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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**RICHARD MITCHELL**

**FILED**

**APPELLANT**

**JUN 06 2008**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS**

**VS.**

**NO. 2007-KA-1201 COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**RICHARD MITCHELL**

**APPELLANT**

**VS.**

**NO. 2007-KA-1202-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**COURSE OF PROCEEDINGS BELOW**

The Grand Jury for the First District of Hinds County, Mississippi indicted Richard Mitchell, the defendant, for the March 27, 2003 murder and armed robbery of Willie Barnes pursuant to Miss. Code Ann. § 97-3-79 and 97-3-19(2)(e) (1972). The trial began on November 28, 2006. On November 30, the trial court convicted and sentenced the defendant to life imprisonment without possibility of parole. T. 368-369; CP 80-82; RE 16-18. The defendant appealed his conviction and now appears before this honorable Court. CP 94-97; RE 19.

## STATEMENT OF FACTS

During March 2003, Richard Mitchell, the defendant, was beat up by boys on Alabama Street according to Michael Gibson. T. 201. Gibson loaned the defendant a gun because Gibson “didn’t want to walk him home.” T. 202.

The defendant conversed with Robert Buford and Darwan Traylor on the morning of March 27, 2003 according to both men’s testimony. T. 141, 178. The defendant complained he needed to pay his probation officer to the two men. T. 152, 178-79. Buford testified the defendant planned to solve his problem by “hitting a lick.” T. 179. The defendant also informed Gibson he intended to rob someone to get the money. T. 203-04.

Cleotha Warren, a resident of Crawford Street, witnessed a man walking down a pathway. T. 168. Unsure of where the pathway went, he asked his children where it went. T. 168. They informed him it went to the next street over. T. 168. About fifteen (15) to twenty (20) minutes later, Warren observed the same man returning down the pathway looking excited. T. 168. Warren heard police sirens fifteen (15) minutes after seeing him return. T. 168. Warren identified the defendant out of a photo lineup. T. 173-73.

Buford and Traylor, both residents of Powell Rhodes, witnessed the defendant walking from the pathway leading to Crawford Street around 6 in evening on March

27, 2003. T. 136-37, 184. Gibson testified he interacted with the defendant on the evening of March 27, 2003. T. 205. Gibson noticed the defendant had blood on his shirt. T. 207. The defendant bragged to Gibson that "he hit a lick." T. 205. Gibson requested a cut. T. 206. The defendant handed him two five (5) dollar bills. T. 206. The defendant continued down Powell Rhodes until he reached the pathway between Buford and Traylor's houses according to the testimonies of Buford and Traylor. T. 138, 176. He began down the walkway and called for Buford to come over to him. T. 138, 176. Traylor observed the defendant dropped something that looked like a wallet. T. 138. Buford noticed the defendant possessed a gun. T. 180. Both witnesses testified the defendant had blood stains on his shirt. T. 140, 176. Buford provided the defendant with a new shirt, which was gray with orange stripes. T. 176. Traylor observed the transfer of the shirt. T. 140. Buford testified the defendant put on the shirt and gave Buford ten (10) dollars and then left. T. 176.

A few streets over Slade Moore, a sergeant and shift supervisor with Jackson Police Department, was patrolling the area on Martin Luther King Drive. T. 126-28. At approximately 6 o'clock in the evening, a man darted across the street about 100 to 200 feet in front of Moore. T. 128. As he approached the area where the man darted, another man flagged him down. T. 128. He stopped his car in front of Deluxe Barbershop at 2219 Martin Luther King Drive. T. 128. Moore stepped into the

barbershop and observed a man lying face down in a pool of blood. T. 130.

Authorities later identified the man as Willie Barnes. T. 130. Someone lethally shot Willie Barnes. T. 301.

Stephen Hayne, a forensic pathologist, performed the autopsy of Willie Barnes. T. 296-98, 300. The murderer shot Mr. Barnes three times. T. 301. The murderer shot Mr. Barnes once in back. This injury did not kill Mr. Barnes; it was not lethal. T. 301. The murderer shot Mr. Barnes two more times. One of the shots entered in the back of Mr. Barnes's head. The bullet exited through his nose. T. 302. The last shot entered his neck, traveled through his brain, and exited out of his eye. T. 302-03. Both of these shots were lethal. T. 302-03.

Charles Taylor arrived at the crime scene to collect evidence. T. 211. The crime scene investigator recovered three spent cartridges and two projectiles. T. 216; Exhibits 17-21.

James Cornelius, a Jackson Police Department detective, arrived at the scene. T. 237. He learned the suspect was a black male. T. 239. The detective interviewed Buford and Gibson. T. 240. The interviews led the detective to the defendant. T. 241. The detective obtained a search warrant and arrest warrant for the defendant. While executing the search warrant, the police discovered a gray shirt with blue and orange stripes. T. 244; Exhibit 8. The police found no weapon during the search.

Detectives ran into Buford's aunt Katherine Ledbetter outside of court services. T. 271, 276. She notified them she may have stumbled upon the weapon. T. 271. The police then located a gun behind her house in a rusted paint can. T. 271; Exhibit 15. Brian McIntire, firearm and tool marks specialist at the Mississippi Crime Lab, matched the gun to the casings and projectiles recovered at the crime scene. T. 293-94. McIntire confirmed the gun to be the murder weapon. T. 294; Exhibit 42. During the trial, Gibson recognized Exhibit 15 as the possible gun he loaned the defendant. T. 207. Buford also recognized the gun. T. 187-88. Traylor did not recognize the shirt in evidence during the trial, but Buford testified it was the shirt he gave to the defendant. T. 153, 188; Exhibit 8. Gibson and Buford both pled guilty to being accomplices after the fact for this crime. T. 190, 199.

The jury found defendant guilty as charged.



## **STATEMENT OF THE ISSUES**

### **I.**

The trial court properly exercised its discretion in refusing Jury Instructions D-10 and D-11 with regard to accomplice testimony since it adequately cautioned about uncorroborated testimony.

### **II.**

The weight of the evidence is sufficient to support the verdict of the jury.

### **III.**

Closing argument was proper because the defendant did not object and the State made the argument to highlight the defendant's lack of defense not to point out the defendant's failure to testify.

## ARGUMENT

### Issue I.

#### **THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING JURY INSTRUCTIONS D-10 AND D-11 WITH REGARD TO ACCOMPLICE TESTIMONY SINCE IT ADEQUATELY CAUTIONED ABOUT UNCORROBORATED TESTIMONY.**

The defendant claims the trial court committed a reversible error by denying his Instructions D-10 and D-11 concerning accomplice testimony. The trial court granted Instructions S-3 and S-4 to cover the accomplice testimony instead. The trial exercised its discretion properly because S-3 and S-4 adequately covered the needed instructions for accomplice testimony. CP 62-63; 66-67; RE 20-21; T 331-332.

The standard of review for jury instructions is for the Court to read all the jury instructions together and take them as a whole. *Chinn v. State*, 958 So.2d 1223, 1225 (Miss. 2006). If the jury instructions as a whole fairly portray the law, the Court can find no reversible error. *Id.* (quoting *Adkins v. Sanders*, 871 So.2d 732, 736 (Miss.2004)).

With regard to granting cautionary instructions for accomplice testimony, the trial court has discretion. *Wheeler v. State*, 560 So.2d 171, 173 (Miss. 1990). The court's discretion is not absolute. *Id.* The court should include "consider with suspicion" in the jury instruction when an accomplice's testimony is uncorroborated. *Smith v. State*, 907 So.2d 292, 297-98 (Miss. 2005).

In *Wheeler*, the trial court granted a jury instruction which stated “testimony of accomplice is to be considered with great care and caution.” *Wheeler*, 560 So.2d at 172. The defendant’s instruction added “suspicion.” *Id.* The Court reversed and explained deleting “suspicion” diluted the instruction. The jury needed a stronger warning. *Id.* at 174. In *Rosenthall*, the Court upheld the instruction with the phrase “great care, caution, and suspicion.” *Rosenthall v. State*, 844 So.2d at 1160. The Court affirmed the trial court’s use of “great caution and suspicion” in *Smith*. 907 So.2d at 297-98.

According to the above cases, the trial court did not abuse its discretion in granting the jury instructions S-3 and S-4 instead of D-10 and D-11. The defendant’s rejected jury instructions D-10 and D-11 read as follows:

D-10

The Court instructs the jury that the law looks with suspicion and distrust on the testimony of an alleged participant and requires the jury to weigh same with great care and suspicion. You should weigh the testimony from Robert Buford and Michael Gibson and passing on what weight, if any, you should give this testimony, you should weigh it with great care and caution.

D-11

The Court instructs the jury that witnesses, Robert Buford and Michael Gibson, were convicted of Accessory after the Fact in this case. You should weigh these witnesses’ testimony with great care, caution, and suspicion. You must consider the extent the witnesses’ testimony is either supported or contradicted by other evidence. The relationship the witness may have with either side and to each other and how the witnesses might have affected by the verdict.

In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or deliberate falsehood, and whether it pertains to a matter of importance or unimportant detail.

You may reject or accept all or any part of the witness's testimony and you may reject part and accept other parts of the witness's testimony.

After making your own judgment, you will give the testimony of each witness the weight and credibility, if any, you think it deserves.

CP 62-63.

The trial court granted S-3 instead:

S-3

The Court instructs the jury that Michael Gipson is an accomplice in this case and the uncorroborated testimony of an accomplice is to be considered and weighed with great care, caution, and suspicion. You may give it weight and credit as you deem it is entitled. (emphasis added).

CP 66.

The trial court also granted S-4. The only difference between S-3 and S-4 is the name Michael Gibson is exchanged with Robert Buford. CP 67.

According to precedent, the trial court must warn the jury the uncorroborated testimony of an accomplice must be considered with suspicion. Instruction S-3 and S-4 both tell the jury they must consider the testimony with "great care, caution, and suspicion." The inclusion of suspicion adequately cautioned the jury; therefore, the trial court did not abuse its discretion.

Since the trial court included “suspicion” in the jury instruction, it adequately cautioned the court about uncorroborated accomplice testimony. The trial court exercised proper discretion, and this is not a reversible error.

**Issue II.**  
**THE WEIGHT OF THE EVIDENCE IS SUFFICIENT TO  
SUPPORT THE VERDICT OF THE JURY.**

The Court's standard of review for sufficiency of evidence is as follows:

If a review of the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusion on every element of the offense," the evidence will be deemed sufficient.

*Bush v. State*, 895 So.2d 836, 843 (Miss. 2005) (citing *Edwards v. State*, 469 So.2d 68, 70 (Miss. 1985)).

When reviewing sufficiency of evidence, the Court considers evidence presented by both sides. *Brown v. State*, 890 So.2d 901, 917 (Miss. 2004); *Boyd v. State*, 977 So.2d 329, 336 (Miss. 2008). The Court regards the evidence in the light most favorable to the verdict. *Brown*, 890 So.2d; *Boyd*, 977 So.2d. The Court accepts all credible evidence as true. *Boyd*, 977 So.2d. The jury holds the responsibility of assessing the credibility of witnesses. *Strahan v. State*, 955 So.2d 968, 974 (Miss. App. 2007). The Court cannot determine the credibility of witnesses; only the jury can. *Evans v. State*, 725 So.2d 613, 680-681 (Miss. 1997). Since the jury determines the credibility of witnesses, the Court only overturns the jury's verdict "when it is so contrary to the overwhelming weight of evidence that allowing it to stand would sanction an unconscionable injustice." *Boyd*, 977 So.2d.

In *Bush*, the State presented the jury testimony from a victim and a

co-conspirator. *Bush*, 895 So.2d. The Court considered the evidence in the most favorable light to the State and accepted all testimonies as true and held the State produced sufficient evidence for the verdict. *Id.* Like *Bush*, the *Brown* court upheld the verdict. *Brown*, 890 So.2d. The State presented three separate witnesses, and the Court held sufficient evidence existed. *Id.* Defendant in *Boyd* argued the State failed to establish he possessed the same caliber gun as the murder weapon. *Boyd*, 977 So.2d at 337. The Court held sufficient evidence existed for a jury to conclude the defendant caused the death even absent a murder weapon. *Id.* Defendant in *Strahan* argued insufficient evidence since there was no evidence connecting him to the scene and the witnesses were unreliable. *Strahan*, 955 So.2d at 972-73. The jury accepted the testimony. *Id.* at 973. The Court upheld the verdict. *Id.*

According to precedent, the weight of evidence is sufficient to uphold the jury's verdict. The State presented numerous witnesses, who testified to the defendant's demeanor directly prior to and after the crime took place. The justice system entrusts the jury with the duty of assessing the credibility of the witnesses. From the jury verdict, it appears the jury relied on their testimony. Since the jury accepted the testimonies as credible, the Court must accept this evidence as the truth. In reviewing the evidence in the most favorable light of the verdict, the weight of the evidence is in favor of the jury's verdict. Therefore, it would not be unconscionable

for the Court to allow verdict to stand.



**Issue III.**

**CLOSING ARGUMENT WAS PROPER BECAUSE THE DEFENDANT DID NOT OBJECT AND THE STATE MADE THE ARGUMENT TO HIGHLIGHT THE DEFENDANT'S LACK OF DEFENSE NOT TO POINT OUT THE DEFENDANT'S FAILURE TO TESTIFY.**

The defendant alleges the State's closing argument was improper. The State mentioned witness Michael Gibson's testimony was uncontested and undisputed three times during the closing argument. T. 338, 339, 345. The defendant never objected to the closing argument. An objection must be made to preserve the error for appellate review. The State's argument highlighted the defendant's lack of evidence supporting his defense. The State did not make the statements to point out the defendant did not testify. Therefore, the court should not reverse.

The standard of review for a closing argument is “whether the natural and probable effect of the improper argument... [created] an unjust prejudice...and [secured] a decision influenced by the prejudice so created’ such that a new trial should be granted.” *Strahan*, 955 So.2d at 974 (citing *Johnson v. State*, 477 So.2d 196, 209-10 (Miss.1985)).

For the defendant to appeal, the defense must make a contemporaneous objection when the prosecution allegedly makes the prejudicial comment. *Dunaway v. State*, 551 So.2d 162, 164 (Miss. 1989); *Boyd v. State*, 977 So.2d 329, 337 (Miss. 2008). If the defendant asserts no objection, he waives the point for appeal.

*Dunaway*, 551 So.2d at 164.

In *Dunaway*, the prosecution voiced alleged prejudicial statements. Since the defendant asserted no objection to the comments, he waived the point. *Id.* at 163-64. The defendant argued in *Boyd* the prosecutor present an argument with no basis in fact. *Boyd*, 977 So.2d at 337. The defendant asserted no objection during the trial. The court waived the point on appeal. *Id.*

In the closing argument, the defendant made one objection during the closing argument. The defense made the motion for mistrial because of an outburst by a victim's family member. The defendant never objected to the content of the State's closing argument. This issue should not cause reversal. Closing argument was proper because the State merely highlighted the lack of defense.

Even if the court overlooks the lack of objection, the court should not reverse since the State only highlighted the defendant's lack of defense. The State is able to comment on any lack of the defense. *Howell v. State*, 860 So.2d 704, 753 (Miss. 2003). Comments about lack of defense shall not be construed as insinuations about the defendant failure to testify. *Id.*

During the closing argument, the State in *Howell* stated, "If you had an alibi..., don't you think you would tell somebody about it." *Id.* The State stated this because of the discrepancies in the defendant's alibi. The court did not reverse the case on

this issue since the State only pointed out the defendant's lack of defense. *Id.*

The State commented about Michael Gibson's undisputed testimony three times. The State merely tried to highlight the lack of defense. The State's purpose was not to prejudice the jury on the defendant's failure to defend himself. Since the statements were made merely to highlight the lack of the defense, the court should not reverse.

The defendant never objected to the State's closing argument. The State did not prejudice the jury by highlighting the defendant's lack of defense. No relief should be granted on this allegation of error.

## CONCLUSION

The trial properly exercised its discretion in the jury instruction. Using “suspicion” in the accomplice instruction cautioned the jury sufficiently.

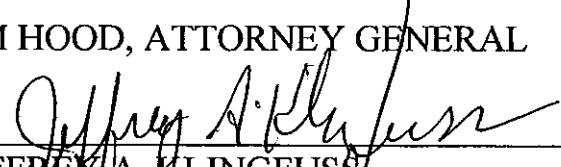
Additionally, the weight of the evidence supported the jury’s verdict. Jury accepted the testimonies as credible. The Court must accept all credible evidence as the truth. Therefore, it would be appropriate for this Court to uphold the jury’s verdict.


Finally, the State’s closing argument was proper. The State commented on the uncontested testimony to highlight the lack of defense not the failure the defendant to testify. On top of that, the defendant never objected to the State’s argument. Therefore, the Court should affirm the verdict and sentence of the jury and trial court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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 6th day of June, 2008.

  
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