

**IN THE COURT OF APPEALS 12/29/95**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 93-KA-O1109 COA**

**ALVIN JUDE RUSSELL**

**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

TRIAL JUDGE: HON. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MICHAEL W. CROSBY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY KLINGFUSS

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL/MURDER

TRIAL COURT DISPOSITION: FOUND GUILTY AND SENTENCED TO LIFE IN THE  
CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE BRIDGES, P.J., KING, AND SOUTHWICK, JJ.

BRIDGES, P.J., FOR THE COURT:

The defendant, Alvin Jude Russell was indicted and tried for the murder of his wife pursuant to section 97-3-19 of the Mississippi Code. The jury convicted Russell and sentenced him to life imprisonment in the custody of the Mississippi Department of Corrections. Aggrieved, Russell appeals, claiming that he was denied his right to assert an insanity defense. Specifically, Russell argues that the trial court erred in excluding the expert and lay testimony offered by the defense to prove his claim of insanity. Russell also alleges that the lower court erred in its refusal to grant a jury instruction on the lesser-included offense of manslaughter. After a careful review of these issues on appeal, we reverse and remand this case for a new trial.

### FACTS

At the time of the incident, Russell was a forty-eight-year-old male with many physical and emotional problems. Russell's doctor diagnosed him with a tumor in his pituitary gland, which caused him to be confused and disoriented. Russell's doctor also classified Russell as depressed. Furthermore, IBM, Russell's employer, had informed Russell that the company was downsizing and they would offer incentives to all employees who retired early. Afraid that he may be laid off without money, Russell decided to leave employment with the company. Moreover, he and his wife undertook to set up a furniture making business, which later failed. Because of the strain put on the marriage as a result of all the above problems, his wife, Rebecca Russell, (Rebecca) moved out of the couple's home and served her husband with divorce papers. As a result, Russell became depressed and disoriented.

On the day of the shooting, the couple had agreed to meet at a bank in order to withdraw money from a joint savings account. Once Rebecca arrived, Russell walked over to her car, and said:

this doesn't make any sense, Becky. Why don't you tell me if you truly want this divorce? If you want something tell me what it is otherwise I cannot handle all of this legal stuff. If you just take half of everything that I have, we'll split the bank account in half, we'll split the house and sell it. Whatever we have we'll split right down the middle. I think that's fair. If you don't think so, tell me. Let's start somewhere. I can't believe what you're demanding from me is coming from you, I know it's coming from the scumbag divorce lawyer.

Rebecca responded by telling Russell that she would discuss it with her lawyer and then turned around and began walking toward the bank. According to Russell's testimony, he did not know or remember exactly what happened next, except that he heard a gunshot and realized that he had a gun in his hand. He testified that he saw his wife starting to fall toward him. Russell claimed that he shot his wife again but he did not understand why he did so. Rebecca was pronounced dead at the scene of the crime.

During trial, the defense sought to bring forth evidence of the defendant's insanity through the testimony of an expert as well as lay witnesses. In order to decide whether or not to admit the testimony, the trial judge conducted a hearing outside the presence of the jury. The trial judge ruled that the insanity defense was not admissible to the jury because the defense had not created a

reasonable doubt as to the defendant's sanity. After hearing the testimony, the trial judge decided that the testimony of the expert was not admissible because in the expert's opinion, the defendant was suffering from a mental defect, but the defendant knew the difference between right and wrong. The judge prohibited the testimony of the lay witnesses on the grounds that they could not testify as to the defendant's state of mind at the time of the actual shooting. For the foregoing reasons, the trial judge prohibited the defendant from interposing an insanity defense in any form.

## LAW

A brief discussion of the insanity defense would prove helpful in understanding this opinion. Courts of this state still apply the M'Naghten test in determining the issue of insanity. *Roundtree v. State*, 568 So. 2d 1173, 1181 (Miss. 1990); *Davis v. State*, 551 So. 2d 165, 173 (Miss. 1989). In order to prove insanity under the M'Naghten standard, the defense must prove that the defendant was unable to distinguish the difference from right and wrong at the time of the crime. *Laney v. State*, 486 So. 2d 1242, 1245 (Miss. 1986). The defense of irresistible impulse is unavailable in Mississippi, unless the impulse is caused by a mental disease which exists to such a high degree that the defendant's conscience, judgment and reason are affected and would result in the defendant's inability to distinguish right from wrong. *Westbrook v. State*, 658 So. 2d 847, 850 (Miss. 1995). The jury is charged with determining the issue of sanity. In arriving at its final decision, the jury may accept or reject expert and lay witness testimony. *Tyler v. State*, 618 So. 2d 1306, 1308 (Miss. 1993) (citing *Roundtree v. State*, 568 So. 2d 1173, 1181 (Miss. 1990); *Yarbrough v. State*, 528 So. 2d 1130, 1130 (Miss. 1988)). The defense must create a reasonable doubt as to the sanity of the defendant at the time of the act; however, once the reasonable doubt is created, the State bears the burden of proving the defendant's sanity beyond a reasonable doubt. *White v. State*, 542 So. 2d 250, 252 (Miss. 1989).

### I. THE TESTIMONY OF THE EXPERT AND LAY WITNESSES ON THE ISSUE OF INSANITY

At trial, after the State rested, the defense sought to introduce evidence through the testimony of Dr. Cox, a psychiatrist who had previously examined the defendant. At this time, the trial judge would not allow Dr. Cox to testify in the presence of the jury but did allow the defense to proffer the testimony outside the presence of the jury. Dr. Cox testified that he examined the defendant on three different days for a total of four hours. The doctor also testified that he examined the defendant's previous medical records and spoke with the Defendant's preceding doctors. Dr. Cox concluded that although he believed that, in general, the defendant knew the difference between right and wrong, the tumor in his pituitary gland may have caused the defendant to have a rage attack on the day of the shooting which overwhelmed his reason and judgment. The trial judge ruled that Dr. Cox's testimony was not admissible because Dr. Cox could not conclude that the defendant did not know the difference between right and wrong, and had therefore, failed to lay a proper predicate for an insanity defense. We believe that the trial judge acted correctly.

In Mississippi, the issue of whether or not the opinion of an expert is admissible is a question of law for the trial judge. *Billiot v. State*, 454 So. 2d 445, 459 (Miss. 1984) (citations omitted). The trial judge should base his decision on whether or not the opinion is based on and supported by sufficient facts and evidence. *Gulf Ins. Co. v. Provine*, 321 So. 2d 311, 314 (Miss. 1975). This Court will

reverse the decision if the trial judge abuses his discretion. *Billiot*, 454 So. 2d at 459.

Here, the opinion of the expert, did not support the ultimate conclusion of insanity. Instead, the expert testified that the defendant acted out of an irresistible impulse and therefore had no control over his actions.

The defendant is proved sane until the defense creates a reasonable doubt of sanity. *Roundtree v. State*, 568 So. 2d 1173, 1181 (Miss. 1990). In this case, the expert's testimony was not admissible on the issue of insanity because the expert testified that the defendant knew right from wrong and therefore, did not satisfy the legal definition of insanity in Mississippi. The defense sought to introduce the testimony of the expert to create a presumption of insanity. The testimony of the expert was not relevant to the issue of insanity. The expert testified that the defendant acted out of an uncontrollable impulse. The uncontrollable impulse theory is not the correct standard for proving insanity in this state. *Westbrook v. State*, 658 So. 2d 847, 850 (Miss. 1995).

For the above reasons, we believe that the trial judge did not err by prohibiting the testimony of Dr. Cox to be submitted to the jury.

The trial judge also refused to allow the testimony of two lay witnesses, Carol Haynes and Wayne Russell, from being submitted to the jury, although he allowed it to be proffered for the record. Carol Haynes, the defendant's sister testified that based on her observations, conversations, and meetings with the defendant for a period of three weeks prior to the shooting, the defendant did not know the difference between right and wrong at the time of the shooting. Wayne Russell's testimony mirrored Carol Haynes' testimony, except that he had not had as frequent contact with the defendant. The trial judge refused to allow the testimony of these two witnesses to be submitted to the jury on the grounds that they had not had contact with the defendant on the day of the shooting, and therefore, could not testify as to the defendant's sanity at the time of the crime.

In *Groseclose v. State*, our supreme court stated that when the insanity defense is tendered, both expert and lay testimony are admissible. *Groseclose v. State*, 440 So. 2d 297, 301 (Miss. 1983). In *Porter v. State*, the court reiterated the criteria for lay witness testimony when an insanity defense is interposed. The court said:

[A] lay witness may express an opinion that another is insane only when a sufficient predicate is laid to establish that: (1) the witness has had a reasonably sufficient opportunity to observe the subject and (2) has noted behavior on his part reasonably indicative of an unsound mind and upon which he bases an opinion that the subject was, at the time of his observation by the witness, of unsound mind. The witness may not make a prognosis or project into some future time an opinion as to the mental condition of the subject nor may he extend it to a date subsequent to the observation. He is limited, in expressing an opinion, to the time when he had the subject under his observation.

*Porter v. State*, 492 So. 2d 970, 975 (Miss. 1986) (citing *Alexander v. State*, 358 So. 2d 379, 384 (Miss. 1978)). The *Porter* case went on to state that if a lay witness does not observe the defendant at the time that the crime is committed, the witness's testimony concerning the defendant's sanity at the moment of the crime is inadmissible. *Id.*

In the case at hand, the trial judge did not act erroneously in refusing to allow the two witnesses to testify as to the sanity of the defendant at the time of the shooting. Neither had observed the defendant immediately prior to the shooting or during the course of the shooting. The trial judge found that a sufficient predicate had not been laid.

For the foregoing reasons we find that this issue is without merit.

## II. REFUSAL OF THE MANSLAUGHTER INSTRUCTION

The defendant also claims that the court erred in refusing a manslaughter instruction. Specifically, the defendant claims in his brief that the lower court erred in refusing all defense instructions as well as all defenses. The lower court denied defense's request for instructions dealing with manslaughter, deliberate design, and insanity. The defendant testified in essence that he did not know what he was doing at the time of the shooting and that he had no intention of hurting his wife when he met her at the bank. The court ruled that all of the defendant's testimony of the incidences which led up to the shooting was not admissible. We must disagree.

The defendant's testimony should have been admitted on the issue of insanity and on the issue of manslaughter. The defendant sought to testify that he was disoriented and confused and that he was under the care of a doctor for a pituitary tumor. He also testified that he had no intention of hurting his wife when he went to the bank to meet her. The defendant further claimed that he did not know what he was doing at the time of the shooting. In light of this testimony, the jury could have found the defendant guilty of manslaughter or found the defendant insane. This testimony should have been admitted and the proper jury instructions should have been given. In a very recent decision, *Giles v. State*, 650 So. 2d 846 (Miss. 1995), the Mississippi Supreme Court stated the following:

In a homicide case, as in other criminal cases, the court should instruct the jury as to theories and grounds of defense, justification or excuse supported by the evidence, and a failure to do so is error requiring reversal of a judgment of conviction. Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction for the court. Where a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error.

*Giles v. State*, 650 So. 2d 846, 849 (Miss. 1995) (citing *Hester v. State*, 602 So. 2d 869, 872-73 (Miss. 1992)).

Accordingly, we reverse the judgment of the lower court and remand this case for a new trial last issue discussed in this opinion.

**THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS REVERSED AND REMANDED FOR A NEW TRIAL. COSTS ARE TAXED TO HARRISON COUNTY.**

**FRAISER, C.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.**