

IN THE COURT OF APPEALS 03/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00868 COA

JULIUS DEARMAN A/K/A JULIUS EVANS DEARMAN

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. ROBERT G. EVANS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF JASPER COUNTY

ATTORNEY FOR APPELLANT:

WILLIAM B. JACOB

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: DEWITT L. FORTENBERRY, JR.

NATURE OF THE CASE: CRIMINAL: MURDER

**TRIAL COURT DISPOSITION: SENTENCED TO A MANDATORY TERM OF LIFE IN THE
MDOC**

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

PAYNE, J., FOR THE COURT:

Julius Dearman was convicted of depraved heart murder and was sentenced to serve a mandatory term of life in the custody of the Mississippi Department of Corrections. The court denied Dearman's motion for JNOV or, in the alternative, a new trial. Feeling aggrieved, Dearman filed this appeal. We find that none of Dearman's issues on appeal has merit and therefore affirm.

FACTS

In the early morning hours of January 31, 1993, Aristotle Bender went to several residences in Jasper County, Mississippi, attempting to pawn a saw and a rifle. One of these residences was that of Julius Dearman where Bender was successful in pawning the saw for \$40.00 to a friend that was visiting at Dearman's home. Dearman and Bender did not see each other during this first visit. Later that morning, Bender, accompanied by O. W. Turner, returned to Dearman's home attempting to obtain more money. This time he was confronted by Dearman who told him that he would not give him any money. Dearman testified that he asked Bender to leave his home but Bender would not and kept insisting that Dearman give him some money. Dearman stated that he then "helped" Bender out of his trailer and onto the front porch, but Bender still would not leave. Dearman testified that he went back in the trailer, retrieved a pistol, and returned to the porch where he attempted to fire the pistol in the air. Dearman stated that the pistol would not fire and Bender still would not leave; therefore, Dearman went back into the trailer and got his .22 rifle. Dearman stated that he fired the rifle several times in the air and told Bender to leave. The testimony indicated that Bender subsequently got into a white car with O. W. Turner and left Dearman's residence.

The defense called O. W. Turner as an adverse witness who testified that he heard Dearman threaten to kill Bender if he came back. Turner's testimony was completely contradictory to a statement he had given to Sheriff Kenneth Cross on February 1, 1993.

Later that afternoon, at approximately 4:00 p.m., Bender returned to Dearman's trailer on foot again asking for money. Dearman refused and he told Bender to get off his property. Dearman testified that when Bender would not leave, he fired five to six shots in the air to the right and left of Bender. The testimony indicated that Bender was approximately 200 yards away from Dearman when Dearman fired the rifle. The testimony also indicated that Dearman had been drinking throughout the day and had consumed eight beers prior to Bender's afternoon visit. Dearman testified that he watched Bender leave his driveway and turn onto the road in front of his trailer. Dearman stated that Bender was alive and well when he left his property.

At approximately 9:00 p.m., Dearman and a female friend left the trailer and discovered Bender lying in the road in front of Dearman's trailer. Dearman testified that he and his friend went to a neighbor's house and called the sheriff. The evidence indicated that Bender had been killed by a single distant

gunshot wound to the back caused by a .22 caliber bullet. The forensic expert, however, could not say conclusively that the bullet had come from Dearman's rifle, but did state that it was possible.

The sheriff questioned Dearman who initially denied seeing Bender on January 31, 1993, but Dearman eventually admitted that he had seen Bender and then told the sheriff everything that had occurred that day involving Bender's visits to his trailer.

The State provided testimony from several neighbors who admitted that Bender had been in the neighborhood on January 31 trying to obtain money. A local hunter, Herbie Dearman, testified that he had been hunting in the vicinity of Julius Dearman's home at approximately 4:30 p.m. on January 31, and that he recalled hearing shots being fired, and that he recognized Dearman's voice yelling at someone. Dearman's next door neighbor, Mr. Epps, testified that he observed a mass alongside the road in front of Dearman's residence at approximately 4:45 p.m. but that he thought it was probably a deer and did not call the sheriff.

The jury was instructed on both depraved heart murder and culpable negligence manslaughter. A guilty verdict for depraved heart murder was returned and Dearman was sentenced to life imprisonment. Dearman contends that the State failed to prove that he killed Aristotle Bender and argues that there exists a reasonable hypothesis that someone else killed Bender.

ANALYSIS

I. DID THE TRIAL COURT ERR IN DETERMINING THAT DEARMAN WAS NOT ENTITLED TO A CIRCUMSTANTIAL EVIDENCE INSTRUCTION?

Dearman contends that the trial court erred by denying his request for a circumstantial evidence instruction. Dearman argues that there were no eyewitnesses who saw Dearman kill Aristotle Bender, nor did Dearman confess to killing the victim. Dearman argues that his testimony that he shot into the air while Bender was present does not constitute a confession that he killed Bender. Dearman contends that there was no direct evidence offered by the State that he killed Bender and the only method that the jury could utilize in determining guilt or innocence was through the use of inferences and circumstances. Dearman argues that the jury should have been instructed that the State had the burden of proving guilt beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence.

The State, in its response, argues that Dearman's admission that he discharged a rifle in the general direction of the victim, Aristotle Bender, on January 31, 1993, was direct evidence of an act which was "eminently dangerous to others and evincing a depraved heart, regardless of human life." The State contends that this admission along with the testimony of Herbie Dearman that he heard the Appellant yelling and then heard shots being fired on the afternoon of January 31, 1993, was sufficient to warrant the trial court's decision that this case was not wholly circumstantial. We agree.

The Mississippi Supreme Court has held that a circumstantial evidence instruction "must be given only where the prosecution is without a confession and only without eyewitnesses to the gravamen of the offense charged." *Mack v. State*, 481 So. 2d 793, 795 (Miss. 1985) (citing *Keys v. State*, 478 So.

2d 266, 267 (Miss. 1985)); *see also* *Boches v. State*, 506 So. 2d 254, 260 (Miss. 1987); *Clark v. State*, 503 So. 2d 277, 278-79 (Miss. 1987) (holding that a conviction based upon both direct and circumstantial evidence would not be reversed for lack of a circumstantial evidence instruction). In *Mack v. State*, the court stated further that "[t]here is no reason on principle why an admission by the defendant on a significant element of the offense should not also operate to render unnecessary the circumstantial evidence instruction." *Id.* *See also* *Sudduth v. State*, 562 So. 2d 67, 72 (Miss. 1990) (holding that defendant's out-of-court admissions to witnesses, although not a confession per se, was sufficient to constitute direct evidence of the crime such that the giving of a circumstantial evidence instruction was not required).

In the present case, we find that the State's case was not wholly circumstantial, therefore negating the need for a circumstantial evidence instruction. A review of the record indicates that Dearman did in fact testify that Aristotle Bender was present on the afternoon of January 31, 1993, and that Dearman fired numerous shots from his rifle in the general vicinity of the victim. Although Dearman does not admit to hitting Bender with any of the shots, we find that his admission of firing at the victim was direct evidence of depraved heart murder. We therefore find Dearman's argument to be without merit.

II. DID THE TRIAL COURT ERR IN INSTRUCTING THE JURY CONCERNING DEPRAVED HEART MURDER AND CULPABLE NEGLIGENCE MANSLAUGHTER?

Dearman contends that the trial court improperly gave Instructions S-2, S-3, S-4, S-5, and improperly refused Instruction D-11. While Dearman makes a blanket assignment of error to each of the above listed instructions, his primary complaint seems to be the distinction between depraved heart murder as defined in instruction S-2 and culpable negligence manslaughter as defined in instruction S-4. Dearman contends that Instruction S-4 did not properly define culpable negligence manslaughter. Dearman argues that the distinction between culpable negligence manslaughter and depraved heart murder is that depraved heart murder carries with it the element of malice whereas culpable negligence manslaughter does not. Dearman contends that, although both carry the element of wilfulness, manslaughter is a lesser degree of malice and wilfulness than depraved heart murder. As such, Dearman argues that the definition of culpable negligence as the "*willful* creation of an unreasonable risk" is improper and confusing. Dearman argues that Instruction D-11 which defines depraved heart murder would have cleared up any confusion if it had been given.

Dearman also assigns error to the giving of Instruction S-3 on the ground that it was too confusing to the jury. Dearman contends that the giving of Instruction S-3 along with the aforementioned instructions resulted in a verdict based "solely, totally and completely upon confusing instructions without the proper distinction being drawn between culpable negligence manslaughter and depraved heart murder."

The State argues that Dearman's assignments of error are unfounded. First of all, the State contends that Dearman does not in his assignment of error point to any specific authority disallowing the State's definition of culpable negligence which would indicate trial court error in granting the instruction. Further, the State contends that the trial court gave both the State's definition of culpable negligence as well as Dearman's definition of culpable negligence. Therefore, the State argues, that any alleged error in the granting of S-4 was cured by the granting of Instruction D-13.

In reference to Instruction D-11, the State argues that the trial court properly denied the instruction on the basis that the defense's use of "antiquated language" was too confusing for the jury. The State contends that the definition of depraved heart murder as contained in Instruction D-11 was a quote from the Mississippi Code of 1930 and that the trial judge did not err in opting to give a more modernized definition of depraved heart murder through instructions S-9 and

D-18. The State argues that the trial court is not required to grant several instructions on the same question in a different verbiage.

The State argues further, regarding Instruction S-3, that Dearman makes no plausible argument, nor does he specify any authority which would disallow the giving of Instruction S-3. As such, the State contends that Dearman's complaint is not properly before this Court.

Mississippi law allows the trial judge to instruct the jury upon principles of law applicable to the case either at the request of a party, Miss. Code Ann. § 99-17-35 (1972), or on the court's own motion, *Newell v. State*, 308 So. 2d 71, 78 (Miss. 1975). *See also* Unif. Crim. R. Cir. Ct. Prac. 5.03. The Mississippi Supreme Court has held that the failure of a court to give a requested instruction is not grounds for reversal if the jury was "fairly, fully and accurately instructed on the law governing the case." *Smith v. State*, 572 So. 2d 847, 849 (Miss. 1990) (citation omitted); *see also* *Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990) (holding that the trial court may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions); *Calhoun v. State*, 526 So. 2d 531, 533 (Miss. 1988) (holding that a trial court is not required to instruct a jury over and over on the same point of law even though some variations are used in different instructions). The standard for reviewing jury instructions is to read all instructions together, not in isolation. *Townsend v. State*, 681 So. 2d 497, 509 (Miss. 1996).

In the present case, Dearman's argument that depraved heart murder and culpable negligence manslaughter were not properly distinguished is one that has been debated numerous times. The Mississippi Supreme Court in *Clayton v. State* stated: "[t]o the extent that we hold on to the notion that depraved heart murder and culpable negligence manslaughter can co-exist given the broad interpretation of depraved heart murder adopted by this Court, instructions such as that given in the instant case defining culpable negligence are to be avoided." *Clayton v. State*, 652 So. 2d 720, 726 (Miss. 1995) (citations omitted). The instructions that the court referred to in *Clayton* consisted of the trial court telling the jury that the distinction between depraved heart murder and culpable negligence was that depraved heart murder required the defendant's acts to be "willful." *Id.* The trial court then instructed the jury that "culpable negligence" was such reckless behavior as to be the "equivalent to willfulness." The Mississippi Supreme Court went on to state:

In *Hurns v. State*, 616 So. 2d 313, 320 (Miss. 1993), we considered jury instructions for

both depraved heart murder and culpable negligence manslaughter. We stated that the more appropriate definition of culpable negligence is "negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life." Where the objective is to distinguish culpable negligence manslaughter from depraved heart murder the definition of culpable negligence should be limited to the definition given by this Court in *Hurns*.

Id. (citation omitted).

In the present case, we find that the language in Instruction S-4 was not such as to fall into the same category as the *Clayton* instructions which the Supreme Court warns us to avoid. We also find that Instruction D-13 defined culpable negligence in a manner that is consistent with the *Hurns* definition. As such, we find that the jury was properly instructed and that the giving of Instruction D-11 would not have cleared up any alleged confusion. We find that the giving of Instructions S-9 and D-18 sufficiently defined depraved heart murder. We find further, as the State correctly points out, that Dearman's assignment of error to Instruction S-3 as being confusing is without merit as Dearman fails to point to any specific authority that would disallow this instruction, and therefore place the trial court in error upon granting such. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). After reviewing all of the instructions, it is our belief that the jury in this case was "fairly, fully, and accurately instructed on the law." We find Dearman's argument to be without merit.

III. DID THE TRIAL COURT ERR IN FAILING TO ALLOW DEARMAN TO PLACE BEFORE THE JURY THE THEORY THAT SOMEONE OTHER THAN JULIUS DEARMAN MAY HAVE KILLED ARISTOTLE BENDER?

This issue concerns the exclusion of evidence and is procedurally governed by Mississippi Rule of Evidence 103(a)(2). Rule 103(a)(2) provides that error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected and the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked. In addition, the Mississippi Supreme Court has stated that admissibility of evidence rests within the sound discretion of the trial court, and reversal of a conviction is appropriate only when the trial court abused its discretion. *Peterson v. State*, 671 So. 2d 647, 655 (Miss. 1996).

In the present case, Dearman contends that the trial court erroneously prevented him from putting on evidence in support of the theory that someone else may have killed Aristotle Bender. Specifically, Dearman contends that the following testimony, had it been allowed, would have supported his theory and properly placed it before the jury for consideration:

(1) Sheriff Cross could have acknowledged that Bender had been an informant for the police department.

(2) Sheriff Cross would have testified that, on January 31, 1993, Bender was being sought by the police for the theft of money from Wendell Harvey's home.

(3) Grady Downey of the Mississippi Crime Lab would have testified that the green leafy substance found in Bender's pocket was not marijuana which would indicate that Bender was in the dangerous profession of dealing counterfeit drugs.

(4) Deputy Sheriff John Riley could have testified that Bender was an informant in a case involving Rayford Jordan who at the time of Bender's death was being sought on a drug charge.

The trial court excluded the above testimony by Sheriff Cross on the ground that it was irrelevant. The testimony by Downey and Riley was excluded on the grounds that the testimony consisted of improper character evidence and was irrelevant. Dearman argues that the exclusion of the above testimony violated his fundamental right to present a defense. In support of his contention, Dearman cites *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973), for the proposition that evidentiary rules cannot be applied mechanically to deprive a defendant of due process. In *Chambers*, the evidence that the defendant, Chambers, sought to present involved an alleged confession by another man (McDonald) to the crime with which Chambers had been charged. *Id.* at 291. Chambers wanted to call McDonald as an adverse witness in order to question him about the alleged confession. *Id.* The trial court denied this request, citing the "voucher rule." *Id.* at 295. Chambers also attempted to present testimony from several witnesses that McDonald had stated to them that he had in fact murdered the victim. *Id.* at 291. The trial court excluded the testimony as being inadmissible hearsay. *Id.* The United States Supreme Court reversed the decision stating that Chambers's constitutional right to due process had been violated. *Id.* at 300.

The case sub judice differs greatly from *Chambers*. Here, Dearman has no particular individual on which he wishes to place the blame for Bender's murder. Dearman is attempting to attack the victim's character by presenting testimony that Bender may have been involved in some dangerous activities which could lead one to believe that other people might have a reason to kill Bender. We do not find that the holding by the United States Supreme Court in *Chambers* is in anyway applicable to the case before us.

Dearman also cites two Mississippi Supreme Court cases, *Day v. State*, 589 So. 2d 637 (Miss. 1991) and *Green v. State*, 614 So. 2d 926 (Miss. 1992). Dearman argues that the holding in *Day* supports his argument that the proffered testimony of Downey and Riley falls within the character evidence exception of Mississippi Rule of Evidence 404(a)(2). *Day*, 589 So. 2d at 641. We disagree. In *Day*, the "character" evidence was offered to demonstrate the relationship between Day and the victim and to explain why their personal relationship caused him to panic or act irrationally at the time of the shooting. *Id.* In the present case, the evidence Dearman seeks to present pertains to acts by Bender toward third persons not the appellant. The Mississippi Supreme Court has held that evidence of specific acts of the deceased toward third parties is not admissible to show bad character of the deceased. *Russell v. State*, 607 So. 2d 1107, 1116 (Miss. 1992).

In *Green*, supra, the Court stated that a substantial right of the defendant had been affected by the exclusion of testimony about the victim's behavior which would have supported the defendant's story and possibly caused the jury to acquit. *Green*, 614 So. 2d at 935. The case before us differs from *Green* in that Green's theory of defense was self-defense. *Id.* at 933. We do not dispute the fact that

a victim's behavior would be important in a self-defense case. In the present case, however, Dearman entered a general denial that he did not kill Bender. The issue of self-defense has not been raised. We therefore fail to see how *Green* could be applicable to the case before us.

We find that Dearman's arguments are without merit, that no substantial right was affected by the exclusion of the testimony, nor did the trial judge abuse his discretion in excluding the aforementioned evidence.

IV. DID THE TRIAL COURT ERR IN FAILING TO ALLOW THE DEFENSE TO INTRODUCE A TAPE RECORDED PRIOR INCONSISTENT STATEMENT OF WITNESS, O. W. TURNER?

O. W. Turner's testimony at trial differed from what he said in a tape recorded statement given to Sheriff Cross on February 1, 1993. Dearman points to three specific responses given by Turner while on the stand which differ significantly from Turner's statement to Sheriff Cross:

- (1) Turner testified that Dearman told Bender that he was going to kill him if he came back to his home.
- (2) Turner testified that, following Dearman's threat, Bender got back into Turner's car and did not say anything about wanting to "get" Dearman.
- (3) Turner testified that he never took Bender to Wendell Harvey's house.

In the statement taken by Sheriff Cross on February 1, 1993, Turner indicated that Dearman did not make any threatening remarks whatsoever. Turner also indicated that when Bender got back into Turner's car, he said he was going to "get" Dearman. The statement further revealed that Turner indicated that he did take Bender to Harvey's house, that Bender went inside, and that Bender returned with \$50.00 in his hand.

Throughout the questioning, the defense points out the inconsistencies between Turner's in-court testimony and his statement to the sheriff by quoting from what seems to be a written transcript of the tape recording. Turner's response to the inconsistencies was either a denial that he had made the statement to the sheriff, that he was scared when he talked to the sheriff, or that he just did not remember. As a result, Dearman requested that the tape be played to refresh Turner's memory. The State, however, objected to the tape's being played in the presence of the jury but was overruled. While the tape recorder was being set up, the defense continued questioning Turner. Once the tape recorder was ready, the defense asked that the tape be played and the State objected, stating that the tape contained hearsay statements involving other witnesses. The State then requested that the tape be played for Turner outside of the hearing of the jury. The judge complied and allowed the tape to be played in his chambers in the presence of Turner. The parties then returned to the courtroom and the defense began questioning Turner regarding whether or not he recognized his voice on the tape recorder. Turner indicated that he did. The defense then again questioned Turner regarding the aforementioned subjects. Turner's responses were the same in regard to the inconsistencies that he did not make the statement, that he was scared, that he did not remember, or that he did not know

what he had told the sheriff. The defense asked that the tape be played and the judge stated that the portions that Turner denied saying could be played for the jury. The defense said "ok" and continued along the same line of questioning. Nowhere in the record is there an indication that the tape was actually played even though the judge stated that he would allow certain portions to be played. The record indicates that the defense finished questioning Turner and tendered the witness with no further mention of the tape's being played.

Dearman, however, on appeal, contends that he was not allowed to fully impeach Turner because the judge refused to permit the playing of the entire tape recording. Dearman argues that Turner's claim that he was scared when he talked to the sheriff was a matter that the jury should have been allowed to determine for themselves by listening to the tape.

A review of the record indicates that the trial judge did permit certain portions of the tape to be played pursuant to Rule 613 which states:

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

M.R.E. 613(b). Upon Turner's failure to recall the inconsistent statement or denial of same, the judge authorized the playing of specific portions of the tape. A review of the record does not indicate that the tape was actually played, however. We are hard pressed to assign this as error to the trial court. We find that the judge was correct in his ruling that certain portions of the tape could be played if the witness denied or could not recall making the out-of-court statements. Dearman complains, in his brief, that he was not allowed to fully impeach Turner. In light of the above events, we do not understand Dearman's argument. We are at a loss as to why the defense did not follow through with its request and play the portions of the tape as were authorized. Notwithstanding this, however, Dearman's argument that he was not allowed to properly impeach Turner is even less credible in light of the fact that the record indicates that defense counsel had been impeaching Turner all along with a transcript of the tape. Every time Turner answered inconsistently, defense counsel would quote from the transcript and say "do you remember that?" It seems that defense counsel's primary reason for wanting the tape played was to show that Turner was not scared when he made the statement to Sheriff Cross as he had explained. The trial judge refused on the basis that whether the tape showed that Turner was scared or not was irrelevant. As we stated in the previous issue, the admission or exclusion of evidence is within the sound discretion of the trial judge, and he will not be reversed unless he has abused that discretion. *Peterson v. State*, 671 So. 2d 647, 655 (Miss. 1996). We do not find that the trial judge abused his discretion in this instance.

Furthermore, Dearman had the opportunity to get portions of the tape recording in when Turner denied making the inconsistent statement. It would seem that the jury could have determined at that time whether Turner was actually scared when he made the statements. Again, we do not know why those portions of the tape were not played by the defense, but we do decline to place the trial court in error for what appears to be error on the part of the defense counsel.

V. DID THE TRIAL COURT ERR IN DENYING DEARMAN'S MOTIONS FOR DIRECTED VERDICT AND JNOV/NEW TRIAL?

A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion when the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled Dearman's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Dearman's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Id. (citations omitted).

Dearman argues that the State failed to prove that he killed Aistotle Bender. The evidence consistent with the guilty verdict must be accepted as true. *Id.* at 778. Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Dearman not guilty of depraved heart murder. We find that the trial court properly denied Dearman's motion for a directed verdict.

Dearman also complains that the jury verdict was against the overwhelming weight of the evidence, and he requests a new trial. The Mississippi Supreme Court has held that "[t]he 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." *Id.* at 781 (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, the jury heard the witnesses and the evidence as presented by both the State and

the defense. The State presented the testimony that Bender died of a single distant gunshot wound caused by a .22 caliber bullet. Dearman admitted that he had two confrontations with Bender on January 31, 1993, and that each time he fired numerous shots from a .22 caliber rifle in the general vicinity of the victim some 200 yards away as Bender was leaving Dearman's driveway. Although Dearman never admitted to killing Aristotle Bender, it is undisputed that on the night of January 31, 1993, Bender's dead body was discovered on the road in front of Dearman's trailer. The testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Dearman. The trial court did not abuse its discretion by refusing to grant Dearman a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to promote an unconscionable injustice. The trial court properly denied Dearman's motion for a new trial.

THE JUDGMENT OF THE CIRCUIT COURT OF JASPER COUNTY OF CONVICTION OF DEPRAVED HEART MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, AND SOUTHWICK, JJ., CONCUR. SOUTHWICK, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY MCMILLIN AND THOMAS, P.JJ., COLEMAN AND PAYNE, JJ.

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SOUTHWICK, J., CONCURRING:

My agreement with the majority is on all issues. My concern about a too-frequently litigated issue is what compels me to write separately. Opinions from this court and the supreme court often state that unless the evidence against an accused is wholly circumstantial, the jury need not be given a circumstantial evidence instruction. That instruction is in effect that the jury cannot convict unless it excludes every reasonable hypothesis consistent with innocence. See, e.g. *Flanagin v. State*, 473 So.2d 482, 485 (Miss. 1985).

It is not difficult to understand the motivation behind such an instruction. If no eyewitness testimony or confession links the defendant to the crime, the inferences that must be used to determine guilt must not be weak, or equivalent in probability to inferences that would lead to the conclusion of innocence. The motivation, like occasionally happens with other good intentions, has not led to a particularly helpful remedy. The circumstantial evidence instruction is actually nothing more than a shifting of emphasis from the normal reasonable doubt instruction. It adds nothing, other than argument in trial and appellate courts regarding its necessity. Excluding every reasonable hypothesis except for guilt, is to me the same process as determining guilt beyond a reasonable doubt. If the circumstances surrounding a defendant's actions infer complicity in a crime, a juror must believe those are the correct inferences beyond a reasonable doubt. That is true under the traditional instruction on the State's burden, and the one on circumstantial evidence. Thus a permanent armistice in this particular war over instructions should be declared. The courts would be better served with a new instruction for all cases, that circumstantial and direct evidence are given the same weight, and that jurors must be convinced of each element of the crime beyond a reasonable doubt. See, *Montgomery v. State*, 515 So. 2d 845, 852 (Miss. 1987) (Robertson, J., joined by 3 justices, concurring).

However, this court has no armistice authority. Thus we must continue to apply the law on circumstantial evidence.

Since the debate is going to continue, the arguments need to tighten. What is too often said is just what I remarked at the beginning of this opinion -- unless the "State's case is based *entirely on circumstantial evidence*," the instruction need not be given. *Billiot v. State*, 454 So. 2d 445, 461-62 (Miss. 1984). That suggests that in a murder case, so long as there is a body, the case is not wholly circumstantial. In a drug case, so long as the State has the drugs to introduce, it is not wholly circumstantial. That cannot be the purpose of the rule.

A better iteration of the rule was recently stated by the supreme court. It held that "circumstantial evidence instructions are required when the prosecution is without a confession and wholly without eye witnesses to the gravamen of the offense charged." *Taylor v. State*, 672 So. 2d 1246, 1270 (Miss.

1996), quoting *Simpson v. State*, 553 So. 2d 37, 39 (Miss. 1989). This standard has two parts. One is a definition of "direct evidence." The other is that the direct evidence must go to the "gravamen" of the offense. I will address each in turn.

The idea that direct evidence is eyewitness or confession testimony dates at least from thirty years ago, and probably longer. The court ruled:

We have held in many cases that this language is necessary and to be included only when the case is based entirely upon circumstantial evidence. In *Underhill on Criminal Evidence*, Vol. 1, 5th ed., Sec. 4, p.5, it is stated: "Direct evidence of the crime is the evidence of an eye witness that it was committed. This includes in criminal law the confessions and admissions of the accused and dying declarations...."

Anderson v. State, 246 Miss. 821, 828, 152 So.2d 702 (1963).

Also important to the analysis is that the direct evidence must go to the gravamen of the offense. The gravamen is the material part or the essential elements of the charge. *Black's Law Dictionary*, Sixth Ed., p. 701 (1990). Thus direct evidence of some elements of a multi-element offense would not avoid the necessity of the circumstantial evidence instruction.

However, I agree that part of the gravamen of depraved heart murder is that the defendant was engaged in an act that was eminently dangerous to others and evincing a depraved heart. Dearman's testimony that he fired numerous shots in the vicinity of the victim was an admission that he acted with a depraved heart. Thus if the circumstantial evidence dialogue is going to continue, I agree that this case did not require the instruction.

MCMILLIN AND THOMAS, P.JJ., COLEMAN AND PAYNE, JJ., JOIN THIS SEPARATE OPINION.