IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CARL SPURLOCK — APPELLANT

V. — NO. 2007-KA-0843-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
W. Daniel Hinchcliff, MS Bar No.
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Carl Spurlock

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STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Carl Spurlock, Appellant
3. Honorable E J. Mitchell, District Attorney
4. Honorable Lester F. Williamson, Jr., Circuit Court Judge

This the 31st day of October, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

W. Daniel Hinchcliff
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE TESTIFYING ACCOMPLICE AND CO-INDICTEE'S MULTIPLE CRIMES.

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT SPURLOCK'S MOTION FOR J.N.O.V.?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lauderdale County, Mississippi, and a judgement of conviction of capital murder as an habitual offender against Carl Sherman Spurlock and a mandatory life without parole sentence following a jury trial that commenced January 29, 2007, Honorable Lester F. Williamson, presiding. Carl Sherman Spurlock is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Prior to trial, Carl Sherman Spurlock ["Spurlock"] opposed the State's Motion in Limine to exclude prior convictions of the co-indictee, who had plead guilty to robbery and was to be the

cornerstone of the State's case against Spurlock. As set forth in the indictment, Morrison was a career criminal. (C.P.5, R.E.6) The trial court ruled that only the one prior conviction which was less than ten years old could be used by the defense for impeachment.

The proofs adduced at trial unfolded as follows. Meridian police officer Larry Cannon, ["Cannon"], responded to a call that a person had been struck on the head. (T. 100) He arrived at the location, the home of Larry Finch ["Finch"], and found him laying on the floor in a pool of blood. (T. 101-102) On cross examination Cannon testified to a shoe print of blood. (T. 108)

The only evidence implicating Spurlock to the crime came from the testimony of Robert Van Morrison. Morrison knew both the victim and Spurlock. He knew the victim as through the "antique business' and knew Spurlock as a fellow "drug addict." (T. 109-110) Objection to this extraneous and prejudicial testimony resulted in an instruction to disregard.

On the evening of the death of Finch, Spurlock had gone to visit Morrison. After leaving and then returning, Spurlock suggested that they go to Finch's to "sell him some stones" and get some money. (T. 117). They walked to Finch's house and were let in. Spurlock said he had some stones to sell but only produced an empty plastic bag. Morrison testified that Spurlock then began to stab Finch. (T. 122) According to the accomplice, after Spurlock stabbed Finch several times, he then hit him with a "stick of some sort." (T. 123-124) Morrison left and Spurlock came after him, asking why Finch was killed. Morrison claimed Spurlock told him that Finch had caught Spurlock trying to pick his pocket. (T. 127) Spurlock had Finches wallet and split the money with Morrison, who accepted the fruits of the murder without protest, despite claiming to be" in total" shock at what had happened. (T. 125-129)

Overcoming his total shock, Morrison had the presence of mind to suggest that Spurlock dispose of his bloody clothes. (T. 129) Despite the cold, according to Morrison's narrative, Spurlock

washed in a creek, leaving his outer shirt there. (T. 129-130) Morrison then took Spurlock to Morrison's home to wash up.(T. 131) He further gave him sweat pants to wear, rather than the purportedly bloody blue-jeans. Despite his being in total shock, "scared" and "off-guard", Morrison initiated and conducted the secretion of evidence, putting Spurlock's allegedly bloody jeans and undershirt in a storm drain. (T. 132-133) Then Morrison took Spurlock back to Morrison's house. From there they left for a liquor store.

It was Morrison, not Spurlock, that was questioned on several occasions. (T. 134) Over a month later, with Morrison evidently being the focus of the investigation, Morrison suddenly comes out and names Spurlock as the murderer. (T. 134-136) Morrison then led the investigators to the storm drain where he concealed the supposedly blood-soaked clothes. (T. 137) Despite the passage of over a month, the clothes had miraculously remained in the same location in the storm drain, while presumably being completely washed free from any discernable blood by torrents of rain water.[1] (T. 136-138, 281,312,336, 378) Finch's wallet was not found.

The state, in direct examination, brought out the fact that Morrison had been charged with the same crime and entered a plea to robbery. (T. 139-140) On cross examination, Morrison explained his deal with the state. The subject capital murder charge herein was reduced to robbery, resulting in a fourteen year sentence. Morrison also had a pending burglary charge (as an habitual) that was dismissed, thereby avoiding a twenty five year sentence. However, he claimed he had not planned to participate in any robbery, thereby, again impeaching himself. He explained the reason he went with Spurlock to Finch's home was to share in the proceeds from the sale of the stones/arrowheads, despite the fact he had no ownership in the items. He then shared the proceeds

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[1]As will be presented later in argument, this testimonial tall tale is intrinsically self impeaching.

of the robbery/murder that he claimed to have had no part in.

Morrison agreed that he told the police that Spurlock had blood all over him. (T. 166)

After the defense had finished cross examination, but prior to redirect, the defense asked to reopen cross and to be allowed to go into Morrison's laundry list of prior crimes. The trial court again ruled against the use of Morrison's criminal curriculum vitae to impeach him, even though he had testified that he made his statement's to the police because his conscious was bothering him. (T. 190) Cross examination as to certain new matters was allowed.

Dr. Hayne, after qualifying as an expert, testified that the cause of death was four lethal stab wounds and the manner of death was homicide. (T. 211) On cross examination, he agreed you would expect to find blood on the assailant. (T. 215)

Benny Blackwell, Finch's uncle, testified that he last saw Finch at 5:30 on the day before he died. He took a wallet found later (in February) at Finch's home to the police. The wallet, which later proved to be Spurlock's, was not connected to the crime. His niece, testified she found the wallet in a casket in Finch's room.

James Sharp, a lieutenant with the Meridian Police Department, went to the scene of the crime where he observed a broken vase, a broken chair, and a broken knife. (T. 241) Morrison had not testified to any struggle that could explain the broken chair or vase. He identified various photos of the scene, including a bloody footprint. He told the prosecutor that introduced the bloody footprint that the print was of no evidentiary value. (T. 252) He testified the footprints would appear to have led to the rear of the house.

On cross examination, sharp acknowledged that no evidence was found or collected connecting Spurlock with the crime.

Joe Hoadley, a detective with the Meridian police, testified that he saw Spurlock and another

male walking four blocks from the scene around 7:00 p.m. on the night of the murder. (It should be recalled that Spurlock lived near this location.) He testified he knew Spurlock and called in to check if he had any outstanding warrants. (T. 274) He went to Morrison on several occasions to press him to make a statement. Morrison's first statement was on January 7, 2005. (T. 277) Morrison also took Hoadley to find the clothes. (T. 278) They were recovered from the bottom of the drain. Recovered was a pair of jeans, size 32 waist, 28 length. The jeans were soaking wet. (T. 281) A t-shirt and socks were also recovered. The T-shirt was very large, yet Spurlock was small. Nothing in Hoadley's testimony, besides what Morrison told him, connected Spurlock to the crime.

Cross examination revealed that Hoadley "found out" that the clothes recovered did not have blood on them. (T. 312) He also conceded that he previously knew Morrison, but did not identify him as the man walking with Spurlock.

J.C. Boswell, an investigator, was present at Morrison's statement. He also testified that the wallet recovered by Betty Blackwell contained Spurlock's driver's license, but again, no connection was shown to this wallet and the murder. We can be sure the victim did not hide it in his bedroom after he was stabbed. He thought the jeans recovered were woman's jeans. (T. 334) Boswell agrees that no evidence was found to connect Spurlock to the crime, other than Hoadley claimed to have seen him in the area. (T. 336)

Upon the State's having rested the defense moved to dismiss, arguing the only evidence in this cause was the testimony of the accomplice, testimony that was impeached. The court overruled the motion.(T.338-339)

Outside the presence of the jury, the court advised Spurlock on his right to testify or remain silent and examined him on his choice.

Spurlock chose to exercise his right to not testify and the defense rested. (T. 340-345)

Spurlock's tendered instruction for a peremptory instruction was denied. (T. 348)

The State in its closing argument admitted there was no evidence of the recovered clothes having any blood and argued, over objection, that the rain had thoroughly washed the clothes.(T. 371)

Spurlock was found guilty of capital murder by the jury, who were not given the opportunity to chose without parol. However, at sentencing, the court found Spurlock to be an habitual offender. Spurlock was thus sentenced to life without the hope of parol.

Counsel filed timely motions for new trial and judgement not withstanding the verdict arguing.

SUMMARY OF THE ARGUMENT

While the trial court properly instructed the jury on their need to view an accomplices testimony with caution and suspicion, it erred in failing to allow into evidence all of the prior felony crimes of Morrison, thereby depriving the jury of the evidentiary tools it should have had to weigh an accomplice's testimony.

The improbable and self-impeached testimony of an accomplice was the sole evidence upon which Spurlock was convicted. As such, the evidence was insufficient to sustain the conviction. The investigating officers admitted there was no other evidence connecting Spurlock to the crime.

ARGUMENT

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE TESTIFYING ACCOMPLICE AND CO-INDICTEE'S MULTIPLE CRIMES.

The State brought on a motion in limine at the onset of the trial to exclude evidence of co-indictee, Robert Van Morrison's ["Morrison"] multiple criminal convictions. The trial court, upon hearing argument, ruled that the evidence of all crimes more than ten years was inadmissible without conducting the required balancing test. The trial judge made the following ruling:

> BY THE COURT: Basically, I understand the objection. But I think Rule 6.09 says clearly that a witness can't be impeached by a conviction that is more than ten -- when more than ten years has elapsed since the day of conviction or the release of the witness from confinement, whichever occurs last.
>
> *****
>
> BY THE COURT: And that's just -- the Court determines the interest of justice and probative value of the conviction for it. **I think that would allow the Court to shorten that time, not lengthen the time.** (emphasis added)

As clearly stated above the trial court errantly believed the required balancing test was only to be applied if it were considering admitting a witnesses prior convictions into evidence which were less than ten years old. Instead, it is precisely in an instance of considering the admission of older convictions that the balancing test is vital:

> Mississippi Rule of Evidence 609(a)(b) FN1 addresses impeachment by prior convictions. If more than ten years have elapsed since the date of the conviction, the court must determine that the probative value of the conviction substantially outweighs its prejudicial effect and the proponent must give advance written notice of intent to the adverse party that such evidence will be used. Id. In the present case, the trial court accepted the State's argument that the prior convictions were not probative of the truth and veracity of the witness's testimony.

Martin v. State, 872 So.2d 713, 720 (Miss. App. 2004) This necessary test is critically important in the case at bar. Without, the self serving testimony of the co-indictee, as admitted by the State and trenchant in the proofs, nothing connected Spurlock with the murder and robbery but Morrison's testimony. Morrison's credibility paramount. The jury needed to know that Morrison was a career criminal, well acquainted with the workings of the system. The State had led the jury to believe Morrison had only one prior conviction. During voir dire the State told the jury Morrison had only

one prior conviction, "a crime in the past." (T. 27) Constitutionally, the fundamental right[2] to confront this witness is the fulcrum of this trial. Whether the jury believes Morrison or not is conclusive of the issue of guilt or innocence and thus determinative of this trial.

The request to revisit the issue of admission of Morrison checkered history was again put to the court after Morrison testified he talked to the police because his conscience was bothering him, thus putting the issue of his conscience , or lack thereof, into play. None-the-less, the trial court perfunctorily again denied Spurlock this critical tool in defending himself. (T. 190)

It is well established that it is error to not allow impeachment of a State's witness by use of prior convictions. In *White v. State,* 785 So. 2d 1059,1061 (Miss. 2001) the Mississippi Supreme court declared that "[a] criminal defendant is afforded greater protection than the prosecution via the Fifth and Sixth Amendments." and further stated that "[t]o deny the accused the right to explore fully the credibility of a witness testifying against him, is to deny him the Constitutional right of a full confrontation." It was also explained that the right is so critical that a Peterson balancing test in not required at all, at least, in so far as convictions occurring less than ten years prior. In the case of *Rogers v. State,* 796 So. 2d 1022, 1025-1026 (Miss. 2001) the failure of the trial court to admit evidence of a prior conviction was found to be error, but harmless. The error was harmless apparently because there were two witnesses to the shooting and Rogers admitted shooting but in self defense. He was on the scene when the police arrived. Thus the credibility of one witness was not the determinative issue. Not so in the present matter.

Accordingly, the error in this case cannot be said to be harmless. No jury would ever convict a defendant who had been seen in the neighborhood of the crime, when he also lived in that

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[2]. "The right to confront and cross examine a witness is a fundamental right..." *Turner v. State*, 945 So. 2d 992, 999 (Miss. App. 2007) citing *Hobgood v. State,* 926 So. 2d 847, 852 (Miss. 2006)

neighborhood. Clearly Spurlock's wallet was not hidden in a small casket the night of the murder. The State conceded no other evidence implicating Spurlock existed. No fingerprints, no fibers, nothing! The clothes, purportedly worn by Spurlock were not connected to Spurlock except through the testimony of Morrison, and the clothes were not connected to the crime except by Morrison. The investigation revealed no blood on the clothes. No fruits of the crime were connected to Spurlock.

The trial court gave an accomplice instruction, informing the jury that it must view Morrison's testimony with care, caution and suspicion; but then did not allow the jury to hear the facts that would allow it to do so.

The probative value of evidence of Morrison's life of crime was essential, and the failure of the trial court to weigh such evidence for such powerful probative value is error of such proportion as to require reversal of Spurlock's conviction.

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT SPURLOCK'S MOTION FOR J.N.O.V.

As illustrated above, in both the facts and argument, without the testimony of co-indictee Robert Van Morrison, there existed no competent evidence upon which to find Spurlock guilty of the crime of capital murder. As clearly demonstrated by the evidence, Morrison's testimony was substantially impeached. A conviction based upon the uncorroborated testimony of a co-indictee alone is only sufficient when it is reasonable and not impeached.

> Testimony of an accomplice, even when uncorroborated, can be sufficient to support a verdict of guilt. Catchings v. State, 394 So.2d 869, 870 (Miss.1981). However, "where [accomplice testimony] is uncorroborated, it must also be reasonable, not improbable, self-contradictory or substantially impeached." Jones v. State, 740 So.2d 904, 910(¶ 17) (Miss.1999) (quoting Jones v. State, 368 So.2d 1265, 1267 (Miss.1979)).

Hendrix v. State, 957 So.2d 1023, 1027 (Miss. App. 2007) Morrison impeached his own testimony by claiming that he plead guilty to robbery, but, was not guilty of the crime of robbery, thereby

admitting that he has lied under oath. Morrison claimed he was only guilty of accessory after the fact (T. 140) and that he plead guilty to robbery even though he was not guilty of robbery. (T. 145) This Court can take judicial notice of the fact that a plea of guilty, is made under oath and is an admission of the crime charged. "[A] valid guilty plea admits all the elements of a formal charge..." *White v. State*, 921 So. 2d 402, 408 (Miss. App. 2006) If he is only an accesory after the fact, Morrison cannot be guilty of the principal charge. *Hoops v. State,* 681 So. 2d 521, 534 (Miss. 1996) Thus the entirety of Morrison's testimony is that of a perjurer.

Even without this perjured testimony, contradictions were the hallmark of Morrison's yarn. He claimed the clothes worn by Spurlock during the crime had blood all over them (T. 166), yet the police admitted the recovered clothes lacked blood. He claimed he believed Spurlock intended to get money from Finch by selling him stones or arrowheads. He even gave Spurlock a bag to put them in. Curiously, Spurlock simply tucked the empty bag in his pocket. Whatever the purpose of the bag, if, in fact he gave Spurlock a bag, it was not to carry arrow heads. Morrison claims he and Spurlock were drug addicts, yet they did not take the proceeds of the robbery to the local dealer, but went to the liquor store. (T. 110,174) Spurlock gave Morrison half of the money. This begs the question of "why," if Morrison was an innocent tag along. He claimed to not be a close friend of Spurlock, but went to Finch's house with Spurlock expecting Spurlock would just give him some of the proceeds of his sale of arrow heads. (T. 152-153) In the statement to the police Morrison admitted a plan to rob, but at trial claimed the police misunderstood him. (T. 144) Morrison is in shock, yet is clear enough in his thinking to immediately begin the destruction of evidence, concealing the clothes, the wallet and taking Spurlock to his house to shower and giving him something else to wear.

The standard for testing the sufficiency of the evidence and whether the trial court erred in

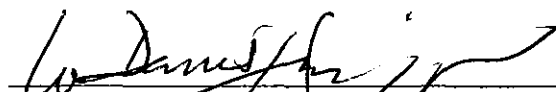
not granting a motion for j.n.o.v. or a peremptory instruction is long established. The State's evidence is accepted as true, along with reasonable inferences. *Brown v. State*, 556 So. 2d 338 (Miss. 1990) As set out above the evidence of a co-indictee is sufficient, even without corroboration. That is unless is is not reasonable or impeached. Where the testimony of the co-indictee is impeached and unreasonable, this Court has a duty to step in and find that a reasonable juror could only find the accused not guilty. *Bridges v. State*, 790 So. 2d 230 (Miss. App. 2001) Although this Court should give "substantial deference" to the jury's decision as it relates to the credibility of a witness, in this case the jury was deprived of sufficient tools to do so (Issue 1) and accepted the testimony of a co-indictee that not only denied under oath the crime he had previously admitted under oath, but whose testimony was impeached and improbable throughout. This is particularly so where the co-indictee's testimony against the accused is without corroboration and largely self exculpatory.

For these reasons, this case should be reversed and the Appellant discharged.

CONCLUSION

The Appellant herein was denied a fundamentally fair trial. Accordingly, this cause should be reversed and rendered, or, in the alternative, reversed and remanded for a new trial

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 
W. DANIEL HINCHCLIFF
[redacted]

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Carl Spurlock, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Lester F. Williamson, Jr.
Circuit Court Judge
Post Office Box 5673
Meridian, MS 39302

Honorable E J. Mitchell
District Attorney, District 10
Post Office Box 5172
Meridian, MS 39302

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 31st day of October, 2007.

W. Daniel Hinchcliff
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200