

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00278 COA**

**DARVON RAY HAMPTON A/K/A DARVIN RAY
HAMPTON**

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:	05/24/95
TRIAL JUDGE:	HON. ROBERT H. WALKER
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	THOMAS A. PRITCHARD
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS
DISTRICT ATTORNEY:	CONO CARANNA
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	MURDER: SENTENCED TO LIFE IMPRISONMENT IN THE CUSTODY OF THE MDOC, SAID SENTENCE WITHOUT HOPE OF PAROLE OR PROBATION
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE McMILLIN, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Darvon Ray Hampton was convicted of the murder of Anthony Harris under Mississippi Code Section 97-3-19(a)(1) (Rev. 1994), and sentenced as an habitual offender to serve a term of life imprisonment in the custody of the Mississippi Department of Corrections. Hampton's motion for JNOV or, in the alternative, a new trial was denied. We find Hampton's arguments to be without merit and therefore affirm the judgment of the circuit court.

FACTS

On March 7, 1994, Anthony Harris was shot in the back and subsequently died from that gunshot. The State's primary witness was Terrell McDonald, who indicated that the appellant, Darvon Hampton, shot and killed Harris. McDonald indicated that just prior to the shooting he and Hampton had been riding around. McDonald testified that they stopped on Lameuse Street where McDonald sold Anthony Harris some cocaine in exchange for a gun. McDonald stated that he then gave the gun to Hampton. McDonald testified further that later that evening, Harris approached the car where McDonald was seated on the passenger's side and Hampton was seated on the driver's side. McDonald testified that Harris claimed the cocaine that McDonald had sold him was fake and that he wanted his gun back. McDonald indicated that Hampton told Harris to get away from his car but that Harris ignored the request and continued to argue about the gun. McDonald testified that Hampton then got out of the car and hit Harris in the head with the gun several times. McDonald stated that Harris ran and that Hampton fired a shot in Harris's direction. Thereafter, McDonald testified, he and Hampton left the scene and subsequently hid the gun at someone's house. The next day, McDonald went to the police and told them what happened and where the gun was hidden. McDonald testified that the police instructed him to get the gun and that he did as requested.

Hampton testified in his own behalf and denied that he shot and killed Harris. Hampton's version of the events are significantly different. Hampton testified that Harris had the gun at the time the argument began. Hampton stated that he tried to get Harris away from his car by pushing him and that Harris pulled out the gun. Hampton testified that he snatched the gun from Harris and hit him several times in the head. Hampton stated that Harris kept coming at him and that he fired the gun at Harris's feet. Hampton indicated that someone then grabbed him and took the gun away. Hampton stated that he ran toward his car and then heard a second shot. Hampton indicated that as he and McDonald were leaving the scene, Harris was running toward the car and threw a bottle at them as they sped away.

After hearing the evidence, the jury found Hampton guilty of murder. Feeling aggrieved, Hampton filed this appeal asserting two issues.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN OVERRULING THE MOTION OF HAMPTON, MADE AT THE CLOSE OF PROOF FOR THE STATE, FOR A DIRECTED VERDICT AND FOR A PEREMPTORY INSTRUCTION ON THE ISSUE OF MURDER BY DELIBERATE DESIGN, AT THE CLOSE OF ALL THE EVIDENCE.

Hampton challenges both the sufficiency and weight of the evidence in this first assignment of error. Specifically, Hampton contends that the State failed to prove that Hampton acted with deliberate design as was charged in the indictment. Hampton claims that the charge of murder should not have been submitted to the jury and that the only crime he could possibly be guilty of is manslaughter.

We will first address Hampton's sufficiency argument. 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 Hampton'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 [Hampton'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).

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 Hampton not guilty of deliberate design murder. We find that the trial court properly denied Hampton's motion for a directed verdict.

We next turn to Hampton's contention that the verdict was against the overwhelming weight of the evidence and that he is entitled to a new trial as a result. 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; *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (stating that witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (stating that 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 of Terrell McDonald who stated that Hampton pistol whipped Anthony Harris and that as Harris ran from Hampton, Hampton pointed the gun in Harris's direction and fired. The State also presented medical evidence that Harris died of a single gunshot wound to the back. Following the State's case, Hampton chose to testify in his own behalf in which he related a story different from that of McDonald. 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 Hampton. The trial court did not abuse its discretion by refusing to grant Hampton 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 Hampton's motion for a new

trial.

II. WHETHER THE TRIAL COURT ERRED WHEN IT REFUSED TO OFFER A SUPPLEMENTAL JURY INSTRUCTION DEFINING THE PARAMETERS OF THE CONCEPT "DELIBERATE DESIGN," IN A HOMICIDE PROSECUTION WHEN IT WAS ONE OF TWO PRIMARY ISSUES TO BE DETERMINED BY THE TRIER OF FACT.

Hampton argues that the trial court erred in failing to instruct the jury on the meaning of the term "deliberate design." The State argues that Hampton offered no such instruction and that even if he had, it would not be error for the trial court to refuse it as the jury was adequately instructed on murder, heat of passion manslaughter, and self-defense.

The standard for reviewing jury instructions is well established. 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 (Rev. 1994)**, or on the court's own motion, *Newell v. State*, **308 So. 2d 71, 78 (Miss. 1975)**. *See also URCCC 3.07*. 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)**; *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)**.

Despite the lack of an instruction specifically defining "deliberate design," we find that the jury was sufficiently instructed on the law by Instructions C-9 and D-2 which defined self-defense, Instruction C-10 which defined "heat of passion," Instruction S-1 which presented the elements of murder, and Instruction C-11 which distinguished murder from manslaughter. Reading the jury instructions as a whole, we find that the jury was properly instructed on the applicable law and that the trial judge did not abuse his discretion in failing to give an instruction which defined "deliberate design." We note that Hampton made no effort to draft a "deliberate design" instruction for the judge's consideration. Had such an instruction been offered to the judge for his consideration, perhaps the judge would have given the instruction. We note further that although a trial judge has the authority and the duty to instruct the jury on his own when he believes the instructions offered are not sufficient, *see Newell*, **308 So. 2d at 78**, we do not believe the trial judge's failure to instruct the jury on the definition of "deliberate design" in the instant case rises to the level of reversible error, if error at all.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF MURDER AND SENTENCE AS A HABITUAL OFFENDER TO A TERM OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

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

