IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLINTON WYATT NOLAN — APPELLANT

VS. — NO. 2008-KA-0564

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLINTON WYATT NOLAN **APPELLANT**

vs. **CAUSE No. 2008-KA-00564-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of DeSoto County, Mississippi in which the Appellant was convicted and sentenced for his felony of **MANSLAUGHTER.**

STATEMENT OF FACTS

The Appellant was indicted upon the "heat of passion" variety of manslaughter. (R. Vol. 1, pg. 8). That the Appellant shot and killed his father was stipulated by the defense. (R. Vol. 2, pg. 155). However, it was theory of the defense that the Appellant was legally insane at the time the Appellant killed his father.

Since the issues in this case are whether the State proved that the Appellant was not insane at the time of the killing, we do not think that an extensive statement of facts is necessary, the facts concerning the Appellant's alleged insanity and those establishing a killing in the heat of passion perhaps being better set out in the responses to the Appellant's assignments of error.

Briefly stated, the Appellant rang emergency services at 2.45 on the morning of 26 May 2006 to say that he had shot his father. He initially reported that his father was dead, but then said that he was still breathing. The Appellant further stated that he shot his father "out of emotion." The Appellant's father then spoke to the dispatcher to say that his son had shot him in the chest. The victim also told the dispatcher that the Appellant was autistic, asks the dispatcher to be careful with the Appellant, and told her that the Appellant might not know what he was doing. He also stated that his son was having problems of some kind. Law enforcement arrived, and the Appellant was arrested.

The Appellant was interviewed at the DeSoto County jail. He told law enforcement that he could not turn his front lobe off and that he had been depressed for a few weeks. The Appellant also reported that he had not been sleeping well and that his medications had been making him feel funny. He thought someone might have given him truth serum in his room. The Appellant had received good marks in college.

As the Appellant began to make statements about the shooting, the law enforcement officer turned an audio tape machine on. When he did this, the Appellant stopped, indicating to the officer that the Appellant was consciously choosing what to say, if anything.

The defense produced evidence to demonstrate that the Appellant had been diagnosed years before the shooting as suffering from Asperger's syndrome. This condition is not a psychotic illness. The Appellant's treating psychiatrist went to visit the Appellant in jail and found him to be very agitated and confused, and thought that the Appellant was "grossly psychotic" at that time. The Appellant did know that he was in jail for having shot his father. The psychiatrist thought that the Appellant was beginning to become psychotic about a week prior to the shooting. The Appellant was subsequently released on bail. He was admitted to the

hospital, where he stayed for three months, even though by the time he was released his hallucinations had diminished. The Appellant still showed signs of agitation. The treating psychiatrist believed that the Appellant thought his father thought badly of him and considered him to be a sexual deviant. The treating physician diagnosed the Appellant as afflicted with schizoaffective disorder, depressive type. This disorder lies between schizophrenia and manic depression. This physician did not think that the Appellant understood the nature and quality of his acts when he shot his father.

A psychologist was called by the defense to testify. He testified that he thought that the Appellant was unable to understand the nature and quality of his actions at the time the Appellant shot his father.

Neither defense expert had listened to the interview with the Appellant. Neither one had listened to the tape of the 911 call. There were lay witnesses presented by the defense to testify to the Appellant's behavior after the shooting.

The State presented an expert in rebuttal, who testified that the Appellant was able to understand the nature and quality of his actions. The State further presented the testimony of law enforcement officers which concerned the Appellant's acts, statements and demeanor just after the Appellant killed his father. (R. Vol., pp. 139 - 150; Vol. 2, pg. 151).

The trial court, in an extensive finding of fact, found beyond a reasonable doubt that the Appellant was not legally insane at the time the Appellant killed his father, and further found that the Appellant was guilty of manslaughter. (R. Vol. 2, pp. 170 - 180).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A DIRECTED VERDICT IN FAVOR OF THE APPELLANT ON ACCOUNT OF THE STATE'S ALLEGED FAILURE TO PROVE EACH OF THE ELEMENTS OF "HEAT OF PASSION" MANSLAUGHTER, ESPECIALLY "HEAT OF PASSION?"

2. WAS THE TRIAL COURT'S FINDING THAT THE APPELLANT WAS NOT INSANE AT THE TIME OF THE KILLING AGAINST THE GREAT WEIGHT OF THE EVIDENCE?

3. SHOULD THE *M'NAUGHTEN* STANDARD, USED IN THIS STATE TO DETERMINE WHETHER AN ACCUSED WAS INSANE AT THE TIME OF THE COMMISSION OF AN OFFENSE, BE ABANDONED?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A DIRECTED VERDICT

2. THAT THE TRIAL COURT DID NOT ERR IN FINDING THAT THE APPELLANT DID NOT MEET THE *M'NAGHTEN* STANDARD

3. THAT THE THIRD ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A DIRECTED VERDICT

At the conclusion of the State's case - in - chief, the defense moved for a directed verdict. It did not, however, assign specific grounds for such relief. The trial court then denied relief on the defense motion. (R. Vol. 3, pp. 10 - 11). The defense then produced its case and the State presented a rebuttal case. At the conclusion of all of the evidence in the case, there was no renewal of the motion for a directed verdict. (R. Vol. 3, pp. 123 - 126). Because this was a bench trial, there was no request for a peremptory instruction. There was no motion for a directed verdict made at the conclusion of the defense case. (R. Vol. 3, pg. 82).

It is well settled that where an accused moves for a directed verdict at the conclusion of

the State's case-in-chief and then presents his own case, after relief on that motion has been denied, his motion for a directed verdict is waived. To preserve the issue of sufficiency of the evidence, the accused must renew his motion, either by renewing his motion for a directed verdict at the conclusion of the evidence or by requesting a peremptory instruction. *Hubbard v. State*, 938 So.2d 287, 292 (Miss. Ct. App. 2006).

It is also well settled that an accused must specifically state the reason or reasons he believes the State's evidence was insufficient. A trial court does not commit error where it overrules a motion for a directed verdict where specific grounds are not alleged in support of it. *Moore v. State*, 958 So.2d 824 (Miss. Ct. App. 2007).

The Appellant, in his "Motion for J.N.OV. Or New Trial," did assert that the State failed to prove the elements of heat of passion manslaughter, and, specifically, that the State failed to prove "heat of passion." (R. Vol. 2, pg. 181). We submit, though, that under *Hubbard* and *Page v. State*, 990 So.2d 760 (Miss. 2008), this was too late.

In *Page*, the defense made a motion for a directed verdict at the conclusion of the State's case - in - chief, but did not attempt to renew the motion at the conclusion of all of the evidence until after the jury had been instructed and the case submitted for decision. The Court held that the attempt to renew the motion was untimely and that the issue was for that reason barred for review. *Page*, at 762.

It is true that the Court noted that the defense in *Page* either failed to file a motion for judgment notwithstanding the verdict or failed to see to it that it was included in the record on appeal. Here there was such a motion. However, this is of no consequence. The Court in *Page* clearly held that the question of sufficiency of the evidence was waived by the failure to properly renew the original motion for a directed verdict. It did not hold that this waiver would have been

somehow cured had a motion for judgment notwithstanding the verdict been filed.

This is not surprising. Even had there been a motion for judgment notwithstanding the verdict in *Page*, any such motion could not have cured the fact that the issue was waived for having failed to properly preserve it. It would have been illogical had the Court held, in effect, that a sufficiency of the evidence issue, waived by the failure to timely present it, would be somehow revived for no reason other than the simple fact that it was raised again after the waiver. This would be particularly so where, as here, there was no other evidence of guilt presented between the time the original motion for a directed verdict should have been renewed and the time the motion for judgment notwithstanding the verdict was filed.[1]

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[1] But then, there is something illogical about the entire process of challenging the sufficiency of the evidence of guilt as that process exists now. As we have pointed out above, where an accused moves for a directed verdict at the conclusion of the State's case - in - chief, and then presents his own case, the motion is waived. So far, so good. But it does not seem to make much sense to say that, where the defense renews its motion at the conclusion of all of the evidence, the waiver of the original motion somehow disappears, the trial court to consider the all of the evidence in the case. Why say that the original motion is waived only later to say that it is not? This is a peculiar thing since, if the State's evidence is insufficient, that fact will or should be apparent at the time of the first motion for a directed verdict. Evidence produced by the defense subsequent to the original motion for a directed verdict may and often does conflict with the State's evidence, but the fact of conflict in the evidence hardly means that the accused is entitled to a directed verdict, only a jury verdict. In any event, nothing the defense could produce in the way of evidence could effectively strike evidence of guilt previously produced by the State. Why a trial court should consider anew the question of the sufficiency of the State's evidence, which issue has been in any event waived by the production of defense evidence, has never, to our knowledge, been explained.

Even more curious is the motion for judgment notwithstanding the verdict, a superfluous motion if ever there has been one, something to the body of the law akin to the appendix in a human body. It would not seem to add a single thing of procedural or substantive significance to the question of whether the evidence was sufficient. It may not allege specific grounds not earlier raised; there is no evidence for it to address that would not have been addressed in the renewed motion. But, notwithstanding what to us appears to be a peculiar process for challenging the sufficiency of the evidence, it does seem clear that it is the renewed motion for a directed verdict that is the essential motion, where an accused has presented his own case, and not the motion for judgment notwithstanding the verdict. The entire function of a motion for a directed verdict is to direct a verdict of acquittal.

In addition to having waived the sufficiency of the evidence claim generally, the Appellant also waived his specific claim that the State failed to produce sufficient evidence on the "heat of passion" element of this form of manslaughter. This is because he never raised it until the motion for judgment notwithstanding the verdict. As we have said above, the appellate courts have held that the failure to allege in particular where the State's proof is not sufficient amounts to a waiver of the allegations.

The trial court did not err in overruling the motion for a directed verdict made at the conclusion of the State's case - in - chief. The Appellant did not assert any specific ground for that relief. Once the defense presented a case - in - chief, it waived its allegation that the State's evidence, at the conclusion of the State's case - in - chief, was insufficient. Because it did not renew the motion for a directed verdict at the conclusion of all of the evidence, the defense waived any complaint about the sufficiency of the evidence. *Page v. State*, 990 So.2d 760 (Miss 2008).

Assuming for argument that the First Assignment of Error is before the Court, we adopt the trial court's detailed "Findings of Fact" and "Conclusions" (R. Vol. 2, pp. 170 - 180) and the trial court's ruling from the bench (R. Vol. 3, pp. 131 - 148) as our response to the Appellant's First Assignment of Error. The Appellant killed his father "out of emotion," this "emotion" having been provoked by the Appellant's belief that his father considered him a sexual deviant. The defense was not to the effect that the Appellant was not in the heat of passion, as that phrase is defined in this State's law, but that the Appellant was legally insane at the time. There was but one issue in the case at bar, as the stipulations demonstrate, and that issue was the Appellant's

sanity.

The First Assignment of Error is without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN FINDING THAT THE APPELLANT DID NOT MEET THE *M'NAGHTEN* STANDARD

Where an issue regarding an accused's sanity at the time he committed a criminal act arises, the analysis availed of in Mississippi to resolve the issue is the *M'Naghten*[2] standard. This standard was set out recently by this Court in *Clemons v. State*, 952 So.2d 314 (Miss Ct. App. 2007):

> In Mississippi, the question of whether a defendant in a criminal case was insane at the time of the offense is controlled by the *M'Naghten* test. *Woodham v. State,* 800 So.2d 1148, 1158 (Miss.2001). Under the *M'Naghten* test, it must be proved that at the time of committing the act the defendant "was laboring under such defect of reason from disease of the mind as (1) not to know the nature and quality of the act he was doing or (2) if he did know it, that he did not know that what he was doing was wrong." *Id.* The inquiry under this test is whether the defendant "did not know right from wrong at the time of committing the act." *Id.* It is presumed that the defendant is sane until there is a reasonable doubt regarding his or her sanity. *Taylor v. State,* 795 So.2d 512, 517 (Miss.2001). When such doubt is raised, the State bears the burden of proving the defendant's sanity beyond a reasonable doubt. *Id.*

Clemons, at 317.

The Appellant presented testimony to the effect that he had for many years suffered from Asperger's syndrome, a high - functioning form of autism. He had also been treated for symptoms associated with anxiety, attention deficit disorder and depression. He had been treated with various medications for these afflictions. The Appellant was not thought, prior to his shooting his father, to be a danger to himself or others. Asperger's syndrome is not a form of psychosis, though some of its sufferers are more at risk at having psychotic episodes.

The Appellant was irritable and suffered from insomnia in the week prior to the shooting.

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[2] *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

His medication was changed, and within twenty - four hours he shot his father.

The Appellant's psychiatrist visited the Appellant while the Appellant was in jail. The Appellant was confused and was having hallucinations. The psychiatrist had never seen the Appellant in such a condition before. However, the Appellant did understand that he was in jail for having shot his father. The psychiatrist thought the Appellant grossly psychotic at the time of this visit. This meant that the Appellant was unable to distinguish between what was real and what was not real. The psychiatrist thought that the Appellant was becoming psychotic a week prior to the Appellant's father's death. The Appellant was placed on another medication.

After the Appellant was released from jail, he was immediately placed in a place known to the record as "Lakeside." He stayed there for some three months. His mental condition became improved, though the psychiatrist became of the opinion that the Appellant suffered from schizoaffective disorder. This disorder included symptoms of hallucinations and delusions.

The Appellant displayed "command hallucinations" after he killed his father. At the time he killed his father, the Appellant felt badly about his father. The Appellant felt his father thought him to be a sexual deviant. The psychiatrist thought these concerns were connected to the fact that the Appellant had been molested when he was much younger.

The psychiatrist's opinion as to whether the Appellant understood the nature and quality of his actions was that the Appellant always understood that he shot his father. However, he thought the Appellant was delusional and psychotic at the time he shot his father and that for that reason unable to understand the nature and quality of what he was doing.

The Appellant had no recurrence of delusions or hallucinations after he went to live with his mother.

The Appellant had never been diagnosed with a psychotic illness until after the shooting.

When the psychiatrist visited the Appellant in jail, the Appellant expressed remorse for having shot his father, even though he was said to be suffering from delusions and hallucinations at the time. While the Appellant was having "command hallucinations" while in jail, he did not indicate that he had such when he shot his father. This doctor had not listened to the 911 call. (R. Vol. 3, pp. 12 - 36).

Another psychiatrist was called by the defense, he having been retained for the purpose of determining the Appellant's mental status at the time of the shooting. This psychiatrist thought that the Appellant was suffering from paranoid thinking prior to the killing. The Appellant's though processes were highly confused and he was having "command hallucinations." These troubles were exacerbated by Asperger's syndrome. This psychiatrist did not think that the Appellant understood the nature and quality of his acts on the night the Appellant killed his father. The doctor had not listened to the 911 call. (R. Vol. 3, pp. 36 - 51).

A friend of the Appellant's family testified. She stated the Appellant and his father had a close relationship and that they spent a lot of time together. She saw the Appellant in jail. At that time the Appellant was talking to a wall. He asked her whether she heard the voices. The Appellant knew who she was and where he was. She saw the Appellant after he had been release from Lakeside and thought he was rather like he had been before he shot his father, only quieter and more subdued. She knew that the Appellant's father told her a week before the killing that the Appellant was having trouble sleeping and that things in the house were uneasy.

The Appellant was very sad about his father's death. He told this friend that he had been told that he had killed his father. (R. Vol. 3, pp. 51 - 60).

Two other family friends were called to testify. They testified as to the good relations between the Appellant and his father. They both testified that the Appellant's father told them

about the Appellant's inability to sleep during the week prior to the killing. (R. Vol. 3, pp. 60 - 82).

The trial court heard the taped 911 call and the statement given by the Appellant. The Appellant made the 911 call and reported that his father had a gunshot wound. The Appellant stated that he had shot his father and gave his home address. The Appellant was instructed to apply pressure to the wound, which he appeared to do. The Appellant was able to answer questions from the dispatcher and his father and he followed the instructions given to him. (R. Vol. 1, pg. 140).

During the interview with law enforcement, the Appellant cried when he was told that his father was dead. He admitted having shot his father. The Appellant was concerned about having an attorney, and he was concerned about an audio tape recorder. The Appellant stated that he was having problems with insomnia. He reported that someone had given him "truth serum." The Appellant told the officers that he was tired, upset with himself and sad and that he did not know what he did. The officers, noting the Appellant concern with the tape recorder, told him that such concern indicated to them that he was conscious of what he was saying and was thinking through what he was going to say. (R. Vol. 1, pp. 141 - 143).

The Appellant had several books on forensics and crime scenes in his bedroom. One book was particularly significant since the detective who saw them had the same book in his office. (R. Vol. 3, pp. 82 - 93).

The State then presented the testimony of a clinical psychologist. He stated that he had reviewed the Appellant's psychiatric records and evaluations, the Appellant's statement to the sheriff's department, the 911 transcript and the records from the mental institution the Appellant was placed in. He also personally evaluated the Appellant. It was the opinion of the

psychologist that the Appellant was aware of the nature and quality of his actions when he shot his father. The Appellant had indicated to the psychologist that he did get his gun and then entered his father's room and did shoot his father. The Appellant was familiar with guns. The transcript of the 911 call clearly indicated that he knew what was going on: the Appellant was upset and disturbed by his actions. The tape of the interview at the sheriff's department further indicated that the Appellant knew what he had done and knew what he had done was wrong.

The Appellant did not assume that he was doing something other than shooting his father. The psychologist did believe that the Appellant was mentally ill at the time, but not so ill as to be unable to know the nature and quality of his actions. The psychologist thought that the Appellant was obsessed with the idea that he had been accused of being a sexual deviant or a sociopath. Those afflicted with Asperger's syndrome tend toward obsessive thinking, sometimes to the extent that it seem psychotic or manic. The psychologist stated that it might have been that the Appellant having command hallucinations prior to killing his father, but, if so, it was his view that they would support the insanity defense if the hallucination was that his father was about to kill him, and thus acted in self - defense. The psychologist stated that the defense experts failed to explain how the Appellant did not know that he had a gun and did not know that he had shot his father. (R. Vol. 3, pp. 93 - 122).

There was a conflict in the testimony as to whether the Appellant appreciated the nature and quality of his acts at the time he shot his father. However, in addition to the testimony on behalf of the State to the effect that the Appellant did appreciate the nature and quality of his acts, there were the statements made by the Appellant just after he shot his father while the Appellant was in touch with emergency services. The Appellant was quite conscious of what he had just done. His conversation with the 911 dispatcher was lucid. That the Appellant was

conscious that his acts were wrong were established in that same conversation: The Appellant was crying, and it was obvious that he understood what he had done and that what he had done was wrong. The tape of his interview by law enforcement further corroborates the State's expert testimony.

As we have said above, the trial court considered the evidence and testimony concerning the Appellant's sanity exhaustively. (R. Vol. 2, pp. 170 - 180; Vol. 3, pp. 131 - 148). We adopt the trial court's reasons and conclusion here. The State's evidence was more than sufficient to create an issue of fact concerning the Appellant's sanity at the time of the shooting for the trial court to decide. Because there was substantial testimony and evidence to demonstrate the Appellant's sanity at the time he shot his father, this Court should affirm the trial court's finding. *Roundtree v. State*, 568 So.2d 1173, 1181 (Miss. 1990). The issue of an accused's sanity is an issue for the trier of fact, and the appellate courts are bound by the trier of fact's decision. *Yarbrough v. State*, 528 So.2d 1130 (Miss. 1988). Where there is conflicting evidence on the question, the finding made by the trier of fact is deserving of especial deference and respect, and is essentially unreviewable. *Taylor v. State*, 795 So.2d 512, 517 - 518 (Miss. 2001).

It is true that the Appellant suffered from mental problems. However, the fact that he was so afflicted did not of itself establish the defense of insanity. The *M'Naghten* standard is a legal standard, one that is unknown to psychiatry. *Roundtree, supra*, at 1180. The question to be resolved was not resolved solely by evidence that the Appellant suffered from one or more mental afflictions; the question to be resolved was whether he knew the nature and quality of his acts or, if he did so, whether he knew what he was doing was wrong. There was much evidence to show that the Appellant knew what he had done and knew that what he had done was wrong. He was crying during the 911 call; he admitted that he had shot his father. He was remorseful.

Expressions of remorse are particularly probative on this question. *Frost v. State*, 453 So.2d 695, 698 (Miss1984).

The Second Assignment of Error is without merit.

3. THAT THE THIRD ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT

In the Third Assignment of Error, the Appellant urges the Court to abandon the *M'Naughten* standard, if not altogether then under the facts of the case at bar. He does not, however, suggest what standard ought to be used in place of the *M'Naghten* standard.

The Appellant never raised this issue in the trial court so far as we can find. That being so, it is not properly before this Court. A trial court may not be put in error on an issue never presented to it. *Logan v. State*, 773 So.2d 338, 346 (Miss. 2000).

Even assuming for argument that the issue is before the Court, the Mississippi Supreme Court has rejected invitations to abandon the *M'Naghten* standard. *Westbrook v. State*, 658 So.2d 847, 850 (Miss. 1995). In *Westbrook*, the appellant there sought instructions on "uncontrollable urges or impulse," which instructions were refused by the trial court. This sounds much like what the Appellant is arguing here, though he did not present to the trial court what legal standard he thought should have been availed of in place of *M'Naghten*. As the Court in *Westbrook* rejected the attack on the *M'Naghten* standard, so should this Court. In any event, whether *M'Naghten* should be abandoned is a matter for the Supreme Court to consider.

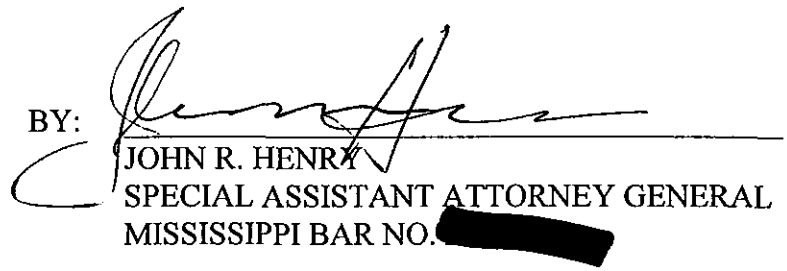
The Third Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

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

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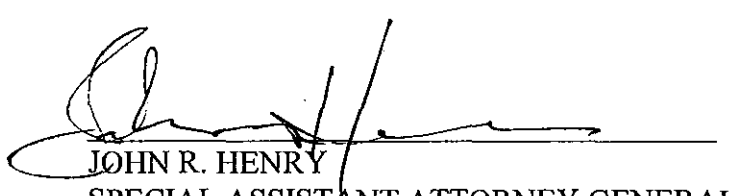
This the 29th day of January, 2009.



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