

¶2. On October 7, 1996, several events took place which eventually lead to the murder of David Earl Jordan. Testimony revealed that on this day Maggie Jordan, David Jordan's wife, had an obligation to appear in court and be on standby as a witness in an ongoing trial. David Jordan was not currently employed and anticipated spending the day with Maggie Jordan; however, Maggie Jordan did not allow David Jordan to go with her to the courthouse. David Jordan remained at home and eventually was discovered spending his spare time at the house of Sylvia Pierre, a friend of Maggie Jordan.

¶3. At the trial, testimony revealed that while at the house of Sylvia Pierre, David Jordan consumed alcohol to the point of appearing to be intoxicated. Later, Maggie Jordan stopped at Sylvia Pierre's house and found David Jordan inside Pierre's dwelling. Thereafter, a fight ensued between Maggie and David Jordan. During the course of the fight there were exchanges of physical violence between the two, and Maggie Jordan telephoned the sheriff's department. After placing the telephone call to the sheriff's department, Maggie Jordan left Ms. Pierre's house and went to her and David's mobile home to meet the deputy sheriffs. After Maggie Jordan had returned home and talked with the deputies, she took a visiting friend to his house because he had a prior babysitting obligation. Ultimately, the friend did not have to babysit, and they returned to the Jordans' mobile home. During this time, Sylvia Pierre delivered David Jordan to the Jordans' residence, and he was at the residence when Maggie and the friend returned to the mobile home.

¶4. Maggie Jordan's testimony revealed that David Jordan still appeared to be heavily intoxicated and he possessed a machete. Maggie Jordan testified that David Jordan threatened her with the machete and caused the machete to puncture holes in the front door of the mobile home. A second set of deputies were dispatched to the Jordans' mobile home. When they arrived, Maggie Jordan removed the machete from David Jordan's possession and placed it by the front door. No arrests were made, the deputies simply issued warnings to Maggie and David Jordan.

¶5. Maggie Jordan further testified that shortly after the deputies had left, David Jordan continued making verbal threats towards her and another physical confrontation ensued between them. Michelle Lappert, a friend, guest and the ex-girlfriend of Christopher Parker, had to separate Maggie and David Jordan. At this time, both Lappert and Parker believed Lappert was pregnant with Parker's child. Lappert testified that while she attempted to separate Maggie and David, David Jordan was aiming for Maggie and struck her in the lip with a hair spray can. Lappert testified that the argument then became focused between her and David Jordan and Maggie Jordan left the mobile home. Lappert proceeded to calm down David Jordan.

¶6. During David Jordan and Lappert's confrontation, Maggie Jordan went to the "corner store" and made telephone calls searching for help with David Jordan. Maggie Jordan had previously made a telephone call to Sylvia Pierre's house asking for help from Parker; however, Ms. Pierre talked Parker out of getting involved in the situation which existed. While at the store Maggie Jordan made her second telephone call to Sylvia Pierre's house. Maggie Jordan talked with Christopher Parker and explained that David was being violent and had struck her and Michelle Lappert.

¶7. After speaking with Maggie Jordan, Christopher Parker exited Sylvia Pierre's house and met Pierre outside, where Pierre and her son were admiring the neighbor's horses. Parker explained that Maggie Jordan needed help because David was beating Michelle and he had to go over to the Jordans' residence. Christopher Parker went back to Sylvia Pierre's house and retrieved a M-1 carbine from her house. The M-1 had the capability of holding 15 rounds of ammunition and was fully loaded. Sylvia Pierre testified that she tried to talk Parker out of taking the gun and going to the Jordans' residence, but to no avail. Parker

had a friend drive him, Sylvia Pierre, and her son in the friend's vehicle to the Jordans' mobile home. Approximately five minutes later, they arrived at the Jordans' residence.

¶8. When they arrived David Jordan was outside of the mobile home pacing in front of the Jordan's automobile. Maggie Jordan exited the trailer and met Parker while he was still in the automobile and repeated some of the events of the day which included the fact that David Jordan had struck Michelle Lappert in the face. Parker immediately exited the vehicle possessing the gun and aimed the gun at David Jordan. Parker pulled the trigger, but the gun did not fire. Parker proceeded to attempt to unjam the gun and instructed David Jordan to run. David Jordan did not move. Eventually, Parker unjammed the gun, and emptied the gun containing fifteen rounds of ammunition. Thirteen bullets struck David Jordan and inflicted fatal injuries. Parker got back in the vehicle, and Parker, Sylvia Pierre, her son and Parker's friend left the Jordans' residence.

¶9. After the vehicle containing Parker had driven away, Maggie Jordan "hollered." It was then that Michelle Lappert exited the mobile home. Maggie Jordan instructed Michelle Lappert to call 911. An ambulance arrived and transported David Jordan to Gulfport Memorial Hospital where he was pronounced dead.

ISSUE: WHETHER THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT A MANSLAUGHTER JURY INSTRUCTION.

¶10. Parker argues he was entitled to the manslaughter jury instruction because a reasonable jury could not on the evidence exclude the lesser-included-offense of heat of passion manslaughter beyond a reasonable doubt. Parker further argues that the record contains sufficient evidence that David Jordan was in a drunken state and violent mood and that Parker had been informed by Maggie Jordan, David Jordan's wife, of Jordan's violent behavior toward herself and Parker's ex-girlfriend, Michelle Lappert. Furthermore, Sylvia Pierre's testimony classified Parker as "irrational." Parker argues that all of the aforementioned facts warrant giving a heat of passion, manslaughter jury instruction.

¶11. In *Graham*, the Mississippi Supreme Court defined heat of passion as "a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter." *Graham v. State*, 582 So. 2d 1014, 1017-18 (Miss. 1991). The passion or anger must suddenly be aroused by some immediate and reasonable provocation, by words or acts of one at the time and includes an emotional state of mind characterized by anger, rage, hatred, furious resentment, or terror. *Id.* at 1018. Moreover, the passion felt by the accused "should be superinduced by some insult, provocation, or injury, which would naturally and instantly produce, in the minds of ordinarily constituted men, the highest degree of exasperation." *Barnett v. State*, 563 So. 2d 1377, 1379 (Miss. 1990) (quoting *Preston v. State*, 25 Miss. 383 (1853)).

¶12. A review of the record does not reveal facts which would naturally and instantly provoke Parker or any other "ordinarily constituted man" to reach the highest degree of exasperation and result in the taking of an individual's life and, therefore, warrant giving the jury a manslaughter jury instruction. The record does reflect that Parker appeared to be angry; however, the facts in this case do not warrant the provocation of anger that should have resulted in the taking of David Jordan's life. The supreme court has stated that "a high degree of sudden and resentful feeling will not alone palliate an act of homicide committed under its influence." *Windham v. State*, 520 So. 2d 123, 127 (Miss. 1987) (quoting *Preston v. State*, 25 Miss. 383, 387 (1853)).

¶13. At trial, testimony revealed that Parker had received a telephone call from Maggie Lou Jordan while at Sylvia Pierre's house. Ms. Jordan was asking for assistance from Parker because David Jordan had been beating her and had struck Michelle Lappert, Parker's ex-girlfriend, in the mouth. As a result of Ms. Jordan's pleas for help, Parker made arrangements to go and assist Ms. Jordan and his ex-girlfriend. Ms. Pierre testified that Parker obtained a gun from her but he only obtained it for protection; however, the facts surrounding the shooting could lead the mind of a reasonable juror to believe otherwise. The drive to the Jordan's residence took approximately five minutes which takes away any element of instant provocation. Once Parker arrived at the Jordans' residence, Ms. Jordan repeated the same story of the day's events to Parker relative to Jordan beating her and striking Michelle Lappert in the mouth. No additional information was given to Parker in respect to David Jordan's actions that could have provoked a new fit of rage to support Parker's argument that he killed Jordan in the heat of passion.

¶14. Without seeing or talking to Michelle Lappert to confirm Ms. Jordan's story and determine the extent of her injuries, Parker exited the vehicle he had arrived in while possessing the gun he had brought. When Parker initially attempted to fire the gun at Jordan, it jammed. While Parker proceeded to manipulate and unjam the gun, he instructed David Jordan to run. Once the gun was unjammed, Parker shot at David Jordan fifteen times, striking Jordan with thirteen bullets.

¶15. At the time Parker shot Jordan, Jordan was not in close proximity to Lappert, Parker's ex-girlfriend. In fact, Jordan was outside while Lappert was in the mobile home. Additionally, Jordan was unarmed and was not making any physical or verbal threats to Parker or other individuals present. Furthermore, forensic evidence presented by Dr. Paul McGarry proved that all thirteen bullet wounds inflicted by Parker entered Jordan's back, again negating any ill intentions from Jordan at the time of his shooting. Dr. McGarry testified that David Jordan had "thirteen clear entry wounds and additional reentry wounds all of which came from the back of his body in a forward direction. There were wounds of the left side and of the left part of his abdomen, but all of the wounds were going in a forward direction coming from behind him. The majority of the wounds, thirteen coming in the back of his body, were close together in space and close together in direction indicating that they were inflicted on him when he was in a nonmoving position from behind and below his body going in a forward, upward, rightward direction."

¶16. In *Barnett v. State*, 563 So. 2d 1377, 1379 (Miss. 1990), Barnett and the victim were involved in an argument. Testimony reflected that the victim had a knife and had displayed such knife to Barnett. Barnett then proceeded to go to his father's trailer to obtain a gun and then to his trailer to obtain the necessary bullet. *Id.* at 1378. Barnett came back outside and shot the victim. *Id.* Barnett had requested that he be allowed a jury instruction based on heat of passion manslaughter which the trial court refused. *Id.* at 1379. The Mississippi Supreme Court refused the manslaughter instruction stating, "there simply was no evidence in this record to support a manslaughter instruction." *Id.* at 1380. Unlike the circumstances in *Barnett*, Parker did not have physical contact with Jordan. Additionally, Jordan made no visual or verbal threats. In fact, Parker only had mere hearsay of violent actions previously taken by Jordan on which he tried to justify his actions as a heat of passion crime.

¶17. In *Calvin v. State*, 175 Miss. 699, 168 So. 75, 76 (1936), the appellant and the victim had been in what witnesses described as a "friendly struggle". The struggle escalated and the appellant declared his

purpose to get his gun and kill the victim, as well as using other expletives indicating malice. "[I]t was a question for the jury, even if it would have been manslaughter if the killing had occurred instantaneously, or immediately after the struggle, before there was sufficient time for deliberation and reason." *Id.* at 76. Similar to *Calvin*, Parker indicated he had time for deliberation when he implied his purpose to Jordan. Parker displayed the gun, it jammed, and while Parker was unjamming the gun Parker advised Jordan to run. As previously mentioned, trial testimony reflected that Parker was angry; however, "[t]here must not only be passion and anger to reduce a crime to manslaughter, but there must be such circumstances as would indicate that a normal mind would be roused to the extent that reason is overthrown and that passion usurps the mind destroying judgment." *Id.* at 76.

¶18. Under the circumstances reflected in the record, a normal mind would not be roused to the extent that reason is overthrown and that passion usurps the mind destroying judgment. *Calvin v. State*, 175 Miss. 699, 168 So. 75, 76 (1936). It has been stated by the Mississippi Supreme Court, "there are people who refuse to restrain the infirmities of temper, but the law does not excuse their so doing unless the circumstances are adequate to show great provocation." *Id.* In the instant case there was no "great provocation" by Jordan to justify Parker having taken Jordan's life and which would excuse Parker's actions in doing so.

¶19. This Court acknowledges that "[i]f there is any evidence which would support a conviction of manslaughter, an instruction on manslaughter should be given." *Graham v. State*, 582 So. 2d 1014, 1018 (Miss. 1991). In *Colburn v. State*, 431 So. 2d 1111, 1114 (Miss. 1983), the Mississippi Supreme Court stated "[o]ur law is well-settled that jury instructions are not given unless there is an evidentiary basis in the record for such." The record does not establish sufficient evidence to show Christopher Parker did not act with malice aforethought and was provoked to the level of enraging feelings which would cause an individual to take another person's life and require a jury instruction based on manslaughter as said crime is defined in Miss. Code Ann. § 97-3-35 (Rev. 1994). For the aforementioned reasons, we, therefore, find no reversible error by the trial court.

¶20. THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.

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

SOUTHWICK, P.J., DISSENTING

¶21. It is with respect for the majority's views that I nonetheless dissent. The evidence supports the jury's verdict, but that verdict was reached without the instruction necessary for consideration of Parker's only defense. Since the jury was not fully informed of all the law necessary for its deliberations, I would reverse.

¶22. The majority opinion fairly presents the evidence in the case. Parker argues that he was told by phone

that his girlfriend was being beaten by David Jordan. This placed him into a state of such rage as to make the homicide one committed in the heat of passion. It is acknowledged that Parker was immediately angered by the news about his girlfriend. He obtained a gun and took a five minute drive to Jordan's residence. There, even before he got out of his vehicle, he was told that Jordan "was beating [his girlfriend] in the face." Parker then immediately tried to shoot Jordan, but his gun jammed. After correcting the problem, he ran after Jordan and fired fifteen rounds at him. Thirteen struck the victim. A witness said that Parker was acting dazed, "like he wasn't there."

¶23. Parker asked for an instruction on heat of passion manslaughter, but it was refused. The majority finds this to be correct for several reasons. Though Parker was angry, the provocation is found not to be one that "would naturally and instantly produce, in the minds of ordinarily constituted men, the highest degree of exasperation." Further weakening the proof is that Parker did not see his girlfriend struck but only heard about it, that he drove for five minutes before reaching his victim, and that being retold the same story at Jordan's house constituted no "additional information . . . that could have provoked a new fit of rage" sufficient to justify the instruction.

¶24. The evidence also shows that Parker had lived with the woman whom Jordan hit until five days before the homicide, that both Parker and his girlfriend believed that she was pregnant with his child, and that he still loved her.

¶25. One authority cited by the majority involved two men who initially were playfully scuffling, but the tug and pull became more heated. *Calvin v. State*, 175 Miss. 699, 168 So. 75, 76 (1936). The accused became angry, used strong language, and went to obtain his gun. I too find this case important, but because the supreme court held that it was for the jury to decide whether too much time had passed from the fight until Calvin got his gun and used it. *Id.*, 175 Miss. at 703. Exactly so. The argument in *Calvin* was whether a peremptory instruction acquitting of murder should have been given, leaving it for the jury solely to determine whether Calvin should be found guilty of manslaughter or should be acquitted. *Id.* at 701. The court held that "the facts here involved do not, per se, constitute manslaughter. . . . Whether the facts developed constitute, in this case, manslaughter is a question for decision of the jury." *Id.* at 703. Had Parker also received the instruction, I would agree that as in *Calvin* we could affirm the jury's rejection of the defense.

¶26. In the other principal case relied upon by the majority, the defendant and the later homicide victim were in an argument about who could win a fight with the other. *Barnett v. State*, 563 So. 2d 1377, 1379 (Miss. 1990). The victim went to his car, got a knife and threatened to use it. Barnett then walked to his father's nearby trailer and got a rifle, then went to his own to get one bullet. Finally he returned and shot the victim. The supreme court held that no manslaughter instruction was needed. The question in each case is whether the specific factual provocation rises to the level of overwhelming the reason of an "ordinarily constituted" individual. The provocations in *Barnett* were nothing more than two men arguing with each other about their relative fighting skills, which escalated to one person pulling a knife and the other finding a rifle.

¶27. What occurred in our case more closely approaches the necessary provocation:

"Heat of Passion" is defined as: In criminal law, a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and

reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

Mullins v. State, 493 So.2d 971, 974 (Miss.1986), quoting Black's Law Dictionary 650 (5th Ed.1979). The presence of "[p]assion or anger suddenly aroused" is more of a jury question when the event was Parker's learning that his pregnant girlfriend was getting a beating, and within five minutes having the events re-described to him at the scene.

¶28. This Court held in another case that an accused was as a matter of law guilty only of heat of passion manslaughter even though several minutes passed between the provocation and the shooting. The accused was beaten at a bar, then went to her house next door, tried but failed to place a phone call, found her gun, then went back to the bar and made certain that her assaulter would never hit her again. *Wade v. State*, 724 So. 2d 1007, 1009 (Miss. App. 1998). The Court found that there was insufficient evidence to sustain the jury's conviction for murder and reversed and entered judgment for manslaughter. *Id.* at 1011. The provocation was more substantial in *Wade* than here, but the point is that passage of a few minutes does not necessarily end the availability of the defense.

¶29. I find the evidence adequate that Parker was enraged. Not as convincing is that the provocation was one that should have caused an "ordinarily constituted man" to lose control, nor is it particularly compelling that the emotional state generated by the provocation was one that should have overthrown reason. There are, in other words, some facts upon which Parker could make an argument but which are not especially convincing.

¶30. However, what I find beyond dispute is that Parker's only defense was to admit the crime but to seek the jury's acceptance of heat of passion. This was the only instruction that he requested. Therefore, unless this instruction was given to the jury, Parker conceded guilt and there was nothing upon which the jury could deliberate.

¶31. It was also error for the trial court not to allow Welch's instruction relating to his theory of defense. Defendants are entitled to have instructions on their theory of the case presented to the jury for which there is foundation in evidence, even though the evidence might be weak, insufficient, inconsistent, or of doubtful credibility, and even though the sole testimony in support of the defense is the defendant's own testimony.

Welch v. State, 566 So.2d 680, 684 (Miss.1990). In closing argument Parker's attorney argued that the actions were "of a man that just lost it temporarily," that he did not have a deliberate design to kill, and "what he did was an act of somebody in anger, in the heat of passion, that was irrational. He never planned to murder the man." In other words, he argued all around "heat of passion" without having an instruction to support it.

¶32. It is reversible error to refuse to submit to a jury the instructions necessary to support an accused's only defense unless there is no evidence to support it. This may seem to be "begging the question," as the majority holds that there is no evidence. My view is that what actually exists here is that the provocation appears too insubstantial and the delay in committing the homicide too prolonged. In other words, the evidence is considered "weak, insufficient" and otherwise unconvincing. *Id.* With that I may agree, but it is for the jury to determine what is convincing. When the instruction is needed to present the accused's only defense, its denial is essentially directing a verdict of guilt since the only granted instructions are on matters

about which there is no dispute. The supreme court has rightly warned that denying such an instruction will be scrutinized closely.

¶33. Over several pages of transcript appear the thoughtful comments of the trial judge as he attempted to discern through questioning of the attorneys whether there was adequate evidence to support the instruction. That exchange is an exceptional example of the proper attention that is to be given by a trial judge to an important instruction. I do not disagree with the trial court that the evidence is weak. Where I part company is that when the instruction is an accused's only defense, the evidentiary demand should not be so great.

¶34. I would reverse and remand.

MCMILLIN, C.J., KING, P.J. AND COLEMAN, J., JOIN THIS SEPARATE OPINION.