IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHN JOHNSON — APPELLANT

V. — NO. 2008-KA-01176-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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JOHN JOHNSON **APPELLANT**

V. **NO. 2008-KA-01176-COA**

STATE OF MISSISSIPPI **APPELLEE**

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. John Johnson, Appellant
3. Honorable Anthony (Tony) Lawrence, III, District Attorney
4. Honorable Robert P. Krebs, Circuit Court Judge

This the 6th day of February, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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REPLY ISSUE

THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, WHICH SHOWED THAT JOHNSON ACTED IN SELF-DEFENSE OR, ALTERNATIVELY, IN THE HEAT OF PASSION. (*RESPONDING TO ISSUES II AND III IN THE BRIEF OF THE APPELLEE*).

As a preliminary matter, the appropriate standard of review for a challenge to the overwhelming weight of the evidence should be clarified. The State cites *Jackson v. State*, 815 So. 2d 1196, 1203 (Miss. 2002) as authority for the proposition that, in evaluating a challenge to the overwhelming weight of the evidence, "this Court must accept as true the evidence which supports the verdict." (Brief of the Appellee, p. 13). However, as this Court is well aware, in *Bush v. State*, 895 So. 2d 836 (Miss. 2005), the Mississippi Supreme Court clarified the standards of review for both the weight of the evidence and the sufficiency of the evidence as well as the differences between the two. *Bush*, 895 So. 2d at 843-45 (¶¶15-19). In so doing, the *Bush* court explained that

prior Mississippi cases had erroneously stated that, in reviewing a challenge to the weight of the evidence, the reviewing court "must accept as true the evidence that supports the verdict." *Id.* at 844 fn.3. This was erroneous because it pertained to the standard of review for the sufficiency of the evidence. (*Id.*).

Accordingly, Johnson respectfully requests this Court to acknowledge as much as it decides the issues in this case pertaining to the weight of the evidence. Johnson respectfully submits that, when *all of the evidence* adduced at Johnson's trial is considered (even in the light most favorable to the State), it becomes clear that allowing the verdict to stand "would sanction an unconscionable injustice." *Id.* at 844 (¶18).

In arguing that the verdict was not against the overwhelming weight of the evidence, the State relies almost entirely on Mizell's testimony that Johnson shot Franklin when he turned and grabbed his beer bottle, and she did not see Franklin attack Johnson. However, nearly all of the remaining evidence, both eye-witness testimony and physical evidence proved otherwise. All of the evidence adduced at trial, even considered in the light most favorable to the prosecution, overwhelmingly showed that Johnson shot Franklin in self-defense or, alternatively, manslaughter.

A. Self-defense

As to whether Johnson shot Franklin in self-defense, the State concludes that there was sufficient credible evidence for a jury to believe that Johnson did not shoot Franklin in self-defense[,] . . . " and the verdict should be affirmed because the jury "was entitled to believe Mizell's version of events and not Johnson's." (*Id.*). Mizell's testimony may, perhaps, suffice under the standard of review for sufficiency of the evidence.[1] However, under a review as to the weight of the

[1] In so stating, Johnson does not concede that the State presented sufficient evidence to prove beyond a reasonable doubt that he did not act in self-defense.

evidence, the verdict can not stand based merely on Mizell's testimony, in light of the numerous other witnesses's testimony and the physical evidence, which corroborated their testimony.

First, it is undisputed that Franklin and Johnson were previously involved in a violent encounter at Johnson's house, in which Franklin wielded a baseball bat toward Johnson's nephew, refused to leave, and threatened Johnson with the baseball bat. (Tr. 207-08). Whereupon, Johnson fired a gun in Franklin's direction, and Franklin went to his car, retrieved a gun, and fired into Johnson's occupied dwelling in retaliation. (*Id.*). Consequently, Johnson had a reason to anticipate that Franklin would again act in an irrational or reckless manner likely to cause serious bodily injury or death to him.

It is also undisputed that Franklin approached Johnson's truck with a beer bottle, which was in his hand at the time Johnson shot him. Although Mizell testified that Johnson shot Franklin as he turned and grabbed his beer bottle, *all remaining eyewitnesses* (Starla, Welford, and Johnson) testified that Franklin, beer bottle in hand, attacked Johnson through his truck door or window as Johnson was trying to leave. (Tr. 82-83, 180-82, 193-95, 210-11). The State makes much of the fact that the beer bottle found near Franklin's body was unbroken. (Brief of the Appellee, p. 4, 8, 9, 10-11). However, as noted in Johnson's brief, whether the bottle was broken or unbroken is hardly significant. (Brief of the Appellant, p.8 (fn.4)). This is so because, under Mississippi law, one acts in necessary self-defense when he or she has "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). Further, the danger to a defendant "need not be actual, but only reasonable apparent and imminent." *See, e.g., Scott v. State*, 203 Miss. 349, 353, 34 So. 2d 718, 719 (Miss. 1948). As a matter of common sense, one facing an attack with a beer bottle reasonably apprehends serious bodily injury whether the bottle is intact or broken, as it will

almost certainly break upon impact.

Significantly, it is undisputed that Johnson shot Franklin only one time. Beyond all this, the physical evidence was consistent with the testimony of Johnson, Starla, and Wellford; Dr. McGary testified that the single bullet fired by Johnson entered Franklin's body in the left upper chest below the shoulder, and the bullet angled rightward, *backward*, and *downward*! (Tr. 132) (emphasis added). This was consistent with Franklin leaning inside Johnson's truck, as testified to by all eyewitnesses but one (Mizell). Furthermore, Dr. McGary testified that Johnson's gun was "inches away" from Franklin's body when it was fired. (Tr. 139). This corroborates Johnson's testimony that he "touched the gun to [Franklin] and shot him." (Tr. 211).

In the instant case, the State had the burden to prove that Johnson did not act in self-defense and to prove this beyond a reasonable doubt. *Harris v. State*, 937 So. 2d 474, 481) (¶23) (Miss. Ct. App. 2006). In light of the overwhelming weight of the evidence discussed above, this Court would sanction an unconscionable injustice were Johnson's conviction allowed to stand.

B. Manslaughter

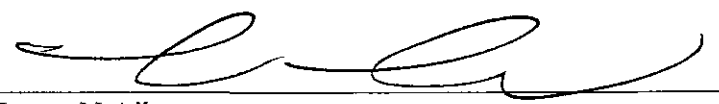
Concerning heat-of-passion manslaughter, the State claims that the record "is devoid of credible evidence that Johnson had sufficient provocation. . . ." (Brief of the Appellee, p. 15). However, the following evidence (discussed in more detail above) overwhelmingly showed that Johnson shot Franklin in the heat-of-passion: (1) Johnson's previous violent encounter with Franklin, (2) the undisputed evidence that Franklin approached Johnson's truck and had a beer bottle in his hand when Johnson shot him, (3) the fact that three of the four eyewitnesses to the incident testified that Franklin leaned inside Johnson's truck and attacked him, and (4) the physical evidence that was consistent with and corroborated these witnesses' testimony.

Most significant to this issue is the testimony of Starla, Wellford, and Johnson (as opposed

to that of Mizell) that Johnson shot Franklin, after Franklin, beer bottle in hand, leaned inside Johnson's truck and attacked him. In the State's brief, no mention of this evidence is made in the argument concerning the weight of the evidence and manslaughter. (See Brief of the Appellee, p. 15-16). Incredibly, the State argues that "words alone, even if provocative, or disagreements between people are insufficient to satisfy the 'heat-of-passion' requirement. . . ." (Brief of the Appellee, p. 15-16 (citing *Phillips v. State*, 794 So. 2d 1034, 1037 (¶¶9-10) (Miss. 2001)).

At bottom, the overwhelming weight of the evidence, including three of four eyewitness accounts, established that Johnson shot Franklin as Franklin attacked Johnson while seated in his truck. The physical evidence corroborated this. At the time Johnson shot Franklin, he was holding a beer bottle. Johnson already resented Franklin, and Franklin had previously provoked Johnson into a violent confrontation. Accordingly, the overwhelming weight of the evidence shows that Johnson was sufficiently and suddenly provoked into passion and anger by Franklin's rash actions, which placed Johnson in a state of mind overcome with resentment and terror causing him to act out of passion rather than reason. Therefore, Johnson is entitled to a new trial or, alternatively, a remand of his case for re-sentencing for manslaughter.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for John Johnson, 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:

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Honorable Anthony (Tony) Lawrence, III
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Honorable Jim Hood
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This the 6th day of February, 2009.

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