IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EVERETT BOYD — APPELLANT

VS. — NO. 2006-KA-0562-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Everett Boyd has been convicted of shooting a man during a drive-by shooting. A reasonable and fair-minded juror could have found that the bullet that struck and killed the victim also entered a dwelling house.

During Boyd's trial for felony-murder and shooting a firearm into an occupied dwelling, Charles Adams and L. C. Gibson, two of Boyd's riding companions, identified Boyd in-court as the man who fired two shots from the driver's seat of his motor vehicle after conversing briefly with the decedent outside the decedent's home. (Adams: R. 165, 170- 72; Gibson: R. 190, 194-96)

EVERETT BOYD prosecutes a criminal appeal from the Circuit Court of Holmes County, Jannie M. Lewis, Circuit Judge, presiding.

The spectre of double jeopardy, the weight and sufficiency of the evidence, and unobjected to closing argument of counsel form the centerpiece of the present appeal.

Following a two (2) day trial by jury conducted on February 24-25, 2006, Boyd was

convicted of murder (Count I) and shooting into an occupied dwelling house (Count II). After a hearing conducted on March 9, 2006, the trial judge sentenced Boyd to life imprisonment for murder (Count I) and to ten (10) years for shooting into an occupied dwelling, the latter to run concurrent with the sentence imposed with Count I. (R. 300-01)

An indictment returned on July 6, 2004, charged in Count I that

COUNT I
MURDER

> " . . . EVERETT BOYD . . . did, on or about the 02nd day of May, 2004 . . . unlawfully, wilfully, feloniously, and without authority of law, without any design to effect death, kill and murder Michael O'Neal, a human being, while the said EVERETT BOYD was engaged in the commission of the crime of Drive By Shooting, in violation of Section 97-3-109 (1) of the Mississippi Code of 1972, and all being in violation of Section 97-3-19(1)(c) of the Mississippi Code of 1972, as amended, . . ." (C.P. at 5)

COUNT II
SHOOTING INTO OCCUPIED DWELLING

> " . . . that EVERETT BOYD, did, on or about the 02nd day of May, 2004, in Holmes County, Mississippi, unlawfully, willfully and feloniously shoot a firearm into the occupied dwelling house of Glenda Hoover, located on Old Tchula Road, Lexington, Holmes County, Mississippi, in violation of Section 97-37-29 of the Mississippi Code of 1972, as amended . . ." (C.P. at 5)

Five (5) issues are raised by Boyd in his appeal to this Court.

I. Whether Boyd's conviction violates the Fifth Amendment of the United State Constitution, *viz.*, the Double Jeopardy Clause.

II. Whether the State proved an essential element of shooting into an occupied dwelling, *viz.*, a willfull shooting.

III. Whether Boyd's convictions are against the overwhelming weight of the evidence and are supported by sufficient evidence.

IV. Whether the State invented and argued facts not in evidence during closing argument.

V. Whether cumulative errors require reversal.

STATEMENT OF FACTS

This is a tale of alcohol and guns and a friendship gone awry.

Late at night on May 1, 2004, four men, Michael O'Neal, the twenty-six (26) year old (R. 37) victim; Everett Boyd, the defendant; Charles Adams, and L. C. Gibson, friends, were out drinking together in Holmes County. After calling it a night around midnight, they drove to Boyd's house in Boyd's blue Chevy where O'Neal had left his own automobile. (R. 167-68, 232)

After saying a few things to the people standing around, O'Neal, for inexplicable reasons, pulled out his pistol and shot twice in the air. O'Neal then left in his automobile and returned to a house on Tchula Road in Lexington where he resided with Glenda Hoover, his girlfriend, and their three children. (R. 72)

After entering the house and giving Hoover a hug, a car pulled up outside the house. O'Neal left to investigate at which time Hoover heard Everett Boyd, who she had known for eight (8) years (R. 75-76), talking with O'Neal about something. We quote:

> Q. [BY PROSECUTOR WALDRUP:] When he went outside, what did you hear?
>
> A. I heard Everett saying something, and I hear Michael saying, Man, what you talking about? He's like, what you talking about? He said, Man I don't know what you talking about.
>
> Q. What else did you hear?
>
> A. That's all I heard from talking. And I heard two gunshots.
>
> Q. Where were you at in the house when you heard the two gunshots?
>
> A. I was in the bedroom.

Q. What, if anything, hit your house? Did anything strike your house when you heard those two shots?

A. Yeah. My - - the bullet came through my bedroom window.

Q. Was that on the first shot or the second shot?

A. Second shot.

Q. After you heard the second shot, were you able to hear the car anymore?

A. Yeah. I heard it drive off fast. (R. 75-76)

After hearing the car drive off, Hoover went outside where she observed O'Neal on his feet staggering toward her. After watching him collapse on the ground, she knew then he had been shot. O'Neal was unresponsive to her questions, and Hoover went inside to summon an ambulance. (R. 77)

Her telephone rang at 11:48 p.m. It was Everett Boyd calling from a cell phone asking what Mike was doing now. Hoover at this time accused Boyd of shooting O'Neal. Boyd denied it.

At 12:24 a.m., according to Hoover's caller ID, Boyd telephoned a second time from a land line. Hoover did not talk to Boyd at this time. (R. 78) Rather, she summoned her father, Glenn Brown, and O'Neal's father, John Pilgram. (R. 82)

After O'Neal was covered, Everett Boyd showed up. (R. 82) He went straight to O'Neal's body which was located between two cars and began to tug at his body. (R. 82-83, 115, 126)

Additional colloquy is quoted as follows:

Q. [W]hen you walked outside after the shots, where did you walk out of? Was it the front door or the side?

A. The front door.

Q. Now, I asked you earlier did anything enter your house

while you were standing there when you heard the shots fired. Did anything enter your house?

A. Yes.

Q. What was that?

A. A bullet.

* * * * * *

Q. Where were you at when the projectile entered your house?

A. I was laying right here. I was sitting on the bed. (R. 88)

Hoover later found a .45 bullet underneath some pieces of broken window glass and turned it over to the local authorities. (R. 88-89, 98-99)

Nine (9) witnesses testified for the State of Mississippi during its case-in-chief, including **Charles Adams** and **L.C. Gibson**, both of whom were riding with Boyd the night of the fatal shooting and were ear and eyewitnesses to the events which transpired.

Dr. Steven Hayne, a forensic pathologist, performed an autopsy on O'Neal on May 2, 2004. (R. 30) Hayne ruled the manner of death a homicide (R. 30) with the cause of McNeal's death being " . . . a [single] gunshot wound to the chest." Dr. Hayne " . . . described it as distant and perforating, that is, the bullet entered the body and exited the body." (R. 31)

The decedent had a blood-alcohol level of .55 and would have been severely intoxicated at the time of his death. (R. 38) The entrance wound was consistent " . . . with a large caliber projectile, including a .45 caliber projectile." (R. 39) The bullet would have still been traveling with some velocity after exiting McNeal's body and Dr. Hayne " . . . would expect that at a short distance to penetrate or perforate a half-inch piece of wood." (R. 40)

State's exhibit S-6 is " . . . a large caliber full metal jacket projectile consistent with a .45

caliber." (R. 42)

The wound inflicted on McNeal " . . . would be consistent with the decedent in a standing position receiving a gunshot wound through the chest . . . I would strongly favor that he was in a standing position when he received that shot straight through the body." (R. 46)

The distance from the end of the muzzle of the gun to the decedent could be within 50 feet or even 100 feet. (R. 46)

The decedent's clothing was not present at the autopsy table. (R. 45)

Brian McIntire, a forensic scientist specializing in firearms and tool mark identification, testified the projectile in exhibit S-6 was a .45. "The caliber is .45 caliber, and we refer to it as .45 auto." (R. 54, 60) "That's the measurement in inches. It's the diameter of the projectile." (R. 54)

State's exhibit S-7 is a 9 mm Luger handgun. (R. 56-57) The bullet found by Glenda Hoover that struck Michael McNeal cannot be fired from state's exhibit S-7. (R. 57-58) "This projectile cannot be fired from . . . this caliber gun." (R. 58) The inch equivalent for a 9 mm is .355. (R. 57-58)

"If the gun was inside the car at the time that it was fired, the chances would be greater that the cartridge case would be - - that it would stay inside the car as it was ejected from the firearm." (R. 60)

In order to do a "gunshot residue distance termination" "[o]ur standard operating procedures at the laboratory require that we have th[e]se three elements: the firearm, the ammunition, and the garment or clothing. (R. 63)

Glenda Hoover, the decedent's girlfriend and the mother of his three children (R. 72), was inside her home around midnight when she heard a car drive up. After McNeal went outside, Hoover overheard a conversation between McNeal and Everett Boyd who she had known for eight

(8) years. (R. 74, 104) She then heard two gunshots. (R. 76-77) One of the bullets, the "second shot," came through her bedroom window. (R. 76, 98) Hoover went outside and saw McNeal coming toward her; she watched as he fell to the ground unresponsive to her questions. (R. 77)

Minutes later, while McNeal was still on the ground, Hoover received a telephone call from Boyd's cell phone. Boyd wanted to know what Michael was doing. (R. 78-80) When Hoover accused Boyd of shooting McNeal, Boyd vigorously denied it, hollered and hung up. (R. 78) Hoover later received a second call from Boyd's home telephone which she did not answer. (R. 80-81)

Hoover called 911 and also her daddy, Glenn Brown, as well as McNeal's father, John Pilgram, both of whom arrived at the scene. (R. 82)

While McNeal was still on the ground, Everett Boyd drove up, looked at the body, and remarked that McNeal had shot himself.

The next day Hoover found a bullet inside her house underneath some broken window glass, State's exhibit S-6. (R. 88-89, 98-99, 112) She took it to the sheriff's office the following day and gave it to Sam Chambers. (R.88-89)

Hoover told Deputy Chambers at the hospital that Everett Boyd shot McNeal. (R. 92)

Exhibit S-7, a 9 mm (R. 56-57, 118), is McNeal's gun. (R. 92) Hoover went with McNeal when he purchased it two months ago. (R. 92, 96) She did not see the gun that night (R. 93) which was turned over to the authorities by her father, Glenn Brown, after the shooting. (R. 94)

Two shots were fired that night outside Hoover's house; only one bullet was found. (R. 112)

John Pilgram, the decedent's father, lives on old Tchula Road not far from the scene of the shooting. During the early morning hours of May 2, 2004, Pilgram was at home when he heard two gunshots. (R. 113) Pilgram learned via a telephone call his son had been shot and " . . . when I got

over there, he was laying there on the ground." (R. 113-14)

When Everett Boyd arrived at the scene, " . . . he got out of the car, he said, I didn't shoot him. He must have shot himself." (R. 115, 119)

The first time Pilgram saw exhibit S-7, a 9 mm handgun, it was " . . . [o]n the car seat [i]n Mike's car" after the shooting. (R. 117) There was no gun on the ground near the decedents body. "He didn't have no gun." (R. 117) Mr. Pilgram gave the gun to Hoover's father, Glenn Brown. (R. 117) Exhibit S-7, a 9 mm handgun (R. 56-57), was thereafter admitted into evidence as a full evidentiary exhibit. (R. 118)

Glenn Brown, a resident of Lexington and the father of Glenda Hoover, testified that Glenda notified him by telephone that McNeal had been shot. (R. 125) Brown immediately went to his daughter's house where he saw John Pilgram standing nearby and observed McNeal lying on the ground. (R. 125)

Ten or fifteen minutes later, Everett Boyd drove up in a car. Two other guys inside the car with Boyd remained inside while Boyd got out " . . . walked over toward me and Mr. Pilgram and where Mike was laying." (R. 125-26) Boyd was trying to raise McNeal up and said something to Mr. Pilgram that Brown did not understand. (R. 127) The terrain from the yard to the road in that area is "almost even." (R. 127)

Exhibit S-7 is a handgun given to me by Mr. Pilgram the next day and " . . I took it to the sheriff's department." (R. 127) The first time I saw this gun was " . . . when [Mike] first bought it, he showed it to me." (R. 127) There were no bullets in the gun when it was given to me. (R. 127)

The two men riding and drinking with Boyd and McNeal that evening were Charles Adams and L. C. Gibson. Both men testified at Boyd's trial.

Charles Adams, an ear and eyewitness to the entire incident, testified that Everett Boyd fired

two shots from inside his automobile that night after conversing with Michael McNeal outside McNeal's home. The testimony of Adams implicating Boyd has been more fully developed in our response to Point III targeting the weight and sufficiency of the evidence.

L. C. Gibson, also an ear and eyewitness to the incident, implicated Boyd in the shooting of McNeal. His testimony, likewise, has been more fully developed in our response to Point III.

Sam Chambers, a deputy sheriff and investigator for Holmes County, testified he investigated the incident on Old Tchula Road involving the shooting of Michael O'Neal. (R. 212) After talking with Glenda Hoover and others at the hospital, Chambers began looking for Everett Boyd. (R. 211)

Chambers later went inside Hoover's house where he observed a broken bedroom window. (R. 213-14) There appeared to Chambers " . . . to be a bullet hole out in the back wall, about a foot from the, a foot or less from the ceiling." (R. 214)

Exhibit S-7 is a 9 mm firearm given to one of Chambers' deputies by Glenn Brown the following day. (R. 127-28)

Exhibit S-6 is the bullet that Glenda Hoover brought to me a day or two later. (R. 215)

Chambers also interviewed Boyd on May 2, 2004 at 4:00 a.m. (R. 217) He also interviewed both Gibson and Adams. (R. 216)

After being advised of his rights and signing a waiver of those rights, Boyd gave a voluntary statement to Chambers in the presence of other officers. (R. 219)

Boyd told Chambers he owned a .38 revolver that was in lay away in Grenada. He also told Chambers that O'Neal owned " . . . a 9 or a .380. Maybe a .45." (R. 220, 222) Chambers had no personal information at that time as to why Boyd would come up with a .45. The bullet, S-6, was not tested until a year later when it was determined to be a .45 projectile. (R. 223-24)

Both Gibson and Adams told falsehoods the first time Chambers interviewed them. After he was charged with accessory-after-the fact, Adams told the truth about what happened. (R. 224) Everett Boyd was the only suspect in this case and the only person charged with murder. (R. 226)

When first questioned, Boyd denied going to O'Neal's house after O'Neal left Boyd's house. (R. 226)

> Q. (Mr. Waldrup) Would you go to page 36 [of Boyd's statement]? Go to the top of the page. I'm referencing his statement. Do you see the first question asked by the Captain? Would "Captain be you?
>
> A. Yes, that's me.
>
> Q. Okay. Read that question that you asked the defendant.
>
> A. "Now if I, now, if I've got some witness saying that you came by, back through there in your car and passing them apartments, they're lying on you?"
>
> Q. What was his answer?
>
> A. Answer: "That second time? They might have did see me come through the second time, yes."
>
> Q. Prior to him answering "the second time," had he even said anything about going over there one time?
>
> A. No, he haven't. (R. 227-28)

At the close of the State's case-in-chief, the defendant's motion for a directed verdict was denied. (R. 249-50)

After being advised personally of his right to testify or not, Boyd elected not to testify in his own behalf. (R. 250-53)

The defense rested without producing any witnesses, relying instead upon insufficient proof in the State's case. (R. 253)

Peremptory instruction was not requested.

The jury retired to deliberate at 2:24 p.m. and returned with the following verdicts 26 minutes later at 2:50 p.m. :

> "We, the jury, find the defendant, Everett Boyd, guilty of murder as charged in Count I of the indictment." (R. 296; C.P. at 51)

> "We, the jury, find the defendant, Everett Boyd, guilty as charged of shooting into an occupied dwelling, as alleged in Count II of the indictment." (R. 296; C.P. at 52)

A poll of the jurors, individually by name, reflected the verdicts returned were unanimous. (R. 296-97)

Following a sentencing hearing conducted on March 9, 2006, Boyd was sentenced to life imprisonment for murder (Count I) and to ten concurrent years for shooting into an occupied dwelling. (Count II) (R. 300-01)

Boyd voiced, *ore tenus*, a motion for a new trial/JNOV on March 9th which was overruled following argument. (R. 301-06)

Robert S. Smith, a practicing attorney in Jackson, represented Boyd very effectively at trial.

Bernard C. Jones, Jr. and Laura Skeen Kens, practicing attorneys in Jackson and Ridgeland, respectively, have filed an excellent brief in this Court on Boyd's behalf.

SUMMARY OF THE ARGUMENT

I. Boyd's prosecution and convictions for murder and shooting into an occupied dwelling did not violate the double jeopardy provisions of the state or federal constitution.

II. Giving the State the benefit of all reasonable inferences that could be gleaned from the testimony by a reasonable and fair-minded juror, there was sufficient evidence to demonstrate a wilfull shooting into an occupied dwelling house.

III. The verdict of the jury was not against the overwhelming weight of the evidence. The evidence clearly does not preponderate in favor of Boyd.

There was ample evidence which, if accepted as true, was sufficient to support the jury's verdict.

IV. Of the many prosecutorial remarks complained about, only one was the target of objection. Contemporaneous objection to closing argument is necessary in order to preserve the point for appellate review.

The only comment objected to was clearly innocuous and insufficient to warrant reversal.

V. There being no reversible error in any part, there can be no reversible error in the whole. **Genry v. State,** 735 So.2d 186, 201 (Miss. 1999).

ARGUMENT

I.

BOYD'S CONVICTION OF MURDER, AN OFFENSE ARISING OUT OF THE SAME NUCLEUS OF OPERATIVE FACT AS SHOOTING INTO AN OCCUPIED DWELLING, DOES NOT GIVE RISE TO A VIABLE CLAIM OF DOUBLE JEOPARDY.

Boyd argues that ". . . the indictment under which [he] was charged clearly violates the protection afforded by the double jeopardy clause." (Brief of Appellant at 9)

We do not share this concern.

There is nothing wrong with the indictment which alleges in two separate counts that Boyd committed two separate and distinct felonies, murder (by virtue of the felony-murder doctrine) and shooting into an occupied dwelling house. It matters not that a single bullet may have passed through the victim, killing him, and also entered the dwelling house occupied by Glenda Hoover. The victim's death occurred while an entirely different underlying felony, a drive-by shooting

proscribed by Miss.Code Ann. §97-3-109(1), was taking place.

Admittedly, we have had some difficulty in pinpointing the nature of Boyd's double jeopardy argument.

Boyd, citing **Blockburger v. United States,** 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), contends he has been denied his right against double jeopardy because " . . . he was punished multiple times pursuant to the state's drive-by shooting statute for engaging in a single distinct event." (Brief of Appellant at 9) Put another way, ". . . Boyd's conviction of two felonies for a single shooting event subjected him to double jeopardy." (Brief of Appellant at 12)

We contend, on the other hand, that if one kills another by discharging a firearm from a vehicle, whether purposely, knowingly, or, as in the instant case, recklessly under circumstances manifesting extreme indifference to the value of human life, he is guilty of murder while engaged in the commission of a drive-by shooting.

Boyd's dual convictions of felony-murder and shooting into an occupied dwelling house did not constitute double jeopardy because Boyd committed two separate and distinct crimes arising out of a common nucleus of operative fact. Where, as here, two crimes arising out of the same transaction are separate and distinct and where, as here, each requires proof of an additional fact which the other does not, there is no double jeopardy dilemma. **Norman v. State,** 543 So.2d 1163 (Miss. 1989); **Barnette v. State,** 478 So.2d 800 (Miss. 1985); **Smith v. State,** 429 So.2d 252 (Miss. 1983); **Blockburger v. United States,** *supra*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *See also* **Brock v. State,** 530 So.2d 146 (Miss. 1988).

Felony-murder is defined by Miss.Code Ann. § 97-3-19(1)(c) as follows:

> "(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

* * * * * *

> (c) When done without any design to effect death by any person engaged in the commission of any felony *other than* rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felonies: . . ." [emphasis ours]

Count I of Boyd's indictment charging him with felony-murder alleged that Boyd " . . . did, on or about the 02nd day of May, 2004 . . . unlawfully, wilfully, feloniously, and without authority of law, without any design to effect death, kill and murder Michael O'Neal, a human being, while the said EVERETT BOYD was engaged in the commission of the crime of Drive By Shooting, in violation of Section 97-3-109 (1) of the Mississippi Code of 1972, and all being in violation of Section 97-3-19(1)(c) of the Mississippi Code of 1972 . . ." (C.P. at 5)

Jury instruction 2 (S-6) authorized the jury to find Boyd guilty of murder if it found from the evidence beyond a reasonable doubt that

> "1. EVERETT BOYD, ON OR ABOUT May 02, 2004, in Holmes County, Mississippi;
>
> 2. did willfully, unlawfully, feloniously, without authority of law, and not in necessary self-defense;
>
> 3. kill Michael O'Neal, a human being;
>
> 4. while engaged in the felony of Drive-By-shooting; . . . " (C.P. at 34)

The statutory definition of a drive-by shooting is found in Miss. Code Ann. §97-3-109 which reads, in its pertinent parts, as follows:

> (1) A person is guilty of a drive-by shooting if he attempts, other than for lawful self-defense, to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly

under circumstances manifesting extreme indifference to the value of human life by discharging a firearm while in or on a vehicle.

The essential elements of the underlying felony of drive-by shooting are found in jury instruction 5 (S-3) which reads as follows:

> "The Court instructs you that the person commits the crime of Drive-By-Shooting if he causes serious bodily injury to another, recklessly under circumstances manifesting extreme indifference to the value of human life by discharging a firearm while in or on a vehicle.
>
> The subject vehicle does not have to be moving." (C.P. at 36)

Because our felony-murder statute negates a finding of premeditation, malice aforethought, and any deliberate design to effect death, jury instruction 4 (S-2) also instructed the jury that

> " . . . the State does not have to prove that the Defendant, . . . acted with premeditation or deliberate design or malice aforethought. All that is necessary is that you believe beyond a reasonable doubt that Michael O'Neal, . . . was killed by EVERETT BOYD, not in necessary self-defense and at a time when EVERETT BOYD was engaged in the felony of "Drive-By-Shooting", and if you so find, then EVERETT BOYD is guilty of the crime of Murder as used in these instructions." (C.P. at 35)

The statutory offense of shooting into a dwelling house is found in Miss.Code Ann. §97-37-29 which reads as follows:

> If any person shall willfully and unlawfully shoot or discharge any pistol, shotgun, rifle or firearm of any nature or description into any dwelling house or other building usually occupied by persons, whether actually occupied or not, he shall be guilty of a felony whether or not anybody be injured thereby and, on conviction thereof, shall be punished by imprisonment in the state penitentiary for a term not to exceed ten (10) years, or by imprisonment in the county jail for not more than one (1) year, or by fine of not more than five thousand dollars ($5,000.00), or by both such imprisonment and fine, within the discretion of the court.

Count II of the indictment charging Boyd with shooting into an occupied dwelling house,

clearly a separate and distinct offense, alleged that Boyd

> " . . . did, on or about the 02nd day of May, 2004, in Holmes County, Mississippi, unlawfully, willfully and feloniously shoot a firearm into the occupied dwelling house of Glenda Hoover, located on Old Tchula Road, Lexington, Holmes County, Mississippi, in violation of Section 97-37-29 of the Mississippi Code of 1972 . . ." (C.P. at 5)

Jury instruction 7 (S-8) authorized the jury to find Boyd guilty of shooting into an occupied dwelling house if it found beyond a reasonable doubt that Boyd did

> "1. . . . on or about May 02, 2004, in Holmes County, Mississippi,
>
> 2. unlawfully, willfully and feloniously shoot a firearm,
>
> 3. Into an occupied dwelling house . . . " (C.P. at 39)

Admittedly, the .45 handgun allegedly used by Boyd is inextricably woven into the elements of both offenses. The pistol supplied both the means by which the bodily injury/death was inflicted as well as the means by which Boyd shot into the dwelling house occupied by Glenda Hoover.

No matter.

Where, as here, the two offenses arise out of a common nucleus of operative fact, the test is whether each statutory provision requires proof of an additional fact which the other does not. In other words, does each offense have at least one statutory element not contained in the other? **Blockburger v. United States**, *supra*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *See also* **Brock v. State**, *supra*, 530 So.2d 146 (Miss. 1988).

The same-elements test for double jeopardy violations asks the following question: Does each offense contain an element absent from the other offense? **Powell v. State,** 806 So.2d 1069 (Miss. 2001); **Huff v. State,** 828 So.2d 228 (Ct.App.Miss. 2002), reh denied.

This case passes the **Blockburger** "same-elements" test with flying colors.

In the case at bar, a murder committed while one is engaged in the commission of a drive-by

shooting, requires that the defendant cause death recklessly under circumstances manifesting extreme indifference to the value of human life by discharging a firearm while in or on a vehicle. These are elements absent from the offense of shooting into a dwelling house.

Needless to say, the offense of shooting into a dwelling house requires a "shooting into a dwelling house," an element not required for murder.

Shooting into an occupied dwelling house also requires the willfull discharge of a firearm into a dwelling house or any other building usually occupied by persons. Murder requires no such thing.

It seems apparent, therefore, that Boyd committed two separate and distinct crimes which, although arising simultaneously out of the same transaction, did not implicate double jeopardy. While the use of a pistol was essential to the proof in each case, each offense, nevertheless, required proof of an essential ingredient the other did not.

In summary, an element of the felony-murder charged here is a death or serious bodily injury caused recklessly under circumstances manifesting extreme indifference to the value of human life by discharging a firearm while in or on a vehicle.

Shooting into a dwelling house is an element absent from the felony murder charge here. No death or injury is required, only an intent to shoot a firearm into a dwelling house. Therefore, the **Blockburger** "same-elements" test is satisfied, and Boyd's protection against double jeopardy was not violated.

Finally, this case does not exist in the context of separate convictions of both murder as well as the underlying felony. (Brief of Appellant at 10-11) Any suggestion to the contrary is misplaced and to no avail.

II.

THERE WAS SUFFICIENT EVIDENCE FROM WHICH A REASONABLE AND FAIR-MINDED JUROR COULD FIND THAT BOYD "WILLFULLY" SHOT INTO AN OCCUPIED DWELLING HOUSE.

Boyd argues the State failed to prove that Boyd "willfully" discharged a pistol into a dwelling house. (Brief of Appellant at 12)

An act "willfully" done is an act "knowingly" and "intentionally" done. **Perrett v. Johnson,** 253 Miss. 194, 175 So.2d 497 (1965); **Ousley v. State,** 154 Miss. 451, 122 So. 731 (1929).

There is testimony in this case that on two occasions Boyd expressed his intent, once *prior* to Boyd's discharge of a pistol at McNeal's house and once *after* Boyd discharged his pistol at the home occupied by McNeal and Hoover.

First, there is credible testimony that after O'Neal fired his own pistol into the air at Boyd's house, Boyd stated he was going to do to O'Neal's house what O'Neal had just done to Boyd's grandmother's house.

Second, after Boyd discharged his pistol twice at O'Neal's house, he was heard to say he had just done what O'Neal had done at my house and that's all I did.

During the direct testimony of Charles Adams the following colloquy took place:

> Q. [BY PROSECUTOR WALDRUP:] Okay. Before you left, what, if anything did Everett Boyd say to y'all before he went over to Michael's house?
>
> A. He said he was going to go and shoot in front of his [O'Neal's] house. "He woke my grandfolks up. He shot in front of my house, I'm going to shoot back in front of his house." (R. 169-70)
>
> * * * * * *
>
> Q. After that conversation ended, did Mr. Boyd stay outside, or did he get back in the car?

A. He got back in the car.

Q. Wh[en] he got back in the car, what did he do?

A. He shot out the window.

Q. How many times?

A. Twice.

Q. Okay. Were you able to see the gun fired?

A. I seen it fired. (R. 171-72)

The testimony of L. C. Gibson, another ear and eyewitness to the incident, reflects the following:

> Q. [BY PROSECUTOR WALDRUP:] Okay. Now, after that happened, what, if anything, did [Boyd] say at that time?
>
> A. When we was driving off, I said, "What happened, Man?" He said, "Well, you know, I just shot." I thought, he said, "I just shot because he had shot at my house. I just shot in his house to woke his people up like he did mines."
>
> Q. Okay. Did you have any, after, after those shots were fired at Michael O'Neal's house, where did y'all go at that point?
>
> A. We went back to Everett Boyd's house. (R. 196-97)

If these are not direct expressions of Boyd's intent, we don't know what is.

In **Newburn v. State**, 205 So.2d 260, 265 (Miss. 1967), this Court stated:

> "Intent is a state of mind existing at the time a person commits an offense. If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent. The mind of an alleged offender, however, may be read from his acts, conduct, and inferences fairly deducible from all the circumstances."

In **Shanklin v. State**, 290 So.2d 625, 627 (Miss. 1974), this Court further opined:

> Intent to do an act or commit a crime is also a question of fact

> to be gleaned by the jury from the facts shown in each case. **The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent.** [citations omitted; emphasis supplied]

See also **Chambliss v. State**, 919 So.2d 625, 627 (Miss. 1974), citing **Shanklin v. State,** *supra;* **Knox v. State,** 805 So.2d 527 (Miss. 2002) [Intent to do an act or commit a crime is a question of fact to be gleaned by the jury from the facts shown in each case.]

Here Boyd's intent could be read from his expressions, acts, conduct, and inferences fairly deducible from the surrounding circumstances.

It was a jury issue by virtue of jury instruction 7 (S-8) which instructed the jury in plain and ordinary English it was required to find beyond a reasonable doubt that Boyd "unlawfully, willfully and feloniously [shot] a firearm into an occupied dwelling house."

III.

> **THE EVIDENCE WAS LEGALLY SUFFICIENT TO SUPPORT THE DUAL VERDICTS RETURNED BY THE JURY.**
>
> **THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

Boyd contends " [t]he trial judge failed to prevent a miscarriage of justice when she overruled Boyd's motions for a directed verdict, for a judgment notwithstanding the verdict, and new trial." (Brief of Appellant at 13) Stated differently, Boyd claims the evidence is wanting in both legal sufficiency and weight. (Brief of Appellant at 13-16)

We disagree. Indeed, the question is not even close.

At the outset we invite the Court's attention to several factual deficiencies in Boyd's brief.

First, he states on page 15 that " . . . the decedent's .45 was found in the front seat of his vehicle . . ." He further states that "[t]he State did show that the decedent had a .45 caliber weapon, but the State never tested the bullet that killed him to determine if the decedent's gun was the deadly weapon."

Boyd has confused the decedent with the defendant.

We understand the record to reflect the handgun belonging to the decedent, Michael O'Neal", was a 9 mm, not a 45 caliber handgun. State's exhibit S-7 was a 9 mm Luger handgun (R. 56-57, 118) found by Mr. Pilgram on the seat of O'Neal's and Hoover's white automobile after the shooting. (R. 116-17) We cannot find in the record any indication that O'Neal had a 45 caliber weapon.

Second, Boyd states on page 16 of his brief that

> "[t]he medical examiner clearly stated that the bullet that killed the decedent had to have been aimed by someone in a standing position. (Tr. at 45-46) However, Boyd was convicted of killing the decedent while SITTING in a vehicle. If Boyd was sitting in the vehicle and did fire a weapon, he did not deliver the fatal shot."

The record reflects it was *O'Neal, the decedent, and not Boyd, the defendant,* who was in a standing position when he received a gunshot wound through his chest. (R. 45-46) We quote:

> BY TRIAL DEFENSE COUNSEL:
>
> Q. Dr. Hayne, based on this shot - - this shot was not shot straight in the air. Would you say it was shot straight?
>
> A. It would be consistent with the *decedent in a standing position* receiving a gunshot wound through the chest, yes, sir. Not recumbent or lying on the back or in a - - *somewhere above the shooter*. I would strongly favor that he was in a standing position when he received that shot straight through the body." (R. 45-46) [emphasis supplied]

Third, Boyd states in his brief at page 15 that " . . . the weapon that Boyd shot into the air,

and according to the testimony, was placed under his front seat and found to be a 9 mm, not a .45."

The record reflects *it was O'Neal, the victim/decedent, not Boyd, the shooter/defendant,* who shot into the air with a 9 mm later found on the front seat of the automobile in which O'Neal was riding.

The weapon that Boyd fired from the window of his automobile (R. 172-73, 196) was never found. L.C. Gibson testified "[a]fter the shots was fired, I think he (Boyd) put the weapon up under the seat or something like that." "I saw him put it down." (R. 196)

These observations remove the wind completely from underneath the wings and the very heart of Boyd's arguments. His claims are devoid of merit for this reason, if for no other.

Everett Boyd's conviction of felony-murder and shooting into an occupied dwelling house was based largely upon the ear and eyewitness testimony of Boyd's two riding companions, Charles Adams (R. 164) and L.C. Gibson. (R. 189)

Boyd's voluntary statement given to Deputy Chambers and Chief Deputy Roosevelt March is also incriminating in the sense Boyd emphatically denied being present when O'Neal was shot. *See* exhibit folder. There is also the matter of Boyd's afterthought and "slip of the tongue" when he told Deputy Chambers that McNeal's gun was "maybe a .45" (R. 222) and related to Chambers he may have been seen by others "the second time" when he had not said anything about being over at McNeal's house the first time. (R. 227-28)

Gibson's statement to the authorities, on the other hand, included the following:

> CHIEF: But you did see Boyd's gun.
>
> ANSWER: Yes. When he shot.
>
> CHIEF: What kind of gun he have?
>
> ANSWER: I didn't pay that close attention to know exactly what kind

> it was cause he shot it and put it back up. I'm just saying, he didn't - couldn't believe he had shot the man cause he was sitting in the car, getting ready to leave. O'Neal was standing back that way and I seen Boyd shoot. I couldn't tell whether he was shooting down, up, but I knew he took a gun out the window and shot two times and drove off. He said man he done shot at my house. I done at his house. Woke his people up just like he work my people up. And we went home. (R. 42))

The testimony of Adams and Gibson, both of whom heard two shots fired from inside the vehicle in which they were riding, carried great weight with the jury, especially where, as here, the defendant produced no evidence for them to weigh.

Equally incriminating was Hoover's testimony who clearly overheard Boyd and O'Neal discussing something while outside in front of her home. She later found a .45 bullet inside her house. This testimony provided the icing for an already palatable cake.

Two shots were definitely fired by Boyd from the window of his vehicle. There was some testimony that a second bullet which could not be removed struck Hoover's bedroom wall a foot or so below the ceiling. (R. 214-15, 228-29)

Even if Boyd was unaware he had shot O'Neal, it is uncontradicted that Boyd was the only one shooting over at O'Neal's house that night.

Boyd argues the State never placed the caliber of weapon that delivered the fatal shot in Boyd's possession and could not have delivered the fatal shot while seated in a vehicle.

Not so.

While the State did not by direct evidence place a .45 in Boyd's possession, it did by reasonable inference. Moreover, the testimony of Dr. Hayne reflects without a doubt the shot that struck and killed O'Neal could have been fired while Boyd was seated in his motor vehicle. The decedent was "somewhere above the shooter." (R. 46) In any event, these were questions for the jury

to ponder and resolve.

The jury knew this much. One minute O'Neal was alive and talking to Boyd in the front yard of McNeal's house. The next minute two shots are fired, and McNeal falls dead from a perforating gunshot wound to his chest. A bullet simultaneously enters Glenda Hoover's dwelling house by shattering a bedroom window. Another bullet strikes a bedroom wall. Adams and Gibson, Boyd's two riding companions, later testify that Boyd fired two shots from the window of his automobile after which Boyd exclaims that he just shot because he (O'Neal) had shot at my house. "I just shot in his house to woke his people up like he did mines." (R. 196-97)

A reasonable and fair-minded juror could have found from all the evidence that McNeal was shot in the chest either intentionally or by accident when Boyd shot into the dwelling house occupied by Hoover. While Boyd claims he could not have delivered the fatal shot while seated inside a vehicle, there is nothing in the law of physics that would create a reasonable doubt as to the identity of the shooter. Obviously, a bullet struck O'Neal, who was "somewhere above the shooter" (R. 46), and it may well have entered the dwelling house after passing through his body. Of course, two shots were fired. A fair-minded juror could have found that one bullet struck and killed O'Neal, and either the same bullet or the other one, or both, entered the dwelling house occupied by Hoover.

While there was no direct evidence placing a .45 in Boyd's hands, a reasonable and fair-minded jury could have found from all the evidence that O'Neal was shot with a .45. Boyd admits as much in his brief at page 7 where he states that the prosecution " . . . put forth ample evidence that the weapon that killed O'Neal was a .45. . . ."

According to both Adams and Gibson, it was Boyd who was doing all the shooting at the home of McNeal. A logical inference from all the evidence in the case is that Boyd used a .45 to fire the shots that struck O'Neal and entered Hoover's dwelling house. This is especially true where, as

here, Boyd told Deputy Chambers and Chief Deputy Roosevelt March in his pretrial statement that O'Neal shot himself with "maybe a 45." We quote:

> CHISOLM: What kind of gun did Mike [O'Neal] have?
>
> ANSWER: I'm not sure. It's black. Look like maybe a nine or 380. Maybe a 45. I don't know bout that big. He had it in his right hip when he shot. After he had shot he stuck it back right here. Got in his car. He shot like three times in the air before he left my house. I wasn't mad at him. * * *

The great weight of the testimony, on the other hand, reflects that O'Neal's gun, exhibit S-7, was a 9 mm and not a .45. (R. 56-57, 116-17, 118)

It is enough to say that the testimony of Adams and Gibson, if true, was sufficient, standing alone, to prove Boyd's identity as the shooter. Their testimony was both substantial and credible and, if believed, carried sufficient weight to support Boyd's convictions. **McNeal v. State,** 405 So.2d 90 (Miss. 1981); **Burks v. State,** 770 So.2d 960 (Miss. 2000); **Brooks v. State,** 52 So.2d 609 (Miss. 1951).

Boyd laments the State never tested for gun powder residue, never tested the decedent's gun and never did this and that. (Brief of Appellant at 14-15)

No matter.

The jury received jury instruction 8 (D-1) concerning its duty with regard to the "believability" of the witnesses. (C.P. at 40) It also received jury instruction 9 (D-2) dealing with prior inconsistent statements. (C.P. at 41) The jury obviously resolved these questions adversely to Boyd. This Court " . . . is bound by the jury findings upon an issue presented by the instruction requested by appellant." **Kinney v. State,** 336 So.2d 493, 496 (Miss. 1976).

Lest we forget, "[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity."

Jones v. State, 381 So.2d 983, 989 (Miss. 1980). *See also* **Blocker v. State,** 809 So.2d 640, 645 (Miss. 2002), para. 18 ["(I)t is up to the jury to weigh any inconsistencies or contradictions in [a witnesses] testimony"; **Greer v. State,** 819 So.2d 1 (Ct.App.Miss. 2000), reh denied.

The standards of review for weight and sufficiency of the evidence are fully articulated in **Chambliss v. State,** 919 So.2d 30, 33-34 (¶¶ 10-16 (Miss. 2005), citing **Bush v. State,** 895 So.2d 836, 844 (Miss. 2005). The evidence in this case passes the tests with flying colors.

"Weight" implicates the denial of a motion for a new trial while *"sufficiency"* implicates the denial of motions for directed verdict, peremptory instruction, and judgment notwithstanding the verdict. **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

"[A] greater quantum of evidence is necessary for the State to withstand a challenge that the verdict is contrary to the overwhelming weight of the evidence, as distinguished from the legal sufficiency of the evidence argument." **Collier v. State,** 711 So.2d at 458, 462 (Miss. 1998).

Stated somewhat differently, "[a] greater quantum of evidence favoring the State is necessary for the State to withstand a motion for a new trial, as distinguished from a motion for j.n.o.v." **May v. State,** *supra*, 460 So.2d 778, 781 (Miss. 1984).

"If the evidence is found to be legally insufficient, then discharge of the defendant is proper." **Collier v. State,** *supra*, 711 So.2d 458, 461 (Miss. 1998) citing **May v. State,** 460 So.2d 778. 781 (Miss. 1985).

On the other hand, " . . . if the verdict is against the overwhelming weight of the evidence, then a new trial is proper." **Collier v. State,** *supra*, 711 So.2d 458, 461 (Miss. 1998) citing **May v. State,** 460 So.2d 778, 781-82 (Miss. 1985).

In other words, the remedy for a defect in "weight" is a new trial while the remedy for a

defect in "sufficiency" is final discharge from custody.

Our response to Boyd's sufficiency argument is summarized in only three words: Classic jury issue. It is clear that " . . . after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime(s) beyond a reasonable doubt." **Bush v. State,** *supra*, 895 So.2d at 843, quoting **Jackson v. Virginia,** 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Stated differently " . . . reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense(s)." **Chambliss v. State,** *supra*, 919 So.2d 30, 34 (Miss. 2005).

Where, as here, the target of the defendant's complaint is also the "weight" of the evidence, as opposed to its "legal sufficiency," such implicates the denial of a motion for a new trial.

"The motion for a new trial is addressed to the sound discretion of the trial court." **Burge v. State**, 472 So.2d 392, 397 (Miss. 1985). This Court reviews the trial court's denial of a post-trial motion under the abuse of discretion standard. **Flowers v. State**, 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State**, 566 So.2d 1240, 1242 (Miss. 1990). No abuse of judicial discretion has been demonstrated here.

"[T]he scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict." **Herring v. State**, 691 So.2d at 957 citing **Goff v. State**, 572 So.2d 865, 867 (Miss. 1990). In a motion for a new trial, all facts are construed in favor of the non-moving party. **Staten v. State,** 813 So.2d 775 (Ct.App.Miss. 2002).

This includes the identification testimony of Adams and Gibson which clearly outweighed the defendant's evidence in this case which was nil, i.e., nada. Quite obviously, the evidence does not preponderate in Boyd's favor.

It has been said the testimony by the State's witnesses may be given full effect by the jury where, as here, an accused does not take the witness stand. **Reeves v. State**, 159 Miss. 498, 132 So. 331 (1931). Stated differently, "[t]he prohibition against adverse comment and inference does not protect a defendant from the probative force of the evidence against him." **Tuttle v. State** , 174 So.2d 345 (Miss. 1965).

In **Rush v. State**, 301 So.2d 297, 300 (Miss. 1974), we find these words applicable to this observation.

> While it is the right and privilege of a defendant to refrain from taking the witness stand, and no presumption is to be indulged against him for exercising that right, still the testimony of the witnesses against him may be given full effect by the jury, and the jury is likely to do so where it is undisputed and the defendant has refused to explain or deny the accusation against him. *Reeves v. State,* 159 Miss. 498, 132 So. 331 (1931). * * * * * *

See also **Grant v. State,** 762 So.2d 800, 804 (Ct.App.Ms. 2000) ["We note that Grant presented no evidence which leaves the jury free to give full effect to the testimony of the State's witnesses. *Benson v. State*, 551 So.2d 188, 193 (Miss. 1989)."]

This assigned error - the sufficiency and weight of the evidence - is devoid of merit.

Finally, in **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility

of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State,** 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Hilliard v. State,** 749 So.2d 1015, 1016 (Miss. 1999); **Groseclose v. State,** 440 So.2d 297, 300 (Miss. 1983).

Contrary to Boyd's position (Brief of Appellant at 24-25), the case at bar does not exist in this evidentiary posture.

IV.

CONTEMPORANEOUS OBJECTION TO ALLEGEDLY PREJUDICIAL REMARKS DURING CLOSING ARGUMENT IS REQUIRED ELSE THE OBJECTION IS WAIVED. THE ARGUMENT COMPLAINED ABOUT HERE WAS NOT OBJECTED TO.

THE TRIAL JUDGE DID NOT ERR IN OVERRULING THE DEFENDANT'S LONE OBJECTION TO THE PROSECUTOR'S CLOSING ARGUMENT.

Boyd complains about certain portions of the State's closing argument which he claims " . . . wove a tale of fiction that contained no evidence or facts given during trial." (Brief of Appellant at 17)

The problem with this argument is that save for one innocuous comment by Mr. Waldrup, none of the remarks complained about, fiction or not, were the target of an objection, contemporaneous or otherwise.

The only objection in the record is found in the following colloquy:

> (Mr. Waldrup) * * * I'm going to go through some of the stuff that Mr. Smith told you in his opening (argument).

MR. SMITH: Your Honor, I'm going to object. I'm not required to prove anything in this case.

THE COURT: Overruled. (R. 263)

This lone objection was properly overruled because the remark was completely innocuous. With respect to the remaining portion of the State's rather lengthy closing argument, both argument-in- chief as well as rebuttal, the record, much like the cupboard of ole Mother Hubbard, is bare. (R. 263-78; 285-95)

It is well settled that a contemporaneous objection to allegedly prejudicial remarks of a prosecutor during opening or closing argument or to allegedly prejudicial questions propounded during trial is required in order to preserve these points for appellate scrutiny.

Failure to object operates to procedurally bar appellate review. **Rogers v. State,** 928 So.2d 831 (Miss. 2006); **Havard v. State,** 928 So.2d 771 (Miss. 2006), reh denied; **Spicer v, State,** 921 So.2d 292, as modified on denial of rehearing, cert denied 127 S.Ct. 493; **Edwards v. State,** 737 So.2d 275 (Miss. 1999); **Manning v. State,** 735 So.2d 323 (Miss. 1999); **Watts v. State,** 733 So.2d 214 (Miss. 1999); **Weatherspoon v. State,** 732 So.2d 158 (Miss. 1999); **Skinner v. State,** 726 So.2d 272 (Ct. App. Miss. 1998).

"Failure by defense counsel to contemporaneously object to a prosecutor's remark at trial bars consideration of prosecutorial misconduct allegations on appeal." **Brown v. State,** 936 So.2d 447, 453 (Ct.App.Miss. 2006), citing **Davis v. State,** 660 So.2d 1228, 1255 (Miss. 1995).

Stated differently, a contemporaneous objection to allegedly prejudicial remarks by the district attorney is required else the objection is waived. **Handley v. State,** 574 So.2d 671 (Miss. 1990); **Hill v. State,** 432 So.2d 427 (Miss. 1983); **Alford v. State,** 760 So.2d 48 (Ct.App.Miss. 2000); **Swindle v. State,** 755 So.2d 1158 (Ct.App.Miss. 1999) [Defendant waived any challenge to

all but one of the prosecutor's remarks made during closing argument where he failed to make a contemporaneous objection to all but one comment.]

In **Hill v. State,** *supra*, 432 So.2d 427, 439 (Miss. 1983), this Court opined:

> In this case, however, there was no objection to this argument. We have consistently held that contemporaneous objection must be made to improper argument by the state, and unless such objection is made, any claimed error for such improper argument will not be considered on appeal. [numerous citations omitted]

The absence of a contemporaneous objection to all but one of the allegedly prejudicial comments targeted on appeal is absolutely fatal to Boyd's complaint. **Turner v. State,** 818 So.2d 1181 (Miss. 2002) [By failing to object to the state's closing argument during trial, defendant was precluded from raising any issues concerning the argument for the first time on appeal.]; **Hampton v. State,** 815 So.2d 429 (Ct.App.Miss. 2002) [A contemporaneous objection must be made in order for the Court of Appeals to consider claims of improper or erroneous comments by a prosecuting attorney made during closing argument.]; **Swindle v. State,** *supra*.

Miss.Code Ann. § 99-35-143 is precisely in point. It reads, in its pertinent parts, that

> [a] judgment in a criminal case **shall not be reversed** because the transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present in court during the trial or any part of it, or that the court asked him if he had anything to say why judgment should not be pronounced against him upon the verdict, **or because of any error or omission in the case in the court below, except where the errors or omission are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court.** [emphasis added]

The underlying bases for the existence of a contemporaneous objection rule are contained in **Oates v. State**, 421 So.2d 1025, 1030 (Miss. 1982), where we find the following:

> There are three basic considerations which underlie the rule

> requiring specific objections. It avoids costly new trials. Boring v. State, 253 So.2d 251 (Miss. 1971). It allows the offering party an opportunity to obviate the objection. Heard v. State, 59 Miss. 545 (Miss. 1882). Lastly, a trial court is not put in error unless it had an opportunity to pass on the question. Boutwell v. State, 165 Miss. 16, 143 So. 479 (1932). These rules apply with equal force in the instant case; accordingly, we hold that appellant did not properly preserve the question for appellate review.

In **Leverett v. State**, 197 So.2d 889, 890 (Miss. 1967), this Court, quoting from **Collins v. State**, 173 Miss. 179, 180, 159 So. 865 (1935), penned the following language:

> The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.

"A trial judge will not be found in error on a matter not presented to him for decision." **Ballenger v. State**, 667 So.2d 1242, 1256 (Miss. 1995) citing numerous cases. No violation of fundamental rights is involved here, and the procedural bar/waiver/forfeiture rule is applicable to Everett Boyd.

Counsel invites this Court to invoke "plain" error. (Brief of Appellant at 17) We are not enamored with the so-called "plain error" rule which we have always felt should be something for this Court, in extremely rare cases, to notice and not for the appellant to argue. Allowing an appellant to argue "plain error" on appeal eviscerates the need for a contemporaneous objection rule.

In any event, any error was not so "plain" to trial defense counsel that it generated so much as a contemporaneous whimper. This simply detracts from the validity of Boyd's present complaint. Accordingly, we do not feel compelled to respond to each of Boyd's individual complaints. It is enough to say the remarks and argument complained about were fair and reasonable inferences drawn from the testimony.

The prosecutor's argument was fully supported by reasonable inferences to be drawn from all of the evidence in the case, including the out-of-court statements of the defendant and the testimony of Adams and Gibson, ear and eyewitnesses.

"A district attorney has the right to comment on the evidence and may analyze and deduce inferences from the testimony and may even call witnesses by their names, so long as he does not violate proper decorum of the court or infringe upon the defendant's right not to testify." **Ragan v. State**, 318 So.2d 879, 882-83 (Miss. 1975). Put another way, both

> . . . the state and defense counsel should be given wide latitude in their arguments to a jury. This is inherent in, and indispensable to, our adversary system. Courts should be very careful in limiting the free play of ideas, imagery and the personalities of counsel in their argument to a jury. [**Johnson v. State**, 477 So.2d 196, 209 (Miss. 1985)].

See also **Rogers v. State,** 796 So.2d 1022 (Miss. 2001), where we find the following language applicable here:

> While attorneys are afforded wide latitude in arguing their cases to the jury, they are not allowed to employ tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury. *Sheppard v. State*, 777 So.2d 659, 661 (Miss. 2000) (citing *Hiter v. State*, 660 So.2d 961, 966 (Miss. 1995)). The purpose of a closing argument is to fairly sum up the evidence. The State should point out those facts upon which the prosecution contends a verdict of guilty would be proper. *Clemons v. State*, 320 So.2d 368, 370 (Miss. 1975). **The prosecutor may comment upon any facts introduced into evidence, and he may draw whatever deductions and inferences that seem proper.** *Bell v. State*, 725 So.2d 836, 851 (Miss. 1998) (collecting authorities). Counsel "cannot, however, state facts which are not in evidence , and which the court does not judicially know, in aid of his evidence. Neither can he appeal to the prejudices of men by injecting prejudices not contained in some of the evidence." *Nelms & Blum Co. v. Fink*, 159 Miss. 372, 131 So. 817, 821 (1930); *see also Sheppard*, 777 So.2d at 661. [emphasis ours]

Moreover, the jury was instructed that arguments by the lawyers are not to be considered as

evidence.

Jury instruction C-CR-1 states, in part, the following:

> After I have completed reading the instruction(s), the attorneys will make closing arguments. These arguments are intended to help you understand the evidence and apply the law. But, the arguments are not evidence. Therefore, if a statement is made during the argument which is not based upon evidence, you should disregard the statement entirely. (C.P. at 32)

This Court has repeatedly held that when a trial court instructs the jury, it is presumed the jurors follow his direction. **Moore v. State,** 787 So.2d 1282 (Miss. 2001); **Puckett v. State**, 737 So.2d 322 (Miss. 1999); **Hobson v. State**, 730 So.2d 20 (Miss. 1998); **Crenshaw v. State**, 520 So.2d 131 (Miss. 1988); **McFee v. State**, 511 So.2d 130 (Miss. 1987); **Johnson v. State**, 475 So.2d 1136 (Miss. 1985); **Wilson v. State,** 797 So.2d 277 (Ct.App.Miss. 2001) [Jury is presumed to have followed the admonition of the trial judge to disregard an objectionable remark made during trial by either the prosecutor or a witness.]; **Pearson v. State,** 790 So.2d 879 (Ct.App.Miss) [It is presumed that admonishments to the jury concerning improper remarks from a state's witness eradicate the prejudicial effect from the minds of the jurors.]

Stated differently, "[a]ppellate courts assume that juries follow the instructions." **Clemons v. State**, 535 So.2d 1354, 1361 (Miss. 1988). "Our law presumes the jury does as it is told." **Williams v. State,** 512 So.2d 666, 671 (Miss. 1987). "To presume otherwise would be to render the jury system inoperable." **Johnson v. State**, *supra*, 475 So.2d at 1142.

V.

THERE BEING NO REVERSIBLE ERROR IN ANY PART, THERE CAN BE NO REVERSIBLE ERROR TO THE WHOLE.

Boyd argues " . . . that the cumulation of errors, while maybe not reversible error in and of

themselves, combined together to deprive him of a fundamentally fair trial." (Brief of Appellant at 19)

The complete answer to this contention is found in **Genry v. State**, 735 So.2d 186, 201 (Miss. 1999), where we find the following language:

> This court may reverse a conviction and sentence based upon cumulative effect of errors that independently would not require reversal. **Jenkins v. State**, 607 So.2d 1171, 1183-84 (Miss. 1992); **Hansen v. State**, 592 So.2d 114, 153 (Miss. 1991). However, where "there was no reversible error in any part, so there is no reversible error to the whole." **McFee v. State**, 511 So.2d 130, 136 (Miss. 1987).

Contrary to Boyd's suggestion otherwise, this is not a proper case for application of the doctrine of either "cumulative" or "plain" error. It was true in the **Genry** case, and it is equally true here, that since the appellant failed " . . . to assert any assignments of error containing actual error on the part of the trial judge in this case, this Court finds that this case should not [be] reverse[d] based upon cumulative error." 735 So.2d at 201.

Same here.

CONCLUSION

This case was well tried by lawyers representing both sides.

In addition, Boyd has filed a healthy brief replete with citations of legal authority. He has simply reached the wrong conclusion.

In the final analysis, the question of guilt or innocence was a jury issue.

While there is testimony demonstrating that Michael O'Neal was intoxicated the evening he was shot and killed, O'Neal was entitled, nevertheless, to the full protection provided by law.

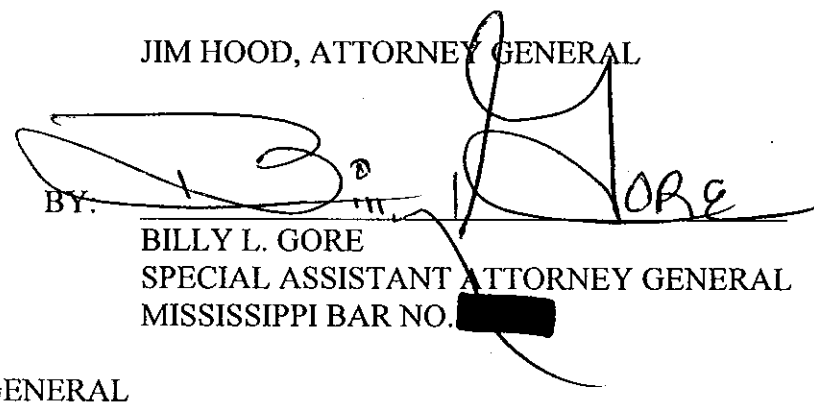
We find In **Dickerson v. State,** 441 So.2d 536, 538 (Miss. 1983), the following language applicable to this state of affairs:

> Contributory negligence is not a defense to manslaughter. All that the state must prove with respect to the victim is that he was prior to the incident a live human being. **The homicide laws of this State protect all living beings within the jurisdiction, sinners as well as saints, drunks as well as deacons.** (emphasis ours]

Appellee respectfully submits that no reversible error, whether cumulative, plain or otherwise, took place during the trial of this cause and that Boyd's judgments of conviction for murder (Count I) and shooting into an occupied dwelling house (Count II) and his dual concurrent sentences to life imprisonment (Count I) and ten (10) years (Count II) imposed in their wake should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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:

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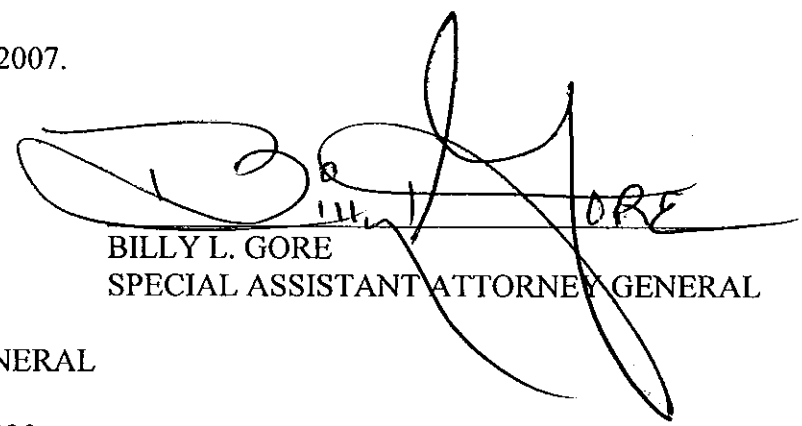
This the 31st day of August, 2007.



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