

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

**THOMAS TERRELL SMITH**

**APPELLANT**

**VS.**

**NO. 2008-KA\_0375-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**PROCEDURAL HISTORY:**

On November 1, 2007, Thomas Terrell Smith, "Smith" was tried for murder before a Oktibbeha Circuit Court, the Honorable James T. Kitchens, Jr. presiding. R. 1. Smith was found guilty and given a life sentence in the custody of the Mississippi Department of Corrections. R. 485. From that conviction, Smith appealed to this Court. C.P. 127.

**ISSUE ON APPEAL**

**I.  
WAS THE JURY PROPERLY INSTRUCTED?**

## STATEMENT OF FACTS

On July 19, 2004, Smith was indicted for the deliberate design murder of Undies "Terry" Tate on January 29, 2004 by a Oktibbeha Grand jury. C.P. 5.

On November 1, 2007, Smith was tried for murder before a Oktibbeha Circuit Court, the Honorable James T. Kitchens, Jr. presiding. R. 1. Smith was represented by Mr. J. Joshua Stevens, Jr. R. 1.

Mr. Eddie Davis testified that he was a friend of Mr. Tate. Davis testified to being in the car with Mr. Tate and his three year old son. They went to "Larry C's." Davis was sitting next to Tate as a passenger in the car he was driving. He was only a few feet from Tate when he saw Smith shoot him. He testified that Tate was unarmed and was not threatening or arguing with Smith when he was shot. R. 128-150.

Davis testified that on Wednesday, he saw Tate hit Smith in the head with a handgun. This was in a pool hall. This was at "Spann's Place." They were playing pool and drinking beer. Smith was upset with Tate because he perceived him to be interfering with his relationship with a woman. After being struck, Smith left the club, and Tate returned to playing pool.

However, on the following day, the day of the shooting, Davis testified that Tate was not armed. Davis was sitting in the passenger seat next to Tate. Tate's three year old son was behind his father in the back seat. Tate testified that Tate had stopped his car at a place called Larry C's, which was "a little hamburger stand." R. 154.

When Tate was attempting to leave, Smith's red Jeep blocked his car's path. Smith got out with a hand gun, a 9 millimeter. He walked toward Tate. After Tate was asked, "What's up?", he raised his hands to show he was not armed.

This was when Davis saw Smith shoot Tate. Davis jumped out of the car. He followed the

car to where it came to rest. He found Tate who was shot lying in the car seat. Tate's small child was fortunately not physically harmed.

Mr. Jimmy Lee testified that he was Smith's cousin. R. 152-184. Lee testified that Smith was upset over Tate's hitting him in the head. Smith angrily told him he was going to kill Tate. Lee tried to convince him to let law enforcement deal with his grievance against Tate. R. 157.

Lee testified that he was an eye witness to the slaying. He was standing outside Larry C's. Lee testified that he saw Smith use his red Jeep to block Tate's car. He saw Smith get out his car. Smith approached Tate's car with a handgun. Lee, who was alarmed by what he saw, told his cousin, Smith, "Man, don't shoot that man. Don't shoot the man." R. 169.

Mr. John Cunningham was a machine operator for M & S Pipe. R. 189-212. Cunningham testified to hearing an acquaintance, Kenny Culpeper, tell the angry Smith to calm down. He told him to try and even the score with Tate by hitting him in the head, and forget about trying to use a gun. R. 192.

Mr. Cunningham testified that he was at Larry C's. He saw Tate's car being blocked in the road by Smith's red jeep. This occurred as Tate was attempting to leave. He testified that he could see Tate's hands "on the gearshift" and "steering wheel." Tate did not threaten Smith, or make any threatening moves. Just after Tate responded to Smith's "What's up now?" greeting, Cunningham heard a popping sound. He also saw Davis, who was a passenger in the car, jump out of the car.

Dr. Stephen Hayne testified that he did an autopsy on the decedent, Mr. Tate. R. 281-290. He testified that he died from a gun shot wound. The bullet traveled from Tate's left shoulder downward through his lung, heart and liver. This resulting in massive internal bleeding and death. R. 288.

At the conclusion of the state's case, the trial court denied a motion for a directed verdict.

The Court found there was sufficient evidence for finding that the prosecution had made out all the elements of deliberate design murder. R. 291-294.

Mr. Thomas Terrell Smith, the defendant, testified in his own behalf. R. 350-389. He denied having used his red Jeep to block in Tate's car. Smith testified about Tate hitting him in the head with a handgun. This was at Spann's Place. He admitted he left the club on his own. He went home. He admitted he did not seek any medical attention for any injury he supposedly received. R. 374. He admitted that after the altercation he went home and went to sleep. R. 375.

Smith also denied that he searched for Tate's car. However, when he found it, he went to confront Tate. He got out of his car. He went to speak to Tate. They exchanged words. When Smith thought that Tate was "reaching for something," he "shot him." R. 375.

On cross examination, Smith admitted that he carried a gun in his car. He had it when he confronted Tate. He admitted he pointed it, and shot and killed Tate at Larry C's hamburger stand. He admitted he did not see Tate with a gun when he fired his weapon. However, he testified he saw him with one the night they had an encounter at Spann's Place. R. 383.

On rebuttal for the prosecution, Deputy Sheriff John Davis testified that Smith had "a small scab" on the top of his head. R. 430. Smith told Davis of having been hit in the head with the butt end of a pistol.

During jury instruction selection, the trial court stated he was granting, under the facts of this case, C-38, a manslaughter instruction which was referred to as "an imperfect self defense instruction." There was no objection. R. 399-400.

The trial court also granted instructions S-4 for deliberate design murder, S-5 for self defense, D-12 the elements instruction, in addition to other instructions. C.P. 78,79, 86.

The trial court denied other instructions proposed by the defense, finding some instructions

repetitive, a comment on the evidence and not a proper statement of the law as applied to the facts of this case. R. 425. Among the instructions refused was D-14. a heat of passion manslaughter instruction, D-17, a manslaughter after an aggravated assault felony was committed by the victim, and D-15, a self defense instruction based upon “anticipation of an attack” by the victim, and D-19 another “anticipation of harm “ from the victim instruction .

During closing argument, Smith’s counsel presented Smith’s defense to the jury. He argued that Smith had a right to defend himself against a larger man. Smith had a right to arm himself and act in anticipation of an attack by “this brute.” R. 451. Smith was supposedly merely trying to protect himself from harm and acted without “any malice aforethought.” R. 450-461.

Smith was found guilty and given a life sentence in the custody of the Mississippi Department of Corrections. R. 485. From that conviction, Smith appealed to this Court. C.P. 127.



## SUMMARY OF THE ARGUMENT

The record reflects that there was no objection to the trial court's granting of jury instruction C-38. R.399-400 . The issue of a lesser included instruction for manslaughter was therefore waived. **Davis v. State**, 568 So. 2d 277, 279 (Miss. 1990).

In addition, the record reflects that the jury was properly instructed. R. 396-427. The record reflects that when the instructions were taken together, the jury was instructed on the elements of murder, self defense and manslaughter. C-38 and related instructions included Smith's theory of the case, as reflected by his testimony and other evidence before the jury. **Comby v. State**, 901 So. 2d 1282, 1288 (¶15)(Miss. Ct. App. 2004); and **Gollott v. State**, 672 So. 2d 744, 752 (Miss. 1996)

The appellee believes that the record supports the trial court in its finding that the instructions for heat of passion manslaughter, and other self defense manslaughter instructions dealing with "the anticipation of an attack" were either repetitive, not supported by the evidence, a comment on the evidence under the facts of this case or a misstatement of the law.

The appellee believes that trial court properly found no basis for a heat of passion manslaughter instruction. R. 418-419. However, the trial court did provide C-38, an instruction for "imperfect manslaughter." R. 399-400. This stated that where there was evidence that a shooter unreasonably believed that his life was in danger but, nevertheless , if the jury believed he acted at the time without malice aforethought, they could find him guilty of manslaughter. C.P. 74-75. The trial court also denied instructions D-15, and D-17 for self defense based upon "anticipation of an attack" by the victim.

The court's "imperfect or subjective self defense manslaughter instruction" was in addition to the more conventional self defense instruction. This instructed the jury that they were the judge of the reasonableness of the grounds upon which the defendant acted. That the danger to the

defendant must have been actual, present and urgent to make his assault reasonable under the circumstances of this case. C.P. 79.

There was corroboration from three eye witnesses that Tate was not an aggressor “when” he was shot and killed. These eye witnesses were Mr. Davis, Mr. Lee, and Mr. Cunningham. They testified that Tate had nothing in his hands. He made no threatening remarks to Smith at the time he was shot. Tate also had his three year old son present in the car beside him. R. 138-139; 166-167; 197-198.

While Smith’s testimony indicated that he was struck in the head by Tate the night before, he admitted that he never saw Tate with any weapon when he shot him. R. 359; 380. At most, he testified that he thought Tate was “reaching for something” when he shot him. R. 380. While there was evidence that Tate made alleged threatening remarks to Smith when he hit him previously, there was no testimony indicating any threats were made to Smith the day Tate was shot and killed. R. 138-139; 166-167; 197-198; 359-380.

## ARGUMENT

### PROPOSITION I

#### **THIS ISSUE WAS WAIVED. AND THE JURY WAS PROPERLY INSTRUCTED UNDER THE FACTS OF THIS CASE.**

Smith believes that the trial court erred in denying him jury instructions in support of his theory of the case. Smith thinks that his proposed instructions for “heat of passion”, “the decedent’s commission of a felony” provocation instruction, and “classic self defense” were in keeping with his theory of defense. Smith thinks that the fact that Tate hit him, and threatened to kill him placed him in reasonable fear for his life. He thinks these facts should have been included in his “anticipation of attack” instructions Appellant’s brief page 2-8.

To the contrary, the record reflects that there was no objection to the court’s granting of jury instruction C-38 for the lesser included charge of manslaughter. R.399-400. Therefore, the issue of a lesser included instruction for manslaughter was waived.

In **Davis v. State**, 568 So. 2d 277, 279 (Miss. 1990), the Supreme Court held that failure to object to an instruction waived it on appeal.

In addition, the record reflects, as stated by the trial court, that the facts of this case did not justify some of Smith’s proposed instructions. Among those proposed instructions was an instruction for in “the heat of passion” manslaughter, (D-14; C.P. 91), instructions for “killing after a felony” manslaughter , (D-17; C.P. 94 ) as well as for self defense instructions based upon “anticipation of an attack.” (D-15, D-19; C.P. 92; 96.)

The record reflects that Smith submitted over twenty different instructions to the trial court. Some of these instructions were repetitive, as pointed out by the trial court. C.P. 87-108.

The trial court granted instructions on deliberate design murder, the elements of deliberate

design murder, imperfect or subjective self defense manslaughter, as well as other related instructions. C.P. 68-75; 77-81, 86.

The trial court believed the jury instruction C-38 was sufficient for providing a manslaughter instruction which incorporated Smith's theory of the case.

The trial court provided jury instruction C-38, which was "imperfect self defense." C. P. 74-75. The Court explained he believed this was the proper instruction given the testimony in the instant cause which included Smith's own testimony.

Jury instruction C-38 states as follows:

The Court instructs the jury that if a person kills another under the actual bona fide belief that such a killing is necessary in order to protect himself from great bodily harm or death, but that such belief is not reasonable under the circumstances, then there is no malice aforethought and the killing is not murder, but at most is the crime of manslaughter.

Therefore, if you find from the evidence in this case that on January 29, 2004, the defendant, Thomas Smith, did shoot and take the life of Uddies Tate, acting on his actual bona fide belief that such was necessary to protect himself from great bodily harm or death at the hands of Uddies Tate, but that such belief by the defendant was not a reasonable belief under the circumstances, then you may find the defendant guilty of the lesser included offense of manslaughter. C.P. 74-75.

The colloquy over Smith's requested jury instructions included the trial court's rejection of Smith's belief that one who kills another after he has been the victim of a felony can not be found guilty of murder. Smith's counsel believed, under those circumstances, he could only be found guilty of manslaughter. The trial court pointed out that from the testimony presented there was no evidence of any threat or weapon shown by the victim "at the time" of the actual slaying.

Stevens: Your Honor, you know, there are several manslaughter statutes, a number of them and one of them I tried to frame to meet this particular type of manslaughter, which is once somebody's committed a felony against you, or tried and failed, it's can't be murder then, it's manslaughter, is what I--what I've drawn, and it's--I wasn't satisfied from the research, but the statute is there, and I can give you this--

**Court: The problem is the morning of the killing, there's no indication that Mr. Tate was trying to commit some felony against him. At that point in time he's sitting in a car with his three year old child and another man. No one sees a pistol. There is no testimony that a gun was produced at that point, or waved about, and I've given an imperfect self defense instruction. This one will be (D-13) refused. R. 410-411. (Emphasis by Appellee).**

The record reflects there were three eye witnesses to the fatal encounter between Smith and Tate testified. They were Mr. Eddie Davis, Mr. Jimmie Lee and Mr. John Cunningham. Lee and Cunningham were customers at Larry C's. Davis was a friend of Tate and a passenger in the front seat of his car. This was where Davis saw Smith shoot and kill Tate before his three year old son. R. 136-137. Lee was Smith's cousin. He told Smith not to shoot when he saw him approached Tate's car with a hand gun by his side.

Mr. Eddie Davis testified to being a passenger in Tate's car. He was going to help Mr. Tate retrieve another car. He was with Tate and his three year old son. He saw Smith with a gun. He saw him point it directly at Tate. While trying to get out of the car, he heard "a pow." This was when Tate was shot in the shoulder. R. 137.

Davis testified that on Wednesday, the day before the events at issue, on Thursday, he saw Tate hit Smith in the head. He beat him with a pistol in a pool hall. This was at Spann's Place. They were playing pool and drinking beer. Smith was upset with Tate because he thought he was interfering with his relationship with a woman. She had been at the club. After being struck, Smith left the club. Tate returned to playing pool.

However, on the day of the shooting, he testified that Tate was not armed. Davis was beside him as a passenger in his car. Tate's three year old son was behind his father in the back seat. Tate was not armed.

Davis testified that Tate had stopped his car at a place called Larry C's, which was "a little

hamburger stand.” R. 154. When Tate was attempting to leave, Smith’s red Jeep blocked his car’s path. Smith got out with a hand gun, and walked toward Tate. After Tate was asked, “What’s up now?”, Tate raised his hands to show he was not armed. This was when Davis saw Smith shoot Tate. R. 136-137.

Q. And as this defendant and Mr. Tate was in the car, other than the words “what’s up,” was there anything else exchanged?

A. No. No more I can recall.

Q. Did you hear Mr. Tate make any threatening remarks towards Mr Smith that morning?

A. No, ma’am.

Q. Any threatening –did you see Mr. Tate make any threatening moves toward Mr. Smith that morning?

A. No, ma’am. R. 138-139

Davis testified to hearing Tate use threatening words at Span’s Place. This was after Tate had hit him in the head with a handgun. He heard Tate say, “Terrell, do you believe that I’ll bow your brains out? Don’t never get into me and my old lady’s affair again.” R. 132. However, there were no such remarks at the time and place of the slaying.

Mr. Jimmy Lee corroborated Davis. Lee was Smith’s cousin. Lee testified that Smith was upset over Tate’s hitting him in the head. Smith told him he was “going to kill” Tate. Lee tried to convince him to let law enforcement deal with it.

Q. Okay. And when you were trying to tell Thomas Smith to just leave it alone, what was his response to that?

A. He said that he was going to kill him, he was going to kill him, he going to kill him. R. 157.

Lee testified that he was standing near Tate’s car as an eye witness to the slaying. Lee testified

that he saw Smith use his red Jeep to block Tate's car. He saw him get out with a handgun and approach Tate's car. Lee, who was alarmed by what he saw, told his cousin, Smith "Man, don't shoot that man. Don't shoot the man." R. 169. Lee could see Tate was not armed, or threatening Smith in any manner. He also had his three year old son beside him in the car.

Lee then saw Smith take both hands and "put it in the car and pulled the trigger." R. 165.

Q. Okay. Did you at any point see Mr. Tate with a gun?

A. No, ma'am.

Q. Did you see him make any threatening moves toward Mr. Smith?

A. No, ma'am.

Q. Did you hear him make any threats toward Mr. Smith?

A. No, ma'am. All I just saw, ma'am, when --when they said, "What's up?", Terry had his left hand on the steering wheel and had his right hand on the gearshift.

Q. Okay. And after Mr. Smith shot Mr. Tate, did you see where his--where his son was at that point?

A. His son was still sitting in the back seat, standing upon the back seat behind his daddy.

Q. So the son was there the whole time this transaction was--was going on?

A. Yes, ma'am. R. 166-167.

Mr. John Cunningham was a machine operator for M & S Pipe. Cunningham corroborated Lee. He heard Kenny Culpeper tell Smith "to try and even the score" with Tate. He could do this by hitting him in the head. He encouraged him to forget about using a gun. R. 192.

Mr. Cunningham testified that he was at Larry C's. He saw Tate's car being blocked in the road by Smith's red jeep. This occurred as Tate was attempting to leave from Larry C's. He testified that he could see Tate's hands "on the gearshift" and "the steering wheel." Tate did not threaten

Smith, or make any threatening moves. Just after Tate responded to Smith's "What's up now?" greeting, Cunningham heard "a pop sound." He also saw Davis, who was a passenger in the car, jump out of the car.

Q. Okay. Now, were you able to see where Mr. Tate had his hands at the time that Thomas Smith walked up to his car?

A. His right hand was on the gearshift, putting it back in gear, and his left hand was on the steering wheel.

Q. Okay. And at any time while Mr. Smith was standing by Terrell's vehicle, did you see Terry Tate make any threatening movements toward Thomas Smith?

A. No, ma'am.

Q. Did you hear him make any verbal threats toward Thomas Smith?

A. No, he--when he--when Terrell just said, "What's up?", I guess Terry said, "What's up?" Then he just, like, backed up. Next thing I know, a pop sound, and Eddie Davis jumped out the car, went one way, and the car went the other way.  
R. 197-198.

Mr. Thomas Terrell Smith, the defendant, testified in his own behalf. He denied having used his red Jeep to block Tate's car. R. 380. He testified that Tate hit him in the head with a handgun. This was at Spann's Place. R. 359. This was the day before the encounter that resulted in Tate's death. Smith admitted that he left the club after being struck. He did not seek medical care. He spent the night at home in his bed. The next day he found a hand gun. He denied that he went looking for Tate. He testified that he just happened to encounter his car at Larry C's.

Smith explained that when he thought Tate was "reaching for something", he "shot him." R. 380. This occurred while Tate was still sitting in the driver's seat in his car at Larry C's. R. 380.

On cross examination, Smith admitted that he carried a gun in his car. He had it in his hand when he confronted Tate. He admitted he pointed it at him. He admitted he shot and killed him. He admitted he did not see Tate with a gun. However, he testified he saw him with one the night they



had an encounter at Spann's Place. R. 383.

Q. And you blocked him in.

A. I did not block him in.

Q. And you got out of your vehicle, didn't you?

A. No, I didn't.

Q. Where did you shoot him from, sir?

A. He had—I pulled beside him, and I opened my door, and me and him were exchanging words. And by that time he was reaching for something, and I had just stepped out then. **And when we was, like, reaching for something, then that's when I shot him—**

Q. Okay.

A. —and got back in. R. 380. (Emphasis by appellee)

On cross examination, Smith admitted he took a 9 millimeter handgun with him to his encounter with Tate. He admitted that he pointed it at Tate, pulled the trigger and shot Tate who died from the wound. He also admitted that he did not see Tate with a handgun when he shot him.

Q. And did you or did you not point his 9 millimeter at Terry Tate?

A. Yes, I did.

Q. And did you or did you not pull the trigger and kill Terry Tate?

A. Yes, I did.

Q. **And you never saw a gun, did you?**

A. **I seen one the night before.** R. 383.

Q. All right. And tell the court what you did the next morning?(The day after the encounter with Tate at Spann's Place.

A. **I got up the next morning, like I normally do, and got in my cousin's Jeep,...I asked him about, you know what I'm saying, you know, about a pistol, and he gave it to me. And So I had left.** R. 363. (Emphasis by appellee)

In **Comby v. State**, 901 So. 2d 1282, 1288 (¶15)(Miss. Ct. App. 2004), the Court stated succinctly that where all the instructions taken together properly announce the applicable rules of law reversal was not required.

**Burton ex rel. Bradford v. Barnett**, 615 So.2d 580, 583 (Miss.1993). Defects in specific instructions do not require reversal where all the instructions taken as a whole fairly-although not perfectly-announce the applicable rules of law.

In **Parker v. State**, 401 So.2d 1282, 1286 (Miss. 1981), Parker retrieved a rifle from a vehicle. He then fired it into the Court house where Mr. Tisdale had fled. Tisdale fled there after having shot at Parker's brother. He was wounded when the brother returned fire with a hand gun in his pocket. When Parker shot his rifle into the court house, he was chasing after Tisdale. He was not confronting him. He did not see him with a weapon. He was not being threatened verbally.

The proof is uncontradicted that the altercation originated between Eddie Ray Parker and Tisdale, and when they met the second time at the courthouse, Tisdale shot Eddie Ray Parker, who returned to fire and wounded Tisdale. At that point, Tisdale fled into the courthouse while appellant went to his brother's automobile, obtained a 30-30 rifle, and pursued Tisdale toward the courthouse.

Appellant was asked why he shot at Tisdale and he said, "Because he had pointed a gun at me earlier, shot my brother and had shot at me when he was coming toward the courthouse and I was pursuing him."

[2] If a person provokes a difficulty, arming himself in advance, and intending, if necessary, to use his weapon and overcome his adversary, he becomes the aggressor, and deprives himself of the right of self-defense. **Woods v. State**, 183 Miss. 135, 183 So. 508 (1938).

In **Nicholson on behalf of Gollott v. State**, 672 So. 2d 744, 752 (Miss. 1996), the Court stated that "the trial courts are under no obligation to grant cumulative instructions." The Court also stated where there was no specific contemporaneous objection to the failure to grant an instruction, the court need not consider that issue on appeal.

The record reflects that there was no objection to the trial court's granting jury instruction

C-38, the so called "imperfect self defense" instruction. R. 399-400. And as stated by the trial court, many of Smith's other jury instructions for self defense were cumulative.

This Court does not review jury instructions in isolation. **Malone v. State**, 486 So. 2d 360, 365 (Miss. 1986). If the instructions given provide correct statements of the law and are supported by the evidence, there is no prejudice to the defendant. **Sanders v. State**, 313 So. 2d 398, 401 (Miss 1975). This Court has fully examined the instructions granted by the trial court in the case sub judice and finds that, taken together, the jury was correctly and completely charged.

Regarding the instructions Gollott claims the trial Court erroneously refused, Gollott failed to object to the refusal of D-4. As a result, this Court is not bound to address the alleged error on appeal. **Lockett v. State**, 517 So. 2d 1317, 1332-33 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed 895 (1988). Instruction D-11, which was also refused by the trial court, defines "willful" and "intent." This Court has specifically stated that trial courts need not grant defendant's instructions defining "willful," as that definition is a matter of interpretation for the jury. **Ramon v. State**, 387 So. 2d 745, 751 (Miss. 1980). Instruction S-1 provided the jury with a correct definition of "intent" and the trial courts are under no obligation to grant cumulative instructions. **Medley v. State**, 600 So. 2d 957, 962 (Miss. 1992).

The record reflects that the trial court granted jury instruction C-38, which was referred to as an imperfect self defense instruction. It instructed the jury that if they believed, from all the evidence, that Smith acted under an unreasonable belief that such a killing was necessary to protect himself, but that, at the time Smith acted, they also believed there was no malice aforethought on his part, then they could find Smith guilty of manslaughter. C. P. 74-75.

In **Austin v. State** 860 So.2d 1224, 1226 (Miss. App. 2003), the Court found no error in refusing to grant a self defense instruction. However, the court granted a lesser included manslaughter not in necessary self defense instruction.

¶ 10. The trial judge refused instruction D-4 on the ground that it was not supported by the evidence. However, the judge modified an instruction which gave Austin a lesser-included-manslaughter-not-in-necessary-self-defense instruction. Also, the judge did not find that a self-defense instruction should be given in light of the testimony that Austin got out of the car, which was still in motion, and purposefully shot Jones, who sustained a shot to the back of his right arm and another shot to the

back of the neck. There was also evidence that the victim, Jones, was running away from the shooter.

¶ 11. Also noteworthy is the fact that Austin's appointed counsel, Allan Shackelford, filed a brief, in accordance with **Turner**, 818 So. 2d at 1189(¶ 11), and stated that after scouring the record thoroughly for reversible error, he found none that would not be frivolous.

¶ 12. We find that based on the evidence presented in the record, the trial judge properly denied jury instruction D-4 for lack of an evidentiary foundation. Therefore, this issue is without merit.

In **Davis v. State**, 568 So. 2d 277, 279 (Miss. 1990), that failure to object to an instruction waives it on appeal. Additionally, repetitious instructions are not required.

This Court has repeatedly held that failure to object to a jury instruction constitutes a waiver. See, e.g., **Barnett v. State**, 563 So. 2d 1377, 1380 (Miss. 1990); **Watson v. State**, 483 So. 2d 1326, 1329 (Miss. 1989).... see, e.g. **Ragan v State**, 318 So. 2d 879, 882 (Miss. 1975)(“The trial court is not required to grant several instructions on the same question in a different verbiage.”)

In **Sanders v. State**, 586 So 2d 792, 796 (Miss. 1991), the court stated that jury instructions should not be given which emphasize one portion of testimony unduly over others.

As a general proposition, the trial judge should not give undue prominence to particular portions of the evidence in the instructions. To that end, this Court has held that instructions which emphasize any particular part of the testimony in such a manner as to amount to a comment on the weight of the evidence are improper. **Duckworth v. State** , 477 So. 2d 935, 938 (Miss. 1985)...

The record reflects that Davis, the eye witness in the car with Tate, did not hear Tate say anything that could be considered threatening to Smith at Larry C's. This was where Smith admitted that he shot and killed Tate. R. 138-139. The words that could be considered threatening came the day before at Spann's Place. This happened on the previous day. R. 132.

In **Manuel v. State** 667 So. 2d 590, 593 (Miss.1995), the case relied upon by Smith, the Supreme Court reversed for failure to grant Manuel's self defense instruction. However, in that case there was testimony from Manuel about a physical struggle with Norris, the victim. Manuel also

testified the drunken Norris threatened to kill her during that encounter. Manuel used a knife from her kitchen to stab Norris while he was allegedly striking her in the face and chest with his fists.

The Court found that the trial court erred by not granting Manuel's instruction for self defense which was not well written. Whereas, in the instant cause, the record reflects that Smith was granted jury instructions for self defense as well as for manslaughter, given the facts of this case. C.P. 74-75; 79.

Manuel was entitled to instruct the jury on her theory of self-defense. The theory was a correct statement of the law and it was supported by evidence. Jury Instruction D-5 was the only instruction submitted by Manuel that embodied this theory; therefore, the trial judge had a duty to see that it was in correct form. The trial judge recognized the flaws in Jury Instruction D-5, yet he did nothing to rectify the problem. Because the trial judge failed to cure this problem, the jury was not instructed on this specific theory of Manuel's defense; this was reversible error.

The appellee would submit that the record summarized above indicates that the jury were properly instructed, given the facts of this case. Smith was given instructions for a lesser included instruction for manslaughter as well as for self defense. C.P. 74-75; 79. While Smith did not get supplementary instructions, nevertheless, the appellee thinks the trial court correctly instructed the jury. C.P. 68-75; 77-81; 86.

The court correctly found that, under the facts of this case, and the time span between the events, that Smith was not entitled to these many additional instructions which would have been repetitive and a comment on the evidence.

Smith's counsel argued in his closing that he believed there was a basis for the jury to find him not guilty of murder but of manslaughter. He attempted to psychologically connect the previous altercation to Smith's actions on the following day. R. 450-461. However, the jury did not find that argument convincing, given the facts of the case, as stated with cites to the record above.

The appellee would submit that this issue is lacking in merit.

CONCLUSION

Smith's conviction should be affirmed for the reasons cited in this brief. The jury were properly instructed, given the testimony and evidence presented to the jury in this case.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 James T. Kitchens, Jr.  
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This the 8th day of October, 2008.



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