

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Court of Appeals and the judges of the Court of Appeals may evaluate possible disqualification or recusal.



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So certified, this the 20th day of November, 2008.


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Joe Lee Brunner v. State of Mississippi

2008-KA-00469-COA

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STATEMENT OF THE ISSUES

I. The trial judge abused his discretion when he denied Instruction D-10 regarding factors by which the jury could evaluate the credibility of the identification by Lorea May, as this denial prevented presentation of Mr. Brunner's defense of misidentification;

II. The evidence was insufficient as a matter of law to support the verdict of the jury.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Joe Lee Brunner was indicted by a Hinds County grand jury in Cause Number 06-489, filed August 8, 2006, in connection with the March 7 burglary, armed robbery and beating of Lorea May and the theft of a vehicle from the home of Mrs. May and her husband, Otho May. CP 7-8. The four count indictment charged house burglary of the Mays' home, aggravated assault and armed robbery of Mrs. May and the theft of the couple's 2002 Cadillac, in violation of MISS. CODE ANN. § § 97-17-23; 97-3-7(2)(b); 97-3-79; 97-17-42 (1972). The state also sought sentencing enhancements 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 time. CP 8-9.

The first trial of Mr. Brunner ended in a mistrial on May 23, 2007. CP 20. The second trial came on for hearing and on June 27, 2007, after the jury initially deadlocked, Mr. Brunner was convicted on all four counts. CP 24; 66; 77-80. On June 28, 2007, Mr. Brunner was sentenced 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 prosecution of post-trial motions, all of which were denied, Mr. Brunner now appeals his convictions and sentence to this honorable Court. CP 85-89; RE 25.

B. STATEMENT OF FACTS

On the morning of March 7, 2006, Lorea May, 81, had seen her husband Otho off to his job as a roofing contractor before returning to bed; her adult daughter Marilyn, then living at home, left for classes at the University of Mississippi Medical Center before securely locking the

kitchen door the family used for primary entry and exit to their home. T. 183; 193; 221; 250; 277; 279; 282-283.

Mrs. May had drifted back to sleep when she thought she saw someone come from a bedroom across the hallway; then Mrs. May testified that a man came into her room and went through a bowl of keys on a chest of drawers opposite from her bed. T. 183; 227. The only light was from the hallway, but the light did not shine into bedrooms. T. 185; 230; 231. Mrs. May's eyeglasses were in a nightstand on the opposite side of the bed; at no time during the incident did Mrs. May have use of her eyeglasses. T. 232; 233.

Mrs. May testified she pretended sleep and observed the intruder for about ten minutes, then when he went back into the hallway, she asked "what are you doing in here?" T. 186; 187. The man said Mr. May had sent him to the house for keys to the couple's 2002 Cadillac, which Mrs. May disputed. T. 187. The stranger said Mr. May was right outside and Mrs. May testified she told him to bring Mr. May in the house. T. 187. As these events unfolded, Mrs. May testified she retrieved the gun from her husband's nightstand opposite from her side and the intruder swiftly wrenched the weapon from her; Mrs. May testified he threatened to kill her if she did not give up her pocketbook. T. 188. The stranger then began hitting her head with something hard, she testified, and she told him where her purse was. T. 189. Mrs. May testified she did not know what he used to beat her (T. 191). The intruder took the gun, car keys and her purse before pushing away Mrs. May's walker and ripping the bedroom telephone from the wall, she testified. T. 200; 206. After the man left, Mrs. May testified she pulled herself to the den and used that telephone to call police. T. 213. An ambulance was summoned and Mrs. May was treated and released at the Mississippi Baptist Medical Center emergency room. T. 214. While she was at the hospital, police officers came with a photographic line-up, from which Mrs. May identified the accused, Joe Lee Brunner. T. 217. Marilyn May arrived to take her mother home from the

hospital, after her mother received a total of eleven staples to close two lacerations to her head and ten stitches to close a laceration above her eye. T. 244-246.

Testimony was completely contradictory as to how police developed Mr. Brunner as a possible suspect. Detective Perry Tate who responded to the scene testified that Mrs. May told him that the intruder resembled someone who once worked for her husband but gave no name. T. 430; 432. Det. Tate also testified that he spoke with Otho May at the May residence, possibly after Lorea May had been taken by ambulance to the hospital, and that Otho May just named a name and told Tate of Joe Brunner. T. 430. Mr. May, however, was adamant that police asked him of Mr. Brunner, that he had no recollection of assisting police identifying Mr. Brunner as a possible suspect and that he was never even asked by anyone about prior employees who might have been involved in the attack. T. 259; 260; 273.

Tate testified he left the Mays' home for Mr. Brunner's residence but Mr. Brunner was not there. T. 431. Tate testified he then left his business card and prepared the photographic array from which Lorea May later identified Mr. Brunner, although she could *not* definitively identify Mr. Brunner as her assailant during trial, nor could she discern the race of the court reporter to her immediate right or the dark gray tie the assistant district attorney wore as he stood before her. *Exhibit 17*; T. 184-185; 219.

Upon cross-examination, Mrs. May testified she had seen Mr. Brunner only once when her husband took money to Mr. Brunner at his home, but that she did not know Mr. Brunner personally. T. 221. Otho May, however, testified that Mr. Brunner had been to the Utah Street home of the Mays more than one time. T. 272.

The testimony took a bewildering turn regarding the Mays' 2002 Cadillac, recovered March 8, 2006 (T. 304-305) in rural Copiah County. T. 323. Deputy Jesse Twiner testified that Jackson police sought his assistance in locating the missing Cadillac and Mr. Brunner, reportedly

visiting the family of Leshandre Martin, Mr. Brunner's girlfriend and mother of his infant. T. 314. Twiner testified that he received a call from a rural resident who wanted law enforcement to check a black Cadillac parked on her rural road. T. 316; 323; 331. Twiner testified the Vehicle Identification Number matched that of 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.

At trial, Mr. Brunner admitted stealing the truck in Copiah County and that it was a "crazy, dumb thing to do, but I had to get home." T. 367. Mr. Brunner testified that he had left Otho May's employ because he needed more hours than May could provide, disputing allegations that May fired him for stealing. T. 416-418. According to testimony by Mr. Brunner, on the morning of March 7, he ran into Clinton 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. Mr. Brunner testified he picked up Martin, dropped their daughter off with a relative and went to visit Copiah County that afternoon, returning to Jackson about midnight. T. 358; 362. Mr. Brunner testified that he saw Pierre again the next day and again rented the Cadillac for a return visit, this time with Pierre, to Copiah County, where the car began "puddling" and went dead on the street in front of Hazlehurst Funeral Home. T. 365-366. Mr. 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. Mr. 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, however, varied in respects with a video tape made by the Copiah County Sheriff's Department recorded March 23, 2006, such as who he was with and where certain events took place on March 7th-9th. T. 355.

Leshandre Martin corroborated that the two went to Copiah County March 7 in a black car provided by “Red” the name by which she testified she knew Clinton Pierre. T.437; 438. She also testified that she did not see Mr. Brunner on March 8 because she was asleep. T. 449; 450. Martin also testified that the reason she could not identify Clinton Pierre from a photographic array was because the photographs were too blurred to be recognizable and that police never returned as they promised with clearer photographs. T. 446; 451.

No fingerprints or any other physical evidence linked Mr. Brunner to burglary of the Mays’ home, nor the armed robbery and aggravated assault of Lorea May. T. 304; 305.

SUMMARY OF THE ARGUMENT

The trial court's abuse of discretion in denial of Instruction D-10 essentially cut off presentation of Mr. Brunner's defense of misidentification to the jury. The trial court ruled that the instruction, concerning time-tested guidelines for the evaluation of eyewitness identification, were repetitious of other instructions. Mr. Brunner also asserts the trial court failed to use the appropriate legal standard to analyze the proposed instruction. In addition, Mr. Brunner submits that a comparison of the denied Instruction D-10 with the two instructions which were given, C-2 and C-4, clearly demonstrates a lack of repetition.

Mr. Brunner also contends 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, who suffered severe lacerations to her head and eye during the March 7, 2006 incident. An essential element of any crime is to identify the accused beyond a reasonable doubt; Mr. Brunner submits the identification was not beyond a reasonable doubt.

ARGUMENT

I. The trial judge abused his discretion when he denied Instruction D-10 regarding factors by which the jury could evaluate the credibility of the identification by Lorea May, as this denial prevented presentation of Mr. Brunner's defense of misidentification;

It was error to refuse the submission by Mr. Brunner of Jury Instruction D-10 (CP 35-36) regarding identification because Mr. Brunner respectfully submits the trial judge did *not* cover factors to assess the credibility of Lorea May's identification in Instructions C-2 and C-4. Rejection of Instruction D-10 was an abuse of discretion and reversible error, as it deprived Mr. Brunner of his fundamental constitutional right to present his defense of misidentification to the jury through appropriate jury instructions. T. 457; RE 27. *See Crane v. Kentucky*, 476 U.S. 683 (1986); AMEND. VI; XIV, U.S. CONST.

In so ruling, Mr. Brunner also asserts that the trial court failed to use the proper standard for evaluation of the requested instruction, as required by long-standing case law.

[I]n deciding whether there is sufficient evidence that an issue be submitted to the jury, we must consider all of the evidence in the light most favorable to the party requesting the instruction ... That party must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Jones v. State*, 768 So.2d 1241, 1254, ¶ 40 (Miss. 2001).

This standard has been applied when the Court considers the denial of an instruction regarding weighing the credibility of impeached witnesses (*McGee v. State*, 608 So.2d 1129, 1134-1135 (Miss. 1992)) or a lesser offense instruction as in *Booze v. State*, 964 So.2d 1218, (Miss.Ct.App. 2007).

Jones also points out that "the granting of instructions should err on the side of inclusion rather than exclusion." [internal citations omitted]. So long as the proposed instruction correctly states the law, is supported by the evidence *and is not repetitious*, the requested instruction should be granted. *Jones., Id.*

The trial court rejected as “repetitious” the following instruction:

Instruction D-10 (CP 35-36)

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.

In evaluating the identification testimony of a witness you should consider your assessment of the credibility of any witness in general, and should also consider, in particular, whether the witness had an adequate opportunity to observe the person in question at the time or times about which the witness testified.

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 known 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.
[emphasis not in original]

Instead, the trial court ruled that the following two instructions adequately addressed the issue of identification:

Instruction C-2 (CP 28)

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

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.

Instruction C-4 (CP 30)

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.

Turning to the record then, the crux of the matter here is whether Instruction D-10 was repetitious of Instructions C-2 and C-4. Mr. Brunner asserts D-10, compared with C-2 and C-4, is not repetitious. In this case, identification of Mr. Brunner as the assailant rested solely on the testimony of a then 81-year-old woman, without her customary glasses, in a darkened bedroom with only light from a hallway which she testified does not light the bedroom. T. 185; 230; 233. Lorea May could not properly identify Mr. Brunner in the courtroom nor even describe him for the record at trial. T. 218; 219; 224 Mrs. May could not identify the race of the court reporter seated directly to her right in the courtroom and told the jury the prosecutor wore a light blue tie when the tie was dark gray. T. 184-185. Mrs. May gave no description of clothing, hair, eyes, height, weight, facial hair, tattoos or any other identifying characteristics such as voice. T. 224-226; 234 235. Mr. Brunner had dreadlock hair on March 7th, he testified, and the record reveals he had a scar on his face, tattoos on his neck and all over both arms all the way up, including wrists, hands, knuckles and the back side of his arms. T. 376-378. When counsel for Mr. Brunner asked her at trial whether she looked carefully at the face of the intruder, she replied,

“With the light that I had, I did the best I could.” T. 238. With all due respect to Mrs. May and the trauma she endured, Mr. Brunner humbly submits that falls far below the standard of beyond a reasonable doubt.

In *Warren v. State*, 709 So.2d 415, 420-421 (Miss. 1998), the state Supreme Court reversed the voyeurism conviction of Warren due to the trial court’s refusal to give the one instruction dealing with factors by which jurors could evaluate the credibility of the complainant’s identification, “which was anything but conclusive,” Justice Banks wrote. In *Warren*, as here, the identification was based on the testimony of one witness. The factors contained in D-10 are those outlined in *Neil v. Biggers*, 409 U.S. 188, 198 (1972) and accepted by the Mississippi Supreme Court in *York v. State*, 413 So.2d 1372 (Miss. 1982). Instructions C-2 and C-4, however, offer mere generalities, not court-tested guidelines to assist jurors in assessing the credibility of Mrs. May’s identification – or misidentification – of Mr. Brunner. This instruction was the heart of his defense theory, that of misidentification. Mr. Brunner’s first trial on these matters ended in a mistrial; and jurors in the second trial initially notified the judge they were hopelessly deadlocked. CP 24.

Mr. Brunner submits that the Supreme Court’s decision in *Warren* is dispositive of the issue here, necessitating reversal and remand.

II. The evidence was insufficient as a matter of law to support the verdict of the jury.

Throughout a criminal trial, the burden never shifts from the state to prove all essential elements of the crimes charged, including presentation of proof “beyond a reasonable doubt the identity of the defendant as the one guilty of the offense charged...” *Evans v. State*, 382 So.2d 1084, 1085 (Miss. 1980). Mr. Brunner respectfully contends the state failed to prove beyond a reasonable doubt that he was the one who entered the home of Lorea and Otho Mays on March 7, 2006 and robbed and assaulted Lorea Mays.

This issue is closely linked with that in Mr. Brunner's first assignment of error, as the record demonstrates that Mrs. May testified her eyeglasses were in the nightstand during the entire incident, that the only available hallway light did not reach into the bedroom where she lay and she could give absolutely no identifying characteristics. (*See discussion in Issue No. 1*) Mrs. May initially told police the man who entered her home resembled one of her husband's employees. Mr. Brunner had worked for Mr. Otho May for several years and had, according to testimony from both Otho May and Mr. Brunner, been to their Utah Street home more than once.

No fingerprints or any other physical evidence ties Mr. Brunner to the burglary, armed robbery and assault of Mrs. May and jurors were deprived of the factors courts traditionally use to test the credibility of an eyewitness identification by denial of Instruction D-10.

In *Bush v. State*, 895 So.2d 836 (Miss. 2005), the Court reiterated the standard it uses to review denial of a directed verdict motion and Motion for Judgment Notwithstanding the Verdict: (CP 85-88; T. 456; RE 26)

“...in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows “beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.” ... the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.*

Given Mrs. May's own testimony and her inability at trial to conclusively identify Mr. Brunner or even describe him, counsel for Mr. Brunner argues that no rational trier of fact could have found Mrs. May, the sole eyewitness, so credible in her identification as to be beyond a reasonable doubt. The critical nature of the identification cannot be doubted; Mr. Brunner's first

trial ended in a mistrial and jurors in the second trial subsequently notified the trial judge they were hopelessly deadlocked before finally arriving at a verdict of guilty on all counts. CP 24.

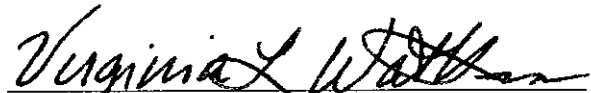
For these reasons, Mr. Brunner respectfully requests this honorable Court reverse and remand his conviction for a new trial.

CONCLUSION

The trial court's denial of requested Instruction D-10, to guide jurors on considering the credibility of Lorea May's identification of Mr. Brunner as her attacker essentially deprived Mr. Brunner of presentation of his defense of misidentification to the jury. As explained herein, Mr. Brunner also asserts that the trial court failed to use the appropriate standard in reviewing Instruction D-10 due to the critical nature of the identification. An adequate evidentiary basis existed for the giving of the instruction and as demonstrated by a comparison of the two instructions the trial court gave, in contrast to the rejected Instruction D-10, there was no repetition.

For these reasons, Mr. Brunner humbly seeks reversal and remand of his conviction for a new trial consistent with fundamental constitutional minimums.

Respectfully submitted,



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Certificate of Service

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