

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**JOE LEE BRUNNER**

**APPELLANT**

**VS.**

**NO. 2008-KA-0469-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE CASE**

On June 27, 2008, Joe Lee Brunner was convicted by a Hinds County jury on a four count indictment for the March 7, 2006 house burglary, aggravated assault and armed robbery of Lorea May and the theft of a vehicle from the home of Mrs. May and her husband, Otho May, in violation of MISS. CODE ANN. § § 97-17-23; 97-3-7(2)(b); 97-3-79; 97-17-42 (1972). CP 24; 66; 77-80. 7-8 The court enhanced Brunner's sentence on Counts I - III under MISS. CODE ANN. § 99-19-351, et seq. (1972) due to the fact that Mrs. May was more than 65 years old at the commission of the crime. CP 8-9. Brunner was sentenced to fifty (50) years on Count 1 of house burglary; forty (40) years on Count II of aggravated assault; eighty (80) years on Count III of armed robbery and ten (10) years on Count IV for auto theft, to be served consecutively, all in the custody of the Mississippi Department of Corrections. CP 77-80; T. 539; 550; RE. 18-24. After denial of post-trial motions, Brunner appeals. CP 85-89; RE 25.

## FACTS

Lorea May lived with her husband Otho May, a roofing contractor, and their adult daughter Marilyn. T. 183, 193, 221; 250, 277. On the morning of March 7, 2006, after her husband and daughter left the house, Mrs. May was awakened by an intruder coming out of a bedroom across the hall from her bedroom. T. 183-84. The man entered her room and began going through a bowl of keys. T. 184. The light was on in the hall but not in Mrs. May's room. T. 185. May's head was down, so he could not see that she was watching him and feigned sleep for approximately ten minutes. T.184-86. At no time during the intrusion did Mrs. May have on her eyeglasses. T. 232, 233. When the intruder went back into the hallway, Mrs. May asked him what he was doing there. T. 186-87. The man responded that Mr. May had sent him for keys to the couple's 2002 Cadillac, which Mrs. May disputed. T. 187.

Mrs. May got out of bed and retrieved a gun but the intruder swiftly wrenched the weapon from her. T 187-88. Mrs. May testified the intruder threatened to kill her if she did not give up her pocketbook. T. 188. As the intruder beat Mrs. May in the head with an unknown object, she begged for her life. T. 189. The intruder took the gun, car keys and her purse before taking Mrs. May's walker away from her and ripping the bedroom telephone from the wall. T. 199-200, 206. After the intruder left, Mrs. May pulled herself into another room and called the police. T. 213-14. Prior to leaving her house in an ambulance, Mrs. May gave police information about the identification of her attacker. T. 214. While being treated at the hospital, Mrs. May picked Brunner out of a police photographic lineup as the intruder who attacked her. T. 215-16; Ex .S-14. Mrs. May testified she was sure she identified the correct person in the lineup. T. 218. Mrs. May made an in court identification of Brunner as the person who attacked her. T. 219. She also testified that Brunner use to work for her husband in his roofing business. T. 220. Upon cross-examination, Mrs. May testified

she had seen Mr. Brunner only once when her husband took money to Mr. Brunner at a home, but that she did not know Mr. Brunner personally. T. 221.

Otho May, Mrs. May's husband, testified that he had employed Brunner off and on for about five or six years in his roofing business. T. 251-52. Mr. May testified he did not recall having an employee named Clint Pierre. T. 254. Mr. May testified his wife identified Brunner as her assailant in a photograph lineup T. 259. He testified during the investigation, Brunner was the only former employee he was questioned about by the police. T. 259. Mr. May testified that at no time did he have to suggest to his wife that Brunner was the one who assaulted her; she identified Brunner from the photographic lineup on her own. T. 268. Mr. May testified that Brunner had been to their home but not in their home more than one time to get paid. T. 272.

Marilyn May, the Mays' daughter, testified that while she was with her mother at the emergency room, her mother identified her assailant from a photograph lineup shown to her by the police. T. 285.

Officer Charles Keyes with the Jackson Police Department was the responding officer to the Mays' house after the assault. He testified as to his findings upon arriving at the house and that Mrs. May believed her assailant to have been a black male who used to work for her husband. T. 293

Michael Childress, Jackson Police Department crime scene investigator testified as to his findings of the crime scene. T. 301-310.

Deputy Milton Twiner testified that Jackson police sought his assistance in locating the missing Cadillac and Brunner, reportedly visiting the family of Leshandre Martin (Leshandre), Brunner's fiancée and mother of his infant. T. 314. Twiner testified that on March 8 he responded to a call from a rural resident who wanted law enforcement to check a black Cadillac parked by an African American man on her rural road. T. 316; 323; 324; 331. The car turned out to be the Mays'

missing Cadillac. T. 324. Shortly afterwards, Twiner testified that he received a report of stolen pick-up from the parking lot of the local Wal-Mart, a parking lot easily accessible on foot from the location of the Cadillac. T. 325-326.

Chief Investigator Byron Swilley with the Hazlehurst Police Department testified to interviewing Brunner on March 23, 2006. T. 335. Swilley testified Brunner admitted that he came to Hazlehurst in a black Cadillac and stole the truck after the car broke down. T. 337.

Brunner testified in his own defense. (T. 351-423). At trial, Brunner admitted stealing the truck in Covich County because the Cadillac broke down and he had to get home to Jackson. T. 367. Brunner testified he worked for Otho May for six or seven years before leaving for other employment a few weeks prior to the assault. Brunner claimed he left May's employ because he needed more hours than May could provide disputing allegations that May fired him for stealing. T. 416-418. On cross examination Brunner admitted he told Jackson Police Department (JPD) detectives that Mr. May fired him for stealing roofing shingles. T. 416-18.

According to Brunner's testimony, on the morning of March 7, he ran into Clinton Pierre (Pierre), a former fellow May employee who offered him a 2002 black Cadillac for "rent" of drugs and money because Pierre was a dope fiend. T. 357. Brunner, an admitted drug dealer, first testified he was walking alone when he ran into Pierre. Brunner subsequently changed his testimony so that Brunner and his fiancée Lashandre Martin (Lashandre) were walking together when they ran into Pierre. T. 780-81. One version of events was that Brunner picked up Lashandre, dropped their daughter off with a relative and went to visit Covich County on the afternoon of March 7, returning to Jackson about midnight. T. 358; 362.

Brunner testified that he saw Pierre again the next day, March 8, and again rented the Cadillac for a return visit, this time with Pierre, to Covich County. The car began "puddling" and

went dead on the street in front of Hazlehurst Funeral Home. T. 365-366. Brunner testified that he struck out for the Wal-Mart on a foot trail and looked over his shoulder to see the Cadillac pulling away from him. T. 367. Brunner testified that he learned from television reports he was wanted on several charges, and called police with his location on March 14. T. 369; 370.

Mr. Brunner's trial testimony varied considerably with the statement made to the Copleah County Sheriff's Department, a statement he gave Jackson Police Department, and his testimony from his first trial, concerning who he was with and where and when certain events took place on March 7<sup>th</sup>-9<sup>th</sup>. T. 355-424.

The defense called Detective Perry Tate with the JPD to testify about interviewing Mr. and Mrs. May after the assault. Mrs. May told him before leaving the house in an ambulance that her assailant was similar to an individual who used to work for her husband. T. 430; 433-434. The detective testified he then interviewed Mr. May about possible suspects. Mr. May talked about having fired Brunner a few weeks prior to the assault. T. 430. Detective Tate prepared a photo lineup and Mrs. May picked Brunner out as her assailant. T. 434. Mrs. May was not able to identify Clinton Pierre from a photographic lineup. Ex. S-14; T. 428-434.

Leshandre Martin testified that she and Brunner went to Copleah County on March 7 in a black car provided by "Red" the name by which she testified she knew Clinton Pierre. T.437; 438; 441. Leshandre testified they stopped in Crystal Springs to visit with a cousin before going to her mother's house, then with someone named Chris and then on to Hazlehurst. T. 440-45. According to her testimony, she and Brunner returned to Jackson around 9:00 or 10:00 p.m. T. 442. She also testified that she did not see Brunner on March 8 because she was asleep; the statement she gave police indicated she knew Brunner left the house by 9:00 am. T. 449; 450.

After listening to the prosecution witnesses and then listening to the conflicting testimony

of the Appellant and his fiancée, the jury found Brunner guilty on all four counts. In a hearing before the jury, the State produced evidence that Brunner was subject to an enhanced penalty, as provided in Mississippi Code Annotated section 99-19-351 et seq. The jury found Brunner subject to an enhancement as charged. The trial court sentenced Brunner to fifty (50) years on Count I of house burglary; forty (40) years on Count II of aggravated assault; eighty (80) years on Count III of armed robbery and ten (10) years on Count IV for auto theft, to be served consecutively, all in the custody of the Mississippi Department of Corrections. CP 77-80; T. 539; 550; RE. 18-24. After denial of post-trial motions, Brunner appealed raising issue with the trial court's denial of a misidentification jury instruction and the sufficiency of the evidence. CP 85-89; RE 25.

## **STATEMENT OF THE ISSUES**

- I. The trial judge properly refused Instruction D-10.
- II. The State provided legally sufficient evidence to support the jury's verdict.

## SUMMARY OF THE ARGUMENT

The trial judge properly refused Brunner's Jury Instruction D-10. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. *Austin v. State*, 784 So.2d 186, 192 (Miss.2001)(quoting *Humphrey v. State*, 759 So.2d 368, 380 (Miss.2000)). In reading the jury instructions as a whole, Instruction D-10 is repetitious.

The state provided legally sufficient evidence to support the jury's verdict. Evidence is legally sufficient to support a jury's verdict when the State has proven that the defendant committed every element of the crime charged. *Bush v. State*, 895 So.2d 836, 843 (Miss.2005).

## ARGUMENT

### I. THE TRIAL JUDGE PROPERLY REFUSED INSTRUCTION D-10.

Brunner argues that by rejecting his proffered Instruction D-10, the trial court denied him an instruction on his only defense theory-misidentification.<sup>1</sup> Brunner claims Instruction D-10 was the heart of his defense theory, that Mrs. May misidentified Brunner. Brunner relies on *Warren v. State*, 709 So.2d 415 (Miss. 1998) as being dispositive of the issue of whether Instruction D-10 was repetitious of Instructions C-2 and C-4.<sup>2</sup> Brunner's reliance is misplaced. In *Warren*, the

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<sup>1</sup>Instruction D-10 states:

The Court instructs the jury that in any criminal case the State must not only prove the essential elements of the offense or offenses charged, but must also prove the identity of the defendant as the perpetrator of the alleged offense or offenses.

You may consider, in that regard, such matters as the length of time the witness had to observe the person in question, the prevailing conditions at that time in terms of visibility or distance and the like, and whether the witness had know or observed the person at earlier times. You may also consider the circumstances surrounding the identification itself, including, for example, the manner in which the defendant was presented to the witness for identification, and the length of time that elapsed between the incident in question and the next opportunity the witness had to observe the defendant.

If, after examining all of the testimony and evidence in this case, you have a reasonable doubt as to the identity of the defendant as the perpetrator of the offense charged, you must find Joe Brunner Scott [sic] not guilty.

<sup>2</sup>Instruction C-2 provides:

You should carefully scrutinize all the testimony given, the circumstances under which each witness testified, and every matter in evidence that tends to show whether a witness is worthy of belief. Consider each witness' objectivity, state of mind, demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider the extent to which it is contradicted by other evidence in the case. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood. After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves. CP 28.

Mississippi Supreme Court reversed a conviction partially due to the trial court's refusal to give the instruction dealing with factors by which jurors could evaluate the credibility of the complainant's identification of the defendant. In *Warren*, the rejected jury instruction was the only instruction dealing with misidentification, such is not the case here. (Instructions C-2 and C-4 assist jurors in assessing the credibility of Mrs. May's identification of Mr. Brunner. Also in *Warren*, the evidence was based on the identification of one witness. In the case sub judice, the verdict was based on Mrs. May's identification and on cumulative testimony of the law enforcement officers from the Jackson Police Department, Hazlehurst Police Department, and the Copiah County Sheriff's Department, along with Appellant's own testimony and statements and Lashandre Martin's testimony placing him in possession of the Cadillac after the theft.

In a similar issue, the Mississippi Supreme Court held in *Smith v. State*, 802 So.2d 82 (Miss.,2001) that the trial court was not required to give the defendant's requested instruction on his misidentification defense, in prosecution for murder, where the jury was otherwise instructed that the State had the burden of proving that it was the defendant who had killed the victim. The *Smith* court held the standard of review for challenges to jury instructions is as follows:

Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly

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Instruction C-4 provides:

The law presumes every person charged with the commission of a crime to be innocent. This presumption places upon the state the burden of proving the Defendant guilty of every material element of the crime with which he is charged. Before you can return a verdict of guilty on any count, the state must prove to your satisfaction beyond a reasonable doubt that the Defendant is guilty of the crime charged in that count. The presumption of innocence attends the Defendant throughout the trial and prevails at its close unless overcome by evidence that satisfies the Jury of his guilt beyond a reasonable doubt. The Defendant is not required to prove his innocence. CP 30.

elsewhere in the instructions, or is without foundation in the evidence. *Austin v. State*, 784 So.2d 186, 192 (Miss.2001)(quoting *Humphrey v. State*, 759 So.2d 368, 380 (Miss.2000)).

The Mississippi Supreme Court has held that on the specific issue of jury instructions dealing with eyewitness identification, “the general instruction given to the jury to the effect that the State has the burden of proving each element of the offense charged beyond a reasonable doubt”, includes the misidentification issue. *Smith v. State*, at 88 (quoting *Robinson v. State*, 473 So.2d 957, 963 (Miss.1985).) Like in *Robinson*, Instructions 7, 9, 11 and 13 in the case at bar place upon the State the burden of proving “beyond a reasonable doubt that the defendant Joe Lee Brunner ...” committed the crimes as charged “then you shall find the defendant guilty as charged.... If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt then you shall find Brunner not guilty.”<sup>3</sup> Consequently, the jury was instructed on Brunner’s misidentification theory even in the absence of Instruction D10. This issue is without merit.

## **II. THE STATE PROVIDED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY’S VERDICT.**

Brunner argues on appeal that the “evidence adduced at trial is insufficient as a matter of law to support the verdict due to the extraordinarily weak identification of Lorea May.” Brunner’s argument is contrary to the record and without merit.

Evidence is legally sufficient to support a jury’s verdict when the State has proven that the defendant committed every element of the crime charged. *Bush v. State*, 895 So.2d 836, 843 (Miss.2005). “In appeals from an overruled motion for JNOV the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State.” *McClain v. State*, 625

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<sup>3</sup>For brevity purposes, Appellee will not quote verbatim Jury Instructions 7, 9, 11, and 13. The instructions which set forth the elements of each crime can be found at CP 39, 41, 43, and 45.

So.2d774, 778 (Miss.1993). On review, all evidence supporting the verdict must be accepted as true, and the State must be given the benefit of all reasonable inferences that could be drawn from the evidence. *Bell v. State*, 910 So.2d 640, 646 (Miss.App.2005). If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict or JNOV should be overruled. *Brown v. State*, 556 So.2d 338 (Miss. 1990), *Davis v. State*, 530 So2d 694 (Miss. 1988). A finding that evidence is insufficient results in a discharge of the defendant. *May v. State*, 460 So.2d 778, 781 (Miss.1984). The appellate court will reverse only when reasonable and fair-minded jurors could only find the accused not guilty. *Wetz v. State*, 503 So.2d 803, 808 (Miss.1987). It is the jury's duty to resolve any conflicts in testimony. *Groseclsoe v. State*, 440 So.2d 297, 300 (Miss. 1983).

The day of the assault, Mrs. May identified Brunner as her assailant from a photograph line-up. She testified that she was sure she identified the correct person in the lineup. T. 218. Mrs. May made an in court identification of Brunner as the person who attacked her. T. 219. Even though she was not wearing her glasses at the time of the assault, Mrs. May testified she was 100% sure she identified the correct person. *Id.* She also testified that Brunner use to work for her husband in his roofing business. T. 220.

Mr. May and Marilyn May both testified that Mrs. May identified Brunner in the line-up without any suggestion. Detective Tate testified that while interviewing Mrs. May she said her assailant looked similar to an individual who use to work for her husband and then subsequently picked him out in the line-up. T. 430, 432.

Not only was Brunner's trial testimony inconsistent, it conflicted with his statement given to JPD officers after his arrest, and conflicted with his testimony from his first trial. Brunner's testimony also differed with Lashandre Martin's testimony on virtually every aspect of events from

the time she got into the Cadillac until the following day. The only consistency between the engaged couple's trial testimony was that they dropped their baby off with Brunner's aunt prior to leaving Jackson and they went to and from Hazlehurst in a black car on March 7, 2006. Their testimony conflicted as to whether Leshandre walked with Brunner to the store, when Leshandre got into the Cadillac, whose idea it was for Brunner to "rent" the Cadillac, whether anyone rode with them in the Cadillac to Hazlehurst, how many times they stopped for gas, where they stopped, who they saw on the trip, when they returned to Jackson and where they left the Cadillac upon returning. Their testimony even conflicted as to when Brunner left his mother's house the morning of March 8th.

Brunner argues that Mrs. May's identification of Brunner was not credible because the assault took place in a dimly lighted room, Mrs. May did not have on her glasses and did not see any tattoos on her assailant. However, accepting the May's testimony as true and giving the State the benefit of all favorable inferences that may reasonably be drawn from the evidence there is more than sufficient evidence to support the jury's verdict of guilty on all four counts.

## CONCLUSION

The trial court's denial of requested Instruction D-10 as being repetitious did not deprive Brunner of presentation of his defense of misidentification to the jury. The State provided legally sufficient evidence of Brunner's guilt. Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's verdict and sentence of the trial court.

Respectfully yours,

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**CERTIFICATE OF SERVICE**

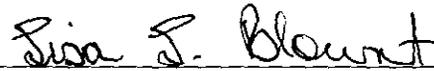
I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 23<sup>rd</sup> day of February, 2009.



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