IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHANCELLOR CHRISTMAS — APPELLANT

VS. — NO. 2007-KA-1450-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2007-KA-1450-SCT**

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STATEMENT OF ISSUES

I. CHRISTMAS HAD NO CONSTITUTIONAL RIGHT TO HAVE COUNSEL PRESENT DURING ECHOLS' INTERROGATION.

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW DEFENSE COUNSEL TO EXTRACT HEARSAY TESTIMONY FROM DEPUTY REEVES.

III. THE STATE DID NOT ENGAGE IN IMPROPER REDIRECT EXAMINATION OF DEPUTY REEVES.

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V. THE VERDICTS WERE NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

VI. THE TRIAL COURT DID NOT ERR IN REFUSING CHRISTMAS'S CHALLENGE FOR CAUSE AS TO JUROR CHUNN.

STATEMENT OF FACTS

On the morning of July 25, 2006, Chancellor Christmas, Joseph "Biscuit" Harris, Travis Thurman, and Raymond Echols were gallivanting around Hinds County in a stolen black Chevrolet Avalanche, seemingly unaware that their every move was being tracked by GPS satellite, courtesy of OnStar. The crew saw "an old white lady" at her mailbox and decided to rob her. T. 329. Christmas, the driver, pulled up to eighty-year-old Margie Sellers' house and knocked on her door. T. 182, 330. When Sellers came to the door, Christmas asked if he and his friends could fish in the pond near her home. T. 182, 330. Sellers explained that she did not own the pond, and advised Christmas of the owners so that he could go ask them for permission to fish in the pond. T. 182-183. Christmas and his friends drove away, feigning to go ask the owners of the pond for permission to fish there. T. 330. They then returned to Sellers' home. This time, Christmas and Harris went to the door. T. 331. Christmas told Sellers that the owners of the pond were not home, and she instructed them to ask the owners' parents who lived nearby. T. 183. When Sellers turned to walk into her home, Christmas grabbed her and put a gun to her head. T. 183, 331. He then shoved her into the house, asking, "Where's the money? Where's the money? I'll kill you. Where's the money?" T. 183. Sellers told Christmas that the only money she had was in her purse on the couch. T. 183. He then began shoving her down the hall and into a bedroom, where he forced her into a closet and ordered her not to move. T. 183. When Sellers thought the robbers had left, she called 911. T. 184.

Hinds County Sheriff's Deputy Andrew McKinley was on patrol when dispatch advised of the stolen Avalanche which was being tracked by OnStar and of the armed robbery. T. 211. McKinley and other units caught up with the Avalanche and attempted to block it in, but the stolen vehicle briefly evaded the officers and a chase ensued. T. 213. After the truck nearly hit another vehicle, the four men jumped out and fled by foot. T. 214. Harris was found hiding under a nearby

house and was taken into custody, but the other three escaped. T. 217-219. Officers found one Nike tennis shoe near the Avalanche, and the matching tennis shoe was found one street over. T. 236-37.

Following the robbery, Quincy Ross was at his family's home, where Christmas also lived. T. 282. According to Ross, Christmas came running in with no shoes on. T. 283. When Ross asked Christmas where his shoes were, he replied that he lost them in "a high speed chase or something." T. 283. Christmas elaborated, stating that "they" had robbed "an old white woman" in Edwards by gunpoint. T. 284. Ross immediately informed his mother, who in turn informed the authorities of the defendant's whereabouts. T. 285. Christmas later gave a statement to authorities in which he admitted to being present during the robbery. T. 345.

Raymond Echols was brought in for questioning and gave a statement to authorities in which he admitted to being one of the four men in the stolen vehicle. T. 293. He stated that the other three men were Christmas, Harris, and Thurman. T. 294. According to Echols, prior to the robbery, Christmas was driving the stolen vehicle, Harris was in the front seat, and he and Thurman were in the back seat. T. 328. This statement was corroborated by the fact that Christmas's fingerprints were found on the drivers' side door. T. 265. The four had planned on finding some four wheelers to steal, but when they saw Sellers at her mailbox that morning, the plan changed. T. 297, 329. Echols testified that it was Christmas's idea to rob Sellers. T. 329. After driving past her house, Christmas turned around and pulled into her driveway. Christmas then engaged Sellers as he feigned interest in fishing in the nearby pond. Echols further testified that after driving off and coming back, Christmas put a gun to Sellers head before he and Harris entered her home and robbed her. T. 331-332. The pair came out with a white purse, and shortly thereafter, a police chase ensued. T. 332.

Christmas was ultimately convicted by a Hinds County Circuit Court Jury of burglary and armed robbery.

SUMMARY OF ARGUMENT

Christmas had no constitutional right to have counsel present during Echols' statement to police. The record contains no evidence that the right to counsel had even attached at the time Echols identified Christmas as one of the burglars/armed robbers. Further, Christmas was not subject to a physical lineup, where counsel is required.

The trial court did not err in refusing to allow defense counsel to extract hearsay testimony from Deputy Reeves. Nor did the trial court allow the State to conduct improper redirect of Deputy Reeves. Further, for the sake of argument only, even if the trial court erred in these regards, no substantial right belonging to Christmas was violated by the evidentiary rulings.

The State proved each element of the crimes charged beyond a reasonable doubt. The verdicts were not against the overwhelming weight of the evidence.

Finally, Christmas's argument that the trial court erred in refusing one of his challenges for cause fails as a matter of law. The venireperson in question did not sit on the jury, as defense counsel exercised a peremptory strike against her. Additionally, defense counsel had one remaining peremptory challenge at the conclusion of jury selection.

ARGUMENT

I. CHRISTMAS HAD NO CONSTITUTIONAL RIGHT TO HAVE COUNSEL PRESENT DURING ECHOLS' INTERROGATION.

Echols had just met Christmas for the first time on the morning of the robbery at Harris's house, and apparently did not know his real name. When Echols gave a statement to authorities, he named Harris and Thurman by name, but kept referring to Christmas as "the tall one." T. 295, 298, 307. Detective Reeves showed Echols a picture of Christmas so he could be sure that Echols was in fact referring to Christmas when he referred to "the tall one." T. 307. Christmas had already admitted to being present during the robbery by the time Echols gave his statement. T. 310.

At trial, defense counsel argued that Christmas had a constitutional right to have counsel present before Reeves showed Echols Christmas's picture. Defense counsel further argued that the out-of-court identification was impermissibly suggestive, and as a result, any in-court identification was tainted. Accordingly, defense counsel sought to suppress both the out-of-court identification and any in-court identification of Christmas by Echols. A hearing was held outside the presence of the jury, and the trial court made an on the record finding of the *Biggers* factors, and ruled that any in-court identification would be sufficiently reliable.[1] The trial court further noted that defense counsel had no authority, and the trial court was unaware of any, to support his assertion that Christmas was entitled to have counsel present when Echols was shown Christmas's photograph.

On appeal, Christmas argues only that Echols' out-of-court and in-court identification of Christmas should have been suppressed because Christmas did not have legal counsel present during Echols' out-of-court identification. He relies on *Lattimore v. State*, 958 So. 2d 192 (Miss. 2007), to support his argument. The *Lattimore* court found that the appellant's Sixth Amendment right to

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[1] *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

counsel was violated when he was required to participate in a physical lineup/show up without the benefit of counsel. However, the court applied a harmless error analysis because "[the witness's] in-court identification was based upon her view of the defendant at the scene of the crime and not based upon the lineup." *Id.* at 198. *Lattimore* is distinguishable from the case *sub judice* for two reasons. First, there was no question that Lattimore's right to counsel had attached at the time he was required to participate in the lineup, as he had been arrested for capital murder eight days prior. *Id.* at 198 (¶¶11-12). In the present case, the record contains no evidence that Christmas had been arrested for the armed robbery and burglary at the time Echols was shown Christmas's photograph. As such, the adversarial process was initiated by Christmas's January 2007 indictment, more than four months after Echols' statement and pretrial identification. Because Christmas was merely a suspect at the time of the pretrial identification and no formal charges had been brought against him, his Sixth Amendment right to counsel had not yet attached. *Young v. State*, 962 So.2d 110, 119 (¶18) (Miss. Ct. App. 2007) (citing *Nixon v. State*, 533 So.2d 1078, 1087 (Miss. 1987)). Furthermore, *Lattimore* involved a physical lineup. There is no question that once the right to counsel has attached, a defendant must be allowed to have counsel present during a physical lineup. *Lattimore* at 198 (¶¶11-12); *Jimpson v. State*, 532 So.2d 985, 989 (Miss.,1988); *U.S. v. Wade*, 388 U.S. 218, 236-37 (1967). However, in the case *sub judice*, Christmas was not required to participate in a physical lineup. Rather, Echols was merely shown a photo of Christmas because he kept referring to Christmas as "the tall one," rather than by name. "It is well settled that the accused does not enjoy the right to counsel during a photographic lineup as it is not viewed as a critical stage of the criminal prosecution process." *Arrington v. State*, 815 So.2d 494, 497-98 (¶6) (Miss. Ct. App. 2002) (citing *Magee v. State*, 542 So.2d 228, 233 (Miss. 1989)). Accordingly, Christmas's first assignment of error necessarily fails.

Christmas does not argue on appeal that Echols' out-of-court identification of Christmas was impermissibly suggestive or that the subsequent in-court identification was tainted. However, should this honorable court find that the appellant's first assignment of error does encompass the entire argument raised by defense counsel at trial, the State would briefly offer the following response. For the sake of argument only, assuming that Reeves act of showing Echols Christmas's photo was impermissibly suggestive, the trial court fully addressed the *Biggers* factors and determined that an in-court identification would be sufficiently reliable and admissible. T. 322-325. Because the trial court's ruling was based on substantial credible evidence, it must not be disturbed on appeal. *Outerbridge v. State*, 947 So.2d 279, 282 (¶8) (Miss. 2006).

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW DEFENSE COUNSEL TO EXTRACT HEARSAY TESTIMONY FROM DEPUTY REEVES.

The following exchange occurred during Deputy Reeves' cross-examination.

Q. Investigator Reeves, you testified that --that you questioned Mr. Christmas, correct?

A. Right.

Q. And that was tape recorded, correct?

A. Right.

Q. And I believe you testified that he was present at the time of the incident?

A. Yes.

Q. All right. But as far as him saying he participated --

BY MR. ARTHUR: I'm going to object to that. It's hearsay.

BY THE COURT: Sustained.

T. 356. Christmas claims that the trial court erred in sustaining the objection, because Reeves' answer may not have included hearsay if he simply answered no. Appellant's brief at 13. However, if defense counsel was in fact simply attempting to elicit a non-hearsay "yes" or "no" answer, he could have simply rephrased the question. In any event, even assuming that the trial court erred in sustaining the State's objection, reversible error will not be predicated upon erroneous exclusion of evidence unless a substantial right belonging to the defendant has been violated. *Ladnier v. State*, 878 So.2d 926, 933 (¶27) (Miss. 2004).

Christmas baselessly asserts, "Obviously, the State wanted the jury to be left with the impression that Christmas admitted to 'participation' in the alleged crime." Appellant's brief at 13. Christmas then claims that the Reeves' anticipated response of "No, Christmas did not admit participation" prejudiced his defense "since Christmas's 'mere presence' would not have made him

guilty of the alleged crimes." Appellant's brief at 13. However, the jury was clearly instructed in instruction S-5 that mere presence was insufficient to support a verdict of guilt. C.P. 32. Additionally, instructions S-1 and S-2 made it absolutely clear to the jury that the State was required to prove more than mere presence in order to support a conviction for either armed robbery or house burglary. Because no substantial right belonging to Christmas was violated by the trial court's exclusion of evidence, his second assignment of error must fail.

III. THE STATE DID NOT ENGAGE IN IMPROPER REDIRECT EXAMINATION OF DEPUTY REEVES.

As previously stated, reversible error will not be predicated upon the erroneous admission or exclusion of evidence unless a substantial right belonging to the defendant has been violated. *Ladnier*, 878 So.2d at 933 (¶27). As acknowledged by the appellant, "Trial courts have broad discretion in allowing or disallowing redirect examination of witnesses and when the defense attorney inquires into a subject on cross-examination of the State's witness, the prosecutor on redirect is unquestionably entitled to elaborate on the matter." *Manning v. State*, 835 So.2d 94, 99-100(¶15) (Miss. Ct. App. 2002) (citing *Greer v. State*, 755 So.2d 511, 516 (¶14) (Miss. Ct. App. 1999)).

On redirect, Reeves was being questioned about Christmas's interview. After asking Reeves several questions regarding the information Christmas provided in his statement, the prosecutor asked, "And did you ask him if -- he admitted he ran -- he ran out," to which defense counsel objected as to improper redirect." On appeal, Christmas claims that the question was improper because "[t]here had been no inquiries on cross-examination of anything related to the subject of Christmas running." Appellant's brief at 15. However, the rule regarding the scope of redirect examination is not so narrowly construed. Defense counsel opened his cross-examination of Reeves by asking about the substance of Christmas's statement. T. 356. Defense counsel broached another line of questioning, then returned to the subject of Christmas's statement to Reeves. T. 358. On redirect, the prosecutor was simply inquiring about Christmas's statement, as the subject had already been broached on direct and cross. As such, the trial court did not abuse its discretion in overruling

Christmas's objection.[2]

[2]Although the trial court's reasoning for overruling the objection differs from the State's analysis on appeal, this Court often upholds trial court rulings where "the right result is reached even though for the wrong reason." *Towner v. State*, 837 So. 2d 221, 225 (¶9) (Miss. Ct. App. 2003) (citing *Puckett v. Stuckey*, 633 So. 2d 978, 980 (Miss. 1993)).

IV. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT ON COUNT II HOUSE BURGLARY.

Christmas argues that the jury's verdict on Count II burglary was not supported by legally sufficient evidence because the State failed to prove the element of breaking. In the context of burglary, breaking is "**any act or force**, however, slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed." *Alford v. State*, 656 So.2d 1186, 1190 (Miss. 1995) (quoting *Smith v. State*, 499 So.2d 750, 752 (Miss. 1986) (internal quotations omitted). Taking the evidence in the light most favorable to the State, there can be no question that the State proved the element of breaking. Mrs. Sellers testified that she had turned around and was about to enter her home when Christmas grabbed her from behind, stuck a gun to her head, and shoved her into and throughout the house. T. 183. Additionally, Echols testified that when Mrs. Sellers turned her back to Christmas and Harris, Christmas "grabbed her and put the gun to her head," to gain entrance to the house. T. 331. Placing a gun to someone's head and shoving them into the front door of their home is certainly an act of force employed to effect entrance.

Relying on *Hill v. State*, 929 So. 2d 338 (Miss. Ct. App. 2005), Christmas seems to argue that reversible error was committed because the State proved constructive breaking, yet the jury was only instructed on actual breaking. His reliance on *Hill* is completely misplaced. Regardless of what the State argued on appeal in *Hill*, the case was reversed because the State failed to prove a breaking at all, whether actual or constructive. Such is not the case at hand. As explained above, the State clearly proved actual breaking beyond a reasonable doubt. Further, *Hill* makes it abundantly clear that in the case *sub judice*, the State proved actual, not constructive breaking. "If a defendant obtains permission to enter a building by using deceit, this will constitute a constructive breaking." *Hill v. State*, 929 So.2d 338, 341 (¶7) (Miss. Ct. App. 2005) (citing *Templeton v. State*, 725 So.2d 764, 767

(¶ 7) (Miss. 1998)). Although Christmas was deceitful in initially engaging Mrs. Sellers' with a lie about wanting to fish in the nearby pond, he gained entrance into her home by use of force, not deceit.

Because the State proved each element of the crime of burglary beyond a reasonable doubt, Christmas's fourth assignment of error must fail.

V. THE VERDICTS WERE NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Christmas frames his fifth issue as one of legal sufficiency, yet the body of his argument pertains only to the weight of the evidence.[3] As correctly noted by Christmas, an argument that the verdict is against the overwhelming weight of the evidence will succeed only when the verdict represents an unconscionable injustice. *Bush v. State*, 859 So. 2d 836, 844 (¶18) (Miss. 2005). The heart of Christmas's argument on this issue is simply that Echols and Sellers' testimony was in conflict, and that Echols' testimony was only corroborated by Reeves' testimony that Christmas admitted to being present at the scene. However, it is well established that conflicts which arise in the testimony are to be resolved solely by the jury. *Moses v. State*, 893 So.2d 258, 261 (¶7) (Miss. Ct. App. 2004). This honorable Court has stated the following regarding conflicts in the evidence.

> Jurors are permitted, and indeed have the duty to resolve the conflicts in the testimony they hear. Any conflicts in the testimony of witnesses is the province of the jury. Who the jury believes and what conclusions it reaches are solely for its determination. As the reviewing court, we cannot and need not determine with exactitude which witness(es) 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.

Stephens v. State, 911 So.2d 424, 436 (¶38) (Miss. 2005) (internal citations omitted).

It is true that when Sellers was shown a photo lineup, she picked out an individual named Terrell White as the person who grabbed her and stuck the gun to her head. However, the jury also heard testimony that prior to being shown a photographic lineup, Sellers had watched a news broadcast which named White as a suspect and showed his photo. 207-208; 364. She further testified that she got a much better look of the mens' faces on the news than she did when Christmas

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[3]Motions for JNOV, peremptory instructions, and directed verdict attack legal sufficiency, whereas a motion for new trial attacks the weight of the evidence. *McLendon v. State*, 945 So.2d 372, 384 (¶34) (Miss. 2006); *Shumpert v. State*, 935 So.2d 962, 966 (¶8) (Miss. 2006).

had a gun to the back of her head. T. 207-208. In any event, Echols gave eyewitness testimony that Christmas participated in the burglary/armed robbery, Christmas admitted to being present during the crimes, Christmas stated to Reeves that White was not involved in the burglary/armed robbery, and Christmas left his fingerprints on the stolen vehicle used in the burglary/armed robbery. The conflicting evidence presented a factual dispute to be resolved by the jury.

Christmas also claims that Echols' testimony was corroborated only by Reeves' testimony that Christmas admitted to being present at the scene. First, even uncorroborated accomplice testimony can be sufficient to support a verdict of guilt. *Hendrix v. State*, 957 So.2d 1023, 1027 (¶8) (Miss. Ct. App. 2007). Second, Echols' testimony was corroborated by Reeves' testimony and by Christmas's fingerprints found in the getaway vehicle. The verdicts were not against the weight of the evidence, nor do they represent an unconscionable injustice.

VI. THE TRIAL COURT DID NOT ERR IN REFUSING CHRISTMAS'S CHALLENGE FOR CAUSE AS TO JUROR CHUNN.

Defense counsel claims that the trial court committed reversible error in failing to accept his challenge for cause as to venireperson Shaun Chunn. However, Chunn did not sit on the jury, as defense counsel exercised a peremptory strike against her. T. 159, 162. Further, Christmas used only eleven of his twelve peremptory strikes. "This Court has explained that a prerequisite to presentation of a claim of a denial of constitutional rights due to denial of a challenge for cause is a showing that the defendant had exhausted all of his peremptory challenges and that the incompetent juror was forced by the trial court's erroneous ruling to sit on the jury." *Mettetal v. State*, 615 So.2d 600, 603 (Miss. 1993) (citing *Chisolm v. State*, 529 So.2d 635, 639 (Miss. 1988)). Because Chunn did not sit on the jury, and because Christmas did not exercise all of his peremptory challenges, his final assignment of error necessarily fails.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Christmas's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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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