

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
Case # 2007-KA-01646-COA

JOHNNY STEVE PARKER

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellant, Johnny Steve Parker, hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Honorable Paul S. Funderburk, Circuit Court Judge of Alcorn County, Mississippi, First Circuit Court District, State of Mississippi and presiding Judge in this case
2. Thomas and Janie Kingen, parents of the deceased, Timothy Kingen
3. Johnny Steve Parker, Defendant/Appellant
4. Arch Bullard and Greg Meyer, Assistant District Attorneys
5. John A. Ferrell & J. Deborah Martin of Ferrell & Martin, P.A., and Dudley Williams, Attorneys for Appellant


John A. Ferrell

JOHN A. FERRELL
FERRELL & MARTIN, P.A.
Post Office Box 146
Booneville, MS 38829
Telephone: (662) 728-5361
Facsimile: (662) 728-5062
MS Bar No. [REDACTED]

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STATEMENT OF THE ISSUES

A. Whether the Lower Court abused his discretion and committed reversible error in admitting into evidence over Defendant's objection the testimony of Debra Dillingham Ross Parker that Defendant told her that if he caught her with anyone that he would kill them and would kill her.

B. Whether the Lower Court abused his discretion and committed reversible error in failing to grant Defendant's Motion for Mistrial due to a discovery violation of the prosecution pertaining to witness Rhonda Lindsey.

C. Whether the Lower Court committed reversible error in failing to grant Defendant's Motion for directed verdict made at the close of the State's case in chief and in failing to grant instruction D-1 (peremptory instruction) offered at the close of all of the evidence in the case and in failing to grant Appellant's Motion for Judgement Notwithstanding the Verdict

filed subsequent to the Verdict and Judgment of the Court being entered.

D. Whether the Lower Court committed reversible error in failing to grant Defendant a new trial as the verdict of the jury was contrary to the overwhelming weight of the evidence.

Appellant, Johnny Steve Parker, submits that all of the above constitute reversible error warranting this Court's reversing and rendering this case or, in the alternative, remanding this case to the Circuit Court of Alcorn County, Mississippi for a new trial.

STATEMENT OF THE CASE

A. Nature of the Case

This appeal involves the conviction of Johnny Steve Parker, Defendant/Appellant (hereinafter referred to as Parker) in the Circuit Court of Alcorn County, Mississippi, on the charge of murder.

B. Course of the Proceedings

and Disposition in the Court Below

On or about December 13, 2005, an indictment was returned against Parker by the Grand Jury of Alcorn County, Mississippi, charging him with the June 21, 2005, murder of Tim Kingen. (C.P. 4-5) The trial was held before a jury in Alcorn County, Mississippi beginning on February 12, 2007, resulting in a verdict of guilty as charged against Parker. (C.P. 128, R.E. 27) Parker was sentenced by the Honorable Paul S. Funderburk, to serve a term of life in prison in the custody of the M.D.O.C. (C.P. 125-126, R.E. 28-29) On February 23, 2007, Parker timely filed a Motion for JNOV or in the alternative for a new trial. (C.P. 116-122, R.E. 30-36) The Court denied said Motion on August 22, 2007. (C.P. 164-166, R.E. 37-39) On September 17, 2007, Parker timely filed his Notice of Appeal and complied with all of the mandates of the Mississippi Rules of Appellate Procedure pertaining to perfecting said appeal (C.P. 171-175)

C. Statement of Facts Relevant
to the Issues Presented for Review

Mary Beth Anderson:

On Saturday, June 18, 2005, Ms. Anderson, David Strachan and Shannon Williams went to the home of Tim Kingen (Tim) and cooked out, played cards and generally socialized until about 3:00 in the morning of Sunday, June 19, 2005. (Tr. 194-195)

Again on Sunday evening, the same group met at Tim's house located at 9 CR 207 and again ate and played cards, everyone leaving Tim's house around 12:30 a.m. Monday, June 20, 2005. On Monday evening at approximately 9:00 p.m. Ms. Anderson and Mr. Strachan returned to Tim's house where Mr. Strachan paid Tim \$20.00 that he owed him. (Tr. 199)

Tim had a group of friends that neither Ms. Anderson, Mr. Strachan nor Ms. Williams knew about, including an individual that Tim was dating whose name was unknown to Ms. Anderson. (Tr. 204)

Ms. Anderson thought that Tim's using drugs would be out of character for him. (Tr. 206)

David Strachan:

Mr. Strachan agreed that Tim had associates that he was not familiar with and he found it hard to believe that Tim would use drugs. (Tr. 223)

Debra Dillingham Ross Parker (Debra):

Debra is the ex-wife of Parker. Their divorce became final on June 16, 2005. (Tr. 294)

Debra is a convicted felon having been convicted of false pretense for writing several bad checks. (Tr. 294, 321)

Debra was seeing Tim, their first official date being on Friday, June 17, 2005, though she had been to his house several times prior to that date. (Tr. 297-298)

The car that Debra was driving was awarded to Parker in the divorce. (Tr 303)

On Monday evening, June 20, 2005, Debra went to Tim's house where they smoked part of a joint of marijuana. (Tr. 309)

About 12:30 a.m., Tuesday, June 21, 2005, a van drove by Tim's house and Debra told Tim that the only van that she knew about belonged to Parker (Tr. 309)

In one statement Debra told officers that she left Tim's house at around 2:00 a.m. on Tuesday, June 21, 2005, and went home to her father's place where she was living. (Tr. 309-310, 337)

She later made a statement that she left the house between 2:00 and 3:00 a.m. (Tr. 334-335)

She later made a statement that she left the house around 1:00 a.m., (Tr. 336)

Debra also stated that Tim smoked marijuana and she told officer Beckner on June 25, 2005, that Tim smoked weed and did

"ice" every now and then and was getting his "ice" in Tennessee.
(Tr 322)

Debra admitted she smokes marijuana but denied knowing what the term "ice" meant (slang for crystal meth) because she does not use the term. (Tr. 321-322)

Debra acknowledged that Parker was anxious to get the automobile back from her and that Parker had also accused her of having some of his other vehicle titles as well which was the reason that attorney Tom Sweat wrote her a letter on June 20, 2005. (Tr. 330, Ex D-4)

On Tuesday afternoon, June 21, 2005, Parker retrieved his vehicle from Debra who had it at her father's home. He told her that if he caught her with anyone, that he would kill them and kill her. (Tr. 311, 312, 325)

Debra had pawned the title to the vehicle which Parker received in the divorce prior to him retrieving the vehicle on June 21, 2005. (Tr. 325)

Debra had also been ordered incarcerated by the Chancery Court for her failure to abide by the Court Orders about the vehicle. (Tr 325-326)

Prior to leaving Tim's home the morning of June 21, 2005, Debra left Tim a note but dated it June 22, 2005. (Tr. 317, Ex S-18)

Debra went to the neighborhood where Tim lived on Thursday, June 23, 2005, with her sister Brenda and Tim's truck was there but she did not go by to check on him. (Tr. 340)

At the time that she left Tim's house in the early morning hours of June 21, 2005, the blinds were closed and she shut the door as she left and carried out his garbage. (Tr. 342, 309)

Brenda Hillis:

Brenda Hills (Brenda) is the sister of Debra Dillingham Ross Parker. (Tr. 229)

Brenda's home phone number was 662-665-8577 and her records are shown on Exhibit S-24 for the period of time June 19, 2005, to June 24, 2005. (Tr. 231-232)

Brenda talked to Steve on several occasions and sometime after 8:53 on June 20, 2005, she went riding with Parker in his brown van. (Tr. 246-247)

Brenda and Parker had sex that evening (Tr. 248-249) and Parker took her home around 1:00 in the morning. (Tr. 253)

Brenda told Beckner that she got home approximately one hour before she called Steve Parker at 2:50 a.m. which would have made her getting home around 1:50 a.m. (Tr. 278)

Brenda made a call to Parker's home at 2:50 a.m. on June 21, 2005, and spoke to John Adam Parker, his son and Steve Parker as well. (Tr. 255)

Brenda had previously told Beckner some few days after the body of Tim was found that she talked to Parker during the 2:50 a.m. phone call. (Tr. 265)

Prior to that call being made, Debra came to her house upset and made a call at 2:15 a.m. to Michael Joslin. (Tr. 267)

This is consistent with what she told Beckner in one of her statements. (Tr. 267)

Michael Joslin was an individual that Debra had talked to on several occasions from Brenda's phone. (Tr. 268)

Brenda was living at 3600 Tinin Apartment 23, Corinth, Ms on June 20 and 21, 2005. (Tr. 228)

Tinin Apartments is next door to Magnolia Regional Health Center on Alcorn Drive. (Tr. 272)

In order to go to town from her apartment, you get on Alcorn Drive and intersect with Highway 72 and go east on Highway 72 towards the downtown area. (Tr. 273)

Brenda showed Parker where Tim's house was located during their date. (Tr. 249) and Parker got mad when he saw the car that he received in the divorce that Debra had possession of. (Tr. 276)

Janie Kingen:

Janie Kingen is the mother of Tim. (Tr. 172)

The last time that she saw Tim alive was June 17, 2005. (Tr. 172)

For several days after June 18, 2005, she attempted to contact him with no success. (Tr. 181-182)

After leaving a message at 7:53 on Friday, June 24, 2005, she went to his home. (Tr. 182-183)

Upon arriving, she saw his truck in the driveway and could hear the TV blaring wide open. (Tr. 183)

The front door was unlocked and the blinds were closed.
(Tr. 183-184)

She opened the door and ultimately found her son lying on the floor. (Tr. 185)

Mike Beckner :

In June of 2005, Mike Beckner (Beckner) was an investigator with the Alcorn County Sheriff's Department. (Tr. 347)

He responded to a call on June 24, 2005, at the home of Tim. (Tr. 347)

There were no signs of a struggle or a fight and nothing appeared to be missing. (Tr. 350)

Beckner found half of a marijuana joint in the ash tray.
(Tr. 357)

Beckner had talked with Parker at the Alcorn County Sheriff's office on June 20, 2005, when Parker advised he was concerned about Debra having pawned his car title and maybe having stolen other titles to his vehicles. Beckner advised him to go to the pawn title places and get a copy of that and if she had forged any paperwork to bring it back and he would charge her. (Tr. 371)

Beckner advised that Parker's cell phone number was 415-6837. (Tr. 378)

Beckner acknowledged that the note left by Debra (Ex. 18) had the wrong date on it, being dated June 22, 2005. (Tr. 389)

Beckner used that date to swear on his oath before Judge Little to obtain search warrants for Parker's van. (Tr. 389)

Beckner acknowledged that he understood that Parker got his vehicle from Debra at O'Dell Dillingham's house on the afternoon of June 21, 2005. (Tr. 391)

Beckner acknowledged that Brenda told him that Debra came to her apartment in the early morning hours of June 21, 2005, upset and made a phone call and left. (Tr. 408)

The Beretta 9 mm found at the scene belonging to Tim could not be ruled out as having fired the fatal shot. (Tr. 436) (The murder weapon was never found.)

Beckner acknowledged that he began his investigation with the premise that June 22, 2005, [from the note of Debra (Ex. 18)] was the correct date she was there and obtained search warrants based upon that incorrect information. (Tr. 436, 437)

The underlying facts and circumstances dated June 25, 2005, that Beckner used to get a search warrant contained the statement, "On June 25, 2005, Investigator Beckner interviewed Johnny Steve Parker about his whereabouts the night of June 21, 2005. Johnny Steve Parker stated he was at home and didn't leave." (Tr. 439)

Subsequently, the cell phone records of Parker showed that he made a call at 2:12 a.m. on June 21, 2005, showing he was not at home and Beckner used that information and Parker's statement as evidence Parker was being deceptive with him. (Tr. 439-440)

Beckner acknowledged that there were no finger prints of Parker at the crime scene. (Tr. 455)

Beckner acknowledged there was no hair or fiber evidence found in Parker's van. (Tr. 455)

Beckner acknowledged that there were no signs of forced entry at Tim's home. (Tr. 455)

Beckner acknowledged that Parker was arrested for the murder of Tim on July 1, 2005, with the investigation having begun on June 24, 2005. (Tr. 456)

Beckner talked with Rhonda Lindsey who lives on County Road 207. Lindsey told Beckner on June 28, 2005, that within the past week she saw a full sized light colored van parked over at Tim Kingen's residence. She could not remember the day.

Thomas Gandy:

Thomas Gandy, (Gandy) a representative for Cingular Wireless testified as an expert on how cell phones and cell towers work. (Tr. 465)

Gandy testified that different antennas cover different areas from that tower. (Tr. 465)

He further testified that Cingular can determine what area cell phones are in by what antenna the cell phone is using. (Tr. 465)

Exhibit 30 showed that on June 21, 2005, at 2:12 a.m. the cell phone of Parker, number 415-6837, made a call to Parker's home phone, 287-3986, and bounced off of Tower T-166C. (Tr. 468, 469, Ex. 30)

The indication on Exhibit 30 of T-166C, is the cell site identifier. Tower 166 has three sectors, being A sector, B sector and C sector. (Tr. 469)

Tower #166 is located in east Corinth as shown on the map. (Ex 35) The antenna utilized in the call made at 2:12 a.m. from Parker's cell phone used C Sector which is the sector facing to the northwest. (Tr. 470)

Gandy acknowledged that U.S. Highway 72 intersects with Alcorn Drive and if someone is traveling on U.S. Highway 72, they are going to go into the C Sector of Tower 166. (Tr. 473)

Of the other two towers, A and B, A covers to the northeast and B covers to the South. (Tr. 475)

According to the map, Proper Street which turns into County Road 200 is also going to be in the C Sector. (Tr. 475)

John Adam Parker:

John Adam (John Adam) is the son of Johnny Steve Parker. (Tr. 479)

John Adam Parker could not recognize his father from the witness stand. (Tr. 480)

John Adam acknowledged that he had last seen a 9 mm gun a year before the murder though he had lived with his father for that total period of time. (Tr. 491-492)

John Adam originally told Officer Beckner that he could not remember where his dad was on June 21 and June 22, 2005. (Tr. 499)

He advised that his father told him on the morning of June 21, 2005, that he had sex with Brenda the night before. (Tr. 489)

His father was angry over the automobile that Debra still had in her possession. (Tr. 502)

He testified that he answered the call received at 2:50 a.m. by Brenda and the call received on the morning of June 21, 2005, from his grandmother, Mary Parker and that his father was not at home. (Tr. 486)

John Adam acknowledged that he was unhappy with his father because he was thrown out of the house. (Tr. 505)

Rhonda Lindsey:

Rhonda Lindsey testified that she saw a van that looked like the van in the picture (Ex. S-16) in Tim's driveway during the past week. (Tr. 512)

She advised that this took place in the early daytime between 9:00 a.m. and 12:00 noon. (Tr. 516)

She also advised that she told Beckner during the interview of June 28, 2005, that she heard a gunshot. (Tr. 514)

Her statement to Beckner, however, made no mention of the gunshot. Lindsey again testified that she told Beckner about the gunshots but that she did not hear any gunshots at the time that she saw the van. (Tr. 555-556)

At the time she saw the van she was outside of her house. (Tr. 557)

Chad Harville:

Chad Harville testified that he was a police officer with the Corinth Police Department and that he went to Farmington and rode around with Adam Rencher with the Farmington Police Department on Saturday night June 18, 2005. (Tr. 520)

While they were at the Central Mini Mart in Farmington, a white male asked him where County Road 207 was located but neither he nor officer Rencher knew where that county road was located. (Tr. 522-523)

Tom Sweat:

Tom Sweat testified that he represented Parker in his divorce case and that at no time after the filing of the divorce did Parker seek to have the divorce stopped. (Tr. 584, 586)

On June 20, 2005, Sweat received a call from Parker who was upset about not having received certain property including his car and requested that Sweat write a letter to Debra. (Tr. 589)

Sweat wrote Debra the letter and received two phone calls on June 21, 2005, from Parker, again inquiring about his car and certain titles that he believed Debra had taken from him. (Tr. 590, 593)

Martha Davis:

Martha Davis, sister of Parker advised that there were certain titles to vehicles missing and she was assisting her brother Parker in trying to have duplicate titles issued. (Tr. 600-601)

Mark Parker:

Mary Parker, mother, of Parker, testified that she called Parker on the morning of June 21, 2005, at approximately 7:13 a.m. to ask him to come to breakfast and that she talked directly to Parker. (Tr. 604)

Parker ate breakfast with her that morning. (Tr. 605)

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II.

SUMMARY OF THE ARGUMENT

This is a purely circumstantial evidence case. Johnny Steve Parker was convicted of murder without any direct evidence linking him to the crime and on testimony from an ex-wife who was anything but credible. The circumstantial evidence in this case was not even substantial and the investigation of Officer Beckner, the primary investigating officer in the case, was based upon incorrect information which alone led him to limit his search to Johnny Steve Parker.

The prosecution attempted to establish a motive for the crime through the incredible testimony of the ex-wife. Her testimony on the alleged threat should never have been allowed but did serve to inflame the jury against Parker. The credible evidence in the case showed that Johnny Steve Parker was not jealous of his ex-wife Debra Dillingham Ross Parker, his only interest in her being to obtain his vehicle that he got in the divorce and to prosecute her for stealing his car titles and pawning the title to that car.

The prosecution was also guilty of a discovery violation by failing to provide an accurate statement containing the substance of what Rhonda Lindsey had told Beckner shortly after the body of the victim was found. There was nothing in the substance of her oral statement as given to the defense pertaining to her having heard any gunshots, though this testimony was elicited at trial. This testimony was not only important from what Lindsey testified to at trial, but had the defense known about her having heard gunshots, the nature of those gunshots and when they occurred, would be important as to whether or not she actually heard the gunshot that killed the deceased.

Finally, and of utmost importance, a review of the testimony in this case clearly reveals that there was not sufficient evidence to sustain a verdict of guilty in this case. Even when viewing the evidence in the light most favorable to the verdict, no reasonable hypothetical jury could find beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that Johnny Steve Parker was guilty of this crime.

Further, the verdict was clearly against the overwhelming weight of the evidence and a new trial should have been granted. A review of the testimony bears this out as well. Even when accepting all of the evidence which supports the verdict as true, to allow this verdict to stand would sanction an unconscionable injustice. No conviction should be based on such

weak circumstantial evidence and there are no reasonable inferences to be gleaned from the evidence which would incriminate Johnny Steve Parker in the commission of this crime. The jury failed to follow the circumstantial evidence instruction and the "two theory" instruction required in circumstantial evidences cases and to allow this verdict to stand would be a travesty.

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ARGUMENT

1. The Lower Court Abused his Discretion and Committed Reversible Error in Admitting into Evidence over Defendant's Objection the Testimony of Debra Dillingham Ross Parker That Defendant Told Her If He Caught Her with Anyone That He Would Kill Them and Would Kill Her.

During the testimony of Debra Dillingham Ross Parker (Debra) ex-wife of Defendant/Appellant, Johnny Steve Parker (Parker), she testified over the objection of attorney for Parker, that on Tuesday afternoon, June 21, 2005, when Parker came to her home to retrieve his vehicle that Parker told Debra "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." (Tr. 311)

Parker submits that the Lower Court abused his discretion in allowing this testimony which is reversible error and the case should be reversed and remanded therefor.

At the time Parker allegedly made this statement to his ex-wife, Debra, presumably, according to the state's theory, Tim was already dead. The state's case against Parker was purely circumstantial as will be more fully discussed in other portions

of this brief and presumably, the trial judge allowed this statement into evidence in order to show motive or intent on the part of Parker to kill Tim. The alleged statement serves neither purpose as Tim was already dead by the time Parker supposedly made these statements to Debra. The statement as phrased is not an admission on the part of Parker that he did in fact kill Kingen but the alleged statement is merely one wherein he is supposedly stating a hypothetical situation at a future time.

As will be more thoroughly discussed in another portion of this brief, Debra is anything but a credible, reliable witness. She is not only a convicted felon (Tr. 294, 321) but is an admitted drug user. (Tr. 309, 321-322)

Presumably, she was the last person to see Tim alive on the early morning hours of Tuesday, June 21, 2005, but in three statements she gave three different times as to when she left Tim's residence. (Tr. 309-110, 337), (Tr. 334-335), (Tr. 336)

She left a note at Tim's house upon her departure those early morning hours but she dated it June 22, 2005. (Tr. 317, Ex S-18) This wrong date ultimately caused Beckner's whole investigation to be off by twenty-four hours. (Tr. 436-437)

Debra and her sister, Brenda Hillis (Brenda) gave inconsistent statements as to where Debra went when she left Tim's home early that morning, though Brenda later changed her story once the investigation began to center on Parker. Debra told the officers that she left and went to her father's home

where she was living and denied going to Brenda's. (Tr. 309-310,337) Brenda, however, consistent with the statement she gave a few days after Tim's body was found, testified that it was Debra who made the call at 2:15 a.m. on June 21, 2005, from Brenda's home phone to a Michael Joslin, also someone that she had been seeing. (Tr. 267)

Debra lost her car to Parker in their divorce, had pawned the title to that vehicle and had been ordered incarcerated by the Chancery Court for her failure to abide by Court Orders making it clear that she had every reason to do whatever she could to incriminate Parker in this crime. (Tr. 325-326)

In addition, it is certainly hard to believe that Parker who, according to the prosecution had within the last twelve hours before the statement was allegedly made, murdered Tim and was talking to his ex-wife and making future threats against her and any boyfriends she might have.

Allowing the statement into evidence served no purpose than to improperly bolster the state's already weak case by supposedly providing motive and ill will by Parker towards Tim. This from a person who totally lacked credibility.

Debra's inconsistent and incredible testimony permeates this whole circumstantial evidence case. While it may be true that the jurors are to decide issues of credibility, this Court has considered the credibility of a witness on appeal and held that a conviction cannot stand when based upon "unreliable and shifting" testimony. In Shaw v. State 21 So. 2nd 590, 591 (Miss

1945), Justice Griffith held that the unreliable and shifting testimony of a prostitute could not support a guilty verdict.

Pursuant to Rule 103 of the Mississippi Rules of Evidence, it was an abuse of discretion and reversible error for the Lower Court to allow Debra to testify concerning the alleged statement of Parker as it substantially undermined his receiving a fair trial, a substantial right to which he is entitled. For this reason, his conviction should be reversed and remanded.

2. The Lower Court Abused his Discretion and Committed Reversible Error in Failing to Grant Defendant's Motion for Mistrial Due to a Discovery Violation of the State of Mississippi Pertaining to Witness Rhonda Lindsey.

During the state's case-in-chief, Rhonda Lindsey was called to testify. Lindsey lived on the same street as did Tim in June, 2005. (Tr. 509) Beckner took a statement from Lindsey on June 28, 2005, shortly after the body of Kingen was discovered. (Tr. 313) The substance of the statement according to Beckner was as follows: "Within the past week, I saw a full sized light colored van parked over at Tim Kingen's residence. I can't remember the day." (Tr. 515) It was this statement which was provided to the defense following a request for discovery under Rule 9.04 of the Uniform Circuit and County Court Rules of the State of Mississippi. On direct examination of Lindsey by Mr. Bullard, the following exchange took place:

Q. Okay. 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, 2005?

A. Just about hearing a gunshot. (Tr. 513-514)

It was later determined through cross-examination of Ms. Lindsey that her best recollection was that she saw the van between 9:00 a.m. and 12:00 noon. (Tr. 516)

One more witness testified on Wednesday, February 14, 2007, after Lindsey's testimony. Upon the Court reconvening on Thursday morning, June 15, 2007, Parker through his attorney, moved for a mistrial due to a discovery violation in that the substance of the statement provided the defense from Rhonda Lindsey contained nothing about her hearing a gunshot. (Tr. 527-530) It was obvious from Lindsey's testimony that she remembered telling Beckner on June 28, 2005, that she heard a gunshot and it is also obvious that Assistant District Attorney Bullard was aware that the lady had said that she heard gunshots but thought nothing unusual about it. (Tr. 529-533) The Trial Court noted that the Defendant and his attorney have a right to rely on the representation from the State that defense had been provided full and complete discovery. (Tr. 533) The Court took the Motion for Mistrial under consideration. (Tr. 534)

Subsequently, Rhonda Lindsey was re-called to the stand and testified again that she told the law enforcement officers about hearing some gunshots. (Tr. 555)

She further testified that she did not hear any gunshots at the time that she saw the tan van at Tim's house. (Tr. 556-557)

Section A.1. of Rule 9.04 of the Uniform Circuit and County Court Rules of the State of Mississippi provides that the prosecution shall disclose:

"The names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial together with a copy of the contents of any statement written, recorded or otherwise preserved of each such witness and the substance of any oral statement made by any such witness."

Section A.6. requires the prosecution to disclose any exculpatory material concerning the defendant.

Rule 9.04 further provides under Subsection I, that:

"If at any time prior to trial it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances. If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense, as required by these rules, and the defense objects to the introduction for that reason, the Court shall act as follows: I.2. "If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the Court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial."

It is obvious from a review of the testimony that Beckner failed to disclose to the defense the substance of the true statement given by Rhonda Lindsey to him on June 28, 2005. The importance of her having heard gunshots is obvious. While she later testified that she did not hear a gunshot at the time that she saw the van. (Tr. 555-556) the fact that she heard gunshots

at some other time during that time frame of when Tim was killed would certainly be of importance to the defense in making further investigation of her knowledge of gunshots as related to the whereabouts of Parker at those times. Her statement was not of significant importance to the defense as related by Beckner and there would therefore, be no need to inquire of her further. However, had his statement of the substance included her having heard gunshots at some point in time, her testimony would have taken on much more significance.

Though the Trial Court did not specifically rule on the Motion for Mistrial which it had taken under consideration, the Lower Court certainly ruled on it by implication when it allowed the case to continue and allowed the jury to deliberate to a verdict. The recalling of Lindsey did not cure the obvious detriment to the Defendant in the preparation of his case and had the Defendant been aware of the true substance of the statements made by Lindsey, more investigation would have been warranted into her knowledge about gunshots in the area and when.

Defendant's Motion for a Mistrial preserved this issue for appeal without a Motion for Continuance as it has been held that a Motion for Mistrial in this context is the functional equivalent of a Motion for a Continuance. Dowbak v. State 666 So. 2nd 1377, 1385 (Miss 1996) citing West v. State 553 So. 2nd 8, 18, (Miss 1989).

Due to this discovery violation on the part of the state, Defendant was denied his Constitutional rights to a fair trial and this violation alone warrants this Court's reversing and remanding this case for a new trial.

3. The Lower Court Abused His Discretion and Committed Reversible Error by Denying Parker's Motion for Directed Verdict Made at the Close of the State's Case-in-chief and in Failing to Grant Instruction D-1 (Peremptory Instruction) Offered at the Close of All of the Evidence in this Case and in Denying Parker's Motion for Judgment Notwithstanding the Verdict or in the Alternative, in Denying Parker a New Trial.

At the close of the State's case-in-chief, Parker, through counsel, made a Motion for Directed Verdict (Tr. 575-579, R.E. 18-22) which motion the Court denied. (Tr. 580, R.E. 23) At the close of all of the evidence, Defendant offered Instruction D-1 which read, "The Court instructs the jury to find the Defendant, Johnny Steve Parker, not guilty." (C.P. 102, R.E. 25)

The Court denied Instruction D-1. (C.P. 630, R.E. 26) After the jury returned their verdict of guilty, (C.P. 128, R.E. 27), the Court entered a Judgment thereon on February 16, 2007, and ordered Parker to serve a term of life imprisonment in the custody of the Mississippi Department of Corrections. (C.P. 125-126, R.E. 28-29) Subsequently, on February 23, 2007, Parker, through counsel, filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial which set forth the same issues for the Court to consider

on said motions as are presented in this Appeal (C.P. 116-122, R.E. 30-36) which the Court denied. (C.P. 164-166, R.E. 37-39)

The standard of review for denial of a Motion for Judgment Notwithstanding the Verdict and Motion for a Directed Verdict are essentially the same. A Motion for Directed Verdict and Judgment Notwithstanding the Verdict both challenge the legal sufficiency of the evidence presented at trial. Jefferson v. State 818 So. 2nd 1099 ¶30, (Miss 2002) The evidence in this case is wholly circumstantial and therefore the burden on the state is to prove the Defendant guilty beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence. Parker v. State 606 So. 2nd 1132, 1140, (Miss 1992) When considering a Motion for Directed Verdict, the Appellate Court must consider the evidence introduced by the state as true, together with all reasonable inferences therefrom. If there is sufficient evidence to support a guilty verdict, the Motion for Directed Verdict must be overruled. (Parker, at 1140) The Court may only discharge the Defendant when it concludes, based upon the evidence viewed in light most favorable to the verdict, that no reasonable, hypothetical jury could find beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that the Defendant was guilty. Singleton v. State 948 So. 2nd 465, ¶16 (Miss 2007)

Under this review, the central issue is whether the evidence shows beyond a reasonable doubt and to the exclusion of

every reasonable hypothesis consistent with innocence that the accused committed the act charged and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction. Flora v. State 925 So. 2nd 797 ¶82, (Miss 2006)

A review of the facts of this case as set forth in the statement of the facts herein clearly show that there was not sufficient evidence in this case to sustain a conviction as no reasonable, hypothetical jury could find beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that Parker was guilty of this crime.

The jury in this case was properly instructed as to the heightened burden of proof upon the state in this circumstantial evidence case as shown by Instructions C-2. (C.P. 91) The Court also properly instructed the jury as to the "two theory" test in Instruction C-5 which provided:

"The Court instructs the jury that if there be any fact or circumstances in this case susceptible of two interpretations, one favorable and the other unfavorable to the Defendant and when the jury has considered such facts or circumstance with all the other evidence, if there is a reasonable doubt as to the correct interpretation, they must resolve such doubt in favor of the Defendant and place upon such fact or circumstance the interpretation favorable to the Defendant."

Though the jury was properly instructed in this circumstantial evidences case, the jury failed to heed those instructions and to properly consider and analyze all of the evidence in the case.

The state based its case in large part upon the testimony of Debra, ex-wife of Parker. Her testimony is riddled with inconsistencies, falsehoods and contradictions to such an extent that it is not worthy of belief. As noted previously in the case of Shaw v. State, 21 So. 2nd 590, 592, (Miss. 1945), a witnesses' testimony can be so incredible and not worthy of belief that it cannot sustain a verdict. In reversing and remanding that case for a new trial, Justice Griffith writing for the Court held that,

"A jury of sound and reasonable men engaged solely in a search for truth, uninfluenced by bias or other improper motives of consideration, could not safely accept and act upon the evidence of the prostitute in this case and without her evidence, the conviction is without support certainly insofar as Shaw is concerned."

Such is the testimony of Debra, a convicted felon. As noted, she gave three different times when she left Tim on the early morning hours of June 21, 2005. In one statement she testified that she left around 1:00 a.m. (Tr. 336) In another statement she testified that she left around 2:00 a.m. (Tr. 309-310,337) and in another statement she testified that she left between 2:00 and 3:00 a.m. (Tr. 334-335) Though herself an admitted drug user, she denied at trial that she knew the meaning of the word "ice", though it was she who used it in a statement to Beckner when talking about Tim's use of marijuana and "ice" which, according to her, he got from Tennessee. (Tr. 322) She lied about her whereabouts after she left Tim's home testifying that she went home to her father's though her own

sister testified that she came by her apartment, upset, in the early morning hours of June 21, 2005, and made a phone call to one of her other acquaintances. (Tr. 267) It was she who provided a supposed motive for Parker's killing of Tim based upon his alleged jealousy of her and hence the statement made after Tim's death. The record is clear, however, that it was Parker who filed for the divorce and never told his attorney to stop the divorce (Tr. 86) and Parker's only anger was exhibited towards Debra, not because of any jealousy of her but because she continued to have possession of an automobile that he received in the divorce case and his belief that she took other titles to vehicles that he owned and would not return. (Tr. 276) Parker's ire being directed only at Debra is shown by the fact that he consulted with his attorney on Monday, June 20, 2005, and had him write her a letter about the car and his other vehicle titles (Tr. 330, 589) and the fact that Parker sought the assistance of Officer Beckner on Monday, June 20, 2005, to assist him in investigating her pawning of his car title. (Tr. 371) It is also uncontradicted in the record that Debra wrongfully and contemptuously violated the Chancery Court orders by pawning Parker's title to the automobile she had in her possession until the afternoon of Tuesday, June 21, 2005, when Parker was finally able to retrieve that vehicle from her. (Tr. 325-326) There is nothing in this record to suggest that Parker even knew Tim or that he had any motive to do him harm.

The state further based their case upon the cell phone record of Parker which showed that he made a phone call from his cell phone at 2:12 a.m. on June 21, 2005, to his residence. (Tr. 439) Beckner used this fact to surmise that Parker had been evasive in his statement to Beckner that he was "at home" on the "night of June 21, 2005". (Tr. 436-437, 439) Beckner's misplaced reliance on the significance of that date was the result of the note that Debra had left at Tim's house prior to leaving on the early morning hours of June 21, 2005, which she dated June 22, 2005. (Tr. 436, Ex S-18) Beckner wrongfully began his investigation theorizing that it was the early morning hours of June 22, 2005, when Tim was killed and thus his questioning of Parker as to his whereabouts on "the night of June 21, 2005" did not elicit an evasive answer on the part of Parker but revealed the erroneous assumption on the part of Beckner.

It is also interesting to note that the phone call made at 2:12 a.m. from Parker's cell phone bounced off of the tower sector that covered to the northwest from the tower location, including Highway 72, Alcorn Drive and Proper Street which turned into County Road 200. (Ex S-35) That particular tower sector of Tower 166 was Sector C and would have been the sector that the cell phone would have bounced off of while Parker was returning home from having been on his date with Brenda Hillis. (Tr. 473,475) Had Parker been in the sector where Tim's house

was located, his call would have bounced off of Sector A of Tower 166. (Tr. 475)

Beckner began his investigation of this case centering on Parker as the only suspect on wrong information that he took as fact from Debra. There was no forensic evidence linking Parker or anyone else for that matter to this crime. There were no fingerprints of Parker at the crime scene (Tr 455), there was no hair or fiber evidence found in Parker's van (Tr. 455), there were no signs of forced entry at Tim's home and no murder weapon was ever found. (Tr. 455) In spite of the lack of evidence and the erroneous assumptions made by Beckner at the beginning of the investigation, he arrested Parker for the murder of Tim on July 1, 2005, only one week after Tim's body was found on the evening of June 24, 2005.

Brenda testified that she was living at 3600 Tinin Apartment 23 in Corinth, Ms, which is right next door to Magnolia Regional Health Center off of Alcorn Drive. (Tr. 228, 272-273) She also advised that after Parker dropped her off sometime in the early morning hours of June 21, 2005, that she called his home at 2:50 a.m. and talked to Parker. (Tr. 255) This is consistent with what she had previously told Beckner only a few days after Tim's body was found. (Tr. 265) Brenda consistently testified that Debra came to her house in the early morning hours of June 21, 2005, upset and talked to a Michael Joslin from Brenda's home phone at 2:15. (Tr. 267) Again, this

is consistent with what Brenda told Beckner only days after the body was found. (Tr. 267-268)

The testimony of Chad Harville is interesting and worthy of note. Officer Harville testified that he was a police officer of the Corinth Police Department and went to Farmington and rode around with Adam Rencher of the Farmington Police Department on Saturday night, June 18, 2005. (Tr. 520) In spite of the fact that both of these trained officers were interrogated by this white male who was looking for County Road 207, neither officer testified at trial that Parker was that individual. (Tr. 523)

It is commonsensical that if Parker had been the individual that Harville talked to on that evening and that Rencher talked to on that evening they would have identified him as such. It is also nonsensical to think that someone who has murder in his heart would talk to two police officers about the whereabouts of his planned victim, talk to Beckner on Monday, June 20, 2005, about his problems with Debra, consult his attorney on June 20, 2005, about writing Debra a letter about his problems with her and then talk to his ex-wife the afternoon of June 21, 2005, after the murder, and make a threat of future harm to her and anyone she might date.

It is obvious from a review of the testimony that there was not sufficient evidence to sustain this conviction as no reasonable, hypothetical jury could find beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that Parker was guilty of this crime.

Therefore, Parker respectfully requests the Court to reverse and render on this point or in the alternative, to reverse and remand for a new trial.

4. The Lower Court Abused his Discretion and Committed Reversible Error in Denying Parker's Motion for a New Trial as the Verdict of the Jury was Against the Overwhelming Weight of the Evidence.

It has been held that as distinguished from a JNOV, a Motion for New Trial asks the Court to vacate the Judgment on grounds related to the weight, not the sufficiency, of the evidence. (Singleton at ¶20) quoting Smith v. State 802 So. 2nd 82 ¶11 (Miss 2001) The appropriate standard of review of a denial of a new trial or a claim that a conviction was against the overwhelming weight of the evidence has been stated as follows:

[The Appellate Court] must "accept as true the evidence which supports the verdict and will reverse only when convinced that the Circuit Court has abused its discretion in failing to grant a new trial. A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an "unconscionable injustice". (Singleton at ¶20) citing Crawford v. State 754 So. 2nd 1211 ¶30, (Miss 2000)

Parker has recited numerous facts in the case not only in his statement of facts but throughout the argument on Issue C above. Suffice it to say a review of the testimony and a review of this weak circumstantial evidence case clearly shows that the conviction was against the overwhelming weight of the evidence.

This fact is made clear by an analysis of certain key points upon which the State relies in its case.

Parker has previously noted that the Court properly instructed the jury on the "two theory" analysis set forth in both Parker at page 1140 and in the case of Conley v State 790 So. 2nd 773, ¶65 (Miss 2001). There are several relevant circumstances in this case which are susceptible of two interpretations, though alone they are proof of nothing. Clearly, the evidence and the facts show that at the very least there is a reasonable doubt as to which interpretation is correct and therefor the jury should have found those facts in favor of Parker. Once the analysis is done, the overwhelming weight of the evidence is clearly contrary to conviction.

The state places great importance on the cell phone records of Parker showing that at 2:12 a.m. on June 21, 2005, he made a call from his cell phone that bounced off of the northwest Sector C of Tower 166. This was clearly at a time when Parker would have been returning home from having been out with Brenda, a fact uncontradicted in the record. At most, it shows that Parker was out and about in the early morning hours of June 21, 2005, returning from a date and nothing more. The state places importance on this cell phone record due to Beckner's interrogation of Parker shortly after the body was discovered when in response to Beckner's question "Where were you the night of June 21, 2005?", Parker responded that he was at home. Of course, as seen in previous portions of this brief, Beckner was

laboring under the misconception that the murder had taken place on the early morning hours of June 22, 2005, due to the note of Debra Parker. (Tr. 436-437)

The state went to great lengths to try to create a motive for this killing but the evidence is clear that Parker was through with Debra as evidenced by the divorce being granted and his efforts to obtain his car and car titles. The proof simply does not substantiate that Parker was jealous of Debra and there is nothing else in the record to indicate Parker had any motive for having ill feelings towards Tim.

The cell phone records of Brenda reveal that she called Parker at 2:50 a.m. on June 21, 2005, on his home phone and she in fact did talk to Parker. (Tr. 255, 265) John Adam testified that he talked to Brenda but his animosity towards his father was well documented in the record. At any rate, Brenda continued to acknowledge that she did, in fact, talk to Parker at the time of that call which could have even been during the time that Debra was still at the home of Tim. On the morning of June 21, 2005, Parker talked to his mother and ate breakfast with her, (Tr. 604-605) the contradictory testimony of John Adam to the contrary notwithstanding.

As previously noted, there is no forensic evidence and no murder weapon to tie Parker to this crime. The investigating officer was quick to make an arrest on insufficient evidence and when he determined that his early mistake had skewed all of his investigative facts, additional statements were taken from

willing witnesses such as Debra to change their statements to fit Beckner's unfounded and unsubstantiated theories.

Reviewed as a whole, it is obvious that this conviction is against the overwhelming weight of the evidence especially considering this is a circumstantial evidence case and to allow it to stand would sanction an "unconscionable injustice". Therefore, Parker respectfully requests that the Court reverse and remand this case for a new trial.

CONCLUSION

The testimony in this case or the lack thereof, has been stated throughout this brief. It is inconceivable how a jury could find Johnny Steve Parker guilty of this crime based upon the record in this case.

The testimony of Debra Parker, a convicted felon and admitted drug user was central to the prosecution's case and the numerous inconsistencies, falsehoods and contradictions in her testimony make her not worthy of belief. Even if her testimony is to be given credence, however, it still does not have rise to the level of sufficient evidence under the standard to sustain this verdict.

The defense in any criminal case is entitled to full disclosure from the prosecution. That was not followed in this case and the violation warranted the granting of a mistrial by the Court. The failure to do so was an abuse of discretion. The information denied the defense by the prosecution was of significant importance in the preparation of the case for the defense and the failure to give full disclosure on this point denied Johnny Steve Parker a fair trial, as did admitting into evidence the alleged statement by Johnny Steve Parker to Debra Dillingham Parker Ross.

Finally, when the record is viewed as a whole in a light most favorable to the prosecution, it is obvious that the evidence was not sufficient to sustain a verdict against Johnny Steve Parker. Further, a review of the record in this case

shows that the verdict of the jury was against the overwhelming weight of the evidence and on these points, the Court abused his discretion and committed reversible error in failing to grant the directed verdict and JNOV and in failing to grant Johnny Steve Parker a new trial. No reasonable, hypothetical jury could find Johnny Steve Parker guilty beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence on the record of this case and to allow it to stand would sanction an unconscionable injustice.

Therefore, Johnny Steve parker requests that the Court reverse and render or in the alternative grant Johnny Steve Parker a new trial.

Respectfully submitted,

FERRELL & MARTIN, P. A.
POST OFFICE BOX 146
BOONEVILLE, MISSISSIPPI 38829
TELEPHONE (662) 728-5361
MISSISSIPPI BAR NO. [REDACTED]

BY:


John A. Ferrell

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
Case # 2007-KA-01646-COA

JOHNNY STEVE PARKER

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF MAILING

This is to certify that I, John A. Ferrell, attorney for Appellee, have this day mailed by United States mail, postage prepaid, the original and three (3) copies of the Appellant's Brief to Betty W. Sephton, Clerk, Supreme Court of Mississippi at the address of said Court, P. O. Box 249, Jackson, Mississippi, 39205-0249.

This the 5th day of June, 2008.



JOHN A. FERRELL

CERTIFICATE OF SERVICE

I, John A. Ferrell, do hereby certify that I have this day forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to the following:

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

Honorable Arch Bullard
Assistant District Attorney
P. O. Box 212
Corinth, MS 38834

THIS the 5th day of June, 2008.



JOHN A. FERRELL