

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENNETH MOORE, APPELLANT

VS.

STATE OF MISSISSIPPI, APPELLEE

CAUSE NO. 2009-KA-00946-SCT

APPEAL FROM THE CIRCUIT COURT OF HOLMES COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

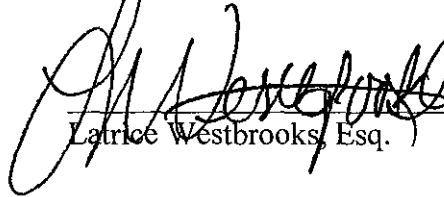
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CERTIFICATE OF INTERESTED PARTIES

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 the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Kenneth Moore, Appellant;
2. Latrice Westbrooks, Esq., The Law Office of Latrice Westbrooks, PLLC, attorney of record for Appellee, R.B., a Minor by and through his Next Friend, D.L.B.;
3. James H. Powell, District Attorney of Holmes, Humphreys & Yazoo Counties, District 21; and

This the 20th day of December, 2009.



Latrice Westbrooks, Esq.

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STATEMENT OF THE ISSUES

- I. WHETHER THE COURT ERRED WHEN IT ALLOWED A PREJUDICIAL PHOTOGRAPH TO BE ADMITTED FOR IDENTIFICATION PURPOSES WHEN THE DEFENDANT DID NOT CONTEST IDENTIFICATION OF THE DECEASED?**
- II. WHETHER THE COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S MOTION FOR CONTINUANCE?**
- III. WHETHER A MISTRIAL SHOULD HAVE BEEN DECLARED IN LIGHT OF JUROR MISCONDUCT?**
- IV. WHETHER THE COURT ERRED IN ALLOWING SPECULATIVE TESTIMONY?**
- V. WHETHER THE EVIDENCE SUPPORT A VERDICT OF MANSLAUGHTER RATHER THAN MURDER?**

STATEMENT OF THE CASE

I. Nature of the Case

¶1. The Appellant seeks to reverse the verdict finding him guilty of Murder. The Holmes County Circuit Court sentenced the defendant on May 30, 2008 to life imprisonment in the custody of the Mississippi Department of Corrections.

II. Course of Proceedings and Disposition Below

A. Procedural History

¶2. The Appellant appeals the verdict and sentence rendered in the Holmes County Circuit Court. The Appellant was indicted on January 2, 2008 by a Holmes County Grand Jury. On February 5, 2008, the Defendant waived arraignment and received a trial date of May 14, 2008. The trial commenced on May 14, 2008 with the State announcing ready for trial and the Defendant

announcing not ready for trial. On May 15, 2008, the jury returned a verdict of guilty of Murder. The Defendant was sentenced on the same day. On May 30, 2008, the undersigned filed a notice of appeal with the Holmes County Circuit Clerk and hence brings forth this appeal.

B. Substantive Facts

¶3. On the evening of August 19, 2007, Kenneth “Kenny” Moore went to the “Greasy Club” in West, Mississippi. He was later joined by his cousin, James Skinner. The Greasy Club was owned by Junior Williams. Also at the club was Cordarius “Cord” McChriston who was with his cousin Thomas Kirkwood.¹ Skinner testified that Kenneth came up to him and told him that “that dude [McChriston] was messing with him”. There was also testimony that Kenny told McChriston to “Go on and I don’t [sic] want to fight you”. A fight began between Cord and Kenneth. No one knew what the arguing or altercation was about. There was no evidence that Moore was agitating McChriston. (T.rec. 180). As the boys were fighting, Junior Williams, as the owner of the premises, did not try to stop the fight. He stated “As long as it’s one-on-one, let them fight”. As the fight broke out, a crowd gathered to watch it - for as long as they could watch it. No one intervened and stopped it except for Latravis Skinner, Kenny’s brother.

¶4. During the fight, Cord beat Kenny mercilessly while Kenny was on the ground defenseless. (T.rec. 183, ln 21-22); (T.rec. 302, ln 15-19);(T.rec. 303, ln 2-9). Kenny begged Cord to stop but he did not. (T.rec. 188, ln 1-10; T.rec. 189, ln 17-21). The fight ended when Latravis pushed Cord off Kenny. Corey Johnson saw Kenny immediately reaching (but did not know for what). He tried to talk to Kenny and calm him down but Kenny was still mad and upset. (T.rec. 304, ln 12-16; T.rec. 308, ln 15-27). Several others tried to talk Kenny down and away from Cord but they were

¹ Cordarius’ name is also spelled “Cardarius”.

unsuccessful. The parties never left the scene of the club or the fight. Immediately afterwards, Kenny walked up to Cord McChriston and shot him in the chest (this was the fatal shot). Cord jumped a fence and ran to a nearby club called the “Safe House” while Kenny chase and shot at him again.² There was no evidence of other penetrating wounds aside from the chest wound. (See testimony of Dr. Steven Haynes, *supra*). McChriston later died from injuries from the gunshot wound.

SUMMARY OF THE ARGUMENT

¶5. The Holmes County Circuit Court did abuse its discretion during the trial. The Court allowed prejudicial and inflammatory photographs of the deceased into evidence. The photographs had no probative value as the defendant did not contest the identification of the defendant. The defendant contends that the Court abused its discretion when it denied Moore’s motion for continuance. Also at issue is juror misconduct that should have led to the Court declaring a mistrial. It was also error for the Court to allow inadmissible speculative testimony. Lastly, the evidence supports a conviction of manslaughter and inasmuch the verdict was against the overwhelming weight of the evidence. In the wake of these issues, Appellant/Defendant Kenneth Moore requests that the matter be reversed and remanded back to the Holmes County Circuit Court.

² The Safe House and the Greasy Club are located in close proximity to each other. (T.rec. 185, ln 11-16).

ARGUMENT

I. WHETHER THE COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S MOTION FOR CONTINUANCE?

¶6. On the day of trial, Defense counsel requested a continuance from the date of the trial's first setting. Defendant's counsel requested additional time to prepare for trial and furthermore discovery requested had not been propounded to the defense. (T.rec. 45, ln 7-22). The trial court denied the continuance. During the trial, the state offered into evidence audio tapes of the statement of the defendant. At this time, the defense objected to the admission of the evidence as it had not been provided to the Defendant (after two requests had been made for it) (Rec. Ex. A). The trial court denied the motion to disallow the statement. (T.rec. 236). The court stated based on the time period had with the transcripts, the defense had enough time to prepare and there was an attempt to provide the defense with the audio tapes (T.rec. 236, ln 15-27). The court also noted within the same breath that the audio tapes did not provide the defense with the actual statement.³ *Id.*

¶7. When reviewing the lower court's denial of a motion for continuance, the court looks to see whether the Court abused its discretion in denying the continuance. The court will not reverse unless the ruling resulted in manifest injustice. *Johnson v. State*, 926 So.2d 246, 251, (¶15) (Miss. 2006), *citations omitted*; *Hicks v. State*, 902 So.2d 626 (Ct.App. 2004). The circuit judge has wide discretion deciding whether to grant a continuance . . . and will not be reversed absent a finding of substantial prejudice; It is the moving party who has to show prejudice. *Conway v. State*, 915 So.2d 521 (Ct.App. 2005)(¶15).

¶ 8. The Moore case was a first setting on the Court's docket. Defense counsel expressed that

³The court also noted that there was not a discovery violation (line 24-25).

she needed additional time to prepare and that discovery was still outstanding. (T.rec. 45). Defense counsel made two requests for the audio tapes that allegedly supported the statements of witnesses and the defendant. On the day of the status conference, the announced that discovery had not been provided. The state's investigator suggested that counsel go to the Sheriff's office to get the tapes. The tapes received from the Sheriff's office were also blank.⁴ In the middle of the trial, the prosecution attempted to introduce the tapes through the testimony of Sheriff March. The defense objected and reminded the court that the tapes had not been provided even though defense counsel repeatedly requested them. Failure to produce this evidence amounted to the prosecution's attempt to prevent the defendant from confronting all evidence against him.⁵ In the wake of the discovery violations, it was error for the court to deny the motion for continuance and motion to disallow statement. (T.rec. 236).

II. WHETHER THE COURT ERRED WHEN IT ALLOWED A PREJUDICIAL PHOTOGRAPH TO BE ADMITTED FOR IDENTIFICATION PURPOSES?

¶9. Dr. Steven Haynes testified for the state as the medical examiner. The State through his testimony, offered into evidence, autopsy photographs McChriston. State's exhibits numbers S-2-B which was introduced for identification purposes.⁶ (T.rec. 212, ln 21-27). The photograph depicted McChriston laying on the table with his mouth and teeth protruding. (Rec.Ex. B).

¶10. The standard of review that appellate courts must apply to admission of evidence is an abuse

⁴ Moore's attorney was told that she was receiving the original tapes in the matter.

⁵ It was also discovered during the trial that an assistant district attorney encouraged prosecution witnesses not to speak with the defendant's attorney. (See testimony of Elisa Love, p. 190, ln 19-27).

⁶ In the transcript, (p. 209-210) the State introduced the exhibits showing the identification photo as S-A-1. During the testimony of Dr. Haynes, the State introduced the identification photograph as S-2-B.

of discretion. *Price v. State*, 898 So.2d 641 (Miss. 2005). The admission of photographs is a matter left to the sound discretion of the trial judge. . . photographs are considered to have evidentiary value in the following instances: (1) aid in describing the circumstances of the killing; (2) describe the location of the body and cause of death; (3) supplement or clarify witness testimony. *Williams v. State of Mississippi*, 3 So.2d 105 (Miss. 2009) citing *Noe v. State*, 616 So.2d 298 (Miss. 1993) and *McIntosh v. State*, 917 So.2d 78 (Miss. 2005).

¶11. The Court has also noted with regard to admission of autopsy photographs are only admissible if they have probative value. *Roden v. State*, 1998 Miss.App. LEXIS 181 citing *Noe*, 616 So.2d at 303. In the case of photographic evidence it is especially important that the photographs not be so gruesome or used in such a way as to be overly inflammatory or prejudicial. *Hurns v. State*, 616 So. 2d 313, 319 (Miss. 1993). The indiscriminate use of autopsy photographs showing where "a medical technician or pathologist has used the tools of his trade to puncture, sever, dissect and otherwise traumatize body parts" is discouraged. *Noe*, 616 So. 2d at 303. Gruesome photographs like the solitary instance of photographs being [sic] prejudicial involving a close-up photograph of a partly decomposed, maggot-infested skull. *Williams citing McNeal v. State*, 551 So.2d 151 (Miss. 1989).

¶12. The Defense objected to use of the photograph in evidence. (T.rec. 210-211). The objection was based on the contention that the photographs were prejudicial and had no probative value. (T.rec. 210). *McDavid v. State*, 594 So.2d 12, 15 (Miss. 1992). No other witnesses were used to identify the deceased. There was nothing in S-A-1 that aided the jury with regard to the injuries. It did not aid the description of the killing and the corpus delicti; or describe the location of the body and cause of death; or supplement or clarify another witnesses testimony. *Jackson v. State*, 766

So.2d 795 (Miss.Ct.App. 2000). The proper predicate was not established allowing Haynes to testify to the defendant's identity.

III. WHETHER A MISTRIAL SHOULD HAVE BEEN DECLARED IN LIGHT OF JUROR MISCONDUCT?

¶13. Sarah Wade, a juror, was related to a witness in the case, Dewan McGee. Not only was McGee is Wade's nephew (a fact that was not revealed during the voir dire process) but Wade and McGee traveled to court together on the first and second day of trial. (T.rec. 230-232). During the State's voir dire, Wade did not acknowledge that she was related to McGee and was providing transportation for him.(T.rec.81, ln 12-18). Wade indicated, upon the Court's inquiry, that she did not mention the relationship because she (Wade) did not feel it would effect her ability to be fair and impartial. (T.rec. 232, ln 14-19). Ultimately, the court removed Wade from the jury panel. The court also acknowledged Wade's "enthusiasm" to serve as a juror as well as Wade's disappointment that she was being removed from service in this case. (T.rec. 243, ln 3-24).⁷

¶14. While the defendant's counsel did not move for a mistrial, it does not preclude consideration by the appellate court. *Lattimore v. State*, 958 So.2d 192, ¶39 (Miss. 2004). Wade's failure to candidly acknowledge a familial relationship with McGee and that she was providing transportation for him, deprived the defendant of making a challenge for cause or a pre-emptory challenge against her. The juror misconduct and the appearance of impropriety was not cured by the removal of the juror and the witness. First, there was no polling of the other jurors to reveal whether Wade discussed the case with them or her relationship to McGee. The court shall declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or

⁷ The State, after the Wade inquiry, decided not to call McGee as a witness.

in the conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. *Brent v. State*, 632 So.2d 936, 941 (Miss. 1994).

¶15. The case at bar is distinguishable from *Brent*. In that case, both the prosecution and the defense knew about the juror, Lewis, veracity to be braggadocios.⁸ Being informed, both parties accepted him on the panel. Lewis kept telling the bailiff and other jurors how he was "going to raise hell in the jury room". Upon learning of this the court removed Lewis over defense objections. Next, the court polled the jury and asked them to disregard any remarks made outside of the courtroom to which all of the jurors agreed. *Id* at 940.

¶16. In the present case, the defendant was deprived of the ability to strike Wade because of her supposed impartiality. Furthermore, the court failed to poll each juror to ensure that there had been no impropriety outside of the courtroom. The court simply made an inquiry of Wade (with whom she was familiar) and removed her from the case. There was no further inquiry to determine if the jury had been tainted. Failure to do this resulted in irreparable prejudice to the defendant's case.

IV. WHETHER THE COURT ERRED IN ALLOWING SPECULATIVE TESTIMONY?

¶17. During the testimony of Latravis Skinner (the brother of Kenny) testified that he witness the fight and the shooting. He also testified that he pushed Cord off Kenny and when Kenny got up, he shot Cord. (T.rec. 315, ln 24-29; T.rec. 317, ln 8-10). During cross examination, the prosecution asked Latravis if he knew how much Cadarius' weighed, to which the witness answered no. (T.rec. 16-17). Afterwards, the district attorney - not satisfied with the answer - kept pressing about the

⁸ Lewis was the father-in-law of the sheriff of Copiah County at the time of this case. He had a reputation for being a bragger.

witness' knowledge of the weight of the deceased over the objections of the defense. (T.rec. 323-324). It is error for the trial court to allow evidence based on speculation. *Edmonds v. State*, 955 So.2d 702 (Miss. 2007); *Balouch v. State*, 938 So.2d 253 (Miss. 2006). The testimony had been asked and answered. It had no factual basis. Inasmuch, admission of that testimony was prejudicial to the defendant.

V. WHETHER THE EVIDENCE SUPPORT A VERDICT OF MANSLAUGHTER RATHER THAN MURDER?

¶18. The sufficiency of the evidence conclusively show that the killing was done in the heat of passion mitigating the killing to a manslaughter. *Johnson v. State*, 2009 Miss.App. LEXIS 748; No. 2008-KA-01176-COA. By the accounts of Moore, Jennifer Grant, Latravis Skinner and Elisa Love, the shooting occurred immediately afterward the fight ended. According the Captain Sam Chambers, Moore shot because the victim jumped on him (T.rec. 268, ln 19-22) and Moore did not want to fight McChriston and he told him to "go on, I don't want to fight you". The court instructed the jury on manslaughter, in instruction No.4; the instruction also defined the emotional state of mind, characterized by anger, rage, hatred, furious resentment or terror.

¶19. During the trial Dr. Steven Haynes testified that the entrance of the gunshot wound over the chest of the decedent. (T.rec. 211-212). Dr. Haynes also testified that there was only one gunshot wound that penetrated McChriston's body. (T.rec. 213, ln 27-29; T.rec. 214, ln 1) (Rec. Ex. B). This is not consistent with any testimony that Cord was not facing Kenny when he shot him.

¶20. The chief distinction between murder and manslaughter is the presence of deliberation and malice in murder and its absence in manslaughter. *Johnson citing Goldsby v. State*, 226 Miss. 1, 78

So.2d 762 (1955). The supreme court defines “heat of passion” as follows: 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 of terror. *Johnson citing Given v. State*, 967 So.2d 1, 11 (¶33) (Miss. 2007) and *Mullins v. State*, 493 So.2d 971 (Miss. 1986). Stated differently, in order for a crime to be reduced from murder to manslaughter, circumstances must exist that would rouse a normal mind ‘to the extent that the reason is overthrown and that passion usurps the mind destroying judgment’. *Johnson citing Graham v. State*, 582 So.2d 1014, 1018 (Miss. 1991).

¶21. In the case at bar, the facts definitely fit the standard of heat of passion - manslaughter. The argument, fighting and the surrounding instigation of the fight, were the acts that provoked and fueled the anger that led to the shooting of McChriston. By all accounts from the witnesses, McChriston was beating Kenny while he was balled up on the ground. (T.rec. 173). Latravis Skinner testified that Jamario Johnson and Corey Johnson talked to Kenny but the conversation did not last over a minute. (T.rec. 325, ln 14-19). Skinner also testified that between the arguing, the fighting and shooting was a span of twenty (20) minutes. (T.rec. 329, ln 28-29; 330, ln 1-9); see also the testimony of Jermaine Young who stated that five (5) to ten (10) minutes after the arguing and fighting, Kenny starting shooting at Cardarius. (T.rec. 176, ln 4-13). Gregory Malone also testified that Moore did not stay down the road long. (T.rec. 156, ln 25-28). Johnson also testified that Moore was still angry and upset while others tried to calm him down. The killing in the matter was fueled by anger and embarrassment and in that instance, Moore’s reason was overthrown and his judgment

was destroyed. *Keys v. State*, 2009 Miss. App. LEXIS 697 (No. 2007-KA-02221-COA). Unlike the defendant in *Keys* (who left the scene of the altercation, went to his home, returned thirty (30) minutes later and shot the victim), Moore never left the scene of the altercation and the shooting occurred within minutes after the arguing and altercation. His conduct was in reaction to the spur of the moment. He was not acting with deliberate design when he shot McChrison.

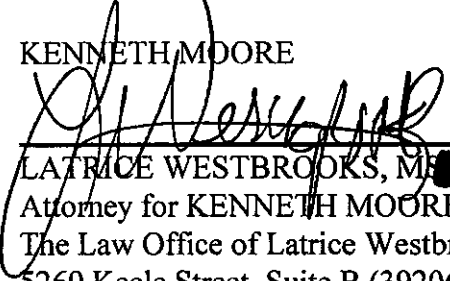
¶22. The verdict was clearly against the overwhelming weight of the evidence. Looking at the evidence in the light most favorable to the prosecution, a reasonable juror could *not* have concluded beyond a reasonable doubt that all of the elements of murder by deliberate design were satisfied. (Emphasis added). It is undisputable that Moore's actions were the result of an emotional state of mind fueled by anger, rage hatred and furious resentment.

CONCLUSION

¶23. Appellant respectfully prays that this Court reverse the verdict of the Holmes County jury on the offense of Murder and remand the case back to the Holmes County Circuit Court. The Appellant also request any relief under the principals of law and equity to which he may be entitled.

Respectfully Submitted this the 20th day of December, 2009.

BY: KENNETH MOORE


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CERTIFICATE OF SERVICE

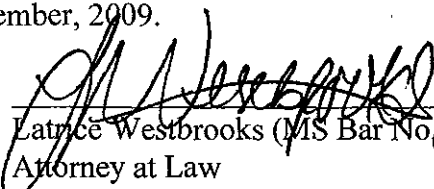
I, LATRICE WESTBROOKS, do hereby certify that I have this day forwarded, via facsimile and U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing the Brief of the Appellant to all parties concerned as listed below:

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THIS the 20st day of December, 2009.



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