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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARCO TERRELL LAMAR — APPELLANT

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NOV 15 2007
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SUPREME COURT
COURT OF APPEALS

VS. — NO. 2007-KA-0692-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARCO TERRELL LAMAR **APPELLANT**

VS. **NO. 2007-KA-0692-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of the Second Judicial District of Panola County, Mississippi, in which the Appellant, Marco Terrell Lamar, was convicted and sentenced for the felony crimes of **AGGRAVATED ASSAULT WITH A DEADLY WEAPON,** Miss. Code Ann. § 97-3-72(2)(b) (1972), and **POSSESSION OF A CONTROLLED SUBSTANCE,** Miss. Code Ann. § 41-29-139(c)(2)(f) (1972), and was sentenced as a **HABITUAL OFFENDER and RECIDIVIST**, Miss. Code Ann. § 99-19-81 and § 41-29-147 (1972).

STATEMENT OF FACTS

On or before the 30th day of June, 2006, in Panola County, Mississippi, Appellant Marco Terrell Lamar (Lamar) did wilfully, unlawfully, feloniously, purposely, or knowingly cause bodily injury to Eramus Spears by shooting him with a deadly weapon, handgun. (R. E. 1).

On or before the 30th day of June, 2006, in Panola County, Mississippi, Appellant Marco Terrell Lamar did wilfully, unlawfully, knowingly, and intentionally possess a controlled substance, to-wit: More than one kilogram but less than five kilograms of Marijuana. (R. E. 1).

Three men who did not live in Panola County went to Memphis together that day, and you were asked about these men earlier, Eramus Spears, Demarquese Bledsoe, and Alton Keys. One of those men had the phone number for the defendant, Marco Terrell Lamar. The phone call was made to Mr. Lamar. They agreed to meet in the Wal-Mart parking lot. Well, when the three men get to the Wal-Mart parking lot, Mr. Alton Key stayed in the car that the three men came to the parking lot in. The other two men, Bledsoe and Spears, get out of the car that Bledsoe and Spears were in and get into the car operated by Marco Terrell Lamar. Spears is sitting in the front seat on the passenger side. Lamar is sitting in the front seat behind the steering wheel. Bledsoe is in the backseat. The three of them smoked a blunt, a mixture of marijuana with a cigar and tobacco. The three of them were smoking a blunt in Marco Terrell Lamar's car. Bledsoe and Spears wanted to buy what's called a dime bag worth, ten dollars worth of marijuana from Lamar.

At any rate, at some point, Bledsoe in the backseat gets greedy and he sees a bag containing a lot of marijuana. So, Bledsoe and Spears get out of Marco Lamar's car and they are walking away and Bledsoe's carrying the satchel or the bag with the dope in it. Lamar realizes that someone has gotten away with what he considers to be his valuable property and starts shooting. He fires and Spears gets hit. Marco Lamar shoots Spears. Bledsoe hears gunshots fired and drops the bag. There were multiple shots fired or three or four or whatever. One vehicle parked in the parking lot had its back window shot out and a projectile was found in that vehicle. The bag with the marijuana in it, Bledsoe drops it. When Spears got shot, one of the bullets hit his cell phone, so you have a shot damaged cell phone found in the parking lot. (Tr. 99 - 101).

For the felony crime of **AGGRAVATED ASSAULT WITH A DEADLY WEAPON**, Miss. Code Ann. § 97-3-72(2)(b) (1972), Lamar was sentenced as a **HABITUAL OFFENDER and RECIDIVIST**, Miss. Code Ann. § 99-19-81 and § 41-29-147 (1972) to twenty (20) years in the

Mississippi Department of Corrections.

For the felony crime of **POSSESSION OF A CONTROLLED SUBSTANCE,** Miss. Code Ann. § 41-29-139(c)(2)(f) (1972), Lamar was sentenced as a **HABITUAL OFFENDER and RECIDIVIST,** Miss. Code Ann. § 99-19-81 and § 41-29-147 (1972) to six (6) years of Post - Release Supervision

SUMMARY OF THE ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN ITS REFUSAL TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL AND IN THE ALTERNATIVE A JUDGMENT NOT WITHSTANDING THE VERDICT. THE VERDICT WAS WELL WITH THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Smith v. State, 826 So.2d 768, 770 (Miss. App. 2002) holds that in determining whether a jury verdict is against the overwhelming weight of the evidence, the 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.

II.

APPELLANT HAD EFFECTIVE ASSISTANCE OF COUNSEL.

Garibaldi v. State, 840 So.2d 793, 796 (Miss. App. 2003) held that each case involving claim of ineffective assistance of counsel should be decided based on the totality of the circumstances, that is, by looking to the evidence in the entire record; the standard of performance used is whether counsel provided reasonably effective assistance and that for purposes of claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct.

III.

THE TRIAL COURT DID NOT ERR IN ALLOWING RELEVANT EVIDENCE.

Mississippi Rule of Evidence 401, "RELEVANT EVIDENCE:"

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

IV.

THE JURY INSTRUCTION WAS PROPER.

The Mississippi Supreme Court held in Smith v. State, 835 So.2d 927, 934 (Miss. 2002) that when considering a challenge to a jury instruction on appeal, the Court does not review jury instructions in isolation; rather, it reads them as a whole to determine if the jury was properly instructed. Dobbs v. State, 950 So.2d 1029 (Miss. 2006) holds that when read as a whole, if the jury instructions fairly announce the law of the case and create no injustice, then no reversible error will be found.

V.

THE TRIAL COURT PROPERLY ALLOWED TESTIMONY OF CO-CONSPIRATORS.

Mississippi Rule of Evidence 401, "RELEVANT EVIDENCE:"

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

VI.

NO CUMULATIVE ERRS OCCURRED.

Smith v. State, 907 So.2d 389 (Miss.App.2005) holds that the plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice, and

if a contemporaneous objection is not made at trial, an appellant must rely on plain error to raise the argument on appeal.

The State's response to cumulative error argument 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).

THE ARGUMENT

PROPOSITION I.

THE TRIAL COURT DID NOT ERR IN ITS REFUSAL TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL AND IN THE ALTERNATIVE A JUDGMENT NOT WITHSTANDING THE VERDICT. THE VERDICT WAS WELL WITH THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Smith v. State, 826 So.2d 768, 770 (Miss. App. 2002) holds that in determining whether a jury verdict is against the overwhelming weight of the evidence, the 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.

The State counters that the jury heard all of the evidence, exhibits and testimony, and the members of the jury believed the evidence produced by the prosecution. The jury verdict should stand.

The correct standard as stated above in Smith, is to take the evidence presented by the prosecution as true together with reasonable inferences. The evidence cited in the record, taken as true together with reasonable inference is more than sufficient evidence in support of the jury's

verdict. Furthermore, weight and sufficiency of the evidence will be discussed in detail below.

The applicable standard of review is found in Dilworth v. State, 909 So.2d 731, 741 (Miss. 2005) and Bush v. State, 895 So.2d 836, 843 (Miss. 2005). The standard of review for a post-trial motion is abuse of discretion.

In Carr v. State, 208 So.2d 886,889 (Miss.1968) the court held:

> We stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.' However, this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, 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 beyond a reasonable doubt.

Reasonably, matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. "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).

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.

Where a defendant has made post-trial motions assailing the sufficiency of the evidence, " . . . the trial court must consider all of the evidence - not just the evidence which supports the State's case - in the light most favorable to the State." Winters v. State, 473 So.2d 452, 459 (Miss. 1985). See also McClain v. State, 625 So.2d 774 (Miss. 1993). This includes the defendant's evidence, if any, which must be construed in a light most favorable to the prosecution's theory of the case.

In judging the legal "sufficiency," as opposed to "weight," of the evidence on a motion for

a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant. Hart v. State, 637 So.2d 1329, 1340 (Miss. 1994); Edwards v. State, 615 So.2d 590, 594 (Miss. 1993); Clemons v. State, 460 So.2d 835, 839 (Miss. 1984); Forbes v. State, 437 So.2d 59, 60 (Miss. 1983); Bullock v. State, 391 So.2d 601, 606 (Miss. 1980); Boyd v. State, 754 So.2d 586 (Miss. App. 2000).

If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict and request for peremptory instruction or JNOV should be overruled. Brown v. State, 556 So.2d 338 (Miss. 1990); Davis v. State, 530 So.2d 694 (Miss. 1988). As stated previously, a finding that evidence is insufficient results in a discharge of the defendant. May v. State, 460 So.2d 778, 781 (Miss. 1984).

Put another way, the trial court, and this Court on appeal as well, must accept the State's evidence as true and view it in a light most favorable to the State's theory of the case.

The State counters that the jury heard all of the evidence, exhibits and testimony, and the members of the jury believed the evidence produced by the prosecution. The jury verdict should stand.

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

PROPOSITION II.

APPELLANT HAD EFFECTIVE ASSISTANCE OF COUNSEL.

Garibaldi v. State, 840 So.2d 793, 796 (Miss. App. 2003) held that each case involving claim of ineffective assistance of counsel should be decided based on the totality of the circumstances, that is, by looking to the evidence in the entire record; the standard of performance used is whether

counsel provided reasonably effective assistance and that for purposes of claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct. The record shows Appellant's counsel was well within the Garibaldi competency requirements.

Furthermore, this Court is charged with a review of the totality of counsel's performance and the demonstration of resulting prejudice. Stringer v. State, 627 So.2d 326, 329 (Miss. 1993). Mere allegations are insufficient.

Witt v. State, 781 So.2d 135, 138 (Miss. App. 2000) holds that to establish a violation of a defendant's Sixth Amendment right to effective assistance of counsel based on a conflict of interest, the defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. Nothing in the record evinces the allegation that an actual attorney conflict of interest occurred or that prejudice happened.

In Stevenson v. State, 798 So.2d 599, 601 (Miss. App. 2001), the Court set the standard for the determination of ineffective assistance of counsel as follows:

> The standard for determining whether or not a defendant was afforded effective assistance of counsel was set out in the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052,80 L. Ed. 2d 674(1984). Before counsel can be determined to have been ineffective, it must be shown (1) that counsel's performance was deficient, and (2) that the defendant was prejudiced by his counsel's mistakes... Under Strickland, there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. To overcome this presumption, "the defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result would have been different. A reasonable probability is sufficient to undermine confidence in the outcome. Strickland. 446 U.S. at 684, 104 S. Ct. at 2068.
> *Id.,* at 154.

There is no indication in the record other than the allegations of the Appellant that performance of the counsel fell below the standards as defined by Strickland. In fact the record

supports the exact opposite.

On appeal this Court must confine itself to what actually appears in the record, and unless provided otherwise by the record, the trial court will be presumed correct. Shelton v. Kindred, 279 So.2d 642, 643 (Miss. 1973). The Appellant has not presented a claim procedurally alive "substantially showing denial of a state or federal right" and as is apparent from the face of the motion and from the prior proceedings, he was not entitled to any relief. Horton v. State, 584 So.2d 764, 767 (1991).

Clearly, judging on the totality of the performance of counsel, there was no merit to the Appellant's claim that he was denied effective assistance of counsel. Counsel is required to be competent and not flawless.

The substantive principles of law relative to this issue are found in the familiar case of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was not only deficient, but that said deficient performance prejudiced the defense. The State submits that it simply cannot be maintained from the record in this case that counsel's assistance was ineffective, and that said ineffective assistance should have been apparent to the trial court, which would then have had the duty to declare a mistrial or to order a new trial *sua sponte*. The aforementioned has not been shown in this record.

Nothing in the record evinces that Appellant's trial counsel was deficient or the outcome of case would have been different even with the Appellant's allegations and assertions.

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

PROPOSITION III.

THE TRIAL COURT DID NOT ERR IN ALLOWING RELEVANT EVIDENCE.

Mississippi Rule of Evidence 401, "RELEVANT EVIDENCE:"

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The cell phone was relevant evidence. Evidentiary rulings are within the broad discretion of the trial court and will not be reversed absent an abuse of discretion. Coleman v. State, 697 So. 2d 777, 784 (Miss. 1997).

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

PROPOSITION IV.

THE JURY INSTRUCTION WAS PROPER.

Appellant's counsel wrongly contends that proposed jury instruction, D - 4 / an identity instruction, should have been issued to jury. (Appellant Brief 21).

The Mississippi Supreme Court held in Smith v. State, 835 So.2d 927, 934 (Miss. 2002) that when considering a challenge to a jury instruction on appeal, the Court does not review jury instructions in isolation; rather, it reads them as a whole to determine if the jury was properly instructed. Dobbs v. State, 950 So.2d 1029 (Miss. 2006) holds that when read as a whole, if the jury instructions fairly announce the law of the case and create no injustice, then no reversible error will be found.

Brassfield v. State, 905 So.2d 754 (Miss. App. 2004) holds: instructions should clearly inform jury of elements of crimes and State's burden of proof, and there was no risk that jury was confused about elements of crime necessary to convict.

The Court does not review jury instructions in isolation; rather, it reads them as a whole to

determine if the jury was properly instructed. Smith v. State, 835 So.2d 927, 934 (Miss. 2002), Kelly v. State, 493 So.2d 356, 359 (Miss. 1986) and Norman v. State, 385 So.2d 1298, 1303 (Miss. 1980). Reading the jury instructions as a whole, all elements to the crime of capital murder are present and properly stated.

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

PROPOSITION V.

THE TRIAL COURT PROPERLY ALLOWED TESTIMONY OF CO-CONSPIRATORS.

Mississippi Rule of Evidence 401, "RELEVANT EVIDENCE:"

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The co-conspirators, Bledsoe and Spears, gave relevant testimony against Lamar. They effectively became witnesses for the State.

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

PROPOSITION VI.

NO CUMULATIVE ERRS OCCURRED.

Smith v. State, 907 So.2d 389 (Miss.App.2005) holds that the plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice, and if a contemporaneous objection is not made at trial, an appellant must rely on plain error to raise the argument on appeal.

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CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deshun T. Martin, 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 15th day of November, 2007.

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