NEWS RELEASE

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FOR IMMEDIATE RELEASE
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AG STRANGE ANNOUCES CONVICTION UPHELD

FOR MURDER IN HOUSTON COUNTY

(MONTGOMERY) – Attorney General Luther Strange announced that the Alabama Court of Criminal Appeals upheld the murder conviction of a Dothan man on Friday. Gregory Gross, 27, was found guilty by a Houston County jury in August of 2010 for the murder of Christopher Mackey.

Evidence presented at trial stated that Gross was told by a bouncer and the owner of the establishment to leave Frank's Billiards, located in the Dixieland community. He refused to leave, and as the owner went to call the police, Gross shot and killed the victim, Mackey, when he was aiming at someone else.

Gross was convicted and sentenced to 99 years imprisonment, and subsequently sought to have his conviction reversed on appeal. The Attorney General's office argued for the Alabama Court of Criminal Appeals to affirm the conviction. The court issued a decision on Friday, March 18, upholding the conviction.

The case was prosecuted at trial by Houston County District Attorney Doug Valeska's Office. It was handled on appeal by Attorney General Luther Strange's Appeals Division.

For additional details, see attached ruling by the Alabama Court of Criminal Appeals.

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REL: 03/18/2011

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

SAMUEL HENRY WELCH
Presiding Judge
MARY BECKER WINDOM
J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

Lane W. Mann
Clerk
Gerri Robinson
Assistant Clerk
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MEMORANDUM

CR-09-1909 Houston Circuit Court CC-09-1480

Gregory Gross v. State of Alabama

WINDOM, Judge.

Gregory Gross appeals his conviction for murder, a violation of § 13A-6-2, Ala. Code 1975, and his resulting sentence of 99 years in prison. On September 15, 2010, Gross filed a motion for new trial and a notice of appeal. After conducting a hearing, the circuit court denied Gross's motion.

I.

On appeal, Gross argues that the State failed to present

sufficient evidence to support his murder conviction. Specifically, Gross contends that the State failed to prove that he intended to kill Christopher Mackey.

Section 13A-6-2, Ala. Code 1975 states, in pertinent part:

> "(a) A person commits the crime of murder if he or she does any of the following:
>
> > "(1) With intent to cause the death of another person, he or she causes the death of the person ...."

Regarding the sufficiency of the State's evidence to support a conviction, this Court has repeatedly held:

> "In deciding whether there is sufficient evidence to support the verdict of the jury and the judgment of the trial court, the evidence must be reviewed in the light most favorable to the prosecution. Cumbo v. State, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979). Conflicting evidence presents a jury question not subject to review on appeal, provided the state's evidence establishes a prima facie case. Gunn v. State, 387 So. 2d 280 (Ala. Cr. App.), cert. denied, 387 So. 2d 283 (Ala. 1980). The trial court's denial of a motion for a judgment of acquittal must be reviewed by determining whether there existed legal evidence before the jury, at the time the motion was made, from which the jury by fair inference could have found the appellant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, the appellate court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983); Thomas v. State. When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for a judgment of acquittal by the trial court does not constitute

error. Young v. State, 283 Ala. 676, 220 So. 2d 843 (1969); Willis v. State."

Breckenridge v. State, 628 So. 2d 1012, 1018 (Ala. Crim. App. 1993).

> "'In determining the sufficiency of the evidence to sustain the conviction, this Court must accept as true the evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider the evidence in the light most favorable to the prosecution.' Faircloth v. State, 471 So. 2d 485, 489 (Ala. Cr. App. 1984), affirmed, Ex parte Faircloth, [471] So. 2d 493 (Ala. 1985).
>
> > "'...
> >
> > "'"The role of appellate courts is not to say what the facts are. Our role, ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision to the jury." Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978). An appellate court may interfere with the jury's verdict only where it reaches "a clear conclusion that the finding and judgment are wrong." Kelly v. State, 273 Ala. 240, 244, 139 So. 2d 326 (1962). ... A verdict on conflicting evidence is conclusive on appeal. Roberson v. State, 162 Ala. 30, 50 So. 345 (1909). "[W]here there is ample evidence offered by the state to support a verdict, it should not be overturned even though the evidence offered by the defendant is in sharp conflict therewith and presents a substantial defense." Fuller v. State, 269 Ala. 312, 333, 113 So. 2d 153 (1959), cert. denied, Fuller v. Alabama, 361 U.S. 936, 80 S. Ct. 380, 4 L. Ed. 2d 358 (1960).' Granger [v. State], 473 So. 2d [1137,] 1139 [(Ala. Crim. App. 1985)].
> >
> > "... 'Circumstantial evidence alone is enough to

> support a guilty verdict of the most heinous crime, provided the jury believes beyond a reasonable doubt that the accused is guilty.' White v. State, 294 Ala. 265, 272, 314 So. 2d 857, cert. denied, 423 U.S. 951, 96 S. Ct. 373, 46 L. Ed. 2d 288 (1975). 'Circumstantial evidence is in nowise considered inferior evidence and is entitled to the same weight as direct evidence provided it points to the guilt of the accused.' Cochran v. State, 500 So. 2d 1161, 1177 (Ala. Cr. App. 1984), affirmed in pertinent part, reversed in part on other grounds, Ex parte Cochran, 500 So. 2d 1179 (Ala. 1985)."

White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989). Also,

> "'[c]ircumstantial evidence is not inferior evidence, and it will be given the same weight as direct evidence, if it, along with the other evidence, is susceptible of a reasonable inference pointing unequivocally to the defendant's guilt. Ward v. State, 557 So. 2d 848 (Ala. Cr. App. 1990). In reviewing a conviction based in whole or in part on circumstantial evidence, the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude. Cumbo v. State, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979).'
>
> "Ward, 610 So. 2d at 1191-92."

Lockhart v. State, 715 So. 2d 895, 899 (Ala. Crim. App. 1997). Further,

> "'[i]ntent, ... being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from

> the facts testified to by witnesses and the circumstances as developed by the evidence.' McCord v. State, 501 So. 2d 520, 528-529 (Ala. Cr. App. 1986), quoting Pumphrey v. State, 156 Ala. 103, 47 So. 156 (1908)."

French v. State, 687 So. 2d 202, 204 (Ala. Crim. App. 1995), aff'd in part, rev'd in part on other grounds, 687 So. 2d 205 (Ala. 1996).

> "'The question of intent is hardly ever capable of direct proof. Such questions are normally questions for the jury. McMurphy v. State, 455 So. 2d 924 (Ala. Crim. App. 1984); Craig v. State, 410 So. 2d 449 (Ala. Crim. App. 1981), cert. denied, 410 So. 2d 449 (Ala. 1982).' Loper v. State, 469 So. 2d 707, 710 (Ala. Cr. App. 1985)."

Oryang v. State, 642 So. 2d 989, 994 (Ala. Crim. App. 1994).

The owner of Frank's Billiards, Frank Lloyd, testified that on the evening of September 22, 2009, he saw Gregory Gross and Anthony Smith arguing and asked Gross to leave the bar. Lloyd and his bouncer attempted to escort Gross outside, but Gross broke free of their grasp. Lloyd tried to grab Gross a second time, but Mackey stepped in between them. Mackey asked Lloyd not to kick Gross out of the bar and stated, "If you going to put him out, put everybody out." (R. 148). Afterwards, Lloyd asked Mackey to step aside and when he refused, Lloyd said he would call the police. While Lloyd was in the front of the bar telephoning the police, he heard a gun shot and saw people running from the bar. Lloyd later found Mackey lying on the floor in the back poolroom.

David Frazier testified that he was in the back poolroom with Cynthia McGhee at the time of the shooting. Frazier saw Mackey holding Smith down on the pool table and choking him. He later saw Gross fire a shot from a silver gun and Mackey fall to the floor.

Cynthia McGhee stated she saw Mackey choking Smith on the pool table and then turned around. When she looked again, she saw Gross with a "shiny gun in his hand" and watched as he pulled the trigger. (R. 186). She heard Mackey call out that

he had been shot before falling to the ground.

Anthony Smith confirmed that prior to the shooting, Mackey held him down on the pool table by his shirt. Smith also stated that during his altercation with Mackey, he noticed Gross standing over to the right but did not see Gross with a gun and could not see who fired the shot that struck and killed Mackey.

Thomas McClain testified that he was Gross's cellmate following his arrest. McClain said that Gross confessed to him that he had accidentally shot Mackey. According to McClain, Gross and Mackey were arguing with Smith, and Gross accidentally shot the wrong person.

The Defense presented testimony by Dwight Malone, who stated that he saw Mackey and Smith arguing near the pool table, but did not see Gross with a gun and could not see the individual who fired the shot killing Mackey.

Based on the foregoing, the State presented sufficient evidence from which the jury could have reasonably concluded that Gross was guilty of intentional murder. The State presented evidence indicating that Gross fired a pistol with the intent to kill someone and killed Mackey. Gross's intent to cause the death of someone supplied the intent necessary to sustain his conviction for the intentional murder of Mackey. See § 13A-6-2(a)(1), Ala. Code 1975 (A person is guilty of murder if "[w]ith intent to cause the death of another person, [the defendant] causes the death of that person or of another person."). Furthermore, "[t]he weight and probative value to be given to the evidence, the credibility of the witnesses, the resolution of conflicting testimony, and inferences to be drawn from the evidence are for the jury." Smith v. State, 698 So. 2d 189, 214 (Ala. Crim. App. 1996), aff'd, 698 So. 2d 219 (Ala. 1997). Therefore, Gross's argument is without merit.

II.

Gross also argues that the circuit court erred in denying his requested jury instruction on provocation manslaughter. Gross, however, did not first present this argument to the circuit court. Therefore, he did not preserve this issue for

appellate review. See Harris v. State, 563 So. 2d 9, 11 (Ala. Crim. App. 1989) (defendant must first obtain an adverse ruling in order to preserve an issue for appellate review); Jordan v. State, 574 So. 2d 1024, 1025 (Ala. Crim. App. 1990) (claim was not preserved for appellate review where defendant did not first present his argument to the trial court).

However, even if Gross had preserved his argument for appeal, it is still without merit.

> "'A trial court has broad discretion in formulating its jury instructions, providing they are an accurate reflection of the law and facts of the case. Coon v. State, 494 So. 2d 184 (Ala. Cr. App. 1986). When requested charges are either fairly and substantially covered by the trial judge's oral charge or are confusing, misleading, ungrammatical, not predicated on a consideration of the evidence, argumentative, abstract, or a misstatement of the law, the trial judge may properly refuse to give such charges. Ex parte Wilhite, 485 So. 2d 787 (Ala. 1986).'
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> "Ward v. State, 610 So. 2d 1190, 1194 (Ala. Cr. App. 1992)."

Hemphill v. State, 669 So. 2d 1020, 1021 (Ala. Crim. App. 1995) (emphasis omitted).

In Yeomans v. State, this Court reaffirmed that "[t]he failure to give a proposed jury instruction constitutes reversible error only if such instruction (1) was correct, (2) was not substantially covered by the court's charge, and (3) concerned a point in the trial which was so important that the failure to give the instruction seriously impaired the defendant's ability to defend himself." 898 So. 2d 878, 899 (Ala. Crim. App. 2004) (internal citations and quotations omitted). There is nothing in the record to indicate that Mackey did anything to provoke Gross. Further, multiple witnesses testified that it was Smith and Mackey, rather than Gross, who were involved in an altercation around the time of the shooting. Therefore, Gross was the initial aggressor. Section 13A-6-3(a)(2), Ala. Code 1975 states that a person is guilty of provocation manslaughter if:

> "He causes the death of another person under circumstances that would constitute murder under Section 13A-6-2[, Ala. Code 1975]; except, that he causes the death due to a sudden heat of passion caused by provocation recognized by law, and before a reasonable time for the passion to cool and for reason to reassert itself."

Additionally, we recently stated:

> "This Court has recognized that '§ 13A-6-3(a)(2)[, Ala. Code 1975,] is designed to cover those situations where the jury does not believe a defendant is guilty of murder but also does not believe the killing was totally justified by self-defense.' Shultz v. State, 480 So. 2d 73, 76 (Ala. Crim. App. 1985).
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> > "Alabama courts have, in fact, recognized three legal provocations sufficient to reduce murder to manslaughter: (1) when the accused witnesses his or her spouse in the act of adultery; (2) when the accused is assaulted or faced with an imminent assault on himself; and (3) when the accused witnesses an assault on a family member or close relative."
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> "Rogers v. State, 819 So. 2d 643, 662 (Ala. Crim. App. 2001)."

Lane v. State, 38 So. 3d 126, 131 (Ala. Crim. App. 2009). However, the Alabama Supreme Court has held provocation manslaughter cannot be found where the provocation was not from the victim. Carter v. State, 843 So. 2d 812, 816 (Ala. 2002). In this case, multiple witnesses testified that Gross was the aggressor and that Mackey had done nothing to provoke him at the time of the shooting. Therefore, the circuit court did not abuse its discretion in refusing to charge the jury on provocation manslaughter.

Based on the foregoing, the circuit court's judgment is affirmed.

AFFIRMED.

Welch, P.J., and Kellum, Burke, and Joiner, JJ., concur.