IN THE SUPREME COURT OF MISSISSIPPI

TIMOTHY ROBERT RONK, *Appellant*

versus **No. 2011-DP-00410-SCT**

STATE OF MISSISSIPPI, *Appellee*

SUPPLEMENTAL BRIEF OF APPELLEE

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MELANIE THOMAS
SPECIAL ASSISTANT ATTORNEY GENERAL
Miss. Bar. No. 101016
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680
Telefax: (601) 359-3796
mthom@ago.state.ms.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

COMES NOW, Appellee, the State of Mississippi, by and through the undersigned counsel, and in response to this Court's Order of November 12, 2013, in the above-styled and numbered case, respectfully submits as follows:

STATEMENT OF THE ISSUE

On November 12, 2013, this Court issued an Order requesting supplemental briefing on whether, in light of the defense's requested imperfect self-defense instruction, this court's analysis of the trial judge's denial of that instruction "should relate to the defendant's armed robbery conviction as well as his capital murder conviction." The State respectfully submits the answer to such question is "no" and provides the following legal analysis in support thereof.

LEGAL ANALYSIS

1. This issue is procedurally barred. At no time during trial or direct appeal did Appellant raise the issue of the applicability of an imperfect self-defense manslaughter instruction to a conviction of armed robbery. The State respectfully objects to this supplemental briefing and submits such process allows Appellant to bypass this Court's strict and regular application of procedural bars and raise a new claim of error to preserve on appeal. *See generally Bell v. Epps*, 347 Fed. Appx. 73, 78 (5th Cir. 2009). A trial court cannot be put in error on matters not presented to it for decision. *Moawad v. State*, 531 So. 2d 632, 634 (Miss. 1988). *See Walker v. State*, 823 So. 2d 557 (Miss. App. 2002) (failure to raise issue at trial level bars consideration at appellate level). Moreover, matters on appeal are limited to those contained in the record of the case *sub judice*. This matter is not so contained. "It is the duty of the Appellant to present a record of the trial sufficient to show that the error of which he complains on appeal has occurred and,

further, the error was timely and properly preserved." *Walker v. State*, 671 So. 2d 581, 620; *see Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621 (1977). Appellant failed to raise, preserve, or even present this argument to a governing court; thus, this potential assignment of error is barred from review. *Howard v. State*, 507 So. 2d 58 (Miss. 1987).

2. To the extent this Court is now creating an issue for Appellant to argue on appeal, such argument must be considered on the basis of plain error. The plain error rule will be applied where the defendant failed to make a contemporaneous objection as his substantive or fundamental rights are affected. *Williams v. State*, 794 So. 2d 181, 187 (Miss. 2001). "To determine if plain error has occurred, we must determine 'if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial.'" *McGee v. State*, 953 So. 2d 211 (Miss. 2007) (quoting *Cox v. State*, 793 So. 2d 591, 597 (Miss. 2001)).
3. Plain error did not occur in the case sub judice. Appellant fails to show how the trial court deviated from any existing legal rule holding that manslaughter is a defense to armed robbery, such that it committed plain error in denying Appellant's requested lesser included imperfect self-defense manslaughter offense instruction on his capital murder charge. Appellant also fails to show how the trial court's alleged error in denying a lesser included manslaughter instruction necessitates a reversal of his armed robbery conviction. To say that these arguments are far-fetched is an understatement.
4. Appellant's Supplemental Briefing ignores the pertinent issue: whether imperfect self-defense manslaughter is a defense to armed robbery. It is not. This Court is clear in holding that a self-defense instruction is not applicable to a charge of robbery. *See Johnson v. State*, 29 So. 3d 738, 746 (Miss. 2009). In *Johnson*, the defendant alleged

trial counsel were ineffective for failing to submit a jury instruction on self-defense as a defense to the charge of armed robbery. This Court rejected such claim of error, holding, "In order for self-defense to constitute a valid defense, the defendant must 'act in response to an urgent actual threat or on a reasonable belief that such threat is actual or imminent.' We fail to see how a self-defense instruction is applicable to a charge of robbery, a specific-intent crime." *Johnson, id*. at 746 (quoting *Carter v. State*, 858 So.2d 212, 215 (Miss. App. 2003) and citing *Croft v. State*, 992 So.2d 1151, 1157 (Miss. 2008)). As self-defense is not a defense to armed robbery, Appellant fails to explain how imperfect self-defense manslaughter—which Appellant concedes lacks the element of specific intent—should receive more favorable treatment.

5. Appellant also fails to submit how manslaughter can serve as a defense to armed robbery. While self-defense is at least a justifiable defense to another crime, and is considered in concert with the actual crime charged, imperfect self-defense manslaughter is a crime in and of itself. *See* Miss. Code Ann. §§ 97-3-15, 35. Unlike manslaughter, one cannot be convicted of self-defense; self-defense excuses culpability. Indeed, the State respectfully disagrees with this Court's presumption that imperfect self-defense might "relate to" both the armed robbery conviction "as well as" the capital murder conviction. Imperfect self-defense manslaughter does not "relate to" either of those crimes, because manslaughter is not a defense to capital murder. It is an independent, lesser included crime. It does not defend against the crime of capital murder; it only affords the jury the option of imposing a different conviction and lesser sentence should it acquit the defendant of the greater charge. As the State pointed out during oral argument on appeal, Appellant's jury could not even consider imperfect self-defense manslaughter unless it first acquitted Appellant

of capital murder (something it never did). Thus, unlike self-defense—which a jury can consider in conjunction with capital murder, as a defense to that charge—imperfect self-defense manslaughter is a stand-alone crime. It "relates to" nothing.

6. The substance of Appellant's argument, indeed the linchpin of his attempt to find a connection between two separate, stand-alone crimes, is that a defendant cannot be convicted of both manslaughter and armed robbery, because the unintentional nature of manslaughter negates the specific intent requirement of armed robbery. The State, in response, first submits that Appellant's argument is non-responsive to the issue presented by this Court in its November 12th Order, because it does not address whether Appellant's jury should have been instructed that imperfect self-defense manslaughter is a defense to armed robbery. It instead focuses on the tangential argument that manslaughter and armed robbery have differing standards of intent, and that a manslaughter conviction would have "negated" the jury's ability to convict Appellant of armed robbery. *See* Supplemental Brief of Appellant, p. 8, ¶¶ 1, 2.

7. To dispel Appellant's argument that the use of force to effectuate the crime of armed robbery cannot be intentional where the force employed—the force giving rise to the manslaughter—was unintentional, the State offers the following cases in which this Court and the Mississippi Court of Appeals have upheld convictions of both manslaughter and armed robbery, based on the same factual predicate. *See Smith v. State*, 2013 WL 5912105 (Miss. App. 2013) (defendant plead guilty to manslaughter and armed robbery of Jeffrey Shepherd); *Williams v. State*, 107 So. 3d 1016 (Miss. App. 2012) (defendant, indicted for capital murder pleaded guilty to reduced charge of manslaughter and armed robbery); *Moore v. State*, 81 So. 3d 1147 (Miss. App. 2011) (where victim shot during

robbery of gaming hall, defendant convicted of armed robbery, conspiracy to commit armed robbery, and manslaughter); *Evans v. State*, 61 So. 3d 922 (Miss. App. 2011) (after robbing convenience store, defendant avoided capital murder prosecution by pleading guilty to manslaughter and armed robbery); *Keith v. State*, 999 So. 2d 383 (Miss. App. 2008) (after shooting Roger Jamison and stealing his car, defendant avoided capital murder charge by pleading guilty to manslaughter and armed robbery); *Harrington v. State*, 859 So. 2d 1054 (Miss. App. 2003) (evidence sufficient to support defendant's conviction of robbery with deadly weapon, conspiracy and manslaughter); *see also Howell v. State*, 860 So. 2d 704 (Miss. 2003) (co-defendant in capital murder case plead guilty to manslaughter and armed robbery); *Williams v. State*, 94 So. 3d 324 (Miss. App. 2011) (capital murder co-defendant plead guilty to manslaughter and armed robbery).

8. Further, that the specific intent required for an armed robbery conviction may be different from the intent formed in any type of manslaughter (either heat of passion or imperfect self-defense) does not make Appellant's armed robbery conviction invalid. Assuming Appellant had been convicted of manslaughter and armed robbery (which he was not), this Court consistently applies the U.S. Supreme Court case of *Dunn v. United States*, 284 U.S. 390, 393-94 (1932), in upholding inconsistent verdicts. *See U.S. v. Powell*, 469 U.S. 57, 69 (1984) ("The rule established in *Dunn v. United States* has stood without exception in this Court for 53 years"). Inconsistent or contradictory verdicts are not reasons to overturn a criminal conviction. Inconsistent verdicts are examined only for sufficiency of the evidence, such verdicts treated independently as if they arose from separate indictments. *Jones v. State*, 95 So. 3d 641, 645-47 (Miss. 2012). In *Sanders v. State*, 63 So. 3d 497, 504 (Miss. 2011) this Court agreed with the "well-reasoned analysis" of the

Court of Appeals in upholding inconsistent verdicts: "[w]hen analyzing the weight of the evidence that supports a jury's verdict, we are simply prohibited from considering, in any way, what the jury did on another count. It is irrelevant and immaterial. It is as if it never happened." There was no inconsistent verdict in this case, nor has Appellant suggested the evidence at trial was factually insufficient to support a conviction for armed robbery. He argues only that a manslaughter conviction should make the evidence of armed robbery *per se* "legally insufficient."

9. Appellant fails to present any legal authority on which this Court could reverse Appellant's armed robbery conviction based on the intent required under a separate charge of manslaughter. To the extent this Court chooses to find a new rule of law holding that a defendant cannot be convicted of manslaughter[1] and armed robbery stemming from the same factual predicate, this is not plain error, as plain error requires deviation from an existing legal rule. Accordingly, this issue as a whole is meritless.

10. The State also notes that any such new rule of law could be considered an exception to the general bar against retroactivity, pursuant to *Teague v. Lane*, 489 U.S. 288, 310 (1989). *See Jones v. State*, 122 So. 3d 698 (Miss. 2013). A new rule barring convictions for manslaughter and armed robbery based on the same factual predicate would place at least one of those convictions "beyond the power of the criminal law-making authority to proscribe. *Teague*, *id*. at 307; *see Schriro v. Summerlin*, 542 U.S. 348, 351–352 (2004) ("New substantive rules generally apply retroactively ... because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him").

[1] Either heat of passion or imperfect self-defense; if Appellant's argument holds true, neither version of manslaughter could have the same specific intent requirement as armed robbery.

11. Finally, to the extent this Court chooses to create a new rule of law barring the State form seeking convictions for armed robbery and manslaughter (stemming from the same criminal event), this Court cannot reverse Appellant's current armed robbery conviction until Appellant is actually convicted of manslaughter. Only then would the two convictions be incongruous. Appellant currently stands convicted of capital murder, not manslaughter; accordingly, such issue is not ripe because the facts giving rise to it have not yet occurred. This Court cannot hold the circuit court in error on a matter upon which it has not yet ruled. Such issue "is premature and not ripe for appellate review." *Thoms v. Thoms*, 928 So.2d 852, 855 (Miss. 2006). "A decision on appeal should be limited to a consideration of and ruling upon those issues necessary to a proper disposition of the appeal. A court should not ordinarily go further and express an opinion on other matters." *Ex Parte Castle*, 248 Miss. 159, 163, 159 So.2d 81, 83 (1963).

12. The convoluted contingency of Appellant's argument is that this Court should negate both the capital murder and armed robbery convictions based on nothing more than the possibility that, if his case is reversed and a new jury allowed to consider manslaughter, the jury might improperly convict Appellant of both manslaughter and armed robbery, in light of a rule not yet promulgated. The State finds this suggestion more along the lines of an advisory opinion, a suggestion to the trial judge that he not allow such incongruous convictions to be rendered in the event, one day, they are. This Court cannot issue advisory opinions. *See Nelson v. State*, 72 So. 3d 1038, 1045 (Miss. 2011); *York v. State*, 751 So. 2d 1194, 1199-1200 (Miss. App. 2011); *Tallahatchie General Hospital v. Howe*, 49 So. 3d 86, 93 (Miss. 2010). The purpose of appellate review "is not to settle questions

in the abstract or to issue advisory opinions." *Scoggins v. Baptist Mem'l Hosp.-Desoto*, 967 So.2d 646, 649 n. 1 (Miss. 2007).

CONCLUSION

Imperfect self-defense manslaughter is not a defense to any crime. Manslaughter does not relate, in any way, to Appellant's armed robbery conviction, and the trial judge did not commit plain error in denying Appellant's imperfect self-defense manslaughter instruction on the basis of a concurrent charge of armed robbery. Therefore, this Court's analysis of the trial judge's denial of the imperfect self-defense manslaughter instruction should not extend to consideration of Appellant's armed robbery conviction.

Respectfully submitted this the 17th day of December, 2013.

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MELANIE THOMAS
SPECIAL ASSISTANT ATTORNEY GENERAL
Counsel of Record
Miss. Bar No. 101016

BY: /s/ Melanie Thomas

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

This is to certify that I, Melanie Thomas, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be electronically filed a true and correct copy of the foregoing SUPPLEMENTAL BRIEF OF APPELLEE, which motion was electronically transmitted to the following:

Justin T. Cook
Alison Steiner
Office of the State Public Defender
Capital Defense Counsel Division
239 N. Lamar St., Suite 604
Jackson, MS 39201

I also hereby certify that I have this day caused to be mailed a true, via U.S. postal service, postage prepaid, a true and correct copy of the foregoing Brief to the following:

Hon. Lisa Dodson
Presiding Judge
Circuit Court of Harrison County
Post Office Box 1461
Gulfport, MS 39502

Joel Smith
District Attorney, Harrison County
Post Office Box 1180
Gulfport, MS 39502

This the 17th day of December, 2013.

By: /s/ Melanie Thomas