IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLARENCE BENNETT, JR. — APPELLANT

VS. — NO. 2006-KA-0054

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLARENCE BENNETT, JR. **APPELLANT**

vs. **CAUSE No. 2006-KA-00054-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Bolivar County, Second Judicial District, in which the Appellant was convicted and sentenced for his felonies of **AGGRAVATED ASSAULT** and **FELON IN POSSESSION OF A FIREARM**.

STATEMENT OF FACTS

Robert Graham, an investigator with the Cleveland police department, testified that he responded to a report of a shooting at East Side Manor Apartments, which were located at the corner Beech and Martin Luther Kings streets in Cleveland, Bolivar County, Second Judicial District, Mississippi, on 6 April 2005. When he arrived there, there were several brother officers present. One of those was speaking with the victim in the case at bar, one Myron Hall, who resided at apartment number twelve. After speaking with Hall, who had injuries to his back, Graham and his fellow officers turned their attention to the Appellant, who resided at apartment number fourteen.

The officers found a 9 millimeter handgun in the Appellant's apartment and a holster. Inside the gun were four unfired bullets. They found a 9 millimeter shell casing just outside the door of the Appellant's apartment. The Appellant himself was found and was placed in a squad car as a crowd of people gathered about.

Graham also spoke with one Bobby Riley, who lived in the vicinity of apartments twelve and fourteen of East Side Manor Apartments.

After Hall was taken away for treatment, Graham gave the Appellant his *Miranda* rights. The Appellant told Hall that he had shot Hall because Hall was approaching him while armed with a knife. The Appellant further stated that there had been a difficulty between Hall and himself earlier in the day, the difficulty apparently having been about a vehicle that the landlord had forced someone, apparently the Appellant, to move. The Appellant became upset about the matter, got into an argument, and was then arrested for disturbing the peace. The Appellant made bond on that charge and returned to his apartment. According to the Appellant, Hall ran at him with a knife, so the Appellant shot at Hall twice. The Appellant admitted to having possession of the gun and told Graham that he had purchased it some two months prior to shooting Hall. (R. Vol. 2, pp. 29 - 61).

Tonya Lewis lived with two children and her boyfriend, Myron Hall, at apartment number 12, East Side Manor Apartments on 6 April 2005. Tonya knew the Appellant because the Appellant was always "picking with [her]".

The Appellant was "picking" with Tonya because the Appellant thought that she had called a Reverend Jackson on him to get the Appellant to move his truck. The Appellant, apparently, had a red truck in a parking space. When Tonya asked the Appellant to move the truck, the Appellant responded in insulting terms. Some how or another, the truck got moved, apparently to the Appellant's great annoyance. The police were summoned and carted the Appellant off, but, alas, not

for long.

Tonya and Hall and the children then went somewhere and then returned to the apartments. When they returned, she observed the Appellant standing in a doorway. Tonya and her son went inside their apartment while Hall went to the trunk of the car to get the children's book bags, her daughter following shortly afterwards. Tonya heard some talking and the heard two or three gunshots. Hall then came into their apartment and told her that he had been shot. The police were summoned again.

The police arrived, put the Appellant in the back of a squad car, where he continued his rant about the truck and all while Hall was being treated for injuries to his back. Tanya testified that Hall did not have a weapon just prior to having been shot. Hall possessed no weapon or a thing that might be used as such save a razor he used in cutting hair. That razor, though, was inside the apartment and inside a bag prior to and at the time Hall was shot. Hall was not armed during the first difficulty between the Appellant, Tonya and himself. (R. Vol. 2, pp. 61 - 71).

Officer Stanley Ray "Bo" Brewer testified that he was one of the officers dispatched to East Side Manor apartments on the afternoon of 6 April 2005. When he arrived, there were several people standing about the doorway at apartment number twelve, who reported that Hall had been shot. They also reported that the person who shot Hall was in apartment number fourteen. So Brewer and his fellow officers went to number fourteen, knocked on the door and announced themselves, and when the Appellant opened the door they handcuffed him and stuffed him into a squad car. The officers then looked around the apartment to see if anyone else was within it. While doing so they saw a gun holster lying on a couch. They also saw a shell casing just outside the Appellant's door.

Brewer went on to testify that the police department had been called out to deal with the

Appellant earlier in the day. (R. Vol. 2, pp. 71 - 78).

Myron Lamar Hall was then brought round to give testimony. He said that he lived at East Side Manor apartments and was employed at Parchman Farm and so lived and was so employed on 6 April 2005, the day he was shot by the Appellant

Things began badly when Hall heard the Appellant and Hall's girlfriend arguing outside of the apartment in which Hall and his girlfriend lived. Hall went out to help his damsel in distress and ran after the Appellant. The Appellant ran off to his apartment. This, though, was not to be the end of things.

Later that same day, Hall picked up the children from school. As he was helping one of them, his daughter, into the apartment from the car, the Appellant stuck his head out of his door and said, "If you see that tall man again, tell him I got something for him." Hall responded, "Tell the man I got something right here." At that point, the Appellant stepped out of his apartment and fired several shots at Hall. When the Appellant pulled his gun, Hall turned to run into his apartment. Hall was not armed at the time he was shot, nor was he armed when he ran toward the Appellant during the earlier difficulty. He never threatened the Appellant.

The Appellant was upset with Hall's girlfriend because the Appellant's truck had been towed away.

Hall suffered a "graze wound" to his back and was treated for it and released. (R. Vol. 2, pp. 79 - 94).

One Bobby Riley was then called to testify. She stated that she lived in apartment twenty of the East Side Manor Apartments and that she knew Myron Hall and Tonya Lewis. She knew the Appellant, though not by name. On the day of the shooting, she heard loud talk without her apartment. She saw Hall. She then heard two shots fired and saw Hall run to his apartment. She

thought Hall fell down before he got into his apartment. She did not see anything in Hall's hand. Hall was standing by his car when the loud talking began. She did not see who fired the shots. (R. Vol. 2, pp. 94 - 105).

Officer Rhett Nelson had an eventful day on 6 April 2005. He was dispatched to the East Side Manor apartments on that day to quell a disturbance at that place. Upon arriving, he was told that the occupant of apartment fourteen, the Appellant, had been cursing and causing trouble. Nelson went to the Appellant's apartment and knocked on the door. The Appellant, in a bellicose mood and showing distinct signs of being intoxicated, answered the door. He then explained in colorful language that he was upset that the landlord had been told that his truck was broken down. He apparently blamed Hall and Lewis for ratting him out about the truck. He thought that but for the fact that Lewis could not parallel park she would not have told the landlord. The landlord had a policy against having broken down motor vehicles in his parking lot. As the Appellant was explaining his situation to Officer Nelson, he made it a point to yell at people in the area. After several attempts to get the Appellant to quit yelling at people, Nelson arrested the Appellant and charged him with disorderly conduct. On the way to the police station, the Appellant told Nelson that what he, the Appellant, needed to do was to get his gun and shoot Hall and Lewis. The Appellant made motions with his hands at though he were cocking a gun. The Appellant also opined that Lewis needed to be arrested because she could not parallel park.

The Appellant, though, was able to make bond and, as it turned out, cause more trouble.

About an hour afterwards, Nelson and other officers were again sent to the East Side Manor apartments to investigate a report that shots had been fired there. When Nelson arrived, he found a group of people around apartment twelve. The Appellant was not among them. After Hall was seen to, the officers went to the Appellant's apartment, where they were met with a loud "Who is

it?" from the occupant therein. The Appellant, still irate, opened the door and was arrested at that point.

Nelson observed a 9 millimeter shell casing outside the Appellant's apartment. When the Appellant was asked where his gun was, the Appellant initially told the officers that he did not have a gun. Then he told them that it was in his truck. The gun was not in the truck. (R. Vol. 2, pp. 105 - 118).

The defense stipulated that the Appellant had been convicted of a felony. (R. Vol. 2, pg. 118),

The Appellant testified on behalf of the defense. He said he lived at apartment fourteen at East Side Manor apartments. He woke on the morning of 6 April 2005 with a "little ol' hangover" and took some pain medication for it. Somehow or another there was a connection between the pain medicine (or perhaps the hangover) with the loss of an index finger.

So he then spent the morning going over some papers he intended to file in Justice Court in consequence of someone having stolen parts from his pick'em up truck. Then he sorted out clothes he intended to give to his aunt's boy. Then he decided to take his garbage out and put his welding gear into his truck.

Now, the problem with getting the garbage out was that he had to pass by Hall's and Lewis' apartment to get to the garbage container. There was bad blood between Hall and Lewis and himself, as the Appellant put it. The Appellant said he did not want a confrontation with Hall. But, as the Appellant put his garbage in the back of his pick'em up truck, Hall was said to have said to him, "You need to go ahead and junk that old piece of junk." The Appellant was offended, we suppose – it was bad enough to have had parts stolen from the truck and then to have it referred to as an old piece of junk – so he told Hall, "Man, you need to go ahead and leave me alone, man. I just want

you to teach your skank ass bitch how to drive her car." Continuing, the Appellant also told Hall, "Why you wasting your time with me? Put your time to some value; teach her how to park."

While all of this was being said, the Appellant claimed he was having trouble stuffing his garbage into his vehicle. According to the Appellant, as he was fussing with his garbage, Hall started cursing him, came toward him, and popped a knife. The Appellant said he was tired, was trying to get his garbage back into his apartment since it would not fit into the vehicle, but Hall was cursing. The Appellant said he just did manage to get back into his apartment. Hall then supposedly kicked the Appellant's door and then kicked the Appellant's motor vehicle. The Appellant said he saw all this by peeking out of a window. Hall supposedly told the Appellant that he was going to cut his bitch ass up and other such things.

The Appellant thought that Hall was a thug, something out of *Boyz N the Hood* or *Menace II*. Hall was said to have favored the wearing of bandanas, caps worn backwards, baggy clothes and saggy pants. So there Hall was, according to the Appellant, raising trouble in the apartment complex, cursing and armed with a knife. The Appellant said he was too scared to go back outside.

A short time later the police showed up, thought not to the Appellant's relief. The officers asked the Appellant what the problem was, and the Appellant told him about his truck and the fact that Lewis couldn't drive worth fifty cents. Nonetheless, the Appellant was arrested and taken to the jail. He said he probably could not have made motions with his hands because he was manacled. Anyhow, the Appellant made bond, the bondsman telling him that he should stay in his apartment. The Appellant agreed to do so.

As soon as the bondman left, the Appellant left his apartment and went to his aunt's house, hoping to find a social security card for himself. The card had not arrived, so, perhaps in consolation, the Appellant went to Cecil's and got a half - pint of Heaven Hill for two dollars. He

sat there and drank about half of it and then went back to his apartment.

When the Appellant got back to his apartment, he saw Hall playing with a little girl. The Appellant opened the car door, put heaven's hill in his front pocket, opened the glove compartment and took out his pistol, got out of the car and put the pistol behind himself. The Appellant said he backed up behind the car so he could keep his eye on Hall. The Appellant said the Hall saw him nonetheless and came toward him, popping a knife, talking crazy and cursing and walking "gangster style." The Appellant said he walked toward his door. The Appellant said he told Hall, "I just got out of jail. I don't want to go to jail again, man. Why don't you just leave me alone, man." Hall was said to have responded with profanity.

The Appellant got to his door but said that he was having trouble getting into it, what with having lost an index finger and having to keep an eye on Hall and having to keep his gun hidden. Hall at that point was said to have leaped. The Appellant put a bullet into the gun's chamber and fired at Hall. Hall was at the air conditioning unit for apartment thirteen.

When the Appellant fired at Hall, Hall was said to have twisted and performed something like a ballerina's bow. After the second shot, Hall started shaking and acted as though he was going to fall. His leg was shaking and he was making facial expressions, which led the Appellant to believe that Hall was in pain. The Appellant said he thought he was going to be seriously injured when he fired.

The Appellant then started walking and told Hall, "Get your dog ass out of my way." Hall then began to make his way back to his apartment, holding the wall to keep himself up. The Appellant then went to his apartment. Poor Officer Nelson and his fellow officers showed up about ten minutes later.

The Appellant was not sure what he told the police about the shooting. He said he was

drunk. He was drunk and mad when he shot Hall. He admitted that there were certain aspects of his testimony, particularly the location of Hall when he shot Hall, that he did not tell the police. He may or may not have made motions with his hands when he was being booked for disorderly conduct. But, once again, he stated that he was drunk, so he could not particularly remember. He figured that Hall got shot in the back because Hall was trying to dodge a bullet. He did not think he shot Hall in front of Hall's apartment.

The Appellant admitted that he heard the State's witnesses testify as to Hall's location when the Appellant shot him, but the Appellant assumed they were wrong because he could not see that far. He said he was not a Jesse James or a Wyatt Earp, one of those outlaw shooters who could shoot accurately from a distance. He thought he shot Hall while Hall was "right up at [him]." The Appellant further testified that Lewis was not involved in the second episode with Hall. The Appellant denied having been drunk when law enforcement first paid him a visit, though he did admit that he had been suffering from a bad hangover. He denied having shot Hall when Hall was at or near or going to his apartment. The Appellant maintained that he shot Hall as Hall was rushing toward him while armed with a knife. (R. Vol. 2, pp. 127 - 150; Vol. 3, pp. 151 - 157).

At sentencing, the Appellant told the trial court that he was not attempting to shoot Hall. He was attempting to shoot "a young gangster thug." (R. Vol. 3, pg. 226). The Appellant also claimed that he fired his weapon but "spote" the shells and picked them up after the shooting. (R. Vol. 3, pg. 229)

STATEMENT OF ISSUES

1. WAS THE VERDICT OF GUILTY ON THE CHARGE OF AGGRAVATED ASSAULT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

SUMMARY OF ARGUMENT

THAT THE VERDICT OF GUILTY ON THE CHARGE OF AGGRAVATED ASSAULT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

ARGUMENT

THAT THE VERDICT OF GUILTY ON THE CHARGE OF AGGRAVATED ASSAULT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE[1]

This Court's standard of review when considering whether a trial court erred in refusing to grant a new trial is an abuse of discretion standard. In considering a claim that a trial court erred in refusing to grant a new trial on the allegation that the verdict is contrary to the great weight of the evidence, this Court must accept as true the evidence in support of the verdict. A new trial will not be granted absent a finding that the verdict is so contrary to the great weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice. *Prater v. State*, 18 So.3rd 884, 893 (Miss. Ct. App. 2009).

In the case at bar, there is no question but that the Appellant did shoot Hall. Hall testified that he did so and the Appellant admitted that he did so. The only issues for the jury to resolve were whether the Appellant shot Hall in necessary self - defense or whether the Appellant, drunk and angry and just released from jail, shot at Hall because Lewis told the landlord about the state of the Appellant's car.

Lewis testified that the Appellant was mad with her because she reported his broken - down truck to the landlord. The Appellant somehow figured that her inability to parallel park had something to do with it. The Appellant was sufficiently obnoxious in his comments and demeanor

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[1] We do not find that the Appellant brings a challenge to his conviction for having been a felon in possession of a firearm. That being so, we consider it unnecessary to address the evidence in support of that conviction other than to point out that the evidence clearly showed that he was in possession of a firearm and that he was a convicted felon at the time he was in such possession.

that law enforcement had to be summoned to deal with him. The Appellant was then arrested on a charge of disorderly conduct.

On the way to jail, or at the jail, the Appellant told a policeman that he thought he needed to shoot Hall and Lewis. When the Appellant returned to the apartments, that is what he did, at least with respect to Hall.

Hall testified that was not armed at the time he came to the assistance of Lewis and that he was not armed when the Appellant shot him. Hall further testified that he did not threaten the Appellant.

It is true enough that in the trial and prior to sentencing the Appellant claimed that he shot Hall because Hall was advancing on him while armed with a knife. However, this testimony by the Appellant simply created an issue of fact for the jury to resolve. The simple fact that the Appellant claimed – at trial – that the victim menaced him with a knife is no basis to find that the verdict against the Appellant constitutes an unconscionable injustice.

The Court is told that the jury's decision was unreasonable, a product of speculation, conjecture or guesswork. In support of this claim, the Appellant first says that there were not witnesses in the case without a stake in the outcome who could definitively say what happened. To the extent that the Appellant would have this Court disregard the testimony of Hall and Lewis on account of their "stake" in the trial, the Court, we suppose, is to fail to see that the very same point might be raised with respect to the Appellant, even if the Appellant had not given an entirely different account of how he came to shoot Hall during the sentencing hearing.

The credibility of witnesses is a matter for the jury to consider and determine. This Court will not set aside verdicts on straight issues of fact or on account of a conflict in the facts. *Price v. State*, 892 So.2d 294, 297 (Miss. Ct. App. 2004). Hall's account of what occurred was not utterly

incredible and was not impeached. As for Riley, while the witness seems to have been somewhat rattled over the experience of being a witness, her account of what she saw and heard corroborated Hall's. That she testified that she did not see who shot Hall was no reason to disregard her testimony. Such minor conflicts as there may have been between her testimony and a statement made by her during the investigation of the shooting were matters to be considered by the jury.

It may be that there was a difficulty between Hall and the Appellant earlier on the day of the shooting. It may be that the Appellant – the one who at sentencing completely changed his story of the shooting – testified that Hall and threatened him with a knife in that earlier confrontation. However, Hall testified otherwise. This was a factual issue for the jury to determine and is no basis for a new trial. It ought to be recalled that Hall's testimony was corroborated in a number of ways and that the Appellant, prior to the shooting, expressed an interest in shooting Hall or Lewis and Hall. The fact that Hall was shot in the back is a rather strong indication that the Appellant's account was not to be believed.

It may be that the Appellant testified, at least during trial, that he was defending himself. However, that the Appellant gave such testimony in no way means that the jury was required to believe it, much less acquit him on account of it. It was for the jury to determine whether the Appellant shot Hall in lawful self - defense or whether he shot him because of the contretemps concerning the Appellant's broken - down truck.

There is nothing in the record before this Court to demonstrate that the verdict of aggravated assault constitutes an unconscionable injustice. There was a conflict in the evidence about how the shooting came about, but it was for the jury to determine the true facts of the case. Accordingly, this Court should not find that the trial court abused its discretion in refusing to grant a new trial.

Beyond this, given the fact that the Appellant, in sentencing, offered an entirely new theory

of how he came to shoot Hall, thereby necessarily admitting that his testimony at trial was perjured, the Court should, at a minimum, disregard the trial testimony by the Appellant. The Appellant's trial testimony cannot possibly be seen as being contrary to the verdict in view of this apparent perjury, much less overwhelmingly so. The only credible evidence in the case at bar is that given by the State's witnesses. It would be an astounding thing indeed to find that a verdict could be upended on the ground that it was contrary to the great weight of the evidence where that "great weight" was only greatly false evidence.

The Assignment of Error is without merit.

CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

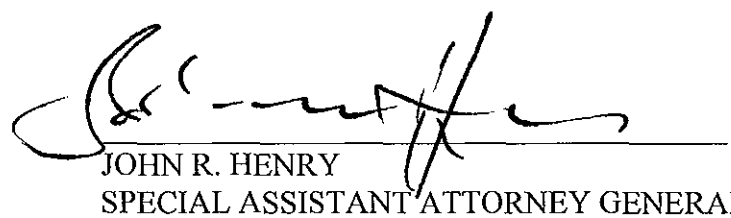
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Kenneth L. Thomas
Circuit Court Judge
P. O. Box 548
Cleveland, MS 38732

Honorable Brenda Mitchell
District Attorney
P. O. Box 848
Cleveland, MS 38732

Justin T. Cook, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 10th day of May, 2010.



JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680