

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**JOHNNY CHARLES SHORTER**

**APPELLANT**

**VS.**

**NO. 2008-KA-0112-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE CASE**

The grand jury of Rankin County indicted defendant, Johnny Charles Shorter for Murder in violation of *Miss. Code Ann.* § 97-3-19. (Indictment, cp.4). After a trial by jury, Judge Samac S. Richardson, presiding, the jury found defendant guilty. (C.p.119). Defendant was sentenced to Life

After denial of post-trial motions this instant appeal was timely noticed.

**STATEMENT OF FACTS**

Defendant was getting a divorce from his wife. He loathed the knowledge that his wife was involved with someone else. Defendant called his divorce attorney and told him he was going to drive over and kill the man who was currently staying with his wife. The divorce

attorney called 911 dispatch in Hinds county and gave a warning. Quickly law enforcement began to prepare, but sadly, within the hour defendant had gone to his wife's home and shot Ken Boutwell. Defendant's wife calmly called 911 to get assistance as it appeared Mr. Boutwell was barely alive. Mr. Boutwell succumbed to his wounds shortly thereafter.

The jury heard the evidence and found defendant guilty of murder.

### **SUMMARY OF THE ARGUMENT**

#### **I.**

**THE ADMISSION OF THE 911 TAPE OF THE  
DIVORCE ATTORNEY'S CALL IS NOT ERROR.**

#### **II.**

**THE ADMISSION OF THE WIFE'S CALL TO 911  
ON TAPE WAS NOT ERROR OR IN VIOLATION  
OF *CRAWFORD*.**

#### **III.**

**DEFENDANT WAS NOT ENTITLED TO A  
MANSLAUGHTER INSTRUCTION.**

#### **IV.**

#### **THE EVIDENCE SUPPORTS THE JURY VERDICT.**

#### **ARGUMENT**

#### **I.**

#### **THE ADMISSION OF THE 911 TAPE OF THE DIVORCE ATTORNEY'S CALL IS NOT ERROR.**

In this first allegation of error, defendant claims it was error for the trial court to admit the 911 tapes where defendant's (divorce) attorney called to warn police that defendant had called and claimed he was going to kill a man.

Defendant claims such was a privileged communication and inadmissible. The trial court allowed admission.

Appellate counsel for defense has presented an extensive and comprehensive argument. The State's response will be much shorter, to wit:

Assuming that the records were privileged and confidential, Rule 1.6(b)(1) states that a lawyer may reveal such confidential information to the extent the lawyer reasonably believes necessary "to prevent the client from committing a criminal act." Therefore, since the records were not obtained illegally, Crawford's confession (which may or may not have resulted from use of the mental records) was not illegal on this basis. This assignment of error is without merit.

*Crawford v. State*, 716 So.2d 1028, 1041 (Miss. 1998).

It was not error to admit the 911 tapes of defendant's divorce attorney calling to warn of defendant's claims that he was going to kill a man.

No relief should be granted on this allegation of error.

## II.

### **THE ADMISSION OF THE WIFE'S CALL TO 911 ON TAPE WAS NOT ERROR OR IN VIOLATION OF *CRAWFORD*.**

Again, at trial the 911 tape was admitted where defendant's wife called 911 after defendant shot Mr. Boutwell. She was calling for assistance, defendant was on property (armed), and initially the victim was alive, barely. Within that tape it was clear she was trying to communicate to the dispatcher and officers that the man (her husband) who committed the crime was present. And, was not intending on leaving.

¶ 15. We find the *Davis* [547 U.S. 813 (2006)] decision to be applicable to the current case. In *Davis*, the United States Supreme Court reviewed statements made by a victim to a 911 dispatcher during a domestic abuse altercation. When viewing the primary purpose of the call objectively,

the court ruled that 911 calls are "interrogations in one sense, but not in a sense that 'qualifies under any conceivable definition.' " Id. at 2274. The court noted that 911 calls typically describe "current circumstances requiring police assistance." Id. at 2276. Such is the case at bar.

*Williams v. State*, 960 So.2d 506, 510 (Miss.App. 2006)(citation added).

Counsel for defendant argues some of the statements exceeded 'current circumstances requiring police assistance' and it was error for the trial court to allow the jury to consider the same. However, it is the position of the State that such statements were to communicate to the dispatcher the scene, the conditions (defendant present and armed and had no intention of leaving), were imperative to receiving assistance and ultimately for the safety of the officers.

There was no error in the admission of the 911 tape where defendant's wife called in.

As to the spousal-immunity privilege such was addressed in *Dowbak v. State*, 666 So.2d 1377, 1382 (Miss. 1996). It would appear that the tape was not testimonial and the State cannot find where Angelique Shorter (defendant's wife) testified at trial.



Again, no error and nor relief should be granted.

### III.

#### **DEFENDANT WAS NOT ENTITLED TO A MANSLAUGHTER INSTRUCTION.**

Next defendant challenges his conviction by asserting he is entitled to a new trial because the lower court did not grant a manslaughter instruction.

The State argued and the trial court agreed there was only evidence of premeditation and a manslaughter instruction was not warranted. Tr. 405.

¶ 32. . . . Denial of a manslaughter instruction is proper where the record is clear that the decedent was shot with malice or deliberate design. *West v. State*, 725 So.2d 872, 890 (Miss.1998). More on point, the defendant in *Walker v. State* requested a self-defense instruction or provocation instruction because the defendant told a third party after the killing that the "dude [victim] made a move on him." 740 So.2d at 888. The trial court denied this request, and this Court affirmed. It is clear that no reasonable hypothetical juror could find that this killing was without malice. *Blue v. State*, 674 So.2d 1184, 1201 (Miss.1996). There is no evidence in the record that supports a manslaughter instruction under the

aforementioned authority as the State adduced evidence throughout the trial relating to premeditation. Therefore, Simmons was not entitled to a manslaughter instruction. This assignment of error is meritless.

*Simmons v. State*, 805 So.2d 452, 474 (Miss. 2001).

The State's position now on appeal, is undiminished from that expressed by the prosecutor at trial and the ruling of the trial court.

Under the rationale of *Simmons*, as supported by *Blue & Walker*, there is no error and the requested relief is unwarranted.

#### IV.

#### **THE EVIDENCE SUPPORTS THE JURY VERDICT.**

Lastly the argument is presented there is reasonable doubt, that perhaps defendant's wife could have done it, or, again, it was heat of passion.

Looking to the evidence presented, there was ample evidence of premeditation and guilt. Even in this brief it is clear

The circuit court therefore properly denied the motion for j.n.o.v. Clark's motion for a new trial was within the discretion of the trial judge. We will not reverse the denial of a motion for a new trial "unless we are convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an

unconscionable injustice." *Morgan v. State*, 681 So.2d 82, 93 (Miss.1996); *Johnson*, 642 So.2d at 928. Because we cannot say that the verdict in this case was contrary to the evidence, we affirm the decision of the circuit court.

*Clark v. State*, 693 So.2d 927, 931 (Miss. 1997).

The State contends that no unconscionable injustice will occur nor was there an abuse of discretion by the trial court in denying the motion.

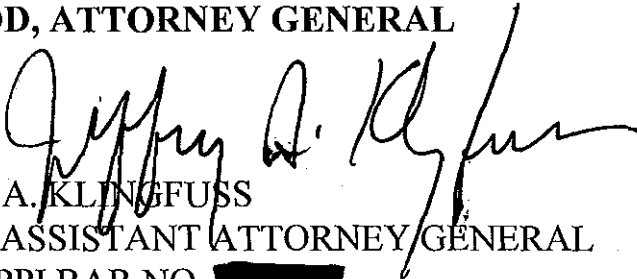
Consequently, no relief should be granted on this last allegation of error.

**CONCLUSION**

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the verdict of the jury and sentence of the trial court.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL**

A handwritten signature in black ink, appearing to read "Jeffrey A. Klingfuss", is written over the typed name and title of the signatory.

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**CERTIFICATE OF SERVICE**

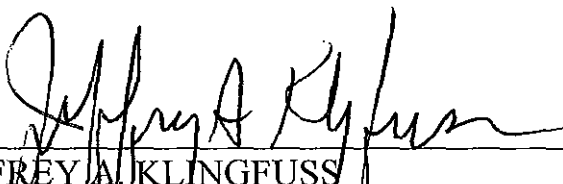
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 10th day of April, 2009.

  
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