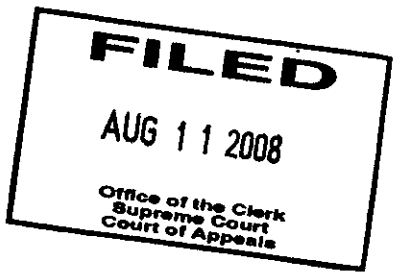
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CARL ELEY — APPELLANT



VS. — NO. 2007-KA-2220-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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CARL ELEY **APPELLANT**

VS. **NO. 2007-KA-2220-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On June 11, 2007, Carl Eley, "Eley" was tried for armed robbery before a Hinds County Circuit Court jury, the Honorable W. Swan Yerger presiding. R.1. Eley was found guilty and given a twenty five year sentence in the custody of the Mississippi Department of Corrections. C.P. 31. From that conviction he appealed to the Mississippi Supreme Court. C.P. 45.

ISSUES ON APPEAL

I.

DID THE TRIAL COURT ERR IN DENYING A JNOV OR A NEW TRIAL?

II.

DID THE TRIAL COURT ERR IN ALLOWING MR. BANNISTER TO TESTIFY?

STATEMENT OF THE FACTS

On December 14, 2006, Eley was indicted for armed robbery of Mr. James Stone on or about August 25, 2006 in Jackson, Mississippi by a Hinds County Grand jury. C.P. 3.

On June 12-13, 2007 , Eley was tried for armed robbery before a Hinds County Circuit Court jury, the Honorable Swan Yerger presiding. R.1. Eley was represented by the Hinds County Public Defenders Office, Mr. Frank McWilliams and Ms. Ginger Gibson. R. 1. .

The record reflects that during voir dire juror, Mr. Cash, did not respond to a question about whether he "knew any of those possible witnesses." R. 38. This included Detective David Domino's name along with all the other possible state witnesses. R. 38.

Mr. Eley filed a motion in limine. C.P. 11-12. This motion sought to prohibit Mr. Mark Bannister, the working companion of the armed robbery victim, Mr. Stone, from testifying. This was based upon Bannister's inability to identify him. Eley believed that Bannister lacked "the personal knowledge" required under M. R. E. 602. Such knowledge would be necessary for any such identification. C.P. 11-12.

The trial court overruled the motion. R. 23. The court found that Bannister could testify about issues relevant to the circumstances surrounding the armed robbery. The record reflects that Bannister was present when Stone, the victim, was robbed. He was outside the house when the robbery took place. The record reflects that Bannister could, and did identify the companion seen with the gunman. He saw them(the gun man and his companion) together more than once the day of the robbery. This included being present just before and after the actual robbery. R. 146. In addition, the record reflects that Bannister provided a general description of the gun man which corroborated that provided by the victim, Mr. Stone. R. 144-145.

Detective David Domino testified he investigated a armed robbery in South Jackson. This

was August 25, 2006. Domino testified that the description of Stringer, the gunman's companion, which was six feet, kind of thin, dark skinned male matched that of a suspect located at a convenience store. It also included the fact that the suspect had on "a red shirt." R.. 121. The store was in the same neighborhood as the house where the robbery occurred.

Bannister informed Domino that the suspected gun man had on a dew rag and "had braids" underneath the rag. R. 135

After the robbery, Bannister saw the two suspects walking in the neighborhood of the robbery. R. 149. When Bannister, the victim's co-worker, was shown a set of photographs, he picked out Stringer's photo with no difficulty. R. 122. Stringer was discovered after investigation to be Eley's cousin. R. 197. Domino also testified that Mr. Stone, the robbery victim, not only identified Eley's photograph but he also identified Stringer's. This was when he was shown a set of photographs of young black male suspects. R. 123. He identified Eley as the gun man and Stringer as the companion.

Mr. Stone described his assailant as being five four to five seven, black male. He also said he had gold teeth. R. 126. When shown a set of photographs of suspects, Stone picked out Eley's photograph with no difficulty. R. 129. No suggestions were made to Stone.

The photographs were shown to Stone on September 26, 2006. 130. Stone also picked out Stringer's, Eley's cousin, as the person who was with Eley at the crime scene. R. 165. Stone testified that he had seen both Eley and Stringer, his "look out" companion, at his work site several times on the day of the robbery. Eley was close to Mr. Stone during day light hours. He had a good view of their faces. Neither Eley or his companion were disguised.

Mr. Bannister testified to working with Stone on a work site. R. 143. They were putting up vinyl siding. Two young men visited them several times the day of the robbery. R. 144. Bannister

had talked with a young man wearing "blue shorts and red shirt." R. 144. Bannister described the young man who followed Stone into the house at the time of the robbery as being five four to five seven dark medium complexion, black male. The man also had a dew rag on his head. R. 126. Bannister picked out the man who was with him when the robbery occurred from a photo spread shown to him. R.146. No suggestions were made to him. He had no difficulty picking out his photograph. R. 146.

After the robbery, Bannister and the contractor on the house drove around the neighborhood of the robbery. They saw two young men who fit the description at a convenience store. R. 149. One of them had on blue pants and a red shirt. Bannister testified he believed they were the same two young men present when Stone was robbed at gun point. R. 149.

Mr. James Stone testified to being robbed. R. 157-174. A young man with whom he had spoken several times during the day followed him inside a house. This was the house he and Bannister were employed to repair. He and Bannister were putting up vinyl siding. Once inside, unexpectedly the man held a gun on him. He demanded his wallet. Since his wallet was empty, he had Stone open his pockets. They contained $42.00. R.159. The man took the money and ran. Stone described him as being 5 feet four to 5 feet seven and having gold teeth. He also had on a dew rag. R. 164.

Mr. Stone was shown a set of photographs a month later in September. R. 165. He had no difficulty picking out the photograph of the suspect who robbed him. He testified to having seen him at the work site earlier in the day. He had even given him a cigarette while they talked. R.159.

Stone testified that the other young man who has with Eley previously in the day stayed outside. This was when the shorter of the two went inside the house behind him. He described the man who stayed outside as being "tall and skinny." R. 164. He also had on "red shirt." Stone

testified that he had no difficulty picking out the photograph of the armed robber. R. 165.

Mr. Stone also identified the photograph of Stringer, Eley's companion, from a photo spread. R.165. No one made suggestions or provided any names for any suspect. R. 166. The photograph of Eley did not show the suspect's teeth. R. 167. Stone identified Eley in the court room as being the same person who robbed him at gun point. He was the same person with whom he had shared a cigarette at the crime scene. R. 168.

Detective Rhonda Daniels with the JPD testified that when Eley was arrested in March 2005, her records indicated that he had four "gold teeth" on his upper teeth. R. 178. She testified that "grills" were gold teeth that were capable of being easily placed on or taken off an individual's teeth without the assistance of a dentist. R. 179. Permanent gold teeth require a dentist's assistance.

Mr. Eley testified in his own behalf. He testified he was 22 years old. He denied having robbed anyone. R. 192. He was arrested in October 24, 2006. Eley admitted Stringer was his cousin. R. 197. He admitted that he lived at 1735 Topp Avenue which was two streets from where the robbery occurred on Cox Street. R. 195. He claimed that he had never had any gold teeth. R. 199.

He admitted that Stringer, his cousin, visited his home. R. 199. He admitted his hair was plaited which he maintained was different from braided. He also admitted that he told law enforcement initially that he was getting his hair "braided" the day of the robbery. R. 200.

Eley was found guilty and given a twenty five year sentence in the custody of the Mississippi Department of Corrections. C.P. 31.

"The day after the trial" Mr. Miles had a conference with the trial court. R. 247. Mr. Miles for the state, informed the court that Detective Domino recognized a juror. After the trial Domino was able to remember who that juror was. Upon additional reflection, Detective Domino determined he had previously interviewed juror Cash. He recognized him as a victim of a crime.

This occurred some twenty months before the trial in the instant cause. R. 247. Miles brought this to the court's attention with the defense present. R. 247.

Eley's counsel filed a Motion for a JNOV or a New Trial. C.P. 33. This included a request for a new trial based upon juror Cash allegedly "lying" about his not recognizing Detective Domino. C.P. 33.

A hearing for a JNOV or a New Trial was held because of this claim. . R. 235-262.

Eley's motion was premised upon juror Cash "lying" about his not recognizing Domino. Mr. Miles pointed out that although he had tried the case in which Cash was a victim, he did not remember this either. He discovered this after the trial when Detective Domino reminded him.

This was after the trial and guilty verdict. Miles explained that the Hinds County prosecutors try hundreds of cases each year. Miles also pointed out that no affidavits from Cash or anyone knowledgeable about whether he recognized Domino's name during voir dire was filed with his motion. R. 246-247 ; C.P. 11-12.

After hearing argument from the prosecution and the defense team, the trial court denied the motion. R. 257-261. The trial court found that there was a lack of evidence that the juror met the third criteria under **Odom, infra.** This criteria was whether the juror had "substantial knowledge of the relevant information requested" of jurors during voir dire.

From that conviction and denial of relief on his motion for a new trial, Eley appealed to the Mississippi Supreme Court. C.P. 45.

SUMMARY OF THE ARGUMENT

1. The record reflects that the trial court did not err in denying a motion for a JNOV or a New Trial. R. 260-261. There was a lack of evidence for holding that juror Cash met the third criteria for alleged failure to answer truthfully a relevant and unambiguous question. **Odom, infra.** , **Herrington v. State** 690 So.2d 1132, 1139 (Miss. 1997), and **Salter v. Watkins** 513 So.2d 569, 573 (Miss. 1987). There was no affidavit filed from Mr. Cash with their motion or at the hearing on their motion for a JNOV or New Trial. R. 246 ; C.P. 11-12.

The record reflects that Eley did not met its burden of proof for showing, as stated in his motion, that Cash "lied" during voir dire. This would be lying about his not recognizing Detective Domino. Nor did Eley meet his burden for showing that not only did Cash have "knowledge" of recognition but that this knowledge in any way adversely effected the outcome of Eley's trial. **Moore v. State** 909 So.2d 77, 83 (¶19-¶20) (Miss. App. 2005).

The record reflects that while juror Cash had been previously interviewed as a victim of a crime, he had also at one time been investigated as a suspect in another crime which was non-adjudicated. R.86-89; 254-255. The defense opposed the prosecution's strike for cause on Cash. It did so because they believed when a charge is non-adjudicated, a suspect does not have to reveal it to others. R. 88-89. The trial court accepted the defense position, and Cash was not struck for cause. R. 89.

2. The record reflects that the trial court did not abuse its discretion in admitting testimony from Mr. Bannister. R. 23. **Parker v. State**, 606 So. 2d 1132, 1136 (Miss. 1992). While Bannister did not identify Eley's photograph, he provided an accurate description of the clothing worn by Eley's companion. The record reflects that this person, Mr. Stringer, was Eley's cousin. R.144-145. Stringer was still wearing these same clothes shortly after the robbery. R. 121-122. This was blue

pants and a red shirt. R. 144.

In addition, Bannister provided a general description of the other suspect which was corroborated by the robbery victim, Mr. Stone. R. 145. Bannister also testified to locating the "two suspects together" shortly after the robbery. R. 149-150. He notified law enforcement.

The suspects were located at a convenience store in the neighborhood of the robbery. The taller suspect, who stayed outside with Bannister during the robbery, still had on his blue pants and red shirt when he was detained by police. His companion fled and was not captured until a later date.

Under the facts of this case, the fact that Bannister did not witness the armed robbery itself did not in any way make his testimony any less relevant. The record reflects that he testified about relevant and material issues based upon his personal experience and knowledge His testimony was needed to provide the jury with "a coherent story" of what occurred. **Ballenger v. State**, 667 So. 2d 1242, 1256 (Miss. 1995).

Therefore, the Appellee would submit that the trial court did not abuse its discretion in admitting Bannister's testimony in the instant cause. M. R. E. 403, and 609.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THE TRIAL COURT CORRECTLY DENIED A MOTION FOR A JNOV OR A NEW TRIAL.

Eley believes that the trial court erred in denying him a JNOV or a New Trial. He erred in not finding that juror Cash interfered with his ability to receive a fair trial. Eley believes that Cash violated the **Odom v. State**, 355 So 2d 1381 (Miss 1978) , requirements for voir dire of jurors. He violated them when he did not state during voir dire that he knew Detective Domino who would be testifying in this case. After the trial, it was revealed that Detective Domino had interviewed him when he himself was a victim of a crime over a year prior to trial. Appellant's brief page 7-12.

To the contrary, the Appellee would submit that the record indicates that while Cash had been interviewed by Detective Domino, there is a lack of evidence that he either remembered his name or recognized him when he testified. The record reflects that Detective Domino's interview was conducted some "twenty months" prior to the trial. R. 255.

After hearing testimony at a hearing on Eley's motion for a JNOV or a New Trial based upon alleged **Odom, supra** violation, the trial court denied the motion. R.260. The trial court found that there was a lack of evidence that Cash had "substantial knowledge" of the information requested during voir dire. In other words, under the third prong **Odom** test, that Eley did not sufficient evidence for inferring that juror Cash at the time of voir dire "had substantial knowledge about the information requested at that time."

> Mr. Miles:
> **Obviously I didn't–you know, as Ms. Gibson stated, I prosecuted the case in which Mr. Cash was a victim, and I didn't remember that. I didn't remember that–and as she said, we prosecute hundreds of cases.** So does Detective Domino. And I can state as-I will promise you if I had remembered Cash as being a victim at that time I would have brought it to the Court's attention and to the defense's

attention.

The trial court denied the motion for a new trial. The Court found a lack of evidence that juror Cash had recognized Detective Domino's name during voir dire.

> **If the Court rules today that he is being dishonest, it's based on speculation because no affidavit has been offered before the court, and it's their burden, it's their motion to show that he had knowledge of who this obscure name, Detective Domino, who that might have been, if that's the same guy that interviewed him 20 months ago, or that he able to recognize him, and then going beyond that, if that even effected his determination of Mr Eley's guilt.** R. 255.
>
> So there all types of situations where people's memories are such that the particular person does not remember someone's name or even what he looked like. On the other hand, Detective Domino by nature of his training and experience was trained to remember people, people's names, people's faces as part of his work. It's a different situation for someone like Mr Cash. But in any event, basically what the defense is asking this court to do is engage in guesswork, speculation or conjecture or surmise that Cash did, in fact, remember Sergeant Domino, what his name was and/or what he looked like. And this Court is not permitted to do that.
>
> The third prong as mentioned in the **Odom** case was whether the juror had substantial knowledge of the information sought to be elicited. **And the judge nor any other trial judge is not in a position to find affirmatively that a juror such as the juror in this case, Mr. Cash, had substantial knowledge of the information of who Sergeant–Detective Domino was, his name and his face. And, of course, this is one of the essential prerequisites before the court can find that there was some error involved in the jury trial.**
> In any event, the Court finds that in the opinion of this trial judge that the defendant did, in fact, have a fair and impartial jury, and a fair and impartial jury trial, which is what he was entitled to. R. 260.

In **Odom v. State** 355 So.2d 1381, 1383 (Miss. 1978), the Supreme Court stated the three prong test for dealing with alleged failure of a juror to answer relevant and unambiguous questions in a truthful manner.

> Therefore, we hold that where, as here, a prospective juror in a criminal case fails to respond to a relevant, direct, and unambiguous question presented by defense counsel on voir dire, although having knowledge of the information sought to be elicited, the trial court should, upon motion for a new trial, determine whether the question propounded to the juror was (1) **relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the juror had substantial knowledge of the**

> **information sought to be elicited.**[FN1] **If the trial court's determination of these inquiries is in the affirmative, the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond.** If prejudice reasonably could be inferred, then a new trial should be ordered. It is, of course, a judicial question as to whether a jury is fair and impartial and the court's judgment will not be disturbed unless it appears clearly that it is wrong. (**Jones v. State**, 133 Miss. at 711-13, 98 So. 150). (Emphasis by Appellee).

As to the other claim against juror Cash for lying during voir dire, the record reflects that Cash did indicate candidly and truthfully during voir dire to having been arrested for a DUI ten years ago. R. 85. However, he did not respond as to his having been arrested for possession of cocaine. R. 86. When the prosecution attempted to strike him for cause for not responding candidly about the cocaine charge, the defense objected. R. 88. Mr. McWilliams for the defense explained that he counseled his clients that having a charge non-adjudicated meant that you did not have to reveal it. R. 88.

The trial court decided because of possible confusion over what non-adjudication meant, he would reject the prosecution's strike on Cash for cause. R. 89.

> Court: Well, it could have been some confusion in view of the non adjudication. I believe this is the first time the court had that identical situation come up. So he did volunteer to DUI. So under the circumstances the Court believes that there's not cause for a challenge–challenging for cause. But obviously the state may use an excuse.

In addition, the record reflects that while the defense argued this issue during the hearing on the motion for a new trial, the "not responding because of non-adjudication issue" was not raised in its Motion for a New Trial. C.P. 33. Therefore, the prosecution did not have time to prepare to answer this allegation. Mr. Miles pointed out that this allegation was based upon a reversal of the defense position taken during voir dire on strikes for cause. R. 88-89. There they argued, as reflected by the record, that a juror should not be expected to reveal an arrest or charge when it was eventually

non-adjudicated.

In **Herrington v. State** 690 So.2d 1132, 1139 (Miss. 1997), the Supreme Court found the trial court did not abuse its discretion in not dismissing a juror. During voir dire, the juror did not respond when asked if she knew M..S. , the juvenile female victim, in a rape case. A juror discovered later by accident that the victim went to school with her children, which she then related to the judge.

> Both parties agree that the ability to dismiss a juror is within the discretion of the trial judge. **Scott v. Ball**, 595 So.2d 848, 849 (Miss.1992); **Myers v. State**, 565 So.2d 554, 558 (Miss.1990). Here it would appear that this discretion was not abused. It was entirely consistent for Ms. Griffin to answer that she did not know M.S. She stated that she was unaware that her children went to school with M.S. until her children brought that to her attention. Trial counsel never asked the venire if anyone had children who attended a particular school. Thus, there is no material misrepresentation. **Myers**, 565 So.2d at 558. This issue is without merit.

In **Salter v. Watkins** 513 So.2d 569, 573 (Miss. 1987), the Supreme Court found that juror Deweese's response during voir dire that he did not know the defendant Watkins was an honest answer. He discovered that he knew her indirectly. He discovered that he knew members of her family from another juror during the trial. He stated he could be fair and impartial along with the other jurors. The Court found that he did not have "substantial knowledge of the information sought to be elicited. "

> In fact, Deweese had never laid eyes upon Defendant Watkins prior to the trial and had to be told who she was by Mr. Bobo, another juror. There was no evidence that Deweese was even aware of the existence of Watkins before the trial.
>
> When asked on voir dire, Deweese answered that he did not know Watkins and that was an honest answer; therefore, he did not have "substantial knowledge of the information sought to be elicited" as required in **Dorrough v. State**, 437 So.2d 35, 36 (Miss.1983).

In **Moore v. State** 909 So.2d 77, 83 (¶19-¶20) (Miss. App. 2005), the Court found that Moore failed to show that he "suffered any prejudice" from a juror's lack of response to relevant

questions. The juror did not respond to questions about being involved with drug related crimes as well as to questions about having any condition that would prevent them from paying attention. It was discovered that Juror Lindsay had a hearing loss in one ear and had been involved with drug related crimes.

> Furthermore, assuming arguendo that the question was not ambiguous, we fail to see that Moore has shown that he suffered any prejudice from Lindsay's presence. At the hearing on the motion for a new trial, Lindsay testified that she heard and understood everything that occurred during the trial, testifying "I understand everything that is going on. I made sure that I sit there, I made sure that I listen real good loud and clear. Because the microphone was real loud, I could hear real good."

In **Lindsey v. State** 965 So.2d 712, 718 (¶17) (Miss. App. 2007), the Appeal Court stated that it would not substitute its judgement for that of the trial court on a **Odom** issue about a juror who did not respond or answer an alleged relevant and un ambiguous question during voir dire.

> ¶ 17. We are of the opinion that the resolution of this matter is based on the trial court's consideration of the evidence submitted to support the motion for a new trial. The trial court clearly found Ms. Richardson's affidavit to lack credibility and there were not sufficient grounds to grant the motion. We will not substitute our judgment for that of the trial court. Indeed, we hold that the trial judge's ruling was within his discretion. We find no merit to this issue.

The record reflects that the trial court did not abuse its discretion in denying Eley's motion for a new trial. There was a lack of evidence for finding that Eley met his burden of proof for showing either that juror Cash lied or misrepresented the truth about his recognition of Detective Domino. He did not recognize his name as being someone who interviewed him some twenty months prior to trial. There were no affidavits or any other evidence in support of Eley's claim that juror Cash lied. The Appellee would submit that this issue is lacking in merit.

PROPOSITION II

MR. BANNISTER'S TESTIMONY WAS PROPERLY RECEIVED.

Eley believes that the trial court erred in denying his motion in limine. This motion was to prohibit Mr. Mark Bannister from testifying. Eley believes that since Bannister was unable to identify him, he should not have been permitted to testify in the case against him. Eley believes that the fact that Bannister claimed he was present at his work site before the robbery and yet could not identify him makes his testimony suspect. He thinks the trial court should have affirmed his motion to prohibit his testimony. Appellant's brief page 12-14.

To the contrary, the record reflects that Mr. Bannister testified to being present with Stone, the armed robbery victim, before and after the robbery. R. 143-174. While Bannister did not witness the actual robbery, he did have relevant experiences, knowledge and memory about the circumstances surrounding the armed robbery. The record reflects that the robbery occurred inside a house with Bannister outside. Bannister was with the companion of the actual robber when he was robbing Stone inside the house. Bannister was assisting Mr. Stone, the victim, put up siding at this work site at the time. R. 143-144. The robbery occurred around 2:30 in the afternoon. R. 115.

The record reflects that Bannister provided an accurate description of what the companion with the gun man was wearing. He was wearing "blue pants and a red shirt." R. 111; 144. The record also reflects that Bannister identified the photograph of Mr. Stringer as being the "look out"companion with whom he was speaking when the robbery occurred. R. 146.

Q. The man on the porch?

A. **The man on the porch, oh, probably five ten , six foot, clean cut, maybe a red shirt, blue shorts.**

Q. **Now, when the police–did the police give you an opportunity to pick out the man–was the man on the porch put in a photo line up later on?**

A. **Yes, sir.**

Q. **And did you have an opportunity–did you have any difficulty picking that man out?**

A. **No, sir.** R. 146. (Emphasis by Appellee).

Detective Domino corroborated Bannister in testifying that he provided an accurate description of Stringer, the companion with the gunman at the crime scene. He also corroborated the fact that Bannister identified Stringer's photograph out of a photo spread shown to him.

Q. And what was the –what was the physical description of Eric Stringer?

A. Approximately six feet, six one, kind of thin built, dark skinned male.

Q. **Did the description you just gave of Eric Stringer, did that match the general description of the man with the robber that the victim and the witness gave you?**

A. **Yes.**

...

Q. **And was Mark Bannister able to pick out Eric Stringer's photograph out of that photographic lineup?**

A. **Yes, sir.** R. 122. (Emphasis by Appellee).

Detective Domino also testified that Mr. Stringer, the suspected companion of the gunman, was located in the same neighborhood within thirty minutes of the actual robbery. He was located by Mr Bannister and his work site supervisor based on Bannister's description. R. 115. Once arrested, Mr. Stringer, the alleged "look out" suspect, never made any statement to law enforcement.

Mr. Bannister also provided a general description of the man who robbed co-worker Stone. R. 145. He described him as wearing "a wave cap," and being about five five, and about 20 years old. He explained that a wave cap was the same as a dew rag. R. 145. Bannister also remembered that the suspect had "braided" hair under his dew rag. R. 135.

Q. **And by wave cap you're talking about a dew rag?**

A. **Yes, sir.** (Emphasis by Appellee).

In his testimony, Mr. Eley admitted that his hair was plaited which he claimed was different from being braided. However, he admitted that in his statement to law enforcement he stated that on the day of the robbery he was getting his hair "braided." R. 200.

Mr. Stone described the man who robbed him as being five four weighing about 140-150 pounds, and wearing "a dew rag." R. 164.

Therefore, Bannister's description of the gun man corroborated that of Stone who was the person actually robbed inside the house.

Mr. Bannister also testified to locating "the two suspects" present when Stone was robbed shortly after the robbery. R. 149-150. He and the contractor for the siding job drove around looking for the suspects in their neighborhood. This was in part due to the fact that the suspects had been seen together in the neighborhood and around the house walking or riding a bike earlier in the day.

> A. **We were riding around looking for the guys. And when we spotted them he got on his cell phone and called James and said they were over here by the convenience store.** R. 149. (Emphasis by Appellee).

The trial court found that Bannister's testimony was relevant to the circumstances he witnesses in connection with the armed robbery of his work companion.

> Court: All right. The Court is of the opinion that this witness, Bannister, is entitled to testify to what has been represented to be the nature of his testimony. And it goes to the weight of his testimony considering his inability to pick this particular defendant out of a line up. That's just part of the weight and credibility of the testimony of Mr. Bannister. **But the court believes that it is admissible and it's up to the jury to decide based on hearing his testimony about what he saw and then the other testimony about the lineup as to what they believe.** R. 23. (Emphasis by Appellee).

In **Ballenger v. State** ,667 So. 2d 1242, 1257 (Miss. 1995), the Court stated that the prosecution has a legitimate interest in telling "a coherent story of what happened" in connection

with a criminal charge. This is true even where circumstances require mentioning other possible crimes or wrongs committed by a defendant. It would seem to the appellee that this would also be true where circumstances require mentioning coordinated crimes committed by the companion of an armed robber.

> Evidence of other crimes or bad acts is also admissible in order to tell the complete story so as not to confuse the jury. In **Brown v. State**, 483 So. 2d 382 (Miss. 1986), the Court stated: the state has a legitimate interest in telling a rational and coherent story of what happened... **Turner v State**, 478 So 2d 300, 301 (Miss. 1985); **Neal v. State**, 451 So. 2d 743, 759 (Miss. 1984). Where substantially necessary to present to the jury the complete story of the crime evidence or testimony may be given even though it may reveal or suggest other crimes. **State v Villaviciencio**, 95 Ariz. 199, 388 P. 2d 245 (1964)

In **Parker v. State**, 606 So. 2d 1132, 1136 (Miss. 1992), the Court stated that the trial court' s ruling on evidentiary matters would be affirmed unless the trial court abused its discretion. In that case, the court found no reversible error even though evidence of another crime, possession of marijuana, was admitted in a murder case. Id. 1137.

> The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused. **Johnston v. State**, 567 So. 2d 237, 238 (Miss. 1990), citing **Hentz v State**, 542 So. 2d 914, 917 (Miss. 1989)...Unless the trial judge's discretion is so abused as to be prejudicial to the accused, this Court will not reverse his ruling. **Shearer v. State**, 423 So. 2d 824, 826 (Miss. 1983)...The discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence. **Johnson**, 567 So. 2d at 238.

The Appellee would submit that the record cited indicates that the trial court did not abuse its discretion. The record cited above clearly indicates that Mr. Bannister's testimony was relevant, and material under the circumstances of this case. Bannister's testimony was based upon his personal knowledge. M. R. E. §609. It was relevant for understanding the identification process as well as for allowing the jury to understand the circumstances involved in the robbery at the crime scene.

The Appellee would submit that Bannister's testimony was not "substantially outweighed" by the danger of unfair prejudice, confusion of the issues or the presentation of cumulative evidence. M. R. E. § 403.

This issue is also lacking in merit.

CONCLUSION

The trial court's rulings should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: W. Glenn Watts

W. GLENN WATTS
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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 W. Swan Yerger
Circuit Court Judge
Post Office Box 327
Jackson, MS 39205

Honorable Robert Shuler Smith
District Attorney
Post Office Box 22747
Jackson, MS 39225-2747

Virginia L. Watkins, Esquire
Attorney At Law
Post Office Box 23029
Jackson, MS 39225

This the 11th day of August, 2008.

W. Glenn Watts

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