

**IN THE COURT OF APPEALS 12/29/95**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-KA-00854 COA**

**LEONARD HAYES**

**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. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ANTHONY J. BUCKLEY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: JEANNENE T. PACIFIC

NATURE OF THE CASE: CRIMINAL - MANSLAUGHTER

TRIAL COURT DISPOSITION: SENTENCED TO SERVE A TERM OF 20 YEARS IN THE  
CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE FRAISER, C.J., KING, AND SOUTHWICK, JJ.

KING, J., FOR THE COURT:

Leonard Hayes was indicted and convicted in the Circuit Court of Jones County of manslaughter. The trial court sentenced him to a term of twenty years in the custody of the Mississippi Department of Corrections. Hayes appeals and assigns three errors in the trial below. Finding no error, we affirm.

I.

On November 6, 1993, Sandra Hayes, the fifteen-year-old sister of the defendant, Leonard Hayes, was visiting McCullum's Bar and Bar-B-Q Pit in Laurel, Mississippi when Noel Breland, a twenty-one-year-old male, began making sexual advances toward her. Sandra rejected his advances. As Sandra walked to her boyfriend's vehicle, Breland began yelling obscenities at her. Breland followed her to her friend's vehicle and poured alcohol over the front of the vehicle. Breland then walked to the passenger side and threw beer in Sandra's face and punched Sandra in the face several times. Upon witnessing Breland's actions, the defendant Hayes reached into the glove compartment, pulled out a gun, and fired a shot at Breland. Breland then punched Sandra again and Hayes fired another shot. Hayes fired a third time when Breland continued to hit Sandra. Breland was killed and Sandra lost two of her fingers.

On December 2, 1993, the Grand Jury of Jones County indicted Leonard Hayes for manslaughter. After deliberations, the jury found Hayes guilty as charged. Hayes was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections.

II.

1. WHETHER THE TRIAL COURT ERRED IN FAILING TO ENSURE A FAIR AND IMPARTIAL JURY?

Hayes contends that he was denied a fair trial because the trial court refused to allow him to challenge for cause venireman Elvin Ulmer. Hayes argues that Ulmer should have been removed because he previously lived next door to the victim's family.

"The determination of whether a juror is fair and impartial is a judicial question. This Court will not set aside a trial court's determination that a juror is fair and impartial unless such determination clearly appears wrong." *Carr v. State*, 555 So. 2d 59, 60 (Miss. 1989). Additionally, the appellant must make a "threshold" showing that "he had exhausted all of his peremptory challenges *and* that the incompetent juror was forced upon him by the trial court's erroneous ruling." *Chisolm v. State*, 529 So. 2d 635, 639 (Miss. 1988) (emphasis added). In *Mettetal v. State*, the Mississippi Supreme Court held that:

The loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury. So long as the jury that sits is impartial, the fact that the

defendant had to use his peremptory challenges to achieve that result does not mean that the defendant was denied his constitutional rights.

*Mettetal v. State*, 602 So. 2d 864, 869 (Miss. 1992) (citation omitted).

In the instant case, the record clearly establishes that venireman Ulmer was not forced upon Hayes by the trial court's ruling since after the trial court refused Hayes's strike for cause, Hayes used a peremptory strike to eliminate Ulmer. It is, therefore, not necessary for us to reach the issue of whether the challenge for cause should have been granted. This assignment of error is without merit.

## 2. WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF GUILTY OF MANSLAUGHTER OR IN THE ALTERNATIVE WAS AGAINST THE OVERWHELMING WEIGHT OF THE CREDIBLE EVIDENCE?

By this issue, Hayes contends that the evidence was insufficient to support a conviction of manslaughter.

The scope of review by an appellate court is limited when presented with the question of the sufficiency of evidence. *Benson v. State*, 551 So. 2d 188, 192 (Miss. 1989). In *Swinford v. State*, the Mississippi Supreme Court explained that:

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with jury's verdict is quite limited. We proceed by considering all of the evidence-not just that supporting the case for the prosecution-in the light most consistent with the verdict. We give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fairminded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.

*Swinford v. State*, 653 So. 2d 912, 914 (Miss. 1995) (citations omitted).

In the instant case, the indictment charged that on November 6, 1993, Hayes did "wilfully and feloniously kill and slay Noel Breland, a human being, without malice, in the heat of passion, by the use of a dangerous weapon, a gun, in violation of section 97-3-35 of the Mississippi Code of 1972. . . ." Section 97-3-35 provides that: "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." Miss. Code Ann. § 97-3-35 (1972). Additionally, section 97-3-15 provides that:

(1) The killing of a human being by the act, procurement, or omission of another shall be justifiable in the following cases:

...

(f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished;

Miss. Code Ann. § 97-3-15 (1972). Therefore, to prevail on a claim of self defense, Hayes must (1) reasonably have believed himself or another to be in imminent danger of death or great bodily harm from the deceased; and (2) reasonably have believed that the deceased had the capacity to inflict death or great bodily harm. *Stennis v. State*, 234 So. 2d 611, 613-14 (Miss. 1970); *Spivey v. State*, 212 Miss. 648, 654, 55 So. 2d 404, 406-07 (Miss. 1951).

Here, it is undisputed that (1) Hayes killed Breland, a human being, (2) without malice, (3) in the heat of passion, (4) by the use of a dangerous weapon, a gun, and (5) without authority of law. This leaves the question of Hayes's claims that he shot and killed Breland in necessary self-defense of another person, his sister.

A review of the proceedings below reflects (1) that the deceased, Breland, was twenty-one years of age male and weighed 250 pounds; (2) that Sandra was fifteen years of age and weighed less than one hundred pounds; (3) that on the night in question Breland was intoxicated; (4) that Breland, unprovoked, began beating Sandra, with his fists when she rejected his advances; and (5) that the defendant Hayes, in his efforts to protect his sister, reached into the glove compartment of the car in which his sister was sitting, retrieved a gun, and fired three shots, killing Breland.

The question of whether Hayes's acted reasonably in the methods used to defend his sister was a proper issue for the jury to resolve. *See Hall v. State*, 644 So. 2d 1223, 1229 (Miss. 1994) (explaining that whether the defendant was acting in self-defense and whether excessive force was used in repelling an attack are issues for the jury to decide)). By finding Hayes guilty of manslaughter, the jury determined that Hayes's actions were not in necessary self-defense of his sister or that his actions were not objectively reasonable. We find that the evidence viewed in the light most favorable to the State is sufficient to support the verdict.

In an alternative theory, Hayes argues that the jury verdict was against the overwhelming weight of the evidence and that the trial court erred in denying his motion for a new trial. In *McClain v. State*, the Mississippi Supreme Court stated that where the defendant asserts that a new trial should have been granted because the jury verdict was against the weight of the evidence, the standard of review is as follows:

New trial decisions rest in the sound discretion of the trial court, and the

motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

*McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993) (citations omitted).

After hearing the evidence in the instant case, the jury chose to accept the state's version and to reject Hayes's version. "The jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain*, 625 So. 2d at 781. "Accepting as true the evidence favorable to the verdict, the verdict is not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice." *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987); *Temple v. State*, 498 So. 2d 379, 382 (Miss. 1986); *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983). This assignment of error is without merit.

### 3. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT'S JURY INSTRUCTION NO. D-8?

Hayes contends that the trial court erred in refusing to give Instruction D-8 to the jury. D-8 stated:

The Court instructs the Jury that when, as in this case, some evidence of self-defense of another, is offered by the defendant, the State must then prove beyond a reasonable doubt that the defendant, Leonard Hayes, did not act in self-defense of another; if the evidence does not show beyond a reasonable doubt that the defendant, Leonard Hayes did not act in self-defense of another, that being Sandra Hayes, then you must find him not guilty.

In refusing D-8, the trial judge stated that he found that the jury had been adequately instructed on the defendant's theory of the case.

The record indicates that Hayes requested and was granted D-6 and D-7, which clearly defined his theory of the case. D-6 stated:

The Court instructs the Jury that even though you believe from the evidence that the Defendant, Leonard Hayes, intentionally shot the deceased, Noel Breland, bringing about his death, and yet if you further believe from the evidence in this case that when said defendant shot Noel Breland, the deceased, it was done in lawful defense of his younger sister, Sandra Hayes, a minor, and that at the time of the shooting there was reasonable ground for Leonard Hayes to believe and he did believe a design on the part of the deceased, Noel Breland, to either kill or cause some great personal injury to his sister, Sandra Hayes, and that there was imminent danger of such design being accomplished,

then you should find the defendant Leonard Hayes not guilty.

D-7 stated:

The Court instructs the Jury that in deciding upon the guilt or innocence of Leonard Hayes, you should determine what an ordinary and reasonable man might have reasonably inferred from all the facts and circumstances by which the evidence shows that Leonard Hayes was at the time surrounded, and, in doing so must not try him in the light of subsequent developments, nor must you require of him the same cool judgment that the jury can now bring to bear upon the occurrence.

This Court does not review jury instructions in isolation; rather they are read as a whole to determine if they "announce the primary rules of law." *Bradford ex rel. Burton v. Barnett*, 615 So. 2d 580, 583 (Miss. 1993); *Strickland v. Rossini*, 589 So. 2d 1268, 1273 (Miss. 1991). Reversal is in order on the basis of faulty jury instructions "where we find two or more instructions in hopeless and substantive conflict with each other." *Strickland*, 589 So. 2d at 1273. However, reversal is not proper "if other instructions clear up the confusing points." *Id.*

The jury instructions submitted in the instant case accurately reflected the rules of law applicable to the "defense of others" theory. As a result, Hayes was not prejudiced by the refusal of the instruction. Because the jury was properly instructed, this Court finds that this assignment of error is without merit.

For the foregoing reasons, we affirm the conviction and sentence of the trial court.

**THE JUDGMENT OF THE JONES COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER AND SENTENCE TO SERVE TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST JONES COUNTY.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**