IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KAREY WHITTINGTON — APPELLANT

VS. — NO. 2009-KA-0167

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

On or about July 9, 2003, the Pike County Grand Jury indicted Karey Whittington for the murder of Jerry Frith on March 5, 1999, in violation of **Section 97-3-19 of the Mississippi Code of 1972**, as amended. Whittington was tried in the Circuit Court of Pike County, Mississippi, on September 15-17, 2004. On September 17, 2004, Whittington was convicted of the murder of Jerry Frith. (C.P. 58) He was sentenced into the custody of the Mississippi Department of Corrections for and during the remainder of his natural life and was ordered to pay a fine in the amount of $10,000.00 and court costs. (C.P. 60) Whittington filed his Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial on September 27, 2004. (C.P. 62) The trial court denied the motion. (C.P. 64) Whittington filed a Petition for Out of Time Appeal or for Post Conviction Collateral Relief on January 22, 2007. (C.P. 65) On October 20, 2008, the trial court granted Whittington's Motion, holding, that the request was made pursuant to the authority granted in Section 99-39-5-(h) and would be treated as a Motion for

Post Conviction Collateral Relief. (C.P. 76) On February 11, 2009, Whittington filed an Amended Notice of Appeal, thereby appealing the Judgment of Conviction and the Order Sentencing, filed September 17, 2004, and the Order Denying Defendant's Motion for New Trial or in the Alternative Judgment Notwithstanding the Verdict, dated September 24, 2004 and filed October 1, 2004. (C.P. 83)

SUMMARY OF THE FACTS

Leroy Carr testified that he knew Jerry Frith and was present in the area on March 5, 1999 when Frith was shot. He testified that he was walking down Adams Street when he heard the gunshot. He looked around and heard a car speeding off with loud pipes. He described the car as an orange-reddish Camaro driven by two white males. (Tr. 131) Carr ran up to the corner of Adams and McComb and looked down the street. He saw Frith laying in the street about four houses down. (Tr. 131) Carr approached Frith and took off his coat and put it under Frith's head. Carr heard air escaping from Frith's chest. (Tr. 132)

On March 5, 1999, Officer Michael Roberts responded to a call for a murder. He was the first officer to arrive. When he arrived on the scene, he noticed a black male laying on the street. He approached the man and saw where he had been shot in the right chest. The ambulance arrived but it was clear that the man was already deceased. (Tr. 134) Roberts asked people out in the local houses if they had seen anything. Roberts came across Mr. Carr. He filed a police report with Carr's statement in it. He was not able to find any other witnesses that saw or heard anything. (Tr. 136)

On direct examination by the State, Assistant Chief Perry Ashley testified regarding the investigation he made into the murder of Jerry Frith which occurred in 1999. Ashley testified that in May of 2003, Investigator Haygood of the Pike County Sheriff's Department told him about Robert LeBlanc who had information regarding the murder of Jerry Frith. Haygood then brought LeBlanc to meet with Ashley. LeBlanc gave a statement and named some individuals. Later he stated corrected his statement as to the identity of one of the individuals. On Jun 18, 2003, as part of his investigation, Ashley then talked to Tony Temple about the murder of Jerry Frith. Temple was later indicted as an accessory after the fact. (Tr. 141) Ashley testified Temple gave him a statement regarding his involvement in a the murder of Jerry Frith. Ashley testified that Temple also spoke of another person's involvement.

Ashley testified that they took at statement from Mr. Temple on June 18, 2003. (Tr. 141) Temple had been arrested on some burglary charges that occurred in the county. When he spoke with Temple, Ashley was trying to find out who was responsible for Frith's murder in 1999. (Tr. 142) Ashley identified th other party involved as Karey Whittington. (Tr. 144) Ashley asked Temple who could verify what he had said, and Temple identified Dewayne Cash. Ashley also interviewed Dewayne Cash on June 18, 2003. (Tr. 145)

Lieutenant Gregory Martin of the McComb Police Department testified that he was the crime scene analyst on March 5, 1999 related to Frith's murder. Lt. Martin testified that he arrived at the scene at 10:57 p.m. Frith was laying in the street and appeared to have been shot in the chest. (Tr. 149) Lt. Martin found a bottle of gin in Frith's front left pock and in his front right pocket, a Red Top matchbox with burnt copper wire, a metal pipe with black tape at one end and one light-blue cigarette holder. (Tr. 159) In the right rear pocket, he found one key and some

nail clippers. (Tr. 160) There were no firearms found in the victim's clothes or near the victim. (Tr. 168)

Pike County Coroner, Percy Pittman testified that upon arriving at the scene, he found a 34 year old black male lying in the street. Someone had put a sheet over him or something under his head. He had a large gunshot wound to the chest. (Tr. 171) Pittman called a hearse or an ambulance to come and take Frith's body to the morgue. Frith's body was sent to Dr. Haynes for autopsy. Frith had alcohol and cocaine in his blood at the time he was murdered. (Tr. 181)

Detective David Haygood testified that during his time working at the Pike County Sheriff's office he became acquainted with Robert LeBlanc. LeBlanc was promoted to trust status and worked on the vehicles outside. (Tr. 187) Haygood and LeBlanc talked daily. About April, 2003 Detective Haygood had a conversation with LeBlanc about some unsolved burglaries. LeBlanc said that he had some involvement in those burglaries. Another person's name came up as also being involved in the burglaries. (Tr. 189) Detective Haygood asked LeBlanc if he possibly knew of any other things that person could have been involved in. (Tr. 189) LeBlanc told Haygood that he and Tony Temple were riding around and that Tony explained that he had been with someone who shot a man in Baertown. LeBlanc was able to give Leblanc the caliber of the weapon used in the murder. (Tr. 190)

Detective Haygood called the McComb Police Department and advised Detective Cowart of the information he had received from LeBlanc. (Tr. 191) Haygood, Cowart and Ashley meet with LeBlanc who again told the story of his conversation with Temple. (Tr. 192) LeBlanc identified the person he believed committed the murder, but later contacted Haygood and told him that the name he had given was wrong and the person who had committed the murder was

Karey Whittington. (Tr. 192-193)

Robert LeBlanc testified that he remembered that the person Tony Temple told him about was a guy who wore a necklace with a knife on it. He was able to remember the name Karey Whittington which he then told to Detective Haygood. (Tr. 208) LeBlanc testified that Temple had a gun that was a Derringer, over and under and shot a .410 gauge from one barrel and a .32 caliber from the other. LeBlanc testified that he and Tony Temple went out and shot the gun.

Forensic pathologist Dr. Steven Hayne testified that Frith had a gaping gunshot wound measuring approximately seven-eights of an inch in diameter, located over the lower right chest wall . The bullet track was explored and the track led through chest wall and into the abdominal cavity. The bullet traveled front to back, and downward at approximately 30 degrees and to the left at approximately 20 degrees. The bullet struck the right lunch, struck the heart, hit the diaphragm, and then struck the liver. It finally impacted on the right side of the first lumbar vertebra without injuring the spinal cord. (Tr. 232) Death was a product o massive internal bleeding and exsanguination, primarily from the wound to the heart. (Tr. 232)

There was no rifling on the slug that was recovered and it was consistent with a .410 shotgun slug. A piece of paper wadding was also recovered from the wound track, which had been carried into the body behind the slug itself (Tr. 233) Dr. Hayne testified that the wound to Mr. Frith occurred within three to ten feet of the end of the muzzle of the weapon that killed him. The would was on an up to downward angle, traveling downward in the body. (Tr. 242) Frith had cocaine metabolites in the urine, but non in the blood. He had an alcohol concentration of 0.09 percent in his blood. (Tr. 244)

Crime lab technician Steve Byrd testified that the projectile recovered from Mr. Frith's

body had a diameter of .410 inches and was consistent with a .410 shot gun. He identified the piece of paper or fiber found in Frith's body as consistent with filler wadding, a substance that takes up space in a shotgun shell, .410 gauge.

Tony Temple testified that on the evening of March 5th of 1999, he was at Whittington's apartment with Whittington and Dewayne Cash. (Tr. 259) Whittington asked Temple to take him to McComb to get some marijuana. Temple had a 1981 red Camaro that he drove to take Whittington to McComb. (Tr. 259) They went to a few houses looking for marijuana, but didn't find anything. They went to White Acres and then to Baertown in South McComb. (Tr. 260) Whittington was sitting in the passenger seat and Temple was driving. In the back seat was a pistol-grip .410 shotgun that belonged to Temple's grandfather. The gun was on the floor between the seat and the passenger side door. Whittington had placed the gun there. They passed two men and Whittington told Temple to turn around and go back. Temple pulled up so that the two men were on the passenger side, talking to Whittington. Whittington asked them to come over to the care. He asked them for some marijuana. The men told him that they did not have any marijuana, but they had some crack. Whittington told Temple he didn't want any crack and instructed him to leave and drive off. (Tr. 263) Temple put the car in gear and drove off at 15 to 20 miles per house. He did not get far when Whittington stuck his head out the window and shot one of the men. When he looked at Whittington, he saw him sitting on the door, his body outside the car, with the gun pointing down at an angle. Whittington was pointing the gun to the rear of the car.

When Whittington fired the gun, Temple panicked and mashed the gas, left Baertown, hit 51, and was driving as fast as I could. Whittington told Temple that he wanted to scare the men

because he was tired of getting ripped off. He told Temple that Jerry Frith had a gun at one time, but Temple testified that Jerry Frith did not have a gun. After they returned to the apartment where Whittington lived, Whittington then told Temple that he did not scare the man, but shot him. Whittington began bragging to Dewayne Cash who was still in the apartment that he had shot a man. Whittington told Cash, " I just shot me a nigger. I'm tired of getting ripped off, I got ripped off three days in a row and I'm sick of it."

Temple and Whittington decided to park the car for a few days and left the gun behind Temple's house in the woods by some hay bales. Temple testified that the gun was damaged when the hay caught on fire and that his grandfather found it. He later told Whittington he had burned the gun with a torch. (Tr. 268)

Temple was later arrested on a burglary charge and told the police about the murder. He was asked how he could prove what he alleged and Temple told the police that Dewayne Cash could verify what he told them. (Tr. 270) Temple testified that he did not come forward sooner because he was afraid and that Whittington had told him that if he ever said anything he would shoot Temple or make sure Temple went down with him. (Tr. 271)

Dewayne Cash testified that he was living with K.D. during the spring of 1999. (Tr. 317) When Temple and Whittington came into the apartment, Temple was distraught, pacing back and forth, asking why did he do it, it didn't need to be done, that wasn't nothing wrong. Cash asked what was going on and Whittington told him that as they were leaving, he sat out on the window and aimed at a man's chest and shot him. (Tr. 319) Whittington told Temple that he, "sat on the window, aimed out, and shot the nigger in the chest."

Drew Wallace testified that he was incarcerated in the Pike County Jail for fifteen days,

earlier in the year, during mid January. Whittington was among a group of prisoners Wallace associated with while he was housed in the Pike County Jail. Wallace and Whittington had several conversations during the time they were both incarcerated. Whittington asked Wallace why he was locked up. Wallace then asked Whittington why he was in jail and Whittington told him he was in jail for murder. Wallace asked if he did it. Whittington said no, but grinned at Wallace. In his second conversation with Wallace, Whittington told Wallace that Tony Temple and Dewayne Cash were testifying against him because he had bragged to them. Wallace walked in on a third conversation, in which Whittington was describing the length of gun he used to Mario Molinari. Wallace warned Whittington that talking could come back and bit him. Whittington told him, "I did it, they know I did it, but they'll never find the weapon." Meaning that if they never found the weapon, they could not convict him. (Tr. 340-342)

Candy Berry, Whittington's ex-wife, testified that after their divorce, she and Whittington talked about getting back together. Whittington said that he was scared. Berry testified that he was crying and acting scared and saying that he was going to get the death penalty and he told her what happened that night. He told her that they went out looking for marijuana and the guy didn't have marijuana, he had crack cocaine. Whittington told Berry that the man pulled a gun on him and that Whittington was hollering "Let's go." and then he leaned out the window and shot the gun in the air. Whittington told Berry that it was self-defense because the guy pulled a gun on him and he was just shooting in the air.

Jeff Box testified that he is a trusty mechanic at the Pike County Sheriff's Office. (Tr. 371) Box testified that in late 2002 Whittington told him that he had "killed one SOB and that he would kill another one if they was messing with him." Box said he encountered Whittington

when a friend called him and Whittington was out in his backyard with a pistol in his hand, and he thought someone was in the bushes behind his house. (Tr. 376) Box later informed Detective Haygood about the incident. (Tr. 378)

Mario Molinari testified that in late January or early February of 2004 he was in the Pike County Jail. During that time, he met Karey Whittington and his father. They were housed together in the same room for sleeping. (Tr. 386) Whittington told him that he and a guy named Tony Temple were driving and a guy made him mad enough to want to shoot him. He said he reached out of the passenger side window with a .410 shotgun and shot the guy. (Tr. 387) Molinari testified that Whittington bragged about the incident on about twenty occasions and that the only evidence the DA had was people snitching on him and that the DA thought he was in a red pickup truck but he was really in a red Camaro. Whittington told Moliari that he got rid of the gun and that they would never find it, so he didn't have to worry about that. (Tr. 388)

SUMMARY OF THE ARGUMENT

Hearsay is an out-of-court statement offered by a declarant to prove the truth of the matter asserted. M.R.E. 801(c). However, in this case, the testimony was not hearsay because it was not offered to prove the truth of the matter asserted. The testimony was offered to show the path of the investigation and not to prove Whittington's guilt.

Based on the testimony presented at trial, Whittington did not have a 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. Thus, taking the evidence in the light most favorable to Whittington, there is no evidentiary foundation for a self defense instruction. Thus, the trial court did not err by refusing the self defense instruction. This issue is without merit.

Thus, taking the evidence in the light most favorable to Whittington, there is no evidentiary foundation for a manslaughter instruction. Thus, the trial court did not err by refusing the manslaughter instruction. This issue is without merit.

ARGUMENT

I. The trial judge was within his discretion to overrule Whittington's objections to the testimony of Perry Ashley.

The standard of review for the admission or exclusion of evidence is an abuse of discretion. ***Ladnier v. State*, 878 So.2d 926, 933 (Miss.2004)**. Reversal will not occur "unless the error adversely affects a substantial right of a party." ***Id.*** (quoting ***Whitten v. Cox*, 799 So.2d 1, 13 (Miss.2000)**). Hearsay is an out-of-court statement offered by a declarant to prove the truth of the matter asserted. M.R.E. 801(c). However, in this case, the testimony was not hearsay because it was not offered to prove the truth of the matter asserted. The testimony was offered to show the path of the investigation and not to prove Whittington's guilt. Further, the trial court clearly instructed the jury as to the nature of the evidence and how it was to be considered. Juries are presumed to follow the directions of the trial court. "[W]hen a trial court instructs the jury, it is presumed the jurors follow the instructions of the court." ***Grayson v. State*, 879 So.2d 1008, 1020(32) (Miss.2004)** (quoting *Williams v. State*, 684 So.2d 1179, 1209 (Miss.1996)). "It is well settled that when the trial judge sustains an objection to testimony and he directs the jury to disregard it, prejudicial error does not result." **Pittman v. State, 928 So.2d 244, 250(¶ 12)** (Miss.Ct.App.2006) (quoting **Estes v. State, 533 So.2d 437, 439 (Miss.1988)**).

On direct examination by the State, Assistant Chief Perry Ashley testified regarding the investigation he made into the murder of Jerry Frith which occurred in 1999. Ashley testified

that in May of 2003, Investigator Haygood of the Pike County Sheriff's Department told him about Robert LeBlanc who had information regarding the murder of Jerry Frith. Haygood then brought LeBlanc to meet with Ashley. LeBlanc gave a statement and named some individuals. Later he stated corrected his statement as to the identity of one of the individuals. On Jun 18, 2003, as part of his investigation, Ashley then talked to Tony Temple about the murder of Jerry Frith. Temple was later indicted as an accessory after the fact. (Tr. 141) Ashley testified Temple gave him a statement regarding his involvement in a the murder of Jerry Frith. Ashley testified that Temple also spoke of another person's involvement. (Tr. 143) Defense counsel objected to hearsay. The prosecutor stated that Temple's identification of another individual was not being offered for the truth of the matter asserted, but was offered merely to show that it was said. (Tr. 143.) The jury was giving a limiting instruction, as follows:

> Hearsay is an out-of-court statement that's submitted in court to prove a fact, to prove the truth of something. Normally, hearsay is not accepted in court unless it falls under one of the hearsay exceptions. There are a number of exceptions. But this is not presented for the truth of what was said.
>
> Now, Mr. Temple may have said that so and so committed the murder. That may or may not be true. This is submitted to you only for the fact that is was said, to explain this officer's actions in following up with this investigation. Now, what Mr. Temple told Mr. Ashley may or may not have been true. That's not the purpose of this testimony that's being submitted at this time.

With that caveat, the trial court overruled the objection. (Tr. 144) Temple then identified the defendant, K. D. Whittington, as the other person who was involved in the murder of Jerry Frith. Temple further testified that Dewayne Cash could verify his statement. (Tr. 144) Ashley testified that he talked with Dewayne Cash on the same afternoon he talked to Temple. Ashley testified that Dewayne Cash's testimony was consistent with what Temple had already told him.

(Tr. 145. Defense counsel again objected on grounds of hearsay and speculation. The trial court overruled the objection. (Tr. 145)

In the case at bar, investigators followed a trail of breadcrumbs in order to get to Karey Whittington. It was essential for the jury to understand how they made each step in their investigation, which continued with interviews of Tony Temple and Dewayne Cash later that same day. All three witnesses, LeBlanc, Temple and Cash testified at trial to the same information Ashley used to conduct his investigation. The trial court correctly advised the jury that the testimony from Ashley was to be considered only to show that it was said and the jury is presumed to follow the trial court's instruction. The trial court was within its discretion to admit the Ashley testimony identifying Temple, Cash and Whittington and non-hearsay testimony offered only to show that it was said.

Whittington cites ***Woods v. State*** **973 So.2d 1022, 1026 (Miss. Ct. App. 2008)** for the proposition that the testimony of Temple that Temple identified Whittington and told him that Dewayne Cash could confirm the story is prohibited as "testimony by which one witness vouches for another." In *Woods*, the prosecutor asked a witness, "Can you tell when she's lying to you or when she's telling the truth." ***Id.*** Woods objected, but the witness answered affirmatively before Woods's objection was sustained. ***Id.*** Also, the witness indicated, upon questioning, that she believed Katrina. ***Id.*** In the case at bar, that evidence was not offered for one witness to vouch for the truthfulness of another, but only to show that it was said in order to establish the progression of the investigation. Further, at trial, defense counsel objected only on grounds of hearsay, and did not object on the grounds of incompetent and prohibited vouching. Therefore this assignment of error is barred.

Ratcliff v. State, 308 So.2d 225 (Miss. 1975) is clearly distinguishable, since there was no instruction by the trial court that the testimony should not be considered for the truth of the matter asserted but only for the fact that it was said. It is further distinguishable because in Ratcliff, the prosecutor stated that the informant was reliable and credible and had "given him a lot of reliable information over a period of time." *Id.* No such reassurances of credibility were given here. The testimony was presented only as what happened in the course of the investigation. *Ratcliff* and its ilk are not applicable to the case at bar.

LeBlanc testified that

> That night when I was back in the trusty's dorm, there was several other inmates back there, trusties. And I got to asking question about certain people that hung around with us, you know, and the time frame that I was hanging out with these guys. And a name got brought up, and the name was K.D. Whittington. . . . I mean, I knew right then that that was the name that I couldn't think of the day before.

(Tr. 206-207)

LeBlanc's testimony was intended to explain his thought processes as he tried to remember who Temple had identified. LeBlanc did not testify that someone in the jail said K.D. Whittington was the murderer, but merely that the name was mentioned and this jogged his memory. The evidence was not offered to prove that Whittington committed Frith's murder but to explain how LeBlanc remembered events from several years past. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

II. Trial Court correctly sustained the prosecution's objection to the testimony of Raymond Dangerfield offered by the defense.

Dangerfield testified on behalf of the defense that he was in the Pike County Jail, housed in C-Block with Karey Whittington for about five or six months. He testified that he was in the

cell next to Whittington's cell. The defense attempted to question Dangerfield regarding conversations he had with Whittington about the murder. The trial court correctly ruled that this was hearsay.

Any statements made by Whittington to Dangerfield could only be admissible pursuant to M.R.E. 801(d)(1) if Whittington testified at trial, since that exception applies only to prior statements by witnesses. There is no other exception under which the testimony could be admitted and the trial court correctly sustained the prosecution's objection. The admission or exclusion of evidence is a matter of the trial court's discretion which will be reversed only for an abuse of that discretion which results in prejudice to a party. ***Shearer v. State*, 423 So.2d 824, 826-27 (Miss.1982)**.

Whittington relies on ***Le v. State*, 913 So.2d 913 (Miss. 2005)** and ***Jordan v. State*, 728 So.2d 1088 (Miss. 1988)** for the proposition that because hearsay statements were used by the prosecution, he should be able to offer hearsay of own statements in rebuttal. However, the testimony of Ashley, Roberts and Martin identifying Temple and Whittington were all clearly admitted by the trial court only the for the purpose of showing that the statement was made and not for the truth of the matter asserted, and therefore, were not hearsay as admitted. Further, Whittington does not seek to attack the credibility of an unavailable witness whose statements are damaging to him, as is the case in *Le* and *Jordan*, he essentially seeks to testify through a proxy witness. The testimony of Temple, LeBlanc, Cash, Wallace and Berry as to statements made by Whittington as to the murder were all statements against interest by Whittington and thus admissible pursuant to 804(b)(3). Dangerfield's testimony regarding Whittington's denial of the murder is not a statement against interest and does not fall under any exception to the rule

against hearsay. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

III. The trial judge correctly admitted the testimony of Candy Berry regarding her reasons for approaching the prosecutor about Whittington after the defense opened the door to the testimony on cross examination.

Whittington objects to the testimony of his ex-wife Candy Berry that he was out on bond after being charged with child abuse. However, Berry's testimony to the charges against Whittington came only after defense counsel attempted to discredit her on cross examination by asserting that she intended to find something to have Whittington charged with because she was angry about the child support order that gave him shared custody and visitation with the children, and was testifying against Whittington because of her anger about the custody order. The trial court ruled that defense counsel opened the door to testimony about why she initially went to law enforcement. The testimony revealed that Berry went to the District Attorney to find out why Whittington was out on bond after he had been charged with abuse. The prosecutor was familiar with the case now at bar and asked her if she knew anything about it and discovered that she did indeed have knowledge of the murder and Whittington's involvement in it.

Candy Berry, Whittington's ex-wive testified for the prosecution. On cross examination, the following colloquy took place:

Q. Candy, since you and Karey Dale got a divorce, you have – y'all have had a kind of a rocky relationship, haven't you?

A. Yes, sir.

Q. And, in fact, back the first of the year, you filed something like telephone harassment and

had him put in jail, didn't you?

A. Yes, sir.

Q. And you dropped those charges, didn't you?

A. No, sir.

Q. Okay. Were they thrown out?

A. They couldn't find the charges. They had lost them.

Q. Couldn't find the charges. But you didn't refile them, did you?

A. No, sir.

Q. And then you in fact also made the statement the first part of August that you wanted him in jail, just out of the blue, you wanted him in jail, and you wish you could find something to get the DA to prosecute him on, didn't you?

A. That's not true.

Q. You didn't say that?

. . . .

Q. Okay. And that, basically, is when you told them that you wanted him in jail, didn't you?

A. No, sir.

Q. Okay. Now --

A. May I say what --

THE COURT: You may explain your answer.

A. What I told them was that I did not want him around the kids at that time.

On re-direct, the prosecution queried Berry as follows:

Q. Mr. Ainsworth asked you – I think he said you wanted him in jail and wanted something

to prosecute him about. And he also said to you – he also asked you about him being convicted and not being able to see his children.

You didn't come to the District Attorney's office to talk about this murder case did you?

A. No, sir.

Q. What did you come to the District Attorney's office to talk about?

Mr. Ainsworth: I'm going to object to any of that, Your Honor.

Mr. Tidwell: I think the door was opened, Judge.

The Court: I think so. I overrule the objection.

A. I come about child abuse and see if I could have his bond revoked to keep --

The Court: Just a minute. Ladies and gentlemen of the jury, go with your bailiffs to the jury room please.

(TR.364-365)

Mississippi Rule of Evidence 404(b) states the following as to the admissibility of prior "bad acts":

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In ***Hodges v. State*, 912 So.2d 730, (Miss. 2005)**, the Mississippi Supreme Court held that where the defense opened the door to evidence of prior bad acts by eliciting testimony of good character on direct examination in its case in chief. Lisa Hodges was Quintez Hodges's sister. During cross-examination by the State she was asked about Quintez escaping from jail twice. Hodges argued on appeal that evidence of escape attempts was not relevant to any of the

statutory aggravating factors and was improper rebuttal to Lisa Hodges's testimony.

The Court stated:

> The prosecution has no right to introduce evidence of wrongs and bad acts to prove Hodges's character or to show he acted in conformity therewith, unless it is competent rebuttal evidence in the face of the showing of Hodges's good character made on direct examination of this witness. ***Hansen v. State*, 592 So.2d 114, 148 (Miss.1991)** (citing *Simpson v. State*, 497 So.2d 424, 428-29 (Miss.1986); *Winters v. State*, 449 So.2d 766, 771 (Miss.1984)). M.R.E. 404(b) provides that:
>
> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

***Hodges*, 912 So.2d at 755**.

Further, the Mississippi Supreme Court has held that "the State is allowed to rebut mitigating evidence through cross-examination, introduction of rebuttal evidence or by argument." ***Wiley v. State*, 750 So.2d 1193, 1202 (Miss.1999)** (quoting *Turner v. State*, 732 So.2d 937 at 950).

In the instant case, Candy Berry, Whittington's ex-wife and the mother of his two children, was asked on cross examination about charges she had filed against Whittington for telephone harassment and about a conversation she had with friends in which she was alleged to have said she wanted Whittington in jail. In an attempt to discredit Berry's testimony in Whittington's trial for the murder of Jerry Frith, defense suggested that Berry had come to the police station to looking for some reason to have Whittington prosecuted. In the course of the cross examination, was asked whether she had filed telephone harassment charges against Whittington and whether she had told friends that she wanted Whittington to go to jail and was

looking for something on which the DA could prosecute him. (Tr. 360, 361) Berry testified that she told her friends that she did not want Whittington around the children at that time. (Tr. 362)

On redirect, Berry testified that she did not come to the police department to talk about the murder of Jerry Frith, but rather had come about child abuse to see if she could have his bond revoked. The trial judge interrupted her testimony and directed the jury out of the court room and conducted an M.R.E. 403 balancing test on the record. The trial judge held:

> And I find that it is more – it is prejudicial, without any doubt. But I find that with a limiting instruction, that it is more probative than prejudicial.
>
> This is – the cross-examination of this witness by defense counsel was intended to show that this is something she was doing, coming down here, testifying for other reasons relating to the children.
>
> And I will so instruct the jury that this can be received only to rehabilitate the witness and will not be used in any way to show that he acted in conformity therewith or that the other charge should be taken into consideration when they consider this case.

(Tr. 368)

IV. The trial court correctly refused Whittington's manslaughter instruction.

Whittington alleges that the trial court should have given a lesser-included-offense instruction on manslaughter. The standard of review for challenges to jury instructions is as follows:

> Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.

***Humphrey v. State*, 759 So.2d 368, 380 (Miss.2000)** citing ***Heidel v. State*, 587 So.2d 835, 842**

(Miss.1991) (superceded by statute).

At trial, Whittington proposed a jury instruction on manslaughter as a lesser-included offense. Manslaughter is defined as "[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...." **Miss.Code Ann. § 97-3-35 (Rev.2006)**. The supreme court has 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.

***Agnew v. State*, 783 So.2d 699, 703 (Miss.2001)** (quoting *Graham v. State*, 582 So.2d 1014, 1017-18 (Miss.1991)).

In deciding whether to grant a lesser-included-offense instruction, the trial court must consider, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be made in favor of the accused, whether a reasonable jury could find the accused guilty of the lesser-included offense. ***McCain v. State*, 971 So.2d 608, 614(19) (Miss.Ct.App.2007)**. Thus, to determine whether a manslaughter instruction should have been given, the court must determine if a reasonable jury could have found that Whittington acted in the heat of passion. ***Id.***

The Mississippi Supreme Court defined heat-of-passion manslaughter 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.

***Tait v. State*, 669 So.2d 85, 89 (Miss.1996)** (quoting *Buchanan v. State*, 567 So.2d 194, 197 (Miss.1990)).

"Pushing or shoving is also insufficient to require the [heat-of-passion-manslaughter] instruction absent testimony that the defendant was acting out of violent or uncontrollable rage." ***Cooper v. State*, 977 So.2d 1220, 1223 (Miss.Ct.App.2007)** (citing *Turner v. State*, 773 So.2d 952, 954 (Miss.Ct.App.2000)).

There was no evidence adduced at trial to support a finding that Whittington was in a state of violent or uncontrolled rage or that there had been any provocation. The only testimony regarding the Whittington's allegation that the victim had a gun is told in the context of Whittington's story that he shot in the air to scare the men. Shooting in the air is not the act of someone who is facing a serious provocation. Taking the evidence in the light most favorable to Whittington, there is no evidentiary foundation for a manslaughter instruction. Thus, the trial court did not err by refusing the manslaughter instruction. This issue is without merit.

V. The trial court correctly refused Whittington's self defense instruction.

Whittington alleges that the trial court should have given a lesser-included-offense instruction on manslaughter. The standard of review for challenges to jury instructions is as follows:

> Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to

> have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.

***Humphrey v. State*, 759 So.2d 368, 380 (Miss.2000)** citing ***Heidel v. State*, 587 So.2d 835, 842 (Miss.1991)** (superceded by statute).

Mississippi Code Annotated section 97-3-15(1)(f) (Rev.2000) states that the killing of a human being is 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."

The trial court refused the self defense instruction offered by the defense due to lack of foundation in the evidence. Other than the hearsay testimony of Candy Berry, there was not evidence that the victim had a gun. Further, there was not proof or testimony that the victim ever threatened to use a gun against Whittington. There was no proof or testimony that Whittington ever felt that he was in imminent danger. In fact, Whittington's statement to Berry was that "this guy had pulled a gun on him . . . .and he said he leaned out the window and shot it in the air." This statement is inconsistent with an assertion of self defense. A person who feels that they must shoot in order to prevent imminent harm does not shoot into the air. Further, Whittington told Berry that he leaned out of the window to shoot. One who is in fear of imminent danger does not further expose himself to that danger. The mere presence of a gun in the possession of the victim, alleged only in hearsay statements, is not sufficient evidence to support a claim of self defense. Based on the testimony presented at trial, Whittington did not have a 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.

Thus, taking the evidence in the light most favorable to Whittington, there is no evidentiary foundation for a self defense instruction. Thus, the trial court did not err by refusing the self defense instruction. This issue is without merit.

VI. The verdict is supported by the overwhelming weight of the evidence.

The standard of review for claims that a conviction is against the overwhelming weight of the evidence is stated as follows:

> [An appellate court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction unconscionable injustice.

Valmain v. State*, 5 So.3d 1079, 1086 (Miss.2009)** (quoting *Todd v. State*, 806 So.2d 1086, 1090 (Miss.2001)). "There is a presumption that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to [an appellate court]." ***Id. (quoting ***King v. State*, 857 So.2d 702, 731 (Miss.2003)**).

Whittington asserts that the verdict is against the overwhelming weight of the evidence because the witnesses were unreliable. However, the witness testimony was shown to be reliable by its consistency with the other evidence. Tony Temple testified that he owned the red Camaro that the two men used to go search for drugs and from which Whittington shot Frith. Temple saw Whittington seated in the window of his car, feet in the passenger side, angled back and shooting over the roof of the vehicle at the men they were leaving behind. Temple testified that he did not see a gun. Whittington's own posture gives him away. No one who is afraid for his

life puts his body outside to the car to make a shot. People who are afraid of imminent harm do not shoot into the air.

Frith was found dead in the street immediately after the gun shot. There was no gun near the victim and a red passenger car was speeding off in the distance. The trajectory of the bullet wound was consistent with Whittington's position, aiming over the hood of the car, angled down toward the victim. The evidence of the .410 bullet taken from Frith's body was consistent with the .410 pistol grip shotgun described by Temple as the murder weapon. The allegedly unreliable witnesses were remarkably consistent. Whittington bragged that he went with his friend Tony Temple to buy marijuana and "shot a nigger." The testimony overwhelming supports the verdict. The jury's verdict and the rulings of the trial court should be affirmed.

CONCLUSION

The Appellants assignments of error are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

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STATE OF MISSISSIPPI

By: Laura H. Tedder

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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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This the 25th day of September, 2009.

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