

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY WAYNE WALLACE

APPELLANT

FILED

JUN 09 2008

VS.

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

NO. 2007-KA-1275-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 | ii |
| STATEMENT OF FACTS | 2 |
| STATEMENT OF THE ISSUES | 8 |
| ARGUMENT | 9 |
| Issue I. | |
| THE TRIAL COURT PROPERLY ALLOWED THE VICTIM TO MAKE AN IN-COURT IDENTIFICATION BECAUSE THE IMPROPER PRETRIAL LINEUP DID NOT IMPERMISSIBLY TAINT THE IDENTIFICATION. | 9 |
| Issue II. | |
| THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION WHEN ORDERING HIM TO SHOW THE COURTROOM HIS TEETH BECAUSE IT WAS NON-TESTIMONIAL. | 12 |
| Issue III. | |
| THE WEIGHT OF THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY. | 14 |
| CONCLUSION | 16 |
| CERTIFICATE OF SERVICE | 18 |

TABLE OF AUTHORITIES

FEDERAL CASES

| | |
|--|-----------|
| Schmerber v. California, 384 U.S. 757, 764 (1966) | 12 |
|--|-----------|

STATE CASES

| | |
|--|---------------|
| Boyd v. State, 977 So.2d 329, 336 (Miss. 2008) | 14, 15 |
| Brown v. State, 890 So.2d 901, 917 (Miss. 2004) | 14 |
| Bush v. State, 895 So.2d 836, 843 (Miss. 2005) | 14, 15 |
| Hundley v. State, 822 So.2d 1116 (Miss.App. 2007) | 12 |
| Lewis v. State, 725 So.2d 183, 188 (Miss. 1998) | 12, 13 |
| McCrary v. State, 342 So.2d 897, 899 (Miss. 1977) | 12 |
| Outerbridge v. State, 947 So.2d 279, 282 (Miss. 2006) | 9, 10 |
| Roche v. State, 913 So.2d 306, 310 (Miss. 2005) | 9, 10 |

STATE STATUTES

| | |
|--|----------|
| Miss. Code Ann. § 97-1-1(a) | 1 |
|--|----------|

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY WAYNE WALLACE

APPELLANT

VS.

NO. 2007-KA-01275 COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

COURSE OF PROCEEDINGS BELOW

The Grand Jury for Seventeenth Circuit Court District of Tate County, Mississippi indicted Johnny Wayne Wallace, the defendant, for the September 9, 2004 conspiracy, armed robbery, and aggravated assault of Ollie Buford pursuant to Miss. Code Ann. § 97-1-1(a), 97-3-79, and 97-3-7(2)(b) (1972). CP 8. The jury convicted the defendant of conspiracy and attempted armed robbery. The jury found the defendant not guilty of aggravated assault. T. 152-53. The court sentenced the defendant to serve twelve (12) years for armed robbery and five (5) years for conspiracy to run consecutive. T. 171. The defendant appealed his conviction and now appears before this honorable court.

STATEMENT OF FACTS

On September 9, 2004, Marrieo Love and Lacie Lloyd, previously Lacie Jones and Love's former girlfriend, met up with Antonio Boyce and Johnny Wallace, the defendant. T. 43, 67-68, 71, 93, 127. The defendant never denied he was with the group that evening when questioned by police. T. 53. According to testimony from Love, Lloyd, and Boyce, the group conspired to rob Ollie Buford, a distant cousin of Love. T. 70-71, 93, 127. Mrs. Lloyd drove the conspirators in her white Chevy Lumina to Mr. Buford's house. T. 70, 93, 128. The group discussed their plans on the way over. T. 70-71, 93, 128. The plan consisted of Mrs. Lloyd dropping the trio off and her returning in fifteen (15) to twenty (20) minutes. T. 72. Once at Mr. Buford's, Mr. Love intended to tell Mr. Buford that his girlfriend "put [them] out" and he needed to find a ride. T. 95. When Mr. Buford took him to use his phone, Mr. Love intended to ask him for his money. T. 94. The defendant and Mr. Boyce both carried a gun. T. 94, 128.

The plan failed. Mrs. Lloyd dropped the thugs off at Mr. Buford's house and drove away. T. 72. The thugs went to Mr. Buford's door. According to Mr. Love's and Mr. Buford's testimony, Mr. Love stated his girlfriend "put [them] out" and asked to use his phone. T. 94-95. Mr. Buford welcomed the men into his well-lit living room. T. 5. Mr. Buford recognized Love and Boyce. T. 4. He did not

recognize the defendant. T. 4.

Buford took Mr. Love upstairs to his phone. T. 4, 94. The other two thugs stayed downstairs. T. 5, 94, 129. Instead of asking for money, Mr. Love pretended to call someone and then told Mr. Buford no one answered. T. 5, 94.

Mr. Buford and Mr. Love walked back downstairs. T. 5. According to the victim's testimony, the defendant yelled a question and then began shooting him. T. 5. According to both Mr. Love and Mr. Boyce, the defendant asked about the money and then started shooting. T. 95, 129. The defendant shot at least once before Mr. Boyce fled. T. 129. Mr. Love heard four or five shots. T. 96. Mr. Buford confirmed he was shot five times.

One bullet traveled through Mr. Buford's finger. One bullet hit his arm. Three bullets penetrated his thigh. One of bullets remains lodged in his leg. T. 6. The remaining two thugs fled. T. 96. When Mrs. Lloyd returned to the scene, an ambulance had already arrived. T. 73. The defendant and Mr. Love jumped into Mrs. Lloyd's white Lumina. T. 73, 96. The trio did not know where Mr. Boyce went. T. 96.

Jim Woolfolk, a Tate County police officer, responded to a shooting call. T. 21. Officer Woolfolk discovered the victim wrapped in a blanket in the front of the house. T. 22. Officer Woolfolk observed blood seeping through the blanket. T. 22.

The officer questioned Mr. Buford. T. 9, 22. In his impaired state, Mr. Buford said Steve shot him. T. 10, 22. Mr. Buford recalled the attacker wore a gold or silver plate across the front of his mouth. T. 14. In his weak and fragile state, Mr. Buford does not recall if he told the officer this at the time of the crime. T. 14. Officer Woolfolk claimed Mr. Buford only described the shooter as a black male. T. 23. Brady Lance, Tate County Sheriff's chief deputy, arrived to a secured scene. T. 24, 28. Deputy Lance recovered several shell casings. T. 26. Deputy Lance documented blood in the living room, in the bathroom tub, on a table and chair in living room, and blood on floor leading from living room to bathroom. T. 27-34; Ex. 2-3, 13-15. Bullets pierced two chairs and shattered a ceramic pot. T. 29-30, 32; Ex. 5-6, 11. Deputy Lance did not dust the scene for fingerprints. T. 47.

The criminals fled to Mr. Love's sister's house on Smart Road. T. 73, 97. The three criminals emerged from the white Lumina. T. 74, 99. Mrs. Lloyd remained by the car. T. 74. The other two approached a couch in the yard. T. 74, 99. According to his testimony, Mr. Love lifted the couch. T. 112. Then, the defendant hid the gun underneath the couch. T. 112.

Mr. Boyce lived down the street from Love's sister on Smart Road. T. 75, 100. The criminals waited on Mr. Boyce at his house. T. 75, 100. Mr. Boyce never arrived. T. 75, 100. The criminals left Mr. Boyce's house for the defendant's aunt's

house. T. 75, 100.

Mr. Love and Mrs. Lloyd decided to go to police with a concocted story. T. 76, 11. Love and Lloyd promised the defendant they would not implicate him. T. 77, 100. The defendant's aunt took Love and Lloyd to the Sardis police station. T. 76, 102. The defendant and his aunt's husband rode along. T. 76, 102.

Once inside the station, both Love and Lloyd informed the police Mr. Buford's shooter was outside. T. 78, 102. The officer did not believe them. T. 78, 102. The couple gave the police several different versions of what happened. T. 78, 102. They both claimed they ultimately told the truth and implicated the defendant as the shooter. T. 79, 103. Mr. Boyce denied connection to the crime when first questioned. T. 131. He also gave varying versions. T. 131. Love, Lloyd, and Boyce pled guilty to their involvement in the crime. T. 85, 119, 134.

Love and Lloyd's interviews led Deputy Lance to the murder weapon under the couch on Smart Road in Panola County. T. 40. Ex. 22. Starks Hathcock works at the Mississippi Crime Lab as a firearms examiner. T. 57. Mr. Hathcock examines items to determine if that particular item was fired from a particular firearm. T. 57. Mr. Hathcock confirmed the projectiles submitted to him were fired from the recovered gun. T. 65.

About five or six months after the crime, Deputy Lance went to Mr. Buford's

office. T. 20 of Suppression Hearing (SH). Deputy Lance testified he went to Mr. Buford's office to eliminate Steve Mangrum as suspect. T. 48. Mr. Buford testified Deputy Lance placed three or four pictures on his counter. T. 15-16. Mr. Buford identified the defendant as the shooter. T. 15-16. Deputy Lance claimed he only took Steve Mangrum's picture out of his file. T. 48. He claimed Mr. Buford inadvertently saw the defendant's picture in his file. T. 48-52. Mr. Buford then identified the defendant as the shooter. T. 48-52. Deputy Lance felt no need for Mr. Buford to identify the defendant as the shooter because three other people already identified him. T. 53.

While in jail, Mr. Love sent the defendant a letter. T. 49, 104. Ex. 23. The letter stated, "Tell me how it feels to be accused of something you didn't do." T. 106. When first questioned, Mr. Love told the police the defendant came inside his cell and forced him to write it. T. 49. Finally, Mr. Love explained the defendant claimed he had something Mr. Love wanted. Mr. Love stated the only way to get it back was to write the letter. T. 105. Mr. Love testified the letter was false. T. 107.

In a suppression hearing, Mr. Buford described his shooter's gold-plated teeth and identified him. T. 4, 12, 17 of SH. Approximately two years have passed since Deputy Lance came to Mr. Buford's store. T. 20 of SH. The trial court reviewed the *Neil* guidelines. T. 25 of SH. The trial court held it was proper for the State to ask

questions concerning the defendant's identification. T. 25 of SH. The trial court did not find the photo "impermissibly suggestive." T. 25 of SH.

During trial, the State asked the defendant to show the jury his teeth for identification purposes. T. 19. The defendant objected. T. 54.

The jury convicted the defendant of conspiracy and attempted armed robbery. T. 152-53. The jury did not find the defendant guilty of aggravated assault. T. 152-53.

STATEMENT OF THE ISSUES

I.

The trial court properly allowed the victim to make an in-court identification because the improper pretrial lineup did not impermissibly taint the identification.

II.

The trial court did not violate the defendant's right against self-incrimination when ordering him to show the courtroom his teeth since it was non-testimonial.

III.

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

ARGUMENT

Issue I.

THE TRIAL COURT PROPERLY ALLOWED THE VICTIM TO MAKE AN IN-COURT IDENTIFICATION BECAUSE THE IMPROPER PRETRIAL LINEUP DID NOT IMPERMISSIBLY TAINT THE IDENTIFICATION.

The trial court properly allowed the victim to make an in-court identification. The in-court identification was not impermissibly tainted by the faulty pre-trial lineup. Since the identification was not impermissibly tainted, the Court should affirm the trial court's ruling.

The standard of review for admissibility of evidence is abuse of discretion. *Outerbridge v. State*, 947 So.2d 279, 282 (Miss. 2006). With regard to pretrial identification, the standard of review is as follows:

[W]hether or not substantial credible evidence supports the trial court's findings that, considering the totality of the circumstances, in-court identification testimony was not impermissibly tainted.

Roche v. State, 913 So.2d 306, 310 (Miss. 2005).

To determine if in-court identification is tainted from improper pre-trial identification, the United States Supreme Court presented guiding factors in *Neil v. Biggers*. 409 U.S. 188, 199 (1972). The guiding factors are as follows:

[O]pportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the time of confrontation, and the length of time between the

crime and the confrontation.

Id. The Court affirms unless “there is an absence of substantial credible evidence supporting it.” *Outerbridge*, 947 So.2d at 282.

In *Outerbridge*, the court held the witness had excellent opportunity to view his attacker, had high degree of attention on his attacker, described his attacker in great detail, identified the attacker in a photo lineup within 24 hours of the attack, and expressed complete certainty. *Id.* at 282-83. The court did not abuse its discretion in admitting the evidence. *Id.* at 283. In *Roche*, the court found the defendant did not meet the “heavy burden of showing the conduct gave rise to a very substantial likelihood of misidentification.” *Roche*, 913 So.2d at 312.

Substantial credible evidence supported the identification. Mr. Buford testified he had an opportunity to see the men in a well-lit room. T. 9 of SH. Mr. Buford described a very distinguishing feature of his attacker, his gold plated teeth. T. 12 of SH. Mr. Buford positively identified the defendant as his attacker. T. 4,17 of SH. Mr. Buford identified the man five or six months after the crime. T. 20 of SH. Approximately two years had passed since he viewed the picture. T. 23 of SH.

The trial court reviewed the *Neil* guidelines. T. 25 of SH. The trial court held it was proper for the State to ask questions concerning the defendant’s identification. T. 25 of SH. The trial court did not find the photo “impermissibly suggestive.” T. 25

of SH.

Mr. Buford met the guidelines provided by the Supreme Court. Mr. Buford identified his attacker from characteristics he recalled from the crime not from the improper lineup. Substantial credible evidence existed supporting Mr. Buford's identification. Therefore, the Court should affirm the decision of the trial court.

Issue II.

THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION WHEN ORDERING HIM TO SHOW THE COURTROOM HIS TEETH BECAUSE IT WAS NON-TESTIMONIAL.

The State did not violate the defendant's right against self-incrimination. The State requested the defendant to show the courtroom his teeth. T. 19. This does not constitute self-incrimination. Interestingly, the issue of gold teeth in identification of a defendant is not new. *Hundley v. State*, 822 So.2d 1116 (¶7)(Miss.App. 2007).

According to the United States Supreme Court,

[B]oth federal and state courts have usually held [the protection of self-incrimination] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.

Schmerber v. California, 384 U.S. 757, 764 (1966).

In Mississippi, only compelling production of testimonial evidence violates right against self-incrimination. Identifying physical characteristics does not violate the Fifth Amendment. *Lewis v. State*, 725 So.2d 183, 188 (Miss. 1998) (quoting *McCrary v. State*, 342 So.2d 897, 899 (Miss. 1977); *Porter v. State*, 519 So.2d 1230, 1232. The court permits the defendant to perform relevant non-testimonial demonstrations. *Lewis*, 725 So.2d.

In *Schmerber*, the court held requiring blood for evidence was unrelated to the

defendant's testimony. *Schmerber*, 384 U.S. at 1833. Since the blood did not relate to testimony, the blood was not inadmissible because of self-incrimination. *Id.* In *Porter*, the trial court required the defendant to show the jury a scar for identification reasons. *Porter*, 519 So.2d at 1231. The reviewing court held the exhibition did not violate his right. *Id.* at 1232. The *Lewis* court found that the defendant did not have to try on a shoe in front of the jury. *Lewis*, 725 So.2d at 189. The demonstration lacked relevance because several eye witnesses already testified the defendant wore the shoes during the crime. *Id.*

The State requested the defendant to show his teeth. T. 19. The State made the request for identification reasons. The victim Mr. Buford recognized his aggressor by his gold teeth, a distinguishing characteristic. T. 18.

Smiling was not testifying. It merely showed physical characteristics. The demonstration was relevant. Mr. Buford identified his attacker from this distinguishing characteristic.

In conclusion, compelling the defendant to smile constituted a relevant demonstration. The State did not compel the defendant to testify. The State merely required him to show identifying physical characteristics. Therefore, compelling the defendant to show his teeth did not violate his right against self-incrimination.

Issue III.

THE WEIGHT OF THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY.

The weight of the evidence sufficiently supports the verdict of the jury. The jury could have reasonably found the testimony established the essential elements beyond a reasonable doubt. Therefore, sufficient evidence existed.

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, 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. If the jury "could have found the essential elements of the crime beyond a reasonable doubt," the State presented sufficient evidence. *Bush*, 895 So.2d at 843

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

conspirator. *Bush*, 895 So.2d. The Court 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.*

The State presented sufficient evidence for the jury to convict the defendant. Marrieo Love admitted the group went over to rob Mr. Buford. T. 93. Antonio Boyce admitted the group intended to rob Mr. Buford. T. 128. The defendant asked Mr. Buford where he kept his money according to Boyce prior to shooting him. T. 129. The elements of attempted robbery according to Jury Instruction S-4 are attempt to take personal property from the presence of Mr. Buford against his will while Mr. Buford fears immediate injury due to a deadly weapon. CP 26. The jury could have reasonably found testimony sufficient to prove the elements of attempted robbery.

The jury could have reasonably found the essential elements of the crime existed from testimony. Therefore, the Court should affirm.

CONCLUSION

The trial court properly admitted in-court identification. The out of court identification did not impermissibly taint the in-court identification. Mr. Buford recalled his attacker by characteristics he recalled from the time of the crime. The improper lineup did not affect his recollection. Therefore, the Court should affirm on this issue.

Additionally, the court properly forced the defendant to show the jury his teeth. A court can force the defendant to do something as long as it does not force him to testify. Forcing the defendant to show his teeth is not testimonial evidence. Therefore, the Court should affirm.

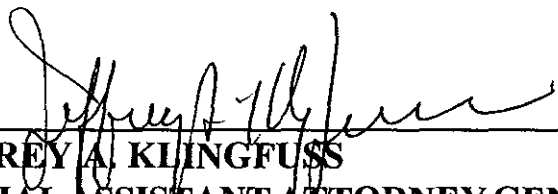
Finally, sufficient evidence exists to support the jury's verdict. Testimony provided enough evidence for a jury to reasonably find the defendant committed

attempted armed robbery. Therefore, sufficient evidence exists, and the Court should affirm.

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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