IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY CHARLES SHORTER — APPELLANT

V. — NO. 2008-KA-0112-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF THE APPELLANT

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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 disqualifications or recusal.

1. State of Mississippi
2. Johnny Charles Shorter, Appellant
3. Honorable Michael Guest, District Attorney
4. Honorable Samac S. Richardson, Circuit Court Judge

This the 20th day of April, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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BRIEF OF THE APPELLANT

REPLY ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING THE 911 CALL OF SHORTER'S DIVORCE ATTORNEY, GIL BAKER.

The State cites *Crawford v. State*, 716 So. 2d 1028, 1041 (Miss. 1998), and argues that the trial court did not err in admitting the 911 call of Shorter's attorney, Gil Baker, because Baker did no violate Rule 1.6 of the Mississippi Rules of Professional Conduct in making the 911 call and disclosing Shorter's confidences. (Appellee Brief at 3-4). Apparently, the State argues that Baker's 911 tape was rendered admissible into evidence by virtue of an ethical rule.

It should pass without citation, that the admissibility of evidence is governed by the Mississippi Rules of Evidence, not the Mississippi Rules of Professional Conduct. Baker did not commit an ethical violation by revealing Shorter's confidences to the 911 dispatcher, as he acted in accordance with the discretionary authority provided for under Rule 1.6(b)(1)–"[an attorney may reveal client confidences] to prevent reasonably certain death or substantial bodily harm." M.R.P.C.

1.6(b)(1).[1] While Baker's compliance with Rule 1.6(b)(1) may have relieved him from potential disciplinary action for the violation of an ethical rule, it did not render the underlying information disclosed admissible as substantive evidence against Shorter in his criminal trial; in fact, it adds nothing. *See* M.R.P.C., Scope ("[N]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.").

Simply put, ethical rules are ethical rules, not evidentiary rules. To be certain, the "Scope" of the Mississippi Rules of Professional Conduct plainly and explicitly provides:

> [T]hese Rules are not intended to govern of affect judicial applications of either the attorney-client privilege or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation [as opposed to ethical disciplinary actions]. . . . The fact that in exceptional circumstances the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client privilege and work product privilege.

M.R.P.C., Scope.

Accordingly, the State's position that Baker's 911 was admissible into evidence by virtue of Rule 1.6, is incorrect as a matter of law, as was the trial court's decision to admit the 911 tape (to the extent that it relied on Rule 1.6).

Furthermore, *Crawford v. State* is distinguishable from the instant case. In *Crawford*, the defendant argued his confession was coerced and obtained in violation of his Sixth Amendment Right to Counsel. In support of this argument, the defendant claimed that an F.B.I. agent obtained

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[1]Under the Mississippi Rules of Professional Conduct, the violation of an ethical rule constitutes professional misconduct, which may subject the offending attorney to the disciplinary action. M.R.P.C. 8.4 (violation of rule is misconduct); *see also* M.R.P.C., Scope ("Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."). Conversely, a lawyer is not subject to discipline where he or she "acts within the bounds of such discretion [as the Rules provide]." M.R.P.C., Scope.

the defendant's mental health records from his attorney's office, used the knowledge of defendant's mental condition to consult with a behavioral science expert (who advised the F.B.I. agent how to obtain a confession from one suffering from the defendant's particular condition), and used the expert's suggested tactics to obtain a confession from the defendant. *Crawford*, 716 So. 2d at 1037-1041 (¶¶32-47). The *Crawford* court first found that the issue was procedurally barred, as the mental health records were not contained in the appellate record. *Id.* at 1040 (¶46). The court went on to suggest that, in any event, the F.B.I. agent did not obtain the defendant's mental health records illegally, and the police's use of the information to obtain the confession did not violate the defendant's Sixth Amendment Right to Counsel and was not fruit of the poisonous tree. *Id.*

Thus, the *Crawford* court, in addressing whether the defendant's confession was fruit of the poisonous tree, dealt with an entirely different issue (from which Rule 1.6 was extremely attenuated) from that of the instant case. *Crawford* did not address whether the substance of the information disclosed by an attorney acting in accordance with Rule 1.6 is admissible as substantive evidence by virtue of Rule 1.6. Moreover, the *Crawford* court first determined the issue to be procedurally barred, thus any discussion concerning Rule 1.6 was arguably dicta.

It is routinely stated that "the trial court's discretion *must* be exercised within the scope of the Mississippi Rules of Evidence." *See e.g.*, *Wilson v. State*, 967 So. 2d 32, 42-43 (¶23) (Miss. 2007); *Johnson v. State*, 994 So. 2d 831, 833 (¶8) (Miss. Ct. App. 2008); *Smith v. State*, 946 So. 2d 785, 788 (¶11) (Miss. Ct. App. 2006) (emphasis added). On appeal, this Court is required to determine if the trial court applied the proper legal standard(s), and reversal is warranted if the trial court applied and incorrect legal standard, resulting to prejudice to the defendant. *Ford v. State*, 975 So. 2d 859, 865 (¶16) (Miss. 2008).

In the instant case, the trial court, to the extent that it relied on Rule 1.6, applied an incorrect

legal standard in admitting Baker's 911 tape. The Mississippi Rules of Professional Conduct do not affect the admissibility of evidence in litigation unrelated or collateral to a disciplinary (ethical) proceeding regarding an attorney's possible violation of an ethical rule.[2] Accordingly, the trial court abused its discretion in admitting Baker's 911 tape.

II. THE TRIAL COURT ERRED IN ADMITTING THE 911 CALL OF SHORTER'S WIFE, ANGELIQUE.

In its brief, the State twice represents that, at the time Angelique called 911, Shorter was armed. (Appellee Brief at 4 ("defendant was on property (armed)"), 5 ("defendant present and armed")). The admissibility of Angelique's 911 tape–whether it was admitted in violation of the Confrontation Clause of the Sixth Amendment–turns on whether "the circumstances objectively indicate[d] that there [was] no such ongoing emergency."*Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266 (2006). Contrary to the State's assertion, the 911 tape clearly reveals that Angelique told the 911 dispatcher that Boutwell was dead, and Shorter (who was standing outside smoking a cigarette) was no longer a threat to anyone. (Ex. S-25). Further, trial testimony established that the gun used in the shooting was on a table in the sunroom. (Tr. 195).

In conclusion, the evidence shows that, at the time of Angelique's 911 call, the emergency had ended (Boutwell was dead and Shorter was outside and not a threat to anyone at the house), and Angelique was describing past events. Therefore, the trial court's decision to admit Angelique's 911 tape violated Shorter's right to confrontation as guaranteed under the Sixth Amendment as set forth in *Crawford* and *Davis*, and Shorter is entitled to a new trial.

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[2] It should also be noted that the trial court applied an incorrect standard as to its other ground for admitting Baker's 911 tape, i.e., that Baker effectively waived the attorney-client privilege on Shorter's behalf when he revealed the information "over the public airways." (Tr. 147, *See* Appellant Brief at 4-6).

III. THE TRIAL COURT ERRED IN REFUSING INSTRUCTION D-1, A MANSLAUGHTER INSTRUCTION.

The State apparently contends that "there was only evidence [of] premeditation and a manslaughter instruction was not warranted." (Appellee Brief at 6) (citing Tr. 405). It is acknowledged that there was indeed *some* evidence of premeditation. Notwithstanding, the existence of *some* evidence of premeditation is not a proper basis to deny a manslaughter instruction where, as here, there was also evidence to support a manslaughter instruction. *See Bradford v. State*, 910 So. 2d 1232, 1233 (¶7) (Miss. Ct. App. 2005) ("a homicide may result from a wilful act or deliberate design without being murder if the killing occurs in necessary self-defense or results from an act committed in the heat of passion without malice aforethought."). Accordingly, it is well-settled that "a criminal defendant is entitled to a lesser offense instruction where there is an evidentiary basis for it in the record." *McGowan v. State*, 541 So.2d 1027, 1028-29 (Miss.1989).

In *Barnes v. State*, 854 So. 2d 1, 6 (¶19) (Miss. Ct. App. 2003) this Court rejected defendant's argument that the trial court erred in granting the State's request for a manslaughter instruction because there was evidence from which to infer that the shooting arose out of an argument concerning money. *Barnes*, 854 So. 2d at 6 (¶¶19-20). In so ruling, this Court held:

> When there is a jury issue on the question of murder, the defendant cannot object to a grant by the court of a manslaughter instruction. When presented with facts from which the jury could infer the predicate state of mind of the defendant, it is permissible for the jury to use such inferences to find the defendant guilty of manslaughter rather than murder.

Id. at (¶19) (internal citations omitted). Surely, the same standard applies when it is the defendant, instead of the State, who seeks a manslaughter instruction.

Importantly, the evidence is viewed "in the light most favorable to the accused[,]" in whose favor all reasonable favorable inferences are drawn. *Mease v. State*, 539 So. 2d 1324, 1330 (Miss. 1989) (quoting *Harper v. State*, 478 So. 2d 1017, 1021 (Miss. 1985)). In the instant case, ample

facts were presented which, considered in the light most favorable to Shorter, provided suficient evidence "from which the jury could infer the predicate state of mind [for manslaughter];" therefore, "it [was] permissible for the jury to use such inferences to find [Shorter] guilty of manslaughter rather than murder." *Id.*

First and foremost, **Angelique told the 911 dispatcher that the shooting arose out of an argument**. (Ex-S-25). Also, the bullet entered Boutwell's body under his arm in such a manner that expert testimony confirmed that his arm had to have been "raised or moved to the back." (Tr. 308). The inference to be drawn is that Shorter and Boutwell argued, and Boutwell's arm was raised in a combative fashion when he was shot. Also, Shorter did not even remember much about the incident, suggesting further that he acted out of passion rather than reason. (Tr. 337). Beyond all this, Beckman's testimony established that, earlier in the day, Shorter was extremely upset about Angelique cheating on him: "I could tell it was tearing him to pieces." (Tr. 233). It is significant that Shorter confronted Beckman earlier in the day believing that he was sleeping with Angelique, yet he did not resort to violence with Beckman. Therefore, it is reasonable to infer that Shorter confronted Boutwell in a similar manner. Finally, a killing arising out of adultery is the quintessential example of heat-of-passion manslaughter; there can be no doubt that the circumstances in the instant case implicated these very emotions.

In sum, the evidence considered in the light most favorable to Shorter with all reasonable favorable inferences, supported the theory that Shorter, emotionally torn over his cheating wife, confronted the man who she was sleeping with, which led to a heated argument and a physical altercation during which Boutwell was shot under his arm while it was raised against Shorter in a combative manner. Shorter respectfully submits that this evidence would be sufficient to affirm a manslaughter conviction on appeal, and it was likewise sufficient to create a jury issue on the

question of murder, so as to permit the jury to find Shorter guilty of manslaughter instead of murder. It is an unconscionable injustice that Shorter was deprived of the opportunity to have the jury pass on the question.

To be thorough, it should be noted that the State relies primarily on *Walker v. State*, 740 So. 2d 873 (Miss. 1999), *Blue v. State*, 674 So. 2d 1184, 1201 (Miss. 1996), and *Simmons v. State*, 805 So. 2d 452, 474 (¶¶31-32) (Miss. 2001). All three cases involved defendants charged with capital murder, and the appellate court in all three cases easily determined that a manslaughter instruction was not warranted, as state of mind is irrelevant in a shooting arising out the underlying felony upon which the capital murder charge is based. *See Walker*, 740 So. 2d at 888 (¶62); *Blue*, 674 So. 2d at 1201; *Simmons*, 805 So. 2d at 474 (¶32).

Consequently, these cases are clearly distinguishable from the instant case, in which Shorter was not charged with capital murder, and his state of mind was of critical importance, as it was the determining factor between a conviction for murder (and a life sentence) or a conviction for manslaughter (and a maximum twenty-year sentence). In light of the foregoing, Shorter respectfully submits that the interests of justice require this Court to grant him a new trial so that the jury may be properly instructed and, thereby, allowed to consider his theory of defense, not just acquittal or murder.

CONCLUSION

Based upon the foregoing, as well as the issues and arguments raised in his initial brief, the Appellant, Johnny Charles Shorter, contends that he is entitled to a new trial. The Appellant would stand on his original brief in support of issues not responded to in this reply brief.

Hunter N Aikens
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Johnny Charles Shorter, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge
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Honorable Michael Guest
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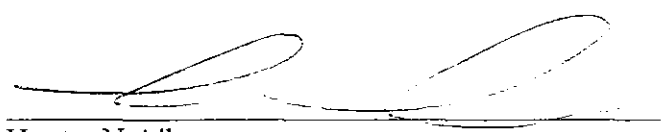
This the 30th day of April, 2009.



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