

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

**PAUL DAVID GRAVES, JR.**

**APPELLANT**

**VS.**

**NO. 2009-KA-0282-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF ISSUES**

- I. GRAVES WAS NOT ENTITLED TO A MISTRIAL BASED ON WITNESS SPANN'S ALLEGEDLY EMOTIONAL TESTIMONY.
- II. THE JURY'S VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.
- III. THE TRIAL COURT PROPERLY SUPPRESSED EVIDENCE OF THE VICTIM'S PRIOR INCARCERATION.

**STATEMENT OF FACTS**

On the night of November 29, 2003, a group of friends from Gulfport traveled to New Orleans for a night out on the town. T. 114. Paul Graves, Fred Thompson, and Kevin Preston (AKA "Fat Fat") traveled to New Orleans in one vehicle, while A.C. Graves (Graves's brother), Dwaninia Spann (A.C.'s girlfriend), Mike Graves (A.C.'s son), and another female traveled in another vehicle. T. 115, 241. After much drinking and socializing, the group went to the Radisson to meet up with more friends. T. 115. Graves and A.C. got into an argument at the hotel room. T. 115. At some point during the argument, A.C. brandished a gun which belonged to Preston and called Graves a

coward. T. 124. Shortly thereafter, Graves and Thompson left the hotel, leaving Preston to ride back in A.C.'s group.

Once in Gulfport, A.C. took Mike home before proceeding to his mother's house. Upon arriving at Mrs. Graves' house, Preston and a female passenger exited the vehicle while Spann and A.C. stayed in the vehicle to talk. T. 117. While they were in the vehicle, Graves came running up to the truck, and an argument ensued between the brothers. T. 117. During the argument, A.C.'s back was against the passenger side of the truck, and Graves kept shoving A.C. against the truck. T. 117. During the confrontation, Graves displayed a gun. T. 117. Both Spann and another eyewitness, Cyzell Smith, testified that A.C. did not have a weapon during the confrontation. T. 119, 150. As Spann went to get Mrs. Graves to break up the fight, Graves shot his brother to death. T. 117-118, 149-150. At trial Graves alleged that the shooting was an accident, claiming that A.C. was the one with the gun, and he was only trying to get the gun away from A.C. so that A.C. would not get in trouble. T. 326-327.

Graves was indicted for murder. A Harrison County Circuit Court jury found him guilty of manslaughter. Graves was sentenced to serve a term of fourteen years in the custody of the Mississippi Department of Corrections.

## **SUMMARY OF ARGUMENT**

Graves was not entitled to a mistrial based on a claim that witness Spann cried during her testimony. The trial court is in the best position to determine the prejudicial effect of allegedly emotional testimony. There has been no showing that the trial court abused its discretion in denying the motion for mistrial.

The verdict is not against the overwhelming weight of the evidence. Although there was conflict in witness testimony, the duty of resolving such conflict lies exclusively with the jury. The State's witnesses made out a case of manslaughter at a minimum. As such, the verdict does not represent an unconscionable injustice.

The trial court properly excluded evidence of A.C.'s prior incarceration. Prior crimes are inadmissible to show conformity therewith. Furthermore, the record does not indicated the nature of A.C.s prior conviction. Without such knowledge, the appellant cannot show the relevance of the excluded evidence.

## ARGUMENT

### I. GRAVES WAS NOT ENTITLED TO A MISTRIAL BASED ON WITNESS SPANN'S ALLEGEDLY EMOTIONAL TESTIMONY.

During Spann's cross-examination, defense counsel asked to approach the bench. T. 127. The following bench conference was not reported. T. 127. At the conclusion of Spann's testimony, outside the presence of the jury, the trial court stated on the record that defense counsel had moved for a mistrial because Spann "became noticeably upset" during her testimony. T. 142. The trial court denied the motion. T. 142. Other than defense counsel's argument in support of his motion, the record contains no evidence of an emotional outburst by Spann.

The trial court's denial of a motion for mistrial is reviewed for abuse of discretion. *Jordan v. State*, 995 So. 2d 94 (¶21) (Miss. Ct. App. 2008). In *Chase v. State*, the victim's widow, Doris Hart, was a key State witness. 645 So. 2d 829, 848 (Miss. 1994). Hart became visibly upset and cried during her testimony. *Id.* Defense counsel's motion for mistrial was overruled. *Id.* The supreme court upheld the trial court's decision, citing the oft-quoted rule that the trial court is in the best position to determine the prejudicial effect of any incident which the appellant claims warrants a mistrial. *Id.* (*Ladner v. State*, 584 So.2d 753 (Miss. 1991)). The Court further noted that Hart was an eyewitness to the murder, and her testimony far more important than any potential prejudice which could have resulted from her emotional display. Finally, the supreme court agreed with the trial court's assessment that "It seems rather unfair to kill a woman's husband and then complain because she cries." *Id.*

The same result was reached in *Walker v. State*, 671 So.2d 581 (Miss. 1995); *Ladner v. State*, 584 So.2d 743 (Miss.1991); and *Evans v. State*, 422 So.2d 737 (Miss.1982). In each of these cases, a State witness cried on the stand and defense counsel moved for a mistrial. In each case, the

reviewing court stated that the trial court was in the best position to determine whether the emotional outburst was so prejudicial as to deprive the defendant of a fair trial. The same result should be reached in the present case.

Graves also claims that even if a mistrial was not warranted, the trial court should have allowed Spann time to gain control of her emotions. However, as previously stated, the record does not reflect the length of time Spann allegedly cried or otherwise displayed emotion. In any event, Graves has failed to show that Spann's allegedly emotional testimony was so prejudicial as to warrant a mistrial. The jury's verdict was based on the overwhelming evidence of Graves' guilt and was not the result of passion or prejudice. Accordingly, Graves' first assignment of error must fail.

## **II. THE JURY'S VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

Reviewing courts examine the evidence in the light most favorable to the verdict in determining whether a verdict is against the overwhelming weight of the evidence. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005) (citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). A verdict will not be overturned based on a claim that the verdict is against the overwhelming weight of the evidence unless allowing the verdict to stand would sanction and unconscionable injustice. *Id.*

Graves is absolutely correct in noting that there were inconsistencies between the witnesses' versions of events. However, the jury has the exclusive duty of resolving any conflicts in witness testimony which may arise. *Moore v. State*, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007). Additionally, determinations of witness credibility lie within the sole province of the jury. *Id.* Graves was found guilty of heat of passion manslaughter, which means that the jury found that there was adequate provocation, but that Graves was not acting in self-defense or with authority of law



when he killed his brother. In addition to receiving a manslaughter instruction, Graves was granted a self-defense instruction and two accident instructions.

Smith and Preston testified that they actually saw the shooting, while Spann testified that she saw the events leading up to the shooting. According to Smith and Spann, Graves was armed and A.C. was unarmed during the fatal confrontation. T. 117-119, 141, 149-150. Preston claimed that it was A.C. who was armed in the front yard, not Graves. T. 256. However, Preston impeached himself during cross-examination, and admitted that he waited five years after the killing to ever mention that A.C. had a gun during the confrontation. Furthermore, although Preston testified for the defense, his testimony regarding the shooting was inconsistent with Graves' testimony. According to Graves, A.C. had the gun and, "I pushed him back, and we started tussling. Tussling with the gun, and got the gun and shot him." T. 326. Preston, on the other hand, claimed that A.C. had the gun during the entire argument, and "the gun shot" when A.C. fell. T. 254-56. Although Preston claimed to have witnessed the incident, he claimed Graves never had the gun, even though Graves admitted that he did.

Both Spann and Smith testified that Paul raised his arm and motioned with the gun throughout the argument. T. 117,127, 132, 141, 149-150. Spann described that fatal altercation as follows.

Paul walks out. He's walking fast toward us. AC doesn't see him because his back is still turned. Paul said, so, what, you calling me a coward. AC turned around and said, yeah, I called you a coward. Paul walked up on him and got in his face, and AC pushed him off and said, get off me.

And then Paul came back at AC, and he made a gesture like this. AC said, so what you got a gun, what you going to do with it, you going to kill me, I'm ready to die. So Paul just kept coming at AC, and AC kept pushing him off of him saying, get off of me. . . .

AC's back is still against the truck. By this time he's at the back at the very end of the

Ct. App. 2005). Additionally neither cumulative evidence nor impeachment evidence is newly discovered evidence sufficient to warrant a new trial. *Carr v. State*, 873 So.2d 991, 997 (¶3) (Miss. 2004) (citing *Ormond v. State*, 599 So.2d 951, 962 (Miss. 1992)). Jennings' testimony fails every requirement of newly discovered evidence sufficient to warrant a new trial. Most obviously, the testimony could have been discovered, and in fact had been discovered, with the exercise of due diligence. It was no secret that Paul had a sister, and she had spoken with both Paul and his attorney about the case, specifically telling Paul's attorney that Spann thought the shooting was an accident. T. 445-46. The so-called newly discovered evidence is both cumulative and merely impeachment evidence. Jennings' testimony is hearsay which presents Spann's alleged opinion that the shooting was an accident, an opinion which Graves' presented at trial. Furthermore, even defense counsel admitted that the so-called newly discovered evidence was merely impeachment evidence. T. 448. As such, Jennings' suspect testimony does not warrant a new trial.

### **III. THE TRIAL COURT PROPERLY SUPPRESSED EVIDENCE OF THE VICTIM'S PRIOR INCARCERATION.**

Graves contends that the trial court erred in excluding evidence of the victim's previous incarceration. Evidence of other crimes is inadmissible to show conformity therewith, but may be admissible for other purposes. M.R.E. 404(b). Evidence of a victim's propensity for violence may be admitted if the defendant presents evidence that the victim was the initial aggressor in the fatal confrontation. *Robinson v. State*, 566 So.2d 1240, 1241 (Miss. 1990). It is for this reason that the trial court allowed Graves to testify that A.C. had shot him in the leg years earlier during an argument. However, the record does not reveal why A.C. was previously incarcerated. "Before a party may secure appellate reversal on an evidentiary exclusion, that party must have placed in the record the substance of the evidence he would have offered had the court ruled otherwise." *Russell*

*v. State*, 607 So. 2d 1107, 1114 (Miss. 1992) (*Heidel v. State*, 587 So.2d 835, 844 (Miss. 1991)). If A.C. had been imprisoned due to an assault on Graves, then perhaps evidence of his incarceration may be admissible. If, however, A.C. had been convicted on drug charges, or even for a violent act toward a third person, such evidence would not be admissible. *Id.* at 1116. The fact that A.C. had been previously incarcerated, with absolutely no details about the incarceration, simply does not meet the relevancy requirement. M.R.E. 401.

Graves claims that the exclusion of evidence of A.C.'s prior conviction diminished the relevance of the fact that A.C. shot him two years prior to the killing. This argument was not made at trial, and Graves is procedurally barred from making this argument for the first time on appeal. *Jackson v. State*, 856 So.2d 412, 415(¶12) (Miss. Ct. App. 2003). In fact, during the hearing outside the presence of the jury in which the trial court was asked to determine whether the evidence of the prior shooting was admissible, defense counsel specifically addressed the ruling on A.C.'s previous incarceration and acknowledge that the two issues were separate and distinct. At no time did defense counsel ever argue evidence of A.C.'s prior incarceration was necessary or in any way connected with evidence of the prior shooting. Furthermore, reversal will not be predicated on the exclusion of evidence unless a substantial right belonging to the defendant is violated by the exclusion. *Brown v. State*, 965 So.2d 1023, 1026(¶ 10) (Miss. 2007). The jury heard evidence that A.C. had previously shot Graves. Graves' claim that the relevance of this evidence was diminished because he was unable to tell the jury that immediately after this shooting A.C. was incarcerated and had only been out of prison a few weeks before the murder is purely speculative.

Graves also claims that the exclusion of evidence of A.C.'s prior incarceration precluded defense counsel from showing that was impossible for Paul to have retrieved a gun from his mother's house prior to shooting A.C. to death. Graves' rationale is that he and his mother would

have testified that a gun was not kept in the house because A.C. was a prior convicted felon. Again, this argument was never raised at trial and is procedurally barred. Furthermore, Graves' argument is disingenuous is because Ms. Graves testified that she kept a gun in her house since 1985, but it came up missing when A.C. started coming back to the house just weeks before the killing, implying that A.C. took the gun. T. 270-71. Additionally, Ms. Graves testified that immediately after the shooting she took her gun from Graves and brought it in the house. T. 277. To claim that the exclusion of A.C.'s prior incarceration prevented the defense from showing that a gun was not kept in the Graves' house is in direct conflict with the record testimony.

For the foregoing reasons, the trial court properly excluded evidence of A.C.'s prior incarceration. No substantial right belonging to Graves was effected by the exclusion of the evidence in question.


### CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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

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This the 20th day of July, 2009.

  
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