IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHN EDWARD JOHNSON — APPELLANT

VS. — NO. 2008-KA-1176-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Jackson County, Mississippi, and a judgement of conviction for the crime of murder entered against John Edward Johnson (Johnson), resulting in a life sentence. (C.P. 162; T. 276, R. 7-8). This conviction and sentence followed a jury trial held from March 3, 2008 to March 5, 2008, Honorable Robert P. Krebs presiding. After denial of post trial motion, Johnson appealed raising the following issues:

ISSUES

I. **WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT, AS THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT JOHNSON DID NOT ACT IN NECESSARY SELF-DEFENSE.**

II. **WHETHER THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, WHICH ESTABLISHES THAT JOHNSON ACTED IN NECESSARY SELF-DEFENSE.**

III. **WHETHER THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, WHICH ESTABLISHES THAT**

JOHNSON ACTED IN THE HEAT OF PASSION AND WAS GUILTY, OF MANSLAUGHTER.

FACTS

On the evening of November 19, 2003, the Moss Point Police Department dispatched officers to Linda Mizell's ("Mizell") house to investigate a shooting. (T. 109-10, 143-44). Officers found Keith Franklin ("Franklin") lying on the ground receiving CPR. (T.108, 145). Franklin was pronounced dead at the scene. (T. 136, Ex. S-22). An autopsy confirmed that Franklin died of a single gunshot wound to the upper left chest. (T.136,Ex. S-22). Johnson was indicted and eventually tried for murder. The following evidence was adduced at trial.

Franklin and Johnson were friends until Franklin started dating Johnson's daughter, Starla Johnson ("Starla") (T. 207). Johnson did not approve of the dating and did not want Franklin around him. (T. 207).

On November 19th, Franklin and Starla went to Mizell's house. (T. 77-78). Subsequently, Franklin and Claude Williams ("Williams") went to the store for beer. (T.79, 184).[1] Johnson and friend, Rodney Welford ("Welford"), arrived at Mizell's house in Johnson's truck so Johnson could retrieve his cellular telephone from Starla. (Tr. 79, 179, 193). Starla walked over to Johnson's truck and the two argued. (T. 184-84, 196, 209). Franklin and Williams returned from the store. (T.80, 180, 193, 209). Franklin wanted to talk to Johnson about the relationship so Franklin and Starla walked over to the truck. (T. 80, 180, 193, 209). Franklin had a Bud Light beer in his hand that he placed between the cab and the back of Johnson's truck. (T. 80, 82).

Mizell testified Johnson and Franklin argued about Starla. (T. 80, 193, 209). Mizell told them they needed to take their arguing somewhere else. (T. 80). Mizell testified that as Johnson's

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[1]Williams was present at the time of the shooting but did not actually see it. Also Williams was out of state at the time of trial so he did not testify. (T. 153).

truck "rolled off" "about three feet" with the door open, Franklin reached for his beer, turned around and was walking away when Johnson shot him under the left arm.(80-85, 94-96). Franklin staggered and fell back to the ground with the beer bottle intact. (T.80-85, 92, 149). Johnson and Welford sped away in the pickup truck. The police recovered the beer bottle lying next to Franklin. (T. 84-85, Ex. S-2). Mizell's testimony was consistent with the statements she gave the authorities after the shooting and the following day. (Ex. D-2; C.P. 32-33).

Jeff Smith ("Smith") a detective with the Moss Point Police Department testified to his investigation of the crime. The night of the shooting he determined there were two (2) eye witnesses to the actual shooting, Linda Mizell and Starla Johnson. (T. 146-47). Smith interviewed both women that night and again the following day. (T. 146, 152). Smith testified they found an intact Bud Light beer bottle next to Franklin's left side but did not find any broken glass from a beer bottle at the crime scene. (T. 147, 151-52). When the authorities recovered Johnson's truck, Smith found broken automobile glass on the passenger's side floorboard, which was clearly unrelated, but did not find any glass from a broken beer bottle in the cab or back of the pickup. (T. 155-56, Ex. S-11,12)

Dr. Paul McGarry, the forensic pathologist who conducted the autopsy, testified Franklin died of a single gunshot wound to the upper left chest below the shoulder. (T132, 136). Dr. McGarry opined the end of the gun was within two feet from Franklin's chest when fired. (T. 139). Dr. McGarry also testified that the bullet entered Franklin's "upper left chest below the shoulder" and traveled "rightward, backward, 20 degrees, downward 50 degrees, to an exit hole of the right central back." (T. 132). McGarry determined from the angle of the bullet entry and exit, that if Franklin was standing next to the truck, and the driver was seated and facing forward, then Franklin would have to have been standing with his left shoulder toward the shooter. (T.135). On cross examination,

McGarry admitted that he was not told the victim attempted to enter the truck.(T. 138). McGarry testified the angle of the bullet could be consistent with Franklin reaching in the truck to unlock the door or to get a hold of the door handle, but, McGarry explained "Any position that he would get in, that would change him from straightly looking at the driver, any position that would put his left shoulder toward the driver, rather than the center of his chest, would account for this....I would expect from the angle of the shot, the way it goes into his chest and goes downward and backward and rightward, that his left shoulder was toward the shooter, his right shoulder was away from the shooter " (T. 139). This is consistent with Mizell's statement and testimony and Starla's statements that as the truck began to roll away, Franklin reached for his beer behind the truck cab and turned.

Starla Johnson testified that Franklin wanted to talk to her dad but Johnson told him to get away. (T. 180). Franklin persisted and when Johnson started to take off, Franklin jumped in the truck, Johnson shot him and then sped off. (T. 180-81). Starla further testified that Franklin tried to hit Johnson twice. (T.180,185). On cross examination, Starla identified the written statement she gave authorities the night of the shooting. (T. 187). In the statement Starla wrote "Keith walked up to John's truck and said, man, what's up John. I don't want you with her. And Keith said, man, we got this straight. John closed his door. Keith, who started to drive off, Keith run up to the truck and John fired." (T. 187). On the day following the shooting, Starla met with Smith again and gave another statement. In her statement on the 20th, she said Franklin had his arm on top of the truck, and reached in with his left hand . (T. 189-90). On cross examination Starla admitted that when John started to drive off the truck door was open and the upper part of Franklin's body was in the truck. (T. 190). Starla admitted she had not talked to her father before giving her statement on the 19th and 20th. (T. 189-90). She refused to admit that in giving her statement the night of the shooting and

again the following day she did not tell Detective Smith that Franklin hit her father.

Several months after the shooting, Detective Smith was finally able to interview, Rodney Welford, Johnson's friend and passenger in his truck at the time of the shooting. Welford told Smith that while standing outside the truck, Franklin had something in his hand. Johnson later told him it was a bottle. Welford admitted to living with Johnson from the day of the shooting. (Ex. D-3). At trial Welford testified:

> [Johnson] tried to shut the door and ease off in his truck, and when he did, it choked down and it went dead. Well, the boy that was arguing with him, had a bottle, or a glass – I can't tell you what it was. It looked like some kind of bottle, and he busted it on the side of that truck, and the glass shattered and went all the way across the back side of that truck. When he did, that boy come inside on him and went swinging with that bottle in one hand and fist in the other.

(T. 193-94). On cross examination, Welford testified that Starla and Johnson were arguing at the truck before Franklin arrived. (T. 197). He was looking through the back window when Franklin broke the bottle and saw glass go in the back of the truck. (T. 198). Welford went on to testify that Franklin had glass or maybe a knife in his hand when he went after Johnson. (T. 199). Welford testified that he was with Johnson for about 12 hours after the shooting. (T. 201).

Johnson testified in his own defense insisting he shot Franklin in self defense. According to Johnson, about three months prior to the shooting, he and Franklin had an altercation. Franklin dropped Starla off at Johnson's house. (T. 208). When Franklin returned he was angry at Johnson's nephew about something and showed up with a baseball bat. *(Id.).* Franklin refused to leave so Johnson pulled out his gun and shot at Franklin's feet. *(Id.).* According to Johnson, Franklin ran to his car to get a weapon so *Johnson shot him. (Id.) (Emphasis added.)* However, Franklin had on a bullet proof vest so he was not injured. Johnson testified Franklin then shot into the house, but no

one was injured. (*Id.*). The fact that Johnson previously shot Franklin was corroborated by Starla's statement.

Johnson testified, "I started taking off, but I couldn't shut my door because they were both standing there."(T. 210). "And I went to pulling off and shut my door, and he struck me beside the head. " I shut my door, and I starting easing off, and Rodney was halfway out of the truck ... I hit the brakes, and Rodney got in. I heard glass break, and I turned to look, and he come through the window on me, and I grabbed my pistol. I thought I shot him in the shoulder." (T. 210). Johnson testified when he shot the gun Franklin was on top of him and he touched the gun to him. (T. 211). After Johnson shot Franklin, he drove off with Welford in the truck to Steve Holcolm's ("Holcolm") house. (T. 210). Holcolm, Johnson's friend, corroborated Johnson's testimony that Johnson left the truck at his house after the shooting. (T. 113). According to Holcolm, his son found a gun on the hood of Holcolm's truck. (T. 114). Authorities recovered the handgun in a "garbage hull" at Holcolm's residence. (T. 124). They arrested Johnson at his residence. (T. 129).

The court instructed the jury on self-defense, murder and manslaughter . (T. 233-49, C.P. 115-150). The jury refused to find Johnson acted in self defense or in the heat of passion and convicted him of depraved heart murder. (C.P. 159, T. 276). The trial court denied Johnson's motion for a new trial. (C.P. 194, T. 294, RE 9).

SUMMARY OF THE ARGUMENT

Johnson's arguments challenge the weight and sufficiency of the evidence. The force of these arguments is that this case does not constitute depraved heart murder. There was sufficient credible evidence to support Johnson's conviction for depraved heart murder, even though Johnson attempted to make a case of self-defense that Franklin was armed with a broken beer bottle and jumping on him. The overwhelming weight of the evidence supports the jury's finding that Johnson did not act in self defense nor did he shoot Franklin in the heat of passion.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS GUILTY OF MURDER AND DID NOT ACT IN SELF DEFENSE.

In his first assignment of error, Johnson claims the prosecution failed to rebut his self-defense theory. The burden of rebutting self-defense rests with the State. The defendant is not required to prove that he acted in self-defense, and, if a reasonable doubt of his guilt arises from the evidence, including evidence of self-defense, he must be acquitted. *Smith v. State,* 754 So.2d 1159(¶ 15) (Miss.2000).

Even though Johnson attempted to make a case of self-defense that Franklin was armed with a broken beer bottle and jumping on him, there was sufficient evidence to support Johnson's conviction for depraved heart murder. The facts indicate that while Franklin was standing outside the truck and Johnson was seated in the driver's seat, Johnson and Franklin began to argue; Johnson began to drive off in the truck; Franklin reached for his beer that was sitting on the back of the truck and began walking beside the truck, then Johnson retrieved his gun from under the arm rest and fatally shot Franklin.

Johnson was convicted of depraved heart murder, "The killing of a human being without the authority of law by any means or in any manner . . . [w]hen 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." Miss. Code Ann. § 97-3-19(1)(b) (Rev.2006). "An act which poses a risk to only one individual and which results in that individual's death may also be deemed depraved-heart murder." *Windham v. State*, 602 So.2d 798, 802 (Miss.1992).

The Mississippi Supreme Court held in *Steele v. State*, 871 So.2d 1282, 1285 (Miss.,2003) that when a defendant has been found guilty by a jury, appellate authority is limited, and the verdict should not be overturned so long as there is "credible evidence in the record from which the jury could have found or reasonably inferred each element of the offense." *Davis v. State*, 586 So.2d 817, 819 (Miss.1991). The reviewing court is to examine all of the evidence in the light most favorable to the verdict. *Yates v. State*, 685 So.2d 715, 718 (Miss.1996).

> The sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence ... must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. A reviewing court is authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

McClain v. State, 625 So.2d 774, 778 (Miss.1993).

There was sufficient evidence that Johnson acted without authority of law. A killing in defense of one's self or another human being is justifiable "where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished." Miss.Code Ann. § 97-3-15(1)(f) (Rev.2006).

Johnson did not have reasonable ground to apprehend that there was imminent danger Franklin would kill him or cause him great bodily harm. Although Johnson put on testimony that he acted in self-defense, the testimony was not credible and was not supported by the physical evidence introduced at trial.

Accounts vary regarding how heated the discussion became between Johnson and Franklin, but neither Mizell nor Starla, the two witnesses with a clear view of the shooting, saw Franklin with

a broken beer bottle, as the defendant and Welford claimed. No broken beer bottle or broken glass was found at the crime scene, in fact, Franklin's bottle of Bud Light was found in tact close to his body. There was no broken glass found in the back of the truck and the only broken glass found inside the cab of the truck was automobile glass unrelated to this incident. This completely conflicts with Johnson's and Welford's statements and testimony that Franklin broke a beer bottle and tried to cut him.

Starla's statements to law enforcement indicated Johnson shot Franklin when Franklin was walking with the truck and trying to talk to him. (T. 187 ; Ex. D-2). Starla's testimony conflicted with those statements. Even though Starla testified that Franklin hit her father she did not mention this in her two previous statements. On cross examination, Starla testified she did not talk with her father before giving the two statements, but she talked with him prior to the trial when they reconciled.

According to Dr. McGarry's testimony, the trajectory of the bullet indicates that Franklin was not facing Johnson but had his left shoulder toward him. (T. 138). If Franklin was swinging at Johnson through the truck window with one hand and trying to hit him with a beer bottle with the other, as Johnson and Welford testified, then Franklin would have been facing Johnson when shot, and that is not what the physical evidence indicates.

Johnson points to the prior altercation with Franklin as a basis for his fear that Franklin would hurt him. In the previous altercation, Johnson claimed Franklin had a bat, in the case *sub judice*, Franklin was unarmed. Also, defense fails to mention that during the previous altercation Johnson actually shot Franklin. If anyone had a right to fear for their bodily safety it was Franklin. The evidence is clear that Franklin was attempting to reconcile his friendship with Johnson when

Johnson fatally shot him.

Johnson cites *Scott v. State*, 34 So. 2d 718 (Miss. 1948) for the proposition that the defendant need not prove he acted in self defense but only that he raise a reasonable doubt that he is guilty of the charge against him. However, in *Scott*, the evidence was uncontradicted that the victim verbally threatened to kill the defendant and then said he was going to get his gun. In the case *sub judice,* the was no evidence the victim verbally threatened Johnson, the victim was unarmed and the evidence conflicted as to whether the victim hit Johnson in the head prior to the shooting. Because the testimony of the witnesses conflicted as to whether Franklin hit or attempted to hit Johnson, it became a fact question for the jury to decide whether Franklin posed a reasonable threat to Johnson.

Conflicts in evidence are to be resolved by the trier of fact. *Norwood v. State*, 834 So.2d 735, 738 (Miss.App.,2003) quoting *Craig v. State*, 777 So.2d 677 (¶ 10) (Miss.Ct.App.2000). Had the jury as trier of fact resolved the conflict in favor of Johnson, the evidence would have supported a not guilty verdict. Instead, the jury resolved the conflict in favor of the State, and found Johnson guilty of depraved heart murder.

There was sufficient evidence for a rational and fair-minded juror to have rejected Johnson's claim of self-defense and found that in shooting Franklin, Johnson committed an act eminently dangerous to another and evincing a depraved heart, regardless of human life. Considering the evidence in the light most favorable to the State and accepting as true the evidence supporting the verdict, Mizell's statement and testimony, Dr. McGarry's findings and testimony, and Starla's statement, the trial court did not err in denying Johnson's motion for a directed verdict and motion for a JNOV. This issue is without merit.

II. THE WEIGHT OF THE EVIDENCE DOES NOT SUPPORT SELF DEFENSE.

In his second assignment of error, Johnson maintains that the overwhelming weight of the evidence established that he shot Franklin in self-defense and he is therefore entitled to a new trial. A challenge that a judgment is against the overwhelming weight of the evidence is reviewed by an appellate court as follows:

"In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. As such, if the verdict is against the overwhelming weight of the evidence, then a new trial is proper." *Jackson v. State,* 815 So.2d 1196, 1203 (Miss.2002) quoting *Dudley v. State,* 719 So.2d 180, 182 (Miss.1998)(internal citations omitted).

When determining whether a motion for a new trial should have been granted, "[t]he motion... is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." *Bush v. State*, 895 So.2d 836 (Miss.2005). However, the evidence is viewed in the light most favorable to the verdict. *Id.* citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997).

In viewing the evidence in the light most favorable to the State, Judge Krebs did not err in refusing to grant Johnson's request for a new trial, as this was not a case where "the evidence

preponderates heavily against the verdict."

The evidence established Johnson shot Franklin in an altercation three months prior to the fatal shooting. The evidence further established that on the night of the fatal shooting, Franklin approached Johnson's truck, while drinking a beer, in an attempt to reconcile their friendship. It was uncontested Johnson's truck door was open as he started to drive off. Franklin walked along side the truck a few steps as it moved. As he reached for his beer that was behind the cab of the truck, Johnson shot and killed him.

Self-defense, manslaughter and depraved heart murder instructions were given to the jury. The question essentially was whether Johnson could reasonably perceive a danger from Franklin. As addressed in Issue I, there was sufficient credible evidence for a jury to believe that Johnson did not shoot Franklin in self-defense.

The jury reached its verdict based on the evidence presented at trial, and was entitled to believe Mizell's version of events and not Johnson's. Allowing the verdict to stand will not sanction an unconscionable injustice. This issue has no merit.

III. THE WEIGHT OF THE EVIDENCE SUPPORTS THE JURY'S VERDICT OF DEPRAVED HEART.

In his final assignment of error, Johnson asserts that the overwhelming weight of the evidence established that Johnson shot Franklin in the heat of passion, and Johnson was guilty, at most, of manslaughter. Johnson argues that because he shot and killed Franklin without malice he must have shot him out of passion. In support of this argument, Johnson points to the prior altercation between the two men, the fact that he didn't want his daughter dating Franklin, the fact that the men argued and Franklin had a beer bottle in hand.

Manslaughter committed in the heat of passion is defined in Miss.Code Ann. § 97-3-35 as, "the killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense...."

Heat of passion has been defined as "[a] state of violent and uncontrollable rage engendered by a blow or certain other provocation given.... 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 or terror" and "would produce in the minds of ordinary men 'the highest degree of exasperation.' " *Phillips v. State*, 794 So.2d 1034, 1037 (¶¶ 9-10) (Miss.2001) (citations omitted).

The record *sub judice* is devoid of credible evidence that Johnson had sufficient provocation or that he was in a state of violent and uncontrollable rage when he shot Franklin. Even though the two men argued before the shooting, "words alone, even if provocative, or disagreements between people are insufficient to satisfy the "heat of passion" requirement and, thus, reduce an intentional

and unjustifiable homicide from murder to manslaughter." Id. at (¶ 10) (quoting *Gates v. State*, 484 So.2d 1002, 1005 (Miss.1986)). There is no evidence of sudden provocation between Johnson and Franklin. Franklin was simply attempting to talk with Johnson. Furthermore, even if there were a past argument between the two men to explain Johnson's animosity toward Franklin, as the defense suggests, "this is also insufficient to satisfy the heat-of-passion element of manslaughter, as the provocation must be immediate-that is, occurring at the time of the killing." *Alford v. State*, --- So.2d ----, 2008 WL 3905907 (¶17) (Miss.App.,2008)

The Mississippi Supreme Court held in *Strahan v. State*, 729 So.2d 800, 806 (Miss.1998), that "the question of whether the defendant has committed murder or manslaughter is ordinarily a question to be resolved by the jury." The State would argue that on this record there is no credible evidence that Johnson shot Franklin in the heat of passion; therefore, the jury's verdict did not work an unconscionable injustice.

CONCLUSION

Evidence that Johnson did not act in self-defense or heat of passion was sufficient to support a conviction for murder. Linda Mizell's testimony, as corroborated by Starla Johnson's statements, the physical evidence from the crime scene and Dr. McGarry's testimony established that Franklin walked over to Johnson's truck with a beer bottle in his hand and set it down on the truck; a verbal exchange occurred; Johnson began to drive away with the door opened, so Franklin, while walking beside the truck reached for his beer and turned. Johnson grabbed his gun and fatally shot Franklin in the upper left chest under the shoulder.

Judging these facts most favorable to the State, a reasonable juror could find Johnson was guilty beyond a reasonable doubt. The weight of the evidence against Johnson demonstrates that sufficient proof was offered by the State for the jury to find him guilty of depraved heart murder. 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 verdict and trial court's sentence.

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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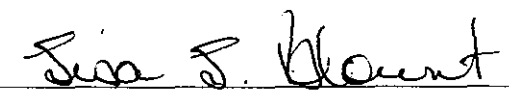
This the 23rd day of January, 2009.



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