IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES C. NEWELL, JR. — APPELLANT

VS. — NO. 2009-KA-0701-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County and the judgment of conviction of James C. Newell, Jr. for manslaughter. (CP). Newell was indicted for murder in violation of *Miss. Code Ann.* ¶ 97-3-19. (Indictment c.p. 13) After a trial by jury, the Honorable James T. Kitchens, Jr. presiding, the jury found defendant guilty of the lesser offense of Manslaughter. (Jury Verdict, c.p.72). Subsequently, defendant was sentenced to 20 years in the custody of the Mississippi Department of Corrections. Additionally defendant is to pay all costs of court and funeral expenses. (Sentencing order, c.p. 88).

After denial of post-trial motions this instant appeal was timely noticed. (C.p.101).

STATEMENT OF FACTS

The State intends to prove during the course of this trial that Mr. Newell went to the Slab House here in Lowndes County on May 14th, 2008, that he had had some problems with his wife, he thought she was cheating on him. For whatever reason, defendant had words with Mr. Boyette. As a result there was an altercation and defendant pulled a gun and shot Mr. Boyette. Consequently, Adrian Boyette died from that gunshot wound on the evening of May 14, 2008.

SUMMARY OF THE ARGUMENTS

I.

The trial court did not err in admitting Newell's threatening voicemail messages to his wife into evidence.

The trial court did not err in admitting into evidence the voicemail message Newell left for his wife, Dianne Newell. The message containing a threat to Mrs. Newell and her friend and was relevant to the issue of deliberate design.

II.

The trial court did not err in excluding evidence of the toxicology report on Adrian Boyette.

The trial court did not abuse its discretion by denying Newell the opportunity to question Dr. Hayne about the results of the toxicology report on Boyette. At the time the evidence was offered by the defense, during the State's case in chief, it was not relevant because no self defense theory was before the trial.

III.

The trial court properly instructed the jury on self-defense.

The trial court have three instructions that covered self-defense, two from the State and one from Defense.

IV.

The jury's verdict is supported by legally sufficient and credible evidence.

Newell's weight and sufficiency arguments must fail. It is clear defendant was hunting for someone to shot, he told people so, he warned his wife.

Considering the evidence in the light most favorable to the verdict, Newell's conviction is not contrary to the overwhelming weight of the evidence. There is legally sufficient evidence to support the jury's verdict. A reasonable juror could find Newell guilty of every element of manslaughter.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN ADMITTING NEWELL'S THREATENING VOICE MAIL MESSAGES TO HIS WIFE INTO EVIDENCE.

In determining the relevancy and admissibility of evidence, trial courts enjoy considerable discretion. Their rulings will not be reversed unless there was an abuse of discretion that prejudiced the accused. *Fisher v. State*, 690 So.2d 268, 274 (Miss.1996) (citing *Shearer v. State*, 423 So.2d 824, 826 (Miss.1982)).

> ¶ 13. We find that Bankston has no standing to argue that Carley could not consent to having her conversation recorded. This Court has held that "[t]he right to be free from illegal searches is a personal right. White v. State, 571 So.2d 956, 958 (Miss.1990). Unless his own rights were violated by a search, a defendant cannot prevent the use of evidence discovered in the search." Powell v. State, 824 So.2d 661, 663(¶ 10) (Miss.Ct.App.2002). We determine the issue of standing after a two-part inquiry: (1) whether the defendant had a subjective expectation of privacy in the place searched; and (2) whether, from society's perspective, that expectation was reasonable.
>
> *Bankston v. State,* 4 So.3d 377, 380 (Miss.App. 2008).

Newell also argues the voice messages were protected as a privileged spousal communication and inadmissible. Mississippi Rule of Evidence 601(a) provides, in pertinent part, that: "In all instances where one spouse is a party litigant the other spouse shall not be competent as a witness without the consent of both[.]"

Under the rationale expressed in *Dowbak v. State*, 666 So.2d 1377, 1382 (Miss.1996) the Misissippi Supreme Court found there was no violation of the

husband-wife privilege or spousal-competency principles in the State's use of the defendant's wife as a confidential informant against her husband. *Id.* (interpreting spousal-competency statute, Mississippi Code Annotated section 13-1-5 (Supp. 1990), now embodied in Rule 601); see also M.R.E. 601 cmt. (Rule 601(a) "retains the substance of superseded M.C.A. § 13-1-5.").

In *Dowbak*, the supreme court rejected the defendant's argument that all testimony resulting from his wife's conversations with police violated spousal-competency principles, and the court declined to hold that spouses "cannot help law enforcement officers investigate or solve crimes in which their spouse might be involved." *Dowbak*, 666 So.2d at 1382. In *Dowbak*, neither the defendant's wife nor the officer to whom she had spoken testified at trial. *Id.* at 1381. Similarly, here, Dianne Newell, (defendant's wife) did not testify as a witness during defendant's trial. However, her voice mail recording was played for the jury.

Newell also contends the trial court erred in admitting the voicemails without them being properly authenticated. The State cites the well-established principle that, "[i]t is the duty of counsel to make more than an assertion; they should state reasons for their propositions, and cite authorities in their support." Johnson v. State, 154 Miss. 512, 513, 122 So. 529, 529 (1929). Pursuant to Mississippi Rules of Appellate Procedure 28(a)(6), this issue is barred for failure to support the argument with

citations to the authorities and statutes relied upon. *Britt v. State*, 844 So.2d 1180, 1183 (Miss.App.,2003).

Further, there is no doubt the tape was what it was purported to be or defense would have pointed it out. Additionally, the State did authenticate the recording. Tr. 293-94, objection overruled by trial court, Tr. 295.

Without conceding error on the part of the trial court, the State submits that if this Court finds the trial court improperly admitted the voicemails into evidence, such admission constitutes harmless error. The Supreme Court has ruled the erroneous admission of contested testimony can constitute harmless error when the overwhelming weight of the evidence supports the accused's guilt. *DeLoach v. State*, 722 So.2d 512, 520(¶ 34) (Miss.1998). The DeLoach court explains that the inquiry is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Id.* (quoting Chapman, 386 U.S. at 24). Further, it "is not whether the jury considered the improper evidence or law at all, but rather, whether that error was 'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' " *Id.* (quoting Yates v. Evatt, 500 U.S. 391, 403 (1991)).

Clearly the admission of the voicemail did not contribute to Newell's manslaughter conviction. The prosecution offered the threatening voicemail messages

from Newell to prove the elements of deliberate as to proof supporting murder. Newell's message to his wife, "I'm going to pop a cap in you" certainly helps to establish that Newell set out that evening armed and ready to kill his wife and her paramour. If the jury believed Newell had deliberate design to kill his wife, then he would have been convicted of murder and not manslaughter.

The State would assert there is no error deserving of any relief.

II.
THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE OF THE TOXICOLOGY REPORT ON ADRIAN BOYETTE.

The standard of review for the exclusion of evidence is abuse of discretion. Herring v. Poirrier, 797 So.2d 797, 804 (Miss.2000). The trial judge is empowered with the discretion to consider and to decide which evidence is admissible, and unless this judicial discretion is so abused as to be prejudicial to the accused, then, the ruling of the lower court must be affirmed. Clark v. State, 891 So.2d 136, 139 (Miss.2004).

During direct examination by the State, Dr. Steven Hayne testified to the cause and manner of Boyette's death. On cross examination defense counsel attempted to question Dr. Hayne concerning a toxicology report results of his autopsy that he drew blood and urine specimens from the body of the victim for toxicological testing by the Mississippi Crime Laboratory, and that the testing would show the presence or absence of ethyl alcohol or "drugs of abuse" in the bloodstream.

Interestingly, the reviewing courts of this State have heard this sort of argument before in *Flora v. State,* 925 So.2d 797, 821 (Miss. 2006).

> ¶ 79. Flora also argues that the State created a "false impression of the evidence" by only referring to the ethyl alcohol testing. This argument would have merit only if Dr. Hayne was aware of the "drugs of abuse" report of which he clearly denied having knowledge on several occasions. By asking Dr. Hayne about the only toxicological report of which he had knowledge, the State did not create a false impression of the evidence, and Flora cannot justifiably claim a due process violation.

> ¶ 80. The trial court did not abuse its discretion by denying Flora the opportunity to ask Dr. Hayne about the results of the "drugs of abuse" report.

So, there is no automatic right to have evidence from the toxicology report of the dead victim presented to the jury. There must be some connection. At the trial below when Dr. Hayne was on the stand there was no evidence the victim was violent or aggressive to defendant. Tr. 260 (Finding of trial court). Further, there was no proof offered that the substances he wished to elicit testimony about would have induced violence. Again, the trial court specifically noted and overruled defense objection. Tr. 259-260. In fact the substances, as the trial court noted are to make one calmer – not more violent.

The succinct position of the State is the defense does not have an automatic right to have toxicology reports admitted in to evidence of the victim. There must be some connection to the crime and that it would be probative or relevant to an issue at trial. As the trial court noted such was not met in this case.

There being no error in denying the questioning of the forensic expert there is no merit to this allegation of error and no relief should be granted.

III.
THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON SELF-DEFENSE.

If warranted by the evidence, it is fundamental that a defendant is entitled to a jury instruction on his theory of the defense. Slater v. State, 731 So.2d1115(¶12)(Miss.1999). This Court examines the jury instructions as a whole in deciding whether the trial court committed reversible error in refusing to grant a jury instruction. Coleman v. State, 697 So.2d 777, 782 (Miss. 1997). "[The] instructions given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." Hickombottom v. State, 409 So.2d 1337, 1339 (Miss.1982).

Newell alleges that the trial court committed reversible error in denying jury instructions D-6, D-7, and D-8. The trial judge refused D-6, D-7 and D-8 but gave two self-defense instructions proposed by the State and one proposed by the defense. (S-5, S-7 and D-23; .P. 42, 45, 49).

Newell argues his proffered instruction D-6 was the first and only proposed jury instruction that addressed justifiable homicide as a theory of defense. Newell overlooks S-7 and D-23. Instruction S-7, offered by the State and accepted by the Court, provides:

> The Court instructs the Jury that to make an assault justifiable on the grounds of self defense, the danger to the attacker must be either actual,

present, and urgent, or the attacker must have reasonable grounds to apprehend a design on the part of the victim to kill him or to do him some great bodily harm; and in addition to this, he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the grounds upon which the defendant acts.
Therefore, if you find from the evidence in this case that the defendant, JAMS C. NEWELL, JR., acted in self-defense, then you should find the defendant not guilty.
(CP 45).

Instruction D-23, offered by Newell and accepted and given by the Court, to the jury states:

> The Court instructs the jury that while the danger which will justify the taking of another's life must be imminent, pending, and present, such danger need not be unavoidable except by killing in self-defense. The Defendant, James Newell, need not have avoided the danger to his person presented by the deceased, Adrina Boyette, by flight. So long as James Newell was in a place where he had the right to be and was not the immediate provoker and aggressor, he may stand his ground without losing the right of self-defense.
> (C.P. 49)

When one jury instruction adequately covers the defendant's theory of self-defense, the trial court may properly refuse to grant a second instruction that is redundant or cumulative. Johnson v. State 749 So.2d 369 (Miss.App.1999) quoting *Gossett v. State*, 660 So.2d 1285, 1295 (Miss.1995). Because of instructions S-5, S-7 and D-23, adequately instructed the jury on self-defense in several forms there was no error in failing to give D-6, D-7, and D-8.

It is the position of the State defendant's defense was not impaired and the jury was adequately instructed. No relief should he grated on this allegation of error.

IV.
THE JURY'S VERDICT IS SUPPORTED BY LEGALLY SUFFICIENT AND CREDIBLE EVIDENCE.

When reviewing the sufficiency of the evidence, an appellate court looks to all of the evidence before the jury to determine whether a reasonable, hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty. An appellate court will not reverse a trial judge's denial of a motion for a new trial unless the verdict is so contrary to the weight of the evidence that, allowing it to stand would sanction an unconscionable injustice. *Groseclose v. State*, 440 So.2d 297, 300 (Miss.1983).

Newell argues then that his conviction for manslaughter for this shooting is "...repulsive to reason, inference, and conclusion." Def. Br. Pg. 40. The State's position could not be more diametrically opposed.

First of all and foremost, defendant was found guilty by the jury of Manslaughter. The jury was instructed on this lesser offense, (S-6, c.p. 43-44) – which instructed the jury:

> "...that if a person kills another under the actual bona fide belief that such a killing is necessary in order to protect himself from great bodily harm or death, but that such belief is not reasonable under the circumstances, then there is not malice aforethought and the killing is not Murder, but at most is the crime of Manslaughter."
> (Jury instruction S-6, C.p. 43-44).

Interestingly, the defense appeared eager to accept this instruction, tr. 405-06. Be that as it may, all the jury as to do is have evidence that defendant's claim of self-

defense not reasonable, and it was manslaughter.

It is interesting that defendant made a statement to someone after the shooting and stated that he went to the "Slab House" to confront someone who might be involved with his new wife confronted someone and defendant stated "He flung the door open and popped a cap in his a*s." Tr. 113, 125, 138, 228. Numerous individual heard defendant use this language. It never included that he felt threatened, or he had a knife or he was afraid.

To conclude if the jury believed that one simple fact – that the shooting was not reasonable under the circumstances – the verdict is just and stands.

Looking to the record, there is a plethora of evidence that defendant's actions amply support the verdict of guilty of manslaughter as his action were not reasonable.

The instruction above was an imperfect self-defense instruction eagerly accepted by defense. They got what they wanted – the jury just didn't believe defendant's claim – which was amply contradicted by defendant's own statements, forensic evidence and reasonable inference.

The verdict of the jury is amply supported by the evidence.

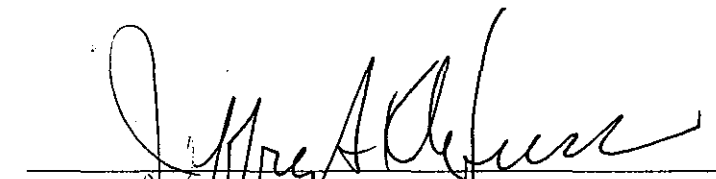
No relief should be granted on this allegation of error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's verdict of Guilty of Manslaughter and the sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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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