IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PERRY L. MASK — APPELLANT

VS. — NO. 2006-KA-1014

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: DEIRDRE MCCRORY
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

IN THE COURT OF APPEALS OF MISSISSIPPI

PERRY L. MASK — APPELLANT

VERSUS — NO. 2006-KA-1014-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Perry L. Mask was convicted in the Circuit Court of Alcorn County on a charge of murder and was sentenced to a term of life imprisonment. Aggrieved by the judgment rendered against him, Mask has perfected an appeal to this Court.

Substantive Facts

Jason Zubke testified that his his parents, Cindy Beck and Charles "Tony" Bascomb, had divorced when he was a young child, and he had spent most of his childhood with his mother in Michigan. Approximately four and a half years before this trial, he had moved to Glen, Mississippi, to live with his father and his paternal grandmother, Shirley Bascomb. During his stay in Glen, he had met Perry Mask "a few times" at the residence of Reagan Moss. (T.223)

On Sunday, February 29, 2004, Mr. Zubke and Mr. Bascomb "[w]ent over to Reagan Moss's house, pulled up right across the driveway. Christy Moss was outside." Ms. Moss told them "to leave" because Mask "had a gun." Mask approached their car and asked Mr. Bascomb, "What dirt road you want to meet on?" (T.224-25) Mr. Zubke described what happened next as follows:

> I told him, *Dad, don't do it.* So we kept going down the road. Perry Mask came flying up behind us, beeping the horn to get us to stop. Said, *Dad, don't stop.* He got up– we got up to Johns Cemetery, and my dad stopped. Perry got– then got out of his truck, came up to the car, said, *You don't think I will shoot you. I will.* Pulled out the gun and shot my dad. Shot him through the left shoulder.
>
> (T.225)[1]

Mr. Zubke went on to testify that his father, who did not have a gun at the time, had done nothing to provoke Mask immediately prior to the shooting. Immediately afterward, Mask told Mr. Zubke, "I didn't mean to shoot your dad. I just wanted to scare him." He added, "If my name gets out to the cops, I am coming back for you and the rest of your family." Mask then "got back in his truck and he took off" in "the direction that he came." (T.233-34)

Mr. Zubke got out of the car, ran around to the driver's side door, and asked his father to "scoot over" so that he could drive him to the hospital. Mr. Bascomb was bleeding and "gasping for air." Shortly afterward, "semi trucks came up the road." Mr. Zubke stopped the drivers, told them that Perry Mask had shot his father, "and had them call 911." (T.234-37)

---

[1]Later during direct examination, Mr. Zubke testified that immediately after Mask "came up to the car," he said, "You ripped us off." (T.232)

Mr. Bascomb was "airlifted... to Tupelo" where he lingered in the hospital for several days. He died on March 4, 2004. (T.237-38)

Anthony Luttrell was one of three truck drivers who happened upon the scene of this shooting. Mr. Luttrell testified that he had been driving his truck around a curve near the cemetery when he saw "a red car sitting there. ... Boy ran out in front" of Mr. Luttrell and "said a guy had been shot." Mr. Luttrell alerted Don and Debra, "the other two truck drivers," who were "a minute or so" behind him. Mr. Luttrell then got out of his truck. (T.282-84) After he was asked to describe what he had observed, he testified as follows:

> [I] walked over to where the car was sitting at, and there was a guy laid over in the seat, that he had fluid running out of his mouth and his eyes rolled back of his head. This was after the boy told me he had been shot. He wanted me to help him move him, and I wouldn't move him. I told him I would call 911. And by that time Debra was walking up and had the phone in her hand, so I told her dial 911.
>
> (T.284)

Mr. Luttrell went on to testify that Mr. Zubke "seemed disoriented, scared, ... nervous." After "[s]omebody asked him what it [the shooting] was over," Mr. Zubke "said it was over some money," and told them the name of the shooter. Mr. Zubke went on to state that the shooter had "walked up and stuck the gun to him and said, *You don't think I won't shoot you, you are crazy*, and pulled the trigger." (T.284-85)

Michael Beckner, an investigator for the Alcorn County Sherif's Department, testified that he was dispatched to the scene of the shooting, where he found medical personnel and several deputies. Deputy Beckner "took a small statement" from Mr. Zubke, who "was visibly upset at the time, and then began taking pictures of the crime scene." The

investigator then "looked in the car for any weapons" and "[l]ooked on the ground for any empty shell casings," but "[d]id not find anything." (T.300-01)

The authorities then began looking for Mask. The following day, March 1, 2004, Deputy Beckner and Deputy Tommy Hopkins saw Mask driving his "blue Toyota 4Runner" and tried to block his exit from a driveway. Mask managed to elude them. Accompanied by backup officers, Deputy Beck and Deputy Hopkins "went down the driveway and located the blue Toyota 4Runner, and the driver's side door was open in front of a small trailer." (T.305-06)

After extensive effort, including assistance from tracking dogs, Mask was apprehended in Alcorn County near the Tennessee border on March 19, 2004. Thereafter, Deputy Beckner "informed Mr. Mask of his rights. He stated that he understood." Deputy Beckner "asked him basically what happened with the shooting. Mr. Mask stated that they had fought– him and Charles Bascomb had fought over a gun." The defendant then "said he didn't want to say anything else," but that Deputy Beckner "could come talk to him Monday in Tishomingo County." (T.308-14)

On that date, Deputy Beckner went to the Tishomingo County Jail and, again, gave Mask the *Miranda* warnings. "He stated that he still understood. ... Mr. Mask stated that he had to shoot Mr. Bascomb because Mr. Bascomb was going to shoot him." (T.314)

Deputy Beckner testified additionally that he had observed no sign of a struggle when he investigated the crime scene shortly after the shooting. He had searched the victim's vehicle; no firearm was found. (T.314) On redirect examination, he was asked whether from his reconstruction of the shooting he had been "able to determine whether a struggle over the gun could have occurred." (T.340) Deputy Beckner gave this answer:

> Just by the angle, looking at the autopsy report, if somebody was fighting over a gun, and a gun went off in the back, a person's hands would have to be like this. And if they were pointing a gun at somebody and it went off on them, their wrists would have to be completely turned.
>
> (T.314)

Accordingly, Deputy Beckner did not think it was possible for this shooting to have occurred during a struggle over a gun. If it had, according to the deputy, "Mr. Bascomb's wrists, I would think, would be broke." (T.341)

Dr. Steven Timothy Hayne, accepted by the court as an expert in the field of forensic pathology, testified that he had conducted the autopsy on the body of the victim. He described the cause of death "as a gunshot wound to the back of Mr. Bascomb, specifically a gunshot wound to the left back." The wound "was either distant or near contact, that is that the weapon as not placed directly against the decedent's back when fired. And also penetrating, that the bullet entered the body but did not exit the body." (T.346-50)

Additional facts will be set out as necessary in the following argument.

SUMMARY OF THE ARGUMENT

The trial court correctly found that the defendant's flight was unexplained and probative of guilt. Accordingly, the flight instruction was proper in this case.

Furthermore, the trial court did not err in overruling the defendant's objection and motion for mistrial during the state's final closing argument.

The verdict is supported by legally sufficient proof and is not against the overwhelming weight of the evidence. Mask is not entitled to a judgment of acquittal or a new trial.

PROPOSITION ONE:

THE TRIAL COURT DID NOT ERR IN GRANTING A FLIGHT INSTRUCTION

Mask first contends the trial court committed reversible error in granting Instruction C-18, set out below:

> The Court instructions the Jury that flight is a circumstance from which guilty knowledge and fear may be inferred. If you find from the evidence in this case, beyond a reasonable doubt, that the defendant, PERRY L. MASK, did flee from the scene of the death of Charles A. Bascomb, then the flight of PERRY L. MASK is to be considered with all other evidence in this case. You will determine from all of the facts whether the flight was from a conscious sense of guilt or whether it was caused by other things, and give it such weight as you think it is entitled to in determining the guilt or innocence of PERRY L. MASK.
>
> (C.P.199)

When this instruction was tendered, the defense objected on the grounds that the instruction would be "prejudicial to the defendant," that it was unwarranted by the proof, and that the defendant "had an independent basis for fleeing from the scene and for staying gone, and they [the state] haven't established that he fled because of the guilt ... " (T.391) The prosecutor responded as follows:

> Quite the contrary, Your Honor, the State is not under an obligation to prove that the defendant fled because of his guilty conscience. The flight itself is the evidence of the guilty conscience, and this instruction is appropriate in this case, because, clearly, not only did he flee the day of the incident but also twenty days thereafter, after multiple attempts to apprehend him. Clearly shows that he was fleeing to avoid being caught in association with this crime.
>
> In regards to the defendant's argument that their position is that the flight is justified, they certainly have put on no proof of contrary, no evidence whatsoever has come in to

> explain his flight. Also a recent Mississippi Supreme Court case has said it is a jury issue.
>
> (T.391-92)

Thereafter, the court took a brief recess to consider *Shaw v. State*, 915 So.2d 442 (Miss.2005), an authority provided by the defense. The court then issued the following ruling:

> The Court finds that the evidence of the defendant's flight is relevant in this case. **His flight is totally unexplained and is probative of the defendant's guilt or guilty knowledge. There is absolutely no independent reason or basis in the record for the defendant's flight,** and the Court finds that it is admissible under Rule 404(b). Furthermore, under Rule 403 of the Mississippi Rules of Evidence, the probative value of the defendant's flight is not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.
>
> (emphasis added) (T.409-10)

In keeping with this finding, the court granted the instruction.

The state submits no error has been shown in the court's well-reasoned ruling, which correctly embodied the evidence– and lack of evidence– presented at trial. "[F]light generally is admissible as evidence of consciousness of guilt," *Liggins v. State*, 726 So.2d 180 182 (Miss.1998), and flight instructions are allowed when the flight is unexplained and probative of guilt. *Gilbert v. State*, 934 So.2d 330, 340 (Miss.App.2006). Here, the trial judge correctly observed that the defendant's flight was "totally unexplained,"[2] and that it was not only probative of guilt, but that its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

---

[2]It is obvious that the defendant failed to explain his flight since he did not testify.

In light of the foregoing facts, the state submits this was an appropriate case fot the granting of a flight instruction. Mask's first proposition should be denied.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ERR IN OVERRULING THE DEFENDANT'S OBJECTION AND MOTION FOR MISTRIAL DURING THE STATE'S FINAL CLOSING ARGUMENT

Mask contends additionally that the trial court erred in overruling his objection and motion for mistrial during the state's final closing argument. The genesis of this issue is the following, which was taken during closing argument by the defense:

> Now, when Mr. Beckner was on the witness stand, he testified he investigated and he gathered information and he gathered information from the witnesses. Even in his investigation, he didn't know what a lot of people said, and he just took Mr. Zubke's statement and went on. He was convinced nothing more to it, case solved, but ladies and gentlemen of the jury, the case is not solved. Something more should have been done. Something more should have been presented on that witness stand as far as witnesses are concerned, as far as documents are concerned, to make you feel comfortable as to what decision your are going to make.
>
> (T.433)

To rebut this argument, the assistant district attorney made these comments during final closing: "Mr. Comer also alluded to these other witnesses. They put witnesses on the stand that testified. They can call those witnesses also if there is pertinent evidence." (T.436) The defense objected and moved for a mistrial, stating in part, "We are not obligated to call any witnesses ... " The prosecutor countered, "He opened the door, Your Honor." The court overruled the objection and denied the motion for mistrial. (T.436)

The state acknowledges that as a general rule, neither party should comment upon the failure by the other to call a witness equally accessible to both. E.g., *Madlock v. State*,

440 So.2d 315, 317 (Miss.1983). However, the appellate courts have established a distinction where, as here, the comments in question were made in rebuttal to argument by the defense. In *Morgan v. State*, *Morgan v. State*, 818 So.2d 1163, 1175-76 (Miss.2002), the Supreme Court not only held that such a response by the state did not rise to the level of plain error, but that "the State is permitted to respond to direct statements that it did not call a particular witness, by pointing out that the defendant did not either." See also *Wright v. State*, 958 So.2d 158, 164 (Miss.2007). Likewise, in *Turner v. State*, 953 So.2d 1063, 1072 (Miss.2007), the Court characterized a similar comment as "a fair response to the defendant's claim that the State failed to call some witnesses who could have been helpful to the jury." In light of these authorities, the prosecutor did nothing improper. The trial court properly overruled the defendant's objection and motion for mistrial.

Solely in the alternative, the state submits that even "[a]n improper comment on the failure to call a witness does not require reversal unless the probable effect of the improper comment created unjust prejudice against the accused resulting in a decision influenced by prejudice." *Bright v. State*, 894 So.2d 590, 596 (Miss.2004). "Given the context of the prosecutor's comment," considered with the overwhelming evidence of guilt, the state contends any arguable error would be harmless. *Id.* In any case, Mask's second proposition should be denied.

PROPOSITION THREE:

THE VERDICT IS SUPPORTED BY LEGALLY SUFFICIENT PROOF AND IS NOT CONTRARY TO THE OVERHWELMING WEIGHT OF THE EVIDENCE

Under his third, fourth and fifth propositions, Mask challenges the sufficiency and weight of the evidence undergirding the verdict. To prevail on the claim that he is entitled to a judgment of acquittal, he faces the formidable standard of review set out below:

> In reviewing the sufficiency of the evidence, the standard of review is quite limited. *Clayton v. State*, 652 So.2d 720, 724 (Miss.1995). All of the evidence is to be considered in the light most consistent with the verdict. *Id.* The prosecution is given the benefit of "all favorable inferences that may reasonably be drawn from the evidence." *Id.* This Court will not reverse unless the evidence with respect to one or more of the elements of the offense charged is such that reasonable and fairminded jurors could only find the accused not guilty. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993).
>
> *Brown v. State*, 796 So.2d 223, 225 (Miss.2001).

To establish that he is entitled to a new trial, Mask must satisfy the rigorous standard set out below:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . **"This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe**

> **was or was not the most credible."** *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss.Ct.App.2001).
>
> (emphasis added) *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss. App. 2004),

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss. App. 1999).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As this Court recently reitereated in *Hales v. State*, 933 So.2d 962, 968 (Miss. 2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

Finally, the state points out that [t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify." *White v. State*, 722 So.2d 1242, 1247 (Miss. 1998).

The prosecution presented direct evidence that the defendant pulled a firearm on the unarmed victim, announced his intention to shoot him and did so, inflicting a wound

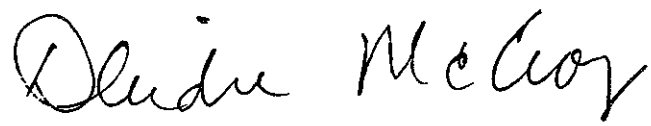
which ultimately killed him.[3] The defendant then fled and remained at large for 20 days. After he was apprehended, he gave a statement admitting the shooting, but describing circumstances which conflicted with the physical evidence. The evidence of guilt is overwhelming. Mask is entitled neither to be discharged nor to be retried. His final proposition should be rejected.

CONCLUSION

The state respectfully submits that the propositions presented by Mask are without merit. Accordingly, the judgment of the circuit court should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI



BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

[3]Evidence of drug use by the eyewitness simply presented an issue of credibility properly resolved by the jury.

CERTIFICATE OF SERVICE

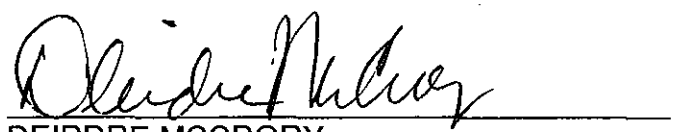
I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Paul S. Funderburk
Circuit Court Judge
P. O. Drawer 1100
Tupelo, MS 38802-1100

Honorable John R. Young
District Attorney
P. O. Box 212
Corinth, MS 38834

Clay S. Nails, Esquire
Attorney At Law
509 Franklin Street
Corinth, MS 38834

This the 27th day of December, 2007.



DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

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