IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-KA-00167-COA

KAREY WHITTINGTON — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Karey Whittington

THIS 23d day of June, 2009.

Respectfully submitted,

KAREY WHITTINGTON

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES

none

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER INCOMPETENT HEARSAY, BOLSTERING AND VOUCHING PREJUDICED WHITTINGTON?

ISSUE NO. 2: WHETHER WHITTINGTON SHOULD HAVE BEEN ALLOWED TO USE HEARSAY TO IMPEACH THE STATE'S HEARSAY EVIDENCE?

ISSUE NO. 3: WHETHER PREJUDICE RESULTED FROM BAD-CHARACTER EVIDENCE?

ISSUE NO. 4: WHETHER A MANSLAUGHTER INSTRUCTION WAS REQUIRED?

ISSUE NO. 5: WHETHER A SELF-DEFENSE INSTRUCTION WAS REQUIRED?

ISSUE NO. 6: WHETHER THE VERDICT IS SUPPORTED BY THE WEIGHT OF EVIDENCE?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Pike County, Mississippi where Karey Whittington was convicted of murder and sentenced to life imprisonment. A jury trial was held September 15-17, 2004 with Honorable Keith Starrett, Circuit Judge, presiding. Whittington is presently incarcerated with the Mississippi Department of Corrections.

FACTS

During the evening of March 5, 1999, Jerry Frith, age 34, was shot once in the lower right chest on a residential street in McComb, in an area commonly referred to as Baertown. [T. 130-32, 149, 152-54, 171, 231-32; Exs. 2, 3, 4, 5, 6]. Mr. Frith died almost immediately. [T. 132-33]. One witness, Leroy Carr, who was nearby, heard a shot and saw a red Chevrolet Camaro with "two white guys" speeding away from where Frith's body was found. *Id.*

Police investigators discovered a bottle of gin and crack cocaine paraphernalia on Mr. Frith; and, toxicology analysis showed blood alcohol and cocaine metabolites in Frith's system. [T. 157-60, 166-67, 178, 180-81, 244; Ex.12]. A forensic pathologist and ballistic expert both said the projectile recovered from Mr. Frith was consistent with a .410 shotgun slug. [T. 233, 237, 249; Ex. 7].

According to law enforcement, no pursuable suspects developed in the Frith shooting for over three years. [T. 140-41]. In April 2003, however, a Pike County detective, who was investigating burglaries, asked an incarcerated informant, Robert LeBlanc, if LeBlanc knew of any other criminal activity in the area besides burglaries. [T. 140-43].

LeBlanc, who was a jail trustee eager to stay on good terms with law enforcement, responded affirmatively, and although identifying someone else initially, LeBlanc ultimately implicated Karey Whittington and Tony Temple in the Frith homicide, after

refreshing his memory from conversations with other unidentified inmates. [T. 187-93, 200, 205-08].

LeBlanc had no first-hand knowledge. LeBlanc said his only source was Tony Temple and the aforementioned unnamed inmates. [T. 188]. Tony Temple and LeBlanc had ongoing criminal endeavors. [T. 255-56].

Tony Temple, known to law enforcement because of his pending burglary and grand larceny charges, was located and interviewed. [T. 141-42]. Temple told officers, and testified at trial that, on the night of Frith's shooting, he and Whittington, who were from Magnolia, went to McComb to buy some marijuana off the street. [T. 143-45, 258-64]. According to Temple, the two were in Temple's red 1981 Camaro. *Id.* [Ex. 16]. Temple said they drove around McComb looking for marijuana; but, they could not find any and ended up in the Baertown area of McComb. *Id.* Temple said there was a .410 with a pistol grip on the back floorboard that belonged to Temples "grandpa". *Id.*

According to Temple, once they got to Baertown, Temple and Whittington ended up talking to two men on the passenger side of the Camaro, with Whittington asking for some pot, but being told that the only dope the two men had for sale was crack. *Id.* Temple said as they started to drive off, Whittington leaned out the passenger window "and shot the dude" with the .410. *Id.*

According to Temple, Whittington said not to worry, that he did not shoot anybody, just scared them because he was tired of getting ripped off by dope dealers, who

had had guns on prior occasions. [T. 265-66]. On cross-examination, Temple said that Whittington told him also that Frith displayed a gun, but Temple did not see it. [T. 275-76].

Temple said after the shooting, the .410 was hidden in some hay which eventually caught fire burning the gun which was then rediscovered by Temple's grandpa. [T. 267-68]. No weapon was introduced into evidence.

Although Temple was initially charged with murder in the present case, he was allowed to plead to accessory after the fact; also, Temple's pending burglary charges were dropped, and his probation from a prior receiving stolen goods case was revoked for only two months. [T. 256-58, 283-287]. Temple had not been sentenced for the accessory conviction at the time of trial. [T. 256-58, 271, 287].

When asked who, if anyone, could corroborate his story, Temple told police that Dewayne Cash, who was staying with Whittington in Magnolia could confirm what Temple claimed. [T. 144]. So, police located and interviewed Cash. [T. 145].

At trial Dewayne Cash said he was staying with Whittington and Whittington's mom in Magnolia in March of 1999. [T. 316-18]. Cash said, one night Whittington and Temple came in "acting very strangely", with Temple freaking out pacing and asking, "why did he do it?". *Id.* Upon inquiry by Cash to Whittington, Cash said Whittington admitted shooting someone in McComb. *Id.*

Cash said he thought Whittington's claims were not true because no serious

attempt was made to hide Temple's red Camaro. [T. 320]. Cash admitted friction between he and Whittington over Whittington's then wife Candy Berry with the conflict culminating in a physical fight between Cash and Whittington. [T. 322-23].

The state also presented testimony from Whittington's ex-wife Candy Berry with whom there had been longstanding acrimony. [T. 355]. Berry testified that, after she and Whittington were divorced, for some unknown reason Whittington allegedly, and conveniently, told her about the Frith shooting, purportedly stating that he and Temple were looking for marijuana in McComb on the night of the shooting, and that the victim, Frith, pulled a gun out, Temple yelled "let's go", and that Whittington said he leaned out the window of the red Camaro as it drove off and shot into the air not intending to harm anyone. [T. 358-59].

The state presented the testimony of three other inmates who claimed to have overheard conversations allegedly broadcasted by Whittington in a common area of the Pike County Jail that he was guilty of the Frith homicide. Drew Wallace, former Pike county jail inmate, testified that he associated with Whittington and Whittington's father who were in jail at the same time. [T. 337, 340]. Wallace said Whittington told him that he was in jail for murder and that "he did it", explaining that Temple was with him and the shooting was over a bad drug deal. [T. 342]. Wallace said on direct there was no deal in regards to his testimony, but on cross-examination, Wallace said that his testimony earned him an opportunity to earn probation through the Regimented Inmate Disciplinary

Program (RID), a better deal than before. [T. 344, 347, 349-50].

The state also offered the testimony of Jeff Box a trustee mechanic at the Pike County jail incarcerated for various methamphetamine charges. [T. 371-72]. Box claimed Whittington told him he had killed someone. [T. 375]. Box said he received special treatment as trustee and testified against Whittington to keep in the good graces of law enforcement. [T. 377-79].

The state's third jailhouse witness was Mario Molinari who had been in the Pike County jail on bad check charges back in 2003. [T. 383]. Molinari said he met Whittington and Whittington's father in the jail. [T. 385-87]. Molinari said Whittington bragged in jail several times about killing someone saying allegedly that he and Temple were involved and that the victim had made Whittington mad. *Id.* Molinari alleged Whittington said he shot out of the passenger side of Temple's car with a .410. *Id.*

Whittington, on the other hand, presented his own jailhouse witnesses Raymond Dangerfield, Michael Kennedy and Karey Dale Whittington, Sr., to rebut the state's evidence, all saying that the appellant never admitted anything about killing anyone.[T. 407, 412, 426-29, 435-37].

Defense witness Amanda Brewer, explained that Whittington's ex-wife Candy Berry had been very motivated to keep Whittington in jail. [T. 445]. Brewer also disputed Candy Berry's denial of telephone conversations with Brewer. *Id.*

SUMMARY OF THE ARGUMENT

The state's case was based on incompetent hearsay, deal based testimony and conjecture. Whittington was not allowed to impeach the state's hearsay evidence with conflicting hearsay. Whittington was irreparably prejudiced by unrelated bad character evidence. The trial court should have instructed the jury on manslaughter and, or, self-defense. The jury's verdict was not supported by the weight of competent evidence.

ARGUMENT

ISSUE NO. 1: WHETHER INCOMPETENT HEARSAY, BOLSTERING AND VOUCHING PREJUDICED WHITTINGTON?

There was but one "eye witness" in this case, and that was co-defendant Temple. There was one ear witness and that was Leroy Carr.

The rest of the state's case consisted of eight hearsay witnesses who just repeated what they were told, either allegedly by Temple or allegedly by Whittington. Out of this hearsay free-for-all, three glaring and prejudicial evidentiary infractions arose.

First, the jury heard accusations against Whittington which were never tested by cross-examination, a confrontation clause violation, including, unchallenged identification of Whittington by the unknown jail inmates from whom Robert LeBlanc refreshed his memory which was communicated to the jury through two investigators. [T. 143-45, 187-93, 200, 205-08]. Whittington's objections were overruled on the stated

pretext that the hearsay was merely information explaining subsequent action and not offered as proof of the matter asserted. *Id.*

Secondly, prejudice resulted from the state cumulatively bolstering hearsay with hearsay through police investigators merely repeating what they were told, which included repeating the aforementioned unchallenged third hand allegations.

Thirdly, after McComb Police Investigator Perry Ashley testified, over objection, that he spoke with Temple and Temple identified Whittington as the shooter in the case and that a person named Dwayne Cash could confirm this, Investigator Ashley stated he spoke with Cash and relayed to the jury what Cash said, but then vouched that Cash's statement was consistent with what Temple's. [T. 142-45]. Testimony by which one witness vouches for another is *per se* incompetent and is prohibited. *Woods v. State,* 973 So.2d 1022, 1026 (¶10) (Miss. Ct. App. 2008), [citing] *Williams v. State*, 539 So.2d 1049, 1051 (Miss.1989) and *Smith v. State*, 925 So.2d 825, 838-39(¶ 32) (Miss.2006).

As stated above, the hearsay evidence was allowed by the trial court by redefining the questionable evidence as "investigative information" offered to explain officers' actions and not offered as proof of the matter asserted. See M. R. E. 801 (c). Appellant suggests this redefinition is pretextual in this case, because, all the police detectives had to say here was that LeBlanc gave information which made in necessary to speak with Tony Temple and that Temple gave information which led police to Dwayne Cash, and so forth. Nevertheless, obviously, the state needed desperately to bolster its key witness

Temple, because of the good deal Temple got, and the trial court erroneously went along.

As stated in the facts, it was reported through Detective Haygood that Robert LeBlanc initially named a different shooter, a Daniel Hartley. [T. 192, 194]. But overnight, LeBlanc spoke with several jail inmates who "corrected" this and who named Whittington as the shooter, hearsay at its rankest. [*Id.*, 200, 205-08].

This testimony explained absolutely no future action on the part of law enforcement. In fact, the two testifying officers spent most of there testimony repeating the accusations against Whittington told to them rather than actually explaining anything they did in their investigation. This leads to the logical conclusion that the state's real purpose of presenting the evidence was not to explain the officers actions, but to bolster its house-of-cards hearsay deal-based case. The trial court should have excluded all of this evidence.

Hearsay is defined as, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M. R E. 801. Hearsay is inadmissible, except under certain exceptions, and when improperly admitted constitutes reversible error. *Murphy v. State*, 453 So. 2d 1290, 1294 (Miss. 1984) Miss. R. Evid. Rules 802, 803 and 804. See also *Quimby v. State*, 604 So. 2d 741, 746-47 (Miss. 1992).

In *Ratcliff v. State*, 308 So. 2d 225, 226-27 (Miss. 1975), a police officer was allowed to testify what an informant had told him during the officer's investigation. The

court said, "[i]nvestigators cannot be permitted to relate to a jury hearsay which is incriminating in its effect as to a defendant on trial for a crime . . . [w]hat an informant told [the investigating officers] was hearsay and inadmissible to the jury." *Id.*

The victim in *Ratcliff* had testified identifying the defendant. Nevertheless, the *Ratcliff* court reversed and remanded the armed robbery conviction based, in part, on the circumvention of the defendant's cross-examination rights which resulted from the admission of the hearsay. *Id.*

In *Anderson v. State*, 156 So. 645, 646-47 (Miss. 1934) it was pointed out that:

> [t]his court has consistently condemned the practice of undertaking to bolster up the testimony of a witness on the stand, and to strengthen his credibility by proof of his declarations to the same effect as sworn to by him out of court.

In *Anderson*, investigating officers were allowed to testify that they took the defendant to the victim who was in bed recouping from being shot and that the victim identified the defendant. The *Anderson* court reversed the conviction stating, "[t]he testimony of [the officers] under the circumstances should not have been admitted." *Id.* If the testimony was inadmissible and reversible error in *Ratcliff* and *Anderson*, it is likewise inadmissible and reversible error here. See also *Bridgeforth v. State*, 498 So.2d 796, 800 (Miss.1986).

In *Crawford v. Washington*, 124 S. Ct 1354, 1356-59, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), Crawford was charged with and convicted of assault with a deadly weapon for stabbing a man who allegedly tried to rape his wife. 124 S. Ct. at 1356-58

Crawford's wife gave a recorded statement to investigating officers which was introduced at trial against Crawford. *Id.* Crawford was never given the opportunity to cross examine the wife's statement. *Id.* Crawford gave a statement/confession claiming self defense which was consistent with the wife's version. *Id.*

Crawford's wife was "unavailable" and did not testify because of the marital privilege applicable in Washington state which did not extend to the spouse's out of court statements. *Id.* The *Crawford* court ruled that admission of wife's statement violated the Confrontation Clause. *Id.* at 1359.

> The Sixth Amendment's Confrontation Clause provides that '[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.'
>
> * * *
>
> The text of the Confrontation Clause . . . applies to 'witnesses' against the accused – in other words those who 'bear testimony'. Testimony in turn is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.
>
> * * *
>
> An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes casual remark to an acquaintance does not." *Id.* at 1364.

The *Crawford* Court explained that statements given to police officers sworn to or not are clearly testimonial, "the Sixth Amendment is not solely concerned with testimonial hearsay. . ." it would also be concerned with "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross-examination." *Id.* at1364-65.

Applying *Crawford*, in this case, it is clear that the investigators' repetition of the statements of Temple and LeBlanc violated the Sixth Amendment Confrontation Clause, especially the testimony about LeBlanc refreshing his memory with overnight conversations with unknown persons in the jail.

In the Mississippi Supreme Court's decision in *Clark v. State*, 891 So.2d 136 (Miss. 2005), ¶16, the Court applied *Crawford*, and found error in the fact that a police officer was allowed to restate to the jury what witnesses had told him. The *Clark* court did not reverse because the erroneous evidence was cumulative of other "overwhelming" evidence. *Id.* Here in Whittington's case, the evidence of guilt is not overwhelming, nor was the improper evidence "merely cumulative".

Whittington's trial was rendered unfair. In *Murphy v. State*, 453 So.2d 1290, 1294 (Miss.1984), the appellant argued that the trial court allowing investigating officers to testify as to what they were told by a witness. The *Murphy* court reversed and remanded the case for a new trial. The *Murphy* court stated that the trial court's allowance of hearsay evidence in that case, similarly to the present facts, "violated Murphy's right to a fair trial and is reversible error." *Id.*

The present case does not involve the kind of valid investigatory information to explain an investigating officers action as in *Jackson v. State*, 935 So.2d 1108, 1114 (Miss. Ct. App. 2006). In *Jackson*, the testimony was offered to "to show why an officer acted as he did and where he was at a particular place at a particular time . . . [and] not

introduced for the purpose of proving the truth of the assertion."

Even if investigative information was justified in the present case, the state exceeded its allowable parameters circumnavigating Whittington's confrontation rights. It was not necessary for the jury to know all of the details gathered in the police interviews when the witnesses themselves were going to testify.

The case of *Turner v. State,* 573 So.2d 1335, 1338 (Miss. 1990), shines a light on the present issue. In *Turner,* the court explained that an otherwise objectionable statement is not hearsay under Rule 801 if "made to explain the reason for a later action", since, the questionable evidence is not offered for the truth of the matter asserted.

What is important for the present case is that the *Turner* court pointed out that a trial court should carefully apply "an objective test ... of how a reasonable objective observer would under the circumstances be likely to perceive" the questionable testimony. *Id.* That is, whether a reasonable person would consider the evidence offered as proof of what was asserted or for some other reason. *Id.*

The *Turner* court said that attention should be turned to "[w]hat the contested statement is supposed to 'explain.'" The *Turner,* the court recognized the pretext that "[a]ny reasonably intelligent, objective observer, e.g., a juror," hearing a police officer repeating a witness' identification of the defendant in that case would assume only that the testimony was offered for the purpose of proving that the declarant was identifying the defendant.

Whittington asks the Court now to apply the *Turner* test and recognize that, in applying the reasonable person standard, the purpose of allowing the police investigators here to repeat the hearsay accusations and identifications against Whittington was for no other reason that to identify Whittington as the shooter of Mr. Frith, and was thus hearsay. The *Turner* court found that such a statement was indeed hearsay, but was admissible, nonetheless, under the "present sense impression" exception. There is no exception applicable to the present facts.

The prejudice to Whittington was a dilution of his rights of cross-examination and fair trial under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article 3 § 26 of the Mississippi Constitution of 1890.

ISSUE NO. 2: WHETHER WHITTINGTON SHOULD HAVE BEEN ALLOWED TO USE HEARSAY TO IMPEACH THE STATE'S HEARSAY EVIDENCE?

To rebut the state's evidence that Whittington made statements in the jail about the charges against him, Whittington offered the testimony of Raymond Dangerfield, Michael Kennedy and Karey Whittington, Sr. [T. 407-09, 429, 435-37]. The trial court excluded a substantial portion of the witnesses testimony pertaining to the details about what the appellant said or did not say on the grounds of hearsay. [T. 409, 419, 429]. Proffers were made. [T. 415-419, 452-54]. This impeachment evidence should have been allowed.

Also, state witness Candy Berry denied having a telephone conversation with a woman named Amanda Brewer about Whittington. [T. 361]. Whittington offered the testimony of Amanda Brewer to rebut Berry's denial and to rebut what Berry had said about being motivated to keep Whittington in jail because of marital strife. [T. 445-48]. The trial court allowed Brewer to state that she had a telephone conversation with Berry but disallowed the specifics of conversation according to Brewer based on hearsay. *Id.* This too was error.

In *Le v. State,* 913 So.2d 913, 941-42 (Miss. 2005), there was an issue of whether the trial court erred in admitting a hearsay statement to law enforcement made by a deceased co-defendant for the state to impeach defense hearsay evidence. The trial court in *Le* had allowed the evidence with a "a limiting instruction to the jury, advising that the statement was being admitted for the limited purpose of weighing the credibility of the declarant."

The Mississippi Supreme Court in *Le,* relying on *Jordan v. State*, 728 So.2d 1088 (Miss.1998), held that the hearsay evidence was "properly admitted to impeach the credibility of [the unavailable witness] pursuant to Miss. R. Evid. 806, which provides in pertinent part:

> When a hearsay statement, or a statement defined in rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a

witness.[1]

The *Le* court said the defendant "opened the door for the State to call a rebuttal witness to contradict the defense witnesses' testimony about [the co-defendant's] statements" and since there was a limiting instruction explaining to the jury that the co-defendant's statement was not to be considered as substantive evidence "but was only to be considered for limited purposes of determining the credibility of [the co-defendant's] statements" the evidence was properly admitted.

Here, the state's reliance on hearsay, in all fairness opened the door for Whittington's counter attack with evidence of the same kind and character as allowed under Miss. R. Evid. 806. Exclusion of the evidence was a due process violation.

In *Hall v. State* 691 So.2d 415 (Miss. 1997), the supreme court reversed the Court of Appeals and found that the trial court therein erred by excluding a defense witness' to impeach a state witness. The trial court and Court of Appeals were wrong in concluding that the offered testimony violated the rule against hearsay; because, the state witness' "prior inconsistent statement was not being '... offered in evidence to prove the truth of the matter asserted." M.R.E. 801(c). The evidence of such statement was being offered "... as circumstantial evidence from which the jury could infer that the trial testimony ...

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The comment to Rule 806 states, "Rule 806 permits the impeachment and rehabilitation of a hearsay declarant. The use of inconsistent statements to impeach the declarant is not limited to prior inconsistent statements. Under the rule the inconsistent statements may be statements made subsequent to the out-of-court declaration at hand."

was unreliable." [citing] *Harrison v. State*, 534 So.2d 175, 179 (Miss.1988); M.R.E. 607. The offered statement in *Hall*, therefore, was not hearsay, its exclusion was erroneous, yet harmless nevertheless. It follows here that Whittington's impeachment evidence against the jailhouse witnesses and Candy Berry was not, therefore, hearsay, but "circumstantial evidence from which the jury could infer that the trial testimony ... was unreliable." Therefore the evidence was admissible. See also, *Long v. State,* 934 So.2d 313 (Miss. Ct. App.,2006).

As found by the trial court here, Whittington established a proper foundation for the introduction of Candy Berry's prior inconsistent statement, i. e., Berry was asked whether she had made the prior inconsistent statement to Amanda Brewer [T. 361, 446], which was denied. Id. See *Bush v. State*, 667 So.2d 26, 28 (Miss., 1996), *Al-Fatah v. State,* 916 So.2d 584, 591 (Miss. Ct. App., 2005), and M.R.E. 613(b).

So, Whittington was forestalled from presenting a full defense and is entitled to a new trial.

ISSUE NO. 3 WHETHER PREJUDICE RESULTED FROM BAD-CHARACTER EVIDENCE?

During the testimony of Candy Berry, Whittington's ex-wife, the stated elicited testimony that Candy Berry had accused Whittington of child abuse. [T. 365-69]. At first the court overruled the objection, then said, after the jury had already heard the

accusation, the testimony and questioning could presume, but references should be that the matter merely "dealt with the children", and the court told the jury to disregard the previous reference to abuse being reported to police after the proverbial bell had rung. *Id.*

Whittington suggests that, since the matter dealt with the children, there would be no innocent reason to include law enforcement unless some criminal act was involved, i. e., some allegation of wrong-doing which the jury could have, and probably did, associate with Whittington.

It is not hard to see that this development in the evidence was more prejudicial than probative of any issue. According to Miss. R. Evid. Rule 401:

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Even if there is some relevancy, there should be some determination of the quality and quantity of foreseeable prejudice:

> Relevant evidence is admissible where its probative value is substantially outweighed by, *inter alia*, the danger of unfair prejudice. MRE 403 Determining whether evidence is prejudicial requires a balancing test. *Foster v. State*, 508 So. 2d 1111, 1117 (Miss. 1987). Thus, the more probative the evidence, the less likely that the existence of prejudice will outweigh its value. *Blue v. State*, 674 So. 2d 1184, 1222 (Miss. 1996).

"Prejudicial evidence that has no probative value is always inadmissible." *Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992). See also *Smith v. State*, 530 So. 2d 155, 160-61 (Miss. 1988).

Usually, evidence of another crime or prior bad act is not admissible. *Ballenger v.*

State, 667 So.2d 1242, 1256 (Miss.1995).[2] However, where another crime or act is so interrelated to the charged crime so as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences, proof of the other crime or act is admissible. *Townsend v. State,* 681 So. 2d 497, 506 (Miss. 1996) . Improperly admitted character evidence constitutes reversible error. *Rose v. State*, 556 So.2d 728, 732 (Miss. 1990).

There was no inter-relation here between the allegation of child abuse and Mr. Frith's death. Under Rule 403 even relevant evidence must be excluded if there is a risk that any prejudice from the evidence will outweigh its probative value. See also *Simmons v. State*, 813 So.2d 710, 716(Miss. 2002).

It is Whittington's position that evidence of reports of child abuse against him, even masked as matters involving the children and law enforcement, was irreparably harmful because of the obvious unfavorable effect the information would have on the jury even with the trial court's caveat. Since the trial court allowed the evidence, the jury was no doubt influenced by it during their deliberations.

One purpose of Rule 404(b) is "to prevent the State from suggesting that, since a

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Mississippi Rule of Evidence 404(b):

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.

defendant has committed other crimes previously, the probability is greater that he is also guilty of the offense for which he is presently charged." *Jasper v. State*, 759 So. 2d 1136, 1141 (¶23) (Miss. 1999). Since the evidence here was not harmless, Whittington suggests its admission resulted in reversible error.

In *Lester v. State*, 692 So.2d 755, 784 (¶51) (Miss. 1997), the Supreme Court reversed the child abuse related capital murder conviction because of wrongfully admitted evidence about fights between the defendant and the deceased child's mother, stating:

> It was error for the trial court to admit evidence of a prior assault not connected with the crime charged, having the effect of portraying Lester as a violent man. See *Buchanan v. State*, 204 Miss. 304, 37 So.2d 318, (1948) (improper for prosecutor to ask questions concerning prior assault with the effect of portraying defendant as violent and quarrelsome); *Herman v. State*, 75 Miss. 340, 22 So. 873, 873-74 (1898) (error for trial court to admit evidence of a prior assault by the defendant); *Raines v. State*, 81 Miss. 489, 33 So. 19, 20-21 (1902) (evidence of prior abusive acts unconnected with the crime charged was incompetent and irrelevant); Miss. R. Evid. 404(b).

Whittington, like Lester, should be afforded a new trial.

ISSUE NO. 4: WHETHER A MANSLAUGHTER INSTRUCTION WAS REQUIRED?

There is little or no proof of premeditation or deliberate design in the death of Frith. The shooting, according to the state's evidence in the best possible light, was unplanned and impulsive. [T. 264]. The gun, which belonged to Temple's grandfather, was on the back seat of the Camaro. [T. 260-61]. There was evidence that Whittington had no intent to kill anyone, just scare the drug dealers who had allegedly made

Whittington mad by ripping him off. [T. 265-66].

There was evidence that Temple heard Whittington say the victim had a gun. [T. 275-76]. Temple could not refute this. [T. 283]. Candy Berry testified that Whittington said the victim had pulled a weapon on Whittington and that Whittington shot in the air. [T. 358-59]. Yet the trial court refused Whittington's requested manslaughter instruction D-8. [T. 456 ; R. 49][3]

"Heat of passion" has been defined 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. *Mullins v. State*, 493 So. 2d 971, 974 (Miss. 1986).

In this case, it is reasonable to suggest that, in all fairness, the jury should have been allowed to deliberate whether Frith either provoked Whittington or threatened him with a gun. Since the jury did not deliberate Whittington's defenses, the Court now cannot say he was afforded full due process.

> A person may form an intent to kill from a sudden passion induced by insult, provocation or injury from another. In that moment of passion,

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D-8: The Court instruct the Jury that manslaughter is the killing of a human being without malice, in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense; and if the jury believes from the evidence beyond a reasonable doubt that the defendant, Karey Whittington, on the 5th day of March 1999, so killed the deceased, Jerry Frith, then you shall find the defendant guilty of manslaughter. [R. 49

> while still enraged, if he slays the other person , the homicide may be manslaughter, even though it is not in necessary self-defense, depending upon the insult, provocation or injury causing the anger. Ordinarily, whether such a slaying is indeed murder or manslaughter is a question for the jury. *Windham v. State*, 520 So. 2d 123, 127 (Miss. 1988).

The rule remains that, "if there is any evidence which would support a conviction of manslaughter, an instruction on manslaughter should be given." *Graham v. State*, 582 So.2d 1014, 1018 (Miss. 1991). The law of what is manslaughter in Mississippi has been consistently characterized as "liberal" and the courts have made "considerable allowance for the frailties of human passion." *Windham v. State, supra,* 520 So.2d at p. 127.

It should not be overlooked that "it is possible for a deliberate design to exist and the slaying nevertheless be no greater than manslaughter." *Williams v. State*, 729 So. 2d 1181,1186 (Miss. 1998). In *Williams v State* where the defendant had joined with several other defendants in the beating death of the victim for no apparent reason and Williams was convicted of murder, the Supreme Court reversed on grant of certiorari because the trial court failed when requested to instruct the jury on differentiating between malice aforethought and deliberate design, and because Williams' murder conviction resulted in a miscarriage of justice. *Id.*

The *Williams* court pointed out that a heat of passion manslaughter instruction was required there because the record, as here, contained sufficient evidence from which "the jury could infer that Williams acted on impulse or in the heat of the moment." See also *Wells v. State*, 305 So. 2d 333 (Miss. 1975) and *Clemens v. State*, 473 So. 2d 943 (Miss.

1985).

The test to determine whether a lesser included instruction is required has been stated as follows:

> [A] lesser included offense instruction should be granted unless the trial judge -- and ultimately this Court -- can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge). *Graham v. State*, 582 So. 2d 1014, 1017 (Miss. 1991) citing *Gates v. State*, 484 So. 2d 1002, 1004 (Miss. 1986).

According to the authorities outlined above, there was a jury question here as to whether the homicide in this case was premeditated or committed by depraved heart, culpable negligence or in the heat of passion. Applying the above law to the testimony and evidence in this case, Karey Whittington was indeed entitled to a heat of passion manslaughter instruction as a matter of law, and to deny him this right was reversible error. *Windham* 520 So. 2d at 127.

ISSUE NO. 5: WHETHER A SELF-DEFENSE INSTRUCTION WAS REQUIRED?

In spite of the testimony that Temple heard Whittington say the victim had a gun, [T. 275-76], and Candy Berry testifying that Whittington said the victim had pulled a weapon and that Whittington shot in the air, [T. 358-59], and the proof that Frith was under the influence of cocaine and alcohol when he was shot, [T. 157-60, 166-67, 178, 180-81, 244; Ex.12], the trial court nevertheless refused Whittington's requested two self-defense instructions D9 and D10 [R. 50-51; T. 456-57][4].

A defendant is entitled to a jury instruction on self-defense when the evidence is in any way supportable of the instruction. *Williams v. State*, 803 So.2d 1159, 1161(¶ 6) (Miss.2001).

In *Calhoun v. State*, 526 So. 2d 531, 532-33, (Miss. 1988), the defendant was convicted of murder as a result of his shooting another man who had threatened him and a mutual girlfriend. Calhoun shot the victim who appeared to be reaching for a weapon,

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D-9: If you believe from the evidence before this court that the bullet that killed Jerry Frith was fired by Karey Whittington, then the Court instructs you that Karey Whittington is not required to prove that he acted in self-defense, but that the State is required to prove beyond a reasonable doubt that Karey Whittington did not act in self-defense before a "Guilty" verdict may be returned. Therefore, if a reasonable doubt of Karey Whittington's guilt arises from the evidence, including evidence of self-defense, your verdict shall be not guilty. [R. 50].

D-10: The Court instructs the Jury that a person is under no duty to retreat and avoid the necessity of using deadly force where otherwise a homicide is committed in self-defense.

If you find from the evidence that the killing of Jerry Frith is justified because Karey Whittington acted in self-defense because he [had] reasonable grounds to fear that he would suffer great personal injury and that there was imminent danger of the injury occurring, then Karey Whittington would have had no duty to retreat, whether he could have done so with complete safety of not. [R. 51].

although none was found. Calhoun had requested an instruction on self defense and defense of another, which was denied by the trial court. The *Calhoun* court found that evidence in the record of threats made against the girlfriend as well as Calhoun warranted the requested instruction and that it was reversible error to deny the requested instructions. *Id.*

By denying the self-defense instruction, Whittington was prevented from fully presenting a defense. In *Manuel v. State*, 667 So. 2d 590, 593 (Miss.1995), the court said:

> In homicide cases, the trial court should instruct the jury about a defendant's theories of defense, justification, or excuse that are supported by the evidence, no matter how meager or unlikely, and the trial court's failure to do so is error requiring reversal of a judgment of conviction. [cite omitted]. (See also, *Butler v. State*, 608 So. 2d 314, 320 (Miss. 1992)).

Therefore, Whittington respectfully requests a new trial.

ISSUE NO.6: WHETHER THE VERDICT IS SUPPORTED BY THE WEIGHT OF EVIDENCE?

The evidence supporting the verdict in this case is simply unreliable. Any corroboration is circular, always leading back to the same unreliable sources, mainly Tony Temple. Temple's plea bargain deals makes him unworthy of belief, with his burglary charges being dropped and his murder charges reduced to accessory after the fact. [T. 197, 283-84 257, 287-90]. The other circular source is what Whittington allegedly said, but, this evidence is unreliable too. It is totally illogical that Whittington would go around the Pike County Jail blabbing about how he killed somebody; and, it

makes even less since that he would admit murder to his ex-wife, a woman who had accused him of child abuse and who was trying to have him arrested and kept in jail.

Almost every non law enforcement witness testifying for the state garnered some type of deal or benefit from testifying against Whittington. Robert LeBlanc, had his grand larceny and burglary charges no-billed with the help of law enforcement [T. 193-210]. The jailhouse witnesses either were trying to please law enforcement or received direct benefit from their cooperation.

Not only were there plenty of deals made, there were many connections between the witnesses too, Temple and LeBlanc were crime partners since 2000, [T. 255-56]. Dwayne Cash and Candy Berry appeared to be romantically linked to the point that it caused a fight between Cash and Whittington. [T. 322-23].

Then there are physical facts. Temple testimony is not only unbelievable because of his deals, his testimony is physically improbable. It is inconceivable that Temple did not see Whittington climb out of the passenger window of the Camaro as alleged.[.T. 276-77].

Weighing all of these factors the evidence of Whittington's culpability is unreliable and, therefore, insufficient to support a guilty verdict. *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994), *Brown v. State*, 829 So. 2d 93, 103 (Miss. 2002).

When a jury's verdict is so contrary to the weight of the credible evidence or is not supported by the evidence, a miscarriage of justice results and the reviewing appellate

court must reverse and grant a new trial; and, this is the relief that Whittington respectfully requests. *Kelly v. State*, 910 So. 2d 535, 539-40 (Miss. 2005).

So called accomplice testimony is suspect. In *Jones v. State*, 368 So. 2d 1265, 1270 (Miss. 1979), the Supreme Court reversed and discharged the Defendant Jones because his conviction for grand larceny was based on the unreliable testimony of an accomplice who had worked out a plea bargain. *Id.* p. 1266 et seq. Any suggested corroboration of Temple is weak.

The *Jones* Court stated the well established general rule of law that, the testimony of an accomplice "must be viewed with great caution and suspicion. Where it is uncorroborated, it must also be reasonable, not improbable, self-contradictory or substantially impeached." *Id.* at 1267 [cites omitted] After pointing out the weaknesses in the accomplices testimony, the *Jones* Court rendered its reversal, and discharged the Defendant. *Id.*

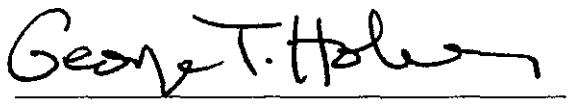
As in *Jones,* Temple's testimony here was uncorroborated as to the events of the alleged shooting. Temple's testimony was self contradictory, suspect, unreasonable and improbable.

Because the evidence was insufficient, the trial court in the present case should have granted the defense's motion for JNOV. [R. 62-64]. See also *Mister v. State*, 190 So. 2d 869 (Miss. 1966), *Cole v. State*, 65 So. 2d 262 (Miss. 1953) and *Lyle v. State*, 8 So. 2d 459 (Miss. 1942).

CONCLUSION

Karey Whittington is entitled to have his conviction reversed with remand for a new trial.

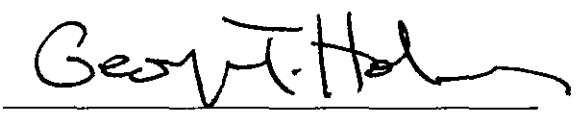
Respectfully submitted,
KAREY WHITTINGTON

By: 

George T. Holmes,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 23d day of June, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Michael Taylor, Circuit Judge, P. O. Box 1350 Brookhaven MS 39602, and to Hon. Dewitt Bates, Dist. Atty. 284 E. Bay St. Magnolia MS 39652, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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