IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LOYAL JOHNSON — APPELLANT

VS. — NO. 2008-KA-0583-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE RULES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LOYAL JOHNSON — APPELLANT

VS. — NO. 2008-KA-0583-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On March 16, 2005, Loyal Johnson, "Johnson" was tried for felony DUI before a Noxubee County Circuit Court jury, the Honorable James T. Kitchens, Jr. presiding. R. 1. Johnson was found guilty and given a five year sentence in the custody of the Mississippi Department of Corrections. R. 294; C.P. 33-34.

From that conviction, Johnson filed notice of appeal to the Mississippi Supreme Court. C.P. 52-53.

ISSUE ON APPEAL

I.
WAS THE VERDICT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

STATEMENT OF THE FACTS

On September 17, 2004, Loyal Johnson was indicted for felony DUI 3rd under M. C. A. Sect. 63-11-30 on May 26, 2004 by a Noxubee Grand jury. His two prior convictions for driving under the influence were on July 9,2002 and September 9, 2003. C.P. 3.

On March 16, 2005, Johnson was tried for felony DUI before a Noxubee County Circuit Court jury, the Honorable James T. Kitchens, Jr. presiding. R. 1. Johnson was represented by Mr. Richard Burdine. R. 1.

Mr. Joni Davis testified that while returning home, his car was struck by another car. On a turn in the road, the other car came over into his lane. When Davis saw the car on his side of the road, he moved as far to his right as he could. He was hindered by a ditch on the side of the road. R. 87-89.

His wife Francesca was with him. R. 87-88. This was on May 26, 2004. R. 85. The impact from the other car dinted his driver's side and back passenger door on the left side of his Cadillac. R. 88. The wreck resulted in over two thousand dollars of damage to Davis's vehicle. R. 110-111. Davis was injured by the blow to his car. He had head and neck injuries. R. 92.

The car that struck a glancing blow to the side of the car did not stop at the scene of the accident. It proceeded down the road and then stopped. The black car then backed up. Davis testified that the driver of the car, Johnson, got out. R. 89.

Davis testified that Johnson "was acting drunk." R. 90. He had trouble walking, had slurred speech and red eyes. Davis testified that there was a "pretty strong smell of beer" coming from Johnson. R. 90. Johnson also offered to pay him money if he would not report the incident to police. Johnson admitted to having prior DUI's on his record.

Davis identified Johnson as the person who hit his car and seemed to be inebriated at the

time. R. 94-95. Davis used his phone to dial 911 and notify police in the area.

Davis testified on cross examination that Johnson had offered him money on more than one occasion after the accident. This was to avoid prosecution. R. 107.

Ms. Franseca Davis corroborated her husband. She testified that Johnson had slurred speech, red eyes, and he "couldn't walk straight." R. 118-119. She also corroborated him in testifying that Johnson offered to pay her husband if he would not report the incident. Johnson told them that he had previous DUIs on his record at that time.

Officer Eddie Franklin testified he was contacted about a wreck. R. 121-165. He arrived at the scene, and then went in pursuit of Johnson. Franklin , who knew Johnson in the community, went to his home. When Johnson got out of a car, and saw Officer Franklin, he ran for the woods. When Officer Franklin caught Johnson, he "had a beer bottle in his hand." R. 125. After Johnson was captured, he told Franklin, "I messed up." R. 125.

Franklin testified that there was a smell of alcohol coming from Johnson at that time. R. 125. This was only about ten minutes after the reporting of the wreck by Mr. Joni Davis. R. 126.

Officer Franklin testified that Johnson would not cooperate with him after he was taken into custody. This was when he attempted to get his "BAC" reading on an alcohol detection devise used by law enforcement. Franklin testified that Johnson not only refused to cooperate, he pretended to be seriously ill. He claimed to have trouble breathing. R. 127-128.

Officer Franklin testified that he did not believe him. He did not belief Johnson was ill because he had witnessed Johnson's feign such illness to avoid being tested for alcohol in his system on prior occasions.

Macon Chief of Police Robert Brown testified. R. 165-171. Brown corroborated Officer Franklin's testimony about Johnson's bizarre non-cooperative behavior. Johnson claimed he

couldn't breathe. He would fall on the floor and roll around. Then he would get up and laugh. He would deny being able to blow into the breath test machine. Then he would assert that he couldn't because he had emphysema. R. 166-167. Brown corroborated Franklin in testifying that he had seen Johnson's strange behavior on prior occasions. R. 167.

When Johnson was tested, his breath alcohol concentration was .112. R. 137. This was an hour and a half after the accident.

The trial court denied a motion for a directed verdict. R. 172.

Johnson testified in his own behalf. R. 203-242. Johnson testified that he was not drinking before the accident. R. 205. But he had some drinks after the accident. R. 211. He further testified that he did not cause an accident rather it was allegedly the fault of Mr. Davis. He denied having offered Davis anything not to report the accident. R. 209. Johnson admitted that he had his driver's license suspended at the time of the accident. R. 209. Johnson admitted that he had two prior DUIs in 2002 and 2003. R. 232-233.

He testified that he did not flee from the scene of the accident. He denied a lack of cooperation with the officers over use of the alcohol breath test machine. He claimed that he had asthma which makes it difficult for him to force sufficient breath into the machine for a valid reading. R. 218; 229. He denied that he was rolling on the floor or laughing when he was supposed to be blowing into "the intoxilizer." R. 136; 166-167.

Mr. Johnson was found guilty and given a five year sentence in the custody of the Mississippi Department of Corrections. C.P. 33-34. Johnson's motion for a new trial was denied . C.P. 46.

From his conviction, Johnson filed notice of appeal to the Mississippi Supreme Court. C.P. 52-53.

SUMMARY OF THE ARGUMENT

When the evidence presented by the prosecution was taken as true with reasonable inferences, there was more than sufficient credible, corroborated substantial evidence in support of the trial court's denial of a motion for a new trial. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993).

It was well corroborated that Johnson smelled of alcohol, had trouble walking, spoke with slurred speech, and had red eyes. R. 90; 118; 126. It was also corroborated that he offered to pay the victim driver not to report the accident because of his prior DUI convictions. R. 90; 118. This was shortly after the car he was driving swerved across the road. It struck the car being driven by the Davis family. It was corroborated that Johnson was driving this swerving car. R. 89;118. Johnson was an adult male. Johnson admitted that had two prior DUIs within five years of this conviction. R. 232-233; 303-304. See M. C.A. Sect. 66-11-30.

This evidence was in addition to Johnson's .112 alcohol in his breath reading an hour after the wreck. R. 137.

There was also corroborated evidence of Johnson's refusal to cooperate in submitting to a measurement of alcohol content in his breath test. R. 136; 166.

This provided more than sufficient corroborated evidence for inferring from the totality of the evidence that Johnson was impaired by alcohol at the time his car struck the side of Mr. Davis's vehicle. **Murray v. State** 967 So. 2d 1222, 1234 (¶ 38) (Miss. 2007); **Kramm v. State** , 949 So. 2d 18, 24 -25 (Miss. 2007).

Johnson's testimony about drinking after rather than before the accident merely created a conflict in the evidence. The jury was responsible for resolving in their deliberations. R. 121-165.

There was no injustice involved in the trial court's denial of a motion for a new trial. **Jones**

v. State , 635 So. 2d 884, 887 (Miss. 1994).

ARGUMENT

PROPOSITION I

THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE JOHNSON'S CONVICTION.

Johnson argues that there was insufficient evidence in support of his conviction. The verdict in his opinion was against the weight of the evidence. While there was evidence that his breath alcohol content, "BAC" was over .08%, he argues there was no proof that he was drunk at the time of the accident. It was taken an hour after the wreck at issue. Johnson argues that his testimony about how he drank "after" the accident was sufficient for indicating that he was not under the influence at the time of the wreck. Appellant's brief page 1-11.

To the contrary, the appellee would submit that the record reflects that there was substantial, credible corroborated evidence in support of the jury's verdict and the trial court's denial of a motion for a new trial. R. 294; C.P. 46.

Both Mr. Joni and Mrs. Francesca Davis testified that Johnson's car ran them off the road. The car Johnson was driving, a 1994 black Chrysler, struck the driver's side of their Cadillac.

The Davises both testified to seeing Johnson get out of the driver's seat of the car. R. 89; 118. They both testified that Johnson speech was slurred, his eyes were red , and he couldn't walk straight. He offered them money if they would not call the police. R. 90; 118. This was within a few minutes of the accident.

Mr. Joni Davis testified that he was struck by another car. His wife Francesca was with him. R. 87-88. This occurred when they were returning home. When Davis saw the car coming toward his side of the road, he moved his vehicle over. He moved as far to his right on the shoulder of the road as he could. He was hindered by a ditch on the side of the road which was totally off the

pavement.

Nevertheless, his car was struck. It was struck a glancing blow to the driver's side front and back door. The swerving car kept going. It went right on past Davis's car. It finally stopped and then backed up. Davis testified that the driver of the car, Johnson, got out. R. 89.

Davis testified that Johnson "was acting drunk." R. 90. He had trouble walking, had slurred speech and red eyes. Davis testified that there was "a pretty strong" smell of beer. R. 90. It was coming from Johnson. Johnson also offered to pay Davis money if he would not report the incident to police. Johnson admitted to having prior DUI's on his record.

Q. What did you notice about this defendant, Loyal Johnson, when he got out of the car?

A. **He was acting drunk.**

Q. What do you mean by that, he was acting drunk?

A. He was walking, like-walking in the – you know how you are when you're drunk. **And then once he got up to me and started talking, he was talking in a slurred way. Then he go on and ask me was I all right. Then he go on and ask me to lie for him and, you know, say he wasn't driving so that he couldn't get another DUI because he said he already had one. So I called the police and he left.**

Q. Okay. Did you notice anything about his eyes? What did you notice–

A. **His eyes were red.**

Q. When he came up to you–

A. Red and glossy.

Q. **What did he smell like?**

A. **Beer.**

Q. **How strong was the odor of beer?**

A. **It was pretty strong.** R. 90.

...

Q. Okay. Now, how did he leave? How was he able to leave?

A. He was walking–how was he able to leave? He walked on to the car. And the dude that was with him jumped on the driver's seat. He jumped in the passenger's side and he left. R. 91. (Emphasis by appellee).

Ms. Franseca Davis corroborated her husband. She testified that Johnson's "speech was slurred. " He had "blood shot red eyes." "He couldn't talk right"; and he "couldn't walk straight." R. 118-119. She also corroborated him in testifying that Johnson offered to pay her husband money. He would pay if he would not report the incident. Johnson told them that he "have some DUIs."

Q. And then what did it do?

A. **Once he kept going, he then backed up and asked my husband was he all right. My husband say, yeah. And he said, well, I have $500 I'll give you because I don't want to get in any trouble because I already have some DUIs.** R. 118. (Emphasis by appellee).

...

Q. Tell me what you meant by that. (Acting drunk)

A. **He couldn't walk straight, and his eyes were blood shot red, and his speech was slurred. He couldn't talk right**. R. 118-119.

Officer Eddie Franklin testified he was contacted about a wreck. Franklin was working with the Macon Police Department. R. 121-165. This wreck call was from Mr. Davis. Franklin arrived at the scene. He continued in pursuit of Johnson's car. When Franklin located Johnson, he testified to seeing him get out of a car and run. He also testified that Johnson "had a beer bottle in his hand." R. 125. This was when he was chased down in some woods behind his house. R. 125-126.

When Officer Franklin subdued him, Johnson told him that he had "messed up." Franklin testified that there was a smell of alcohol coming from Johnson at that time. R. 126. He also had "red eyes." This was only about ten minutes after the reporting of the wreck by Mr. Joni Davis.

Q. Now what happened when you finally caught this defendant out in the woods

behind his house?

A. **When I caught Mr. Johnson, Mr. Johnson had a beer bottle in his hand, and he was just saying over and over, "I messed up".**

Q. Okay. What did you observe about him when you caught him?

A. **He was very talkative, eyes was red and I smelled a scent that believed to be that of alcohol.**

Q. **So you were able to smell alcohol on him?**

A. **Yes, sir.**

Q. Okay. I want to talk time now. From the time the call about the wreck came in until the time you actually had located the defendant and physically had him in your custody, how long a total time are we talking?

A. **About ten minutes.** R. 126. (Emphasis by appellee).

Officer Franklin testified that Johnson "would not cooperate in no type of way." R. 136. This was when he attempted to get his breath alcohol content reading on an alcohol detection devise used by law enforcement. Franklin testified that Johnson not only refused to cooperate, he pretended to be seriously ill. He claimed to have trouble breathing. R. 136.

Officer Franklin testified that he did not believe this was the case. He did not belief Johnson was ill. He did not think so because he had witnessed Johnson's feign such illness to avoid being tested for alcohol in his system on prior occasions.

Q. Okay. Can you explain to the ladies and gentlemen of the jury why it took that much longer than twenty minutes? (To get intoxilyzer results from Johnson)

A. Mr. Loyal refused to cooperate. He was falling out on the floor stating that he had trouble breathing. He said he had some type of disease that prevented him from blowing into the machine. So he would not cooperate in no type of way.

Q. **Did you take his assertion that he was having trouble breathing or that he had a disease seriously?**

A. **No, sir.**

Q. **Why not, sir?**

A. **Because we had dealt with Mr. Johnson before and he also does this**. R. 136. (Emphasis by appellee).

Officer Franklin identified Johnson as the person whose breath alcohol content was .112. This was over a hour after the automobile accident. R. 141-142.

> Q. Now, Officer Franklin, the person who you caught running from you in the woods behind his house minutes after the call about the wreck came in, the person who smelled of alcohol to you when you caught him, the person who told you had messed up and the person who ran a .112 on the intoxilyzer an half hour and twenty minutes after you caught him and took him into custody, is he in the courtroom here today?
>
> A. Yes, sir. R. 141.
>
> Clark: Your Honor, may the record reflect that this witness has also identified the defendant.
>
> Court: The record will so reflect. R. 142.

Macon Chief of Police Robert Brown corroborated Franklin. He testified that he also witnessed Johnson's non-cooperation and feigned illness. This occurred when Johnson was asked to submit to a breath test. This was to test for the presence of alcohol in his respiratory system. Johnson rolled on the floor pretending he could not breath. After he got up off the floor, he laughed. R. 136; 166-167.

In **Murray v. State** 967 So. 2d 1222, 1234 (¶ 38) (Miss. 2007), the Mississippi Supreme Court affirmed Murray's conviction for felony DUI third under the implied consent law, M.C. A. Sect. 63-11-30. Although Murray denied driving the truck involved in an accident initially, there was testimony that he smelled of beer. He had exited the truck scattered with open beer cans. And he was the only person seen by witnesses at the scene of an accident involving his truck.

> ¶ 38. "When there is other sufficient evidence of impaired operation, no eyewitness testimony of impaired operation is needed to sustain a conviction." **Turner v. State**, 910 So.2d 598, 601 (Miss. Ct. App.2005) (citing **Holloway v. State**, 860 So.2d 1244,

1246-47 (Miss. Ct. App.2003)). As in **Turner**, we conclude that "there was sufficient credible evidence from which it could be reasonably inferred" that Murray was operating the truck at the time of the accident. **Turner**, 910 So.2d at 601.

In **Kramm v. State** 949 So. 2d 18, 24 -25 (Miss. 2007), the Court affirmed Kramm's conviction for DUI. This was a hit and run on highway 90 near Grand Casino, Biloxi. Kramm's SUV struck a Honda from behind. The SUV did not stop. There was no eye witness who actually saw Kramm driving the vehicle that caused the accident. There was however testimony from eye witnesses and law enforcement from which it could be reasonably inferred that Kramm was driving the vehicle while he was under the influence of intoxicants. This included testimony that Kramm smelled of beer, and had slurred speech.

¶ 22. Following the guidance provided in **Holloway** and **Lewis**, we conclude that the State is not required to provide eyewitness evidence that Kramm was the driver of the SUV at the time of the accident as long as it provides sufficient proof supporting a reasonable inference that the defendant was driving the vehicle. See also **Turner v. State**, 910 So.2d 598, 601 (Miss. Ct. App.2005).

¶ 24. Here, no new trial is warranted, as the jury's verdict is consistent with the weight of the evidence allowing the State the benefit of all reasonable inferences drawn from the evidence. Sitting as the "thirteenth juror," we find that the evidence and testimony, weighed in the light most favorable to the verdict, support the jury's conviction.

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not an appellate court.

The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). 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. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); **Wetz** at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. Spikes v. State, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808 , **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984). We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

As shown above with cites to the record, the corroborated testimony of state witnesses was more than sufficient for the trial court to deny all peremptory instructions. Mr. Joni and Mrs. Francesca Davis corroborated each other as to Johnson's behavior. His actions at the scene indicated to them his alcohol impaired condition. They both testified to observing him get out of the driver's seat. R. 89; 118. They testified of his inability to walk, or talk in a coordinated normal fashion. They also could smell alcohol on his breath. R. 90-91; 118-119.

Officers Brown and Franklin with the Macon Police Department corroborated each other. R. 136;166. They both testified to Johnson's delaying tactics when he was asked to blow into the alcohol in your respiratory system machine used by law enforcement. They testified to having witnessed his evasive actions and claims of sickness in the past. Franklin could smell alcohol on Johnson's breath also.

The .112 reading on "the intoxilyzer" indicated that was under the influence of alcohol an hour and an half after the accident. Johnson was an adult male. R. 137.

Therefore, the appellee would submit that under "the totality of the circumstances,"it was reasonable to infer that Johnson was not just intoxicated an hour after the accident. He was also impaired by alcohol when his car struck Mr. Davis in a curve of the road.

In **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion for a new trial should be denied unless doing so would result in an "unconscionable injustice."

> Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent "an unconscionable injustice." **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987).We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict." **Jackson v. State**, 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

When the evidence cited above was taken as true with reasonable inferences, there was more than sufficient, credible substantial evidence in support of the trial court's denial of a motion for a new trial. The testimony and evidence cited above provided a reasonable basis for inferring from all the evidence that Johnson was intoxicated at the time he drove into Mr. Davis' car.

He was seen getting out of the car smelling of alcohol. R. 89-90; 118-120. He had trouble walking and talking along with red eyes. R. 90; 118-119. He smelled of alcohol when apprehended some ten minutes later while holding on to a beer bottle. R. 125. He tried more than once to avoid being prosecuted by offering to pay the victim. R. 90;118. He registered .112 on the alcohol in breath content as shown on an chemical analysis instrument. R. 137.

The appellee would submit that there clearly was no injustice, much less an "unconscionable injustice," involved in denying Johnson's motion for a new trial.

This issue is lacking in merit.

CONCLUSION

Johnson's conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

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

CERTIFICATE OF SERVICE

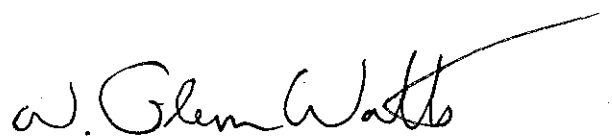
I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable James T. Kitchens, Jr.
Circuit Court Judge
P. O. Box 1387
Columbus, MS 39703

Honorable Forrest Allgood
District Attorney
P. O. Box 1044
Columbus, MS 39703

Leslie S. Lee
Attorney at Law
Mississippi Office of Indigent Appeals
301 N. Lamar Street, Ste. 210
Jackson, MS 39201

This the 11th day of June, 2009.



W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

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