

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENIVEL SMITH

APPELLANT

VS.

FILED
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SUPREME COURT
COURT OF APPEALS

NO. 2007-KA-0059-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On September 25, 2006, Kenivel Smith, "Smith," was tried for aggravated assault with a firearm by a Tunica County Circuit Court jury, the Honorable Albert B. Smith, III presiding. R. 1. Smith was found guilty and given a twenty year sentence in the custody of the Mississippi Department of Corrections. R. 254-255. From the conviction, he appealed to the Mississippi Supreme Court. C.P. 108.

ISSUES ON APPEAL

I.

WAS THE VICTIM'S STATEMENT PROPERLY RECEIVED?

II.

**WAS THE VERDICT AGAINST THE OVERWHELMING
WEIGHT OF THE EVIDENCE?**

STATEMENT OF THE FACTS

In August 22, 2005, Smith was indicted for the aggravated assault of Mr. Andrea Davis on or about December 28, 2004 by a Tunica County Grand jury. C.P. 8.

On September 25, 2006, K. Smith was tried for aggravated assault by use of a firearm by a Tunica County Circuit Court jury, the Honorable Albert B. Smith, III presiding. R. 1. Smith was represented by Mr. C. Gaines Baker. R. 1.

Mr. Andre Davis testified that on December 28, 2004, he was shot in the hip. R. 47. When questioned about who shot him, Davis claimed not to remember what happened two years ago. He remembered giving a statement to law enforcement shortly after he was shot. R. 48. Davis remembered signing the statement. R. 48. When provided with a copy of his statement to investigators, state's exhibit 5 a, Davis still claimed not to remember any factual specifics about the statement. R. 48. He testified that based upon his statement he told law enforcement that "Smith shot me up last night about some drugs." R. 51. He remembered making this identification statement to Officer Harris. R. 71. He remembered that the shots came from the street in front of his house. R. 75.

After a bench conference with the attorneys, the trial court allowed the prosecution to proceed under M. R. E. 804(a)(3), hearsay exception, declarant unavailable. This was because Davis repeatedly claimed "loss of memory" about what happened when he was shot. The trial court found that under M. R. E. 804(b)(5) that the three factors enumerated were satisfied in the instant cause. R. 55-56.

Davis remembered telling investigators that Smith shot him, but he couldn't remember how he knew that Smith had shot him. R. 73. When questioned about what he could or could not remember, Davis claimed to be "so pressured today." R. 76.

After a bench conference, the trial court had the audio recording of Davis's identification statement to Officer Harris played for the jury. R. 83. The jury also had a written transcript of the recording, Exhibit 5 b.

Detective Harold Harris testified that on December 29, 2004, he interviewed Mr. Davis. R. 120. This was part of his investigations of the shooting of Davis on December 28, 2004. Davis had been taken for medical treatment with a life threatening wound to his hip. As part of his investigation, Harris found nine bullet casings in the street near where Davis lived. R. 110. Harris testified that Davis identified Smith as the person who shot him. R. 120. Harris also testified that Davis told him that he was "face to face" with Smith prior to or during a confrontation with him over some alleged missing drugs. R. 140.

Officer Harris testified that he did not make any suggestions to Davis as to the identity of the shooter. Nor did he make any threats or promises concerning any charges that Davis had against him for illegal activity. At the time of the interview, Harris was not aware that Davis had any pending charges against him. R. 121.

Harris testified that Davis had been subpoenaed as a witness in the instant cause. Officers assisted in finding him. However, Davis was not arrested. And Harris testified there were no promises or threats made to Davis about the consequences of his testimony. R. 123-124.

There was evidence that the victim was "scared to death." R. 69, and exhibit 5(b) page 3 and 6. He was scared to death because of death threats from Smith.

The trial court denied a motion for a directed verdict. R. 173.

Smith chose not to testify in his own behalf. R. 221. Smith was found guilty and given a twenty year sentence in the custody of the Mississippi Department of Corrections. R. 254-255. From the conviction, he appealed to this court. C.P. 108.

SUMMARY OF THE ARGUMENT

1. The record reflects that there was record evidence in support of the trial court's ruling. The court found that the alleged victim, Mr. Davis, was unavailable as a witness. R. 55-56. The Court found the requirements for satisfying M. R. E. 804(a)(3), and (b)(5) had been met.

This was because of Davis' repeated claim of memory loss. This was memory loss between the time of the shooting and the trial. In addition, Davis was subjected to cross examination, as was Detective Harris. Officer Harris testified that Davis identified Smith. He identified him as the person who shot him. R. 84-98; 124-157. The defense also cross examined Davis about his audio identification statement that was played for the jury. R. 84-98. See State's exhibit 5© for recording, and 5(b) for transcription of recording. This recording was made when Harris questioned Davis about the circumstances surrounding his being shot. Davis reluctantly admitted to having known Smith since their school days together. R. 102-103.

The record also reflects that in addition to Davis' testimony about how his various infirmities caused him to have memory loss, that Smith "was scared to death." R. 69 and exhibit 5b in manila envelop page 3 and 6.. Smith had threatened to kill Davis or do both him and his family great bodily harm. R. 69, and Exhibit 5a and 5b , page 6 and 9 of Davis's statement to investigator Harold Harris.

Under **Davis v. Washington, & Hammond v. Indiana** , 126 S. Ct. 2266, *2280 (U.S. Wash. 2006), Smith forfeited his right to cross examine Davis by silencing him with death threats.

This would seem to the appellee to be contrary to the defense argument that it was the prosecution who had improperly pressuring Davis. Smith's argument on appeal is that the prosecution pressured Davis to testify because he was subject to prosecution for pending unrelated drug charges. See appellant's brief page 11-12.

2. When the evidence presented by the prosecution was taken as true together with reasonable inferences, there was sufficient credible evidence for denying a directed verdict and a motion for a new trial. **McClain**

v. State, 625 So. 2d 774, 778 (Miss. 1993). Given cross examination of both the victim and the detective, as well as the court's ruling under M. R. E. 804(a)(3) and (b)(5), admitting 5(a), 5(b) and 5©, there was sufficient credible, evidence in support of Smith's conviction. R.55-56.

Davis testified to knowing that he was shot, and to telling Officer Harris who shot him. R. 47;71. He remembered that the shots came from across the street in front of his house. R. 75. Harris' testimony corroborated this by finding nine shells in that location. Officer Harris corroborated Davis is testifying that Smith was identified as the person who shot Davis. R. 120. Davis knew this because he was "face to face" with Smith. R. 140. Davis reluctantly admitted to knowing Smith for a long time, and that he was shot over a misunderstanding about missing drugs. R. 51; 102-103.

The audio recording of Harris's interview of Davis was played for the jury. R. 83. A transcript of that interview was also available. Both Davis and Harris were cross examined about the circumstances under which this interview occurred, and how Davis had identified Smith as his assailant. This was done without any threats, suggestions or prompting. R. 84-98; 124-153.

This was sufficient, credible corroborated evidence in support of the jury's verdict, and a denial of a motion for a new trial.

In addition, there was evidence that the victim was "scared to death." R. 69, and exhibit 5(b) page 3 and 6. He was scared to death because of death threats from Smith. Therefore, under **Davis v. Washington, & Hammond v. Indiana**, 126 S. Ct. 2266, *2280 (U.S. Wash. 2006), Smith forfeited his right to cross examine Davis by silencing him with death threats.

ARGUMENT

PROPOSITION I

THE TRIAL COURT PROPERLY FOUND DAVIS WAS UNAVAILABLE DUE TO MEMORY LOSS.

Smith's appeal counsel believes that the trial court erred in admitting the victim's tape recorded statement into evidence. He believes that there were no sponsoring witnesses with knowledge about how the victim's statement was made and then transcribed. He also believes that the victim's claim of memory loss was invalid, since he testified that he was afraid to testify because of possible prosecution on pending charges. He also complains of improper impeachment with hearsay and no limiting instruction. Appellant's brief page 5-14.

To the contrary, the record reflects that Davis testified to not remembering what happened to him two years previously. He remembered shots were fired at him. He remembered that the multiple shots came from the street in front of his house. R. 46; 75. He knew he was shot in the hip. R. 47. He was outside his house and tried to run when shots were fired at him. R. 42. He also testified that he remembered making and signing an identification statement which he gave to investigators, state's exhibit 5(a). R. 49.

After reviewing state's exhibit 5(a), Smith remembered telling investigators that Smith shot him over a misunderstanding about some drugs. R. 51. He testified to remembering that he told law enforcement that Smith shot him. R. 75-76. He reluctantly admitted that he had known Smith for a long time. R. 102-103. He admitted that he gave this statement which he signed to Officer Harris. R. 71.

The trial court found under M. R. E. 804(a)(3), "hearsay exceptions where a declarant is unavailable," that it could be determined from the testimony that Davis was unavailable by reason of "a lack of memory." This would be lack of memory of the matters related to the circumstances under which he was shot.

Court: For the record, the State has called Andre Davis, the victim of the crime that we're trying today. The defendant has indicated a lack of being able to recall what happened on the

day in question when he was shot. Both attorneys agree that Rule 804 is where we are looking to address the issue of the statement made the day after the incident in question. The court finds that the requirement of 804 (a), unavailable as a witness, has been met. **The—Mr. Davis indicates lack of memory after the review of the statement. I'm looking at (b) and find under the circumstances with which the residual other exception elements that are the litmus test that we review are as follows: The statement must have circumstantial guarantees of trustworthiness. It's admitted by the witness that this is the statement that he have to the police. He recognized he gave it to the police. He recognized the statement that he gave, given one day after the incident in question. The court finds that there is a circumstantial guarantee of trustworthiness. Three, it must be offered as evidence of material fact, and that's obvious. Four and five are, I think, where the rub comes in. It must be more probative than other evidence. And the purpose of the rules, the interest of justice must be best served. R. 55-56.**

...

Larry Baker: It goes to motive, along those lines, and as far as the murder part, that's why we are where we are right now. My guy is not so much that he's forgot what happened. **He's scared to death, because of threats that he has gotten. I think he's refusing to, based upon those. This statement was given at a time when it was right after it happened. R. 69. (Emphasis by Appellee).**

Mr. Andre Davis testified that he told investigators that Smith shot him. He shot him because he thought Davis had taken some of his drugs without paying for them. He also remembered that this identification statement was given to Officer Harris.

Q. Now, when they asked you what happened that night, what did you tell them?

A. Mr. Smith shot me up last night about some drugs.

Q. Is that what you told law enforcement?

A. Yes, sir. R. 51-52. (Emphasis by Appellee).

...

Q. I believe you testified that Detective Harold Harris made this statement or took this statement from you, is that correct?

A. Took what statement, sir?

Q. The one that you're looking at right there.

A. Yes, sir. R. 71. (Emphasis by Appellee).

...

Q. Do you know if they (the shots from a firearm) came from across the street?

A. Yes, sir.

Q. **Do you have any memory of telling law enforcement, the day after this happened, that it was Kenievel Smith?**

A. Yes, sir.

Q. **You do remember saying that?**

A. Yes, sir. R. 75-76. (Emphasis by Appellee).

On cross examination, Davis was questioned about the circumstances under which he gave his statement to Detective Harris. He was cross examined about alleged hearsay from his nephew who supposedly informed him that Smith shot him. R. 93. He was also questioned about his motivation for making the statement.

Davis testified that he was an ex- convict. He had a pending drug charge against him. He testified to feeling "pressured" to testify in the instant cause. However, he admitted that the pending drug charge came "after" he was shot. He also admitted that no one from the District Attorney's office had promised him anything in exchange for his testimony. R. 84-108..

On redirect examination, Davis testified that he could not remember things that happened to him two years ago. This was the result of his having "diabetes" and "high blood pressure." However, he remembered telling law enforcement that Smith shot him. R. 104.

Q. What do you mean by hurt yourself at the same time?

A. **Up here under oath I really can't remember two years later.** There's a lot of stuff I really can't remember two years later. And I don't want to be lying under oath or trying to remember something I really can't remember. I've been sick a couple of times since two years, you know. **High blood pressure, I had it, and like diabetes, I got sugar.**

Q. That's why there was a tape recording. So, you are not denying that was your taped statement?

A. I'm not denying that is my statement.

Q. And those are the statements that you made?

A. Yes, sir.

Q. And you did say that on two years ago that it was Kenivel Smith that shot you?

A. Yes, sir, that was in the statement.

Q. And that's you in your own words it says that as well, is that not right?

A. Yes, sir. R. 104. (Emphasis by Appellee).

...

Q. Did anyone put those words in your mouth?

A. What words?

Q. From that tape recorded statement that you heard?

A. No, sir.

Q. Nobody did?

A. No, sir.

Q. Those words and no one's else's-

A. No, sir.

Q. -concerning the events that happened that night that you were shot?

A. Yes, sir. R. 107. (Emphasis by Appellee).

Detective Harold Harris corroborated Davis. He testified that Smith was identified by Davis as the person who shot Davis. Harris did not make any suggestions to Davis. He also did not threaten Davis based upon any pending charges that he had at the time. Harris also testified to recording Davis's statement. R. 120-121. He identified the voices as being his own and that of Davis. R. 120-121. There was no objection to how the audio tape was made, or to its chain of custody prior to trial.

Q. The day that you took the statement-I believe it was December 29, 2004-had Andre Davis not given you the name of Kenivel Smith, would he have been arrested, Kenivel Smith?

A. If Andre hadn't given us the name of Kenivel, had-no, sir, he wouldn't.

Q. Would there have been any way for you to know who the shooter was had he not given you that name?

A. No, sir, I wouldn't.

Q. So no threats were made to provide that name?

A. No, sir. R. 123-124. (Emphasis by Appellee).

On cross examination, Harris corroborated Davis. Davis told him the shots came from across the street. Harris found nine shell casings at the crime scene. R. 113. They were found in the street in front of Davis's house. See photographic evidence in manila envelop marked 3(a)-3(d) for pictures of nine empty cartridges lying in the street. Harris also testified that Davis told him that he was "face to face" with Smith just prior to his being shot. R. 140. Harris corroborated Davis concerning a dispute over drugs being the motivation for the shooting.

Q. And he was in-where was he standing when bullets were supposedly fired?

A. He said he was-he was on the porch or going back in the yard, standing in the yard when the gun was fired.

Q. Well, which one was it? Was he on the porch or out in the yard?

A. He stated he was on the porch.

Q. Well, did he state on the interview he was face to face?

A. He did state he was face to face with him. R. 140. (Emphasis by Appellee)

The record reflects no objection made to "the playing" of the tape recording. R. 78-84. There was an objection to the juror's possibly seeing statements by Stephanie Hubbard, Davis' girlfriend, which were attached to the back of State's exhibit 5b. R. 80-81. The jurors were questioned and denied having read that

portion of the exhibit, which was removed when brought to the court's attention. Nor was these issues about the recording raised in Smith's motion for a JNOV or a New Trial. C.P. 99-100. Issues raised about the need for sponsoring witnesses and authentication of the taped statement were therefore waived.

In **Spicer v. State**, 921 So. 2d 292, 305 (¶22)(Miss. 2006), the Court found that failure to make "a specific" contemporaneous objection waives an issue on appeal. An objection on one ground waives all other grounds on appeal.

Because Spicer did not object to testimony giving evidence of his fleeing from law enforcement officials, he is procedurally barred from appealing the issue. Failure to make a contemporaneous objection waives an issue for purposes of appeal. **Williams v. State**, 684 So.2d 1179, 1203 (Miss.1996) (contemporaneous objection rule is applicable in death penalty cases). Spicer claims that he made an objection; however, it is clear that the objection which he made merely challenged Sergeant Whites testimony on the basis that the events to which he was testifying were beyond the *res gestae* of the charged crime. An objection at trial on one or more specific grounds constitutes a waiver of all other grounds. **Doss v. State**, 709 So.2d 369, 379 (Miss.1996).

In addition, Officer Harris testified that he recorded Davis's statement with a tape recorder. R. 119. He did this upon locating Davis at his home. This was 1137 Cumberland. This was the day after the incident, December 29, 2004. Harris testified that did not make any suggestions to Davis. He merely recorded what Davis told him. Davis told him Smith shot him. R. 120. Smith shot him because he believed Davis had stolen some drugs from him. Davis told him that he was "face to face" with him when he was threatened. R. 140. Harris made no promises and no threats to Davis in any way prior to his taking the statement. R. 120-121. Harris testified that no one told Davis he would be "locked up" if he did not testify. R. 123.

As to hearsay statements about Davis' nephew allegedly informing him that Smith shot him, the record reflects that Davis was cross examined about this matter. R. 93.

In **Gatlin v. State** 724 So. 2d 359, *369 (Miss. 1998), the Court relied upon **Fielder, infra**, in finding that cross examination about objectionable hearsay waived the issue on appeal.

¶ 46. Although the above arguments support a finding that the testimony of Gaillot was not

hearsay, Gatlin's objection to the testimony was later waived on cross-examination. Gatlin's attorney on cross-examination questioned Gaillot regarding the telephone calls and the letter to which Gaillot had previously testified on direct examination. Gatlin's attorney had previously objected to testimony surrounding the telephone calls and the letter. "[W]hen an objection to testimony is interposed and the objection is overruled and the objecting party cross-examines the witness with reference to this same matter to which he had interposed an objection, the objection is waived." **Dycus v. State**, 440 So.2d 246, 255 (Miss.1983); See also **Fielder v. State**, 235 Miss. 44, 108 So.2d 590 (1959).

In addition, the record reflects that the trial court and defense counsel stated on the record that they could not hear what Davis said about his nephew's statements. He was mumbling. R. 75-77. Consequently, there was a lack of evidence for finding that the jury heard some of this testimony on direct examination.

As to the claim that the prosecution was pressuring Davis to testify by threatening him with prosecution, the record reflects that he was subpoenaed to testify. He was a very reluctant witness. He had been picked up by police because he had not initially appeared to honor the subpoena. R. 106.

On redirect, Davis admitted that he had pending drug charges at the time of trial. However, these charges came "after" the incident at issue occurred. In addition, Davis admitted that no one in the District Attorney's Office had made any promises about these charges. R. 104. Davis acknowledged that although he did not honor a subpoena initially, he was not imprisoned as a consequence. R. 106. Davis also admitted that no one had told him what to say when he made his statements to investigators. R. 107.

In **Carter v. State** 965 So. 2d 705, *711 (Miss. App. 2007), the Court of Appeals found a statement of criminal identification to law enforcement after the commission of a crime was admissible. The witness was "unavailable" because he could not be located. under M. R. E.. 804(a) (5). This evidentiary statement having "circumstantial guarantees of trustworthiness" was found not to be hearsay, and no limiting instruction was required.

¶24...Here, the statement was offered as evidence of a material fact (Carter's identity and involvement in the crime), the statement was more probative than other evidence that could be produced, and admission of the statement served the "interests of justice." The court also made a finding that there were "circumstantial guarantees of trustworthiness." Nothing in the

rules prohibited the statement from being introduced as proof of the truth of the matter asserted, and no limiting instruction was required to be given to the jury.

¶ 25. As to Carter's claim that the statement lacked trustworthiness, we note that the statement was given to a police officer immediately after the commission of a crime, by individuals who had no apparent reason to lie to law enforcement. To date, no evidence has been produced by Carter to indicate that the victims were lying or had any reason to lie to Officer Corley.

The record also reflects that in addition to Davis' testimony about how his various infirmities caused him to have memory loss, Davis informed investigators that Smith had threatened to kill him or do him bodily harm as well as members of his family. R. 69, and Exhibit 5 b , page 3 and 6 of Davis's statement to investigators.

Mr. Larry Baker: It goes to the motive, along those lines, and as far as the murder part, that's why we are where we are right now. My guy is not so much that he's forgot what happened. **He's scared to death, because of threats that he has gotten. I think he's refusing to, based upon those.** This statement was given at a time when it was right after it happened. R. 69. (Emphasis by Appellee).

These threats would seem to the appellee to indicate that it was not the prosecution who had pressured Davis in the instant cause. Their argument on appeal is that the state was pressuring him to testify because he was subject to possible prosecution for pending charges for his own independent drug offense. See appellant's brief page 11-12.

In **Davis v. Washington, et. al.** 126 S. Ct. 2266, *2280 (U.S. Wash. 2006), the United States Supreme Court found in the companion case of **Hammond v. Indiana** that a defendant who procures the silence of a victim forfeits his right to cross examine that witness.

But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in **Crawford**: that "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds." 541 U.S., at 62, 124 S. Ct. 1354 (citing **Reynolds**, 98 U.S., at 158-159). **That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.** (Emphasis by Appellee).

The Appellee would submit that the record reflects that Smith fully cross examined Davis about his identification testimony, and his statement to Officer Harris which was recorded as well as transcribed. R. 84-98. There was no objection to the recording or transcription on grounds of a break in the chain of custody, or any evidence of tampering.

In **Ellis v. State** 934 So. 2d 1000, *1005 (¶ 20-¶21) (Miss. 2006), the Supreme Court found where there was a lack of evidence of any tampering with the evidence, it was admissible. This would be the case even if not every person who handled the evidence prior to trial was called to testify.

¶20... **Ormond**, 599 So.2d at 959. The test of whether there has been a break in the chain of custody of evidence is whether there is an indication or reasonable inference of probable tampering with the evidence or substitution of the evidence. **Nalls v. State**, 651 So.2d 1074, 1077 (Miss.1995) (citing **Gibson v. State**, 503 So.2d 230, 234 (Miss.1987); **Nix v. State**, 276 So.2d 652, 653 (Miss.1973)).

In **Spann v. State**, 771 So.2d at 894 [6]

¶ 21. The proponent of the evidence must show no reasonable inference of material tampering with, or substitution of, the evidence; however, Mississippi law has never required a proponent of evidence to produce every handler of the evidence. **Ormond**, 599 So.2d at 959 (relying on **Butler v. State**, 592 So.2d 983, 985 (Miss.1991)). This case presents no evidence of alteration or substitution or tampering with the [evidence] at any time. Under the abuse-of-discretion standard, although the chain may not have been thoroughly demonstrated, in the absence of any contention of alteration or tampering, the trial court did not abuse its discretion in admitting the [evidence].

Under **Carter, supra**, there was no need for a limiting instruction where the criteria for the admission of M. R. E. 804(b)(5) evidence is met. In addition, there was evidence that Davis's reluctance to testify was the result of death threats from Smith. Mr. Davis was "scared to death" of being killed by Mr. Smith. R. 69 and exhibit 5b in manila envelop page 3 and 6.. This would indicate to the Appellee that Smith's post offense criminal action's should result in a forfeiture of his right to cross examine under **Davis, supra**, as cited above.

The Appellee would submit that this issue is lacking in merit.

PROPOSITION II

THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE AFTER CROSS EXAMINATION FOR AFFIRMING SMITH'S CONVICTION.

Smith's counsel believes there was insufficient evidence in support of his conviction. He believes that the evidence against Smith was based upon "many lies." He believes that Davis and Officer Harris were lying. Davis was lying in his identification of Smith as the person who shot him. And Officer Harris was lying about the position from which shots were fired at Davis, given the locations where the nine shell casings were found. Appellant's brief page 14-16.

To the contrary, as shown under Proposition I, Davis' statement to Officer Harris was not shown to be unreliable or false as to the identity of the person who shot him. Nor was Harris's testimony about either where he found the shell casings, or where he believed the shooter was when the shots were fired at Davis improbable or unreliable.

On redirect, Officer Harris testified that he believed the shooter was moving when the shots were fired, rather than remaining stationary firing from one place. This would corroborate Davis' accounts in his statement of running away from the shooter.

Q. And those shell casings, once you collected them, were they running from the line that they were in from that direction back and forth, is that what your testimony was?

A. Yeah. It was like the shell casings, if you pull the picture up, you see that they are in a line as well as like someone is walking and they are coming out as they are shooting. R. 169. See photographic exhibit S-3a, S-3b, S-3c and S-3d in manila envelop showing location of shells in the street across from the trailer where Davis was living at the time he was shot.

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not this court.

The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808, **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

As shown under Proposition I, Davis testified that he remembered telling investigators that he was shot by Smith. He was shot because of a dispute over some missing drugs. R. 51-52; 71; 75-76; and exhibit 5(a) and 5(b). Davis remembered making his identification statement to Officer Harris. R. 71: 104. Davis was cross examined about what he remembered, and what he said about that to Officer Harris. R. 84-98. Officer Harold Harris testified that Davis told him that Smith shot him. He shot him over a dispute about some drugs. R. 120. Davis told him that he was "face to face" with Smith. This was when they had an encounter over the missing drugs. R. 140.

Harris' investigation at the scene of the crime corroborated Davis' testimony. Harris found bullet casings in the street in front of Davis' trailer. R. 110. Davis testified that the shots came from the street in front of his house. R. 75. Harris was cross examined about his interview with Davis. He was questioned about the circumstances under which he was informed by Davis that Smith was the person who shot him. R. 124-157.

In addition, State's exhibit 5-c the tape recording of Davis' statement to Officer Harris was admitted into evidence. It was also played for the jury. R. 83. Exhibit 5-b the transcription of the relevant parts of the

interview were admitted into evidence for identification. In that statement to Harris, Davis stated he was “face to face” with Smith. R. 140. Smith shot him in the hip. He did so because he was angry over some drugs that were missing. The hand gun used by Smith was believed to be a .9 millimeter or a .45. Davis also clearly stated that Smith had threatened to kill him and his family. R. 69; and exhibit 5b in manila envelop page 3 and 6. It was marked for identification during the trial at page 178.

On redirect, Davis admitted that he told investigators that Smith shot him. R. 104. Davis admitted that he had a pending drug charge but that no one from the prosecutor’s office was involved in the case. No promises had been made to him about the charge for which he had not yet been indicted. The pending drug charge occurred not before, but “after” he was allegedly shot by Smith. R. 105-107. Davis reluctantly admitted to having known Smith for a long time. R. 102.

When this evidence was taken as true together with reasonable inferences there was more than sufficient credible evidence in support of Smith’s conviction.

In **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983), the Court stated that any conflicts in the evidence was to be resolved by the jury. What the jury believes and who the jury believes as to what piece of evidence presented is solely for their determination. As stated:

Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into finding of fact sufficient to support the verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. **Shannon v. State**, 321 So. 2d 1 (Miss. 1975) 373 So. 2d at 1045.

The Appellee would submit that this issue is lacking in merit.


CONCLUSION

Smith's conviction for aggravated assault should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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