IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDNA MAE SANDERS — APPELLANT

VS. — NO. 2009-KA-1925-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On March 13, 2008, Edna Mae Sanders, "Sanders,"was tried for murder of her husband by a Hancock County Circuit Court jury, the Honorable Steve Simpson presiding. R.1. Sanders was found guilty and given a life sentence in the custody of the Mississippi Department of Corrections. R. 441-444.

Sanders' motion for a new trial was denied. C.P. 136-137. From that denial of relief, Sanders filed notice of appeal to the Mississippi Supreme Court. C.P. 138.

ISSUES ON APPEAL

I.

WERE STATEMENTS OF THE VICTIM PROPERLY RECEIVED INTO EVIDENCE?

II.

WAS THE JURY PROPERLY INSTRUCTED, GIVEN SANDER'S TESTIMONY?

III.

WAS SANDERS' PREVENTED FROM TESTIFYING ABOUT HER MENTAL STATE?

STATEMENT OF THE FACTS

On January 26, 2007, Sanders was indicted by a Hancock County grand jury for "the depraved heart" murder of her husband, Mr. Sherman Sanders, on or about July 28, 2006. M. C. A. Sect. 97-3-19 (1) (b). C. P. 4.

On March 13, 2008, Sanders was tried for murder by a Hancock County Circuit Court jury, the Honorable Steve Simpson presiding. R.1. Sanders was represented by Mr. Brian B. Alexander. R. 1.

Ms. Sanders filed a motion to suppress. This was a motion to suppress statements by the decedent to others after he had been burned. The grounds of the motion was alleged hearsay.

After hearing testimony, and argument on the motion, the trial court admitted statements by the decedent, Mr. Sherman Sanders. R. 25-102. He admitted statements to a neighbor, Mr. Tribble, a police officer, Officer Hendry, and an EMT, Mr. Munger. The trial court admitted the victim's statements under M. R. E. 803(1) present sense impression and (2) excited utterance. R. 100-102.

Mr. Daniel Tribble testified that he was the Sanders' next door neighbor. This was in Diamondhead, Hancock County. R. 27. He testified to hearing someone beeping a car horn, and then beating on his fence. It was around 2:00 A.M. in the morning of July 27, 2006. When Tribble went outside, he saw his neighbor, Mr. Sherman Sanders. He was pacing back and forth outside. R. 32. He heard him beeping his horn and saying "help me, help me." R. 33

Officer Brandon Hendry with the Hancock County Sheriff's office testified that he went to the Sanders' home. This was in answer to a disturbance call. When he arrived, he saw a black male outside near his truck. Hendry saw the man had been "severely burned." He had "skin hanging from his chest area and arm." R. 141. He asked him, "what happened?" He immediately stated "his wife poured burning oil on him." R. 45; 141. He stated he was asleep when his wife poured burning oil

on him. R. 141.

Officer Hendry stated that although Sanders' voice was "shaky," he could understand him. R. 51-52. Hendry testified that the burn victim wanted to retrieve some money. It was in a bag he kept under his mattress. However, when the bag was found under the bed, there was no money inside. R. 148. Hendry testified without objection that the decedent said the wife took the money in the Crown Royal bag. R. 182. Hendry also testified to seeing a pot with cooking oil in it. It was "sitting on an end table" with some oil inside. R. 143. One would pass this end table if exiting the houses through the front door. R. 184.

Officer Michael Munger went in response to a call for an ambulance at Diamondhead. R. 186-187. This was at 894 Maili Way. R.141. Munger testified that he arrived there around 2:20 in the morning. R. 62. He had received training in responding to treatment for "burn victims." R. 63. He found a man burned over "his head, and face, and upper body, arms and hands." R. 188. The "skin on both of his hands almost completely removed." R. 190.

When Munger asked him what happened, he pointed to a pot that had oil in it. He told him "he was sleeping and he woke up to his wife pouring oil on him." R. 192.

He told Munger he did not place the pot with oil down inside his house. R. 199. The saucepan was found "on the night stand on the side of the sofa." R.204. See state's exhibit 7, a saucepan admitted into evidence.

Dr. Karen Frye, a burn surgeon, testified that she performed an autopsy on the decedent. R.262-263. She testified that although the decedent was treated for his extensive burn wounds, he died on August 4, 2009. She testified that he had burns that were "deep" and "life threatening." R. 265. He died as a result of complications that developed from the severe burns "over 50% of his body." R. 268. Dr. Frye testified that the decedent had "a deep burn, a full thickness burn." 268. She

also testified that the oil causing these extensive burns would have to have been "hot." R. 268.

Mr. John Bunce, a Hancock County investigator, testified that he performed a test. He took the same type cooking oil found at the scene. It took "twelve minutes" to heat the oil to 435 degrees. R. 272. Once the oil was boiling, he went from the kitchen to the bedroom in question. R. 273. He went with the pot in his hand. This took a additional minute or two. Bunce testified that an arrest warrant was issued for Ms. Sanders. R. 281. She was eventually located in Baton Rouge, Louisiana. R. 274.

The trial court denied a motion for a directed verdict. R. 283.

Ms. Sanders testified in her own behalf. R. 326-398. Sanders testified that she was married to the decedent. She testified that he was allegedly abusive and violent toward her in the past. She testified that on the night of the events at issue, he had beaten her. After struggling with him, she told her daughter to get her autistic son and go to their car.

When the decedent allegedly released her, she went to the kitchen. She picked up some oil on the stove. She followed him down the hall to the bedroom. When she arrived at the bedroom, she said he was on his bed. When he turned toward her, she testified ,"I tossed the grease." R. 354. She claimed he allegedly had pulled out a handgun when he turned in her direction.

The trial court sustained objections to Sanders testifying about what the decedent allegedly said to her. This was in connection with her alleged altercation with him. R. 338-342.

On cross examination, Sanders admitted that she was unemployed. R. 375. She admitted when she went down the hall toward the bedroom, she passed two doors from which she could have left the house. R. 389-390. Sanders also testified that the cooking oil in the pot she used was on the stove. She testified that she did remember leaving the flame on the stove under the pot. R. 382. She also testified that she allegedly "dropped the pot and ran." R. 394. This was after she threw the oil

on her husband.

On cross examination, Sanders testified that she threw the oil "with two hands." R. 394. She also testified that "he screamed" when the oil struck him. R. 394. Ms. Sanders also admitted that she never filed a police report on this incident. R. 397. She also admitted that this was the first time she had presented to anyone her version of what happened. Her testimony was "the first time you've (she) told this story to anybody." R. 397. She had never previously reported any domestic abuse or violence toward her by her husband to law enforcement. R. 374.

Mr. Richard Fayard testified that he investigated the crime scene. This was at the Sanders' home in Diamondhead. He found a sauce pan on an end table. R. 203. He found grease stains on the bed and the wall behind the bed. A tie was also found on the bed with what appeared to be grease stains on it. The tied was "crinkled from the temperature of the oil." R. 206.

Officer Fayard found what he thought was a latex glove. However, it was skin from someone's hand. It "had fingernails and all attached to it." R. 203. He did not locate any weapons in the house. R. 216.

The trial court denied a motion for self defense based upon "the castle doctrine," or the right of a home owner's right to stand their ground. R. 417. The court found Sander's testimony did not support such an instruction. The trial court admitted jury instructions for self defense. C.P. 58;79.

Ms. Sanders was found guilty and given a life sentence in the custody of the MDOC. R. 441-444.

Sanders' motion for a new trial was denied. C.P. 136-137. From that denial of relief, Sanders filed notice of appeal to the Mississippi Supreme Court. C.P. 138.

SUMMARY OF THE ARGUMENT

I. The record reflects that there was record support for the admission of the decedent's statements. R. 95-102. This would be statements to others as "present sense impressions," "excited utterances,""existing state of mine," and "statements for medical diagnosis." This would be under M. R. E. 803(1), (2), (3) and (4). R. 25-101; C.P. 135-136. The record reflects that while Officer Brandon Hendry testified that the decedent was calm, he meant under the circumstances of having severe life threatening burns. This was severe burns over his face, hands, chest and arms. Skin was hanging off his body and hands. R. 51.

In addition, the record also reflects that the only question Officers Hendry or Munger asked was, "what happened?" R. 45; 64. Our Supreme Court has held this question, under circumstances similar to those in the record , does not necessarily indicate a lack of "spontaneity" or trust worthiness. **Eubanks v. State** , 28 So.3d 607, 611 -612 (¶23) (Miss. App. 2009), **Barnette v. State**, 757 So. 2d 323, 329-330 (¶18) (M. C. A. 2000), **Nichols v. State** 27 So.3d 433, 442 (¶30)(Miss. App. 2009), **Anthony v. State** , 23 So. 3d 611, 617 (¶26-¶ 27)(Miss. App. 2009)

The cross examination requirement stated in **Crawford v. Washington**, 541 U.S. 36, 52 (2004) is not applicable where statements by a decedent are admissible under applicable rules of evidence. The record reflects they were admitted after a full suppression hearing. R. 25-101.

II. The record reflects the trial court correctly found a lack of record support for jury instructions based upon "the castle doctrine." R. 417. The trial court found that there was a lack of record evidence for such an instruction. The record reflects Sanders' testimony did not support these instructions, D-10, D-11 (C.P. 77-78) . Sanders admitted that she was advancing toward the decedent who was in his bed. Sanders did not testify to any confrontation or threat to her safety "at

the time" she threw hot oil on her husband. R. 354.

She also admitted on cross examination that she could have exited through two different doors. R. 389-390. This was when she was following the admittedly unarmed decedent down the hall with a pot of hot "grease." R. 390. **Westbrook v. State** 29 So.3d 828, 833 (Miss. App. 2009); **Murphy v. State**, 566 So. 2d 1201, 1206 (Miss. 1990).

While Sanders testified the victim had a gun, she admitted that the decedent was in his bed, and not fighting with her when she threw hot oil on him. R. 354. She admitted the victim had not been advancing toward her, but rather she was following him. No gun was located on the premises, although skin with fingernails from the victim's hand was. R. 203; 216.

III. The record reflects that Sanders was not prevented from testifying that she was afraid of the decedent. R. 342-355. She testified without objection, more than once, that she was afraid "he's going to kill me." R. 354; 364. The record reflects that the trial court only sustained objections to Sanders's statements about what her deceased husband allegedly said to her. R. 342-343. The record reflects that this was what he allegedly said prior to her admission of throwing hot oil on him. This was while he was in bed.

However, Sanders was not prevented from testifying about the decedent's alleged attacking her, as well as the fact that she allegedly feared for her life as a result. R. 354; 364. **Quimby v. State**, 604 So. 2d 741, 747 (Miss. 1992). **Gollott v. State** , 672 So.2d 744, 754 (Miss. 1996).

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THE VICTIM'S STATEMENTS WERE PROPERLY ADMITTED INTO EVIDENCE.

Ms. Sanders argues that the trial court erred in admitting into evidence statements made by Mr. Sherman Sanders, the victim, to police officers and emergency medical personnel at the scene of the alleged crime. Sanders argues that since the statements were made in answer to questions, when he was allegedly described as calm, they should not have been admitted as exceptions to hearsay under Miss. Rules Evid. 803(1) "present sense impression" and (2) "excited utterance." Appellant's brief page 8-21.

To the contrary, the record reflects that the testimony of first responders provided sufficient credible testimony for admitting the statements as "present sense impressions," "excited utterance, " "existing state of mind," and " statements for medical diagnosis." This would be under M. R. E. 803(1),(2), (3) and (4).

As stated by the trial court:

> Court: **Again the court, taking all of the consistency of the statements and the time in which they were made in conjunction with the time that Mr. Sanders clearly started seeking help, leads me to believe that he was in a sufficient excited condition and reaction to the event or condition that caused his injuries such as to make these statements reliable.** As to whether or not these statements are referring to the defendant, Edna Mae Sanders, is still a question for the jury, but the statements themselves are admissible, and the motion to suppress is admissible, and the motion to suppress is overruled. ...With respect to the excited utterance exception to the hearsay rule, the court is also of the opinion based on the record before me that the statements by the deceased that the state intends to offer were also statements made of his condition, **although not while he was perceiving the event, but were sufficiently immediately thereafter or close in time and proximity to be admissible as a present sense impression.** R. 100-102. (Emphasis by appellee).

At the suppression hearing, Officer Brandon Hendry, an investigator with the Hancock

County Sheriff's Office, testified to seeing a black male. He had been "severely burned." When asked about what happened, the decedent stated, "I can't believe she burned me." He stated he was sleeping when she poured oil on his front upper body.

> Q. ..**When you shine the light on him, describe for us, if you would, what do you see?**
>
> A. **I see a black male that was severely burned. I could see the skin and flesh, what appeared to be his skin and flesh, hanging from his chest area and his arms.**
>
> Q. At some point, do you initiate conversation with him, or does he initiate with you?
>
> A. **I approached him, and I said, what happened to you? And he immediately stated that his wife poured oil on him, or burned him rather.**
>
> Q. **So your only question to him was?**
>
> A. **What happened.**
>
> Q. **And what was the purpose in asking that question?**
>
> A. **Well, to determine what I needed to do as far as securing a crime scene, if there was a crime that had occurred.**
>
> Q. **And his immediate response to you was?**
>
> A. **His immediate response was. I can't believe she burned me.** R. 45. (Emphasis by appellee).

On cross examination, Officer Hendry testified clearly that Mr. Sanders' voice was "shaky" and "broken." R. 51. When he testified that he was calm, he explained relatively calm. In other words, he was calm given his having what appeared to be life threatening injuries over half of his body. Hendry testified that he could smell "burning flesh" on the victim. R. 52. It was nauseating.

> Q. Investigator, I was going to ask you to read the question, if you will, and then read your response there, if you will.
>
> A...**He was explained to me clearly that when I asked what happened or how he**

was injured, that he explained to me that he and his wife were recently having marital problems and she just dumped oil, burning oil, on him while he was asleep and did not understand why.

Q. Investigator, a minute ago did you describe Mr Sanders' voice as being broken?

A. **Shaky, I recall.**

Q. Shaky. Do you think there's a distinguishing way to define shaky and broken?

A. **Yes, sir. If I were describing those two terms, I would say shaky as understandable and broken as difficult to understand.**

Q. **So when you said his voice was not broken, what does that mean?**

A. **I was able to understand him.**

Q. **Is that because he was very calm and coherent?**

A. **Relative to the circumstances, yes, sir.** R. 51. (Emphasis by appellee).

In **Eubanks v. State**, 28 So.3d 607, 611 -612 (¶23) (Miss. App. 2009), the court relied upon **Carter v. State**, 722 So. 2d 1258, 1261 (¶10) (Miss. 1988) in finding that the trial court did not err in admitting a statement by a victim as "an excited utterance." The fact that it was in answer to the question, "What happened?" did not preclude its admission, under the circumstances of that case.

> ¶ 23. Likewise, the trial court did not abuse its discretion in finding the statement spontaneous, notwithstanding the time that passed or that it was prompted by a general question from Johnson. Essentially, Inecia's statement was made at the first reasonable opportunity she had to tell a trusted relative what had occurred. See **Heflin v. State**, 643 So.2d 512, 519 (Miss.1994). Furthermore, the question itself, "What happened?," has been specifically cited by the supreme court as an example of a question that, while bearing upon the spontaneity requirement, does not necessarily preclude admission of the statement as an excited utterance. See **Carter**, 722 So.2d at 1261(¶ 10). ¶See **Sanders**, 586 So.2d at 795. Accordingly, the trial court did not abuse its discretion in finding the statement sufficiently spontaneous.

In **Barnette v State**, 757 So. 2d 323, 329-330 (¶18) (M. C. A. 2000), the court found that the trial court did not abuse its discretion in admitting a victim's statement as "an excited utterance."

There was a passage of several hours between the startling event and the first opportunity the injured child had to speak to someone. In the instant cause, the statements were made within less than a half hour from the exposure to hot oil off the stove. R. 44.

> We cannot, under these circumstances, conclude that such a determination was so manifestly incorrect as to constitute an abuse of the trial court's discretion in controlling the flow of evidence. We, therefore, find this issue to be without merit. The mere fact that the statement, as in this case, was in response to an inquiry, though bearing on the question of spontaneity, does not necessarily take a responsive statement outside the realm of admissible excited utterances. **Sanders v. State**, 586 So.2d 792, 795 (Miss.1991).

In **Nichols v. State** 27 So.3d 433, 442 (¶30)(Miss. App. 2009), the Court affirmed the trial court's admission of statements under M. R. E. 803(1) and 803(3). This was testimony about what the witness heard said by a passenger in a car. This was while the witness was on the phone with the driver of a car that was run off the road by the defendant.

> ¶ 30. The trial judge allowed the statements as evidence of the women's state of mind communicated as the women experienced the events leading up to the collision. We find no abuse of discretion in the trial judge's admission of Baptist's testimony. See **Wright v. State**, 958 So.2d 158, 167-68(¶ 26) (Miss.2007) (finding no error in trial court's admission of a rape victim's out-of-court statement made immediately after the rape, because under Rule 803(1) and (3), the statements were not excluded by the hearsay rule).

In the trial court's post conviction Order denying relief, it stated that although the officers described petitioner's husband as calm, they also noted his serious burns over much of his body. He was clearly seeking help for dealing with his life threatening medical condition he was experiencing at that time.

> **Although the officers described petitioner's husband as calm, they also noted the smell of her husband's burning flesh and the fact that he was covered in the severe burns that lead to his death. Therefore, we find that although her husband's voice may have been calm, he was still clearly under the stress that was caused by the petitioner throwing boiling cooking oil on him.** Furthermore, the statements made by her husband (i.e. "she burned me"), also qualify under ruled 803 (1), which allows statements describing or explaining an event or condition made

while the declarant was perceiving the event or condition or immediately thereafter." Therefore, petitioner's argument regarding hearsay is without merit. C.P. 135-136.

In **Anthony v. State** , 23 So.3d 611, 617 (¶26-¶ 27)(Miss. App. 2009), the Court affirmed the trial court in admitting statements under M. R. E. 803(4) although they were not made to a physician. Rather they were made to care givers and a psychologist about "the burns" on a child abuse victim by a member of his household.

> ¶ 26. Mississippi courts recognize a two-part test for the admission of evidence under Rule 803(4). "First, 'the declarant's motive in making the statement must be consistent with the purposes of promoting treatment,' and second, 'the content of the statement must be such as is reasonably relied on by a physician in treatment.' " **Osborne v. State**, 942 So.2d 193, 197-98(¶ 15) (Miss. Ct. App.2006) (quoting **Davis v. State**, 878 So.2d 1020, 1024(¶ 12) (Miss. Ct. App. 2004)).
>
> ¶ 27. Rule 803(4) applies to statements made to non-medical personnel, including psychologists. **In re S.C. v. State**, 795 So.2d 526, 530(¶ 15) (Miss.2001); **Davis v. State**, 878 So.2d 1020, 1023-24 (¶¶ 7, 13) (Miss. Ct. App.2004); see also M.R.E. 803(4) cmt. This exception also allows for the admission of "statements which relate to the source or cause of the medical problem." **Foley v. State**, 914 So.2d 677, 683 n. 1 (Miss.2005) (citing M. R. E. 803(4) cmt.).

The record cited indicates that the victim's statements were made while he was suffering from "severe" life threatening burns over the front of his body. He was still experiencing the effects of the hot oil on his body. The skin had totally pealed off his body. It could be seen hanging, showing raw "burning flesh." There was also the "smell of burning flesh" present. R. 45. See M. R. E. 803 (4), clearly stating these statements need not be made to a physician to be admissible.

His response to being asked what happened did not prevent his response from being "spontaneous." He was still under the effects of his life threatening injuries. His statements to the emergency medical personnel was for purposes of treatment. Officer Munger was trained to deal with burns. R. 63-64. The purpose of Munger's question about what happened was "to assess his mental status and what I needed to do to treat him medically." R. 64.

The appellee would submit that there is a lack of evidence that anything said by the victim, under the circumstances as indicated by cites to the record, was lacking in spontaneity, trustworthy or reliable, given the totality of the evidence presented.

Officers Hendry and Munger's testimony was subjected to cross examination about the circumstances under which the statements were made. R. 47-59; 64-72. And , of course, Sanders testified in her own behalf. R. 326-398. Sanders did not deny having thrown oil on the decedent. She only contested the circumstances under which she did so. According to her testimony, the decedent was in bed, corroborating the victim. R. 51. However, according to her, he was turning toward her when she threw the oil on him. R. 365.

Sanders' testimony provided no basis for suggesting any fabrication on the part of the decedent. She admitted to being the decedent's wife, and to pouring oil on him while he was in bed. This merely made factual differences between her version of what happened and that of state witnesses a factual issue for the jury to resolve. R. 326-398.

The cross examination requirement stated in **Crawford v. Washington**, 541 U.S. 36, 52 (2004) is not applicable where statements by a decedent are admissible under applicable rules of evidence. The record reflects they were admitted after a full suppression hearing. R. 25-101.

The appellee would submit that this issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECTS THE JURY WAS PROPERLY INSTRUCTED.

Ms. Sanders argues that the trial court erred in denying her a jury instruction based upon "the castle doctrine." This would be proposed jury instruction D-10, D-11. C.P. 77-78. She argues that since she was in her home, allegedly not the aggressor, and not doing anything illegal, she had a right to defend her ground and herself from what she believed was the possibility of being killed by her husband. Appellant's brief page 22-24.

To the contrary, the record reflects that the trial court found that there was a lack of evidentiary support for these instructions. This would be support for instructions dealing with a right not to retreat in your own home. The court found that the testimony of Ms. Sanders did not provide any such support. R. 417. There was no testimony about her house, or even her personal space being invaded so that she could not retreat. This would be when she threw oil on the victim. She did not testify about any "inability to retreat" from her husband at the time she admitted pouring boiling oil on him. R. 365.

Rather she testified to following the decedent down a hall. She followed him with the pot of oil in her hand. She admitted that she passed two doors from which she could have left the house. R. 389-390. However, rather than leaving to avoid conflict, she followed her husband to his bed. She admitted that she threw the oil on him while he was in his bed.

The Court's ruling was as follows:

> Alexander: Your Honor, we have a case, **May v. State**, that says no duty to retreat is acceptable, particularly in light of the fact that the district attorney was suggesting she had several doors she could exit out of.
>
> Court: All right. You have your record. The testimony is that she followed Mr. Sherman to the bedroom. I think it's inconsistent with the evidence and I'm not

giving it. R. 417.

Ms. Sanders testified that the decedent allegedly attacked her, threatened her and that she was afraid of him. However, she testified that after allegedly being attacked, she was released. She testified: "He went that way."R. 354. She then testified to following the alleged initial aggressor. She followed him down a hall to his bed room. "I followed him back there." R. 354.

She went through a door to her kitchen. She picked up hot cooking oil from her stove. "I got a pot off the stove and I followed." R. 354. She continued following his path down the hall. She had a pot of oil in her hand. She testified to pouring hot oil from her stove on him with him in the bed. "He came up and turned to me, and I tossed the grease." R. 354.

Q. What did you do at that time? What did you do?

A. More or less, I looked around. I didn't know what to do. **I went to the kitchen. I got a pot off the stove and I followed. I followed him back there. What did he do? He went to the bed. He came up and turned to me, and I tossed the grease.**

Q. Do you see a gun?

A. Yes, I did see a gun.

Q. In his hand?

A. It was in his hand. R. 354. (Emphasis by appellee).

On cross examination, Edna Mae Sanders admitted that she passed two different doors while following her husband toward the bedroom.

Q. And I understand that, ma'am. **As you ran to the kitchen and he went that way, was there a door–there was a door in the kitchen you could have went out of, is that correct?**

A. **Yes.**

Q. As he was that way towards your–your bedroom is down the hallway, correct?

A. (Nods head affirmatively.)

Q. There's a door right there, a front door right there; is that correct?

A. Correct.

Q. **You could have went out that door, correct?**

A. **Correct.** R. 389-390. (Emphasis by appellee).

In **Westbrook v. State** 29 So.3d 828, 833 (¶15)(Miss. App. 2009), the court affirmed the trial court's denial of a castle doctrine jury instruction. There was no evidence that the victim was forcibly entering Westbrook's home or unlawfully attacking him. Rather there was evidence that at the time of the fatal assault the unarmed victim was in a parking lot.

> ¶ 15. The evidence showed that Sharpe was not "in the process of unlawfully and forcibly entering, or had unlawfully and forcibly" entered Buddy's when Westbrook began attacking Sharpe. Moreover, there was no evidence that Sharpe was going commit an assault, offer violence to an occupant of Buddy's, or commit some other crime on the premises while he was in the parking lot at Buddy's. The evidence only established that Sharpe in the parking lot, unarmed, when Westbrook began attacking him. Therefore, we find that Westbrook's killing of Sharpe cannot be justified under the "Castle Doctrine." Accordingly, this issue is without merit.

In **Murphy v. State**, 566 So. 2d 1201, 1206 (Miss. 1990), this Court stated that a defendant was not entitled to an instruction which incorrectly stated the law, or was without foundation in the evidence or is stated elsewhere.

> A defendant is entitled to have an instruction on his theory of the case. **Young v. State**, 451 So. 2d 208, 210 (Miss. 1984); see also **U.S. v. Conroy**, 589 F. Ed 2d 1258, 1273 (5th Cir. 1979), cert. denied, 444 U.S. 831, 100 S. Ct. 60, 62 L. Ed 2d 40 (1979). There is a limitation, however, because a trial judge may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions. **U.S. v. Robinson**, 700 F. 2d 205, 211 (5th Cir 1983), appeal after remand 713 F. 2d 110, reh. den. 719 F. 2d 404, cert den. 465 U.S. 1008, 104 S. Ct. 1003, 79 L. Ed 235 (1984).

The record reflects that Sanders was given jury instructions S-5, and D-12 dealing with self defense. C. P. 58 ; 79. The appellee would submit that these instructions adequately presented her

self defense claim, as reflected in her testimony. R. 326-398.

The appellee would submit that this issue is lacking in merit.

PROPOSITION III

THE RECORD REFLECTS THAT SANDERS TESTIFIED ABOUT HER HUSBAND'S ALLEGED VIOLENT ACTIONS TOWARD HER.

Mr. Sanders argues that she was denied her right to fully testify about her state of mind. This was allegedly at the time of a fatal confrontation with her husband. She argues that she allegedly was not allowed to testify about her husband not only attacking her but also threatening to kill her. She argues this, in turn, prevented her from fully defending herself against the murder charge. Appellant's brief page 23-26.

To the contrary, the record reflects that Sanders testified without objection about alleged confrontations with her husband. This included his allegedly attacking and hitting her. R. 328-337. The record also reflects that she testified, more than once, that she allegedly was afraid he "was going to kill me." R. 354; 364.

Q. You can't say what anybody else said. **Did you think that your life was in danger?**

A. **Yes.**

Q. Or the lives of your children?

A. Yes.

...

Q. **At some point, did you take any steps to defend yourself or your children?**

A. **Yes, I did. Yes, I did.**

Q. What did you do? **What were you thinking at that time?**

A. **I was thinking, oh, this man is going to, he's going to kill me.** R. 364. (Emphasis by appellee).

The record reflects that the trial court sustained objections to Sanders' attempts at testifying about what her deceased husband allegedly said to her. There was also a proffer as to testimony about the decedent allegedly sexually assaulting Sanders' daughter. R. 296. However, this alleged conduct had not been previously revealed to law enforcement or provided in discovery. In addition, the daughter admitted she was neither present nor saw anything that occurred when Sanders threw oil on her step-father. R. 309-310.

> Court: What you are suggesting is a state of mind–the state of mind issue, Mr. Alexander, has to do with the state of mind as to whether she had a reasonable apprehension of a design that he was going to kill her or assault her. **It's not as to a reasonable design as to whether he sexually assaulted my daughter. That's not a basis.** R. 296. (Emphasis by appellee).

While Ms. Sanders testified about her husband's alleged violent actions toward her, she also attempted to testify about what he allegedly said. This would be what he alleged said to her during the events leading up to their fatal confrontation. The trial court sustained objections to this as hearsay. R. 335-342.

> Q. What did he do?
>
> A. He yanked me by my hair and shoved me down the stairway and said, bitch, I'll kick your ass out of the door if you don't–
>
> Fisher: I object to the hearsay.
>
> Court: Sustained.
>
> Alexander. Stop. Stop. Stop.
>
> Court: Ms. Sanders, let me explain to you again.
>
> Sanders: Say what he said or don't.
>
> Court: You may not say what Mr. Sanders said. That's called hearsay, and you may not say it.
>
> Defendant: Okay.

Court: The jury is to disregard that statement. R. 342-343.

In **Quimby v. State**, 604 So. 2d 741, 747 (Miss. 1992), the Court found that the trial court had discretion to determine if hearsay should be admitted. This would be under any of the exceptions to hearsay as contained in M. R. E. 803, "Hearsay Exceptions." This court also stated that unless there was evidence of an abuse of discretion, it would not reverse a trial court's ruling.

> A trial court is entitled to a considerable measure of judicial discretion in deciding whether or not to admit hearsay evidence under either 803(24) or 804(b)(5), and a determination of admissibility will not be overturned on appeal absent an abuse of discretion. These observations, however, presuppose the presence of findings made on the record.

Investigator Richard Fayard with the Hancock County Sheriff's office testified that he inspected the Sanders' home for evidence. He testified that he found no weapons, or handguns in the house. R. 216. He testified to finding what appeared to be "a hand turned inside out." It was determined to be skin as well as attached fingernails from a hand. R. 203. He also found what appeared to be an abundance of oil or grease on the bed, and on the headboard behind the bed. Fayard testified that a tie on the bed had "crinkled" up from apparent exposure to the oil at a "high heat" or temperature. R. 207-208. Fayard concluded from his investigation that the decedent was "attacked in bed." R. 215.

> Q. So please try to speak loudly.
>
> A. .. And there was on the hand basin what at first I thought was like a latex glove. **Upon further review, I was looking at it, and I could tell that it was a hand. It looked like a hand turned inside out. It had the fingernails and all attached to it.** R. 203.
>
> ...
>
> A. When we first looked at it, I walked into the room, and I looked at the bed and noticed how the pattern was on the bed was covered with oil, and noticed that the tie was laying in there. **And being that it's made of like, I'm not a professional, but I'm going to say like a polyester material, and it had been crinkled from being exposed to high heat, and I figured that would be evidence of the temperature**

of the oil. R. 207-208.

...

Q. Did you see any other amounts of that quantity anywhere else around the house?

A. Other than splashed on the back of the headboard by the bed, no, sir. R. 208.

...

Q. **So before you left the house after being there two hours, you had concluded that Sherman Sanders was attacked in bed?**

A. **From the evidence that I gathered, yes, sir.** R. 215. (Emphasis by appellee).

In **Nicholson on Behalf of Gollott v. State** , 672 So.2d 744, 754 (Miss. 1996), the court found that statements admitted to explain why a witness feared someone were admissible. They were not hearsay; whereas, statements about what an alleged assailant said were not admissible.

> On the merits for hearsay, this Court requires an indicia of reliability for such testimony, following federal requirements. **Stoop v. State**, 531 So.2d 1215, 1221 (Miss.1988) (citing Ohio v. Roberts, 448 U.S. 56, 65, 100 S. Ct. 2531, 2538-39, 65 L.Ed.2d 597, 607 (1980)). The trial court instructed Fuller to testify only to what she did as a result of her conversation with Diane. Accordingly, Fuller did not testify as to what Diane said, but only its effect. Therefore, Fuller did not testify as to hearsay. See **Gayten v. State**, 595 So.2d 409, 414 (Miss.1992). Also, this Court has held that if statements are introduced for the purpose of explaining why the declarant had fear, then the statement is not hearsay. **Knight v. State**, 601 So.2d 403, 406 (Miss.1992). Also, Diane's statements are questions as to whether Fuller would look over Diane's apartment. Inquiries do not assert anything. **Gayten**, 595 So.2d at 414.

In **Clark v. State** 928 So.2d 192, 195 -196 (¶16) (Miss. App. 2006), the Court affirmed the trial court in finding a defendant was not prevented from testifying about his fear of a victim. In that instance, the trial court sustained objections where such testimony was repetitive.

> ¶ 14. After our examination of the record, we find that Clark was not prevented from testifying about his fear of Durham and Woodruff. Rather, Clark testified regarding such fears on both direct and cross-examination. Clark testified that Durham threatened him and that Woodruff and Downing heard the threats. He also testified that Woodruff cursed him. When Clark was asked, "What was your fear based on?" He responded, "I was going to get hurt."
> ¶ 15. Furthermore, the prosecution offered evidence regarding Clark's alleged fears of Durham and Woodruff. Joseph Evans, Ted Downing, and Durham were eyewitnesses to the assault and they each testified regarding Clark's state of mind. Each witness testified that no threats were made against Clark before he attacked

> Woodruff. They also testified that Woodruff was sitting down, smoking a cigarette, and had no weapon on him when Clark stabbed him. Clark's own testimony on cross-examination admitted the same.
>
> ¶ 16. Clark simply misstates the trial court's ruling. The trial judge found Clark's testimony admissible but excluded the repetition of such testimony on re-direct. Thus, the record proves that Clark did testify regarding who threatened him, what was said, and under what circumstances. The trial judge properly exercised his discretion to either accept or reject the evidence offered and no prejudice resulted. **Austin v. State**, 784 So.2d 186, 193-94 (¶¶ 23-24) (Miss.2001). We find this issue to lack merit.

The appellee would submit that we have cited sufficient credible, record evidence for showing that Sanders testified that she was afraid of the decedent. She testified without objection that she was afraid he was going to kill her. R. 354; 364. She testified to her state of mind, which was a state of fear. This was allegedly the state of mind she was in when she threw hot grease off her stove onto the decedent.

There was record evidence in support of the jury's verdict. R. 441-442. The jury found that there was sufficient evidence for inferring that Sanders had acted with reckless disregard for the value of the decedent's life when she threw boiling oil on him. This was while he was in his own bed. There was forensic evidence indicating that the oil was "hot" enough to produce "deep burns" over 50% of the decedent's body. R. 265-268. Investigators could smell burning flesh when they arrived. R. 46.

In **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983), the Court stated that any conflicts in the evidence created by testimony from defense witnesses was to be resolved by the jury. What the jury believes and who the jury believes as to what piece of evidence presented is solely for their determination. As stated:

> Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting

> testimony into finding of fact sufficient to support the verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. **Shannon v. State**, 321 So. 2d 1 (Miss. 1975) 373 So. 2d at 1045.

The appellee would submit that the record clearly reflects that Sanders testified about the decedent's alleged aggression toward her both before and on the night in question. R. 326-372. The record reflects that Sanders was only prevented from testifying about what the decedent allegedly said to her. R. 335-342. This was during the series of events that lead up to his having hot cooking oil poured on him while he was in bed.

The appellee would submit that this issue is also lacking in merit.

CONCLUSION

Sanders' conviction for murder and life sentence should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 23rd day of June, 2010.

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