IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARY LEWIS APPELLANT

VS. NO. 2008-KA-1995-COA

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: LA DONNA C. HOLLAND
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE TRIAL COURT PROPERLY DENIED LEWIS'S MANSLAUGHTER INSTRUCTION DUE THE TO LACK OF AN EVIDENTIARY BASIS. 4

II. LEWIS SUFFERED NO PREJUDICE FROM THE ALLEGED DISCOVERY VIOLATION. 7

III. THE TRIAL COURT CORRECTLY RULED THAT COLETTE ROBINSON'S TESTIMONY WAS MORE PROBATIVE THAN PREJUDICIAL. 11

CONCLUSION 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

STATE CASES

Anthony v. State, 843 So.2d 51, 55 (Miss. Ct. App. 2002) 11

Cooper v. State, 977 So.2d 1220, 1221 (Miss. Ct. App. 2007) 5, 6

Gray v. State, 931 So.2d 627, 630 (Miss. Ct. App.2006) 9, 10

Gribble v. State, 760 So. 2d 790, 793 (Miss. Ct. App. 2000) 11

Livingston v. State, 943 So.2d 66, 71 2 (Miss. Ct. App. 2006) 4, 5

O'Neal v. State, 977 So.2d 1252, 1254 (Miss. Ct. App. 2008) 8, 9

Wilson v. State, 574 So.2d 1324, 1336 (Miss. 1990) 5

STATE STATUTES

Miss. Code Ann. § 97-3-35 . . . . . 4, 5

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARY LEWIS **APPELLANT**

VS. **NO. 2008-KA-1995-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

I. THE TRIAL COURT PROPERLY DENIED LEWIS'S MANSLAUGHTER INSTRUCTION DUE TO THE LACK OF AN EVIDENTIARY BASIS.

II. LEWIS SUFFERED NO PREJUDICE FROM THE ALLEGED DISCOVERY VIOLATION.

III. THE TRIAL COURT CORRECTLY RULED THAT COLETTE ROBINSON'S TESTIMONY WAS MORE PROBATIVE THAN PREJUDICIAL.

STATEMENT OF FACTS

On the morning of June 23, 2007, Arthur Patterson picked up his friend Johnny Hawkins to go riding around, as they usually did on Saturday mornings. T. 267. Patterson arrived in his mother's Oldsmobile and explained that his girlfriend, Mary Lewis, had been out all night in his Cadillac, and he aimed to get it back. T. 268. Patterson and Hawkins rode around for about an hour before spotting Lewis in the Cadillac on Eminence Row. T. 269. Hawkins stayed in the car while Patterson approached Lewis and demanded that she return his vehicle. T. 269. Lewis, who was sitting in the Cadillac during the exchange, rolled the window up on Patterson as he reached in the

car in attempt to retrieve the keys. T. 270. One eyewitness to the exchange testified that the two were "kind of tussling" and she saw their hands moving during the encounter. T. 241. Another witness testified that she saw Patterson hit Lewis once or twice. T. 258. However, none of the eyewitnesses saw anything in Patterson's hands during the confrontation. T. 241, 265. After Lewis managed to roll the window either all the way up or almost all the way up, she shot Patterson to death through the window with a .22 caliber pistol. T. 260, 271.

Lewis then fled the scene in the Cadillac. T. 244, 265, 272. She then drove to her uncle's house and hid the Cadillac in his back yard. T. 289. Lewis ultimately gave a statement to police, admitting that she shot Patterson to death. T. 172, Exhibit 2. In her statement, Lewis claimed, "I thought I was shooting down." T. 172, Exhibit 2. Lewis declined to testify on her own behalf. A Hinds County Circuit Court jury found her guilty of murder.

SUMMARY OF ARGUMENT

The trial court properly denied Lewis's heat of passion manslaughter instruction because there is no evidence in the record to show that Lewis acted in a state of violent uncontrollable rage. Even defense counsel admitted that such evidence would have to be inferred. However, there must be an actual evidentiary basis for the granting of an instruction. An inference will not suffice.

Even if the State committed a technical discovery violation in failing to supplement discovery to show that Roy Fleming would testify that Lewis hid the victim's Cadillac at his house, Lewis can show no prejudice because Lewis admitted to such in her statement to police which was provided in discovery. Regarding Lewis's claim that the State committed a discovery violation in failing to notify defense counsel that Fleming would testify that Lewis looked strange when she was at his house or that Lewis's siblings came to talk to her at Fleming's house on the day of the murder, there is no evidence in the record to show that this information was within the State's knowledge. If this honorable Court finds otherwise, Lewis still fails to show prejudice. The aforementioned facts are wholly irrelevant to Lewis's several theories of the case.

Colette Robinson's testimony regarding Lewis's threat that she was going to kill Patterson the very night before she did just that goes directly toward an element of the crime. As such, the evidence was clearly more probative than prejudicial.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED LEWIS'S MANSLAUGHTER INSTRUCTION DUE THE TO LACK OF AN EVIDENTIARY BASIS.

Although a defendant is entitled to an instruction which supports his or her theory of the case, that entitlement is limited to the granting of instructions which correctly state the law, are not fairly covered elsewhere, and which have an evidentiary basis. *Livingston v. State*, 943 So.2d 66, 71 (¶14) (Miss. Ct. App. 2006). Lewis claims the trial court employed an incorrect legal standard in refusing her heat of passion manslaughter instruction. Although the trial court did mention that self-defense and manslaughter are inconsistent defenses when refusing instruction D-10, the trial court had also stated on the record that no evidentiary basis existed for the instruction because no evidence had been presented to show that Lewis was in a state of violent or uncontrollable rage when she murdered Patterson. T. 346, 354. Specifically, the trial court stated,

> My problem is that the manslaughter charge there has to be evidence of a heightened emotional state of the defendant at the time the victim was killed. I'm not sure the record supports any evidence or the record contains any evidence that the defendant at the time of the incident was at a heightened state of emotion and passion.

T. 346. Even if the trial court denied the heat of passion manslaughter instruction in part on the erroneous belief that Lewis could not put forth inconsistent defenses, the trial court properly refused the instruction for lack of an evidentiary basis.

Heat of passion manslaughter is "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." Miss. Code Ann. § 97-3-35. Our courts have further defined "heat of passion" 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. 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.

Livingston, 943 So.2d 66 at 71 (¶15). In the present case, there was absolutely no evidence, as noted by the trial court, that Lewis was in a state of violent or uncontrollable rage or in an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror. In fact, even defense counsel acknowledged that terror or fear on Lewis's part would have to be inferred from the evidence. T. 349. In other words, defense counsel acknowledged that there was no record evidence to show that Lewis was in a state of violent or uncontrollable rage at the time she shot Patterson to death.

In *Turner v. State*, evidence was presented to show that Turner and the victim got in a shoving match, and that the victim pushed Turner over a table before Turner pulled a gun from his pants and shot the victim. 779 So. 2d 952, 953 (¶2) (Miss. Ct. App. 2000). The trial court refused Turner's heat of passion manslaughter instruction. In affirming, this Court noted that when a deadly weapon is used in a killing malice is implied. *Id.* at 954 (¶7). "In order to overcome that implication, there must be some evidence in the record from which the jury could determine that the act was not the result of malice, but a result of the heat of passion." *Wilson v. State*, 574 So.2d 1324, 1336 (Miss. 1990). The *Turner* court acknowledged that there was provocation in the form of the victim pushing the defendant over the table, but stated, "we do not find that this by itself would support a finding of 'violent and uncontrollable rage' absent some testimony from someone that rage appeared to exist." *Id.* at (¶8).

Similarly, in *Cooper v. State*, evidence was presented to show that Cooper and the victim were in a verbal confrontation which turned physical when the victim pushed and choked Cooper. 977 So.2d 1220, 1221 (¶4) (Miss. Ct. App. 2007). Immediately thereafter, Cooper shot the victim

to death. *Id.* Cooper's heat of passion manslaughter instruction was refused. In affirming the trial court's decision, this Court found that although there was provocation, "the record is void of any evidence that Cooper was in a state of violent and uncontrollable rage." *Id.* at 1223 (¶13).

Recently, in *Williams v. State*, the defendant presented evidence that an agitated victim struck him and tried to detain him in attempt to get more drugs from him. 12 So.3d 17, 19 (¶11) (Miss. Ct. App. 2009). Thinking that the victim was about to rob him, Williams then choked the victim to death. *Id.* This Court found that the trial court properly refused a heat of passion manslaughter instruction because there was no evidence in the record to show that Williams acted in a state of violent uncontrollable rage.

It is clear from *Turner*, *Cooper*, and *Williams*, that evidence of the defendant's violent uncontrollable rage required for the granting of a heat of passion manslaughter instruction cannot be inferred simply because the defendant was provoked by the victim. Instead, there must be evidence in the record to show that the defendant acted in the heat of passion. Because there is no evidence in the record to show that Lewis acted in a state of violent uncontrollable rage when she shot Patterson to death, the trial court properly refused her heat of passion manslaughter instruction.

II. LEWIS SUFFERED NO PREJUDICE FROM THE ALLEGED DISCOVERY VIOLATION.

Roy Fleming, Lewis's uncle, gave a statement to police in which he claimed that when he arrived home on the night of the murder, Patterson's Cadillac was parked at his house. T. 164. He further claimed that he did not know who the vehicle belonged to or how it got there. T. 165. When he awoke Sunday and the vehicle was still parked at his house, he called the police to report the presence of the vehicle in his yard. T. 165. At trial, however, Fleming testified on direct that at around 10 a.m. on the morning of the murder, Lewis drove the vehicle to his house. T. 287. Consistent with his statement, he further testified that when the car was still at his house Sunday morning, he called the police. T. 289. Fleming testified that he did not talk to Lewis, who he hardly knew and had only met once before, when she arrived at his house, and he left shortly after she arrived. T. 285, 288-89. All Fleming knew was that she showed up and parked the car in his backyard. T. 289. On cross-examination, Fleming explained that he told the police he did not know who drove the car to his because he did not remember at the time. T. 290. When asked to explain how he remembers a year and a half later that Lewis drove the car to his house that morning, he explained, "When you drink, you forgets," and went on to say that he no longer drinks, so now he remembers. T. 291. Fleming admitted that he did not tell the police that he knew who owned the car or who drove it to his house because he did not want to get involved. T. 292-93.

On redirect, the following exchange between Fleming and the prosecutor occurred.

Q. Mr. Fleming, you talked to me and Mr. Kesler about this just a couple of days ago, didn't you, and we told you you were going to have to come down here and testify?

A. Uh-huh.

Q. All right. Are you worried that you're going to get in trouble for all this?

A. Uh-huh.

Q. It's okay. You can tell us.

A. Yeah.

Q. Okay. And you were worried that by her leaving that car there you might be involved in this, and you might could get in trouble for it?

A. Uh-huh.

Q. Okay.

T. 293. At this point, defense counsel asked to approach the bench and expressed concern that the State had knowledge that Fleming knew more than he told authorities but failed to provide that information in discovery. T. 293. The State admitted that prior to trial Fleming admitted that he knew Mary was at his house with the car, but noted that that information was already in Lewis's statement to police which was provided in discovery. T. 295. After interviewing Fleming during a recess, defense counsel moved for a mistrial. T. 312. Defense counsel stated that during the recess Fleming admitted that not only had he seen Lewis at his house that Saturday, but also that Lewis's brother and sister came to his house to talk to Lewis, which corroborated part of Lewis's statement to police. T. 313-314. Defense counsel claimed that this new information "has a lot to do with her state of mind as to her flight or potential flight." T. 314. The trial court overruled the motion for mistrial because the defense already knew through Lewis's statement and Officer Crowley's testimony that Lewis hid the car at Fleming's house. T. 330-331. Nevertheless, the court recalled Fleming so that defense counsel could further cross-examine him about the "new" information.

This Court reviews a trial court's ruling pertaining to alleged discovery violations for abuse of discretion. *O'Neal v. State*, 977 So.2d 1252, 1254 (¶10) (Miss. Ct. App. 2008). "Where a discovery violation results in the admission of evidence that is merely cumulative, the error is

harmless." *Id.* 1255 (¶13). If this honorable Court finds that the State committed a discovery violation in failing to inform defense counsel that Fleming admitted prior to trial that he knew Lewis was the one who left the car at his house, such error is harmless since this information was provided to defense counsel in Lewis's statement to police, and probably in a summary of Officer Crowley's proposed testimony.

Lewis also claims on appeal that the State failed to inform defense counsel that Lewis's siblings came to Fleming's house to talk to Lewis on the day of the murder and Fleming's observation that Lewis looked "strange like" when she was at his house. First, the record does not indicate that the State was in possession of this information. During argument, the prosecutor indicated only that he suspected that Fleming knew Mary brought the car to his house, and Fleming finally admitted to such prior to trial. Second, even if such information was within the State's knowledge and the State failed to supplement discovery, such error is harmless because no prejudice resulted. "A violation of Rule 9.04 is considered harmless error unless it affirmatively appears from the entire record that the violation caused a miscarriage of justice." *Gray v. State*, 931 So.2d 627, 630 (¶ 9) (Miss. Ct. App.2006). Lewis claims that the information was relevant to her state of mind after the shooting and "was crucial for the jury in determining whether the requisite degree of deliberation or malice existed." Appellant's Brief at 13. The appellant fails to explain how the fact that Lewis's siblings talked to her after the shooting or the fact that Lewis looked strange has any bearing whatsoever on Lewis's degree of culpability or any one of her inconsistent defenses.

Lewis's reliance on *Fulks v. State*, No. 2007-KA-01572 (Miss. July 23, 2009) is completely misplaced. In *Fulks*, a co-defendant gave a statement to police in which he claimed that he and Fulks had not participated a the robbery but merely sat in a car while other passengers planned and committed a robbery. *Id.* at (¶2). The day before trial, the State informed Fulks' counsel that the

co-defendant would testify that Fulks was essentially the ringleader of the robbery. *Id.* The supreme court held that the discovery violation and the trial court's failure to grant a continuance were reversible error because the discovery violation completely undercut the defendant's theory of the case. Such is not the case in the case *sub judice*, because the fact that Lewis's siblings showed up at Flemings house and the fact that Lewis looked strange after murdering her boyfriend are totally irrelevant to Lewis's numerous theories of the case.

For the foregoing reasons, even if this honorable Court finds that the State committed a discovery violation, such error is harmless because Lewis suffered no prejudice.

III. THE TRIAL COURT CORRECTLY RULED THAT COLETTE ROBINSON'S TESTIMONY WAS MORE PROBATIVE THAN PREJUDICIAL.

Colette Robinson, Patterson and Lewis's next door neighbor, testified that the night before the murder, Lewis told her that she was going to kill Patterson. T. 321. Robinson stated that she did not think much of it at the time because she thought Lewis was just venting. T. 322. Prior to Robinson taking the stand, the trial court ruled that the testimony was more probative than prejudicial. T. 311.

When reviewing a trial court's determination that evidence is more probative than prejudicial, this Court must affirm unless the trial court has abused its discretion. *Gribble v. State*, 760 So. 2d 790, 793 (Miss. Ct. App. 2000). This Court has previously noted that "the prejudicial effect that Rule 403 forces a court to weigh is only the unjustified harm to a party arising from evidence that might be given inappropriate weight or could otherwise pervert the fact-finding." *Anthony v. State*, 843 So.2d 51, 55 (¶21) (Miss. Ct. App. 2002). The *Anthony* court went on to state, " That the person charged with murder had only hours earlier threatened to kill the victim is clearly prejudicial to the defendant's chances for acquittal, but not prejudice in the sense of a skewing of the fact-finding." *Id.* at (¶22).

Evidence that Lewis threatened to kill Patterson the night before she murdered him was highly probative of her intent. The trial court did not abuse its discretion in admitting Robinson's testimony.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Lewis's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

LA DONNA C. HOLLAND
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

CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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 L. Breland Hilburn
Circuit Court Judge
Post Office Box 327
Jackson, MS 39205

Honorable Robert Shuler Smith
District Attorney
Post Office Box 22747
Jackson, MS 39225-2747

Virginia L. Watkins, Esquire
Attorney at Law
Assistant Public Defender
Post Office Box 23029
Jackson, MS 39225

This the 9th day of November, 2009.

LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

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