IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENYOUNG FAIR — APPELLANT

VS. — NO. 2008-KA-0767-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The grand jury of Choctaw County indicted defendant, Ken Young Fair with Murder in violation of *Miss. Code Ann.* § 97-3-19. (Indictment, cp.4). After a trial by jury, Judge C. E. Morgan, III, presiding, the jury found defendant guilty of Murder. (C.p.60). Defendant was sentenced to LIFE in the custody of Mississippi Department of Corrections. (Judgement & Sentence order, cp. 64).

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

The statement of facts presented by counsel for defendant is quite adequate and nicely cites relevant facts in the record.

SUMMARY OF THE ARGUMENT

I.

THIS ISSUE IS PROCEDURALLY BARRED AND ALTERNATIVELY WITHOUT MERIT IN FACT AND LAW.

The legal theory of 'imperfect self-defense' was never presented or argued to the trial court for a ruling. Consequently, such an issue raised on appeal is procedurally barred from review. Alternatively, defendant was not entitled to a heat of passion manslaughter instruction since he armed himself before going to the scene.

II.

THE JURY WAS ADEQUATELY INSTRUCTED ON DELIBERATE DESIGN AND THE TRIAL COURT DID NOT ERR IN DENYING PROFFERED INSTRUCTION D-5.

The jury was adequately instructed on the elements by the court's and the State's instructions.

III.

DEFENDANT WAS NOT ENTITLED TO A 'HEAT OF PASSION' MANSLAUGHTER INSTRUCTION.

There was no evidence supporting a heat of passion jury instruction.

ARGUMENT

I.

THIS ISSUE IS PROCEDURALLY BARRED AND ALTERNATIVELY WITHOUT MERIT IN FACT AND LAW.

In this initial allegation of error defendant asserts he was denied an instruction which would have given the jury a chance to find him guilty of manslaughter based upon a theory of imperfect self-defense.

The problem is, this is the first time that idea has been brought to the attention of anyone. It wasn't mentioned at trial, in discussion for jury instructions, during voir dire or presented to the judge. This is totally new and as such is procedurally barred as not having been presented to the trial court for consideration.

> ¶ 12. . . . We note at the outset that Neese does not mention the Weathersby rule in his posttrial motion. It is well established that "questions will not be decided upon appeal which were not presented to the trial court and that court given an opportunity to rule on them...." Fleming v. State, 604 So.2d 280, 293 (Miss.1992) (quoting Colburn v. State, 431 So.2d 1111, 1113-14 (Miss.1983)). Thus, this issue is procedurally barred for failure to present it to the trial court.

Neese v. State, 2008 WL 4560221 (Miss.App. 2008).

Just as in *Neese*, there is no mention of 'imperfect self-defense' in the motion for new trial. Accordingly, this issue is procedurally barred.

Without waiving any procedural bar to review this issue is, alternatively, without merit in fact and law.

¶24. Further, imperfect self-defense is where "an intentional killing may

be considered manslaughter if done without malice but under a bona fide (but unfounded) belief that it was necessary to prevent death or great bodily harm." Smiley v. State, 815 So.2d 1140, 1146(¶ 22) (Miss.2002) (quoting Wade v. State, 748 So.2d 771, 775(¶ 12) (Miss.1999)).

¶ 25. Therefore, there must be evidence present in the record that would have supported a manslaughter instruction if Beale's contention that the trial court improperly denied the instruction is to be found meritorious. Under the facts presented in the record, Beale admitted kicking in the door to Taylor's apartment. Beale also admitted to hitting Taylor in the head with a nine-millimeter gun upon entering her home, knocking her unconscious for a short period of time. After knocking Taylor unconscious, Beale admitted to spotting Thomas in the bedroom, but he claimed that Thomas pulled a gun on him, forcing him to resort to self-defense by shooting Thomas. However, the gun Thomas was alleged to have brandished was never presented at trial. Beale claimed that he threw out the gun while driving to his uncle's home after the shooting. Further, Beale testified at trial that when he entered the apartment he only had intentions of talking to Taylor. There was no evidence presented that words were exchanged between Taylor and Beale once Beale entered the home. Testimony established that Beale hit Taylor very quickly upon entering her home. Under these facts, this Court cannot say the trial court erred in failing to grant a heat-of-passion or an imperfect self-defense manslaughter instruction. Therefore, we affirm the trial court's denial of the manslaughter instructions.

Beale v. State, 2008 WL 4140084 (Miss.App. 2008).

Defendant Fair went to the scene armed and sat rather detached in the confines of the car. This is quite similar to the scenario of *Beale* where defendant went to the scene armed and killed someone. This case, too is not an imperfect self-defense.

Therefore, not only is this issue procedurally barred it is alternatively without merit in fact and law. No relief should be granted on this allegation of trial court

error.

II.

THE JURY WAS ADEQUATELY INSTRUCTED ON DELIBERATE DESIGN AND THE TRIAL COURT DID NOT ERR IN DENYING PROFFERED INSTRUCTION D-5.

Defendant next avers the trial court erred in denying proffered instruction D-5 (c.p. 59). A close reading of the discussion when proffered would lend one to believe the trial court didn't grant the instruction because it was already adequately covered by the State's instruction on deliberate design. Tr. 260-61.

> "[T]he trial court is not required to grant several instructions on the same question in different verbiage." Sproles, 815 So.2d at 454(¶ 9) (citing Ragan v. State, 318 So.2d 879, 882 (Miss.1975)).

Dobbs v. State, 936 So.2d 322, 324 (Miss. 2006).

The State's instruction (c.p. 47 & 48), coupled with the court's instruction at c.p. 46, adequately covered the distinctions between 'malice aforethought' and 'deliberate design' and self-defense. The jury was clearly and succinctly instructed on the law and the proffered instruction D-5 was repetitive and unnecessary. There was no error in the trial court's denial of the instruction.

No relief should be granted on this allegation of error.

III.

DEFENDANT WAS NOT ENTITLED TO A 'HEAT OF PASSION' MANSLAUGHTER INSTRUCTION.

Defendant lastly argues he was entitled to a 'heat of passion ' instruction as a matter of law. Interestingly, he would be entitled to such if there were evidence to support such an instruction. Telling is the fact that none are cited in this allegation of error.

It is actually quite horrifying to read the transcript and reasonable inferences therefrom. *Johnson v. State*, 956 So.2d 358 (¶14)(Miss.App. 2007). These young men (and they were very young) fourteen years old and in the 6th grade, armed with multiple weapons essentially roamed the streets in search of their targets. The defendant, sat in the auto and while words, mere words were exchanged he made sure he got the last, and ultimate say so. He shot, blindly (he says), three times into a group of people, killing one, injuring more.

To be sure and without equivocation a 'heat of passion' instruction is not, should not, and as quite correctly NOT granted. There was no evidence, none. In point of fact, all of defendant's own testimony was slanted to self-defense. There was no mention of anger, emotion or heat of passion.

Or, as the jury found, murder. Calculated. Deliberate.

The trial judge was correct. No relief should be granted based on this

allegation of error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal and exhibits, the State would ask this reviewing court to affirm the verdict of the jury and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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 4th day of December, 2008.

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