IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JERMAIN DEMOND ROBINSON — APPELLANT

VS. — NO. 2008-KA-0225-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. The prosecutor's questions and comments on Robinson's failure to communicate testimony to the police did not violate his right to remain silent.

II. The evidence did not support a manslaughter heat of passion jury instruction.

III. The trial court did not commit reversible error when it delayed introduction of Wallace Winters' statement until the defendant's case in chief. The trial court did not deny Robinson the right to cross examine LaToya Johnson.

STATEMENT OF THE CASE

Jermaine Robinson was indicted by a grand jury of the 1st Judicial District of Hinds County, Mississippi, for the November 14, 2004 murder of Walter Winters Jr. in violation of Miss. Code Ann. § 97-3-19(1) (1972). CP 4. On June 7, 2006 a jury convicted Robinson as charged. T. 460; CP 43. The trial court sentenced Robinson to life imprisonment. T. 461; CP41. After denial of post-trial motions, Robinson appeals.

STATEMENT OF THE FACTS

Jermaine Robinson (Robinson) and LaToya Johnson (Johnson) dated for approximately eighteen months before Johnson broke off the relationship. T.377; 378. By November 13, 2004, the relationship had been over about four months, although Robinson testified he continued to come over to see the couple's child whenever Johnson would permit him to come. T. 378; 384.

Wallace Winters Jr. (Winters), a friend of Johnson's, took her that night to a family get-together and brought her back home around midnight because Johnson was sick. T.200. Wallace walked her into the house and promised to check on her later. T.200. Winters returned as he promised, about 2 A.M., while Johnson was still in bed. T. 225. Johnson testified that she was not "dating" Winters, he was just a friend. T. 200; 201.

On the same evening, Robinson spent the evening and early morning at bar close to where Johnson lived. T. 377; 381. Robinson telephoned Johnson at 5:33 a.m. Johnson did not answer. T. 203. Robinson called Johnson a second time at 5:39 a.m. and she answered. Robinson asked to come over. T. 377. When Johnson told Robinson she had company, Robinson asked his identity and then to speak to him. T. 377. Winters told Robinson he was not dating Johnson and then hung up on him. T. 377-78. Robinson testified that when Winters hung up on his call, Robinson called back, demanded to speak to Winters, who Robinson testified began to curse him. T. 378-379. Robinson then called Johnson a total of 17 times. Exhibit 1-A; 1-B; T. 202; 378; 382. Robinson testified he was angry that Winters would continue to hang up on him. T. 378. Robinson testified Winters talked to him in a threatening manner, telling him to "bring my A down there" that he (Winters) had something for him. T. 378. Armed with a .380 caliber weapon he said he'd carried as protection, Robinson went to side steps of Johnson's house. T. 378; 379. Robinson testified he planned to fight Winters, because he was angry and upset over Winters' threats and continued hang-ups on the

cellular telephone. T. 379.

Johnson testified that Winters walked through the house talking to Robinson on the telephone. T. 227. Johnson acknowledged the two men appeared to be arguing. T. 208; 261. Johnson testified Winters walked outside twice; once to walk around the house and have a conversation with Robinson, and the second time, when he was shot. T. 212; 213; 226. At some point, Johnson heard Winters say, "I am not afraid to die," but did not hear what Robinson said to elicit such a response. T. 398. Johnson also testified she could not hear all of what Winters said. T. 401. Johnson testified she saw authorities remove a kitchen knife from Winters when they moved the body and presumed he got the knife from her kitchen at some point after the first conversation with Robinson. T. 227-229.

Johnson testified she never heard Robinson tell Winters to walk outside nor did she know why Winters walked to the side door the second time. T. 212. Johnson testified she heard the door open and one to two seconds later she heard gunshots. T.217. Robinson, testified that he walked over to the side door of the house and was on the first or second step when Winters opened the door. T. 379. Robinson testified that he saw Winters reaching for a dark handle with "a piece of the shiny thing" attached and he fired four times as he ran from the house. T.397.

Upon hearing the four gunshots, Johnson saw Winters stagger through the house; Winters asked her to call the police and then collapsed. T. 218-219. Officer Tawanda Armstrong testified she responded to the shooting about 6:12 A.M. and found Winters dead in the hallway. T. 139-140. Armstrong testified that she saw a knife in Winters' pocket. T. 142. Crime Scene Investigator James Chambers testified he found Winter's body about 15 feet from the location of the shooting T.302 He removed a black handled kitchen knife from Winters' right hand; the blade of the knife was in his sleeve. T. 297; 300.

Robinson continued to call Johnson after the shooting; Officer Maurice Kendrick, who arrived about 6:15 A.M. testified that Johnson held out her cellular telephone so he could hear. T. 154. Kendrick testified that he heard someone Johnson identified as Robinson say "he was going to spend the rest of his life in jail because of her." T. 153; 154. Kendrick also heard the caller tell Johnson that it was all her fault, that she should have told police something else and that now he would spend the rest of his life in jail. T. 154-55.

Robinson testified he telephoned Johnson after the shooting to find out if Winters was hurt and blamed her for the incident only because he was nervous and scared. T. 380.

Detective Sharesa Sparkman, primary detective on the case, testified they arrested Robinson on December 8, 2004. T. 346. Sparkman issued "Miranda" warnings to Robinson who spontaneously said he was nowhere near the murder scene and wanted to know how did police figure he shot Winters. T. 350.

Dr. Steven Hayne, who conducted Winters' autopsy, testified Winters suffered three gunshot wounds. A fatal wound to the chest, which exited his back, one to his upper abdomen which also exited his back and a third wound entering the right thigh and exiting the left thigh. T. 307; 308; 327.

SUMMARY OF THE ARGUMENT

Robinson was not entitled to a mistrial. The prosecutor's questions and comments on Robinson's failure to communicate his testimony to the police did not violate his right to remain silent. Robinson had in fact not remained silent, not only did Robinson make a statement after being *Mirandized*, he testified on direct examination to something in conflict with the previous statement.

The evidence did not support the granting of a heat of passion jury instruction and therefore the trial court properly denied Instructions D-4 and D-5.

The trial court did not commit reversible error when it delayed introduction of Wallace Winters' statement until the defendant's case in chief. Defense counsel cross-examined Johnson during the state's case-in-chief on inconsistencies between her written statement to police and her testimony. There was no error by the court on this issue.

ARGUMENT

I. ROBINSON WAS NOT ENTITLED TO A MISTRIAL. THE PROSECUTOR'S QUESTIONS AND COMMENTS ON ROBINSON'S FAILURE TO COMMUNICATE HIS TESTIMONY TO THE POLICE DID NOT VIOLATE HIS RIGHT TO REMAIN SILENT.

In his first assignment of error, Robinson claims he was entitled to a mistrial. He contends the prosecutor committed reversible error when she questioned him about telling the police he was not around at the time of the shooting and then testified on direct examination that he shot the victim but it was in self defense. Robinson argues this was an improper comment on his right to remain silent, a violation of his fundamental fair trial rights.

In *Shell v. State*, 554 So.2d 887 (Miss.,1989) *rev'd on other grounds* 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (U.S.Miss. Oct 29, 1990) (No. 89-7279) the Supreme Court addressed a similar issue on appeal. In *Shell,* the defendant gave the sheriff a version of events, he then testified on direct examination to a new version of events never before given to the sheriff's office. On cross examination the prosecutor then asked: "Today is the first time you have told any official the version that you've given today?" Shell responded that it was not. On appeal, Shell claimed that the prosecution's question on cross-examination constituted an improper comment on his right to remain silent and to consult with an attorney. The Mississippi Supreme Court refused to find the prosecutor's question improper. The court reasoned that once the defendant testified to a new version of events on direct examination, the prosecution was well within its rights on cross-examination to inquire further about the novelty of the new story.

Robinson's reliance on *Emery v. State*, 949 So.2d 405 (Miss.2004), *Whigham v. State*, 611 So.2d 988, 995 (Miss.1992) is misplaced; the cases are distinguishable from this one on a factual basis. Upon being arrested and *Mirandized*, Emery and Whigham both exercised the right to remain silent until testifying at trial. The prosecutors in *Emery* and *Whigham* attempted to impeach the

defendant with his post arrest silence.

In the case sub judice, as in *Shell*, the defendant made a statement to the police after his arrest and then testified on direct to something different and in so doing opened himself up to impeachment. Robinson told Detective Sparkman after his arrest that he was nowhere near the murder scene. It may not have been a formal written statement but it was none the less a statement. Robinson implied he could not have been the shooter because he was not at the crime scene when the shooting occurred. He then testified on direct examination that he was in fact at the scene but acted in self defense.

Should this Court find the prosecutor's comments were improper, the State would respectfully argue there is overwhelming evidence of Robinson's guilt and the comments were therefore harmless error. In *Emery v. State*, 869 So.2d405, (Miss.2004), the Mississippi Supreme Court noted that there were circumstances under which reversal would not be required, notwithstanding questions by the prosecutor as to the defendant's post-arrest silence. Also, in *Gossett v. State*, 660 So.2d 1285 (Miss.1995), the prosecutor commented on the defendant's post-Miranda silence. However, the defendant was not allowed to respond. The court held that, even if error had occurred, it was harmless because of the overwhelming evidence of the defendant's guilt. The "harmless error" holding in *Gossett* was further explained in *Riddley v. State*, 777 So.2d 31 (Miss.2000) where, the court held that "even errors involving a violation of an accused's constitutional rights may be deemed harmless beyond a reasonable doubt where the weight of the evidence against the accused is overwhelming." *Id.* at 35.

The State, however, contends that Robinson made a statement to the police that he was not around at the time of the shooting. Under *Shell*, once he testified to a new story on direct examination, the prosecution was well within its rights on cross-examination to inquire further about

the novelty of the story. Robinson opened this door on direct examination of his own accord, and he should not be allowed to derive an unfair advantage (in effect, penalizing the prosecution) by having done so. There is no merit to this assignment of error.

II. THE TRIAL JUDGE DID NOT ERR IN REFUSING TO GRANT JURY INSTRUCTIONS D-4 AND D-5, MANSLAUGHTER INSTRUCTIONS, BECAUSE A HEAT OF PASSION MANSLAUGHTER INSTRUCTION WAS NOT SUPPORTED BY THE EVIDENCE.

In his next assignment of error, Robinson argues that the trial court's rejection of Instructions D-4 and D-5 (CP 31-33) essentially deprived him of his fundamental right to present his defense of manslaughter committed in heat of passion. In addition, Robinson argued the trial court failed to use the appropriate standard by which to evaluate the requested instruction.

Appellee would submit that Robinson was not entitled to a heat of passion instruction based on the testimony presented at trial. The Mississippi Supreme Court has analyzed "heat of passion" arguments on multiple occasions and has provided both a definition and a test to determine whether an act may be so classified. The court defines "heat of passion" as:

> [A] state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. 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.

Givens v. State, 967 So. 2d 1, 11 (¶33) (Miss. 2007).

Also provided by the court is a test that applies an objective standard and evaluates "whether a reasonable person would have been so provoked." *Moody v. State*, 841 So. 2d 1067, 1097 (¶98) (Miss. 2003). Stated differently, in order for a crime to be reduced to manslaughter, circumstances in addition to passion and anger must exist that would rouse a normal mind "to the extent that the reason is overthrown and that passion usurps the mind destroying judgment." *Graham v. State*, 582 So. 2d 1014, 1018 (Miss. 1991).

Robinson testified he went to Johnson's house because Winters told him "bring my A down there and he was going to do something to me." T. 379. He testified that he went "to fight him" and

he "went out of anger." T. 379. He then testified he shot Winters when he opened the door because he thought Winters was about to pull a gun. T. 379.

"A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, or is ***without foundation in the evidence.***" . . . "We will not find reversible error 'where the instructions actually given, when read together as a whole, fairly announce the law of the case and create no injustice.' " *Chinn v. State*, 958 So.2d 1223, 1225 (¶12) (Miss. 2007) [internal citations omitted].

Robinson has not provided any evidence supporting his contention that he acted in the heat of passion. Nothing in the record indicates that Robinson was in a state of violent and uncontrollable rage at the time he shot Winters, as required by the supreme court's standard. Even if Winters and Johnson argued on the phone, "words alone ... or mere disagreements are not enough to require a heat-of-passion instruction." *Myers v. State*, 832 So.2d 540, 542(¶ 10) (Miss.Ct.App.2002) (citing *Gates v. State*, 484 So.2d 1002, 1005 (Miss.1986)).

As stated by Robinson, the Mississippi Supreme Court held in *Hill v. Dunaway*, 487 So.2d 807, 809 (Miss.1986):

> The refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is proper, only if the trial court-and this Court on appeal-can say, taking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inferences which may be drawn from the evidence in favor of the requesting party, that no hypothetical, reasonable jury could find the facts in accordance with the theory of the requested instruction.

The record shows that Robinson repeatedly called Winter on Johnson's phone, went to Johnson's house armed with a gun to confront Winter and then with deliberate design shot Winter three times. No reasonable, hypothetical juror could have found Robinson not guilty of murder and convicted him of heat of passion manslaughter under any theory of the case. In this posture, the

circuit judge did not err in denying jury instructions D-4 and D-5. the requested instruction is not supported by evidence and was properly refused by the trial court. This issue is without merit.

III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT DELAYED INTRODUCTION OF WALLACE WINTERS' STATEMENT UNTIL ROBINSON'S CASE IN CHIEF. THE TRIAL COURT DID NOT DENY ROBINSON THE RIGHT TO CROSS EXAMINE LATOYA JOHNSON.

In his final assignment of error, Robinson claims the trial court improperly denied him the right to impeach LaToya Johnson during cross-examination. Defense counsel sought to enter, through Johnson's testimony, Winters' statement to Robinson, "I am not afraid to die." T. 229-252. Appellee contends the record reflects Winters' statement was not offered for impeachment purposes, it was offered to establish Winters' state of mind prior to the shooting. The prosecutor claimed introduction of Winters' statement through Johnson was prohibited because it was hearsay. Robinson's attorney was attempting establish that Winters provoked Robinson into coming to the house to fight. In the alternative, defense counsel proffered Ms. Johnson's statement to police for the purpose of introducing Winter's statement "I'm not afraid to die." T. 252. In Johnson's statement to police she repeated what she had heard Winters say. Defense counsel had already cross examined Johnson on any inconsistencies in the police statement and her testimony. T.227-229. Defense counsel argued:

> BY MS. WALL: Judge, our position on the testimony that Wallace, Mr. Winters, said before the shooting is that first our argument is it's not hearsay. It's not being offered for the truth of the matter asserted. The statement, I'm not afraid to die, words of fighting, provocation, however you want to describe it, it's not being offered for the truth of what's being said. It's just being offered to merely show his actions, his demeanor at the time. We have submitted to the Court the case of *Harris vs. State* cited at 861 So.2d 1003. And in this case our alternative argument is that if the Court does find that it's hearsay, that particular statement by Mr. Winters, then, we would argue the exception to that falls under 803 (3), state of mind of the declarant.
>
> And just briefly I'll paraphrase. The case says this testimony -- in this case the victim said let's get it on, an expletive, man. And then the Court said, the Supreme Court said the testimony qualifies as an exception to the hearsay rule as a statement of his then existing mental condition or state of mind. The Court has held that Mississippi Rule of Evidence 803 (3) encompasses relevant statements made by murder victims before their death.

> In the instant case I believe some statements were overheard. And, you know, whether or not the victim was the initial aggressor or not and it came into play.
>
> So just to summarize, we don't think it's hearsay, Judge, because it's not being offered for the truth of the matter. If the Court does find that it is hearsay, the exception for present state of mind of the declarant we believe qualifies.
>
> And also we would submit that, you know, the fighting, we've heard the testimony about the phone call, an excited utterance could possibly be argued, Judge. But we've submitted the appropriate case law and we ask that this testimony be allowed. And if not, Judge, we would like to proffer through an exhibit the statement that she gave the police, Ms. Johnson.

T. 232-33.

The trial court ruled Winters' statement was admissible under hearsay exceptions M.R.E. 803 and 804. The prosecutor then objected to its relevancy because there had been no evidence of Winter provoking Robinson. The trial court ruled once the proper evidentiary foundation was laid making the statement relevant, Winters' statement would be admissible. T. 244-46; 249. Robinson was able to recall Johnson during his case in chief and the trial court permitted testimony by Johnson as to Winters' statement.

Robinson cites *Davis vs. State*, 970 So.2d 164 (Miss.2006) in support of his argument that the trial court failed to permit full cross-examination. *Davis* is not applicable on this issue and can be factually distinguished. In *Davis*, the defendant was denied the right to cross-examine an eye witness to a murder about the witness' belief that the prosecutor could assist the witness in possible reduction of the witness' criminal charges. Such is not the case here. Johnson was cross-examined on her statement to police and Winters' statement was not being offered to impeach her.

The State would contend Robinson is procedurally barred from arguing for the first time on appeal that the trial court impermissibly impaired his ability to impeach Johnson's testimony by failing to admit Winters' statement during the State's case in chief.

[A]n appellate court will not consider or review issues that were not raised in the trial court. *Crenshaw v. State*, 520 So.2d 131, 134 (Miss.1988). A defendant is procedurally barred from raising

an objection on appeal that is different than that raised at trial. *Jones v. State*, 606 So.2d 1051, 1058 (Miss.1992). A trial judge cannot be put in error on a matter which was not presented to him for decision. *Logan v. State*, 773 So.2d 338, 346(¶ 29) (Miss.2000).

Finally, Appellee would contend that, in the event this court finds the trial court committed error by delaying admission of Winters' statement, the State would argue "harmless error." In *Harris vs. State*, 861 So.2d 1003 (Miss.2003) the Mississippi Supreme Court held in a similar case that it was harmless error when the trial court excluded admissibility of testimonial evidence. Citing *Parker v. State*, 606 So.2d 1132, 1137-38 (Miss.1992) the *Harris* court held "The admissibility of testimonial evidence is left to the sound discretion of the trial court within the boundaries of the Mississippi Rules of Evidence, and it will not be found in error unless it is has abused its discretion. Such error will warrant reversal only when the abuse of discretion has resulted in prejudice to the accused." Robinson totally failed to demonstrate any prejudice.

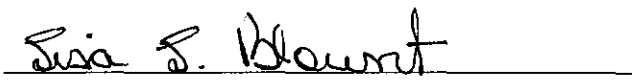
Appellee respectfully submits that the trial court did not impermissibly hinder Robinson's right and ability to impeach the state's key witness against him. Therefore, this issue is without merit.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, Appellee respectfully submits that no reversible error took place during the trial of this cause and would ask this reviewing court to affirm the jury's verdict of murder and the life sentence imposed by the trial court.

Respectfully yours,

By: JIM HOOD, ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Lisa L. Blount, 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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