

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-01995-COA

MARY LEWIS

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI**

REPLY BY APPELLANT

Appellant Seeks Oral Argument

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REQUEST FOR ORAL ARGUMENT

Counsel for Ms. Lewis respectfully asks this honorable Court to grant her request for oral argument, particularly on the issue of the appropriate standard by which a trial judge evaluates jury instructions.

Counsel for Ms. Lewis submits that trial courts in this Circuit Court district rarely grant instructions sought by the accused, particularly if those instructions guide the jury on lesser included offenses or lesser offenses. Ms. Lewis contends this occurs because the trial courts fail to use the appropriate standard in consideration of jury instructions.

ARGUMENT

Comes now Mary Lewis, Appellant herein and pursuant to MISSISSIPPI RULE OF APPELLATE PROCEDURE 28(C) makes this, her *Reply to Brief of the Appellee* on selected issues, I and II. In so doing, Ms. Lewis reiterates all errors, arguments and citation of authority in *Brief on the Merits by Appellant*, incorporated herein by reference, and in no way abandons other errors and issues not specifically addressed in this *Reply*.

I. The trial court not only erred when it refused to permit the jury to consider the defense of manslaughter, as the evidence was insufficient to sustain a conviction for murder, the trial court compounded its error as it failed to use the proper legal standard in evaluating the request for jury instructions on manslaughter and

The problem with the response by honored counsel for the State is it reduces the legal analysis to a discussion to *only* heat of passion manslaughter. Instruction D-10 [reproduced below] uses the language of the statute, MISS. CODE ANN. 97-3-35 (1972) and gave the jury a choice of more options than heat of passion manslaughter alone. In *Lanier v. State*, 684 So.2d 93 (Miss. 1996), the Mississippi Supreme Court reversed for denial of a jury instruction that would have permitted the jury to find Arthur Ray Lanier guilty of manslaughter in the shooting death of Gulfport police officer Buford Dedeaux. The Court again reversed the capital murder conviction of Lanier because the only manslaughter instruction given in the third trial concerned heat of passion manslaughter for which no evidentiary basis existed.

“We agree with Lanier that the statute may be read *in the disjunctive* and that the killing of a human being without malice, or by the use of a dangerous weapon without authority of law and not in necessary self-defense, may be manslaughter,” the Court wrote. *Id.* 684 So.2d at 97. [emphasis added]. The Court held it was reversible error to refuse an instruction which would have permitted the jury to find Lanier “killed Buford Dedeaux, a human being, without malice

but by his own action by the use of a deadly weapon, without authority of law, and not necessarily in self-defense, then you shall find the defendant, Arthur Ray Lanier, guilty of the crime of manslaughter.” *Id.* 684 So.2d at 95; 97.

Instruction D-10, refused by the trial court in the instant case, reads as follows:

If you fail to find the defendant, Mary Lewis, guilty of murder, then you should continue your deliberations to consider the elements of manslaughter.

If you find from the credible evidence in this case beyond a reasonable doubt that Arthur Lee Patterson was a living person, and that Mary Lewis did kill Arthur Lee Patterson, without malice, in the heat of passion, but in a cruel or unusual manner, *or by the use of a dangerous weapon, not in necessary self-defense and without authority of law*, then you shall find the defendant, Mary Lewis, guilty of manslaughter.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find Mary Lewis not guilty of manslaughter. [emphasis added] (CP 36).

Learned counsel for the state acknowledges that the accused is entitled to a jury instruction on her theory of defense, but fails to acknowledge the standard by which the trial court is to consider the request. As noted in *Brief on the Merits by the Appellant*, trial judges are to evaluate all evidence in a light most favorable to the accused; they must consider in the defendant’s favor all favorable inferences flowing therefrom and consider also that the jury may not be required to believe *any* of the State’s evidence. *Fairchild v. State*, 459 So.2d 793, 801 (Miss. 1984) (additional citations omitted). If doubt exists about whether to grant the instruction, the trial judge must resolve such doubts in favor of the accused. *Wadford v. State*, 385 So.2d 951 (Miss. 1980). Lesser offense or lesser-included offense instructions should be refused *only* when, viewing the evidence in the light most favorable to the defendant, the evidence could justify nothing other than conviction on the principal charge. *Hester v. State*, 602 So.2d 869, 872-873 (Miss. 1992).

In the instant case, the trial court failed to give *any* favorable inference to the evidence which showed that

- (1) Arthur Lee Patterson was angry and sought out Ms. Lewis for riding in a car for which both individuals paid and both used and that Ms. Lewis sought to avoid confrontation;
- (2) Patterson blocked the path of Ms. Lewis in the Cadillac so that she could not avoid the ultimately tragic confrontation;
- (3) Patterson had another young relative block Ms. Lewis from behind, to ensure she could not flee and
- (4) Patterson beat Ms. Lewis with her fists and berated her verbally while she sat helpless inside the car.

Clearly then, viewing this evidence in the light most favorable to Ms. Lewis, the evidence supported at the very least the giving of Instructions D-7 and D-10. (CP 33; 36). Ms. Lewis faced an angry companion, who had blocked any ability to exit safely, who was beating her with his fists as he verbally cursed and berated her and thus, could be seen in the state of mind existing when reason is overthrown and one is in an uncontrollable rage. Alternatively, the jury clearly could have found that she acted not out of malice but in a cruel and unusual way by grabbing Patterson's gun from the floorboard and shooting wildly in an effort to free herself and to stop Patterson's beating. Failure by the trial court to employ the correct legal standard in review of the jury instructions essentially denied Ms. Lewis her constitutional right to present a defense to the jury via jury instructions and due process of law.

This Court recently reversed and rendered the murder charge of John Johnson in *John Johnson v. State*, 2008-KA-0176-COA (Nov. 2009) and remanded for resentencing as manslaughter. Ms. Lewis would ask then, that the Court reverse and remand this cause for a new

trial or alternatively to use the direct remand rule to remand her for re-sentencing for manslaughter.

II. The trial court abused its discretion, resulting in manifest injustice, when it denied the request for mistrial upon revelation of the state's failure to comply with rules regarding reciprocal discovery as to statements by Roy Fleming, which inured to the fatal prejudice of Ms. Lewis.

Since counsel for Ms. Lewis initially submitted her *Brief on the Merits*, the Mississippi Supreme Court has decided *Densmore v. State*, 2008-KA-00982-SCT (Nov. 19, 2009), in which his cocaine sale conviction was reversed for failure of the state to comply with UNIFORM RULE OF COUNTY AND CIRCUIT COURT PROCEDURE 9.04 by failing to disclose the identity of its star witness until the morning of trial.

The testimony of Roy Fleming, uncle by marriage to Ms. Lewis, corroborates her chronology of events and description of her state of mind as contained in her statement to police. *Exhibit 2*. Although Fleming met several times with prosecutors prior to trial to discuss his testimony, the state neither disclosed nor supplemented *anything* beyond the initial statement Fleming made to police June 24, 2007.

Coupled with denial by the Court in *Fulks v. State*, 18 So.3d 803 (Miss. 2009) of the state's *Motion for Rehearing*, in which the issue was the state's failure to timely inform defense counsel of material changes in witness testimony, Ms. Lewis would urge the Court to consider these two decisions as essentially dispositive of this assignment of error and reverse and remand.

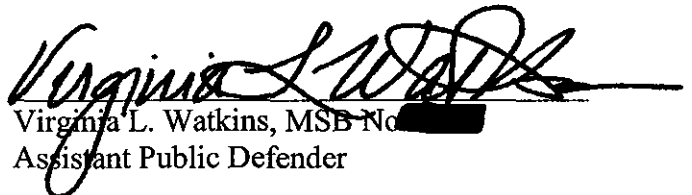
CONCLUSION

Most humbly, Ms. Lewis prays this honorable Court review the errors alleged herein and supporting authority and reverse this cause due to the failure of the trial judge to use the correct legal standard by which jury instructions should be evaluated. This failure resulted in the denial to Ms. Lewis of her right to present a theory of defense to the jury. Had the trial court employed the correct standard, the jury would have had the option of considering whether Ms. Lewis was guilty of manslaughter, an instruction to which the evidence and Mississippi law entitle her.

Additionally, recent decisions by the Mississippi Supreme Court add support to the contention of Ms. Lewis that it was error to deny her motion for mistrial based on prosecutors' failure to comply with rules regarding discovery of changes in statements by Roy Fleming, uncle to Ms. Lewis.

Based on the authority presented here and in the *Brief on the Merits by Appellant*, Ms. Lewis asks this honorable Court to reverse and remand for a new trial or alternatively to reverse and render and remand for re-sentencing under the state manslaughter statute.

Respectfully submitted,


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Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing REPLY BY APPELLANT to the following:

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Honorable Breland Hilburn
CIRCUIT JUDGE
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And by United States Mail, postage prepaid, to

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So certified, this the 30th day of November, 2009.


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