IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MIGUEL ANGEL SOLORZANO BARTOLO — APPELLANT

V. — NO. 2008-KA-0773-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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V. **NO. 2008-KA-0773-COA**

STATE OF MISSISSIPPI **APPELLEE**

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. Miguel Angel Solorzano Bartolo, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Roger T. Clark, Circuit Court Judge

This the 8 day of September, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE CASE

On October 2, 2006, Miguel Angel Solorazano Bartolo (Bartolo) was indicted by a Harrison County Circuit Court grand jury for the crimes of felony theft of telecommunication services in violation of Mississippi Code Annotated section 97-25-54(6)(a) (Rev. 2005) and murder in violation of Mississippi Code Annotated section 97-3-19(1)(a). (C.P. 10-11). After a two day trial, the jury found Bartolo guilty on both counts. (C.P. 96-97, Tr. 342). The trial court sentenced him to serve ten (10) years for felony theft of telecommunication services and life for murder, the sentences to run concurrently. (C.P. 98-99, Tr. 345). The trial court denied Bartolo's motion for new trial and judgment notwithstanding the verdict (JNOV). (C.P. 101-04). Bartolo is presently incarcerated

under the supervision of the Mississippi Department of Corrections.

STATEMENT OF THE FACTS

On February 17, 2006, Christy Ayala met some friends at "Club IP" at the Imperial Palace Casino in Biloxi, Mississippi. (Tr. 171-72). The following morning, Ayala's body was found floating in the bay behind the casino. (Tr. 160-61). The investigation focused on Bartolo after investigators from the Biloxi Police Department (BPD) received information that Bartolo was using Ayala's cellular phone. (Tr. 189-91, 202-04). By tracking Ayala's cellular phone use, police officers located and arrested Bartolo in an apartment in Houston, Texas on February 28, 2006; Bartolo had Ayala's cellular phone on his person at the time of the arrest. (Tr. 207-08, 248-49).

Upon his arrest, Bartolo was read his *Miranda* rights by Officer Richard Moreno of the Houston Police Department. (Tr. 21). However, when Officer Moreno finished reading right "number one," Bartolo told him that he did not understand what he was being told. (Tr. 21). After Officer Moreno re-explained Bartolo's rights "in a more simpler definition," Bartolo said that he understood them. (Tr. 22-23). However, Officer Moreno admitted: "[I] don't believe that he could read the Miranda." (Tr. 29).

The following day, officers from the Houston Police Department, as well as an officer with the BPD, took a statement from Bartolo. (Tr. 207, 256-57). Prior to the interview, Detective Jesus Sosa of the Houston Police Department read Bartolo his Miranda rights. (Tr. 33). After Detective Sosa read right "number one" (the right to remain silent), Bartolo said that he did not understand. (Tr. 33). Detective Sosa then re-read the rights one by one, and Bartolo told him that he understood them. (Tr. 33). In his statement, Bartolo said that Ayala punched him in the stomach and began choking him because he would not have sex with her; whereupon, he choked her until she "fainted" and threw her in the bay. (Ex. S-9).

Dr. Paul McGary performed an autopsy on Ayala's body. (Tr. 277). He testified that the cause of death was "a combination of a violent struggle with strangulation and immersion [or drowning], all occurring close together." (Tr. 286). At the conclusion of trial, the jury found Bartolo guilty on both counts. (C.P. 96-97, Tr. 342). Additional facts are provided where relevant in the discussion below.

SUMMARY OF THE ARGUMENT

The State presented insufficient evidence to prove that Bartolo was guilty of felony theft of telecommunication services which, under Mississippi Code Annotated section 97-25-54(6)(a), requires proof that the defendant unlawfully diverted *fifty dollars ($50) or more* of services to his or her own use. While the State offered evidence that Bartolo *used* Ayala's cellular phone, it failed to establish beyond a reasonable doubt the value of the services that Bartolo allegedly diverted to his own use. Therefore, Bartolo was guilty, at most, of misdemeanor theft of telecommunication services which, under section 97-25-54(6)(a), requires proof that the defendant unlawfully diverted *less than* fifty dollars ($50) of services to his own use. Accordingly, the trial court erred in denying Bartolo's motion for JNOV, and this Court should reverse Bartolo's conviction and sentence for felony theft of telecommunication services.

Additionally, the trial court erred in denying Bartolo's motion to suppress statements, as Bartolo's confession was not made knowingly and intelligently. Bartolo is a Mexican national, with the equivalent of an elementary school education, who on two separate occasions stated that he did not understand what was being read to him after the police read *Miranda* right "number one"- the right to remain silent. (Tr. 21-23, 28, 33). While Bartolo ultimately indicated that he understood the warnings that were read to him (in Spanish), a reasonable doubt exists as to whether he did so knowingly and intelligently, i.e., with "full awareness both of the nature of the right[s] being

abandoned and the consequences of the decision to abandon [them]." *Chim v. State*, 972 So. 2d 601, 603 (¶8) (Miss. 2008) (citing *Coverson v. State*, 617 So.2d 642, 647 (Miss.1993)). In the absence of Bartolo's confession, the evidence is insufficient to support a conviction. Accordingly, Bartolo this Court should enter a judgment of acquittal or, in the alternative grant a new trial.

Finally, the State presented insufficient evidence to support Bartolo's conviction for murder. Bartolo was the only eyewitness to Ayala's death. Therefore, his version of the incident must be accepted as true under *Weathersby v. State*, 165 Miss. 207, 147 So. 481, 482 (1933). Under Bartolo's version of the incident, he could only be guilty of manslaughter based on the theory of imperfect self-defense. Accordingly, this Court should reverse Bartolo's conviction for murder and remand for re-sentencing for manslaughter under "the direct remand rule" as pronounced in *Wade v. State*, 748 So. 2d 771, 777 (¶20) (Miss. 1999).

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT BARTOLO'S CONVICTION FOR FELONY THEFT OF TELECOMMUNICATION SERVICES.

In reviewing the sufficiency of the evidence, the relevant inquiry is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will not be disturbed where the evidence so reviewed is such that "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense." *Id.* (citing *Edwards v. State*, 469 So. 2d 68, 70 (Miss.1985)). However, the proper remedy is to reverse and render where the evidence "point[s] in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt

that the defendant was guilty[.]" *Id.*

Bartolo was convicted of felony theft of telecommunication services under Mississippi Code Annotated section 97-25-54(6)(a), which provides:

> A person shall be guilty of theft of telecommunications services if, having control over the disposition of services of others to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto. Theft of telecommunications services when the value of the services obtained or diverted is less than Fifty Dollars ($50.00) shall be a misdemeanor. *Theft of telecommunications services when the value of the services obtained or diverted is Fifty Dollars ($50.00) or more shall be a felony and shall be punished by a fine not to exceed Ten Thousand Dollars ($10,000.00), or commitment to the custody of the State Department of Corrections for a period not to exceed ten (10) years, or both.*

Miss. Code Ann. § 97-25-54(6)(a) (Rev. 2006) (emphasis added). Thus, an essential element of felony theft of telecommunication services is that the defendant diverted *fifty dollars ($50) or more* of services to his own use. In the instant case, the State presented insufficient evidence to establish that the value of the services Bartolo diverted to his own use amounted to fifty dollars ($50) or more.

A. THE TRIAL COURT ERRED IN ADMITTING AYALA'S UNAUTHENTICATED CELLULAR PHONE RECORDS, WHICH WAS THE ONLY EVIDENCE RELATING TO THE VALUE OF THE TELECOMMUNICATION SERVICES THAT BARTOLO ALLEGEDLY STOLE.

This Court reviews the admission or exclusion of evidence under the abuse of discretion standard of review. *Smith v. State*, 984 So.2d 295, 299 (¶5) (Miss. Ct. App. 2007). Additionally, an error in admitting evidence will not be reversed unless it "adversely affects a substantial right of a party." *Id.*

During the it's case in chief, the State was allowed, over objection, to admit copies of Ayala's cellular phone records from Sprint under the business records exception to the hearsay rule pursuant to Mississippi Rule of Evidence 803(6). (Tr. 214-17, Ex. S-7, S-8). To authenticate these documents, the State merely asked Investigator Kimble **of the BPD** if the **Sprint documents** were

kept in the ordinary course of business. (Tr. 215). Investigator Kimble was then allowed to testify as to content of the phone records and offer her "opinion" that Bartolo diverted over fifty dollars in telecommunication services to his own use. (Tr. 217).

However, as explained below, these documents were not properly authenticated under Rule 803(6), as Investigator Kimble was not a qualified authenticating witness or sponsor of these documents, which were prepared by employees from Sprint. Furthermore, the documents were not certified (by a custodian from Sprint or other qualified witness with first-hand knowledge) and thus not self authenticating under Rule 902(11).

Missisippi Rule of Evidence 803(6) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> *(6) Records of Regularly Conducted Activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, *all as shown by the testimony of the custodian or other qualified witness or self-authenticated pursuant to Rule 902(11)*, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

M.R.E. 803(6) (emphasis added).

Rule 902(11) addresses self-authenticating documents and provides in pertinent part:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> *(11) Certified Records of Regularly Conducted Activities.*
> (A) The records of a regularly conducted activity, within the scope of Rule 803(6), about which a certificate of the custodian or other qualified witness shows (i) the first hand knowledge of that person about the making, maintenance and storage of the records; (ii) evidence that the records are authentic as required by Rule 901(a) and comply with Article X; and (iii) that the records were (a) made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) kept in the course of the regularly

> conducted activity; and (c) made by the regularly conducted activity as a regular practice. Such records are not self-authenticating if the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

M.R.E. 902(11)(a).

While Rule 803(6) does not require the testimony of "all participants who made the record," the rule does require that "testimony concerning the source of these documents is offered by an individual 'with knowledge who is acting in the course and scope of the regularly conducted activity.'" *Ferguson v. Snell*, 905 So. 2d 516, 519-20 (¶12) (Miss. 2004) (quoting *Miss. Gaming Comm'n v. Freeman*, 747 So. 2d 231, 242 (Miss. 1999); *see also* Rule 803(6) cmt ("the source of the material must be an informant with knowledge who is acting within the course of the regularly conducted activity."). In the instant case, Investigator Kimble possessed no knowledge of Sprint's record keeping practices. She worked at the Biloxi Police Department, not Sprint. Therefore, Investigator Kimble was not one acting within the course and scope of Sprint's regularly conducted activity, and her testimony could not authenticate Ayala's phone records under Rule 803(6).

Additionally, the phone records were not certified under Rule 902(11)(a) because Investigator Kimble was not a custodian or other qualified witness with first hand knowledge "about the making, maintenance and storage of the records." M.R.E. 902(11)(a). Further, the record contains no certification from a proper qualifying witness as required by Rule 902(11)(a). Although Investigator received the documents in an e-mail from a Sprint employee, the e-mail does not constitute a proper "certificate" because it lacked "a written declaration under oath or attestation subject to the penalty of perjury." M.R.E. 902(11)(b). Therefore, the phone records are not self-authenticating under Rule 902(11)(a).

In *Chisolm v. State*, this court held that business records (settlement sheets) showing the value of timber cut by the defendant were erroneously admitted through the testimony of an

investigator who had not prepared them, and the documents were not certified or self authenticating under Rule 902(11). *Chisolm v. State*, 856 So. 2d 681, 683-84 (¶¶7-9) (Miss. Ct. App. 2003). There, the Court determined that the error was harmless because the value of the timber cut was properly in evidence through other admissible means. *Id.* However, in the instant case, the phone records were the **only** evidence regarding the value of the telecommunication services that Bartolo allegedly diverted to his own use. Therefore, the error **cannot** be considered harmless.

Beyond all this, there was no testimony in the instant case that the phone records were made at or near the time of the occurrence. Consequently, the phone records were clearly inadmissible for this reason also. *See e.g., Welsh v. Mounger*, 883 So. 2d 46 (Miss. 2004); *H & E Equipment Services, LLC v. Floyd*, 959 So. 2d 578, 581 (¶10) (Miss. Ct. App. 2007).

The trial court erred glaringly in admitting the phone records based solely on Investigator Kimble's authenticating (or rather non-authenticating) testimony. Because the erroneously admitted phone records were the only evidence related to the value of the telecommunication services that Bartolo allegedly stole, the evidence is insufficient to support Bartolo's conviction for felony theft of telecommunication services, which requires proof that one stole fifty dollars or more in services. Consequently, the trial court erred in denying Bartolo's motion for JNOV, and this Court should reverse Bartolo's conviction and sentence for felony theft of telecommunication services

B. ALTERNATIVELY, IF THIS COURT FINDS NO ERROR IN ADMITTING THE UNAUTHENTICATED PHONE RECORDS, THE EVIDENCE WAS STILL INSUFFICIENT TO SUPPORT BARTOLO'S CONVICTION FOR FELONY THEFT OF TELECOMMUNICATION SERVICES AS THE STATE FAILED TO PROVE THE DOLLAR VALUE OF THE SERVICES EVEN WITH THE AID OF AYALA'S PHONE RECORDS.

At trial, Rossana Chavez, Bartolo's supervisor at the Imperial Palace casino, testified that she encountered Bartolo at work six days after the incident, and Bartolo let her aunt borrow a cellular

phone alleged to be Ayala's. (Tr. 187-90). Officers of the BPD (who were tracking the use of Ayala's phone) questioned Chavez and arranged for her to make additional phone contact with Bartolo, which she did several times. (Tr. 190-93). This evidence only establishes that Bartolo *used* Ayala's cellular phone; it does not establish the dollar value of the services diverted.

The State also introduced a list of incoming and outgoing calls that were received or made from February 17, 2006 to February 20, 2006. (Ex. S-7, Tr. 217). Although numerous calls were made during this period, there was no evidence establishing how much these calls cost. Again, this evidence only establishes that Bartolo *used* Ayala's cellular phone; it does not establish the dollar value of the services.

Finally, the State introduced a copy of an e-mail from Sprint that represented that Ayala's cellular phone bill for the billing date, February 6, 2006,[1] was $97.14. (Ex. S-8, Tr. 217). Because the billing date for the $97.14 bill precedes the dates that Bartolo allegedly used Ayala's phone, this evidence does not establish the value of services that he diverted.

On this point, Investigator Susan Kimble of the BPD testified confusingly as follows: "It says date range 2/17 to 2/20. After that from 2/20 that was the end of the billing cycle. This bill date the amount was $97.14." (Tr. 217). This testimony was based purely on speculation, assumption and conjecture, and is wholly unsupported by the record; Investigator Kimble had no personal knowledge of the intricacies of Sprint's billing practices, as explained in the sub-issue above. It is obvious that the "date range: 02/17/2006 to 02/20/2006" pertained to the BPD's request for the record of outgoing and incoming calls on those dates, and the $97.14 bill was for a period of time preceding Bartolo's use, as evidenced by the billing date–February 6, 2006–appearing immediately in front of the charge

[1] This information appeared on the e-mail as follows: "Bill Date: 20060206 Amount: $97.14." (Ex-S-8).

amount. (Ex. S-7, S-8).

The State's proof on this element was fraught with speculation, conjecture, and assumption, and patently insufficient to prove *beyond a reasonable doubt* that Bartolo wrongfully diverted telecommunication services *with a dollar value of fifty dollars or more*.[2] Accordingly, the trial court erred in denying Bartolo's motion for JNOV on this issue, and this Court should reverse Bartolo's conviction and sentence for felony theft of telecommunication services.

II. THE TRIAL COURT ERRED IN DENYING BARTOLO'S MOTION TO SUPPRESS STATEMENTS.

When ruling on the admissibility of a confession, the trial court sits as the trier of fact, and its decision will not be disturbed on appeal unless manifestly wrong. *Wilson v. State*, 936 So.2d 357, 361 (¶8) (Miss. 2006) (citing *Glasper v. State*, 914 So.2d 708, 716 (¶21) (Miss.2005)). In order to be admissible, a confession must have been made voluntarily, knowingly, and intelligently. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612 (1966); *Wilson*, 936 So.2d at 361 (¶8) (citation omitted). The State bears the burden of showing beyond a reasonable doubt that a waiver of Miranda rights and a resulting confession were made voluntarily, knowingly, and intelligently. *Wilson*, 936 So. 2d at 361 (¶8) (citation omitted).

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[2] The trial judge even recognized this fact on his own accord during Bartolo's motion for directed verdict, yet nevertheless decided (improperly and against his better judgment) to let the jury decide the issue. Specifically, the trial judge stated:

> Now, Mr. [prosecutor], I have some problems with Count 1 because - - and I will let you address these problems. The indictment and the statute require that the use of the telephone service exceed $50 in value, and I have reviewed the bill that came into evidence, and it has a . . . total charge of $97, I think. And I don't think that it has been shown or proven that $50 of that [$97] was the result of usage of the phone by the defendant.

(Tr. 299).

Whether a confession was voluntarily, knowingly, and intelligently made is determined from the totality of the circumstances. *Dancer v. State*, 721 So.2d 583, 587 (¶19) (Miss.1998) (citing *McGowan v. State*, 706 So.2d 231, 235 (¶12) (Miss.1997)). A waiver is voluntary if it is the product of "free and deliberate choice rather than intimidation, coercion or deception." *Chim v. State*, 972 So. 2d 601, 603 (¶8) (Miss. 2008) (citing *Coverson v. State*, 617 So.2d 642, 647 (Miss.1993)). A waiver is made knowingly and intelligently "if it is made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice *and the requisite level of comprehension* may a court properly conclude that the Miranda rights have been waived." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141 (1986) (citations omitted)

A defendant's mental capacity is an important factor to be considered in determining whether a confession was made knowingly and intelligently. *See, e.g., Henry v. Dees*, 658 F.2d 406, 409 (5th Cir. 1981); *Cooper v. Griffin*, 455 F.2d 1142, 1145 (5th Cir. 1972) (citing *Sims v. Georgia*, 389 U.S. 404, 88 S.Ct. 523 (1967)); *U.S. v. Garibay*, 143 F.3d 534, 538 (9th Cir. 1998) (language difficulties and mental capacity). Bartolo is virtually uneducated. He has the equivalent of an elementary school education, which he received in Mexico. (Tr. 28). As stated above, Officer Moreno even admitted at the suppression hearing: "[I] don't believe that he could read the Miranda." (Tr. 29). Most significant is Bartolo's affirmative statements that he did not understand what was being read to him. In light of this evidence of Bartolo's mental limitations, a reasonable doubt exists as to whether Bartolo waived his rights and gave the confession "with a full awareness both of the nature of the right[s] being abandoned and the consequences of the decision to abandon [them]." *Chim*, 972 So. 2d at 603 (¶8).

Another important factor to be considered when evaluating if a confession was made

knowingly and intelligently is language difficulties. *See, e.g.*, *Garibay*, 143 F.3d at 538; *U.S. v. Guay*, 108 F.3d 545, 549 (4th Cir. 1997); *U.S. v. Short*, 790 F.2d 464, 469 (6th Cir. 1986); *U.S. v. Heredia-Fernandez*, 756 F.2d 1412, 1415 (9th Cir.1985). Although, Bartolo's rights were read to him in Spanish, he has only limited education even in the Spanish language- an elementary school education. This factor, considered together with Bartolo's mental limitations creates a reasonable doubt that he waived his rights with a full awareness of the nature of those rights and full awareness of the consequences of waiving those rights. Additionally, the lack of familiarity with the criminal process is a factor that must be considered. *Cooper v. Griffin*, 455 F.2d 1142, 1145 (5th Cir. 1972) (citing *Sims v. Georgia*, 389 U.S. 404, 88 S.Ct. 523 (1967)). Here, there is no evidence that Bartolo had any prior experience with the criminal justice system.

Under the totality of the circumstances, a reasonable doubt exists as to whether Bartolo waived his rights and gave his confession knowingly and intelligently. Therefore, the trial court erred in denying Bartolo's motion to suppress statements, and this court should enter a judgment of acquittal or, in the alternative, a new trial.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT BARTOLO'S CONVICTION FOR MURDER AND SUFFICIENT TO ESTABLISH THAT HE WAS GUILTY ONLY OF MANSLAUGHTER.

In reviewing the sufficiency of the evidence, the relevant inquiry is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will not be disturbed where the evidence so reviewed is such that "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense." *Id.* (citing *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985)). However, the proper remedy

is to reverse and render where the evidence "point[s] in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty[.]" *Id.*

Bartolo was convicted of deliberate design murder under Mississippi Code Annotated section 97-3-19(1)(a) (Rev. 2006), which provides in pertinent part: (1) The killing of a human being without the authority of law by any means or in any manner shall be murder. . . (a) [w]hen done with deliberate design to effect the death of the person killed . . . ." Miss. Code Ann. § 97-3-19(1)(a) (Rev. 2006). The Mississippi Supreme Court has defined deliberate design as follows:

> [D]eliberate always indicates full awareness of what one is doing, and generally implies careful and unhurried consideration of the consequences. "Design" means to calculate, plan, contemplate ... deliberate design to kill a person may be formed very quickly, and perhaps only moments before the act of consummating the intent.

Gossett v. State, 660 So.2d 1285, 1293 (Miss.1995) (quoting *Windham v. State*, 520 So.2d 123, 127 (Miss.1988)). "[T]he main distinction between murder and manslaughter is that malice is present in murder and absent in manslaughter." *McCain v. State*, 971 So. 2d 608 (¶18) (Miss. Ct. App. 2007) (citing *Moody v. State*, 841 So.2d 1067, 1096 (¶96) (Miss.2003)). Malice and deliberate design are synonymous. *Tran v. State*, 681 So. 2d 514, 517 (Miss. 1996) (citations omitted).

In the instant case, the evidence presented by the State failed to establish beyond a reasonable doubt that Bartolo acted with deliberate design. The evidence established that Bartolo was guilty, at most, of imperfect self-defense manslaughter.

Imperfect self-defense manslaughter is contemplated under our manslaughter statute, section 97-3-35. *Wade v. State*, 724 So. 2d 1007, 1011 (¶12) (Miss. Ct. App. 1998) (citing Miss. Code Ann. § 97-3-35 (Rev.2006)). Imperfect self-defense is the theory "that [the defendant] killed the deceased without malice, under the bona fide belief, but without reasonable cause therefor, that it was

necessary for him so to do in order to prevent the appellant from inflicting death or great bodily harm upon him . . . ." *Lanier v. State*, 684 So. 2d 93, 97 (Miss. 1996).

Bartolo was the only eyewitness to Ayala's death; therefore, "[his] version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a *credible* witness or witnesses for the state, or by the physical facts or by the facts of common knowledge." *Weathersby v. State*, 165 Miss. 207, 147 So. 481, 482 (1933) (emphasis added).

According to Bartolo's version of the incident, he and Ayala were outside of the casino when Ayala punched him in the stomach and began choking him because he would not have sex with her. (Ex. S-9). Bartolo then choked her until she "fainted" and threw her in the bay. (Ex. S-9). This version of the incident is reasonable and was not contradicted in material particulars by any credible witness or by the physical facts or facts of common knowledge. According to Bartolo's version, he was guilty only of manslaughter based on the theory of imperfect self-defense.

To this end it is significant that Ayala was a Navy Police Officer trained in the art of hand-to-hand- combat. (Tr. 210, 238). Additionally, the evidence established that Ayala was "proud of being a police officer, and she was showed her badge to numerous people on the night in question. (Tr. 232-33). Thus, this evidence in conjunction with Bartolo's version of the events established the following: Ayala, a trained military police officer, who had been displaying her badge, attacked Bartolo by punching him in the stomach and attempting to choke him. Under this evidence, which is undisputed, it is established that Bartolo choked Ayala "without malice, under the bona fide belief, but [possibly] without reasonable cause therefor, that it was necessary for him so to do in order to prevent [Ayala] from inflicting death or great bodily harm upon him." *Lanier*, 684 So. 2d at 97. Further, this evidence is patently insufficient to establish beyond a reasonable doubt that Reed acted with an "unhurried consideration of the consequences" or a "calculation," "plan," or

"contemplation," as the State was required to prove in order to establish that Reed acted with deliberate design.

Consequently, the evidence was insufficient to establish that Bartolo acted with deliberate design. The evidence was, however, sufficient to support a conviction for manslaughter based on imperfect self-defense. Where, as here, the evidence is insufficient to support a conviction for murder, yet sufficient to support a conviction for manslaughter, "the direct remand rule" provides that the proper remedy is to remand the case re-sentencing for manslaughter. *Wade*, 748 So. 2d at 777 (¶20) (citing *Shields v. State*, 722 So.2d 584, 587 (Miss.1998)).

Accordingly, this Court should reverse Bartolo's conviction for murder and remand the case for re-sentencing for manslaughter. Thereby, Bartolo will receive a sentence up to twenty years for manslaughter–a conviction and sentence supported by the evidence–as opposed to a mandatory life sentence for murder–a conviction and sentence both clearly unsupported by the evidence.

CONCLUSION

For the foregoing reasons, Bartolo respectfully requests that this Court reverse his conviction for felony theft of telecommunication services, and also enter a judgment of acquittal regarding his murder conviction or, in the alternative, reverse and remand this case for re-sentencing for manslaughter.

CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for Miguel Angel Solorzano Bartolo, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Roger T. Clark
Circuit Court Judge
P.O. Drawer CC
Gulfport, MS 39502

Honorable Cono Caranna
District Attorney, District 2
Post Office Box 1180
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Honorable Jim Hood
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This the 8 day of September, 2008.

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