IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-KA-00767-COA

KENYOUNG FAIR — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Kenyoung Fair

THIS 10th day of September, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Kenyoung Fair

By: George T. Holmes

George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Choctaw County, Mississippi where Kenyoung Fair was convicted of murder in a jury trial held February 20-21, 2008, with Honorable C. E. Morgan, III, Circuit Judge, presiding. Fair was sentenced to life imprisonment and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Some time near the middle of July 2007, the appellant, fourteen year old Kenyoung Fair, and his friend Darnell Moore, both from Weir, were in Ackerman, when they were accosted by several Ackerman teens for no reason other than they were from out of town. [T. 160-61, 167, 169-72, 174, 199-200, 218, 223-24, 227-28]. Kenyoung and Darnell

were bruised up from the fight. [T. 171]. About a week later there was some evidence of another confrontation. [T. 150, 163, 210].

In the afternoon of July 28, 2007, about a week after the second confrontation, some of the teenagers in Ackerman "got word" that the fellows from Weir were headed Ackerman. [T. 145, 164, 181-90, 215]. Through the grapevine, a group of a bout 12 to 15 Ackerman teens gathered, of all places, in front of the Friendship M B. Church on the corner of Magee and Pickle Avenues, in Ackerman. [T. 146-48, 204, 219]. This area was referred to as Millwood by the local witnesses. *Id.*

The Ackerman mob was ready to fight, and within a few minutes a green Ford Taurus drove up and stopped. [T. 146-47, 151-56, 159-61, 172-76, 198-99, 204, 208, 230-31]. As soon as the Taurus stopped, the Ackerman group approached the driver's side. *Id.*

Kenyoung, and Darnell were in the green Ford Taurus which belong to Darnell, but was being driven by another friend Samuel Lee Dotson, Jr. [T. 172, 198, 230]. Kenyoung was the front passenger, and Darnell was in the back seat. [T. 172]. They were headed to Starkville from Weir. [T. 198-200]. Before getting on the road, Sam, who had been in Ackerman but who lived in Starkville, picked up a shotgun and pistol and put them in the car. [T. 172, 176, 198, 232]. Sam said he was taking the guns back home to Starkville. [T. 201]. According to Sam, Darnell and Kenyoung, there was no plan or intention of confronting the Ackerman teens. [T. 200, 203-04, 231]. Sam said he went to

Ackerman to pick someone up for a ride, but when they went past the Friendship M. B. Church, there was a crowd blocking the road, so he pulled over. *Id.*

There were confrontational words exchanged between Samuel Dotson and the Ackerman mob, quoted by the witnesses with little variance that went something like this: by the occupants of the Taurus, "We heard ya'll were looking for us." [T. 147, 159-61, 172-76, 182-84, 198-99, 204, 208, 230-31]. The Ackerman kids, Gerrodd Edwards, in particular, responded, "Get out of the car, we gonna whip ya'll's ass." *Id.* After seeing the shotgun in the Taurus, somebody, said "Dude's got a heater." *Id.* State witness Samuel Dotson said one of the Ackerman kids reached for the driver's door of the Taurus, then three or found shots from a saw-off shotgun came from inside the Taurus. *Id.*

Gerrodd Edwards took a direct hit in the back absorbing 36 number 4 buckshot pellets distributed throughout his body perforating several major organs. [T. 119, 127, 143]. Two other Ackerman teens were grazed, but uninjured. [T. 224]. Gerrodd was taken to the local hospital and eventually to a hospital in Memphis where he died about a week later on August 6, 2007, from infection and pneumonia. [T. 73-74, 119, 138-39].

Everyone agreed that Kenyoung Fair was the shooter and pointed the shotgun across the car out the driver's side where the Ackerman crew had gathered exchanging the threats and boasts with Sam the driver of the green Taurus. [T. 146-47, 159, 175, 183, 236]. Kenyoung said he thought he saw someone reaching under their shirt or in their

pants for a weapon, and since he did not want to get shot or beat up again, he yelled "get back" and shot three times, not at anyone in particular, "I was just shooting out the window" to get them to "get back" he said. [T. 231, 233-34, 236-37].

SUMMARY OF THE ARGUMENT

This was a case of manslaughter, not murder. The jury was not fully instructed on manslaughter.

ARGUMENT

ISSUE NO. 1: WHETHER THE VERDICT OF GUILTY OF MURDER, AS OPPOSED TO MANSLAUGHTER, IS SUPPORTED BY THE EVIDENCE?

Kenyoung Fair's motion for JNOV for a manslaughter verdict notwithstanding the murder conviction should have been granted based on the theory of "imperfect self-defense" as set out in *Wade v. State*, 748 So. 2d 771, 773-76 (Miss.1999). In *Wade*, the defendant was charged with killing her boyfriend with whom she was in business as co-owners of a bar. As in the present case, in *Wade*, there was testimony of previous violence. Wade's boyfriend had been physically abusive to her. *Id.*

Here the Ackerman kids had attacked Kenyoung Fair and Darnell Moore twice, when they were outnumbered. [T. 160-61, 167, 169-72, 174, 199-200, 218, 223-24, 227-28]. On the day of the shooting here, they were outnumbered again. [T. 146-48, 198-99,

204, 219].

On the day of the killing in *Wade*, the boyfriend became abusive, Wade went and retrieved a gun and said, "You ain't gonna hit me no more", the boyfriend moved toward Wade and she shot him. In the present case, the Ackerman mob made verbal threats, coupled with aggressive gestures, including, reaching for the door of the Taurus and putting their hands under their clothes as if to retrieve a weapon. [T. 156, 159, 166, 198-99, 221, 233-34].

In *Wade,* the Supreme Court stated that Wade was angered by "what appeared to be a renewed attack", and so Wade's case "clearly was a killing in the heat of passion and arguably a case of imperfect self defense, and as such, manslaughter was the appropriate verdict. 748 So. 2d at 773.

The important conclusion of the court in *Wade* was that there was insufficient evidence of "malicious intent"; and, the same can be said of Kenyoung Fair's situation, as any "ill will", was engendered by past physical attacks, and by what appeared to be a new attack by the Ackerman clan. *Id.* at 774. The similarities between *Wade* and present facts require the same result here.

The Supreme Court described the theory of "imperfect self-defense" reducing murder to manslaughter as "an intentional killing ... done without malice but under a bona fide (but unfounded) belief that it was necessary to prevent great bodily harm." *Id.* at 775. See also *Lanier v. State*, 684 So. 2d 93, 97 (Miss.1996). This language in definitely "on

all fours" here.

Under this issue, the Court is asked to grant a new trial or to reduce Kenyoung Fair's conviction to manslaughter as defined in MCA §§ 97-3-31 (unnecessary killing while resisting unlawful act), or 97-3-35 (heat of passion), or 97-3-47 (culpable negligence) (1972). In this case, all of the evidence shows that Kenyoung Fair acted on impulse without any premeditation whatsoever.

"Ordinarily, whether such a slaying is indeed murder or manslaughter is a question for the jury." *Windham v. State*, 520 So. 2d 123, 127 (Miss. 1988). However, the Supreme Court has reversed jury verdicts of murder on more than one occasion remanding for sentencing only for manslaughter, including *Williams v. State*, 729 So. 2d 1181,1186 (Miss. 1998).

In *Dedeaux v. State*, 630 So. 2d 30, 31-33, (Miss. 1993) the court reviewed the facts of a barroom shooting where the Defendant was charged and convicted of murder for shooting his girlfriend's husband. Similar to this case, there was ongoing animosity. *Id.* The defendant Dedeaux shot the victim three times, twice while the victim was moving toward him, and a third time as the victim lay on the ground. *Id.*

Even though the defense did not request a manslaughter instruction in the *Dedeaux* case, the Supreme Court found that the facts only supported a conviction for manslaughter because "this clearly was a killing in the heat of passion" even though a "greater amount of force than necessary under the circumstances" was used. *Id.* The

Dedeaux court reversed the murder conviction and remanded the case for re-sentencing for the crime of manslaughter. 630 So. 2d 31-33.

In *Tait v. State*, 669 So. 2d 85, 86-88 (Miss. 1996), the defendant was indicted for depraved heart murder and convicted. He appealed on weight and sufficiency and that the conviction should have been manslaughter by culpable negligence. Several young men were joking and horesplaying with a gun. The defendant put the gun to the victim's head and it went off. The Supreme Court ruled that the only proper verdict supported by the evidence was for manslaughter by culpable negligence. *Id.* at p 90. The *Tait* facts are analogous here in that there was no evidence of premeditation. In *Tait* there was horseplay, here there was previous physical violence and the appearance of renewed animosity.

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED IN REFUSING REQUESTED JURY INSTRUCTION D-5?

Kenyoung Fair admitted pulling the trigger on the shotgun blasts that ultimately killed Gerrodd Edwards. The state's theory was that the killing was either deliberate design or depraved heart murder. Fair's defense was that the homicide was manslaughter, not murder.

The trial court here made a preemptive ruling that a heat-of-passion manslaughter instruction was not going to be given. [T. 260-61]. However, a culpable negligence instruction manslaughter instruction, D-7,was granted. [R. 54; T. 264].

To inform the jury as to the difference between deliberate design murder and culpable negligence, Fair requested instruction D-5, which was refused:

> The Court instructs the jury that while malice aforethought is a necessary element of the crime of murder, it does not follow therefrom that the existence of actual malice at the time of the slaying would necessarily have the effect of rendering a particular homicide a case of murder. A person may be guilty only of manslaughter or justifiable homicide when slaying another even though the accused is mad is bearing ill will toward his adversary at the time of the killing, if the act is done while resisting an attempt of the latter to do any unlawful act, or after such attempt shall have failed, if such anger or ill will in engendered by the particular circumstances of the unlawful act then being attempted, or the commission of which is thwarted, and in non-existent prior thereto. To constitute murder, the malice must precede the unlawful act which is being attempted or committed by the person killed, where the killing is done in resisting his attempt to do an [un]lawful act. [R. 59, T. 260-61].

It is the appellant's position that D-5, being an accurate statement of the law and having an evidentiary foundation, was a proper and necessary instruction. As will be shown, it was reversible error not to grant a heat of passion instruction as well as D-5.

In *Russell v. State*, 789 So. 2d 779, 780 (Miss. 2001), the Supreme Court reversed a murder conviction, where a manslaughter instruction was given, but the jury was not adequately instructed as to the definition of malice aforethought with an instruction similar to D-5 here.

In *Williams v. State*, 729 So. 2d 1181,1186 (Miss. 1998), the Court reiterated that "it is possible for a deliberate design to exist and the slaying nevertheless be no greater than manslaughter." In *Williams*, the defendant had joined with several other defendants

in the beating death of the victim for no apparent reason and Williams was convicted of murder, the Supreme Court reversed on grant of certiorari, in part, because the trial court failed when requested to instruct the jury on differentiating between malice aforethought and deliberate design in an instruction similar to D-5 here. *Id.*

Under both *Russell* and *Williams*, supra, the learned trial court should have granted D-5, and not to do so was reversible error.

ISSUE NO. 3: WHETHER IT WAS ERROR FOR THE TRIAL COURT TO PREEMPTIVELY DENY A HEAT OF PASSION MANSLAUGHTER INSTRUCTION?

It is axiomatic that a defendant is entitled to have his or her jury fully and properly instructed on theories of defense for which there is a factual basis in evidence. *Green v. State*, 884 So. 2d 733, 735-38 (Miss. 2004). *Windham v. State*, 520 So. 2d 123, 127 (Miss. 1988). "[I]f there is any evidence which would support a conviction of manslaughter, an instruction on manslaughter should be given." *Graham v. State*, 582 So.2d 1014, 1018 (Miss. 1991). *Roberts v. State,* 458 So.2d 719, 720 (Miss.1984).

The Mississippi Supreme Court has defined "heat of passion" as:

> ... a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror. *Mullins v. State*, 493 So. 2d 971, 974 (Miss. 1986).

> A person may form an intent to kill from a sudden passion induced by insult, provocation or injury from another. In that moment of passion, while still enraged, if he slays the other person , the homicide may be manslaughter, even though it is not in necessary self-defense, depending upon the insult, provocation or injury causing the anger. Ordinarily, whether such a slaying is indeed murder or manslaughter is a question for the jury. *Windham v. State*, 520 So. 2d 123, 127 (MS 1988).

The law of what is manslaughter in Mississippi has been consistently characterized as "liberal" and the courts have made "considerable allowance for the frailties of human passion." *Id.*.

> In determining whether a lesser included instruction is required, the trial court must look at "the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence..." *Graham v. State*, 582 So. 2d 1014, 1017 (Miss. 1991) citing *Gates v. State*, 484 So. 2d 1002, 1004 (Miss. 1986).

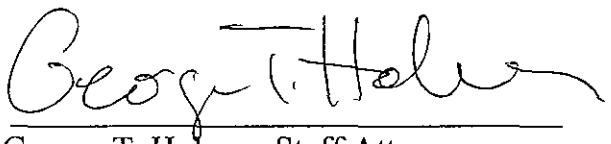
Applying the above law to the testimony and evidence in this case, Kenyoung Fair was indeed entitled to a heat of passion manslaughter instruction as a matter of law, and the trial court erred reversibly by preemptively refusing the same.

CONCLUSION

Kenyoung Fair is entitled to have his convictions reversed with remand for a new trial, or to a reversal and rendering of manslaughter with resentencing.

Respectfully submitted,

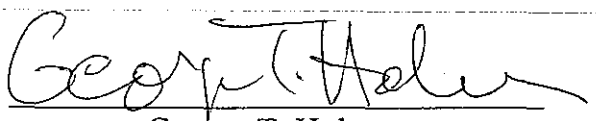
MISSISSIPPI OFFICE OF
INDIGENT APPEALS
For Kenyoung Fair, Appellant

By: 
George T. Holmes, Staff Attorney

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. 2565
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 10th day of September, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. C. E. Morgan, III, Circuit Judge, P. O. Box 721, Kosciusko MS 39090, and to Hon. Mike Howie , Asst. Dist. Atty., P. O. Box 1262, Grenada MS 38902, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.


George T. Holmes