IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RONALD HUSBAND — APPELLANT

VS. — NO. 2008-KA-0290

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: LISA L. BLOUNT
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RONALD HUSBAND **APPELLANT**

VS. **NO. 2008-KA-0290**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Stone County, Mississippi, a judgment of conviction on two counts of capital murder against Ronald Husband, following a trial by jury on January 14-21, 2008, honorable Roger T. Clark, Circuit Judge, presiding. The jury sentenced Husband to life in prison without the possibility of parole. After the denial of post trial motions, Husbands appealed.

FACTS

On November 27, 2005, operators at the Stone County 911 office received a hang up telephone call. The operator called back and recognized the voice of Francis Arnold (Arnold). Sensing a domestic disturbance, the operator dispatched Wiggins police officers Brandon Breland and Odell Fite to Arnold's residence. (T. 723). The dispatcher received radio notification from the officers that they arrived at the location. (T 727). The telephone line remained opened and the 911 call recorded. (T.722; Ex. S-1). The operator testified she heard Officer Fite knock on Arnold's door. (*Id.*) After the door opened the operator heard an argument in the background, and then a struggle. (*Id.*). She dispatched the Stone County Sheriff's Department as soon as she heard the

struggle. (*Id.*) After arriving at the location, a Stone County deputy "advised that we had officers down." (T. 728).

Arnold testified that Ronald Husband (Husband) was her husband's close friend and visited their mobile home frequently. (T.753). After taking her husband to Forrest General Hospital earlier in the day, Arnold returned home for a change of clothes. When she arrived home she saw Husband driving up; Husband had been at the hospital also. (T.751-54). Husband followed her into her home. (T.754). Arnold testified that Husband began hitting her and choking her, and accused her of "lying about coming home." (T.754-55). She was able to dial 911, Husband hung up the phone and then threw it. (T. 755-56). A few minutes later she saw blue lights out of the window, the police arrived at the door, and upon seeing Arnold's bloody condition, asked Husband to leave with them. (T. 757). Husband began to struggle with the police officers; the struggle went from the porch into the front yard. (T. 761). At one point Arnold attempted to help the officers by retrieving and hitting Husband with a flashlight one of them had dropped but the officer instructed her to get back. Arnold heard one officer warn the other he was about to use mace. (T.762). As Arnold headed back to her front door, she saw Husband straddling an officer on the ground pointing an object at the officer. (T.763). She was entering her door when she heard the officer saying "Okay, Okay" and then two gun shots. (T.764). In fear for her safety, Arnold ran through her small trailer and jumped out a back window. (T. 764). When she reached bushes in the back yard she heard more gun shots. (T. 792-93). Arnold testified she ran a few streets before finally receiving assistance from someone in a car who took her back to the scene. (T.767). After returning to the scene other law enforcement officers had arrived and instructed her to remain in the car. (T. 767). Arnold went to the Wiggins Police Station where she gave a written statement and oral statement of the events. (T. 768).

Officers from the Stone County Sheriff's Department and a Mississippi Highway Patrol

trooper responded to a call from Stone County 911 for assistance to check on two Wiggins officers (T. 823; 850). Seeing the two Wiggins officers on the ground, unresponsive, and believing they needed immediate medical care, officers drove a vehicle into the yard and removed Fite and Breland.(T. 826-27). The bullet wounds the two officers received were fatal and the attempt to rescue them was in vain.

A SWAT team cleared the trailer for safety. (T. 870). Investigators from the Stone County Sheriff's Office (SO), the Mississippi Bureau of Investigation (MBI), and analysts from the Mississippi Crime Laboratory (MCL) began a detailed investigation of the crime scene.

Arnold identified Husband as the shooter; authorities went to his home and took him to the Stone County SO. (T. 830-32; 871).

Officer Fite's weapon was missing from the crime scene. A lengthy search for the gun began. Three days later, a dive team recovered the weapon in water beside a road between Arnold's home and Husband's home. (T. 883-87).

Autopsies performed by pathologist Dr. Paul McGarry showed Fite died from a bullet to the heart and a bullet to his abdomen. Officer Breland died from a bullet to his left upper back that traveled through his heart. Breland was also shot in his upper left thigh but that wound was not life threatening. (T. 1218-22).

A Stone County Grand Jury indicted Husband as a habitual offender on two counts of capital murder of a law enforcement officer, M.C.A. § 97-93-19(2)(a). (CP. 20-21; RE. 15-16). The circuit court granted a change of venue and the trial moved to Lauderdale County. A jury convicted Husband of two counts of capital murder of a law enforcement officer and subsequently sentenced him to life without parole in the custody of the Mississippi Department of Corrections. (RE. 20-21). Husband perfected this appeal after having been denied post trial relief. (RE.27; 28).

SUMMARY OF THE ARGUMENT

The trial judge properly denied Husband's motion for a new trial. When challenging the weight of evidence, the appellate court must view the evidence in a light most favorable to the State. The weight of the evidence was such that a reasonable jury could have found defendant guilty of two counts of capital murder, as charged. The testimony and physical evidence admitted at trial sufficiently support the verdict; allowing the verdict to stand would not sanction an unconscionable injustice.

The trial judge did not err in refusing to grant Husband a manslaughter instruction. The granting of a manslaughter instruction is not guaranteed a criminal defendant but must be supported by the evidence presented at trial. Husband did not have an evidentiary foundation to merit the manslaughter instruction.

The trial judge did not err in granting Jury Instruction S-2A and S-3A. Defense asserts the instructions erroneously included the phrase "with deliberate design" thereby confusing the jury. Mississippi Code Annotated section 97-93-19(2)(a) does not specifically require the State to prove deliberate design, however, the additional language simply adds another element, thereby raising the standard of proof required of the State. The instructions were not confusing nor detrimental to the defendant.

ARGUMENT

I. THE EVIDENCE SUPPORTS THE JURY'S VERDICT.

Husband argues that the circuit court erred in denying his motion for a new trial. The evidence adduced at trial established that Ronald Husband shot and killed two uniformed police officers while they were acting within the scope of their official duties.

A motion for a judgement notwithstanding the verdict challenges the legal sufficiency of the evidence presented; while a motion for a new trial challenges the weight of the evidence. *Dilworth v. State*, 909 So.2d 731, 735 (Miss.2005). An appellate court reviews the denial of a motion for a new trial under an abuse of discretion standard. *Id.* at 737. The evidence is viewed in the light most favorable to the verdict and the appellate court will only grant a new trial in exceptional cases where the evidence preponderates heavily against the verdict. *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005). "A greater quantum of evidence favoring the State is necessary for the State to withstand a motion for a new trial, as distinguished from a motion for J.N.O.V." *Dilworth* at 737 (¶20) quoting *Pharr v. State*, 465 So.2d 294, 302 (Miss. 1984)). The verdict will stand unless an unconstitutional injustice would result. *Bush*, at 844 (¶18).

In the case *sub judice,* the prosecution's evidence was overwhelmingly in favor of the guilty verdicts. Accepting the following evidence as true, Appellee contends the trial court did not abuse its discretion in denying Husband's motion for a new trial.

The evidence established that Husband was at Forrest General Hospital and then at Arnold's home. Arnold's uncontradicted testimony established that Husband assaulted her. The 911 operator testified she recognized Arnold's voice from the 911 call and heard a scuffle. Arnold's blood was found on Husband's sweatshirt. (T.1192-96). There was ample evidence of the injuries Arnold received as a result of Husband hitting her. (T.755; Ex. S-2,11, 13).

Arnold's testimony, the 911 operator's testimony and the 911 tape established that Fite and Breland arrived at Arnold's home and knocked on the door. (T 727, ; Ex. S-1). An argument followed and then a scuffle. Arnold testified the officers asked Husband to go with them and he struggled with them first on the porch and then in the front yard. (T. 757). Investigators described the crime scene with the front door opened, broken window, the grill/smoker turned over, plants knocked off the front porch and other items of evidence recovered in the yard. (Ex S-6). An officer's can of mace and flashlight found in the front yard corroborate Arnold's testimony about Husband's struggle with Officers Fite and Breland. Photographs showing the crime scene were admitted into evidence. (S-5-7; 14-18). Photographs taken from the exterior of the trailer corroborate Arnold's testimony that she escaped through the bathroom window. (Ex. S-7).

Photographs from Forrest General Hospital surveillance cameras taken a few hours before the murders show Husband wearing a gold chain, a tan cap, and sunglasses identical to those found in the front yard by investigators. (Ex. S 4; 40; 44-45;) No juror could reasonably infer that Husband left the items during a prior visit at the home, especially considering their proximity to other evidence.

A DNA expert testified that she obtained a partial DNA profile from the sunglasses and cap found in the yard; Husband's DNA could not be excluded. Blood found on Husband's sweatshirt was consistent with Arnold's DNA, further corroborating Arnold's testimony. (T. 1192-96). The Forrest General Hospital photographs show Husband wearing the sweatshirt that officers recovered from his house. (Ex. S- 4; 12).

Officer Fite's gun was located in a culvert with water, beside a road, on the way from the crime scene to Husband's house. (T.1009-11). A ballistics expert testified the four bullets recovered from the officers' bodies during the autopsies were consistent with bullets fired from

Fite's gun. (T. 1148-150).

Five bullets were missing from Fite's gun. (T. 1153). This is consistent with each officer being shot twice and a single shot being fired through the front door of Arnold's trailer. Arnold testified that she closed the front door when running into the house; a crime scene analyst testified the front door was shot when it was either closed or barely open. (T. 758)

Finally, Dr. McGarry testified that both officers died from gun shot wounds. McGarry's testimony concerning the fatal wounds to both officers further corroborated Arnold's testimony and the prosecutions theory of the case. Arnold testified to seeing Husband on the ground straddling one of the officers with a gun pointed at the officer, hearing the officer say "Okay, Okay" and then a sequence of shots. (T. 762). McGarry testified Officer Fite was shot in the heart in close enough range that the barrel of the gun left an impression on Fite's chest. (T. 1214). He was shot a second time in his upper right abdomen. McGarry testified Fite's wounds were consistent with Fite being on his back while someone straddled him and shot in close range. (T. 1218-19). According to Dr. McGarry both wounds were fatal. Officer Fite also had abrasions on his face, nose, cheek, and lower lip on the right side. (T.1214-18). Arnold testified she heard more shots as she fled out a trailer window and through bushes. (T. 766-67). McGarry testified Breland was shot in the upper left thigh and in the upper left back, the bullet to his back being the fatal shot. (T. 1221-1223).

Defense argues the one juror's claim to have made a mistake in convicting Husband and the alternate juror's disbelief of Husband's guilt should be considered as supportive of his challenge to the weight of the evidence. (Appellant's brief 5-6). Appellee asserts in the case *sub judice,* the court must accept the verdict of the jury as given and not go behind the verdict to look at the jury deliberation. *Gavin v. State*, 767 So2d 1072 (Miss.App.2000); M.R.E. 606(b)

When the defense challenges the weight of the evidence, this Court must accept as true the

evidence supporting the guilty verdicts. See *Bush v. State*, 895 So.2d 836, (Miss. 2005). In doing so the evidence overwhelmingly supports the State's case that Husband refused to cooperate with the officers, struggled with them, took Officer Fite's gun, and then shot and murdered them. Allowing the guilty verdicts to stand does not sanction and unconscionable injustice. This issue is without merit.

II. THE EVIDENCE DID NOT SUPPORT A MANSLAUGHTER JURY INSTRUCTION.

Husband asserts in his second assignment of error, the trial court's refusal of a manslaughter jury instruction. Mississippi case law does not permit the granting of a jury instruction that is devoid of credible evidence supporting its premise. *Holland v. State*, 705 So.2d 307 (Miss. 1997). While a criminal defendant is entitled to an instruction embracing his theory of the case, the trial judge may refuse an instruction which either incorrectly states the law, is **without an evidentiary foundation**, or is stated elsewhere in the instructions. *Terry v. State*, *supra*, 718 So.2d at 1125 quoting from *Murphy v. State*, 566 So.2d 1201, 1206 (Miss. 1990).

And while all doubts should be resolved in favor of the accused, " . . . a lesser-included offense instruction should never be granted on the basis of pure speculation." *Fairchild v. State*, *supra*, 459 So.2d 793, 801 (Miss. 1984). "Instructions unsupported by the evidence need not, and should not be given." *Norman v. State*, 385 So.2d 1298, 1301 (Miss. 1980). Rather, "[i]nstructions should be given only if they are applicable to the facts developed in the case being tried." *Pittman v. State*, 297 So.2d 888, 893 (Miss. 1974).

In the case *sub judice*, the defendant fails to point to any evidence that would support a manslaughter heat of passion instruction. The voice on the 911 tape, "Francis, Francis," does not amount to heat of passion. There was no evidence in the record that Husband's actions were without

malice aforethought and in the heat of passion. One should remember, each officer was shot twice. Husband had Fite on the ground, he shot and killed Fite first; then he went for Breland. That is not manslaughter; that is the murder of two law enforcement officers while they were performing their duty. It is capital murder.

In *Mitchell v. State*, 792 So.2d 192, (Miss.2001), a case involving the capital murder of a law enforcement officer, the Mississippi Supreme Court affirmed the trial court's denial of a lesser-included offense manslaughter instruction, stating:

> Jury instructions should be given only if they are applicable to the facts developed in the case being tried. *Lancaster v. State*, 472 So.2d 363, 365 (Miss.1985) (citing *Pittman v. State*, 297 So.2d 888, 893 (Miss.1974)). To grant an instruction that is not supported by the evidence would be error. *Id.* Walker v. State, 740 So.2d 873, 888 (Miss.1999).
>
> Manslaughter is defined as "[t]he 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, shall be manslaughter." Miss. Code Ann. § 97-03-5 (Supp.1994).
>
> This Court addressed lesser-included offense manslaughter instructions:
>
> > Lesser-included offense instructions should be given if there is an evidentiary basis in the record that would permit a jury rationally to find the defendant guilty of the lesser offense and to acquit him of the greater offense.... 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 a lesser-included offense (conversely, not guilty of at least one essential element of the principal charge). *Hobson v. State*, 730 So.2d 20, 26 (Miss.1998) (quoting *Welch v. State*, 566 So.2d 680, 684 (Miss.1990)). (emphasis added by Appellee)

The bottom line is that no reasonable, hypothetical juror could have found Husband not guilty of capital murder and convicted him of heat of passion manslaughter under any theory of the case.

In this posture, the trial judge did not err in denying defendant's jury instruction 9-5 and 9-6 or any other instruction proffering manslaughter for the jury's consideration. A manslaughter instruction was not appropriate in this case. The issue is without merit.

III. THE TRIAL COURT DID NOT ERR IN ALLOWING JURY INSTRUCTIONS S-2A AND S-3A, WHICH CONTAINED THE PHRASE "WITH DELIBERATE DESIGN."

In his final assignment of error, Husband asserts the trial court erred in allowing jury instructions S-2A and S-3A. Husband argues that Jury Instructions S-2A and S-3A misstated the law by including the phrase "with deliberate design to effect the death of Brandon Breland/Odell Fite," thereby confusing the jury.

Defendant asserts that because he was denied the fundamental right of having the jury properly instructed on the elements of the crime procedural bars do not apply. Appellee contends the jury was properly instructed so the defense is barred from raising this issue for the first time on appeal. See *Hunter v. State*, 684 So.2d 625 (Miss.1996).

Procedural bar aside, Husband was indicted and convicted under Mississippi Code Annotated section 97-3-19(2)(a) for capital murder of a peace officer. Section 97-3-19(2)(a) does not specifically require the prosecution to prove "with deliberate design."

In *White v. State*, 964 So.2d 1181 (Miss. 2007) this Court found no error when the defendant was indicted under Mississippi Code Annotated section 97-3-19(1)(a) for capital murder, but a jury instruction was presented by the state on depraved heart murder under section 97-3-19(1).

Defense asserts and Appellee agrees that malice aforethought is not an element of the capital murder of a peace officer, citing *Hansen v. State*, 592 So.2d 114 (Miss.1991) and *Stevenson v. State*, 733 So.2d 177 (Miss.1998), in support. In *Gossett v. State*, 660 So.2d 1285 (Miss.1995) the Mississippi Supreme Court held "malice aforethought" is defined as the equivalent of "deliberate

design."

In *Swanier v. State*, 473 So.2d 180, 188 (Miss.1985), the trial court included the surplusage "of his malice aforethought" in a capital murder jury instruction. The Mississippi Supreme Court held the surplusage served only to raise the State's burden of proof and could in no way have prejudiced the defendant.

Appellee contends that inclusion of the phrase "with deliberate design," raised the State's burden of proof, did not prejudice Husband in a harmful way, nor did it deny him the fundamental right to have the jury instructed on the elements of the crime. This argument therefore is without merit.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's conviction and life sentences of Ronald Husband for the capital murder of officers Brandon Breland and Odell Fite.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: Lisa L. Blount

LISA L. BLOUNT
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, 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:

Honorable Roger T. Clark
Circuit Court Judge
Post Office Box 1461
Gulfport, MS 39502

Honorable Cono Caranna
District Attorney
Post Office Drawer 1180
Gulfport, MS 39502

Justin T. Cook, Esquire
Attorney At Law
301 North Lamar St., Ste. 210
Jackson, MS 39201

This the 24th day of October, 2008.

Lisa L. Blount

LISA L. BLOUNT
SPECIAL ASSISTANT ATTORNEY GENERAL

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