

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LEONARD DOUGALEWTCZ
(Leonard Dougalewicz)

APPELLANT

VS.

NO. 2009-KA-0533-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 101888

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. DOUGALEWICZ'S ADMISSION WAS PROPERLY ADMITTED INTO EVIDENCE	3
II. THE <i>WEATHERSBY</i> RULE IS INAPPLICABLE IN THE PRESENT CASE	6
III. THE VERDICT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.	7
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

STATE CASES

Abram v. State, 606 So.2d 1015 (Miss. 1992)	4, 5
Armstead v. State, 978 So.2d 642, 645-46 (Miss. 2008)	4
Barfield v. State, 22 So.3d 1175, 1185 (¶33) (Miss. 2009)	7
Bush v. State, 895 So.2d 836, 844 (Bush 2005)	7
Clemmons v. State, 473 So. 943 (Miss. 1985)	8
Dedeaux v. State, 630 So.2d 30 (Miss. 1993)	8
Doss v. State, 709 So. 2d 369, 389 (Miss. 1996)	6
Miller v. State, 243 So.2d 558 (Miss. 1971)	4-6
Moore v. State, 969 So.2d 153, 156 (Miss. Ct. App. 2007)	7, 8
Morales v. State, 990 So.2d 273, 277-78 (Miss. Ct. App. 2008)	4
Smith v. State 945 So.2d 414, 421 (Miss. Ct. App. 2006)	8
Taylor v. State, 744 So.2d 306, 312 (Miss. Ct. App. 1999)	9
Weathersby v. State, 165 Miss. 207, 209, 147 So. 481, 482 (1933)	6

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LEONARD DOUGALEWTCZ
(Leonard Dougalewicz)

APPELLANT

VS.

NO. 2009-KA-0533-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

- I. DOUGALEWICZ'S ADMISSION WAS PROPERLY ADMITTED INTO EVIDENCE.
- II. THE *WEATHERSBY* RULE IS INAPPLICABLE IN THE PRESENT CASE.
- III. THE VERDICT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

STATEMENT OF FACTS

On February 6, 2204, Leonard Dougalewicz, Bobby Lindsley, and Dan Bearden were drinking beer at Hideaway Bar. T. 213. As Lindsley, who was known to always have money, played a video game, Dougalewicz told Bearden that he planned to rob Lindsley. T. 215. After trying to talk Dougalewicz out of the scheme, Bearden informed Lindsley of what Dougalewicz planned. T. 215. Bearden would later testify that he was not sure if Lindsley took him seriously. T. 216. Later that night, Lindsley and Dougalewicz left Little Dogs bar together. T. 172, 216. It was the last time that anyone other than Dougalewicz would see Lindsley alive.

By Sunday, Lindsley's friends became concerned because noone had seen him in a couple

of days. T. 132. Debra Lynn Neilson decided to go to Lindsley's trailer to check on him. T. 132. The door was unlocked, and Debra went in and found Lindsley's dead body lying on the floor beside the couch. T. 132. His face was swollen and covered in dried blood. T. 133.

Dougalewicz was questioned on February 11 as a person of interest since he was the last person seen with the victim. T. 281. Dougalewicz initially denied any involvement in Lindsley's murder. T. 285. After Dougalewicz's first interview, Bearden gave a statement to police. Bearden had been working out of town for a week after Lindsley's murder. T. 216. When he returned, he learned of Lindsley's murder. T. 216. Bearden saw Dougalewicz at the bar and asked him if he killed Lindsley. T. 217. Dougalewicz then offered Bearden \$400 or \$500 to keep his mouth shut. T. 217. Bearden refused, and discovered a few days later that a reward was being offered for information pertaining to Lindsley's death. T. 217. He then gave a statement to police. T. 219.

On May 13, 2004, Dougalewicz was questioned a second time after the Bearden interview. Dougalewicz was originally charged with capital murder. T. 293. Dougalewicz asked Investigator Eric Smith what that meant. T. 293. Smith informed Dougalewicz that capital murder is a murder that occurs during the commission of another felony. T. 294. Dougalewicz then inquired and Smith informed as to the sentences for both capital murder and murder. T. 294. Dougalewicz gave a statement admitting that he beat Lindsley to death. T. 288. The very first and last sentence in Dougalewicz's statement was that he did not take anything from Lindsley during the murder. T. 294.

The capital murder charge was subsequently dropped to murder. A Hinds County Circuit Court jury found Dougalewicz guilty of murder.

SUMMARY OF ARGUMENT

At the suppression hearing, the State, through Investigator Smith's testimony, made a prima facie showing that Dougalewicz's statement was voluntarily made. Dougalewicz put on no proof

to rebut the State's prima facie showing. Because substantial credible evidence in the record supports the trial court's finding that the statement was voluntary, the trial court's determination that the statement was admissible must stand.

The Weathersby rule does not apply in the present case because Dougalewicz's confession alone establishes the elements of murder. Additionally, the rule does not apply where the defendant initially denies being involved in the murder.

The jury's verdict is not against the weight of the evidence. Dougalewicz's confession along with the physical evidence and other witness testimony supports the jury's verdict of guilty of murder.

ARGUMENT

I. DOUGALEWICZ'S ADMISSION WAS PROPERLY ADMITTED INTO EVIDENCE.

Dougalewicz claims that his confession was involuntary as it was allegedly given in hope of having the capital murder charge reduced to murder. Dougalewicz does not claim that anyone threatened, promised, or induced him to confess. During Dougalewicz's second interview, he was informed that he was being charged with capital murder. He asked Investigator Smith what that meant. Smith advised Dougalewicz that capital murder occurs when a murder occurs during the commission of another felony. Dougalewicz went on to ask Smith the available sentences for both capital murder and murder, and Smith advised him of the corresponding sentences. According to Dougalewicz, this exchange somehow renders his confession involuntary.¹

¹Dougalewicz adds that he was charged with capital murder even though there was no proof that anything was taken during the murder. This portion of Dougalewicz's argument ignores Bearden's statement to police that Dougalewicz told Bearden he was going to rob the victim, and then after the victim's murder, Dougalewicz, who was characterized as a free loader, suddenly had several hundred dollars in cash to offer Bearden to keep his mouth shut.

In determining the admissibility of a confession, the trial court must ensure that the defendant was informed of his rights under *Miranda* and ensure that the statement was freely and voluntarily made without being induced by force, threat, or intimidation. *Armstead v. State*, 978 So.2d 642, 645-46 (¶11) (Miss. 2008). Reviewing courts will not disturb the trial court's finding that a confession is admissible unless "convinced that such a finding [was] manifestly wrong and/or against the overwhelming weight of the evidence." *Morales v. State*, 990 So.2d 273, 277-78 (¶16) (Miss. Ct. App. 2008) (quoting *Martin v. State*, 854 So.2d 1004, 1007 (¶4) (Miss. 2003)). The State's burden of proving beyond a reasonable doubt that the defendant's confession was voluntarily given is met when an officer involved in the interview testifies that the confession was voluntarily made without threats, coercion, or offers of reward. *Id.* at 278 (¶18). In the present case, Investigator Smith established that the defendant was informed of his *Miranda* rights and signed a *Miranda* waiver before the interview. T. 14. Smith also testified that Dougalewicz was not threatened, coerced, or offered a reward in exchange for his statement. T. 13-14. As such, the State established its *prima facie* case at the suppression hearing. Dougalewicz put on no evidence in attempt to rebut the state's *prima facie* case. T. 21. Instead, defense counsel merely suggested that when Smith explained the difference between capital murder and murder, Dougalewicz was "given the impression of hope of reward by a reduction of the charges against him" Appellant's brief at 7. Dougalewicz asks this Court to find that where there is no offer of reward or leniency made by an officer, yet a defendant unreasonably and subjectively believes that such an offer exists and thereafter gives a statement, the statement is involuntary. Clearly, such is not the law.

Dougalewicz claims that *Abram v. State*, 606 So.2d 1015 (Miss. 1992) and *Miller v. State*, 243 So.2d 558 (Miss.1971) support his position. Both cases are distinguishable from the facts of the present case. In *Abram*, there was at least conflicting testimony regarding the voluntariness of

Abram's confession. 606 So. 2d at 1031. In the present case, Dougalewicz put on no proof to rebut the State's *prima facie* case. Officers in *Abram* admitted that they may have given Abram the impression that his co-defendant "faced the most trouble, and that [Abram's] cooperation would work to his advantage." *Id.* Another officer admitted that "Abram was encouraged to do right by God, that he was told [his co-defendant] was most wanted, and/or that Abram was confronted with the possibility of mercy or the death penalty." *Id.* Another officer in *Abram* told him that "it would look better" if he cooperated. *Id.* Finally, two civilians, one of which was a minister, also encouraged Abram to confess. *Id.* The supreme court found that at least one of the civilians "unwittingly or not acted as an agent and a conduit" of the law enforcement officers involved. *Id.* After considering the totality of the circumstances, the reviewing court found that the encouragement of numerous law enforcement officers and Abram's own minister created hope of leniency which impermissibly induced Abram to confess. *Id.* at 1033-34. In the case *sub judice*, Smith only explained the crime charged and the possible sentences after being asked by Dougalewicz. The solicited factual explanation from Smith bears no resemblance to the unsolicited encouragement of numerous officers and two civilians in *Abram*. It is also important that Dougalewicz did not attempt to rebut the State's *prima facie* case, whereas Abram did provide testimony at the suppression hearing which conflicted with the officers' testimony and rebutted the State's *prima facie* case. The present case simply bears no resemblance to the situation presented in *Abram*.

In *Miller*, the supreme court found that, in light of other circumstances, an officer who simply told the defendant that he would be better off telling the truth impermissibly induced the confession. 243 So.2d 558, 559 (Miss. 1971). Specifically, the *Miller* court stated the following.

Although the statement made by the sheriff that the appellant would be better off by telling the truth was probably not intended as an inducement, yet, when it is considered under the circumstances in which it was made, we conclude it very

probable that the statement caused the appellant to confess. Some of these circumstances were that the appellant was a twenty-year-old Negro youth of previous [sic] good reputation, having never been incarcerated before, who was desirous of being released from jail. These factors, when considered with the additional fact that the sheriff is the highest officer of the county, a representative of the State, speaking in his official capacity to a youth accused of a crime, cast such doubt upon the confession as to render it inadmissible in evidence. We are of the opinion the confession was not voluntarily made and that its admission constitutes reversible error.

Id. Understandably, Dougalewicz relies on this case, as the *Miller* court appeared to set a pretty low bar for showing that a confession is involuntary. However, in discussing the outcome of *Miller*, a nearly forty-year-old decision, the supreme court has noted that in more recent cases, law enforcement officers telling a defendant that he would be better off telling the truth has been found to be “‘mere exhortations to tell the truth’ and not implied promises.” *Doss v. State*, 709 So. 2d 369, 389 (¶78) n. 23 (Miss. 1996). In the present case, Smith did not even give a “mere exhortation to tell the truth,” much less imply a promise of any kind in exchange for Dougalewicz’s confession.

Because the trial court’s finding that Dougalewicz’s confession was voluntary is supported by substantial credible evidence in the record, Dougalewicz’s first assignment of error necessarily fails.

II. THE *WEATHERSBY* RULE IS INAPPLICABLE IN THE PRESENT CASE.

Dougalewicz claims that he was entitled to a directed verdict based on the *Weathersby* rule.

In *Weathersby*, the Mississippi Supreme Court held as follows.

[W]here the defendant or the defendant’s witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

Weathersby v. State, 165 Miss. 207, 209, 147 So. 481, 482 (1933). Even if the defendant is the only eyewitness to a homicide, common-sense and case law dictates that the *Weathersby* rule is

inapplicable if the defendant's version of events establishes a case of murder or manslaughter. "[I]f the defendant or the defendant's eyewitnesses testimony satisfies all the elements of murder or manslaughter, the defendant would not be entitled to a directed verdict of acquittal, as their testimony would be the basis for a valid conviction." *Barfield v. State*, 22 So.3d 1175, 1185 (¶33) (Miss. 2009) (quoting *Johnson v. State*, 987 So.2d 420, 425 (Miss. 2008)). Additionally, *Weathersby* is inapplicable where the defendant initially denies involvement in the murder. *Id.*

The *Weathersby* rule is inapplicable for numerous reasons. First, Dougalewicz's story was contradicted by physical evidence. Dougalewicz claimed that the victim made a sexual advance and he reacted by beating him to death. T. 288. Dougalewicz told Smith that the beating involved only him hitting the victim in the head and stomach with his fists. T. 293, 305. However, Dr. Hayne testified that the numerous injuries the victim received resulted from blunt force trauma. T. 252. Additionally, small pieces of wood were found all over the crime scene. T. 133, 151. Dougalewicz was known to always carry a wooden stick in his car, but after the murder, the stick was no longer in his car. T. 201-202. *Weathersby* also applies because Dougalewicz denied involvement in his first statement and confessed that he murdered the victim in his second statement.

III. THE VERDICT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

Dougalewicz argues that the verdict is against the weight of the evidence because Bearden's testimony was highly suspect and "no reasonable juror could have found murder if instructed on manslaughter" Appellants Brief at 12,15. When reviewing a claim that a conviction is against the weight of the evidence, a reviewing court will not disturb the verdict unless allowing it to stand would sanction an unconscionable injustice. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005). The determination of witness credibility lies within the sole province of the jury. *Moore v. State*, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007). The jury is also responsible for resolving any

conflicts in witness testimony which may arise. *Id.* Even assuming for the sake of argument that the jury entirely discounted Bearden's testimony, Dougalewicz confessed to the murder. Additionally, the jury was properly instructed on both murder and manslaughter. C.P. 37-39. It is clear from the verdict that the jury either did not believe Dougalewicz's story about the alleged sexual advance or found that it was not sufficient provocation to reduce the murder to manslaughter.

Dougalewicz claims that the *Dedeaux* and *Clemmons* cases warrant direct remand and resentencing for manslaughter. In *Dedeaux v. State*, the victim was killed outside a "juke joint." *Dedeaux v. State*, 630 So.2d 30 (Miss. 1993). *Dedeaux* claimed that he acted in self-defense, shooting after he believed the victim reached behind his back while making a statement which indicated that the victim had a gun. *Id.* at 32. Also in *Dedeaux*, the court found that there was no evidence of premeditation. *Id.* at 31. Such is not the case at hand, because the evidence showed that Dougalewicz planned an attack of the victim. Also, there was no issue of self-defense in the present case. Accordingly, *Dedeaux* is inapplicable.

In *Clemmons v. State*, 473 So. 943 (Miss. 1985), the victim was killed during a barroom brawl. Numerous witnesses in *Clemmons* gave conflicting versions of what transpired during the fatal encounter. The supreme court reversed the murder conviction, finding, "there is such contradictory testimony that it is virtually impossible to reconstruct what happened" and the conflicting evidence "cast at least a reasonable doubt, as to murder." *Id.* at 944-45. The present case does not concern conflicting testimony of numerous witnesses. The only eyewitness to Lindsley's murder was Dougalewicz. His version of what transpired was relayed to the jury via his signed confession. It was undisputed that Dougalewicz beat Lindsley to death. The reason for and manner in which the beating occurred was contradicted by physical evidence and witness testimony. It is not the function of the reviewing court to determine whose testimony to believe. *Smith v. State* 945

So.2d 414, 421 (¶21) (Miss. Ct. App. 2006) (citing Taylor v. State, 744 So.2d 306, 312 (¶17) (Miss. Ct. App. 1999). So long as substantial credible evidence supports the jury's verdict, the verdict must be affirmed. *Id.* Dougalewicz's confession along with the physical evidence and other witness testimony supports the jury's verdict.

The jury's verdict is not against the weight of the evidence and represents no unconscionable injustice. It must therefore be affirmed.

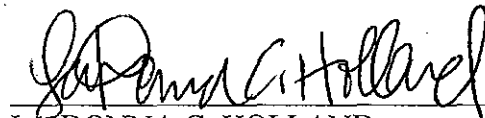
CONCLUSION

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

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:



LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 101888

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

CERTIFICATE OF SERVICE

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

Honorable Winston L. Kidd
Circuit Court Judge
Post Office Box 327
Jackson, MS 39205

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

Thomas W. Powell, Esquire
Attorney at Law
405 Tombigbee Street
Jackson, MS 39201

This the 27th day of January, 2010.



LA DONNA C. HOLLAND

SPECIAL ASSISTANT ATTORNEY GENERAL

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