

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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 21st day of October, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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STATEMENT OF THE ISSUES

- I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT, AS THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT JOHNSON DID NOT ACT IN NECESSARY SELF-DEFENSE.**
- II. THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, WHICH ESTABLISHES THAT JOHNSON ACTED IN NECESSARY SELF-DEFENSE.**
- III. THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, WHICH ESTABLISHES THAT JOHNSON ACTED IN THE HEAT OF PASSION AND WAS GUILTY, AT MOST, OF MANSLAUGHTER.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Jackson County, Mississippi, and a judgment of conviction for the crime of murder entered against John Edward Johnson (Johnson), resulting in a life sentence. (C.P. 162, Tr. 276, R.E. 7-8). This conviction and sentence followed a jury trial held from March 3, 2008, to March 5, 2008, the Honorable Robert P. Krebs, Circuit Judge, presiding. The trial judge denied Johnson's post-trial motion. (C.P. 194, Tr. 294, R.E. 9). Johnson is presently incarcerated under the supervision of the Mississippi Department of Corrections.

STATEMENT OF THE FACTS

On the evening of November 19, 2003, officers of the Moss Point Police Department were dispatched to Linda Mizell's ("Mizell") house on Richard Street to investigate a reported shooting. (Tr. 109-10, 143-44). There, officers found Keith Franklin ("Franklin") lying on the ground receiving CPR. (Tr. 108, 145). He was pronounced dead at the scene. (Tr. 145). An autopsy later confirmed that Franklin died of one gunshot wound to the left chest. (Tr. 136, Ex. S-22). At trial,

the following evidence was adduced.

Franklin and Johnson were friends, until Franklin began dating Johnson's daughter, Starla Johnson ("Starla"), and Starla quit school and lost her job. (Tr. 207). Johnson did not want Franklin dating Starla and told Franklin he did not want him around. (Tr. 207). About three months prior to the incident at issue in the instant case, Johnson and Franklin were involved in a violent altercation at Johnson's house. (Tr. 207-08). On this occasion, Franklin wielded a baseball bat and, according to Johnson, "was going to jump on my nephew about something." (Tr. 208). Franklin refused to honor Johnson's demands that he leave and threatened Johnson with the baseball bat. (Tr. 208). Johnson fired a shot at Franklin's feet, and Franklin then went to his car, retrieved a gun, and shot into Johnson's house. (Tr. 208).

On the night at issue in this appeal, November 19, 2003, Franklin and Starla went to Mizell's house. (Tr. 77-78). Franklin and Claude Williams ("Williams")¹ left in Starla's car to go the store to buy beer. (Tr. 79, 184). After Franklin and Williams left, Johnson and his friend, Rodney Welford ("Welford"), arrived at Mizell's house in Johnson's truck in order to retrieve Johnson's cellular phone from Starla, who had borrowed it. (Tr. 79, 179, 193). Starla walked over to Johnson's truck, and the two got into a small spat regarding the phone and/or Franklin. (Tr. 184-85, 196, 209). As Johnson and Starla were talking, Franklin and Williams returned from the store in Starla's car. (Tr. 80, 180, 193, 209). Franklin exited the car and walked over to Johnson's truck. (Tr. 80, 180, 193, 209). Franklin had a beer bottle with him that he placed behind the cab of Johnson's truck. (Tr. 80). Franklin and Johnson then got into a heated argument, apparently

¹ From the record it is unclear as to how or with whom Williams arrived at Mizell's house. In any event this fact is not material to the merits of this appeal.

stemming from Franklin's dating relationship with Starla.² (Tr. 80, 193, 209). Mizell, noticed the yelling, took her young daughter inside the house, came back out, and told them to take it somewhere else. (Tr. 82).

According to Mizell (the State's only eyewitness), Johnson's vehicle "rolled off" "about three feet" with the door open ("slightly open, but not open to get out of the truck "); whereupon, Franklin grabbed his beer and "turned around," and Johnson shot him. (Tr. 80-83, 94-95). Police recovered a beer bottle lying next to Franklin, on the left side of his body. (Tr. 147, Ex. S-2). Mizell testified that this was the bottle Franklin was holding when he was shot. (Tr. 84-85, Ex. S-2). The three remaining eyewitnesses, Starla, Welford, and Johnson, testified for the defense and provided more details surrounding the shooting.

Starla testified that, as Johnson began to leave, Franklin "ran up to the truck" and "jumped in the truck," and "went in to hit my dad twice." (Tr. 180, 185, 187). On cross-examination, Starla clarified: "He didn't jump in the truck. When he went to swing, his upper body was in the truck like[,] you know, he didn't jump in there." (Tr. 190).

Welford also testified that Franklin attacked Johnson just before Johnson fired the shot. Welford testified that:

[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 is was. It looked like some kind of bottle, and he bursted 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 [sic], that boy came inside on him out there in the truck and went swinging on him. Come inside on him and went swinging with that bottle in one hand and fist in the other. And that kind of scared me. I didn't

² The record contains inconsistent accounts of what exactly was said; however, it is clear that the argument was the result of Franklin and Johnson's strained relationship due to Franklin dating Starla, and Johnson's disapproval of such.

know what was going on. The next thing I know a shot went off.

(Tr. 194). Welford explained that there was a dog in the back of Johnson's truck, and Welford stepped outside of the truck momentarily to calm the dog, just before the shot was fired. (Tr. 194).

Johnson took the stand on his own behalf and insisted that he shot Franklin in self-defense.

(Tr. 211). Johnson testified as follows:

And when I went to pulling off and shut my door, and he struck me beside the head. I shut my door, and I started easing off, and [Welford] was halfway out of the truck. He was trying to get in, and I think he was messing with the dog, to keep the dog from doing anything. I hit the brakes, and [Welford] got in. I heard glass break, and I turned to look, and [Franklin] come through the window on me, and I grabbed my pistol. I thought I shot him in the shoulder.

(Tr. 210). Johnson testified that Franklin was on top of him with his left hand and upper body in the truck. (Tr. 222). Johnson stated Franklin had the beer bottle in his left hand, but he could not recall which hand Franklin punched him with. (Tr. 223). Johnson testified that he felt that Franklin was going to cause him great bodily harm with the beer bottle. (Tr. 221). As Franklin attacked Johnson, Johnson "touched the gun to [Franklin] and shot him." (Tr. 211). Johnson also testified that he feared that Franklin had a gun. (Tr. 225). Despite the testimony that Franklin broke a beer bottle, the bottle recovered near his body was not broken, and there was testimony from an investigating officer that no broken glass was found at the scene. (Tr. 149, 151). However, broken "automobile glass" was recovered from the inside of Johnson's truck. (Tr. 155, Ex. S-11, S-12).

After Johnson shot Franklin, he drove off with Welford in the truck. (Tr. 210). Steve Holcolm ("Holcolm"), a friend of Johnson's, testified that Johnson came by his house after the incident and asked if he could leave his truck at his (Holcolm's) house. (Tr.113). However, Johnson's truck was gone the next morning. (Tr. 113-14). According to Holcolm, his son found a

gun on the hood of his (Holcolm's) truck (Tr. 114). Officer Tony Holifield ("Officer Holifield") later recovered a 9 millimeter handgun in a "garbage hull" at Holcolm's residence. (Tr. 124). Officer Holifield also later apprehended Johnson at his residence "a couple miles from Holcolm's. (Tr. 129). When Officer Holifield arrested Johnson, Johnson told him "[I] didn't kill anybody; that it was self-defense, something of that nature." (Tr. 129).

Dr. Paul McGarry, a forensic pathologist, performed an autopsy on Franklin and concluded that Franklin died of a single gunshot wound. (Tr. 132, 136). Consistent with Johnson's testimony, Dr. McGarry opined that "the end of the gun was inches away from [Franklin's] chest" when it was fired. (Tr. 139). He also testified that the bullet entered Franklin's "left upper chest below the shoulder" and traveled "rightward, backward, 20 degrees, *downward 50 degrees, to an exit hole of the right central back.*" (Tr. 132) (emphasis added). Dr. McGarry's testified that, "from the angle of the shot, . . . [Franklin's] left shoulder was toward the shooter, his right shoulder away from the shooter." (Tr. 140). This is consistent with Starla, Welford, and Johnson's testimony that Franklin was leaning into Johnson's truck attacking him when the single shot was fired. Also, the autopsy report revealed that Franklin had "contusions and abrasions of the hands and left forearm." (Ex. S-22, Tr. 167-68). This is also consistent with Franklin leaning into Johnson's truck attacking him.

The jury was instructed on self-defense, murder, and manslaughter. (Tr. 235-249, C.P. 115-150). After deliberation, the jury found Johnson guilty of depraved heart murder. (C.P. 159, Tr. 276). The trial court denied Johnson's motion for a new trial. (C.P. 194, Tr. 294, R.E. 9).

SUMMARY OF THE ARGUMENT

The State failed to prove beyond a reasonable doubt that Johnson did not act in necessary self-defense when he shot Franklin. The evidence revealed that Johnson and Franklin did not get

along and were involved in prior violent incident. As to the incident at issue, the uncontradicted evidence established that Franklin walked over to Johnson's truck and the two got into a heated argument. The evidence further showed that Franklin attacked Johnson with a beer bottle in his hand as Johnson began to leave. Significantly, Johnson shot Franklin only one time. Additionally, the downward angle of Franklin's bullet wound was consistent with his combative posture as described by three eyewitnesses—leaning into Johnson's truck. In light of the evidence, the State failed to prove beyond a reasonable doubt that Johnson did not reasonably apprehend an imminent threat of great bodily harm when he shot Franklin. Accordingly, this Court Should reverse Johnson's conviction and sentence, render a judgment of acquittal, and order Johnson's immediate release.

Alternatively, should this Court determine that the State presented sufficient evidence on the issue of self-defense, Johnson contends that the verdict was against the overwhelming weight of the evidence. The overwhelming weight of the evidence established that Johnson shot Franklin in necessary self-defense. Therefore, this Court should reverse Johnson's conviction and sentence and remand this case for a new trial.

Alternatively, the overwhelming weight of the evidence established that Johnson shot Franklin in the heat of passion, and Johnson was guilty, at most, of manslaughter. Accordingly, this Court should reverse Johnson's conviction and sentence and remand this case for a new trial or, in the alternative, remand this case for re-sentencing for manslaughter.

ARGUMENT

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

In reviewing the sufficiency of the evidence, the relevant inquiry is whether, “viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will not be disturbed where the evidence so reviewed is such that “reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense.” *Id.* (citing *Edwards v. State*, 469 So. 2d 68, 70 (Miss.1985)). However, the proper remedy is to reverse and render where 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[.]” *Id.*

“When self-defense is raised, the State bears the burden of proving beyond a reasonable doubt that the defendant was not acting in necessary self-defense.” *Harris v. State*, 937 So.2d 474, 481 (¶23) (Miss. Ct. App. 2006) (citing *Heidel v. State*, 587 So.2d 835, 843 (Miss.1991)). Self-defense is addressed in Mississippi Code Annotated section 97-3-15(1)(f) (Rev.2006), which provides in pertinent part that:

“the killing of a human being . . . shall be justifiable . . . “[w]hen committed in the lawful defense of one's own person or any other human being, 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). “The phrase ‘reasonable ground to apprehend,’ used in the statute, implies apparent danger.” *Bell v. State*, 207 Miss. 518, 528, 42 So.2d 728, 731-32 (Miss. 1949) (citation omitted). The Mississippi Supreme Court defines “apparent danger” as “such overt demonstration, by conduct and acts, of a design to take life or do some great personal injury, as would make the killing reasonably apparently necessary to self-preservation or to escape great bodily

harm.” *Id.* (citation omitted). “[T]he danger need not be actual, but only reasonably apparent and imminent.” *Id.*

In the instant case, the evidence was such that no reasonable juror could find beyond a reasonable doubt that Johnson did not have a reasonable apprehension of an imminent threat of great bodily harm when he shot Franklin.

The evidence established that Johnson and Franklin did not get along and had a previous violent encounter at Johnson’s house, in which Franklin wielded a baseball bat and refused to leave, Johnson fired a shot at the ground near Franklin’s feet, and Franklin retrieved a gun and fired into Johnson’s house. (Tr. 208). Therefore, Johnson had pre-existing reason to fear that Franklin would again act in a manner likely to cause great bodily injury.

The evidence also showed that Franklin was the aggressor. To this end, all eyewitnesses testified that Franklin approached Johnson’s truck. Although Mizell represented that “no hits or anything was ever laid up on each other,”³ all remaining eyewitnesses (Starla, Welford, and Johnson) testified that Franklin leaned inside Johnson’s truck and attacked Johnson as he was trying to leave. (Tr. 83, 180-82, 193-95, 210-11).

The evidence further established that Franklin had a beer bottle (whether broken or intact)⁴

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Further, this testimony was in response to the question: “And then *at the time that [Franklin] walked up to the truck*, was he doing anything with his hands?” (Tr. 83) (emphasis added). Mizell also testified that she took daughter inside after Franklin walked up to the truck and the two men began to argue. (Tr. 82). Essentially, Mizell testified that “[Johnson] ‘rolled off,’ and as [Franklin] was grabbing his beer and turned around, [Johnson] shot him.” (Tr. 80). Despite Mizell’s suggestion to contrary, the weight of the evidence established that Franklin attacked Johnson as he was trying to leave.

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Although, Johnson and Welford gave testimony indicating that Franklin broke the bottle, the fact that the bottle recovered was not broken is not material. Under Mississippi law, “the danger need not be actual, but only reasonably apparent and imminent.” *Scott v. State*, 203

in his hand at the time he attacked Johnson. To this end, Mizell testified that Franklin grabbed his beer bottle from Johnson's truck just before the shot was fired. (Tr. 80). Further, Johnson testified that Franklin had a beer bottle in his left hand when he attacked him, and Welford, although he could not unequivocally state that Franklin in fact had a beer bottle or that a bottle was broken, recalled that Franklin had something glass in his hand when he attacked Johnson. (Tr. 193-95, 223). Most Significantly, a beer bottle was recovered next to Franklin's body, on his left side. Therefore, the danger of great bodily harm was reasonably apparent to Johnson, and the threat of such harm being accomplished was imminent.

Beyond all this, it is undisputed that Johnson shot Franklin only one time. Further still, Dr. McGary's testimony indicated that the angle of the bullet causing Franklin's death was consistent with Franklin leaning into the truck with his left arm/shoulder leading, as testified to by Starla, Welford, and Johnson. (Tr. 138, 190, 222).

The point to be stressed, is that, in order for a killing to be justified based on self-defense, "it [is] not required of [the defendant] to prove that he acted in justifiable self-defense, *but only that he raise a reasonable doubt of his guilt* of the charge against him, unjustifiable homicide. The law authorizes action on reasonable appearances." *Scott v. State*, 203 Miss. 349, 354, 34 So. 2d 718, 719 (Miss. 1948) (citations omitted) (emphasis added).

The evidence in the instant case easily raises a reasonable doubt as to Johnson's guilt of the charge of unjustifiable homicide; that is all the law requires for a killing to be justified as self-

Miss. 349, 353, 34 So.2d 718, 719 (Miss. 1948). In sum, whether the bottle was broken or intact is inconsequential because, either way, Johnson had a reasonable apprehension that great bodily harm was about to be inflicted upon him, and the threat was imminent, as Franklin was leaning inside the truck attacking Johnson.

defense. The evidence points in favor of Johnson on the element of self-defense with significant force, such that a reasonable jury could not have found that Johnson was guilty of murder beyond a reasonable doubt.

Accordingly, the evidence is insufficient to support Johnson's conviction and sentence for murder. Therefore, the trial court erred in denying Johnson's motion for new trial,⁵ and this Court should reverse Johnson's conviction and sentence, render a judgement of acquittal, and order Johnson's immediate release.

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

Should this Court reject Johnson's contention that the State presented insufficient evidence to support Johnson's conviction for murder, Johnson asserts, in the alternative, that such a finding was against the overwhelming weight of the evidence.

In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005). The evidence is viewed in the light most favorable to the verdict. *Id.* (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss.1997)). This Court "sits as a hypothetical thirteenth juror." *Lamar v. State*, 983 So. 2d 364, 367 (¶5) (Miss. Ct. App. 2008) (citing *Bush*, 895 So. 2d at 844 (¶18)). "If, in this position, the Court disagrees with the verdict of the jury, 'the proper remedy is to grant a new trial.'"

⁵ While Johnson's post-trial motion was styled "motion for a new trial" (which implicates a challenge to the weight of the evidence), a challenge to the sufficiency of the evidence was made therein where it was asserted that the trial court erred in denying Johnson's motion for a judgement of acquittal at the close of his case-in-chief. Johnson respectfully submits that this was sufficient to preserve a challenge to the sufficiency of the evidence on appeal.

Id. In the instant case, the overwhelming weight of the evidence established that Johnson shot Franklin in necessary self-defense.

As explained above in the argument pertaining to the sufficiency of the evidence, the evidence established that Johnson and Franklin had a previous violent encounter. It is undisputed that, on the night of the incident at issue, Franklin approached Johnson's truck with a beer bottle. The weight of the evidence further established that Franklin, armed with beer bottle in hand, leaned inside Johnson's truck and attacked Johnson as he started to leave. Therefore, the weight of the evidence showed that Johnson had reasonable grounds to apprehend an imminent danger of great bodily injury if he did not shoot Franklin. Further, it is undisputed that Johnson fired only one shot. Additionally, Dr. McGary provided testimony that Franklin's injury was consistent with Franklin's combative posture, as described by Starla, Welford, and Johnson.

In light of the above-detailed evidence, the verdict reached in the instant case (if supported by sufficient evidence) is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. Therefore, the trial court erred in denying Johnson's motion for a new trial, and this Court should reverse Johnson's conviction and remand this case for a new trial.

III. THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, WHICH ESTABLISHES THAT JOHNSON ACTED IN THE HEAT OF PASSION, AND WAS GUILTY, AT MOST, OF MANSLAUGHTER..

The jury's finding that Johnson was guilty of murder was against the overwhelming weight of the evidence, which established that Johnson shot Franklin in the heat of passion. Therefore, Johnson is guilty, at most, of manslaughter.

In *Nicolaou v. State*, the Mississippi Supreme Court explained: A killing with a deadly

weapon may be susceptible of clear explanation by the accused or eyewitnesses as an accident, or justified as having been committed by the accused acting in lawful self-defense, or mitigated manslaughter. *Nicolaou v. State*, 534 So. 2d 168, 172 (Miss. 1988). Manslaughter is addressed by Mississippi Code Annotated section 97-3-35 (Rev. 2006), which provides that “[t]he 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, shall be manslaughter.” Miss. Code Ann. § 97-3-35.

The Mississippi Supreme Court has explained that a killing may be mitigated from murder to manslaughter if it was “committed in a heat of passion arising out of a legally sufficient provocation.” *Neal v. State*, 805 So. 2d 520, 525 (¶16) (Miss. 2002) (citing *Nicolaou*, 534 So. 2d at 171-72); *see also Windham v. State*, 520 So. 2d 123, 127 (Miss. 1987) (The killing of a human “may be committed with a felonious intent and still be only manslaughter.”) (citations omitted). Similarly, this Court has acknowledged: “a homicide may result from a wilful act or deliberate design without being murder if the killing occurs in necessary self-defense or results from an act committed in the heat of passion without malice aforethought.” *Bradford v. State*, 910 So. 2d 1232, 1233 (¶7) (Miss. Ct. App. 2005).

It is undisputed that Johnson killed Franklin with a deadly weapon. Because heat of passion manslaughter requires the absence of malice, it is significant that the jury found Johnson guilty of depraved heart murder, which is committed “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. Miss. Code Ann. § 97-3-19 (Rev. 2006) (emphasis added). By definition, depraved heart murder is committed without malice. *See generally, Tran v. State*, 681 So. 2d 514, 517 (Miss. 1996) (Malice and deliberate design [or

premeditated design] are synonymous) (citations omitted).⁶ Therefore, inherent in the jury's verdict is that Johnson did not act with malice when he shot Franklin.

Assuming for argument's sake that Johnson did not act in necessary self-defense, whether Johnson shot Franklin without authority of law, and not in necessary self-defense is not at issue here. Therefore, this issue turns on whether the weight of the evidence showed that Johnson shot Franklin in the heat of passion.

The Mississippi Supreme Court defines "heat of passion" is 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 or terror.

Givens v. State, 967 So. 2d 1, 11 (¶33) (Miss. 2007) (quoting *Mullins v. State*, 493 So. 2d 971, 974 (Miss. 1986)). Thus it is held that:

A person may form an intent to kill from a sudden passion induced by insult, provocation or injury from another. In that moment of passion, while still enraged, if he slays the other person, the homicide may be manslaughter, even though it is not in necessary self-defense, depending upon the insult, provocation or injury causing the anger. Ordinarily, whether such a slaying is indeed murder or manslaughter is a question for the jury.

Windham, 520 So. 2d at 127 (citing *Kinkead v. State*, 190 So. 2d 838 (Miss. 1966)).

⁶ It is acknowledged that the Mississippi Supreme Court holds that "every murder done with deliberate design to effect the death of another human being is by definition done in the commission of an act imminently dangerous to others and evincing a depraved heart, regardless of human life." *Catchings v. State*, 684 So. 2d 591, 599 (Miss. 1996). However, the converse is not true. The logic behind that rule is that one who kills with deliberate design (malice) acts with and exceeds the culpability required of a depraved heart killing, i.e., an act eminently dangerous to others and evincing a depraved heart, regardless of human life.

In the instant case, the overwhelming weight of the evidence established that Johnson shot Franklin out of passion rather than reason. Johnson resented Franklin and did not want him dating Starla. Johnson and Franklin had previously been involved in a violent incident where Franklin threatened Johnson with a baseball bat, Johnson shot at Franklin's feet, and Franklin retrieved a gun and fired into Johnson's house. The weight of the evidence also revealed that, on the night in question in the instant case, Franklin approached Johnson's truck, and the two began arguing. Although the evidence is unclear as to what exact words were exchanged, three of the four eyewitnesses (Starla, Welford, and Johnson) testified conclusively that Franklin attacked Johnson as Johnson began to drive off. Additionally, Mizell, Johnson and Welford testified that Franklin had a beer bottle in his hand at this time.

This evidence, which is overwhelming, establishes that Johnson shot Franklin under legally sufficient provocation and in an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror. The jury's verdict in the instant case is so contrary to evidence that allowing it to stand will sanction an unconscionable injustice. Accordingly, the trial court erred in denying Johnson's motion for a new trial, and this Court should reverse Johnson's conviction and sentence and remand this case for a new trial. Alternatively, Johnson requests that this case be remanded for re-sentencing for manslaughter under "the direct remand rule." *See, Wade v. State*, 748 So. 2d 771, 777 (¶20) (Miss. 1999).

CONCLUSION

Johnson respectfully submits that the evidence was insufficient to support his conviction for murder, as the State failed to prove beyond a reasonable doubt that he did not act in necessary self-defense. Therefore, Johnson requests that this Court reverse his conviction and sentence, render a judgment of acquittal, and order his immediate release. Alternatively, Johnson submits that the

verdict was against the overwhelming weight of the evidence. Because the weight of the evidence showed that Johnson acted in necessary self-defense, Johnson requests that this Court reverse the judgment of the trial court and remand this case for a new trial. Alternatively, the weight of the evidence established that Johnson shot Franklin in the heat of passion and was guilty, at most, of manslaughter. Accordingly, Johnson requests that this Court reverse the judgment of the trial court and remand this case for a new trial or, in the alternative, remand this case for re-sentencing for manslaughter.

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:

Honorable Robert P. Krebs
Circuit Court Judge
P.O. Box 0080
Pascagoula, MS 39568

Honorable Anthony (Tony) Lawrence, III
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