

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JERMAIL HUMPHRIES

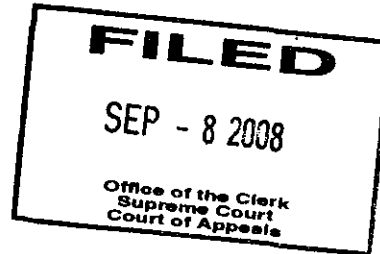
APPELLANT

V.

NO. 2008-KA-0912 COA

STATE OF MISSISSIPPI

APPELLEE



BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

Benjamin A. Suber, MS Bar No. [REDACTED]

301 North Lamar Street, Suite 210

Jackson, Mississippi 39201

Telephone: 601-576-4200

Counsel for Jermail Humphries

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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. Jermail Humphries, Appellant
3. Honorable Robert Schuler Smith, District Attorney
4. Honorable W. Swan Yerger, Circuit Court Judge

This the 8 day of September, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


Benjamin A. Suber
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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STATEMENT OF THE ISSUES

ISSUE NO. 1

THE JURY INSTRUCTIONS WERE CONFUSING TO THE JURY REGARDING THE DIFFERENCE IN DEPRAVED HEART MURDER AND CULPABLE NEGLIGENCE MANSLAUGHTER.

ISSUE NO. 2

THE EVIDENCE WAS INSUFFICIENT TO CONVICT HUMPHRIES OF MURDER INSTEAD OF MANSLAUGHTER.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Hinds County, Mississippi, and a judgment of conviction for the crime of murder. Jermail Humphries was sentenced to life in prison in the custody of the Mississippi Department of Corrections following a jury trial

on February 11-13, 2008, Honorable W. Swan Yerger, presiding. Jermail Humphries is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On September 28, 2006, Zarccheaus Anderson, Michael Buckhalter, Buckhalter's brother, Kendrick, D'Angelo, and Selester Jones were playing basketball after school. Tr. 187-88. During the basketball game, Buckhalter and Anderson got into a fight. Tr. 189. After the fight, Anderson told the boys playing basketball that he would be back, and he went to Jarvis Jones' house. Tr. 189, 203. At the home of Jarvis Jones were Tasha Jones, Jermail Humphries, Kendrick, and D'Angelo.

Anderson told Tasha what had happened at the basketball game and Anderson, Tasha, Jermail and Kendrick went back to the basketball game. Tr. 193. Once they got back to the basketball game, Anderson and Buckhalter got into another fight. *Id.* The rest of the people got out of the car and insisted that the fight between Anderson and Buckhalter was going to be a fair one-on-one fight. *Id.*

During the fight between Anderson and Buckhalter, other people started getting involved. Tr. 194. Selester was fighting with Humphries. Humphries was kicked in the head or slammed onto the ground and Humphries got mad pulled out his gun and fired the gun in the air. Tr. 194, 212. When Humphries fired in the air, the fighting stopped. *Id.* Anderson, Jermail, Jarvis, and Tasha went back to Jarvis' house. *Id.*

Selester, Buchalter, and Buckhalter's brother left the basketball court after the fight and went to Buckhalter's house. Tr. 213. Selester then went to meet up with Tian Short, and

as they were walking down the street they ran into Jermail and Anderson. Tr. 194, 215. Selester said something to Jermail, and then Tian said something to Jermail. Tr. 194-95, 216. Jermail got mad at Tian and Jermail pulled out his gun and shot the gun again as Tian was antagonizing Jermail. Tr. 195. Jermail shot the gun in the air and the other group of boys started running. By the time the other group got across the street, Jermail pointed the gun at them and started shooting that way. *Id.*

Selester, Tian, and others were walking down the street when they ran into Armond Butler and Jerrick Nichols. Tr. 219, 239-40. The guys were discussing the altercation between Anderson and Buckhalter. Tr. 241. The guys noticed a car come down the street and drive pass them with the passenger of the car hanging out of the window flashing a gun. Tr. 242. The passenger did not shoot as the car drove by the house where the guys were standing. *Id.*

The car turned around and came back to where the guys were standing and the car stopped with the passenger hopping out of the car, putting his hands on the roof, and start shooting. Tr. 244, 258. The guys stated that they heard five or six shots, but never saw anyone fire the weapon. Tr. 223, 245, 260.

According to the statement of Humphries, he did shoot his gun at the third altercation, however, he stated that he was firing over the house and there were other shots that were fired. Exhibit 38, RE 20. Ultimately, Armond Butler was shot and killed. Humphries was charged and convicted of murder.

SUMMARY OF THE ARGUMENT

The jury was not adequately instructed. The jury was confused as to the jury instructions. The jury was entitled to the difference between depraved heart murder and culpable-negligence manslaughter. The jury should have also been given the elements of manslaughter, if it was going to be given as a lesser offense to murder.

Based on the evidence presented at trial, Humphries could only have been convicted of manslaughter and not the of depraved heart murder.

ARGUMENT

ISSUE NO. 1

THE JURY INSTRUCTIONS WERE CONFUSING TO THE JURY REGARDING THE DIFFERENCE IN DEPRAVED HEART MURDER AND CULPABLE NEGLIGENCE MANSLAUGHTER.

The jury in this case was instructed on depraved heart murder (MCA § 97-3-19(1)(b) (1972)) and if the jury was to find defendant not guilty of murder, then the jury could find the defendant guilty of [culpable negligence] manslaughter (MCA § 97-3-47 (1972)). Tr. 342-43, 349; CP 24-25, 30; RE 11-15¹. However, the several instructions given did not

¹ S-2 I. The Court instructs the jury that the killing of a human being without authority of law by any means or in any manner is murder when done 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.

Thus, if you find from the evidence in this case, beyond a reasonable doubt, that:

(1) the defendant, Jermail L. Humphries, on or about September 28, 2006, in the First Judicial District of Hinds County, Mississippi,

(2) killed Armond Butler a human being, without authority of law, by any means or in any manner, while said defendant was then and there 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 said Armond Butler or any other individual, and

(3) the defendant, Jermail L. Humphries was not then and there acting in necessary self-defense, then and in that event the defendant, Jermail L. Humphries, is guilty of murder and it is your sworn duty to so find.

II. The Court further instructs the jury that if the State fails to prove, beyond a reasonable doubt, each and every element of murder set forth above, you may not find the defendant guilty of murder, but should proceed in your deliberations to determine whether the said defendant is guilty of the lesser offense of manslaughter, as defined in other instructions of the Court.

The Court further instructs the jury that "depraved-heart" murder and "culpable-negligence" manslaughter, which is defined in other instructions of the Court, are distinguished by degree of mental culpability. In short, "depraved-heart" murder, as defined above in Section I of this instruction, involves a higher degree of recklessness from which malice or deliberate design, as defined

properly state the law, they conflicted and were ultimately confusing to the jury; because, none of the instructions explained the difference between the two prosecutorial theories, or degrees of culpability. Even though manslaughter was included as a lesser offense, the elements were never set out for the jury. The end result was that the jury verdict which convicted Jermail Humphries of murder was not the product of fundamental due process of law guaranteed by the 5th, 6th and 14th Amendments to the U. S. Constitution and Art. 3 §14 of the Constitution of the State of Mississippi.

From the instructions in this case, there is no distinguishable difference between depraved heart murder resulting from “an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design” and culpable negligence manslaughter resulting from “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”.

In the case of *Smith v. State*, 463 So. 2d 1028, 1029-30 (Miss. 1985) the Supreme Court had an analogous issue before it pertaining to the confusing and improper instructions on manslaughter and murder. In *Smith* the Court found that an instruction, similar in part to S-2 here, was peremptory to the issue of murder and was, therefore, improper, unless

above in Section I of this instruction. [R. 342, RE 17-18]

D-4 “Culpable Negligence” is 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. [R. 50; RE 19]

cured by other instructions. In reviewing the manslaughter instruction which was given in that case, the *Smith* Court found that the manslaughter instruction was contradictory to the murder instruction and the jury had to decide which instruction stated the law correctly. *Id.* The Supreme Court found that choosing between jury instructions is a function of the court and not the jury, and reversed the case for a new trial. *Id.*²

The same situation arose in *Scott v. State*, 446 So. 2d 580, 583 (Miss. 1984). The *Scott* Court said “when a jury is given instructions which are in hopeless conflict this court is compelled to reverse because it cannot be said that the jury verdict was founded on correct principles of law.”

In *Williams v. State*, 729 So. 2d 1181, 1182 (Miss. 1998) the defendant requested an instruction which gave the jury some guidance on the difference between malice aforethought and heat of passion, the Court said, “we hold that such an instruction is proper in such a case as this, and error in this case to refuse a proper instruction . . . thereon.”

Jermail Humphries’ conviction was not founded on correct principles of law as in *Williams* and *Scott* which requires reversal. See also *Russell v. State*, 789 So. 2d 779, 780 (Miss. 2001) where 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.

² The confusion in this case was exacerbated by D-9: “The Court instruct the Jury that only if the State has failed to prove all the elements of murder, should you consider a lesser offense; however, if the evidence warrants it, you may find the Defendant guilty of a crime less than murder. Notwithstanding this right, it is your duty to accept the law as given to you by the Court, and if the facts and the law warrant a conviction of the crime of murder, then it is your duty to make such finding uninfluenced by your power to find a lesser offense. This provision is not designed to relieve you from the performance of an unpleasant duty. It is included to prevent a failure of justice if the evidence fails to prove the original charge but does justify a verdict for the lesser crime of manslaughter.” [R. 51; RE 15].

Here there was a very close question between murder and manslaughter. It was crucial for the jury to distinguish between killing in the heat of passion and/or culpable negligence and a killing that was done as the product of a depraved heart also without any intent to effect the death of the victim. With the instructions given, the jury was not able to do their job.

Not only was the jury confused, but jury instruction S-2 listed manslaughter as a lesser offense, but did not list the elements of manslaughter. The law on culpable negligence was not stated properly in D-4 as it instructed the jury to deliberate whether the alleged negligent act was “tantamount to willfulness” based on the surrounding circumstances. However, nothing in the applicable statute requires this finding. Under MCA § 97-3-47 (1972):

Every 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.

The case law does not change the definition. In and *Grinnell v. State*, 230 So.

2d 555, 558 (Miss. 1970) the court held:

[T]he term culpable negligence should be construed to mean a negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be a negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, and that this shall be so clearly evidenced as to place it beyond every reasonable doubt.

In jury instructions presented to the jury were confusing and did not adequately state the law. In part II of jury instruction S-2 read that if every element of murder was not proven beyond a reasonable doubt then the jury may not find the defendant guilty of murder, but should proceed in your deliberations to determine whether the said defendant is guilty of the

lesser offense of manslaughter, as defined in other instructions of the Court. CP 24-25, 17-18. However, manslaughter was not defined in any other instructions of the Court.

The jury was not adequately instructed. The jury was entitled to the difference between depraved heart murder and culpable-negligence manslaughter. The jury should have also been given the elements of manslaughter, if it was going to be given as a lesser offense to murder. Under this claimed error, Humphries respectfully requests a new trial.

ISSUE NO. 2

THE EVIDENCE WAS INSUFFICIENT TO CONVICT HUMPHRIES OF MURDER INSTEAD OF MANSLAUGHTER.

Taking the State's case in its best light, the only conviction which could arguably said to be supported by the evidence is one for manslaughter, not murder.

Manslaughter is defined in MCA § 97-3-47 (1972)

Every 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.

Murder requires premeditation or deliberate design. MCA § 97-3-19(1) (1972):

The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:
(b) When done 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

“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. ” *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. *Dedeaux*, 630 So. 2d at 31-33.

In *Clemons v. State*, 473 So. 2d 943 (Miss. 1985), the Court pointed out that there was “such contradictory testimony that it is virtually impossible to reconstruct what actually happened”. *Clemons*, 473 So. 2d at 944. The *Clemons* case involved a barroom stabbing. The *Clemons* Court pointed out "there is more than enough conflicting evidence to cast at least a reasonable doubt as to murder", then, reversed the murder conviction and remanded for sentencing for manslaughter. *Id* at 945.

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 horsplaying 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 related here in that there was no evidence of premeditation.

In an evaluation of sufficiency of evidence the reviewing court must decide whether any of 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." *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985) (citing *May v. State*, 460 So.2d 778, 781 (Miss.1984)) (emphasis added). If different conclusions could have been reached by reasonable jurors with respect to every element of the offense, the evidence is sufficient. *Bush v. State*, 895 So.2d 836, 843 (Miss.2005) (citing *Edwards*, 469 So.2d at 70). See also *Smith v. State*, 839 So.2d 489, 495 (Miss.2003). The state must prove each element of the indicted offense beyond a reasonable doubt. *Hobson v. State*, 730 So.2d 20, 28 (Miss. 1998); *Heidel v. State*, 587 So.2d 835, 843 (Miss. 1991).

Depraved heart murder and culpable negligence differ "simply by degree of mental state of culpability. In short, 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). Humphries was not trying to kill or even injure Armond Butler. Based on Humphries' statement to police, he was just shooting the gun over the house. Exhibit 38, RE 20-21. Humphries was stated that other shots were fired. *Id.* Humphries' intent seemed that

he only wanted to scare the boys and not injure them. *Id.* The degree of recklessness in the case at hand was not of the higher degree which malice or deliberate design could have been implied.

Humphries respectfully asks this court to review the facts of this case, and to reverse the murder conviction and remand the case for a new trial or sentencing for manslaughter.

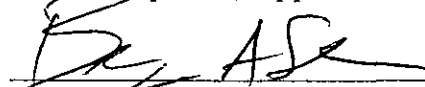
CONCLUSION

Jermail Humphries is entitled to have his conviction for murder remanded for a new trial or sentencing for manslaughter.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Jermail Humphries, Appellant

BY:



BENJAMIN A. SUBER

MISSISSIPPI BAR NO. [REDACTED]

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 N. Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Jermail Humphries, 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 W. Swan Yerger
Circuit Court Judge
405 Tombigbee Street
Jackson, MS 39205

Honorable Robert Schuler Smith
District Attorney, District 7
Post Office Box 22747
Jackson, MS 39225

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 8 day of September, 2008.


Benjamin A. Suber
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200