IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-KA-0053-COA

LEONARD DOUGALEWTCZ
(Leonard Dougalewicz) — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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V.

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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. Leonard Dougalewtcz (Leonard Dougalwicz)

THIS 24th day of November, 2009.

Respectfully submitted,

LEONARD DOUGALEWTCZ
(Leonard Dougalewicz)

By: _____
Thomas W. Powell

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the First Judicial District of Hinds County, Mississippi where Leonard Dougalewicz was convicted of murder.[1] A jury trial was conducted March 6-8, 2006, with Honorable Winston L. Kidd, Circuit Judge, presiding. Dougalewicz was sentenced to life imprisonment and is presently incarcerated with the Mississippi Department of Corrections.

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[1] The appellant's name in the caption is incorrect. In this brief, the appellant's name will be referenced the same as the lower court, "Leonard Dougalewicz", since it is the correct spelling and the name used for the formal conviction and the name used by the Mississippi Department of Corrections. The Court is asked to correct the spelling of the appellant's name by separate motion.

FACTS

On Sunday March 8, 2004, a friend found Bobby Lindsley, a self-employed exterminator, dead in his mobile home at 1500 Linde Drive in Jackson. [T. 132, 186, 277-78]. The door was unlocked, the television and lights were on. [T. 133, 147; Exs. P2 A-B, P3 A-B]. Lindsley had head wounds, facial bruises and lacerations, his jaw was broken, and his arms were bruised. [T. 133, 142, 151, 251-58 ; Exs P2 A-B, P3 A-B, P18, P19]. The cause of death was blunt force trauma to the head. [T. 262-63].

Lindsley's body was in the living room of the trailer on the floor with one leg on a chair. [T. 133, 141, 146, 149-50, 279; Ex. P3-A-B]. Another chair was laying on its side. *Id.* A splintered stick was next to the body. [T. 151-54; Exs. P4 A-M, P5 A-E, P6, P21]. A pack of Marlboro cigarettes, and a pack of Marlboro Lights were recovered from the scene along with various other items. [T. 169-70; Ex. P13]. Lindsley's pick-up truck was outside, locked with the keys in the ignition. [T. 160-61; Ex. P10]. Nothing was processed for fingerprints. [T. 297-98]. No paper money was on his body or in his belongings. [T. 258].

Subsequent tests revealed that Lindsley's blood alcohol content was .28 per cent. [T. 260, 263]. No other substances were detected. *Id.* Lindsley's arm bruises were labeled by the pathologist as "defensive," but he testified they could have been "offensive" as well. [T. 256-58, 263]. Lindsley's fatal head injuries were consistent with being hit from behind or from falling. [T. 252-54, 258, 263, 301].

The appellant, Leonard Dougalewicz, became a "person of interest" when it was learned that he was one of the last persons seen with Lindsley. [T. 172, 185-86, 281]. Lindsley and Dougalewicz were both frequent patrons at the Hideaway Lounge on South Gallatin Street in Jackson, and had been seen leaving together on Friday March 7, 2004. *Id.* Lindsley was reported to smoke Marlboro cigarettes and Lindsley enjoyed Marlboro Lights. [T. 190].

Dougalewicz was taken to police headquarter March 11, 2005, and, after being *Mirandized*, told police that he had been at the Hideaway Lounge on Friday afternoon, went home about 4:00, then went back to the bar after dropping his car off at Bobby Lindsley's trailer. [T. 282-85; Ex. P23]. Dougalewicz said he left the Hideaway about 8:30 p. m., went home, woke up the next day, went to work, came home and went to sleep. *Id.* Dougalewicz said his mother woke him up on Sunday and told him about Lindsley being found beaten to death, and he cried. *Id.* Dougalewicz reportedly told police he did not kill Lindsley, but "wished he had." *Id.* Dougalewicz was released. *Id.*

Dougalewicz mother, Betty, was questioned by police, and she testified at trial. Betty had had a brief romance with Lindsley and she worked at the Hideaway Lounge. [T. 185]. Betty had been informed that Lindsley and the appellant had been in a previous altercation concerning a disagreement about Lindsley's truck. [T. 198-99, 204-05]. Lindsley and the appellant had spent the night together in a motel room. [T. 198, 205]. It was also Betty's understanding that Dougalewicz would occasionally spend the

night with Lindsley. [T. 188].

Betty purportedly told police that Lindsley always had money on hand and the her son Leonard had a bad temper. [T. 210]. Betty even reportedly told police she was afraid of Leonard. [T. 209]. At trial Betty denied that she was afraid of Leonard, but did not deny making the statement to police. In the past, Betty said that Leonard Dougalewicz used to keep a stick in his car. [T. 201-02, 207].

A reward of $25,000 was offered for information regarding Lindsley's death. [T. 219, 221-22, 231-33; Ex. P16]. In May 2004, an individual named Dan Bearden came forward and spoke to police; he had seen a reward poster. *Id.* Bearden's name had been mentioned as a person at the Hideaway Lounge on the Friday night when Lindsley was last seen. [T. 172].

Bearden told police, and testified at trial, that on the Friday before the discovery of Lindsley's body, he had a conversation with Dougalewicz wherein the appellant told Bearden that he was planning on robbing Lindsley. [T. 215]. Bearden said he told Dougalewicz that he did not want to hear of it and immediately went and warned Lindsley. [T. 215].

The following week, after learning of Lindsley's death, Bearden said he saw Dougalewicz at the Hideaway. [T. 217-19]. Bearden said Dougalewicz had four or five hundred dollars on him. *Id.* Bearden said he asked Dougalewicz if he had killed Lindsley, and Dougalewicz reportedly offered Bearden the money to keep his mouth

shut. *Id.* Bearden said he refused the money offered by Dougalewicz. *Id.* Bearden also said he applied for the reward, but had not received it as of the time of trial. [T. 244].

After speaking with Bearden, the police questioned Dougalewicz again on May 13, 2004. [T. 285-86]. Dougalwicz denied having conversations with Bearden. [T. 289-90]. Investigators told Dougalewicz he was being charged with capital murder and told him he could receive the death penalty if convicted. [T. 293-94, 299, 308-09]. Thereafter, Dougalewicz denied taking anything from Lindsley. [T. 287-88].

After being *Mirandized* again, detective said Dougalewicz admitted getting into a fight with Lindsley after Lindsley made untoward sexual advances. [T. 288-89, 301; Ex. P 24]. Dougalewicz said he "freaked out" and beat Lindsley up and left after trying to revive him, but did not take anything. [T. 287-88, 300]. The charge was thereafter reduced from capital murder to murder. [T. 16].

SUMMARY OF THE ARGUMENT

The appellant's purported statement was coerced and should have been suppressed and his motion for directed verdict should have been sustained. The weight of evidence does not support a murder conviction.

ARGUMENT

ISSUE NO. 1: WHETHER THE APPELLANT'S STATEMENT TO POLICE SHOULD HAVE BEEN SUPPRESSED?

Involuntary confessions are inadmissible. *Carley v. State*, 739 So. 2d 1046, 1500 (Miss. Ct. App. 1999), *Neal v. State*, 451 So. 2d 743, 750 (Miss. 1984), *Morgan v. State*, 681 So. 2d 82, 87 (Miss. 1996), Fifth, Sixth and Fourteenth Amendments to the U. S. Constitution and Article 3, § 26 of the Mississippi Constitution of 1890. The state shoulders a burden to prove voluntariness of a confession beyond reasonable doubt, and may meet this burden "by offering the testimony of those individuals having knowledge of the facts that the confession was given without threats, coercion, or offer of reward." *Carley,* 739 So. 2d 1500. See also *Haymer v. State*, 613 So. 2d 837, 839 (Miss. 1993); *Kirkland v. State*, 559 So. 2d 1046 (Miss. 1990).

The burden is met and a prima facie case is established with testimony from officers, or persons with knowledge of the facts, that the confession was voluntarily given free from threats, coercion, or offers of reward. *Cox v. State*, 586 So. 2d 761, 763 (Miss. 1991). In the present case, the state failed to meet this burden. Dougalewicz was

given the impression of hope of reward by a reduction of the charges against him from capital murder to murder. [T. 16-18].

The standard of review regarding the admissibility of a confession is for the reviewing court to determine under the totality of the circumstances whether the "correct legal standard was applied ..., [whether] manifest error was committed, or [whether] the decision [of the trial court] is contrary to the overwhelming weight of the evidence. *Tyler v. State,* 911 So. 2d 550, 554-56 (Miss. Ct. App. 2005).

Dougalewicz was *Mirandised*[2] with each interrogation. [T. 14-15, 281-82, 286-87; Exs. P22-P25]. However, according to *Neal v. State*, 451 So. 2d 743 (Miss. 1984), regardless of the number of times the *Miranda* warnings are given, or how "meticulous", inculpatory statements are not automatically admissible. 451 So. 2d at 753. Even when the trial court record shows the warnings have "been fully and fairly given," the State nevertheless "shoulders a heavy burden to show a knowing and intelligent waiver." *Id.*

In the present case, Dougalewicz was induced into making an involuntary statement, admitting to what would be manslaughter, to avoid the greater crime of capital murder. The officers here told Dougalewicz that he was charged with capital murder even though they had no proof of anything being taken nor of any breaking and entering. Dougalewicz believed that by giving a statement, he could avoid having to be tried for

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[2] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

capital murder with a possible death sentence.

In *Abram v. State*, 606 So. 2d 1015, 1031 (Miss. 1992), the court said:

> "We have repeatedly condemned the practice whereby law enforcement interrogators, or related third parties, convey to suspects the impression, however slight, that cooperation by the suspect might be of some benefit." See also, *Robinson v. State*, 157 So. 2d 49, 51 (Miss. 1963) and *Layne v. State*, 542 So. 2d 237, 240 (Miss. 1989).

In *Abram*, the Supreme Court reversed based on a confession induced by the defendant being "confronted with the possibility of mercy or the death penalty" by the sheriff and was given the impression that a confession to a murder would "work to his advantage" and was coaxed to consider the "religious consequences of his actions" and told "that the law would cooperate with Abram if Abram cooperated with the law", plus was reassured that "it would look better" if he cooperated. 606 So. 2d at 1031.

In reversing, the *Abrams* court also stated:

> A confession made after the accused has been offered some hope of reward if he will confess or tell the truth cannot be said to be voluntary.
>
> * * *
>
> [T]he plain fact is that Abram was given hope of leniency, and was confronted with the legal and religious consequences of his refusal to cooperate."

In *Miller v. State*, 243 So. 2d 558 (Miss. 1971), the court ruled a confession involuntary and inadmissible because the defendant was induced by prodding from the sheriff that the defendant would be better off by telling the truth. 243 So. 2d at 559; see

also, *Robinson v. State*, 157 So. 2d 49, 51 (Miss. 1963).

Dougalewicz's confession was coerced by the state's circumvention of his rights under 5th, 6th, and 14th Amendments to the U. S. Constitution as well as by Article 3 §26 of the Mississippi Constitution. Evidence of the confession should have been suppressed. If there is "... any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."*Miranda v. Arizona,* 384 U.S. 436, 476, 86 S.Ct. 1602, 1629 (1966).

In *Jones v. State* , 461 So. 2d 686 (Miss. 1984), the court said:

> When an accused makes an in-custody inculpatory statement without the advice or presence of counsel, even though warnings and advice regarding his privilege against self-incrimination have been fully and fairly given, the state shoulders a heavy burden to show a knowing and intelligent waiver. [cites omitted] That burden is proof beyond a reasonable doubt. *Id.*

The error here is not harmless. The state could not have obtained a conviction without Dougalewicz's statements. The appellant respectfully requests a new trial.

ISSUE NO. 2: WHETHER THE COURT SHOULD HAVE GRANTED A DIRECTED VERDICT FOR MURDER?

It is Dougalewicz's position that since his purported confession to police is consistent with the physical evidence, he was entitled to a directed verdict of acquittal of the murder charge based on the principle set forth by the Mississippi Supreme Court in

Weathersby v. State, 165 Miss. 207, 209, 147 So. 481, 482 (1933). In *Weathersby*, the Court held:

> [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. *Id.*

Whenever the "*Weathersby* rule applies and the defendant's version affords an absolute legal defense, the defendant is entitled to a directed verdict of acquittal." *Green v. State*, 631 So. 2d 167, 174 (Miss. 1994). If " the defendant's story is materially contradicted, the *Weathersby* rule has no application and the matter of conviction versus acquittal becomes a question for the jury." *Id.*

The *Weathersby* rule was recently applied by the Supreme Court in *Johnson v. State*, 987 So. 2d 420, 422 (Miss. 2008). In *Johnson*, the defendant was the only eye witness and described how he had to stab the victim in self-defense. Afterwards, Johnson tried to get help, to no avail. *Id.*

The *Johnson* court followed the rule from *Weathersby* and reversed the manslaughter conviction and rendered an acquittal of the defendant. *Id.* 424-26. The *Johnson* court noted that it was required to apply the *Weathersby* doctrine because "Johnson's eyewitness account of the stabbing [was] reasonable ... and not 'substantially contradicted in material particulars[.]'" *Id.* The same principles apply here.

The Court was required to accept Johnson's statement "as true". *Id.* It follows that the Court is here likewise required to accept Dougalewicz's testimony as true since neither the testimony nor physical evidence contradict his testimony on any material point. The evidence in *Johnson* "was insufficient to submit to a jury for verdict and [the defendant] was 'entitled to a directed verdict of acquittal.'" *Id.* As to the enduring viability of the *Weathersby*, see also: *Heidel v. State*, 587 So. 2d 835, 839 (Miss. 1991), *Blanks v. State*, 547 So. 2d 29, 33 (Miss. 1989); *Lanier v. State*, 533 So. 2d 473, 490 (Miss. 1988).

The trial court in the present case should have granted the defendant's motion for directed verdict on the murder charge when requested. It would not have been inconsistent for the trial court here to have submitted the case to the jury on the issue of manslaughter versus justifiable homicide after that if the court did not think the evidence justified a complete acquittal.

The trial court, not the jury, should "determine whether the defendant receives the benefit of the *Weathersby* rule." *Green v. State*, 631 So. 2d 167, 175 (Miss. 1994). The remedy requested here is a reversal with acquittal based on justifiable self-defense, or reversal with remand for a new trial on the lesser included charge of manslaughter.

ISSUE NO. 3: WHETHER THE WEIGHT OF EVIDENCE SUPPORTS A MURDER CONVICTION?

Without the alleged confession, the state's case here is less than circumstantial. The verdict of guilty was clearly contrary to the evidence entitling Dougalewicz to a reversal and rending of acquittal, or alternatively to a new trial. *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994), *Brown v. State*, 829 So. 2d 93, 103 (Miss. 2002). The testimony from Dan Bearden is highly suspect. Bearden did not come forward immediately waiting until a reward was posted to talk to police. Bearden's testimony was inconsistent.

The physical evidence is far from conclusive. The pack of Marlboro cigarettes does not prove anything, Dougalewicz and Lindsley apparently spent a good bit of time together. The broken stick does not implicate Dougalewicz, his mother said it had been a long time since he carried a stick around in his car.

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. *Kelly v. State*, 910 So. 2d 535, 539-40 (Miss. 2005).

Alternatively, looking at the state's case in the best possible light, the verdict in this case should have been for manslaughter, not murder. "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).

Manslaughter is defined in MCA § 97-3-35 (1972):

> The 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, shall be manslaughter.

"Heat of passion" has been established to mean:

> ... 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).

See also *Graham v. State*, 582 So.2d 1014, 1017-18 (Miss.1991).

In addition to "passion and anger" there must also be "such circumstances as would indicate that a normal mind would be roused to the extent that reason is overthrown and that passion usurps the mind destroying judgment." *Parker v. State*, 736 So.2d 521, 525(¶ 17) (Miss. Ct. App.1999) (quoting *Calvin v. State*, 175 Miss. 699, 168 So. 75, 76 (1936)).

The Supreme Court has reversed jury verdicts of murder on more than one occasion remanding for sentencing only for manslaughter. Dougalewicz is asking that

the Court reverse and grant him a new trial or simply render a manslaughter conviction.

In *Dedeaux v. State*, 630 So. 2d 30, 31-33, (Miss. 1993) the Court reviewed the facts of a barroom shooting where the Defendant was charged and convicted of murder for shooting his girlfriend's husband. Similar to this case, there was evidence of animosity. *Id.* The defendant Dedeaux shot the victim three times, twice while the victim was moving toward him, and a third time as the victim lay on the ground. *Id.* In the present case, Dougalewicz said the Lindsley made sexual advances.

Even though the defense did not request a manslaughter instruction in the *Dedeaux* case, the Supreme Court found that the facts only supported a conviction for manslaughter because "this clearly was a killing in the heat of passion" even though a "greater amount of force than necessary under the circumstances" was used. *Id.* The *Dedeaux* court reversed the murder conviction and remanded the case for re-sentencing for the crime of manslaughter. 630 So. 2d 31-33.

In *Clemons v. State*, 473 So. 2d 943 (Miss. 1985), the Court pointed out that there was "such contradictory testimony that it is virtually impossible to reconstruct what actually happened". 473 So. 2d at 944. The *Clemons* case involved a barroom stabbing. The *Clemons* court pointed out "there is more than enough conflicting evidence to cast at least a reasonable doubt as to murder", then, reversed the murder conviction and remanded for sentencing for manslaughter. *Id.* at 945.

In the case at bar, we see a similar factual scenario as in *Dedeaux* and *Clemons*. Namely, there was sufficient provocation by an intoxicated victim and reaction by the accused involving more than reasonable force, resulting in the unfortunate and unnecessary death of the victim.

Lindsley's head wounds were consistent with a fall and the arm wounds were just as likely offensive as defensive. [T. 252-54, 256-58, 301]. Dougalewicz respectfully asks this court to review the facts of this case with the guidance of the *Dedeaux* and *Clemons*, decisions, and to reverse the murder conviction and remand the case for a new trial or sentencing for manslaughter.

In an evaluation of sufficiency of evidence the reviewing court must decide whether any of the evidence "point[s] in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty." *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985) (citing *May v. State*, 460 So.2d 778, 781 (Miss.1984)) (emphasis added). If different conclusions could have been reached by reasonable jurors with respect to every element of the offense, the evidence is sufficient. *Bush v. State*, 895 So.2d 836, 843(¶ 16) (Miss.2005) (citing Edwards, 469 So.2d at 70). See also *Smith v. State*, 839 So.2d 489, 495(¶ 12) (Miss.2003).

Here, different conclusions could not have been reached. Arguably here, no reasonable juror could have found murder if instructed on manslaughter; because, under

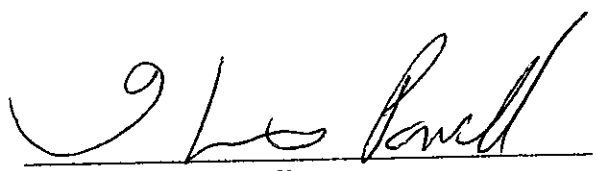
an impartial evaluation of the evidence, Lindsley died as a result of an impulse brought on by sufficient provocation.

CONCLUSION

Dougalewicz is entitled to have his conviction reversed with a rendering of acquittal or with remand for a new trial, or is entitled to a rendering of a manslaughter conviction with remand for resentencing.

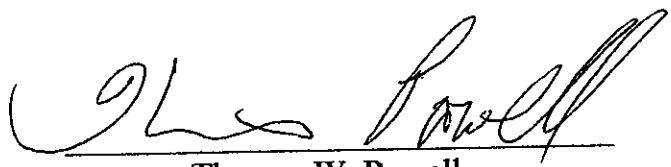
Respectfully submitted,

LEONARD DOUGALEWTCZ
(Leonard Dougalewicz)

By: 
Thomas W. Powell

CERTIFICATE

I, Thomas W. Powell, do hereby certify that I have this the 24th day of November 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Winston Kidd, Circuit Judge, P. O. Box 327, Jackson MS 39205, and to Hon. Robert S. Smith, Dist. Atty., P. O. Box 22747, Jackson MS 39225, 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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