is certainly reasonable from all of the evidence presented for someone to conclude there was noone inside the apartment. Since there was no proof that Desmond Keys knew anyone was

inside the apartment, the State decided to charge him with depraved heart murder (See Record Excerpts at 12). The law is clear that the difference between manslaughter by culpable negligence and depraved heart murder concerns the degree of mental culpability. *Windham v. State*, 602 So.2d 798, 801 (Miss.1992). The determination of a defendant's mental culpability is an issue properly resolved by the jury. *Morris v. State*, 748 So.2d 143, 148 (Miss.1999). These two cases state that the degree of culpability in a case such as this is a question for a jury. *Shumpert v. State* 935 So.2d 962, 967 (Miss.,2006). The Defendant requested a culpable negligence manslaughter jury instruction and the Court again refused the instruction and substituted its own opinions for those of the jury by saying, “ this is probably as a cold case of depraved heart as I’ve seen” (R. 252-255; 259). The Court again invaded the fact finding province of the jury and committed reversible error.

Finally, Dr. Steven Hayne was submitted as an expert in the fields of Forensic Pathology and Terminal Ballistics (R. 223-224). There was no testimony as to any education that Dr. Hayne has in terminal ballistics, however he testified that the bullet that killed Maryianna was a high velocity bullet (like the .30 caliber) instead of a slower bullet (like the .38) (R. 232-234). He was simply not qualified to make this type of testimony, and if he was then the proper foundation to establish that expertise was not laid. Also, Dr. Hayne is not Board certified in Forensic Pathology which Mississippi State Law requires in order to be the State Medical Examiner. The fact that Dr, Hayne is not and has never been board certified by the American Board of Pathology should disqualify him and any testimony he gives about the cause and manner of death in any trial.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ALLOW THE JURY TO BE INSTRUCTED ON THE DEFENDANT'S THEORY OF THE CASE. .

The law in this area is very well settled. A trial Court should "instruct the jury as to the theories and grounds of defense, justification, or excuse supported by the evidence, and a failure to do so is error requiring reversal of a judgment of conviction." *Hester v. State*, 602 So.2d 869, 872 (Miss. 1992) citing *O'Bryant v. State*, 530 So.2d 129, 133 (miss. 1988). If the Defendant's offered jury instruction properly states the law, has a basis in the evidence, and is the only instruction giving his theory of the case to the jury, a court's refusal to grant it is reversible error. *Murphy v. State*, 566 So.2d 1201, 1207 (Miss. 1990). "Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court." *Hester v. State*, at 872.

Furthermore, every accused has a fundamental right to have her theory of the case presented to a jury, even if the evidence is minimal. We have held that "[i]t is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court. This Court will never permit an accused to be denied this fundamental right." *O'Bryant v. State*, 530 So.2d 129, 133 (Miss.1988) (citing *Ward v. State*, 479 So.2d 713 (Miss.1985); *Lancaster v. State*, 472 So.2d 363 (Miss.1985); *Pierce v. State*, 289 So.2d 901 (Miss.1974)). This Court recently has stated that "[w]e greatly value the right of a defendant to present his theory of the case and 'where the defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error.'" *Phillipson v. State*, 943 So.2d 670, 671-72 (Miss.2006) (citing *Adams v. State*, 772 So.2d 1010, 1016 (Miss.2000)).

Chinn v. State 958 So.2d 1223, 1225 (Miss.,2007). The above cases clearly show that if the proffered instruction (1) has a basis in evidence no matter how slight; and (2) is not covered by

other instructions; and (3) are proper statements of the law, then they must be given. The jury in this case was not properly instructed.

The jury instructions given in this case did fairly and accurately depict the law of the State of Mississippi with regard to depraved heart murder; however, the jury was not instructed regarding the defendant's theories of the case. The Defendant's theory was that even if everything the prosecution said was true, he could only be guilty of either culpable negligence manslaughter or heat of passion manslaughter. Jury instructions defining those concepts were submitted by the Defendant.

Mississippi defines depraved heart murder as:

The killing of a human being without the authority of law by any means or in any manner shall be murder when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

Miss. Code Ann. § 97-3-19(b).

Mississippi defines culpable negligence manslaughter as:

Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter.

Miss. Code Ann. § 97-3-47.

Mississippi defines heat of passion manslaughter as:

The killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense.

Miss. Code Ann. § 97-3-35.

The Defendant filed several proposed jury instructions regarding manslaughter all of which were denied by the Court. The Defendant filed an instruction which defined culpable negligence manslaughter to the jury (proposed jury instruction D-11, See Record Excerpts at 18); he gave one which defined heat of passion manslaughter (proposed jury instruction D-12, See Record Excerpts at 19); he submitted one which allowed the jury to consider the lesser included offense of manslaughter (proposed jury instruction D-10; See Record Excerpts at 17); and he also gave a "form of the verdict" instruction which included manslaughter (proposed jury instruction D-6; See Record Excerpts at 16).

Each of these proposed jury instructions were denied by the Court and were the only jury instructions dealing with manslaughter. There were no manslaughter instructions given to the jury by the Court. Each of these proposed instructions were proper statements of the law with regard to manslaughter, culpable negligence manslaughter and heat of passion manslaughter. Each had a basis in the evidence; heat of passion because of the witness testimony of an altercation between Mr. Keys and Mr. Tucker prior to gun shots (R. 195; 199; 214); and culpable negligence because this was not an intent to kill indictment, but was a depraved heart murder indictment. The "recognized distinction between manslaughter by culpable negligence and depraved heart murder concerns the degree of mental culpability". *Windham v. State*, 602 So.2d 798, 801 (Miss.1992). The determination of a defendant's mental culpability is an issue properly resolved by the jury. *Morris v. State*, 748 So.2d 143, 148 (Miss.1999).

(And just for completeness, the defendant objected to the Court's "form of the verdict" jury instruction (C-1) and the State's murder elements instruction (S-1) because neither contained references to manslaughter and were thus improper for failing to allow the Defendant's theory of

the case from being considered by the jury (R. 252-255)). No other offered jury instructions included any reference to culpable negligence manslaughter and/or heat of passion manslaughter. Therefore, no other jury instructions were given to the jury to instruct them on the Defendant's theory of the case. That is reversible error.

In examining this issue it is interesting to note the Statements of the trial judge when making the decision not to grant the proposed instructions to the jury. The Defendant proposed a heat of passion manslaughter instruction and the Judge refused it stating that, "Based on the evidence that's been presented, if he was in a rage and he had time to go get a gun and come back, he should have had time to deal with his rage where he wouldn't come back. If the facts are true as presented, then he should have been able to take care of that while he was out getting his gun" (See Trial Record at 258, also Record Excerpts at 36). The judge is saying the defendant should have had time to cool down from any rage. He is not allowed to make that finding. Whether or not a person has had sufficient time to cool down from rage is a question of fact not a question of law. It is always a jury issue. It is never an issue for a Judge. It is the jury that must determine whether or not an individual had time to calm himself.

Whether there has been cooling time is eminently a question of fact, varying with the particular case and with the condition of the party. There are some provocations which, with persons of even temperament, lose their power in a few moments; while there are others which rankle in the breast for days and even weeks, producing temporary insanity. Men's temperaments also vary greatly as to the duration of hot blood; and it must be remembered that we must determine the questions of malice in each case, not by the standard of an ideal 'reasonable man,' but by that of the party to whom the malice is imputed." Wharton's Criminal Law (10th Ed.) vol. 1, par. 480.

The question in all cases similar to the case at bar is one of fact for the jury. The mere fact that the killing was intentional *132 is not the test.

Haley v. State 85 So. 129, 131 -132 (Miss. 1920)

The Defendant argued that the Court's form of the verdict jury instruction should not be given because it did not contain a culpable negligence manslaughter choice (R. 252-255). The Defendant argued that the only difference between depraved heart murder and culpable negligence manslaughter was degree and that degree is always a jury issue.

Depraved-heart murder and culpable-negligence manslaughter are distinguishable simply by degree of mental state of culpability. In short, depraved~~x~~ heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied

Windham v. State, 602 So.2d 798, 801 (Miss.,1992). This case stands for the proposition that a fact finder must determine if the conduct complained of by the State rises to the level of malice aforethought, i.e., depraved heart murder, or whether the conduct complained of fails to reach that level and is thereby culpable negligence which is only manslaughter. One cannot simply say that this act is so terrible that it must be murder and not manslaughter. That is why 12 men and women decide these things. Judges cannot simply base these decisions on their personal beliefs and morals. The jury represents the collective feelings and beliefs of society and it is the collective responsibility to make these judgment calls and findings of fact, not the man or woman wearing the robe.

The trial Judge overruled the Defendant's objection to the State's jury instruction and subsequently denied the Defendant's proposed jury instruction on culpable negligence manslaughter stating, "Well, I think this is one of those occasions where this act that was committed here, based on the facts that's been presented, that the Court doesn't have to worry about abundance of care. I think this exemplifies, if the facts are true and the jury has to decide that they are, that this is probably as a cold case of depraved heart as I've seen. So I'm going to give the instruction as it is written. C-2 will be given" (R. 256). The trial Court committed

error.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ALLOW THE JURY TO BE INSTRUCTED ON THE CRIME OF CULPABLE NEGLIGENCE MANSLAUGHTER .

Although this issue is covered above, that argument is more about properly instructing a jury on Defendant's theory of the case than it is a direct discussion of the reasons why this Defendant was entitled to a Culpable Negligence jury instruction. Therefore I attempt to do that more thoroughly here.

Depraved-heart murder and culpable-negligence manslaughter are distinguishable simply by degree of mental state of culpability. In short, depraved-heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied. *Windham v. State*, 602 So.2d 798, 801 (Miss.,1992). In this case many witnesses testified that they saw Desmond Keys firing a gun at the Tucker apartment. The jury then determines if they believe that testimony. If they do, then they must determine whether that conduct rises to a level high enough to be considered depraved heart murder or whether it does not rise to that level and is conversely culpable negligence manslaughter. Had they been properly instructed on the law, the jury would have deliberated on that issue and reached a decision.

Culpable negligence manslaughter is a lesser included offense of depraved heart murder.

A lesser-included offense instruction should be granted unless the trial judge and ultimately this Court can say, taking the evidence in the light most favorable to the accused and considering all the reasonable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser-included offense (conversely, not guilty of at least one element of the principal charge).

McGowan v. State, 541 So.2d 1027, 1028 (Miss.1989).

X

“[c]ulpable negligence must be ascertained from the facts of each case, and no ironclad statement can be set forth as applicable to all classes of cases.”
Sims v. State, 149 Miss. 171, 115 So. 217, 219 (1928).

Shumpert v. State 935 So.2d 962, 967 (Miss.,2006)

This Mississippi Supreme Court quote proves that culpable negligence vs. simple negligence vs. depraved heart type negligence is always a jury question. This Court made that distinction as early as 1928 in the above cited Sims case. But perhaps the most definitive case is Shumpert when the Court specifically said that the determination between culpable negligence manslaughter and depraved heart murder is ALWAYS a jury question. The Court said:

Furthermore, a recognized distinction between manslaughter by culpable negligence and depraved heart murder concerns the degree of mental culpability. *Windham v. State*, 602 So.2d 798, 801 (Miss.1992). The determination of a defendant's mental culpability is an issue properly resolved by the jury. *Morris v. State*, 748 So.2d 143, 148 (Miss.1999).

Shumpert v. State 935 So.2d 962, 967 (Miss.,2006).

In this case, however, that issue was resolved by the Judge. Reversible error was committed.

III. DR STEVEN HAYNE SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY IN THE AREA OF TERMINAL BALLISTICS AS THERE IS NO EVIDENCE HE HAS ANY EXPERTISE IN THAT AREA; AND HIS TESTIMONY AS TO MANNER AND CAUSE OF DEATH SHOULD BE EXCLUDED AS HE IS NOT PROPERLY CERTIFIED BY THE AMERICAN BOARD OF PATHOLOGY.

The State of Mississippi is very familiar with Dr. Steven Hayne. He is the man that pretty much testifies in every case in the State of Mississippi as to the manner and cause of death. Dr. Hayne was qualified in this case as an expert in forensic pathology and ultimately testified as to

the cause and manner of death of Maryianna Tucker (R. 222-224).

It appears that serious questions have since arisen about Dr. Hayne's qualifications to testify as an expert witness and whether he is even properly licensed by the American Board of Pathology. State law requires the State medical examiner to be board certified by the American Board of Pathology (See Miss. Code Ann. § 41-61-55). I think this Court can take judicial notice that Dr. Hayne is not. He no longer testifies that he is "Board Certified".

In fact, I believe the Court can also take judicial notice that Public Safety Commissioner has removed Dr. Hayne from the list of approved pathologists. The main reason for this is likely the great amount of autopsies that Dr. Hayne claims to perform. Dr. Hayne claimed at trial, that he had been in the medical examiner's office for the State of Mississippi for some 20 years (R. 222), and that he had performed approximately 35,000 autopsies (R. 223). Using simple math that means Dr. Hayne has averaged approximately 1750 autopsies per year; that is 4.8 autopsies per day every single day of the year for 20 years with no days off. (The National Association of Medical Examiners limits the number of autopsies that a certified medical examiner can do to 250 per year; after 325 the organization will no longer certify the examiners practice). (See Accreditation requirements of the National Association of Medical Examiners).

Another problem with Dr. Hayne in this case is that he was offered as an expert witness in the field of terminal ballistics without any voir dire from either side as to what his training and expertise was with regard to terminal ballistics. The District Attorney simply asked had he ever testified as an expert in that capacity before. Dr. Hayne then testified that he believed that the bullet that killed Maryianna Tucker had to be a high velocity bullet like the one that the State argued killed Maryianna. Dr. Hayne basically ruled out the possibility that a .38 (or slower

velocity) bullet could have killed Maryianna. Because he is an “expert” the jury is more likely to just accept anything he says.

This case is similar to *Edmonds v. State*, 955 So.2d 787, 792 (Miss.,2007) where Dr. Hayne was allowed to testify about a “two-shooter theory” when it was obvious to everyone that his testimony was not based in science. In this case however, the lack of science behind Dr. Hayne’s testimony is not as obvious. In Edmonds, Dr. Hayne has testified to non-scientific opinions which supported the State’s theory of the case. It appears he again did it in Desmond Keys case. Dr. Hayne’s testimony that Maryianna was killed with a high velocity bullet has no scientific basis; or at least none that was testified too. There were no foundational questions asked by the State. He simply said that the wound was caused by a high velocity bullet. What classes or education does Dr. Hayne have to make that opinion. How does anyone know that such opinion is reliable.

It is conceded that there was no objection made to Dr. Hayne’s conclusion or to his lack of proper medical licensure. But these are situations where the Court has got to step in and protect the fair trial rights of each and every defendant. In fat, the Court committed reversible error by accepting Dr. Hayne as a terminal ballistics expert without requiring the State to first put on evidence that he had education and/or training in that field, and that terminal ballistics is recognized as science.

Mississippi law states that Judges have a duty to protect the rights of defendants even if no objections are made. The Court is responsible for making sure that the Defendant receives a fair and impartial trial. This foundation less testimony of Dr. Hayne is the exact situation where a Trial Judge should have stepped in and protected the defendant's rights. This Court has stated

in Livingston v. State,

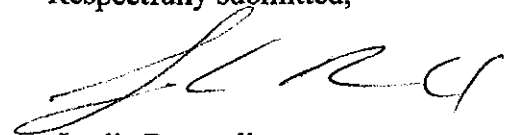
Of course the general rule is that this Court will not consider issues which are not properly raised at trial. Our holding today is not novel or innovative. We have consistently considered errors affecting fundamental rights even in the absence of a contemporaneous objection. In *Brooks v. State*, 209 Miss. 150, 46 So.2d 94 (1950), Justice Percy M. Lee stated: "Constitutional rights in serious criminal cases rise above mere rules of procedure. . . . Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal

Livingston v. State, 525 So. 2d 1300 (1988).

CONCLUSION

Each of the above errors require a reversal of Desmond Keys' conviction of murder and sentence to life imprisonment.

Respectfully submitted,



Leslie Roussell,
Attorney for the Appellant

X

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the above and foregoing on the following:


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This 2 day of October, 2008.


Leslie Roussell