IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARIO BROWN — APPELLANT

VS. — NO. 2007-KA-2145

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: DEIRDRE MCCRORY
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 THE CASE 1

SUMMARY OF THE ARGUMENT 8

PROPOSITION ONE:
BROWN'S CHALLENGE TO THE TESTIMONY OF DR. HAYNE IS PROCEDURALLY BARRED 8

PROPOSITION TWO:
THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON SELF-DEFENSE 10

PROPOSITION THREE:
THE VERDICT IS BASED ON LEGALLY SUFFICIENT PROOF AND IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE; THE TRIAL COURT DID NOT ERR IN OVERRULING THE MOTION FOR J.N.O.V./ NEW TRIAL 13

CONCLUSION 16

CERTIFICATE OF SERVICE 17

Watts v. State, 733 So.2d 214, 233 (Miss. 1999) 8

Weathersby v. State, 165 Miss. 207, 209, 147 So.2d 481, 482 (1933) 14

Williams v. State, 427 So.2d 100, 104 (Miss. 1983) 14

STATE STATUTES

MISS.CODE ANN. Section 41-61-55 (Rev.2005) 9

IN THE COURT OF APPEALS OF MISSISSIPPI

MARIO BROWN **APPELLANT**

VERSUS **NO. 2007-KA-2145-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Mario Brown was tried in the Circuit Court of Coahoma County on a charge of murder, convicted of manslaughter, and sentenced to a term of 20 years in the custody of the Mississippi Department of Corrections. (C.P.16-17) Aggrieved by the judgment rendered against him, Brown has perfected an appeal to this Court.

Substantive Facts

Officer Kenny Davis of the Friars Point Police Department testified that on September 8, 2006, he responded to a report of a shooting at a café on Washington Avenue. He arrived at the café at approximately 11:56 p.m. Acting on information provided by Arthur Davidson, Officer Davis drove his vehicle to another location where he "observed the subject lying on the ground."

Officer Davis recognized this man as Seanl Cole, whom he had known "all his life." The victim did not have a pulse. There were no weapons of any sort[1] anywhere near the Mr. Cole's body. (T.166-69)

Officer Davis went back to his patrol car and "made contact with the sheriff's department and ... advised them to send assistance and also to send an investigator to the scene..." At that point, he "taped off the crime scene." Officer Davis did not see anyone take anything away from the body. (T.169-70)

Investigator Mario Magsby of the Coahoma County Sheriff's Department testified that when he arrived at the scene at about 11:55 p.m., the Friars Point Police Department had secured it. He observed the victim's body "on the west side of the building, which is Willie's Food and Games, also known as Nanny's Place." After "the crime scene unit arrived," Investigator Magsby learned that the suspect, Mario Brown, had "left the scene with Clarence Henderson." He and fellow officers located Henderson at the Parlor Villa Apartments, but Brown was not there. Thereafter, they "just started riding the area looking for Mr. Brown. After several hours he wasn't located ..." At that point, the officers "just started interviewing other witnesses." (T.172-75)

At approximately 11:00 the next morning, Brown surrendered to the Friars Point Police Department. That afternoon, he was interviewed in part by Investigator Magsby and by the Mississippi Bureau of Investigation. First, Brown was advised of his *Miranda* rights, which he

---

[1]Specifically, Officer Davis testified that he had seen no pistol, knife or bottle on or near the body. (T.169)

waived in writing. Thereafter, Brown told the officers that he had walked to Nanny's Place and "exchanged words" with Corey Durrough. At that point, Investigator Magsby "had to leave out." (T.176-77)

Lieutenant Walter Davis of the Mississippi Bureau of Investigation testified that he participated in the interview of Brown. Having been informed of his *Miranda* rights, Brown agreed to give a statement, which was not induced by any promises or coercion. (T.257-62) Lieutenant Davis read the statement into the record as follows:

> Sometime last night, I'm not sure exactly what time, I walked up in front of the café, Nanny's. When I walked up, Rock started talking to me. He was calling me names and was in my face. I don't know what he was mad about. There were some other people around. I saw Tube, P-man, Rob and Mario Durrough. There may have been some other, there may have been some more people there, but I'm not sure who they were. P-man blindsided me. He hit me in the face and knocked me down. I got up. I was backing away from him and I pulled my gun out. My gun is a gray and black Taurus .9 millimeter.
>
> Me and P-man were scuffling and I tried to hit him with the gun. The gun went off. The gun went off a few more times. We were on the ground, and when we got up, P-man ran back in front of the club and around the side. I went down the side of the club that we were scuffling on. I went down the street towards the back of the club. Then I saw someone running. I thought it was P-man and I shot towards him. I think I shot three times.
>
> Then I got in the car with Duke, his tan Cadillac, and he took me to my brother Evan's house. I told Ev what happened and someone called his wife, Dorothy, and told her what had happened. At that time I didn't know that I had hit P-man.
>
> When my baby's mother called and told me that she had heard that P-man was dead, then I went, and then, then I went and threw my pistol into the, the lagoon. I slung it and it went towards the right side. I stayed at Evan's house until about 4:30 or 5:00, and then I walked to my mom's house at 8-35 Scott Drive.

> My brother Natchez Brown came to my mom's house. I got in his car with him and rode to town and found Officer Kenny Davis and I turned myself into him.
>
> (T.263-64)[2]

Steve Chancellor, a crime scene investigator employed by the Mississippi Bureau of Investigation, testified that he arrived at the scene of this shooting at about 3:00 the next morning. (T.184) He found three .9 millimeter shell casings near the front of Nanny's and four others in the back, down the street. He also performed a gunshot residue kit on the victim's hands. (T.190-200)

The results of that test were negative for the presence of gunshot residue. (T.216) On cross-examination, the state's expert acknowledged that this fact did not necessarily mean that Cole had not recently discharged a weapon. (T.219) On redirect examination, however, the expert testified that assuming the evidence was preserved correctly and collected at the scene before autopsy, he would expect the results to be correct for the presence of absence of residue. (T.220)

Starks Harthcock, a ballistics expert, testified that the shell casings recovered in this case were .9 millimeter casings which had been fired from the same gun. The projectile recovered from the victim's body during autopsy had "class characteristics consistent with .9 millimeter caliber." However, because the suspect weapon had not been submitted to him for analysis, Mr. Harthcock had been unable to determine whether it had fired both the slug and the casings.

---

[2]Lieutenant Davis clarified that "Rock" was Corey Durrough; "P-man" was Seanl Cole; "and Duke" was Clarence Henderson. (T.265-66)

(T.223-31)

Dr. Steven Timothy Hayne, accepted without objection as an expert in the field of forensic pathology, testified that he had performed the autopsy on the victim's body. (T.238-41) Dr. Hayne described the victim's injuries and the effect from them as follows:

> So there were three gunshot wounds identified on the external surface of the body now. One gunshot wound was located over the upper right chest. The one was identified near the mid-line of the body, and one was located over the left mid-line abdominal wall. Two of the gunshot wounds were lethal. The one to the upper right chest and the one near the mid-line of the abdomen producing massive internal bleeding into the body cavity to a volume slightly less than four quarts of blood. Massive, acute blood loss like that would produce death from a process called hypovolemia, decreased blood volume, decreased fluid volume in the body. And when you lose 45 to 50% of your total blood volume in an acute, in a very short period fo time, death will result no matter what medical intervention was initiated afterwards.
>
> There was a non-lethal gunshot wound, just a scrape, across the left abdominal wall. It did not enter the abdominal cavity where the organs were.
>
> * * * * *
>
> He bled to death, medically called acute internal exsanguination, which simply means he bled internally. He bled so much that he actually died.
>
> (T.242-43)

Dr. Hayne went on to testify that the trajectories of the bullets were consistent with the victim's having been "ducking" when the shots were fired. None of the wounds were contact wounds. In Dr. Hayne's opinion, someone who had sustained such injuries would have been able to run "for a distance of a hundred yards, maybe a little longer." But "death would intervene in a relatively short period of time." (T.247-52)

Dr. Hayne concluded that the victim died of injuries to the stomach, liver, heart and lung;

the manner of death was homicide. (T.250)

Mary Hopson, the mother of Brown's children, testified that she saw Brown at about 9:30 on the night in question at Charlie's Drug Store in Friars Point. After he gave her some money for the children, they went into Nanny's, where he bought water and a soft drink. At that point, "he said he was about to go home" and did in fact leave the café. Thereafter, Ms. Hopson heard the gunfire. She did not see Brown after he left the club. (T.275-78)

Henderson testified that he was a friend of both the defendant and the victim. The night of September 8, he and Brown "went out drinking" and "went up to the bar uptown, standing out." Henderson saw his "cousin Tori," who eventually "had a few words" with Corey Durrough. After Durrough "called her a bitch or something," Henderson "had a few words" with him. Brown then hit Durrough, and Seanl Cole hit Brown. When Henderson tried to break up the altercation, Cole "punched" him out of the way and "proceeded with jumping" on Brown. At that point, Henderson heard two or three gunshots. Cole "got up and ran around the building," and Brown "went to the other side of the building." When Cole "got up," he did not appear to have been shot. Henderson heard more shots fired after Cole had "made it around the building," while Brown was still standing in front of it. These shots seemed to have been "coming from around the back of the building. ..." (T.280-83)

During cross-examination, the state introduced the statement Henderson had given the police the day after the shooting. (T.289) That statement is reprinted in pertinent part below:

> I saw that Mario had a gun. It was a silver automatic. Then Mario started shooting. He was shooting wild. P-man and Mario Brown were tussling and the gun went off several times. It looked like Mario was shooting P-man.
>
> (T.289)

Brown testified that when he walked out of the club that night, "it was a commotion already going on." Particularly, Henderson and Durrough were "having words." Disturbed by the perceived unfairness of this altercation– three men against one– Brown struck Durrough. Cole then hit Brown "from the blindside" and Brown "went down." When he "got up," Brown "backed up off of him." He saw that Cole and Durrough "had bottles." As Brown "backed up to the street," they "kept coming." Hoping to intimidate them, Brown pulled his gun. Asked whether he was "in any type of fear," Brown testified that he was. Once Cole "made it to" Brown, they "started tussling," and Brown "tried to hit him with the pistol." According to Brown, "The gun, it went off about three times after we tussled," after Brown was on the ground. Cole "got up" and "ran one way" while Brown "went the other." Cole did not appear to have been shot. "After that," Brown "heard some more shooting on the left side of the club." He then asked Henderson to drop him off at his brother's house. About an hour later, Ms. Hopson telephoned to tell Brown that Cole was dead. Brown "panicked" and threw his pistol into the sewage lagoon. The next morning, he turned himself in to the authorities. (T.300-04)

Brown went on to deny that he had intentionally shot Cole. Rather, he had attempted to hit him with the gun "to stop him from hitting" him [Brown] "with the bottle." Specifically, when he was asked, "Did you pull the gun and shoot him?" Brown answered, "No, sir." (T.308)

On cross-examination, Brown maintained that he had tried to hit Cole with the gun, but did not think he had succeeded. When the prosecutor inquired, "[S]o why did it go off?" Brown replied, "He grabbed it. ... My finger wasn't even on the trigger." He also maintained that the gun had discharged accidentally. (T.309-10)

SUMMARY OF THE ARGUMENT

Brown interposed no objection to the testimony of Dr. Hayne. Accordingly, he cannot place the trial court in error for failing to limit the pathologist's testimony. His first proposition has no merit.

Furthermore, the trial court did not err in refusing to instruct the jury on self-defense. After the court invited him to do so, defense counsel was unable to articulate an evidentiary basis for the proffered self-defense instructions. The state submits no such basis can be found in the record. Accordingly, Brown's second proposition lacks merit.

Finally, the trial court did not err in overruling the motion for j.n.o.v./new trial. Brown's reliance on *Weathersby v. State*, infra, is procedurally barred and substantively unavailing. His final proposition should be denied.

PROPOSITION ONE:

BROWN'S CHALLENGE TO THE TESTIMONY OF DR. HAYNE IS PROCEDURALLY BARRED

Brown argues first that the trial court committed reversible error in allowing Dr. Hayne to testify outside his realm of expertise. The fundamental flaw in this argument is Brown's inability to point to any allegedly erroneous ruling by the trial court. No such ruling exists because Brown failed to interpose any objection to the testimony of Dr. Hayne. Defense counsel stated unequivocally that he had no objection to the acceptance of Dr. Hayne as an expert in the field of forensic pathology. Thereafter, Dr. Hayne testified without objection. (T.238-53)

Because the defense failed to object to this testimony, this issue is not preserved for review. *Watts v. State*, 733 So.2d 214, 233 (Miss.1999) (argument that expert exceeded the scope of her expertise was procedurally barred by failure to object at trial). Accord, *Hobgood v. State*,

926 So2.d 847, 851 (Miss.2006) (failure to object to expert opinion testimony barred consideration of the issue on appeal).

A similar issue in an identical posture recently was rejected with the following analysis:

> If Bogan considered this [expert] testimony confusing or imprecise, he was obligated to object. Typically, if a defendant fails to timely object to an issue at trial, the issue is waived for purposes of appeal. [emphasis added] The trial court will not be held in error on a matter that was never presented for its consideration. Having failed to object to the expert testimony, Bogan is procedurally barred from raising this issue on appeal.
>
> *Bogan v. State*, 754 So.2d 1289, 1293 (Miss.App.2000).

As shown by the foregoing authorities, the contemporaneous rule applies to expert testimony as to any other evidence. If the defense feels aggrieved by it, it is obligated to object. In this case, the defense did not make a single objection to Dr. Hayne's testimony and it may not be heard to do so for the first time here. [3] Solely in the alternative, without conceding the necessity of further discussion, the state addresses Brown's assertion that Dr. Hayne is not qualified to be the State Medical Examiner because he is not certified by the American Board of Pathology. (Brief for Appellant 12) This contention is beside the point. While the State Medical Examiner is required to be certified by the American Board of Pathology, MISS.CODE ANN. Section 41-61-55 (Rev.2005), pathologists appointed or employed by him under the supervision of the Commissioner of Public Safety are to required to be so certified. MISS.CODE ANN. Section 41-61-77(3)(Rev.2005). Dr. Hayne was not required to be certified by the American

---

[3]In his brief, Brown does not acknowledge the fact that he failed to object; rather, he proceeds as if the issue were preserved. It follows that he has failed to allege, much less establish, plain error.

Board of Pathology in order to perform autopsies for the State of Mississippi. He was not and never claimed to be the State Medical Examiner.

The state maintains that Brown's first proposition is procedurally barred and should be rejected on that basis alone.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON SELF-DEFENSE

Brown submitted three jury instructions, D-5, D-8 and D-9, on the issue of self-defense. (C.P.36-38) When Instruction D-5 was tendered, the state objected on the ground of absence of evidentiary basis. (T.331) The court then conducted this colloquy:

> BY THE COURT: Okay. What evidentiary basis do we have in the record to show that the defendant acknowledged having killed the victim, but having done so in self-defense?
>
> BY MR. TISDELL: Your Honor, we have, we offered this instruction, tendered this instruction because we got the situation where the defendant does admit to having a gun, he does admit that the gun went off while he and the deceased were struggling with each other. He's not necessarily denying, he cannot say definitively that at that point he was shot or whether he was shot around the corner. But he can say, the whole reason of having the gun that he was in fear of his life because there were several individuals out there. He'd already been struck by one of them to the point where he was knocked, knocked to the ground.
>
> He got up. He tried to scare them away, he used the word "intimidate." And at least one of the persons, the deceased, continued to come toward him with a bottle in his hand which would be used as a weapon. Under those facts--
>
> **BY THE COURT: Again, is the defendant saying that he did it, that he killed the victim but he killed the victim in self defense is my question? And if he said that in the record, I am asking that you point it out to me. In other words, the Court must find an evidentiary basis for giving an instruction.**

BY MR. TISDELL: If I recall, when asked that question on cross and he, his response was he really didn't know.

THE COURT: So then, how can he assert the defense of self defense? Okay, the Court denies D-5.

(emphasis added) (T.332-333)

On the same ground, the court denied Instructions D-8 and D-9. The court did, however, give defense counsel one more opportunity to support his position: "So the Court will be consistent. ... But if the defendant wishes to be heard, you may." Defense counsel stated, "No." (T.333-34)

The state submits it is not surprising that defense counsel was unable to articulate an evidentiary basis for a self-defense instruction because the record does not contain one. While a defendant is entitled to have jury instructions which present his theory of the case, such instructions should not be granted when they have no foundation in the evidence. *Garrett v. State*, 956 So.2d 229, 234 (Miss.2006). Even when that instruction incorporates the sole theory of the defense, there is no constitutional right to have the jury instructed on such theory when it lacks evidentiary support. *Manning v. State*, 835 So.2d 94, 100-01 (Miss.App.2002).

Brown never testified that he shot Cole in self-defense. Although he did say that he was afraid, he maintained that the gun discharged accidentally. This case is factually similar to *Robinson v. State*, 726 So.2d 189, 194 (Miss.App.1998), wherein the defendant claimed he had drawn a weapon to "bluff" his alleged attacker, and that it had accidentally discharged. In light of these facts, this Court upheld the denial of a self-defense instruction. The Court should make the same conclusion here.

In *Wadford v. State*, 385 So.2d 951, 955 (Miss.1980), also upholding the denial of a self-

defense instruction, the Mississippi Supreme Court explained, "The legal concept of self defense in a homicide case is based upon justification of a **purposeful** killing because it was necessary to kill in order to save the killer from imminent danger of suffering death or grave bodily harm at the hands of the person killed." (emphasis added). Because "Wadford's defense ... was that the homicide had been accidental," the defendant was not entitled to a self-defense instruction. In this case, Brown's defense was that the gun had fired accidentally, and that the shots might not have hit Cole at all. His argument should meet the same fate as the one presented by the appellant in *Wadford.*

Although it did not address the specific issue of the denial of a self-defense instruction, the following analysis is instructive here:

> It is clear from the record that no evidence or testimony, not even Gilbert's, indicated that Gilbert shot Townsend in self-defense. Rather, Gilbert's own testimony was that Townsend caused the rifle to discharge when he hit it. Gilbert's own testimony demonstrated that he may not have even known if he shot Townsend. In no way did Gilbert testify that he consciously and intentionally shot Townsend in self-defense. If anything, he testified that he pointed the rifle at Townsend in self-defense and that Townsend hit the rifle and caused it to fire accidentally.
>
> *Gilbert v. State*, 934 So.2d 330, 341 (Miss.App.2006).

Similarly, in this case, Brown denied that he intentionally shot Cole and indicated doubt as to whether the shots from his gun actually hit the victim. Because self-defense simply was not Brown's "explanation for what happened," these instructions were properly denied. *Oatis v. State*, 726 So.2d 1230, 1233 (Miss.App.1998), cited in *Osborne v. State*, 843 So.2d 99, 101 (Miss.App.2003). Likewise, no basis exists for disturbing the trial court's refusal of these instructions on the ground of lack of evidentiary foundation. In light of the foregoing authorities, Brown's second proposition should be denied.

PROPOSITION THREE:

THE VERDICT IS BASED ON LEGALLY SUFFICIENT PROOF AND IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE; THE TRIAL COURT DID NOT ERR IN OVERRULING THE MOTION FOR J.N.O.V./NEW TRIAL

Brown finally contends the evidence is legally insufficient to sustain the verdict and, alternatively, that the verdict is contrary to the overwhelming weight of the evidence. To prevail on the claim that he is entitled to a judgment of acquittal, she faces the formidable standard of review set out below:

> In reviewing the sufficiency of the evidence, the standard of review is quite limited. *Clayton v. State*, 652 So.2d 720, 724 (Miss.1995). All of the evidence is to be considered in the light most consistent with the verdict. *Id.* The prosecution is given the benefit of "all favorable inferences that may reasonably be drawn from the evidence." *Id.* This Court will not reverse unless the evidence with respect to one or more of the elements of the offense charged is such that reasonable and fairminded jurors could only find the accused not guilty. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993).
>
> *Brown v. State*, 796 So.2d 223, 225 (Miss.2001).

This rigorous standard applies to the claim that the defendant is entitled to a new trial:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his 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." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the

> most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss. Ct. App. 2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss. App. 2004),

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss. App. 1999).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As this Court recently reitereated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

In support of his argument, Brown invokes *Weathersby v. State*, 165 Miss. 207, 209, 147 So.2d 481, 482 (1933), which held that "where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, 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 counters first that

because Brown did not raise this issue below, he may not be heard to do so here. *Neese v. State*, 993 So.2d 837, 843 (Miss. App. 2008). "A motion for directed verdict and JNOV must be specific. [citation omitted] ... Without specificity, a trial court will not err by denying the motion." *Davis v. State*, 891 So.2d 256, 258 (Miss.2004 (holding a *Weathersby*-based argument procedurally barred). "It is well established that 'questions will not be decided upon appeal which were not presented to the trial court and that court given an opportunity to rule on them....'" *Davis*, 891 So.2d at 258, quoting *Fleming v. State*, 604 So.2d 280, 293 (Miss.1992). Brown did not raise *Weathersby* at trial, and his post-trial motions are not included in the record. Accordingly, this argument is procedurally barred.

Solely in the alternative, the state submits for the sake of argument that Brown's testimony conflicted with the statement given to the authorities. In the latter, he admitted the he "shot at" the victim; at trial, he testified that the gun discharged accidentally. In his pretrial statement, Brown did not mention that his alleged attackers were wielding bottles, as he testified at trial. Nor did he mention in his statement that he had heard additional gunfire on the other side of the club. These contradictions alone are sufficient to take this case out of the realm of *Weathersby*. *Harris v. State*, 446 So.2d 585, 590 (Miss.1984). This is not one of those "rare case[s] that satisfies the requirements of the rule in *Weathersby*." *Garth v. State*, 771 So.2d 984, 987 (Miss. App. 2000).

The state incorporates by reference its Statement of Substantive Facts in asserting that the proof is not such that rational jurors could have returned no verdict other than not guilty, or such that to allow it to stand would be to sanction an unconscionable injustice. Contrary to Brown's argument on appeal, the evidence and the reasonable inferences therefrom, taken in the light most favorable to the verdict, support the conclusion that Brown fired the shots that actually killed the

victim. Brown admitted prior to trial that he had shot at the victim, and he testified at trial that his gun discharged accidentally during the confrontation with the victim. All of the casings had been fired from the same gun. The reasonable inference is that Brown in fact killed Cole, and no basis exists for disturbing the jury's determination that he did so.

The state respectfully submits the trial court did not err in overruling the motion for j.n.o.v./new trial. Brown's final proposition should be rejected.

CONCLUSION

The state respectfully submits that the arguments presented by Brown have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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 Kenneth L. Thomas
Circuit Court Judge
P. O. Box 548
Cleveland, MS 38732

Honorable Laurence Y. Mellen
District Attorney
P. O. Box 848
Cleveland, MS 38732

George T. Holmes, Esquire
Attorney At Law
MS Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, MS 39201

and

Phillip W. Broadhead, Esquire
Attorney At Law
The University of MS School of Law
P. O. Box 1848
University, MS 38677-1848

This the 4th day of February, 2009.

DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

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

TABLE OF AUTHORITIES

STATE CASES

Bogan v. State, 754 So.2d 1289, 1293 (Miss. App. 2000) 9

Brown v. State, 796 So.2d 223, 225 (Miss. 2001) 13

Clayton v. State, 652 So.2d 720, 724 (Miss. 1995) 13

Fleming v. State, 604 So.2d 280, 293 (Miss.1992) 15

Ford v. State, 737 So.2d 424, 425 (Miss. App. 1999) 14

Garrett v. State, 956 So.2d 229, 234 (Miss.2006) 11

Gilbert v. State, 934 So.2d 330, 341 (Miss. App. 2006) 12

Griffin v. State, 607 So.2d 1197, 1201 (Miss.1992) 13

Hales v. State, 933 So.2d 962, 968 (Miss. 2006) 14

Harris v. State, 446 So.2d 585, 590 (Miss.1984) 15

Hobgood v. State, 926 So2.d 847, 851 (Miss. 2006) 8

Kohlberg v. State, 704 So.2d 1307, 1311 (Miss. 1997) 14

Manning v. State, 835 So.2d 94, 100-01 (Miss. App. 2002) 11

McClain v. State, 625 So.2d 774, 778 (Miss. 1993) 13

Neese v. State, 993 So.2d 837, 843 (Miss. App. 2008) 15

Noe v. State, 616 So.2d 298, 302 (Miss. 1993) 14

Oatis v. State, 726 So.2d 1230, 1233 (Miss. App. 1998), cited in Osborne v. State, 843 So.2d 99, 101 (Miss. App. 2003) 12

Robinson v. State, 726 So.2d 189, 194 (Miss. App.1998) 11

Smith v. State, 868 So.2d 1048, 1050-51 (Miss. App. 2004) 14

Wadford v. State, 385 So.2d 951, 955 (Miss. 1980) 11