IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CAVIN EARL REED — APPELLANT

VS. — NO. 2008-KA-0573

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VERSUS — NO. 2008-KA-0573-COA

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STATEMENT OF THE CASE

Procedural History

Cavin Earl Reed was convicted in the Second Judicial District of the Circuit Court of Harrison County on a charge of murder and was sentenced as an habitual offender to a term of life imprisonment in the custody of the Mississippi Department of Corrections. (C.P.101-02) Aggrieved by the judgment rendered against him, Reed has perfected an appeal to this Court.

Substantive Facts

Aisha Carson testified that in August 2006, she lived at the Keesler Bay Villas apartment complex. The victim in this case, Angie Combs, lived in Building One of the same complex. Ms. Carson identified the defendant, Cavin Reed, as the boyfriend of the victim. (T.108-10)

Early in the morning of August 3, 2006, Ms. Carson made a 911 telephone call. (T.111) When she was asked why she had done so, she testified as follows:

> I was in my bedroom, which was her bedroom was next to mine. And I didn't know at that time. I heard a loud commotion. Then my daughter came in screaming. And she told me that it was Angie. So I went and verified it, and then I called the police.
>
> * * * * *
>
> It sounded like they was [sic] hitting wall to wall in bedroom.
>
> (T.111)

Ms. Carson clarified that the noise was coming from "the apartment next door" to her own. After she "grabbed" her telephone and "went on the balcony," she saw Ms. Combs "being pushed through the window, pushed in and out a couple of times." As Ms. Carson was "on the phone with the dispatcher," she heard Ms. Combs "say she give in." After Ms. Carson ended the 911 call, she saw a blue Lumina "pulling out real fast." The police arrived shortly thereafter. (T.111-17)

Officer Michael Brennan of the Biloxi Police Department was dispatched to the Keesler Bay Villa Apartments that morning at 4:12. He arrived approximately two minutes later to observe "a black female on the southwest end on the third floor balcony pointing toward the northwest end of that building." He "looked up and observed a broken window with blinds sticking out of it." As Officer Brennan "proceeded up the northwest stairwell" he "observed several drops" of what he "identified as blood leading to the second floor breezeway." As he "proceeded to the second floor breezeway," he "observed in the center a large pool" of what he identified "as blood in the center of the breezeway, and the droplets proceeded from that pool to

the northwest stairwell." He then "proceeded to that stairwell and proceeded up it toward the third floor." (T.142-46)

Assisted by another officer, Officer Brennan followed the trail of droplets to Apartment 136. Officer Brennan "observed no signs of forced entry on the doorway." He "knocked loudly several times" and announced that he was a police officer. After he "had no response," he "listened and heard" what he "believed to be a TV." He then "checked the doorknob," found it to be unlocked," opened the door, and announced his "presence as the police several times loudly and had no response." He then "made entry to check on the welfare of possible occupants in the residence." (T.146-47)

In the "first room," the living room, Officer Brennan found "[t]wo young black female juveniles later identified as Analia Combs and Alijah Combs," the children of Angie Combs. These children were aged two and seven, respectively. They were sleeping on the sofa and "appeared undisturbed." As Officer Brennan walked through the living room, he saw what appeared to be blood droplets and blood-smeared pieces of grass at the entrance to a hallway. Having determined that the disturbance had occurred in "[t]he bedroom directly at the end of the hallway," Officer Brennan entered that room. His attention was "immediately drawn to the right wall where a window was, the only window on the wall." The window was "broken and the remaining pieces of glass were covered" in what he "identified as blood." Having cleared "the room to make sure that there was [sic] no other victims or suspects in the room," Officer Brennan "back to the doorway." From there he "observed three shell casings": one immediately to the right, the second "on the bed itself," and the third "to the left of the bedroom on the carpet." (T.147-52)

Officer Brennan then "checked the parking lot for [a] possible location of where a vehicle was that might have been involved." He "observed most parking spots taken," but saw "one empty parking bay on the north end parking lot perpendicular to the 100 building. It was approximately six spaces from the 100 building on the north end ... " This space "had a pool" of what Officer Brennan "believed to be blood on the right side of it." (T.152-53)

Officer Eugene Palmer of the Biloxi Police Department testified that he "was about the third or fourth police patrol officer" to arrive at the scene of this crime. When he "started to go up the stairs to assist the other officers," they "advised they didn't need any assistance." After "the vehicle description and suspect description" were "given over the radio," Officer Palmer "proceeded back towards the City of Biloxi in an attempt to try to locate the vehicle, the suspect, and the victim." As he was traveling "southbound on 110 just across the drawbridge," he "looked over into the northbound side of 110 and saw a vehicle parked on the shoulder area just south of the drawbridge, and it looked like... the suspect vehicle[,] ... a dark colored Chevy Lumina." Officer Palmer "had to turn around and come back northbound to make contact." When he did so, he observed a "female passenger ... leaned back in the front passenger seat... Her head was slumped over to the ... side of the door, and she was completely covered in blood." It was "very apparent" to Officer Palmer that the woman was dead. He also saw "quite a bit of blood on the dash, on the seat, on the back rest, on the windows, and on the center console armrest area." There "was also blood running ... outside the vehicle on the front passenger door, ... dripping out onto the roadway." Officer Palmer then "called for a supervisor." Once the supervisor arrived, Officer Palmer "left the area." (T.163-69)

Investigator Michael Brown of the Biloxi Police Department testified that on August 3, 2006, he was dispatched to the residence of Pearlie Mae Reed, the defendant's mother. As he

began talking with Ms. Reed, her telephone rang. Ultimately, Investigator Brown spoke with the caller, who identified himself as Cavin Reed. The caller told Investigator Brown that he was at 9120 Jim Ramsey Road in Vancleave. "At first" Reed asked "could his mama come and pick him up," but Investigator Brown "told him that wouldn't work," but that he (Investigator Brown) "would have to come and pick him up." While Reed was providing directions to his location, he told Investigator Brown "that a sheriff's car had pulled up in the yard." Investigator Brown advised Reed to "walk outside with his hands up, and that's what he did." (T.175-78)

Thereafter, Reed waived his rights and gave a statement, a recording of which was admitted into evidence and played for the jury. (T.181-84) In that statement, Reed said that he was frustrated that Ms. Combs had been refusing to have sexual relations with him. He stated further that he had taken the locked doorknob off her bedroom door, and that he and she "got into a confrontation." Because she had threatened earlier to shoot him, he "just snapped" when he heard her say "boom." He then shot her, took her to his car, drove her "across the bridge" to Biloxi, and ultimately abandoned Ms. Combs and the car.

Carrissia Martin testified that she had known the defendant for approximately 10 years and the victim for 10 to 12 years. "[A] couple of months" after she moved to Keesler Bay Villa Apartments, she "found out" that Reed and Ms. Combs "were dating." Ms. Martin was under the impression that Reed was living with Ms. Combs. Reed would on occasion visit Ms. Martin at her apartment. Approximately two weeks before Ms. Combs' death, Reed told Ms. Martin that "people was [sic] telling him that she was cheating on him and that he was tired of the cheating and stuff like that." A "couple of days before" Ms. Combs died, Reed reiterated that he was "sick" of Ms. Combs' "cheating" and said that "she [Ms. Combs] wasn't going to be around ... because he was tired of it." (T.189-93)

Dr. Paul McGarry, accepted by the court as an expert in the field of forensic pathology, testified that he had performed the autopsy on the body of Angeline Combs. The victim had sustained "little cut wounds on the soles of her feet involving her toes, involving her toenails. She had some cut wounds on the back of her wrists, fingernails." She also "had a bruise on the front of each shoulder, and she had a one and a half inch abrasion on her left knee, a smaller abrasion of her left ankle where the skin was rubbed away as if she had fallen on a rough surface." (T.205-06)

Dr. McGarry went on to testify that Ms. Combs had suffered two gunshot injuries which he described as Wound A and Wound B. Wound A "went into her cheek right at the angle of her mouth on the right. It went upward and backward, slightly rightward and came out right at the base of her ear." The bullet which caused this wound "did not hit any vital structures" and would not, by itself, have been fatal. Wound B "went in the back of her shoulder seven inches to the right of the midline of her back one and a half inches below the top of her shoulder ... " This wound "also went upward"; it also "went forward 15 degrees and "came out the top of her shoulder." The bullet "opened up some sizable vessels to the right side of her neck where it went in," causing "bleeding into her throat, her mouth, her nose." (T.206-09) Ms. Combs had died of the resulting internal and external bleeding. (T.221)

In August 2006, Michael Reid was employed by the Biloxi Police Department as a crime scene investigator. When he was dispatched to the scene of this crime on August 3, he "found a trail of blood leading from apartment 136." This trail "continued down the west stairwell to the second floor, ... across the breezeway to th east side stairs, went down those set of the stairs, through a grassy area, into the parking lot, and to a parking space," where "there was a large pool of blood." He also observed "a broken window" which he later determined to be in Apartment

136. In that apartment, "There were blood drops between the master bedroom to the front door. There were ... bullet casings found." One casing "was found on the floor just inside the doorway. One was found on the bed, and the other one was found on the east side of the bed." Another bullet "was recovered on the floor just under the broken window." Still "another bullet fragment" was found "in the northwest corner of the bedroom." "[T]wo tooth fragments [were] recovered off the bed." Investigator Reid found "a flathead screwdriver on the floor. The doorknob had been removed from the bedroom door." (T.226-34)

The defense rested without presenting evidence. (T.286)

SUMMARY OF THE ARGUMENT

First, the state contends the verdict is based on legally sufficient proof and is not contrary to the overwhelming weight of the evidence. The state presented ample proof that Reed was guilty of murder.

Additionally, the state submits Reed's challenge to the enhancement of his sentence was waived by his failure to object below. Alternatively, the state contends the prosecution presented sufficient proof for enhancement under MISS. CODE ANN. § 99-19-81 (1972) (as amended). Because Reed stands convicted of murder, the sentence would be identical under either of the habitual-offender statutes. It follows that Reed's sentence of life without parole should be affirmed.

Finally, the state asserts that Reed's speedy trial issue is not properly before this Court. His failure to pursue his motion for a hearing and to obtain a ruling thereon leave this Court with nothing to review with respect to this question.

PROPOSITION ONE:

THE VERDICT IS BASED ON LEGALLY SUFFICIENT PROOF AND IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Reed first attacks the sufficiency and weight of the evidence undergirding his conviction of murder. To prevail on the assertion that he is entitled to a judgment of acquittal, he must satisfy the following formidable standard of review:

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> *Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

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).

See also *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991) (on appellate review the state "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence"), and *Noe*, 616 So.2d at 302 (evidence favorable to the defendant should be disregarded). Accord, *Harris v. State*, 532 So.2d 602, 603 (Miss.1988) (appellate court "should not and cannot usurp the power of the fact-finder/ jury"). "When a defendant challenges the sufficiency of the evidence to support a conviction, the evidence which supports the verdict is accepted as true by the reviewing court, and the State is given the benefit of all reasonable inferences flowing from the evidence." *Dumas v. State*, 806 So.2d 1009, 1011 (Miss.2000).

This rigorous standard applies to the claim that Reed 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),

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 the Supreme Court reiterated 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] Indeed, "[t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify." *White v. State*, 722 So.2d 1242, 1247 (Miss.1998). Reed's decision not to testify or to put on any proof at all left the jury free to give "full effect" to "the testimony of the witnesses against" him. *Rush v. State*, 301 So.2d 297, 300 (Miss.1974). The fact that the jurors did so gives him no valid basis for complaint on appeal.

Reed contends that the overwhelming weight of the evidence supports a finding that he acted in self-defense and, alternatively, that the proof supports at best a finding that he was guilty of manslaughter rather than murder. The state counters that the jury was the "ultimate judge" of whether question whether this killing was murder, manslaughter, or committed in self-defense. *Webster v. State,* 817 So.2d 515, 518-19 (Miss.2002).[1]

It is uncontested that Reed shot at Ms. Combs several times and that she died as a result of gunshot wounds. Some two days earlier, he had told Ms. Martin that he was tired of being cheated on and that Ms. Combs would not "be around" much longer. By Reed's own admission, he was frustrated that Ms. Combs had been depriving him of sexual relations, and that he took the doorknob off her locked bedroom door. The state's proof also shows that he pushed her

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[1]The jury was instructed on all three options (C.P.75-81).

through the window, dragged her as she was bleeding down the stairs and into the car, and drove her to a bridge where she was left to die. As the assistant district attorney stated in closing argument, the evidence justified a finding that this killing "was committed with intent in a design that was formed in his ind at the point he decided" that he was "going into that locked bedroom." (T.318) As for the claim of self-defense, the jury was well warranted in rejecting it. As the prosecutor argued in final closing, "What part of boom falls under this [reasonable grounds to apprehend a design on the part of the victim to kill him or do him some great bodily harm]? None of it. Boom. That's it. And then he shoots her in the face... " (T.335)

We incorporate the state's closing arguments by reference, as well as evidence summarized in our Statement of Substantive Facts, in asserting that the the evidence was not such that a reasonable juror could have returned no verdict other than not guilty, or guilty of manslaughter. To the contrary, the proof amply sustains the jury's determination that this killing was not manslaughter, that it was not justified by necessary self-defense, but that it was in fact murder. *See Jordan v. State*, — So.2d —, 2008 WL 4427202 (Miss., decided October 2, 2008); *Chandler v. State*, 967 So.2d 47, 50 (Miss. App. 2006). No basis exists for disturbing its verdict.

PROPOSITION TWO:

REED'S CHALLENGE TO HIS SENTENCE IS PROCEDURALLY BARRED

After the jury returned its verdict of guilty of murder, the following was taken:

> [THE COURT:] I accept that verdict as the judgment of the court. Do you have anything you wish to say before I pass sentence? You don't have to. It's up to you.
>
> THE DEFENDANT: Well, I would like to apologize to the family afterwards or do I have to do that now?
>
> THE COURT: That would be later. That's not necessary now.

THE DEFENDANT: Okay.

THE COURT: All right. State, do you have available to you at this time the supporting documentation to support the amended indictment?

MR. LUSK: Yes, sir, Judge.

THE COURT: Indicting Mr. Reed as a habitual felon, a life habitual.

MR. LUSK: Yes, sir, Judge.

THE COURT: What's it?

MR. LUSK: That on October 2 of 2000 Mr. Reed was convicted in the Circuit Court of Harrison County Second Judicial District, Cause Number 2000-86, a felony possession of a controlled substance. Mr. Reed was sentenced to a sentence of three years. That three years was suspended for time served. We have calculated that time he spent in jail as 16 months and 15 days.

Then also in April of 2003 Mr. Reed was convicted in the Circuit Court of Harrison County Second Judicial District in Cause Number 2003-18 of the felony of simple assault on a law enforcement officer. And Mr. Reed was sentenced to a term of incarceration of five years.

THE COURT: All right. Cavin Earl Reed, the mandatory sentence for the crime of murder in the State of Mississippi is a life sentence.

Since you have qualified as an habitual felon, that is life without parole. That will be the sentence. You can take him away.

(T.344-45)

As shown by the foregoing excerpt, the defense did not contest the prior convictions or sentences, and entered no objection whatsoever to sentencing. The state therefore contends that Reed may not be heard to challenge his sentence on appeal. His second proposition is

procedurally barred. *Sims v. State*, 775 So.2d 1291, 1294 (Miss. App. 2000). Accord, *Magee v. State*, 951 So.2d 589, 592 (Miss. App. 2007).

Solely in the alternative, the state observes that the essence of Reed's challenge is the assertion that the prosecution failed to prove that he actually served separate terms of one year or more on each of his prior felony convictions. We acknowledge that MISS. CODE ANN.§ 99-19-83 (1972) (as amended) requires this proof. However, the state's proof satisfied MISS. CODE ANN. § 99-19-81 (1972) (as amended), which does not require a showing that the defendant actually served one year or more on each prior conviction. Where, as here, the crime for which the defendant stands convicted carries a mandatory sentence of life, there is no distinction between enhancement under Section 99-19-83 or Section 99-19-81.[2]

For these reasons, no basis exists for disturbing the trial court's imposition of sentence. Reed's second proposition should be denied.

PROPOSITION THREE:

REED'S CLAIM THAT HE WAS TRIED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO SPEEDY TRIAL IS NOT PROPERLY BEFORE THE COURT

Reed finally contends that he was tried in violation of his constitutional right to speedy trial. The state does not contest the assertion that Reed was arrested on August 3, 2006, and that he was put to trial 593 days later on March 18, 2008. (Brief for Appellant 18-19) Reed made a demand

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[2]Section 99-19-81 mandates the imposition of the "maximum term of imprisonment prescribed for such felony... " Here, of course, the maximum, indeed the only, term is life.

for speedy trial on August 14, 2006. (C.P.11) On November 9, 2007, Reed moved for a psychiatric examination. (C.P.14-15) That motion was granted the following December 11. (C.P.17-19)

On March 11, 2008, one week before he was brought to trial, Reed filed a motion to dismiss, contending that his constitutional right to speedy trial had been violated. (C.P.30-30-34) The record does not reveal that that motion was ever brought on for a hearing or that the court ever ruled on it. Reed's failure to obtain a hearing and ruling on his motion leaves this Court with no findings or orders to review. Accordingly, the following language demonstrates the lack of merit in Reed's argument:

> As pointed out by the State, although Kolberg filed a motion to dismiss or prevent the second trial asserting speedy trial violations, there were no hearings or orders on these motions. Thus, Kolberg is not appealing to us from an erroneous decision of the trial judge. In *Rushing v. State*, 711 So.2d 450, 456 (Miss.1998), we stated: "It is the responsibility of the movant to obtain a ruling from the court on motions filed by him and a failure to do so constitutes a waiver of the same." (citations omitted). Accordingly, this assignment of error is without merit.
>
> *Kohlberg v. State*, 829 So.2d 29, 88 (Miss.2002).

Here, as well, Reed is not appealing an allegedly erroneous decision of the trial court. To the contrary, Reed's failure to obtain a hearing and ruling leaves this Court with nothing to review.[3] Reed's final proposition should be rejected.

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[3]As a practical matter, the state submits it is impossible to assess the *Barker* factors where, as here, no record has been made with respect to the reason for the delay and the arguable prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514 (1972).

CONCLUSION

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

Respectfully submitted,

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STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
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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:

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