

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**RAY THOMAS GORE**

**APPELLANT**

**VS.**

**NO. 2008-KA-1977-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

**BY: LISA L. BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR [REDACTED]**

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

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**STATEMENT OF THE CASE**

Ray Thomas Gore was convicted in the Circuit Court of Scott County, Mississippi of murder and sentenced to life imprisonment. After denial of post trial motions, Gore appealed.

**ISSUE**

**I: WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY?**

## STATEMENT OF THE FACTS

In the early morning hours of February 8, 2008, Ray Thomas Gore (Gore) shot and killed Jackie Ford (Ford). Gore and Ford lived in separate apartments in the same apartment complex. (Tr. 38). According to Gore's statement given to police after the shooting, earlier in the evening Ford left her young son with Gore while she went to the store with a male friend. (Tr.112). Around 3:40 a.m., Gore found Ford at her apartment with the friend; Gore then returned to his apartment. (*Id*). Ford went to Gore's apartment and an argument followed. (*Id*). Gore claimed Ford went into the kitchen to get a knife. (*Id*). Gore told authorities "I then went to the closet and got this old gun out of it. I pointed it at her and hit the safety, and the gun went off." (Tr. 112-113; Ex. S-11).

At trial, Nicole Wright, a tenant in the same apartment complex, testified that around 4:00 a.m. Gore knocked on her door and told her to "[c]all 911 because I done shot Jackie." (Tr. 39). Brenda Leffingwell, the apartment complex manager, talked with Gore prior to the police arriving. Leffingwell testified Gore told her "He said 'she's dead. I killed her. I shot her.'" (Tr. 49).

Dr. Steven Hayne testified as to the autopsy of Ford's body. Hayne testified he found a lethal close contact wound to the right ear area. (Tr. 71). There were powder burns around the entrance wound, and in the wound, indicating that the gun was placed to Ford's head in contact with her right ear when the trigger was pulled. (Tr. 71-72).

Investigator Will Jones testified to the crime scene and Gore's interview and statement to him. (Tr. 105- 120; Ex. S-11). Jones also testified that they did not find a knife at the crime scene. (Tr. 115).

The jury convicted Gore of murder in violation of Miss. Code Ann. § 97-3-19(1)(a).

## SUMMARY OF THE ARGUMENT

Ray Thomas Gore's murder conviction should be affirmed. The trial court correctly denied proffered instruction S-4 because the evidence did not support it. Also, Gore failed to request a manslaughter instruction at trial and is therefore prohibited from complaining on appeal about the court's failure to give such an instruction

A circumstantial evidence instruction is necessary only when the State's case is entirely circumstantial; a circumstantial evidence instruction is not required when there is both direct and circumstantial evidence of the guilt of the accused. *Gilleylen v. State*, 255 So.2d 661, 663 (Miss.1971). The State's case against Gore comprised a mix of direct and circumstantial evidence; therefore, the trial court correctly denied Gore's proffered circumstantial evidence instruction.

## ARGUMENT

### PROPOSITION I: THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

#### Jury Instruction S-4. Gore Was Not Entitled to a Heat of Passion Jury Instruction.

In his first assignment of error, Gore argues the trial court improperly rejected the State's proffered manslaughter instruction, S-4. The trial judge found there was "absolutely no evidence of manslaughter in this case. The only evidence in this case is deliberate design or acts of misfortune." (Tr 130). Gore's theory at trial was one of self-defense and he was awarded a self-defense instruction, D-7. On appeal, Gore asserts that there was evidence he had a relationship with the victim and that the victim was with another man. Gore points out that the State established he was "mad" and "jealous." For the first time, Gore alleges that the "killing of Jacqueline Ford was committed in the heat of passion." (Appellant's brief 3).

A defendant is entitled to have a court give jury instructions that present his theory of the case; however, the court may deny an instruction that misstates the law, is covered elsewhere in the instructions, or is not supported by the evidence. *Ladnier v. State*, 878 So.2d 926, 931(¶ 20) (Miss.2004) (citing *Heidel v. State*, 587 So.2d 835, 842 (Miss.1991)). An instruction for a lesser included offense should only be given if there is an evidentiary basis to support it. *Sanders v. State*, 781 So.2d 114, 119(¶ 16) (Miss.2001) (citing *Lee v. State*, 469 So.2d 1225, 1230 (Miss.1985)).

In the case *sub judice*, there is simply no evidence to indicate that Gore shot Ford while in the heat of passion. Gore did not argue a heat of passion theory to the jury and did not present any evidence that he shot and killed Ford in the heat of passion. Heat of passion has been defined by the supreme court as "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." *Graham v. State*, 582 So.2d 1014, 1017-18 (Miss.1991). Anger alone does not constitute heat of

passion, “there must not only be passion and anger to reduce a crime to manslaughter, but there must be such circumstances as would indicate that a normal mind would be roused to the extent that reason is overthrown and that passion usurps the mind destroying judgment.” *Parker v. State*, 736 So.2d 521, 525(¶ 17) (Miss.Ct.App.1999).

Gore may have been mad with Ford when he shot and killed her but it did not amount to killing in the heat of passion. The State would submit that there was insufficient evidence for a jury to rationally find Gore guilty of manslaughter and not murder.

The State would also submit that Gore did not request a manslaughter instruction, the State did, but the trial court denied it. Under the holding in *Berry v. State*, 980 So.2d 936 (Miss.App.,2007), a defendant’s failure to request an instruction at trial means he may not complain on appeal about the court's failure to give such an instruction. If Gore thought he was guilty of manslaughter and not murder, he had a responsibility to request such an instruction at trial. *Id.* The failure to request a manslaughter jury instruction could have been a strategic decision in hopes of securing an acquittal and to prevent the jury from finding Gore guilty of manslaughter.

**Jury Instruction D-5. Gore was not entitled to a circumstantial evidence instruction.**

Gore argues that the trial court incorrectly denied D-5, a circumstantial evidence instruction. Gore requested a two-theory circumstantial evidence instruction to the effect that, if any fact or circumstance is susceptible to two interpretations, one favorable and the other unfavorable to the defendant, that, when the jury considers such fact or circumstance with all the other evidence, there is reasonable doubt as to the correct interpretation, the jury has to resolve such doubt in the defendant’s favor. The trial court found Gore confessed to the killing so it was not a circumstantial case.



“[C]ircumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist.” *Keys v. State*, 478 So.2d 266, 268 (Miss.1985). Direct evidence is that which is not circumstantial, such as eyewitness testimony, the defendant's confession to the offense charged, or the defendant's admission as to an important element thereof. *Lynch v. State*, 877 So.2d 1254, 1265(¶ 23) (Miss.2004). Because a circumstantial evidence instruction is necessary only when the State's case is entirely circumstantial, a circumstantial evidence instruction is not required when there is both direct and circumstantial evidence of the guilt of the accused. *Gilleylen v. State*, 255 So.2d 661, 663 (Miss.1971). A circumstantial evidence case is one in which there is neither eyewitness testimony nor a confession to the crime. *State v. Rogers*, 847 So.2d 858, 863 (Miss.2003).

The State submits the trial court correctly denied the instruction because the case against Gore consisted of both direct evidence and circumstantial evidence. The defendant's admission on a significant element of the offense obviates the need for a circumstantial evidence instruction. *Conner v. State*, 632 So.2d 1239, 1256 (Miss.1993) (overruled on other grounds); *Mack v. State*, 481 So.2d 793, 795 (Miss.1985). In *Lynch v. State*, 877 So.2d at 1265 the Supreme Court stated that “an admission [is] a statement by the accused-it may be direct or implied-of facts pertinent to the issue and tending in connection with other facts to prove his guilt.” Though “not a confession properly so-called,” the defendant's admission going to a significant element of the offense is direct evidence of the defendant's guilt. *Id.* at 1266 (¶ 29).

Gore's statements that he got the rifle from the closet, aimed it at Jacqueline Ford and shot her constitute admissions that he killed Ford, a significant element of murder. *Id.* at 1266-67(¶¶ 28-29). In fact, Gore admitted three separate times to having shot Ford, causing her death. Gore's admissions on a significant element of the offense for which he was convicted were direct evidence

of his guilt. *Id.* Therefore, the State's case against Gore comprised a mix of direct and circumstantial evidence and trial court correctly denied Gore's proffered circumstantial evidence instruction.



## CONCLUSION

The trial court properly instructed the jury. 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 sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

  
\_\_\_\_\_  
LISA L. BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO 

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

**CERTIFICATE OF SERVICE**

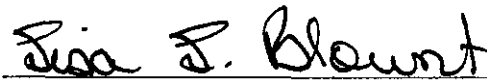
I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Marcus D. Gordon  
Circuit Court Judge  
Post Office Box 220  
Decatur, MS 39327

Honorable Mark Duncan  
District Attorney  
Post Office Box 603  
Philadelphia, MS 39350

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

This the 23rd day of July, 2009.



LISA L. BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL

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

## 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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Attorney at Law  
Post Office Box 178  
Newton, MS 39345

This the 23rd day of June, 2009.



LISA L. BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL

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