

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00120 COA**

DEWAYNE HEFFNER

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	01/05/96
TRIAL JUDGE:	HON. ANDREW CLEVELAND BAKER
COURT FROM WHICH APPEALED:	PANOLA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DAVID L. WALKER
ATTORNEY FOR APPELLEE:	W. GLEN WATTS
	BY: W. GLEN WATTS
DISTRICT ATTORNEY:	ROBERT L. WILLIAMS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I MURDER: CT II MURDER: CT I SENTENCED TO SERVE A TERM OF LIFE IN THE MDOC; CT II SENTENCED TO SERVE A TERM OF LIFE IN THE MDOC, TO RUN CONSECUTIVE TO CT I; DEFENDANT SHALL PAY ALL COSTS OF COURT
DISPOSITION:	AFFIRMED - 9/23/97
MOTION FOR REHEARING FILED:	10/2/97
CERTIORARI FILED:	
MANDATE ISSUED:	12/9/97

BEFORE THOMAS, P.J., HERRING, AND SOUTHWICK, JJ.

HERRING, J., FOR THE COURT:

Dewayne Heffner was indicted and convicted in the Circuit Court of Panola County, Mississippi, on two counts of depraved heart murder and sentenced to two life sentences with the Mississippi Department of Corrections, the terms of each sentence to run consecutively. On appeal, Heffner states in his brief a single issue:

THE TRIAL COURT ERRED IN NOT GRANTING HEFFNER'S REQUEST FOR A DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND HEFFNER'S PEREMPTORY JURY INSTRUCTION D-1, ON THE GROUND THAT THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Following a review of the evidence and testimony presented at trial, we find no error, and accordingly, we affirm the jury verdict and sentence of the trial court.

I. THE FACTS On December 4, 1994, at some time around midnight, Maurice Cooper, Antonio Heintz, Eunice Hull, and Kenny Conner were at a dance at Draper's Pool Hall, a local bar in Sardis, Mississippi. The four had traveled to Draper's in a maroon van which Heintz parked in the parking lot of the bar. The Appellant, Dewayne Heffner, and Terry Harris, together with Lynn Jackson and Teresa Ellis also arrived at the same local bar around midnight. Harris also parked his vehicle in the same parking lot. Kenny Conner was apparently upset with Harris for dating Lynn Jackson whom he had dated in the past. At a later time, as Heffner, Harris, Jackson, and Ellis were walking away from the bar and toward their vehicle, Conner approached Harris and shot him from behind with a sawed-off .22 caliber rifle. Maurice Cooper, a sixteen year old minor, was standing near the maroon van at the time of the shooting along with Antonio Heintz and Eunice Hull. After they observed Conner shoot Harris, the three of them climbed into the van and waited for Conner to join them. Conner then jumped into the van and closed the door. At that point, they attempted to leave the premises but were blocked by other vehicles and could not move. Instead, the van crashed into Draper's Pool Hall. Cooper testified that when Conner entered the van and closed the door, the shootings directed at the van began.

Dewayne Heffner had been walking four to six feet in front of Terry Harris when Conner shot Harris. After the shooting, Heffner ran to the vehicle which Harris had driven to Draper's, because Heffner knew a gun belonging to Harris was under the car seat. Heffner admitted at trial that he retrieved the pistol and used it to shoot at Conner. During the shooting, Antonio Heintz and Eunice Hull, who were sitting in the front seats of the maroon van, were each shot in the head. Heintz died while in the van, and Hull died of his injuries at nearby hospital.

Donna Stevens, a Panola County coroner/medical examiner and investigator, was called to the scene of the shooting. Stevens testified that in her investigation, she did not find any shells or gun shot casings inside the van, although there were numerous bullet holes in the vehicle itself. At trial several police officers who were dispatched to the area where the shooting occurred, testified for the State. Officers Timothy Beavers and James Hughes found several shell casings near the maroon van but did not find any casings inside the van. Beavers did find a .22 caliber rifle on a back seat of the van.

Teresa Ellis testified that after Conner shot Harris, she saw Dewayne Heffner run to the car in which they arrived. She also witnessed Heffner with a gun pointed at the maroon van. However, Ellis was unable to state whether Heffner actually shot Heintz or Hull, since she did not observe the window of the van being shot out. A later inspection of the vehicle confirmed that a window of the van was broken and that bullet holes were located in the back side of the front seat. Ellis also testified that she did not see anyone shooting a gun at Heffner.

Testifying in his own defense at trial, Heffner admitted to shooting at Kenny Conner several times but

insisted that he was only shooting at Conner in self-defense. Heffner also contends that he did not know either of the victims, Antonio Heintz or Eunice Hull, and that if he did shoot them, it was only done in self-defense.

At trial, Heffner moved for a directed verdict at the close of the State's case and argued that the State failed to set forth sufficient evidence to convict Heffner of murder. The trial court denied Heffner's request. At the close of the trial, Heffner requested a peremptory instruction asking the trial court to direct the jury to find him not guilty of the crimes of which he was charged because the evidence failed to support his conviction. The trial court denied Heffner's request for the peremptory instruction. However, the written instructions issued by the trial court to the jury at the close of the trial did include instructions on depraved heart murder, manslaughter, and culpable negligence. In addition, the jury was instructed on the issue of self-defense. Subsequently, the jury found Heffner guilty of two counts of murder as originally charged in the indictment. Thereafter, the trial court denied Heffner's request for a new trial and his motion for a judgment notwithstanding the verdict.

II. THE ISSUES

A. DID THE TRIAL COURT ERR IN DENYING HEFFNER'S MOTION FOR A DIRECTED VERDICT, HIS REQUEST FOR A PEREMPTORY INSTRUCTION, AND HIS MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT?

B. DID THE TRIAL COURT ERR IN DENYING HEFFNER'S MOTION FOR A NEW TRIAL?

III. ANALYSIS

A. DID THE TRIAL COURT ERR IN DENYING HEFFNER'S MOTION FOR A DIRECTED VERDICT, HIS REQUEST FOR A PEREMPTORY INSTRUCTION, AND OR HIS MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT.

Heffner appeals from the trial court's denial of his motion for a directed verdict which he made at the close of the State's case and the denial of his request for a peremptory instruction. The State asserts that Heffner failed to renew his motion for a directed verdict at the close of the trial and thus, waived this issue for appeal. However, Heffner did request a peremptory instruction thereby effectively renewing his motion for a directed verdict. *See Wetz v. State*, 503 So. 2d 803, 806 (Miss. 1987). Additionally, in his post trial motions, Heffner requested a new trial or a judgment notwithstanding the verdict, based upon his assertion that the State failed to establish a prima facie case of murder and that the verdict was against the overwhelming weight of the evidence.⁽¹⁾

When considering a denial of a motion for new trial, a judgment notwithstanding the verdict or a peremptory instruction, the trial court is faced with a challenge to the legal sufficiency of the evidence presented against a criminal defendant. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). In such a situation, an appellate court reviews the ruling of the trial court on the last occasion such a challenge was made. *Id.* Thus, we will review whether or not the trial court erred in denying Heffner's motion for a judgment notwithstanding the verdict, which is the last occasion that Heffner challenged the legal sufficiency of the evidence upon which the jury convicted him.

On review of a denial for a motion for a judgment notwithstanding the verdict, we are required to consider the evidence in a light most favorable to the verdict, giving the State, in this case, the benefit of all inferences reasonably drawn from the evidence presented. *McClain*, 625 So. 2d at 777. The credible evidence which is consistent with the jury verdict must be accepted as true. *Id.* "We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence considered is such that reasonable and fair-minded jurors could only find the accused *not guilty*." *Id.* (citations omitted) (emphasis added). Additionally, the weight and credibility of the evidence submitted at trial are to be resolved by the members of the jury. *Id.* Pursuant to these standards, we review the evidence presented at trial in this case.

We are obliged to accept as true these facts: (1) Heffner had a gun which he pointed at the van in which Heintz and Hull were sitting, (2) no gun shell casings were found in the van to indicate that anyone in the van was shooting at Heffner, and (3) Heintz and Hull died from gun shot wounds to their heads as a result of the gun fire. Additionally, we acknowledge Heffner's admission that he pointed a gun and fired the weapon at least seven times at Conner who, at some point during the melee, jumped into the maroon van, where Hull and Heintz were killed by gunshot wounds.

The members of the jury were given written instructions that if they found beyond a reasonable doubt that Heffner had committed depraved heart murders, then they could find Heffner guilty on two counts of murder. Depraved heart murder is defined as follows:

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

Miss. Code Ann. § 97-3-19 (Supp. 1996). Viewing the facts and reasonable inferences in a light most favorable to the jury's verdict, we simply cannot say that there was insufficient evidence for the jury to convict Heffner of murder, nor can we say that reasonable and fair-minded jurors could have only found Heffner not guilty of the charges against him. Accordingly, we find that the trial court did not err in denying Heffner's motion for a judgment notwithstanding the verdict since there was ample evidence to support the jury's decision.

B. DID THE TRIAL COURT ERR IN DENYING HEFFNER'S MOTION FOR A NEW TRIAL.

In addition to challenging the sufficiency of the evidence, Heffner argues that the verdict of the jury was against the overwhelming weight of the evidence presented in this case and as such, he should be granted a new trial. Such a motion challenges the weight of the evidence and challenges the trial court's sound discretion in ruling on the motion. In determining whether the verdict was against the overwhelming weight of the evidence, an appellate court will accept as true all evidence favorable to the State and will only reverse when the Court is convinced that the trial court abused its discretion in denying a motion for new trial. *Herrington v. Spell*, 692 So. 2d 93, 103 (Miss. 1997). Moreover, this Court will not set aside the verdict of a jury on such a motion unless the verdict is so contrary to the

overwhelming weight of the evidence that permitting it "to stand would sanction an unconscionable injustice." *Clark v. State*, 693 So. 2d 927, 930 (Miss. 1997) (citations omitted).

Considering the evidence presented at trial and accepting as true all evidence favorable to the State, we cannot conclude that the result reached by the jury would "sanction an unconscionable injustice." Thus, we find that this issue has no merit. We affirm the judgment and sentence of the trial court.

THE JUDGMENT OF THE CIRCUIT COURT OF PANOLA COUNTY OF CONVICTION OF TWO COUNTS OF MURDER AND SENTENCE OF TWO LIFE TERMS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SENTENCES TO RUN CONSECUTIVELY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO PANOLA COUNTY.

BRIDGES, C.J., THOMAS, P.J. , COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. McMILLIN, P.J., NOT PARTICIPATING.

1. The standard of review for a claim that a defendant is entitled to a new trial because the verdict was against the overwhelming weight of the evidence is different from the appellate court's standard of review when considering a motion for a judgment notwithstanding the verdict. This difference will be discussed below.