

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

**JERMAIL HUMPHRIES**

**APPELLANT**

**VS.**

**NO. 2008-KA-0912-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of the First Judicial District of Hinds County, Mississippi, Honorable W. Swan Yerger presiding. On February 13, 2008, a jury convicted Jermail Humphries of murder; he received life in the custody of the Mississippi Department of Corrections. CP 40. The trial court denied Humphries' post-trial motions. CP 46. Feeling aggrieved, Humphries appealed his conviction and sentence. CP 48.

## FACTS

On September 28, 2006, Zarccheaus Anderson (hereinafter "Zarccheaus"), Michael Buckhalter, his brother Kendrick, D' Angelo and Selester Jones (hereinafter "Selester") were playing basketball. T. 187-88. Buckhalter and Zarccheaus started fighting. T. 189, 210. Selester and Tian Short broke it up. T. 210. Zarccheaus left but told the boys playing basketball that he would be back, then he went to Jarvis Jones' (hereinafter "Jarvis") home. T. 189, 203-04, 212-13.

Tasha Jones, Kendrick, D' Angelo and the defendant were at Jarvis' home. Zarccheaus told Tasha and defendant about the altercation at the basketball game. T. 193. Tasha, Kendrick, Zarccheaus and the defendant rode in Tasha's blue car back to the basketball court. T. 192-93, 213. Zarccheaus and Buckhalter got into another fight, then both groups got involved. T. 193-94, 213. Selester and the defendant began fighting. The defendant ended up on the ground, and was kicked in the head. T. 194. When the defendant got up with his gun pulled and fired two shots in the air, the fight broke up. T. 194, 204, 212.

A short time later, Selester was walking down the road and met up with Tian Short and some other boys. T. 215-16. The group then saw the defendant; Selester and Tian got in a verbal altercation in the street with the defendant. T. 195, 215-17, 230. Defendant started talking crazy and shot his gun into the air. T. 194-95, 216-17. Selester, Tian and their group of boys started running and the defendant shot at Tian. *Id.* The boys split up; the defendant went back to Jarvis' where he called his brother. T. 195. His brother came over and they loaded their guns. T. 197.

Selester, Tian and others then ran into Armond Bulter and Jerrick Nichols who were on their way to watch a movie at a friend's house. T. 219, 239-40. The young men began discussing the previous altercations when they noticed a blue car come down the street and drive pass them. The

defendant was hanging out of the passenger car window flashing a gun. T. 242. He did not fire any shots at that time. *Id.* The boys noticed the blue car pass by again. The car turned around and came back to where the boys were standing in front of an abandoned house. T. 241-42. The car stopped and the defendant hopped out of the car, put his hands on the roof, aimed a gun in the direction of the boys and shot. When the group of boys saw the defendant with the gun and they started running. They heard five or six shots, but no one actually saw the defendant's gun go off. T. 223, 241-45, 260. While running from the defendant, Armond Butler received a fatal bullet to the back of his head.

When the police questioned the defendant the following day, he admitted to fighting at the basketball game; to firing his gun in the air at the first two altercations and going to Tasha's house and calling his brother to tell him he had been "jumped on." Defendant admitted that later, Tasha came in the house and said she knew where the group of boys were so they got in her car to go find them. He admitted to flashing his gun out the window when driving pass the boys. Finally, he admitted to getting out of Tasha's car and shooting his gun, but claimed he was firing over the house where the boys were running. Defendant also claimed there were other shots fired but he did not know who fired them. T 297-300; Exhibit 38. The defendant was charged and eventually convicted of the murder of Armond Butler.

### ISSUES

- I. **WHETHER THE JURY INSTRUCTIONS REGARDING DEPRAVED HEART MURDER AND CULPABLE NEGLIGENCE MANSLAUGHTER WERE CONFUSING AND MISSTATED THE LAW.**
- II. **WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT HUMPHRIES OF MURDER INSTEAD OF MANSLAUGHTER.**

### **SUMMARY OF THE ARGUMENT**

The trial court did not err with respect to the jury instructions. After a thorough review of the record, construing evidence in favor of the prosecution, there was sufficient evidence to sustain a conviction for depraved heart murder.

## ARGUMENT

### **I. THE CULPABLE NEGLIGENCE MANSLAUGHTER AND DEPRAVED HEART MURDER INSTRUCTIONS CORRECTLY STATED THE LAW AND WERE NOT CONFUSING TO THE JURY.**

In his first assignment of error, Humphries contends that the jury instructions for murder and culpable negligence manslaughter were confusing to the jury or improperly stated the law. More specifically, Humphries claims the jury was never instructed on the elements of manslaughter.

In order for an appellate court to consider a jury instruction issue, the defendant must have made a specific objection to the jury instruction at the trial level. *Harris v. State*, 861 So.2d 1003, 1013 (¶18) (Miss.2003). If no contemporaneous objection is made, the error, if any, is waived. *Chandler v. State*, 946 S.2d 355 (Miss.App. 2006)

Defendant is prohibited from objecting to instruction D-2, which defined culpable negligence manslaughter, because he submitted it. A party can't object to his own jury instructions. Also, even though the defense objected to jury instruction S-2, which defined depraved heart murder, the objection was based on a lack of evidence, not that the instruction was confusing to the jury or a misstatement of the law, as he now complains. **T 342**. Therefore, defendant is procedurally barred from arguing that the depraved heart instruction and the culpable negligence instruction are confusing or a misstatement of the law. Without abandoning the State's argument that Humphries' first assignment of error is procedurally barred, the State will address its lack of merit.

Humphries claims that instructions S-2 and D-4 incorrectly state the law. Instruction S-2, the depraved heart and lesser offense instruction, tracks the language of the Mississippi Code section 97-3-19. "This court has consistently held that instructions in a criminal case which follow the language of a pertinent statute are sufficient." *Rubenstein v. State*, 394 So.2d 735, 772 (Miss.2006)(citing *Byrom v. State*, 863 So.2d 836, 880 (Miss.2003)).



Defendant also contends that the jury was confused by instructions S-2 and D-4, claiming that there was no distinguishable difference between depraved heart murder and culpable negligence manslaughter. The supreme court has repeatedly held that the two crimes are distinguishable by the degree of mental culpability, the determination of which is an issue properly resolved by the jury. *Shumpert v. State*, 935 So.2d 962 ( ¶14) (Miss.2006). Depraved heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied." *Windham v. State*, 602 So.2d 798,801 (Miss.1992). This distinction can be seen by comparing the two instructions. Depraved heart was defined as an "act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without premeditated design to effect the death of any particular individual." (CP 24). Culpable negligence was defined as "conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances to render his conduct tantamount to willfulness. (CP 30). The difference in the mental state of culpability comes through the jury instructions in that depraved heart murder requires a higher mental culpability, i.e. a depraved heart.

Also, in *Lett v. State*, 902 So.2d 630, 637-38 (Miss.Ct.App.2005) this court approved of the State's routine submission of a murder instruction along with an instruction for manslaughter as a lesser-included offense, and further stated that there is nothing inherently confusing about such submissions.

Humphries contends the law on culpable negligence was not stated properly in instruction D-4 offered by the defense. (CP 30). Humphries takes exception to the portion of the definition that states "to render his conduct tantamount to willfulness." Defendant argues that there is no such requirement in the statute.

Instruction D-4 utilized almost verbatim the culpable negligence manslaughter definition

approved in the recent case of *Mullen v. State*, 986 So.2d 320, 325 (Miss.App.2007).

Indeed, the concluding portion of the definition included in the instructions is not found in the statute. However, it can be found in our case law. Speaking of the definition of culpable negligence, the supreme court held that, "[t]his [c]ourt more recently defined manslaughter by culpable negligence as 'such gross negligence ... as to evince a wanton or reckless disregard for the safety of human life, or such an indifference to the consequences of an act under the surrounding circumstances as to render such conduct tantamount to willfulness.'" *Chandler v. State*, 946 So.2d 355, 361(¶ 22) (Miss.2006) (quoting *Shumpert v. State*, 935 So.2d 962, 967(¶ 14) (Miss.2006)) (emphasis added).

The jury received proper instruction as to the definition of culpable negligence. The defendant's first assignment of error is both procedurally barred and without merit.

## II. THE EVIDENCE SUFFICIENTLY SUPPORTED A CONVICTION FOR DEPRAVED HEART MURDER.

In reviewing issues of legal sufficiency, an appellate court does not "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. *Bush v. State*, 895 So.2d 836, 843 (¶16)(Miss.2005) quoting *Jackson v. Virginia*, 443 S.U.S. 307, 315 (1979)). Rather the court will view the evidence in the light most favorable to the State and determine whether any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Id.*

In the case *sub judice*, the jury was instructed on depraved heart murder and culpable negligence manslaughter. Humphries contends that the State did not prove he acted with a depraved heart and the evidence was at best sufficient to support a culpable negligence manslaughter conviction.

Culpable negligence manslaughter is provided for in Mississippi Code Annotated section 97-3-47 (Rev.2006), which states that "[e]very other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title shall be manslaughter." Culpable negligence has been defined as "negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life." *Clayton v. State*, 652 So.2d 720, 726 (Miss.1995). Murder is defined by Mississippi Code Annotated section 97-3-19(1) (Rev.2006). Under that statute, to obtain a murder conviction, the State had to prove that Humphries killed Burton while engaged "in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual ... and was not acting in necessary self defense." That is exactly what the State proved.

The evidence, viewed in the light most favorable to the prosecution, was that Humphries armed himself with a gun, repeatedly sought out the young men he fought with at the basketball court and then intentionally shot at the fleeing group thereby hitting and killing Armond Bulter. These were willful acts likely to cause death or serious bodily injury and evinced a reckless indifference to the danger to human life from which malice may be inferred.

The difference between culpable negligence manslaughter and depraved heart murder is the degree of mental state of culpability. *Windham v. State*, 602 So.2d 798, 801 (Miss.1992). "[D]epraved heart murder requires a higher degree of recklessness from which malice or deliberate design might be implied." *Id.* This court stated in *Cooper v. State*, 977 So.2d 1220, 1225 (¶18) (Miss.App.2007) citing *Lett v. State*, 902 So.2d 630, 637 (¶21) (Miss.App.2005) "The classic example of depraved heart murder is shooting into a crowd of people."

To consider Humphries' argument that the evidence is insufficient to support his conviction, we must examine both the evidence presented to the jury and the reasonable inferences that arise from that evidence, in a light consistent with the verdict. An appellate court will reverse only if rational and fair-minded jurors could not have found the defendant guilty beyond a reasonable doubt. *Steele v. State*, 852 So.2d 78, (Miss.App.2003) citing *Brooks v. State*, 695 So.2d 593, 594 (Miss. 1997).

Selester Jones, Jerrick Nichols, and Tian Short testified the defendant jumped out of the passenger's side of the car and aimed his gun toward the group of boys in front of the abandoned house. They did not actually see the defendant shoot the gun but heard bullets whizzing past them as they ran for safety. The defendant, in his statement to the police, admitted to shooting his gun over the abandoned house and other than the defendant's vague statement about there being other shots, there was no evidence that anyone else shot a gun. **T. 219, 258. 297-300; Ex 38.** Therefore, one could infer the defendant shot Armond Butler.

The evidence was sufficient to enable a reasonable jury to find beyond a reasonable doubt that Humphries murdered Armond Bulter. This issue is without merit.

**CONCLUSION**

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's conviction of Jermail Humphries for murder and sentence of the Circuit Court of the First Judicial District of Hinds County.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

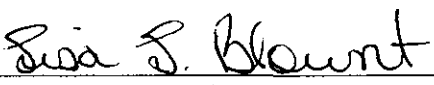
I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 29th day of December, 2008.

  
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