

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-KA-01939 COA

DAVID WELCH

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

APPELLANT'S REPLY BRIEF

JOHN R. McNEAL, JR.
Attorney At Law
P. O. Box 690
Jackson MS 39205-0690
601 969-7794
Fax 969-0040
[REDACTED]
Counsel for Appellant

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TABLE OF AUTHORITIES

CASES:

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<i>Weathersby v. State</i> , 165 Miss. 207, 147 So. 481, (1933)	2
<i>Westbrook v. State</i> , 202 Miss. 426, 32 So.2d 251 (1947)	2-3

STATUTES

none

OTHER AUTHORITIES

none

REPLY ARGUMENT

ISSUE NO. 1: WAS THERE SUFFICIENT EVIDENCE OF DELIBERATE DESIGN MURDER?

The appellant stands by his initial argument that the evidence, viewed in the best light for the state, was insufficient to support a deliberate design murder conviction. The record shows that the learned trial court should have granted a directed verdict of acquittal or JNOV on the murder charge, and, accordingly, should have submitted the case to the jury on the issue of manslaughter only. *asked for instructions?*

The state's position that the physical evidence contradicts Welch's testimony is speculative. If there were any inconsistencies between Welch's testimony and the physical evidence, which is denied, the differences were immaterial and not probative to, nor determinative of, the question of deliberate design. Much of the state's suggested inconsistencies pertains to what happened *after* the shooting, not before.

Welch testimony was consistent with the only other peripheral witness to the shooting, Bobby Miller. Both said after the first shot, Cedric Griffin fell from the bedroom, towards the kitchen, Cedric tried to get up, and was shot again. [T. 436-37, 495-96]. No contradiction.

The state suggests that Cedric did not have injuries that looked as though he had been in a fight. Cedric's wounds were not defensive according to Dr. Hayne. [T. 341, 347]. This is because Cedric was the aggressor. It was Welch who had the defensive

wounds consistent his testimony. [T. 342-44; Exs. D1-D8]. The physical evidence supports the conclusion that Welch was defending himself.

Any contradiction between Welch's testimony and the physical evidence was not "material" to the issue of deliberate design. The "rule" under *Weathersby v. State*, 165 Miss. 207, 209, 147 So. 481, 482 (1933), applies "unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

The state misreads *Johnson v. State*, 987 So. 2d 420, 426 (Miss. 2008). The defendant's version does not have match of every point of evidence. In *Westbrook v. State* 202 Miss. 426, 32 So.2d 251, 253 (1947), the defendant's version of what happened arguably contradicted with physical evidence of the exact location of a scuffle between the defendant and the victim. In addressing the suggested conflict between the defendant's version and physical evidence in *Westbrook*, the court said "it was not enough to show that [the fight] possibly or even probably began [where the state suggested], but the circumstantial evidence thereof must have been so completely conclusive as to have excluded every other reasonable hypothesis" consistent with the defendant's version to remove the case from *Weathersby* control. *Id.* The conclusion is that, simply because an argument of conflict can be made does not remove the case from *Weathersby* control. There has to be a showing that the defendant's version is wrong, unreasonable or unsupportable.

It follows, in the present case, that the state's arguments in its brief are mere speculations, far from the conclusiveness required under the *Westbrook* decision. The appellant's authority is more persuasive.

**ISSUE NO. 2: WHETHER THE WEIGHT OF EVIDENCE REQUIRES A
JNOV OR NEW TRIAL?**

Nothing needs to be added to the Welch's initial arguments and authorities under this issue. The state's arguments are unpersuasive.

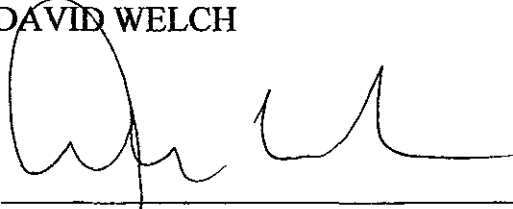
CONCLUSION

Again David Welch respectfully requests to have his conviction reversed and rendered for acquittal. As a second alternative, Welch prays for a new trial on the charge of manslaughter only. As a third alternative, a rendered manslaughter conviction is requested with remand for resentencing.

Respectfully submitted,

DAVID WELCH

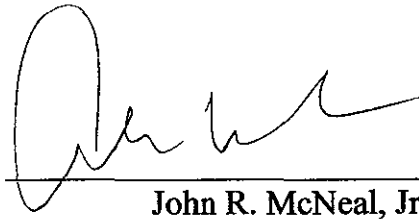
By:



JOHN R. McNEAL, JR., His Attorney

CERTIFICATE

I, John R. McNeal, Jr., do hereby certify that I have this the 26 day of March, 2009, mailed a true and correct copy of the above and foregoing Reply Brief to Hon. Frank G. Vollar, Circuit Judge, P. O. Box 351, Vicksburg MS 39181, and to Hon. G. Gilmore Martin, Dist. Atty., P. O. Box 648, Vicksburg MS 39181, and to Hon. Lisa L. Blount, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



John R. McNeal, Jr.

JOHN R. McNEAL, JR.
Attorney At Law
P. O. Box 690
Jackson MS 39205-0690
601 969-7794
Fax 969-0040
[REDACTED]
Counsel for Appellant

