IN THE COURT OF APPEALS OF MISSISSIPPI

CHANCELLOR CHRISTMAS — APPELLANT

VS.

NO. 2007-KA-1450-SCT ~~2006-TS-01702-COA~~

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM
THE CIRCUIT COURT OF THE
SECOND JUDICIAL DISTRICT OF HINDS COUNTY

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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

1. Margie Sellers;
2. Judge Bobby B. Delaughter;
3. Dewey Arthur, former Hinds County Assistant District Attorney;
4. Chad Doleac, Hinds County Assistant District Attorney;
5. Donald W. Boykin, Attorney for Appellant.

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STATEMENT OF THE CASE

Chancellor Christmas was indicted in the Second Judicial District of Hinds County, Mississippi for Count I, armed robbery/attempted armed robbery and Count II, house burglary (C.P. 4). The indictment further alleged that the victim, Margie Sellers, was over sixty-five (65) years of age, and therefore, any sentence imposed would be enhanced.

On July 9, 2007, the trial began, and it concluded on July 10th. Christmas was convicted as to both counts, and on Count I he was sentenced to ninety (90) years and on Count II, fifty (50) years, the sentences for the two crimes being enhanced pursuant to Section 99-19-351 through 99-19-357 (C.P. 56, 57).

On July 26, 2007, the Court entered its Order Denying Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial. It is from Christmas's convictions and Order Denying Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial that he appeals.

STATEMENT OF FACTS

On July 25, 2006, Margie Marie Sellers, eighty (80) years old at the time, was at her home about 9:00 a.m. at 7100 Highway 22, Edwards, Mississippi (T. 182, 192, 196, 197). She heard a knock at her back door, and when she opened the door there was "a young black man standing on the porch". She testified there was a "big black truck" parked in the back yard. In addition to the man at the back door, she saw "the forms" of two others in the truck. She said the young man at the back door asked her if they could go fishing in the pond near her house, and she told him the pond did not belong to her, but that he had to ask the people next door (T. 182, 183).

Ms. Sellers said they left, but shortly thereafter came back to her house and told her they could not find the house to which she was referring. She said that after she stepped out on her porch talking with one of them, two others came on the porch.

Thinking that the three were leaving, Ms. Sellers turned around to go back in her house, "opened the door," and one of them grabbed her, put what she thought was a gun to her head, and pushed her. She said one of them asked her for her money, and said that he would kill her. He pushed her into a bedroom and then into a closet (T. 183). She then went back into her living room and called 911 (T.184). In response to the State's question if she was "paying close attention to these men," Ms. Sellers said, "They were just clean cut young men...." Ms. Sellers said that after the

incident she went to her son's house, and the next day she went to the doctor because in the State's words she was, "shaken up" (T.192).

The man held a gun to the back of her head, but Ms. Sellers said that she did not attempt to turn around and identify him (T. 193). She said the only thing taken was her purse (T. 194). She identified a "coin purse" as having been in her purse, which she had last seen on the day of the incident, July 25, 2006 (T. 195, 196).

On cross-examination, Ms. Sellers said that she was shown photographs the following day by Sheriff's deputies. At trial she was handed a photograph, Exhibit 9, and acknowledged that she wrote on it, "I recognize the Number 2 picture as being the person who attacked and robbed me...." She said she was referring to the person who actually attacked and grabbed her (T. 200, 201). Investigator, Wesley Reeves, testified that Exhibit 9 was Terrell White, not Chancellor Christmas. He acknowledged that Ms. Sellers never identified Christmas as being one of her assailants. She again stated that she saw only three persons (T. 201). While she said she felt a gun on her head, she did not see one (T. 202).

She described the first person who came to the door and asked if they could go fishing as "very young" and, acknowledged that he was smaller in height than the other two (T.205).

Raymond Echols, age fourteen (14) at the time of the incident, testified concerning his participation and that of others in the incident. He entered a plea bargain with the State, whereby in

exchange for his testimony, the State offered to recommend his sentence be twenty (20) years in the custody of the Mississippi Department of Corrections, with fourteen years suspended and six years to serve (T. 326). Echols testified there were four persons involved in the incident, himself, Christmas, Travis Thurman and Joseph Lee Harris a/k/a "Biscuit." (T. 327). He claimed that it was Christmas's idea to break into Ms. Sellers house, and that it was Christmas who first got out of the vehicle and asked Ms. Sellers about going fishing (T. 330). Echols said he never got out of the vehicle (T. 330, 331). Echols denied that his cousin, Travis Thurman, ever got out of the vehicle at Ms. Sellers (T. 336). He said that when they came out of Ms. Sellers home, they had a white purse (T. 3320). Echols and the others, with Echols driving, then returned to Jackson, and at one point tried to out run law enforcement officials. They finally stopped, and all in the vehicle ran, but were subsequently apprehended (T. 333-334). He told Investigator Reeves that one of the persons was named Terrell (T. 339). He said that during his interrogation that he was shown two picture, and that, referring to the investigator, "He just pointed at them - - asked me if them two guys -- and I said, "Yes" (T. 339). He acknowledged that the only reason he was getting a plea bargain involving him serving six (6) years was because he was testifying that Christmas was involved (T. 340).

On re-direct examination, Echols testified that he was approximately five feet, six inches or five feet, seven inches, was the smallest one in the vehicle that day, and was the youngest one

in the vehicle that day. Investigator Reeves said that Christmas admitted "being present during the robbery," on cross-examination, the Court would not allow defense counsel to question Investigator Reeves as to whether Christmas said he participated in the robbery (T.356).

STATEMENT OF ISSUES

ISSUE ONE

THE TRIAL COURT SHOULD HAVE SUPPRESSED ALL TESTIMONY CONCERNING THE IN-COURT AND OUT-OF-COURT IDENTIFICATION OF CHRISTMAS BY RAYMOND ECHOLS.

ISSUE TWO

THE TRIAL COURT ERRED IN NOT ALLOWING CHRISTMAS TO QUESTION INVESTIGATOR REEVES CONCERNING CHRISTMAS'S NON-PARTICIPATION IN THE ALLEGED CRIMES.

ISSUE THREE

THE TRIAL COURT ERRED IN ALLOWING IMPROPER REDIRECT BY THE STATE.

ISSUE FOUR

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT CHRISTMAS'S CONVICTION OF HOUSE BURGLARY.

ISSUE FIVE

THE TRIAL COURT ERRED BY DENYING CHRISTMAS'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND HIS PREEMPTORY INSTRUCTION CONCERNING COUNTS I AND II.

ISSUE SIX

CHRISTMAS'S JUROR CHALLENGE FOR CAUSE SHOULD HAVE BEEN GRANTED.

SUMMARY OF ARGUMENTS

ISSUE ONE

THE TRIAL COURT SHOULD HAVE SUPPRESSED ALL TESTIMONY CONCERNING THE IN-COURT AND OUT-OF-COURT IDENTIFICATION OF CHRISTMAS BY RAYMOND ECHOLS.

Raymond Echols, a co-defendant of Christmas, entered a plea bargain with the State involving him testifying in Christmas's case. Approximately forty-three (43) days after the incident, Echols was interragated by Hinds County Sheriff's deputies and shown a photograph of Chirstmas. Christmas had no attorney present for the display of the photograph, nor did the Sheriff's deputies even attempt to determine if Christmas had an attorney. Echols made an in-court identification of Christmas. The post-arrest line-up violoated Christmas's Sixth Amendment right to counsel.

ISSUE TWO

THE TRIAL COURT ERRED IN NOT ALLOWING CHRISTMAS TO QUESTION INVESTIGATOR REEVES CONCERNING CHRISTMAS'S NON-PARTICIPATION IN THE ALLEGED CRIMES.

Investigator, Wesley Reeves, questioned Christmas, and he stated at trial that Christmas admitted his presence. On cross-examination, Christmas attempted to get Investigator Reeves to testify that Christmas did not say he participated in the alleged crimes. The State objected to Christmas's question of Investigator Reeves, and the objection was sustained. By the question to Investigator Reeves, Christmas was attempting to have Investigator Reeves say, "No," Christmas did not say he participated. Thus, Christmas did not seek a hearsay statement from Investigator Reeves.

ISSUE THREE

THE TRIAL COURT ERRED IN ALLOWING IMPROPER REDIRECT BY THE STATE.

On re-direct examination of Investigator Reeves, the State questioned Reeves about Christmas running. Christmas objected on the ground that it was improper re-direct. The re-direct examination question was not an attempt to clarify anything asked on cross-examination. In essence, the State on re-direct examination questioned Investigator Reeves about a matter not gone into on cross-examination.

ISSUE FOUR

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT CHRISTMAS'S CONVICTION OF HOUSE BURGLARY.

No evidence was elicited to show that there was an actual "break in" into Ms. Sellers' home. She admitted that it was after she "opened the door" that persons entered her home. While she testified that a gun was held to her head, the relevant jury instruction concerning the elements of house burglary concerned only actual burglary, not constructive burglary.

ISSUE FIVE

THE TRIAL COURT ERRED BY DENYING CHRISTMAS'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND HIS PEREMPTORY INSTRUCTION CONCERNING COUNTS I AND II.

Christmas admitted his presence. Ms. Sellers never identified Christmas as being involved. In fact, she said that the person who first came up on her porch to inquire about going fishing was smaller than the other two. Raymond Echols testified that he never got out of the truck. Echols is five feet, six inches; five feet, seven inches tall, whereas Christmas is six feet, three inches

tall. Ms. Sellers said there were three persons, Echols said there were four. Echols said that one of the other co-defendants, Travis Thurman, never got out of the truck, Ms. Sellers said three got out, whereas Echols said only two. As an accomplice, Echols testimony was to be viewed with great caution and suspicion. His testimony was substantially impeached by that of Ms. Sellers. The evidence was sufficient to support convictions of Christmas of either count.

ISSUE SIX

CHRISTMAS'S JUROR CHALLENGE FOR CAUSE SHOULD HAVE BEEN GRANTED.

During voir dire, Juror Chunn said that when she walked into the courtroom, she wondered what Christmas had done. She emphatically said it was not a matter of her wondering what he was charged with. Clearly, she was prejudiced against Christmas, and Christmas's challenge for cause of her should have been granted.

ARGUMENT OF ISSUES

ISSUE ONE

THE TRIAL COURT SHOULD HAVE SUPPRESSED ALL TESTIMONY CONCERNING THE IN-COURT AND OUT-OF-COURT IDENTIFICATION BY RAYMOND ECHOLS OF CHANCELLOR CHRISTMAS.

Christmas orally moved the Court to suppress testimony concerning any in-court and the out-of-court identification by Raymond Echols of Chancellor Christmas (T. 267). Prior to Raymond Echols testifying, the Court conducted a hearing on the Motion (T. 292-305). The Court denied the motion (T. 322).

Investigator Wesley Reeves, with the Hinds County Sheriff's Department testified that on September 6, 2006 he and Investigator, Eddie Robinson, participated in taking a statement from Echols concerning the robbery of Ms. Sellers (T. 305-306). Reeves testified that prior to September 6th, Christmas had been arrested on August 22, 2006, and that Christmas had no legal counsel present during the questioning of Echols, nor did he attempt to find out if Christmas even had legal counsel (T. 306).

Reeves said a tape recording was made of the interrogation of Echols, but prior to the recording of the interrogation, he showed one photograph to Echols asking him to identify it. During the interrogation, Echols referred to someone as "the tall one," and because Echols did not know the name of the person in the photograph, Reeves handed Echols a single picture, and asked Echols, "Is this the person we are talking about?" Echols responded that it was (T. 306-307). During Reeves interrogation of Echols, Echols identified the person in the photograph as

"Terrell," and that Terrell was the tall person to whom he was referring. Reeves acknowledged that the tape recording of Echol's interrogation started after Echols was shown only one photograph. Reeves said the photograph was actually a photograph of Christmas (T. 308).

While Echols testified that he had been with Christmas approximately three hours the morning of the robbery, he had not seen Christmas before that day (T. 295-297). Echols said that he thought the person in the photograph was named Terrell, because another person, Joseph Harris a/k/a Biscuit, kept calling him Terrell (T. 299, 300). He said that when he was taken into the interrogation room with Reeves and Robinson, they immediately showed him, not one photograph, but two photographs (T. 301). The two photographs shown him were that of Harris (Biscuit) and Christmas, and they were shown to him prior to the recording of his interrogation beginning (T. 299).

The robbery of Ms. Sellers occurred on July 25th, but the photo line-up occurred on September 6th, approximately forty-three days after the robbery. Echols was fourteen (14) years of age on July 25, 2006 (T. 326).

Christmas was entitled to have legal counsel present at the photo line-up. This Court has held that law enforcement officers should not conduct an identification proceeding after the arrest of the defendant and without giving the defendant the opportunity to have legal counsel present at the time Lattimore v. State, 958 So. 2d 192 (Miss. 2007). Thus, it was a violation of Christmas's Sixth

Amendment right to counsel for the photo line-up to be conducted without him having an opportunity to have legal counsel present. The State was required to show by clear and convincing evidence that Echols' in-court-identification was not based upon the constitutionally impermissible line-up. Id., at 198.

The Court denied Christmas's motion with respect to his Sixth Amendment right to counsel at the post-arrest line-up. The Court stated that it knew of no case requiring that. (T. 322).

ISSUE TWO

THE TRIAL COURT ERRED IN NOT ALLOWING CHRISTMAS TO QUESTION INVESTIGATOR REEVES CONCERNING CHRISTMAS'S NON-PARTICIPATION IN THE ALLEGED CRIMES.

On direct examination, Investigator Reeves was asked concerning Christmas, "Did he admit being present during the robbery?" Investigator Reeves responded, "He did." (T. 345).

Further questioning of Investigator Reeves was:

Q. Okay. And Raymond Echols admitted that he was -- they were all in a stolen vehicle?

A. Yes, he did.

Q. Chancellor Christmas admitted that?

A. He did. (T. 348).

On cross-examination, Investigator Reeves was asked, "All right. But as far as him saying he participated --" The State objected to that on the ground on hearsay, and the Court sustained the objection (T. 356). Defense counsel was attempting to clarify that Christmas never said he participated in the alleged crimes. The State's questions, and Investigator Reeves' answers, could have

clearly left the jury with the impression that Christmas admitted participation in the alleged crimes.

The question to which the State objected would not have elicited from Investigator Reeves any statement made by Christmas, but was only seeking a "no" answer. Thus, the question was not eliciting a hearsay statement made by Christmas. In other words, assuming Investigator Reeves would have said, "no," that Christmas did not say he participated, Investigator Reeves' answer would not have constituted hearsay, because there was no statement by Christmas. M.R.E. 801 (c) says:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Obviously, the State wanted the jury to be left with the impression that Christmas admitted to "participation" in the alleged crime. A response from Investigator Reeves saying that "No," Christmas did not admit participation, was critical to Christmas's defense, since Christmas's "mere presence" would not have made him guilty of the alleged crimes.

Even if a response by Investigator Reeves that, "no," Christmas did not admit participation, such response would have constituted a permissible hearsay exception under M.R.E. 803 (24) and M.R.E. 804. M.R.E. 803 (24), entitled, "Other Exceptions" states in part:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the Court determines that (A) the statement is offered as evidence of the material fact; (B) the statement is more probative on the

> point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules in the interest of justice will best be served by admission of the statement into evidence.

Because, as stated previously, the jury could have clearly been left with the impression that because Christmas admitted to being present, he therefore participated in the alleged crime. The "interest of justice" would have obviously been best served by the trial court allowing Investigator Reeves to state that Christmas did not admit participation.

M.R.E. 804 (a) states:

> (a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:
>
> (1) is exempted by ruling of the Court on the ground of privilege from testifying concerning the subject of his statement;"

Christmas met that definition of "unavailability," because he was protected by the Fifth Amendment against self-incrimination. Obviously, if Christmas had taken the stand, he would have subjected himself to being questioned about all matters relating to the alleged crimes, and his testimony would not have been limited to him testifying only about him telling Investigator Reeves that he did not participate in the crime. Obviously, Christmas was prejudiced by the Court sustaining the State's objection.

ISSUE THREE

THE TRIAL COURT ERRED IN ALLOWING IMPROPER REDIRECT BY THE STATE.

During redirect examination of Investigator Wesley Reeves, the State asked, "And, did you ask him if -- he admitted he ran -- he

ran out --? Christmas objected on the ground that the question was improper redirect. The trial court overruled the objection, stating, "In Mississippi you are not limited on what's called into on cross." (T. 368,369). Christmas argued that the question was, "going into new ground here, and that he's not going into ground that was to clarify anything that may have been -- come up as a result of my cross-examination." The trial court responded, "That is not the rule in Mississippi. It's overruled." (T. 369). Subsequently, the State continued its redirect of Reeves on that question, asking, "And the Defendant didn't deny running out of his shoes to get away from the police?" Investigator Reeves responded, "No, he did not." (T. 370, 371).

This Court has repeatedly held that, "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." Massey v. State, 863 So. 2d 1019, 11022 (Miss. Ct. App. 2002); Manning v. State, 835 So. 2d 94, 99-100 (Miss. Ct. App. 2002); Greer v. State, 755 So. 2d 511, 516 (Miss. Ct. App. 1999). On matters relating to redirect examination, a trial court will not be overruled unless there has been a clear abuse of discretion. Conley v. State, 790 So. 2d 773, 786 (Miss. 2001). There had been no inquiries on cross-examination of anything related to the subject of Christmas running. That, coupled with the Court's statement to the effect that the above stated rule in Massey, Manning, and Greer, was not the rule in Mississippi, establishes there was a "clear abuse of discretion."

ISSUE FOUR

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT CHRISTMAS'S CONVICTION OF HOUSE BURGLARY.

Ms. Sellers testified on direct that when three, not four, persons were on her porch, she turned around to go back in her home. She thought they were leaving, but testified, "When I opened the door, that's when he grabbed me from behind, put a gun to my head, shoved me on in the house, and he was pushing me" (T. 183). Thus, no one actually broke into her home. Jury Instruction Number 10 (S-2) instructed the jury on the elements of house burglary, stating, in part, that Christmas, either individually or while aiding, abetting or acting in concert with another, did, "wilfully, unlawfully, and feloniously break and enter the dwelling house of Margie Sellers..." (C.P. 27). Jury Instruction Number 11 (S-6) instructed the jury as follows:

> The Court instructs the jury that the words "break," "broke" and/or "breaking" as used in these instructions refer to any unauthorized act of force, regardless of how slight, necessary to be used in entering a building, such as turning a knob or opening or pushing a door or window. (C.P. 33) (underline supplied)

In Hill v. State, 929 So. 2d 338 (Miss. Ct. App. 2005) the defendant argued successfully there was insufficient evidence to convict him of burglary, because there was no evidence of breaking. In Hill, p. 340, the Court said:

> "Breaking" is an act of force, however slight, used to gain entrance. Winston v. State, 479 So. 2d 1093, 1099. (Miss. 1985). However " the structure must generally be closed. Otherwise the entry is merely a trespass, not a "breaking" and a burglary." Goldman v. State, 741 So. 2d 949, 951 (Miss. Ct. App. 199).

Because the structure which was entered in Hill was a three-wall structure, the defendant argued there could be no actual breaking, and the State conceded that point. In Hill the State argued there was evidence of constructive breaking, but, as in the case sub judice, the jury in Hill was only charged on the definition of an actual breaking. In the case sub judice, the jury was not instructed concerning "constructive breaking," but only actual breaking by stating, "any authorized act of force... such as turning a knob or opening or pushing a door or window." Thus, Christmas's motions for directed verdict and his peremptory instruction (DC-3), concerning house burglary, should have been granted.

ISSUE FIVE

THE TRIAL COURT ERRED BY DENYING CHRISTMAS'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND HIS PEREMPTORY INSTRUCTION CONCERNING COUNTS I AND II.

In considering this Issue, this Court is to view the evidence in the light most favorable to the verdicts, and should reverse the verdicts if they are so contrary to the overwhelming weight of the evidence that to allow them to stand would sanction an unconscionable injustice. Bush v. State, 895 So. 2d 836, 844 (Miss. 2005). This Court is to review the verdicts under an abuse of discretion standard of review. Jones v. State, 962 So. 2d 1263, 1274 (Miss. 2007).

As previously discussed, Christmas admitted to Investigator Wesley Reeves that he was present with the others. Neither Investigator Reeves, nor anyone else, except for Raymond Echols,

testified that Christmas participated, aided, abetted, assisted, or in any way acted in concert with any of the others.

In a number of respects, Ms. Sellers' testimony significantly conflicted with that of Raymond Echols. First, Ms. Sellers said she only say three persons, as opposed to the four claimed by Raymond Echols.

Ms. Sellers was shown a photograph, Exhibit 9, by Investigator Reeves, who had testified that the photograph was of Terrell White, not Christmas. Ms. Sellers said the person in Exhibit 9 was the one who actually attacked and grabbed her (T. 200, 201). She said the first person who came to her door and asked if they could go fishing was "very young" and was smaller in height than the other two (T. 205).

Echols said it was Christmas who went to Ms. Sellers door to ask about going fishing (T. 330). Investigator Reeves said Christmas was six feet three inches tall (T. 347). Echols is about "five feet, six inches; five feet, seven inches" (T. 341). Echols said not only was he not the one to go to the door and inquire of Ms. Sellers about fishing, but he never got out of the vehicle (T. 336). Echols also said Travis Thurman never got out of the vehicle. Thus, Echols' testimony clearly conflicted with that of Ms. Sellers. If one were to believe Echols, he, the smallest, never got out of the truck, and only two persons got out of the truck. Unquestionably, Echols' testimony was substantially impeached by that of Ms. Sellers.

Jury Instruction Number 5 instructed the jury concerning consideration of the testimony of an accomplice such as Echols (C.P. 25). That instruction reads in part:

> It does mean, however, that you must view such testimony with great caution and suspicion. It further means that if such testimony is not corroborated by other evidence, you may not find the Defendant, Chancellor Christmas, guilty unless you find the testimony of Raymond Echols to be reasonable, not improbable, self-contradictory, or substantially impeached.

The only aspect of Echols' testimony which was corroborated was Christmas's admission to Investigator Reeves that he was "present." Again, his testimony was "substantially impeached" by Ms. Sellers, because she said three persons, not two, came in her house, and because the person who came to her door and inquired about fishing was smaller than the other two, not the tallest, as Echols suggested. With respect to "mere presence," this Court has said:

> Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator. Spann v. State, 970 So. 2d 153, 137 (Miss. 2007).

ISSUE SIX

CHRISTMAS'S JUROR CHALLENGES FOR CAUSE SHOULD HAVE BEEN GRANTED.

Christmas challenged for cause venireperson, Shaun Chunn, which was denied. The first question asked of the venire during

Christmas's voir dire was, "How many of you, when you came in, looked at him, and you wondered to yourself, "I wonder what he did?" (T. 61).

Juror, Shawn Chunn, stated, "So I did -- I wondered what he did, not what he was charged with." Juror Chunn stated, "Yes" that she thought Christmas had done something. Her statement shows that she was emphatic that she thought he had done something, not that he was merely charged with something. At no point during the voir dire was Juror Chunn ever rehabilitated to show that she could be a fair and impartial juror.

This identical issue was raised in White v. State, 969 So. 2d 72 (Miss. Ct. App. 2007). The Court said in that case that the law in Mississippi on opinions of jurors was:

> Any person, otherwise competent, who will make oath that is impartial in the case, shall be competent as a juror in any criminal case, notwithstanding the fact that he has an impression or an opinion as to the guilt or innocence of the accused, if it appeared to the satisfaction of the court that he has no bias or feeling or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may conduct. White, at 76.

That statement of the law appears to be self-contradictory. Specifically, it appears that if a person has already formed an impression or opinion as to the guilt or innocence of the accused, it cannot appear to the Court that the juror has "no bias or feeling of prejudice in the case."

White cites Simmons v. State, 241 Miss. 481, 489, 130 So. 2d 860, 863 (1961), stating:

> that a juror has formed an impression about the case does not disqualify him where he states that his opinion is not fixed, and that he will decide the case on the evidence. Id, p.76.

That statement as well seems to be self-contradictory, because it does not seem logical that a juror may have already formed an impression about the case, yet at the same time truthfully say he will decide the case on the evidence.

Juror Chunn did not equivocate. The trial court's denial of Christmas's challenge violated his rights guaranteed him by Article 3, Section 26 of the Mississippi Constitution; Article 3, Section 14 of the Mississippi Constitution; and the Fifth Amendment to the United States Constitution.

Article 3, Section 26 of the Mississippi Constitution guaranteed Christmas the right to a "trial by an impartial jury." Article 3, Section 16 and the Fifth Amendment to the United States Constitution provide that, "No person shall be deprived of life, liberty or property except by due process of law." In Mhoon v. State, 464 So. 2d 77 (Miss. 1985), Mhoon had been denied his rights under those constitutional provisions. Citing Lee v. State, 83 So. 2d. 18 (Miss. 1955), the court in Mhoon stated:

> Respect for the sanctity of an impartial trial requires that courts guard against even the appearance of unfairness for "public confidence in the fairness of jury trials is essential to the existence of our legal system." Whatever tends to threaten public confidence in the fairness of jury trials, tends to threaten one of our sacred legal institutions. Mhoon, at p. 81.

The standard to be applied by this Court is not whether the prospective juror definitely could not be impartial, but whether it

would be likely that he could not be impartial. Berry v. State, 703 So. 2d 269 (Miss. 1997); Billiot v. State, 454 So. 2d 445 (Miss. 1984), cert. denied 469 U. S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2nd 369 (1985). The standard of review for the trial court's denial of the challenge for cause is abuse of discretion. Sewell v. State 721, So. 2d 129 (Miss. 1998).

No case law has been found stating or otherwise suggesting that once a venireperson has made a statement to the effect that they could not be an impartial juror, it is the duty of the defendant to probe further to rehabilitate the venireperson to determine if, in fact, they could be impartial. That responsibility is left with the State.

CONCLUSION

The evidence was insufficient to convict Christmas of either count of the indictment, and the conviction should be reversed and rendered. In the alternative, Christmas should be granted a new trial.

Respectfully submitted,

CHANCELLOR CHRISTMAS

by: DONALD W. BOYKIN
ATTORNEY FOR CHANCELLOR CHRISTMAS

CERTIFICATE OF SERVICE

I, Donald W. Boykin, hereby certify that I have this day mailed by United States Mail or hand delivered, a true and correct copy of the Brief for Appellant and Record Excerpts to:

a. Hon. Bobby B. Delaughter, Circuit Judge;

b. Hon. Jim Hood, Attorney General; and

c. Hon. Robert Smith, District Attorney

DONALD W. BOYKIN