IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MALACHY DEHENRE — APPELLANT

VS. — NO. 2008-KA-0968-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MALACHY DEHENRE **APPELLANT**

VS. **NO. 2008-KA-0968-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Defendant, Malachy DeHenre was indicted by the Grand Jury of Jones County, Second Judicial District for the crime of Murder in violation of Miss. Code Ann. § 97-32-19(1)(a). (C.p.3) After a trial by jury, Judge Billy Joe Landrum presiding, the jury found defendant guilty of the lesser offense of Manslaughter. (C.P. 120) Defendant was sentenced to 20 years in the custody of the Mississippi Department of Corrections, ordered to pay court costs and to get his GED. (Sentencing order, c.p. 160-61)

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

Defendant was having marital problems with his wife, Dr. Nyasha DeHenre. The victim Dr. Nyasha DeHenre was in fear because of threats defendant made against her. She had body guard follow her. Tr. 147 She expressed this fear to others. Dr. Nyasha DeHenre planned on separated from defendant. Tr. 165. He won't have it and declared that the only way she would leave him is in a body bag. Tr. 160-61

A few short months later defendant argued with his wife and shot her. Their daughter called 911 and told the operator her father had shot her mother. Tr.178. She lingered for a few days in the hospital before dying from her wounds. Tr.223.

The jury heard the evidence and the testimony of the defendant and found him guilty of manslaughter.

SUMMARY OF THE ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL DURING JURY SELECTION.

The judge instructed the jury to disregard the comment of the venire person.

II.

THE TRIAL COURT WAS CORRECT IN ALLOWING THE TESTIMONY OF DR. PATEL AS THERE WAS NO DOCTOR PATIENT PRIVILEGE.

The statement was admissible as it was made by defendant and was being offered against him at trial. Defendant was not a patient of Dr. Patel, no privilege existed.

III.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE EXPERT TESTIMONY OF DR. STEPHEN HAYNE.

Dr. Hayne is amply qualified to testify as an expert.

IV.

THE TRIAL COURT DID NOT ERR IN ALLOWING DR. MICHAEL BADEN TO TESTIFY.

Dr. Baden is qualified as an expert and his testimony was relevant.

V.

THE SPOLIATION OF EVIDENCE WAS NOT IN BAD FAITH SO THERE IS NO NEED TO DISMISSED.

Defendant did not meet his burden of proof to have his charges dismissed by claiming spoliation of evidence.

VI.

THE 911 OPERATOR WAS TESTIFYING AS TO 'PRESENT SENSE IMPRESSION'.

Testimony of 911 operators is admissible.

VI. & VII.A & VII.B

THE 911 OPERATOR WAS TESTIFYING AS TO 'PRESENT SENSE IMPRESSION'.

Testimony of 911 operator is admissible and non-testimonial the declarant is the operator not the voice on the line.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL DURING JURY SELECTION.

In this initial allegation of trial court error defendant assert the trial court should have granted the motion for mistrial after a venire member stated that defendant was an 'abortionist'. Tr. 78.

The trial court immediately removed the woman from the courtroom and admonished the jury regarding the comment. The trial court also polled the jury and asked if they could all disregard the comment. The judge then entertained a motion for mistrial at the bench (out of the hearing of the jury.) Tr.79-81. The overruled the motion for mistrial. Tr. 81.

The reviewing Courts of Mississippi have had factually similar situations before and held, to wit:

> ¶ 11. In the record, it is clear that all of the panel members, obviously including those ultimately seated, had indicated that they could base their verdict solely on the evidence presented and the instructions of the court. See Benson v. State, 551 So.2d 188, 191 (Miss.1989). Under these circumstances, the court did not abuse its discretion in determining that the venire had not been prejudiced by Steiner's remarks and in denying the motion for a mistrial. See Tobias v. State, 724 So.2d 972, 977 (¶ 34) (Miss.Ct.App.1998) (citing Irving v. State, 361 So.2d 1360, 1368 (Miss.1978)); Wilson v. State, 574 So.2d 1324, 1332 (Miss.1990).
>
> ¶ 12. After reviewing the record, this Court finds that the trial court did not abuse its discretion by refusing to declare a mistrial after the improper statements of a potential juror. This Court is satisfied that the

> venire panel was not influenced by the improper comments, and any error was harmless error.
>
> *Davis v. State*, 850 So.2d 176, 179 (Miss.App. 2003).

Therefore, the trial court acted quickly to instruct the jury and determine if they could be impartial and disregard the comment. There was no abuse of the trial courts discretion in denying the motion for mistrial under the rationale as summarized in *Davis, supra.*

Accordingly, the State would ask that no relief be granted on this allegation of error.

II.
THE TRIAL COURT WAS CORRECT IN ALLOWING THE TESTIMONY OF DR. PATEL AS THERE WAS NO DOCTOR PATIENT PRIVILEGE.

A.

This next allegation of error claims that statements made by defendant in a conversation with a doctor and the victim, were privileged and error to allow their admission.

The trial court heard this issue as a motion pre-trial. Tr. 27-29. Further, at trial the judge allowed the testimony.

The testimony was that a few weeks prior to the death of defendant's wife Dr. Patel had invited them both over to his home. The reason for the meeting was to get the defendant's wife (also a physician) to come back to her practice in Laurel, Mississippi. He absence had put increased pressures on the doctors in the practice to handle patients, calls, etc.

Anyway, at some point defendant yelled that his wife should come home and that the only way she could leave him was '..in a body bag.' Tr. 161

The trial court ruled pre-trial that any statements defendant made to someone was admissible. Which interestingly this statement was made from the defendant DeHenre to his wife, in the presence of Dr. Patel. So, there was no marital privilege.

¶ 17. Grant objected to the testimony at trial on the ground that the

> statements were hearsay. The trial judge allowed the testimony over Grant's objection as an exception to the hearsay rule. Mississippi Rule of Evidence 801(d)(2) provides an exception to the general rule of excluding hearsay evidence when the statement was an admission by party-opponent. In Conley v. State, 790 So.2d 773, 787(¶ 43) (Miss.2001), the supreme court held that "a statement is not hearsay if it is the party's own statement offered against him. It is irrelevant that the defendant did not intend it to be a statement against interest and that it was self-serving when made." Id. (citing Thornhill v. State, 561 So.2d 1025, 1029 (Miss.1989)). The trial judge did not abuse his discretion in allowing the testimony under Mississippi Rule of Evidence 801(d)(2). See McGee v. State, 853 So.2d 125, 131-32(¶ 19) (Miss.Ct.App.2003) (holding that there is no hearsay issue regarding testimony about what the defendant told the witness). Therefore, this issue is without merit.
>
> *Grant v. State*, 8 So.3d 213, 219 (Miss.App. 2008).

So, succinctly, the statement was not hearsay as it was made by defendant and offered against him at trial. There was no medical privilege regarding the statement.

The trial court was correct in his ruling. No relief should be granted on this partial claim of error.

B.

The statement by defendant that the only way his wife would leave him was '...in a body bag' was made in October of 1996. (Tr. 164). The killing took place the 23rd of January, 1997. (Indictment, c.p.3). A period of three to four months.

Defense objected to this statement on remoteness at trial. Tr. 159.

> ¶ 16. Stallworth's third contention is also without merit. In Webster v. State, 755 So.2d 451, 457 (Miss.Ct.App.1999), the defendant argued that testimony regarding a fight that took place approximately one year earlier

> between him and the murder victim should not have been admitted by the trial court because the event was too remote in time. This Court upheld the Court of Appeals' ruling that the evidence regarding the prior violent act was not too remote in time from the subsequent murder. *Webster v. State*, 754 So.2d 1232, 1238-39 (Miss.2000).
>
> *Stallworth v. State*, 797 So.2d 905 (Miss. 2001).

It is the succinct position of the State that if one year is not too remote for a statement to be relevant and admissible then 3-4 months is also not too remote.

There was no abuse of discretion by the trial court in overruling the claim of remoteness with regard to defendant's prior statement.

III.
THE TRIAL COURT DID NOT ERR IN ALLOWING THE EXPERT TESTIMONY OF DR. STEPHEN HAYNE.

In this next claim of trial court error counsel for defendant raises the now ubiquitous claim that Dr. Stephen Hayne is not qualified as an expert in forensic pathology.

The Mississippi Supreme Court succinctly and directly addressed this very claim in *Lima v. State,* 7 So.3d 903, 907 (¶¶16-20)(Miss. 2009).

> ¶ 17. It is clear from the record that the trial court did not abuse its discretion when it accepted Dr. Hayne as an expert. Dr. Hayne's testimony as to his medical training and experience within the field, which included more than twenty years of experience within the State of Mississippi, exhibited sufficient "knowledge, skill, experience, training, or education" for the trial judge to qualify him as an expert.
>
> ¶ 18. We find nothing in the record to suggest that Dr. Hayne's testimony was not based on "sufficient facts or data." Dr. Hayne's post-mortem examination revealed that Houck's body contained numerous*908 lacerations and abrasions, and that the fatal injury occurred when two slash wounds became confluent and ran horizontally across Houck's neck. Dr. Hayne testified to that effect at trial, and the photographs entered into evidence supported his conclusions.
>
> ¶ 19. Additionally, nothing in the record suggests that Dr. Hayne's testimony was the product of "unreliable principles and methods." Lima claims that Dr. Hayne's testimony was unreliable because he performs many more autopsies annually than the number recommended by the authors of Forensic Pathology. However, Dr. Hayne explained that he does not take vacations and works nearly every day of the year, for approximately sixteen hours a day. He explained that performing a large number of autopsies is viewed by some as necessary in order to remain competent in the field. Dr. Hayne also testified that there was no

> deterioration of his intellectual or physical performance. The State points out that, while Dr. Hayne's work in this particular case was not peer-reviewed, his work in other cases has been. Finally, nothing in the record suggests that Dr. Hayne did not "apply the principles and methods reliably to the facts of the case," nor does Lima point to any specific application errors.
>
> ¶ 20. Thus, based on the foregoing analysis, we hold that the trial court did not abuse its discretion when it accepted Dr. Hayne as an expert.
>
> *Lima v. State*, 7 So.3d 903, 907-908 (Miss. 2009).

It is the position of the State the same rationale applies to this case, the law, and similar facts. Again there is nothing within Dr. Hayne's testimony produced from unreliable principles or methods.

Accordingly, the trial court had ample evidence and testimony to allow Dr. Hayne to testify as an expert witness. There was no trial court error in allowing him to testify and no relief should now be granted on appeal.

IV.
THE TRIAL COURT DID NOT ERR IN ALLOWING DR. MICHAEL BADEN TO TESTIFY.

At this point the issue is simple, at page 49 in the transcript the defense complained that having the smoothing talking expert from New York testify would be cumulative. The trial judge, with great candor, succinctly stated that "if he's qualified he can testify." (Paraphrased from tr. 49).

When Dr. Baden was called as a witness the State quickly asked questions which satisfied the trial court that he was an expert in his field. Additionally, the trial court wanted further information on how such expertise would be relevant to this case and aid the jury. Tr.349. The trial court ruled Dr. Baden was an expert and his testimony would be relevant and admissible. Tr. 356.

> ¶ 25. The admissibility of expert testimony lies within the sound discretion of the trial court. See Miss. Transp. Comm'n v. McLemore, 863 So.2d 31, 34(¶ 4) (Miss.2003). This Court reviews the trial court's admittance of expert testimony under an abuse of discretion standard. Id. Therefore, this Court will not disturb the trial court's ruling unless it is clear that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion. Id.
>
> ¶ 26. Mississippi Rule of Evidence 702 addresses testimony by experts, stating that:
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1)

> the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
>
> Our supreme court adopted the standard set forth in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589-97, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) to determine the admissibility of expert testimony. See McLemore, 863 So.2d at 35-40 (¶¶ 6-25). The Daubert test requires a two-prong inquiry: (1) the trial court must determine whether the expert testimony is relevant, meaning that it must assist the trier of fact; and (2) the trial court must determine whether the proffered expert testimony is reliable. Id. at 38(¶ 16) (citations omitted).
>
> *Teston v. State,* 2008 WL 4914960 (Miss.App. 2008).

Based upon the rational expressed in *Teston* it is the position of the State the trial court applied the correct law to the question of Dr. Baden's qualification and reliability.

In conclusion, the State would again argue there was no abuse of discretion by the trial judge in allowing the testimony of Dr. Baden. No relief should be granted on this allegation of error.

V.

THE SPOLIATION OF EVIDENCE WAS NOT IN BAD FAITH SO THERE IS NO NEED TO DISMISSED.

Herein defendant claims this case should be 'dismissed' because the State destroyed evidence and it was a due process violation.

Defendant constantly uses the word 'destroyed' when that was never determined at trial. It may have been lost, misplaced or destroyed. Regardless, it was not available for defendant's use at trial.

> ¶38. In Murray v. State, we clarified three requirements to find a due process violation by the State in a preservation of evidence case: (1) the evidence in question must possess an exculpatory value that was apparent before the evidence was destroyed; (2) the evidence must be such that the defendant would be unable to obtain comparable evidence by other reasonably available means; and (3) the prosecution's destruction of the evidence must have been in bad faith. Murray v. State, 849 So.2d 1281, 1286 (Miss.2003) (citing State v. McGrone, 798 So.2d 519, 523 (Miss.2001)).

Bell v. State, 963 So.2d 1124 (Miss. 2007).

There was much, and sometimes rancorous, courtroom discussion about the 'evidence' that was not available. Tr.52-60. And the trial court overruled the motion to dismiss based upon 'spoliation of evidence'.

The trial court knew and followed the three-prong test reiterated in *Bell, supra.* And did not find any evidence that there was 'bad faith'.

> ¶ 40. With regard to the last prong, bad faith is defined as "not simply bad judgment or negligence, but rather ... conscious doing of a wrong

> because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will." Murray, 849 So.2d at 1286 (citing Black's Law Dictionary 139 (6th ed. 1990)). In Tolbert v. State, this Court also stated that an inference that the evidence was favorable to the defense exists only "where the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth." Tolbert v. State, 511 So.2d 1368, 1372 (Miss.1987) (quoting Washington v. State, 478 So.2d 1028, 1032-33 (Miss.1985)). There is no evidence that the prosecution intentionally caused the destruction of the mirror or caused it to be unavailable. Neither the prosecution nor the defense was able to use the mirror in the preparation of its case.
>
> *Bell v. State*, 963 So.2d 1124 (Miss. 2007).

It is the position of the State the trial court, based upon the evidence presented pre-trial, did not abuse his discretion in denying the motion to dismiss.

No relief should be granted based upon this allegation of error.

VI. & VII.A & VII.B
THE 911 OPERATOR WAS TESTIFYING AS TO 'PRESENT SENSE IMPRESSION'.

It is the position of the State the testimony of the 911 operator was admissible.

> The Mississippi Rules of Evidence explain a "present sense impression" as a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." M.R.E. 803(1). Its exception from the rule against hearsay is based on the theory that the contemporaneousness of the occurrence of the event and the statement render it unlikely that the declarant made a deliberate or conscious misrepresentation. M.R.E. 803(1), comment 1; Peterson v. State, 518 So.2d 632, 640 (Miss.1987)(citing 4 J. Weinstein, Evidence, Para. 803(1)[01] (1987)). To be admissible under this exception, the statement must be spontaneous. The determination of spontaneity "is a question for the trial judge, whose action should not be overturned unless this Court would be justified in concluding that under all and any reasonable interpretation of the facts the exclamation could not have been spontaneous." Evans v. State, 547 So.2d 38, 41 (Miss.1989). The circuit court correctly found that the statements made by Meunier while talking with the emergency operator perceived the event, described what was happening to her, and were sufficiently contemporaneous to fit within the exception.
>
> *Clark v. State,* 693 So.2d 927, 932 (Miss. 1997).

This holding is consistent with later rulings that 911 tapes and calls and statements made therein are not testimonial in nature. *Williams v. State,* 960 So.2d 506, 510 (¶ 14)(Miss.App. 2006).

Further, this short one paragraph consisting of error VI. appears to be unsupported by citation to rule, law, statute, case law or constitutional provision.

¶ 6. Richardson cites no authority to support the above assertion of error.

> Further, the assertion was explained by a mere two sentences in his brief. Our supreme court has made it clear that assertions of error which are not supported by citation or authority are abandoned. *1279 Thibodeaux v. State, 652 So.2d 153, 155 (Miss.1995). Further, in such a case where the burden of providing authority to support the assignment of error is not met, the issue is procedurally barred. Drennan v. State, 695 So.2d 581, 585-86 (Miss.1997). It is also clear from the briefs and the record that this assignment of error is without merit.
>
> *Richardson v. State*, 807 So.2d 1277, 1278 -1279 (Miss.App. 2001).

Now as to argument VII A & B. These are essentially built upon the premise that the 911 tape is inadmissible. Well, as noted above such tapes are admissible. Of course, it is worth noting that there was actually no evidence presented to the jury that any statement was recanted. It is not in this record. What we do have is the present sense impression testimony of the operator regarding non-testimonial statements made at or near the time of the death. Such are admissible – even if the caller later recants.

Defense counsel creates his own problem in assuming Nyasha DeHenre made the statement – at trial. The truth is the defendant's daughter (Nyasha DeHenre) did not testify at trial. The issue here is in regards tothe testimony of the 911 operator – Dora Morgan. Dora Morgan. Her statements have always been consistent. There was no prior inconsistent statement by her. Dora Morgan has always testified that defendant's daughter stated the he shot her mother.

Thomas v. State, 2009 WL 2370788, (¶25)(Miss.App. 2009)(Rule 613(b) refers to prior inconsistent statements by a witness).

It is the position of the State this issue is without merit in fact and law. No relief should be granted based upon these allegations of error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial of post-conviction relief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

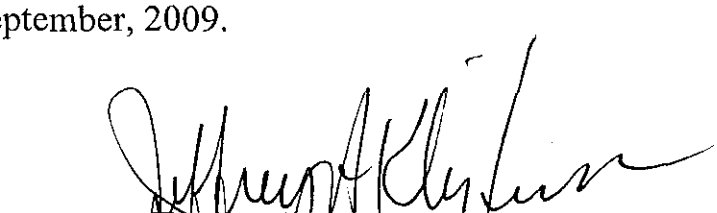
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Billy Joe Landrum
Circuit Court Judge
Post Office Box 685
Laurel, MS 39441

Honorable Anthony J. Buckley
District Attorney
Post Office Box 313
Laurel, MS 39441

David M. Ratcliff, Esquire
John A. Piazza, Esquire
525 Central Avenue, Suite 1
Laurel, MS 39440

This the 8th day of September, 2009.



JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680