IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ARCHIE HALL — APPELLANT

VS. — NO. 2008-KA-1719

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JOHN R. HENRY
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

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ARCHIE HALL **APPELLANT**

vs. **CAUSE No. 2008-KA-01719-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Leake County, Mississippi in which the Appellant was convicted and sentenced for his felony of **MANSLAUGHTER**.

STATEMENT OF FACTS

Chief Deputy Mike Williams of the Leake County Sheriff's Department was despatched at about half past ten on the night of 30 August 2007 to a residence located at 155 Dan Boone Road in Leake County. Upon arriving at that address, he found a female lying on the floor of the residence, just inside of it. This female had a wound to her chest but she was then yet alive. The Appellant was present, sitting on the floor beside the female's head. There were several other younger people present and an older woman as well. Williams asked those present what had happened. The Appellant told Williams that the female had been playing with a gun and that the

gun had gone off.

Williams asked for the gun. The Appellant told Williams that it was in a back room of the residence. Williams went to the room and found a semi - automatic pistol lying on an ice chest. There was no bullet or expended shell in the chamber; the magazine, which was loaded, was lying next to the gun. Williams took the gun and magazine as evidence. The residence was a "single wide" trailer. (R. Vol. 2, pp. 24 - 30).

Dr. Steven Hayne testified that he performed an autopsy on the person of a Shirley Jobe on 31 August 2007, who stood five feet, six inches and weighed three hundred pounds at the time of her death. She died of the consequences of a penetrating bullet wound to her left upper chest, the bullet traveling some fifty to sixty degrees downward and some ten to forty degrees left to right and causing massive internal bleeding along its course. Dr. Hayne ruled her death a homicide. The bullet shot into Jobe's chest was fired at least a foot and a half away from her, there being no tattooing or powder residue noted at the wound site. (R. Vol. 2, pp. 30 - 47).

Willie Mae Jobe, mother of Shirley Jobe, testified that she and Shirley Jobe's six children were present in the trailer at the time Shirley Jobe died. The Appellant was present as well. Shirley Jobe was present too; The Appellant and Shirley Jobe lived together after the fashion of man and wife.

Willie Mae Jobe had retired for the evening on the night of 20 August 2007. Her slumber was disturbed by her daughter, who called out, "Willie, Archie shot me." Willie Mae Jobe said that woke her up. She "laid up" in her bed and thought that her daughter was playing with her. But this notion was soon extinguished when the Appellant came into Willie Mae's room and said, "Yeah, she been shot." At that point a son came into the room, toting a baby, and reported the same thing. Willie Mae jumped up at that point. She did not hear the shot.

When Willie Mae Jobe jumped up and went into the living room, she saw her daughter lying on the floor. Willie Mae Jobe was crying and hollering. The Appellant told her to ring emergency services. The Appellant also told her that Shirley Jobe had been playing with a gun and that the gun had gone off. The Appellant told Willie Mae to tell the operator that as well.

As the mortally wounded Shirley Jobe had was being taken away to hospital, the Appellant told Willie Mae Jobe, "Willie, let's get it straight because she was playing with the gun and the gun went off, and I don't want to go back to jail." Shirley Jobe died that night in hospital.

The Appellant was drunk on the night of 30 August 2007, which was for him his usual state when at home. After Shirley Jones was shot or after she died, the Appellant got himself a quantity of beer to drink. While the Appellant had been to jail for various things like DUI and driving on a suspended license, he had never been to prison so far as Willie Mae knew. There had been at least one instance about two months prior to Shirley Jobe's death in which the Appellant had been violent toward her. Willie Mae was not aware of any difficulty between the Appellant and her daughter on that night. (R. Vol. 2, pp. 48 - 63).

Investigator Michael Harper of the Leak County sheriff's Department testified. He stated that he went to the hospital to which Shirley Jobe had been taken. He found the Appellant there. The Appellant told him that he worked offshore, that Shirley Jobe was alone much of the time in consequence, that he was trying to teach Shirley Jobe how to shoot a gun, and that the gun went off and that she was shot. The Appellant volunteered this and was not in custody at the time. (R. Vol. 2, pp. 63 - 68).

After the Appellant was in custody, and after the usual advice was given and waiver obtained, the Appellant made a statement. He said:

> I . . . upon being in the bedroom room (*sic*) with Shirley Jobe, had a discussion about all my money being gone from my account on a regular base (*sic*) caused her to lose it and grab the gun from the closet, cocked it and pointed it at me, and I scrambled toward her from the bed, which I was laying (*sic*) in, and pushed the gun away from me. While I was grabbing it from her hand and by the way I was holding it and the excitement, the gun went off. I was only trying to get the gun, not get the gun and shoot it. I was defending myself, not trying to take a life. This money secret caused this drama to unfold. She was spending her mom's money as well, trailer note, phone bill, and just holding money, she would beg me to replace and I would simply because when I had a problem smoking dope and running the street and she stuck by my side 'till my problem was solved, so I felt I owed her by not telling anyone of her money problem. Some of the things were casino attending and just wasting it. However, she averaged $1600 to $2,000 per month depending if I worked over after 28 days or come in for a week and week over three weeks. I receive two checks while working, two checks while off. She was also – she has also threatened family members with the gun, waiving (*sic*) it at a - one I was told and threatened me before, but never pulling it on me before. I also have an insurance policy on me for over $100,000. I've only wanted to be honest in this relationship with the truth at all times, whether its about money or any problem, but it continued to be about greed, of food stamps, as well, which was only going to cause problems with the State because of what I made. The car notes were also secret missing money for her mom, Willie Mae, I would have to pay.

(R. Vol. 2, pp. 91 - 93).

The Appellant, when he discussed the money problem, expressed anger toward the officer. (R. Vol. 2, pg. 94).

Greg Waggoner, Sheriff of Leake County, testified that he was present when the Appellant was interviewed at the county jail. The Appellant told Waggoner that the victim had the gun, was playing with the gun, and that she shot herself. Waggoner interrupted the Appellant to tell the Appellant that the autopsy results indicated that the shooting could not have occurred in the way the Appellant claimed. At that point, the Appellant gave the statement just set out

above. (R. Vol. 2, pp. 102 - 103).

The State then brought a Dawn Biggart round to testify. She stated that she knew Shirley Jobe and that on 28 August 2007, two days before Jobe's death, Jobe came into her store to talk, as was her custom. Jobe told Biggart that she had won a lot of money at a casino but that she had "played it all back." Jobe told Biggart that the Appellant would kill her when he got home. Jobe told Biggart that she had spoken to the Appellant by telephone and told him that she had lost the money she had won and that the Appellant was going to kill her when he returned. (R. Vol. 2, pp. 113 - 115).

Steve Byrd, a forensic scientist at the Mississippi Crime Laboratory, testified that the bullet fired into Jobe's body was fired by the gun found in the trailer. (R. Vol. 2, pp. 119 - 127).

The defense presented a case - in - chief, beginning with the testimony of one of the decedent's children, one Davonta Jobe. She testified that her mother and she went to Vaiden to pick up the Appellant. She did not recall any argument between the Appellant and Jobe, but she did recall a stop at a drugstore where the Appellant supplied himself with gin. Jobe had brought the gun with her on the trip because the Appellant requested her to do so. During the trip, the Appellant asked for the gun. He put it in the glove compartment. When they arrived at the trailer, the Appellant took the gun from the glove compartment.

Davonta was in the living room of the trailer when the shot was fired. She saw her mother come out of "the room" and saw that her mother had been shot. The Appellant came out of that room as well. Her mother called out for Davonta's brother and then fell to the floor. She recalled that her mother cried out, "Willie, I've been shot!" Her mother then told her to tell the other children that she loved them. (R. Vol. 2, pp. 131 - 139).

The Appellant testified. He stated that he did not know that Jobe had won a significant

amount of money, but he said that he would have been happy for her if she had. So far as he knew, the only money she was spending was his own. On the day Jobe was shot, she went to Vaiden to pick the Appellant up, the Appellant having driven down from Paducah. While he had spoken with Jobe by telephone, he said that he had not had a discussion with her about money and that he had not threatened to kill her. On the other hand, he appeared to admit that there had been "verbal words" about Jobe's spending habits.

After Jobe picked the Appellant up in Vaiden, she stopped at a drugstore so as to allow the Appellant to buy a "12 pack" of beer and some gin. However, he denied having been drunk when he arrived at the trailer or while at the trailer.

As for Jobe's death, the Appellant's version was that he was sitting on a bed in a bedroom, watching television. Jobe came into the bedroom. The Appellant asked her to get the children ready for bed. Jobe and the Appellant began talking about money. According to the Appellant, Jobe "flew off the handle," casually grabbed the gun, "racked" it, and came toward him, the gun pointed at him. The Appellant claimed that Jobe had taken the gun from a closet.

The Appellant said he was in fear for his life. He "skirted out of bed quick," put his hands on the gun, and struggled with Jobe for control of it. At some point the gun fired. By that time he had control of the gun; after it fired he put it down and tried to see if Jobe had been shot. At first he saw nothing, and, according to the Appellant, neither he nor Jobe realized that she had been shot. The Appellant asked her whether she had been hit. She replied that she did not think so. The Appellant saw no blood on her shirt, but when he pulled it up he saw the bullet hole. At that point, according to the Appellant, he told Jobe that they should call a doctor or emergency services. Jobe then ran into the living room. The Appellant told her not to run but to sit down. The Appellant took the clip out of the gun and set it on the cooler. He then tried to apply

pressure to Jobe's wound, presumably in an attempt to staunch bleeding.

The Appellant denied having told Willie Mae that he did not want to go back to jail and that they need to get their story straight as to how Shirley met her end. He denied having had a physical altercation with Shirley on the night she denied. According to the Appellant, all he did was attempt to disarm the decedent. He denied having told an officer that he was teaching the decedent how to handle a gun when she was shot. He seemed to admit that he did tell the sheriff at first that Shirley came to grief while playing with the gun.

The Appellant stated that the decedent had poor habits with money.

The Appellant claimed that Shirley always took the gun on trips, that he did not request her to bring the gun. He stated that he placed the gun in the glove compartment to keep it away from the children. He denied having brought the gun into the trailer. He claimed that he had taken the gun from the victim when it went off and that he was standing higher than she and that she was slumped at an angle when the gun went off.

The Appellant denied having shot the victim during the course of an argument about money. (R. Vol. 3, pp. 140 - 160). While the Appellant at trial claimed he had never been in jail for anything more serious than a traffic offense, he had in fact been convicted in Arkansas of burglary and theft. (R. Vol. 3, pg. 182).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN OVERRULING THE APPELLANT'S HEARSAY OBJECTION AS TO THE TESTIMONY OF THE WITNESS BIGGART?

2. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S REQUEST FOR A PEREMPTORY INSTRUCTION?

3. DID THE TRIAL COURT ERR IN REFUSING INSTRUCTION D-6?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S OBJECTION TO THE TESTIMONY OF WITNESS BIGGART

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING THE APPELLANT'S REQUEST FOR A *WEATHERSBY* INSTRUCTION

3. THAT THE TRIAL COURT DID NOT ERR IN REFUSING A CIRCUMSTANTIAL EVIDENCE INSTRUCTION

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S OBJECTION TO THE TESTIMONY OF WITNESS BIGGART

Biggart testified, over objection from the defense, that the decedent told her two days prior to the decedent's death that the Appellant was going to kill her. The decedent also told her that she had won and lost a considerable sum of money at a casino. The Appellant's statement to the decedent was made in the course of a telephone call with the decedent, in which she told him about the money won and lost in the casino. The decedent stated that the Appellant was going to kill her for having lost the money. (R. Vol. 2, pp. 105 - 115).

The State asserted that Biggart's testimony was admissible as a present sense impression. M.R.E. 803(1).[1] (R. Vol. 2, pp. 111 - 112). In support of its argument for admission of this testimony, it cited *Cox v. State*, 839 So.2d 1257 (Miss. 2003). In that decision, the facts were that the decedent in that case was on the telephone with his paramour and told her that he saw his paramour's husband standing outside his apartment with a gun. The decedent further told her that he was frightened. This occurred some ten months prior to the time the husband killed the

[1] The State did not assert that the victim's statement to Biggart qualified as an "excited utterance". We presume that it did not do in light of the Mississippi Supreme Court's view that an utterance made more than twenty four hours after a startling event will not be considered an excited one. *Brooks v. State*, 903 So.2nd 691, 698 (Miss. 2005).

decedent. The Mississippi Supreme Court found that the trial court did not abuse its discretion in admitting the statement as a present sense impression.

The trial court accepted the State argument. Moreover, citing *Sharplin v. State*, 330 So.2d 591 (Miss. 1976), the court believed that the evidence of a threat to kill by the Appellant was admissible to prove motive and intent. (R. Vol. 2, pg. 112).

The trial court was correct in its view that the threat to kill the victim was admissible as evidence of state of mind and intent. *Sharplin, supra*, at 595. Yet, the Appellant did not make the threat to Biggart.

As for the State's position, it may be that the decedent did not tell Biggart of what the Appellant said to her at the time the Appellant said it. It may be that the facts of *Cox* show an instance of a statement concerning an event made at the time an event was perceived. But Rule 803(1) is not limited to statements that are made contemporaneously with the event being described or perceived. The rule pertains to "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition *or immediately thereafter*." (Emphasis added).

The victim related the Appellant's threat to kill her no more than two days after the threat was made. The victim was clearly still under stress, given the fact that she kept on and on about the threat. (R. Vol. 107 - 108). The victim's statement to Biggart was spontaneous and not the result of questioning by Biggart. The question of whether a statement is sufficiently spontaneous so as to qualify for admission under Rule 803(1) is a matter left to the determination of a trial court, which is to take into consideration the facts and circumstances surrounding the making of the statement. This Court will not disturb a trial court's determination of the issue unless it concludes that the statement could not have been spontaneous under any reasonable

understanding the facts and circumstances concerning the statement. *Simmons v. State*, 722 So.2d 666, 670 (Miss. 1998). We submit that, given the facts and circumstances concerning the statement, the trial court did not err in determining, in effect, that it was made sufficiently "immediately thereafter" the Appellant made his threat.

In the event, however, that this Court shall find error in the trial court's admission of this testimony, and such error should be regarded as harmless error. The Appellant was indicted for murder. (R. Vol. 1, pg. 5). Biggart's testimony suggested malice aforethought on the part of the Appellant, yet the Appellant was convicted only of manslaughter. So seen, Biggart's testimony, if erroneously admitted, did not prejudice the Appellant.[2]

Beyond this, the evidence that the Appellant did, in fact, kill the victim is quite strong. It will be recalled that the victim herself stated that the Appellant shot her. The Appellant gave different accounts of how she came to her end, and the pathologists' description of the course of the bullet through the victim's body gave the lie to the Appellant's written account of how the victim died. The evidence against the Appellant was overwhelming. A ruling on an evidentiary matter is left to the discretion of a trial court, and, in the event that a trial court abuses its discretion, this Court will not reverse a trial court absent a clear demonstration of prejudice. *Sones v. State*, 14 So.3rd 773 (Miss. Ct. App. 2009). There was no such showing of prejudice here.

The First Assignment of Error is without merit.

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[2] The Appellant tells this Court that the fact that there was initially a three way split by the jury (R. Vol. 3, pg. 177) shows that this alleged error was "formidably prejudicial". We think the initial inability of the jury to reach a verdict shows quite the opposite. Had Biggart's testimony been so decisive one would have thought that the jury would have quickly and without difficulty reached a verdict on murder.

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING THE APPELLANT'S REQUEST FOR A *WEATHERSBY* INSTRUCTION

The Appellant, in his Second Assignment of Error, claims that the trial court erred in refusing a peremptory instruction as per *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933). We do find that the Appellant requested a peremptory instruction, which was refused. (R. Vol. 1, pg. 10; Vol. 3, pg. 161). The *Weathersby* rule was argued in support of the motion for a directed verdict made at the conclusion of the State's case in chief. (R. Vol. 2, pp. 128 - 129).

The *Weathersby* rule is inapplicable where an accused's account of the homicide for which he stands accused is unreasonable, contradicted by the physical facts of the case, or where he has given conflicting accounts of the homicide. *Simpson v. State*, 993 So.2d 400, 407 (Miss. Ct. App. 2008).

The trial court committed no error in refusing the peremptory instruction. We have set out in our "Statement of Facts" how the Appellant explained the shooting. The Appellant at first told the victim's mother to keep their story straight on the notion that the victim had been playing with the gun and shot herself. He also told the mother that that was how her daughter came to be shot. At the hospital, however, the Appellant said he had been teaching the victim how to shoot a gun and that the gun accidentally fired. While in custody, though, the Appellant's account of the victim's death was that she was pointing the gun at him and that the gun went off while or just after disarming her. These were three inconsistent stories, and for this reason alone the trial court committed no error in refusing the instruction.

In addition to this, the Appellant's various stories conflicted with the physical facts of the case. Specifically, the pathologist's testimony concerning the angle and path of the bullet as it went in and through the victim's body was not consistent with how the Appellant tried to portray

the shooting. This was another reason why the trial court was correct in its decision.

Because of the conflicting and differing stories told by the Appellant and the fact that the physical facts of the case did not support his story of an accidental firing of the gun while disarming the victim, the trial court properly refusing the instruction. *Simpson, supra.*

In addition to these considerations, there is the fact that the victim identified the Appellant as the person who shot her, contradicting the Appellant's version(s).

The Second Assignment of Error is without merit.

3. THAT THE TRIAL COURT DID NOT ERR IN REFUSING A CIRCUMSTANTIAL EVIDENCE INSTRUCTION

The Appellant requested a circumstantial evidence instruction, which was refused, the trial court stating that there had been a confession admitted to evidence. (R. Vol. 3, pg. 161). The Appellant assigns error in this ruling, alleging that there was no confession in the case.

A circumstantial evidence instruction should not be given unless the State is without eyewitnesses or a confession, or the accused's admission on a significant element of the case. *Gore v. State*, No. 2008-KA-01977-COA (Miss. Ct. App., Decided 1 December 2009, Not Yet Officially Reported). A circumstantial evidence instruction should only be given where the State's case is built entirely upon circumstantial evidence. *Jackson v. State*, 962 So.2d 649 (Miss. Ct. App. 2007).

In the case at bar, the victim herself stated, just before she died, that the Appellant had shot her. In addition to this, the Appellant, in his custodial statement to law enforcement, stated "[w]hile I was grabbing it from her hand and by the way I was holding it and the excitement, the gun went off."

It may be that there were no eyewitnesses to the shooting, other than the victim and the

CERTIFICATE OF SERVICE

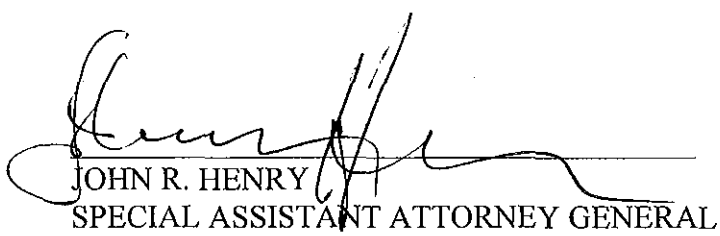
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Marcus D.Gordon
Circuit Court Judge
P. O. Box 220
Decatur, MS 39327

Honorable Mark Duncan
District Attorney
P. O. Box 603
Philadelphia, MS 39350

Edmund J. Phillips, Jr., Esquire
Attorney At Law
Post Office Box 178
Newton, MS 39345

This the 7th day of December, 2009.



JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

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