

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY STEVE PARKER

FILED

APPELLANT

SEP - 4 2008

VS.

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

NO. 2007-KA-1646-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE TRIAL COURT PROPERLY ALLOWED DEBBIE TO TESTIFY REGARDING AN OUT-OF-COURT STATEMENT MADE BY THE DEFENDANT, PURSUANT TO M.R.E.801(d)(2)(A).	6
II. THE DEFENDANT FAILED TO CONTEMPORANEOUSLY OBJECT TO WITNESS RHONDA LINDSEY'S TESTIMONY.	8
III. THE STATE PROVIDED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.	11
IV. THE JURY'S VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.	14
CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

STATE CASES

Bush v. State, 895 So.2d 836, 844 (Miss. 2005)	14
Gray v. State, 931 So.2d 627, 631 (Miss. Ct. App. 2006)	6, 9
Ladnier v. State, 878 So.2d 926, 933 (Miss. 2004)	6
Livingston v. State, 943 So.2d 66, 70 (Miss. Ct. App. 2006)	9
Moore v. State, 969 So.2d 153, 156 (Miss. Ct. App. 2007)	14
Poindexter v. State, 856 So.2d 296, 301 (Miss. 2003)	6
Stephens v. State, 911 So.2d 424, 437 (Miss. 2005)	12
Wash v. State, 931 So.2d 672, 673 (Miss. Ct. App. 2006)	11
Willis v. State, 911 So.2d 947, 950 (Miss. 2005)	9
Wyatt v. City of Pearl, 876 So.2d 281, 284 (Miss. 2004)	9

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY STEVE PARKER

APPELLANT

VS.

NO. 2007-KA-1646-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

- I. THE TRIAL COURT PROPERLY ALLOWED DEBBIE TO TESTIFY REGARDING AN OUT-OF-COURT STATEMENT MADE BY THE DEFENDANT, PURSUANT TO M.R.E.801(d)(2)(A).
- II. THE DEFENDANT FAILED TO CONTEMPORANEOUSLY OBJECT TO WITNESS RHONDA LINDSEY'S TESTIMONY.
- III. THE STATE PROVIDED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.
- IV. THE JURY'S VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF FACTS

Janie Kingen last saw her son, Tim Kingen, on June 17, 2005. T. 172. Because the two usually talked on the phone at least two or three times a week, Janie found it odd that she could not reach Tim for several days, even after leaving numerous messages on his answering machine. T. 178. On June 25, Janie went to Tim's home to check on him. T. 183. She found her son's lifeless body on the living room floor. T. 184.

Investigator Michael Beckner with the Alcorn County Sheriff's Department was assigned to the case. After speaking with Tim's family and friends that had been with him during the last week of his life, the following facts were discovered. On June 17, a Friday night, Tim had a date with Debbie Dillingham. T. 297. Debbie's divorce from Steve Parker had been finalized only the day before. T. 294. During Tim and Debbie's date, Debbie's half-sister, Brenda Hillis, called Debbie distraught, and the couple went and picked her up. T. 299. The three then went riding around, and then went back to Tim's home and socialized until early the next morning. T. 300-301. Both Saturday and Sunday evening, Tim had three of his friends, Mary Beth Anderson, David Michael Strachan, and Shannon Williams, over to play cards. T. 194-195, 213. On both nights the festivities carried over into the early morning hours.

Parker brought Debbie some of her belongings that Sunday. T. 302. While there, he claimed that he had hired a private investigator to follow her around. T. 209. He then proceeded to relay details of her date with Tim two nights prior. T. 304. Unbeknownst to Debbie, Brenda had been sharing with Parker the details of Tim and Debbie's relationship. T. 235.

Monday night at approximately 9:00 p.m., David and Mary Beth went to Tim's house so that David could repay Tim \$20. They stayed for only fifteen to twenty minutes. T. 198. At the same time David and Mary Beth were leaving Tim's house, Parker picked up Brenda to "go riding" in his

brown van. T. 246. Brenda agreed to show Parker where Tim lived, and at approximately 12:45 a.m., they drove past Tim's house. T. 251. Debbie was at Tim's house at this time. Debbie would later testify that she and Tim saw a van tap its brake lights in front of the house at approximately 12:30 a.m., and that she commented that the only person she knew who drove a van was her ex-husband. T. 309. Debbie went home at around 2:00 a.m., unaware that it was the last time she would see her new beau. T. 309.

At 3:00 a.m., Brenda, who had been dropped off at home a couple hours prior, called Steve to check on him, as he appeared very upset after driving past Tim's home and seeing Debbie's car. T. 254. John Parker, Steve's son, answered and stated that his father was not home. T. 255, 485. Brenda finally spoke with Parker on the phone shortly after 10 a.m., and Parker told her that she had better not tell anyone that she had shown him where Tim lived. T. 257.

John would later testify that his father came home some time between 10:00 a.m. and noon on Tuesday. T. 487. When Parker finally came home, he would not tell his son where he had been all night when asked. T. 487. Parker and his son watched the Jerry Springer Show, then went outside and talked on the front porch, where Parker told John that Debbie "was using his car to drive around and F everybody." T. 488. Parker also bragged that he had had sex with Brenda. T. 489. Shortly thereafter, Parker went and retrieved the car that Debbie had been driving. T. 310. When Debbie later testified about this encounter, she stated, "He told me that if he caught me with anyone -- that he would kill them, that he would kill me, and the very last thing he said to me before he left is, I told you what I would do if I caught you with another man." T. 311. Parker also told her that he knew she was seeing Tim, and stated, "I told you what I would do to a man." T. 312.

Tim had not shown up for dinner plans he made with David, Mary Beth, and Shannon for Tuesday night. T. 200, 218. His friends called around that evening, but could not get in touch with

Tim. T. 200, 218. Debbie tried getting in touch with Tim Tuesday through Friday, but could not get in touch with him. T. 312-314. She discovered Friday evening at work that Tim had been found shot to death in his home. T. 316.

Beckner's investigation led to Parker. Parker denied that he had gone riding with Brenda, and further claimed that he had not left his house all day Tuesday. T. 371, 374. These claims were contradicted by Brenda, John, and Parker's own mother, who claimed that he had come to her house for breakfast that Tuesday morning. T. 246, 485-487, 604. Parker was ultimately indicted, tried, and convicted for Tim's murder.

SUMMARY OF ARGUMENT

Parker claims that the trial court erred in admitting testimony of Parker's threat to kill Debbie and anyone with whom she may become romantically involved. However, the statement in question was properly admitted under MRE 801(d)(2)(A). Further, even if the statement had been erroneously admitted, reversible error cannot be predicated upon the erroneous admission of evidence unless a substantial right belonging to the defendant was violated. No such right belonging to Parker was violated by the admission of the statement.

Parker is procedurally barred from claiming that the State committed a discovery violation in failing to disclose an oral statement allegedly made by witness Rhonda Lindsey because defense counsel failed to contemporaneously object to her testimony on the subject.

Finally, the State presented legally sufficient evidence to support the jury's verdict which was not against the overwhelming weight of the evidence.

ARGUMENT

I. THE TRIAL COURT PROPERLY ALLOWED DEBBIE TO TESTIFY REGARDING AN OUT-OF-COURT STATEMENT MADE BY THE DEFENDANT, PURSUANT TO M.R.E.801(d)(2)(A).

Parker claims that the trial court erred in allowing Debbie to testify regarding Parker's statement that he would kill her and any man with whom she may have a relationship. Error will not be predicated upon the admission or exclusion of evidence unless a substantial right belonging to the defendant was violated. *Ladnier v. State*, 878 So.2d 926, 933 (¶27) (Miss. 2004). Parker fails to articulate what substantial right was violated by the admission of the statement in question. Further, although Debbie was permitted to testify regarding an out-of-court statement, it was not hearsay. "A statement is not hearsay if [t]he statement is offered against a party and is . . . his own statement" M.R.E. 801(d)(2)(A). Parker claims that statement in question was not an admission, but rather a statement concerning a hypothetical situation. Appellant's brief at 20. However, referencing M.R.E. 801(d)(2)(A), this honorable Court has stated, "Extrajudicial statements by a criminal defendant, so long as the statements are relevant to the matter being tried, are admissible in evidence." *Gray v. State*, 931 So.2d 627, 631 (¶15) (Miss. Ct. App. 2006). See also, *Poindexter v. State*, 856 So.2d 296, 301 (¶15)(Miss. 2003). The statement in question was a reminder to Debbie that Parker had told her he would kill anyone with whom she was romantically involved. Parker made this statement on a Tuesday afternoon, and the State's evidence showed that Tim was likely murdered earlier that morning. There can be no serious dispute as to the relevance of Parker's statement made to his ex-wife of less than a week.

Because the statement was properly admitted as non-hearsay, Parker's first assignment of error must fail. The remainder of Parker's argument under this issue, which involves nothing more than an attack on Debbie's credibility, is appropriately discussed under his fourth assignment of

error, a claim that the verdict was against the weight of the evidence.

II. THE DEFENDANT FAILED TO CONTEMPORANEOUSLY OBJECT TO WITNESS RHONDA LINDSEY'S TESTIMONY.

The State called Rhonda Lindsey, one of Tim's neighbors, during its case-in-chief. Lindsey testified that she had seen a brown van at parked at Tim's house in the early morning hours of June 21. T. 512-513. During Lindsey's testimony, the following exchange occurred.

Q. Are there details that you talked about today that were -- are not in that statement that you told the officers about back on the 28th day of June of 2005?

A. Just about hearing a gunshot.

T. 513-514. The remainder of the exchange makes clear that the prosecutor was attempting to elicit from the witness that she had not told the officer that it was a Tuesday when she saw the brown van at Tim's house, and an explanation as to how she came to remember that it was a Tuesday when she saw the van. T. 514. After Lindsey was excused, the State called its next witness. After that witness was excused, the court recessed for the day. The next morning, outside the presence of the jury, defense counsel moved for a mistrial claiming that the State committed a discovery violation. Defense counsel claimed that it was evident from Lindsey's testimony that she had informed Beckner that she heard a gunshot, but that Beckner failed to record that information, and the State in turn failed to inform the defense of the oral statement. The prosecutor replied that two weeks prior to trial, he had spoken with Lindsey and she mentioned that people frequently shot guns in the rural area in which she lived, which concerned her because she has two children. T. 531-532. Lindsey's off-hand comment did not pertain to a specific time, much less the time frame in which Tim was murdered. Without ruling that a discovery violation had occurred, the court advised that a potential discovery violation could be cured. T. 534. The State subsequently recalled Lindsey, and she testified that she had previously mentioned to law enforcement that she had become accustomed to

hearing gunshots in the rural area to which she moved from the city. T. 556. She clarified that her comment about gunshots was in no way related to her seeing a brown van at the victim's home. T. 556. Defense counsel had also been given the opportunity to interview Lindsey before she was recalled. T. 582.

Parker is procedurally barred from raising the issue of an alleged discovery violation since he failed to make a contemporaneous objection during Lindsey's testimony. *Livingston v. State*, 943 So.2d 66, 70 (¶8) (Miss. Ct. App. 2006); *Willis v. State*, 911 So.2d 947, 950 (¶¶11-12) (Miss. 2005). In *Livingston*, the appellant claimed that the State had committed a discovery violation for allegedly failing to disclose prior to trial the substance of oral statements given by two witnesses. *Id.* However, it was not until after both witnesses had left the stand that defense counsel objected. *Id.* This Court found that the issue was procedurally barred for failure to raise a contemporaneous objection. *Id.* A similar situation occurred in *Willis*. There, defense counsel waited until after an officer who had testified regarding a written statement left the stand before alleging a discovery violation. *Willis*, 911 So. 2d at 949 (¶9). The supreme court held that Willis was procedurally barred from arguing a discovery violation on appeal since he failed to raise a contemporaneous objection. *Id.* at 950 (¶12). Accordingly, Parker's claim is also procedurally barred since he waited until the morning after Lindsey testified, and after another witness had already been called, before alleging a discovery violation.

Additionally, even if this honorable Court were to reach the merits of Parker's claim, "[t]he Mississippi Supreme Court has held that a violation of Rule 9.04 is considered harmless error unless it affirmatively appears from the entire record that the violation caused a miscarriage of justice." *Gray v. State*, 931 So.2d 627, 630(¶ 9) (Miss. Ct. App.2006) (citing *Wyatt v. City of Pearl*, 876 So.2d 281, 284(¶ 10) (Miss.2004)). It was absolutely clear from Lindsey's testimony after being

recalled that her reference to hearing gunshots in the rural area in which she lives was in no way connected to Tim's murder investigation. The reference to hearing gunshots was a general, off-the-cuff statement and did not pertain to a specific time frame, much less the day Tim was murdered. As such, in addition to Parker's claim being procedurally barred, admission of the statement did not cause a miscarriage of justice.

III. THE STATE PROVIDED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

Although Parker cites relevant and controlling case law on the issue of legal sufficiency, the majority of his argument concerns matters of witness credibility and alleged inconsistencies in witness testimony, which are clearly matters concerning weight of the evidence. Again, those arguments will be addressed under the appropriate issue.

“In reviewing the sufficiency of the evidence, all evidence supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can be reasonably drawn from the evidence.” *Wash v. State*, 931 So.2d 672, 673 (¶5) (Miss. Ct. App. 2006). The State presented the following evidence which supports the verdict and from which the jury drew reasonable inferences of Parker’s guilt. Tim was last seen alive at approximately 2:00 a.m. on Tuesday. T. 309. Less than an hour and a half prior, Brenda showed Parker where Tim lived, and the two drove past Tim’s house in Parker’s van. T. 251. Parker became furious when he saw that Debbie was at Tim’s house. T. 252. Debbie and Tim had seen a large van drive past and tap its brake lights in front of the house during this time. T. 309. Parker had dropped Brenda off at home at approximately 1:00 a.m., and when she called his house two hour later, he was not home. T. 253, 254, 485. Tim’s neighbor, Rhonda Lindsey, saw a van matching the description of Parker’s van parked in Tim’s driveway early Tuesday morning. T. 512-513. Parker did not go home until 10:00 a.m. or later the next morning and refuses to tell his son where he had been. T. 487. What he does furiously tell his son, however, is that Debbie has been using his car “to drive around and F everybody.” T. 488. Parker also speaks to Brenda on the phone that morning and tells her that she better not tell anyone that she showed him where Tim lives. T. 257. Later that day, Parker picks up his car from Debbie and tells her that he will kill anyone with who she becomes romantically

involved. T. 311. Before leaving, he again states, "I told you what I would do if I caught you with another man." T. 311. When Parker later speaks with Beckner, he denies having ever gone riding with Brenda. T. 374. He also claimed that he did not leave the house at all Tuesday, yet his own son claimed that he did not come home until late in the morning, and his mother claimed that he had been to her house that day. T. 371, 487, 604. Parker later asks his son to lie to law enforcement and state that Parker had traded his 9 mm handgun for a hunting rifle. T. 493. Tim had been shot to death with a 9 mm handgun. T. 434. Taking all of this evidence in the light most favorable to the verdict, a reasonable juror could find that Parker was guilty of Tim's murder.

In a circumstantial case, the State need not expel every possible doubt, but only reasonable hypotheses consistent with innocence. *Stephens v. State*, 911 So.2d 424, 437 (¶43) (Miss. 2005). The only hypotheses, reasonable or otherwise, advanced by Parker at trial were that Debbie was responsible for the murder, or some unknown person Tim knew from his alleged involvement with methamphetamine may have been responsible. Parker very weakly implied that Debbie may have been jealous of Tim's friend Shannon, implying to the jury that Tim and Shannon were romantically involved. However, both Mary Beth and David testified that they were all just friends and that Tim and Shannon were not romantically involved. T. 203, 219. The State further provided evidence that Tim was still alive when Debbie left at 2:00, that she went home to her father's house afterward where she slept late until seeing Parker the next day. T. 309-310. Also, Debbie had no mode of transportation after Parker retrieved his car. T. 392-393. The jury also heard Beckner's testimony regarding why he ruled Debbie out as a suspect. T. 399-410. Further, there was absolutely no indication that Debbie and Tim had anything but an amorous, although short-lived, relationship. As far as defense counsel's tenuous implications that Tim's alleged meth use factored in to his death, neither Mary Beth or David, two of Tim's closest friends, knew anything about Tim using meth,

Beckner testified that no meth or meth paraphernalia was found in Tim's home, and no meth was found in Tim's body during the autopsy. Accordingly, the State also excluded the only alternatives advanced by Parker at trial.

When the evidence is viewed in the light most favorable to the State together with all reasonable inferences which may be drawn from the evidence, it is clear that the State presented legally sufficient evidence to support the jury's verdict.

IV. THE JURY'S VERDICT IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

This Court will not disturb a jury's verdict unless allowing it to stand would sanction an unconscionable injustice. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005).

The thrust of Parker's argument is an attack on Debbie's credibility. However, the jury alone is responsible for assessing witness credibility. *Moore v. State*, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007). Reviewing courts will not and cannot re-examine issues relating to witness credibility. *Id.* The remainder of Parker's argument concerning the weight of the evidence pertains to alleged inconsistencies in witness testimony. Resolving conflicts in the evidence is also a task assigned exclusively to the jury. *Id.* "It is enough that the conflicting evidence presented a factual dispute for jury resolution." *Id.* The jury heard the conflicts in the evidence of which Parker now complains, and resolved those conflicts in favor of the State's case. Parker acknowledges several conflicts in the evidence, but essentially claims that the jury erroneously resolved those conflicts against him. For instance, he acknowledges that the jury was presented with evidence from two witnesses that Parker was not at home on June 21 at 2:50 a.m., but insists that the jury should have believed his version of events that he was home. Appellant's brief at 36. He also claims that evidence shows that he was "through with Debra," and in no way jealous of her relationship with Tim. Appellant's brief at 36. His assertion completely ignores the fact that the jury was presented with evidence that Parker threatened Debbie that he would kill anyone with whom she was romantically involved. Again, Parker completely ignores the basic principle that reviewing courts are not in the business of assessing witness credibility and resolving conflicts in the evidence. These tasks lie within the exclusive province of the jury. The jury was presented with conflicting evidence, but its resolution does not represent an unconscionable injustice. Accordingly, his final assignment of error must fail.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Parker's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:



LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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:

Honorable Paul S. Funderburk
Circuit Court Judge
Post Office Drawer 1100
Tupelo, MS 38802-1100

Honorable John R. Young
District Attorney
Post Office Box 212
Corinth, MS 38834

John A. Ferrell, Esquire
Attorney At Law
Post Office Box 146
Booneville, MS 38829

This the 4th day of September, 2008.



LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680