IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TERRANCE GARY — **APPELLANT**

VS. — **NO. 2008-KA-0619-COA**

STATE OF MISSISSIPPI — **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

In a shootout perhaps reminiscent of Wyatt Earp and the gunfight at the OK Corral, young Louis Trevillion, a high school senior, was tragically caught in the crossfire and killed by a bullet the State contended was fired from a handgun wielded by Terrance Gary. The two issues raised in this appeal focus squarely upon the sufficiency and relative weight of testimony used to convict Terrance Gary of the lesser included offense of manslaughter by culpable negligence following his indictment for murder less than capital.

Gary claims the State failed to prove beyond a reasonable doubt Gary's identity as the shooter of Louis Trevillion.

He claims, in the alternative, "Gary simply tried to stop a fight between Louis Trevillion and Vernon Gary" and fired his pistol in self-defense. (Brief of Appellant at 7-8)

The posture of this case is controlled fully, fairly, and finally by the recent decision of **McCallum v. State,** No. 2007-KA-00992-COA decided December 9, 2008 [Not Yet Reported],

citing **Chambliss v. State,** 919 So.2d 30, 33-34 (¶10) (Miss. 2005) (quoting **Bush v. State,** 895 So.2d 836, 844 (¶18) (Miss. 2005)).

TERRANCE GARY, a non-testifying African-American male and young resident of Hermanville (R. 46) at the time of his trial and conviction for manslaughter, prosecutes a criminal appeal from the Circuit Court of Claiborne County, Lamar Pickard, Circuit Judge, presiding.

Gary, in the wake of an indictment for murder less than capital returned on November 8, 2006 (C.P. at 3), was convicted of "manslaughter by culpable negligence." (C.P. at 54)

Gary apparently seeks a reversal and discharge but, if not, at least a remand for a new trial. (Brief of Appellant at 3)

The defendant's criminal indictment, omitting its formal parts, alleged that Terrence Gary ". . . on or about the 8th day of November, 2006, . . . did wilfully, unlawfully, feloniously, and of his malice aforethought and without the authority of law, kill and murder one Louis Trevillion, a human being, contrary to and in violation of Section 97-3-19 of the Mississippi Code of 1972 . . ." (C.P. at 3)

Following a one (1) day trial by jury conducted on November 15, 2008, the jury returned a written verdict of, "We the jury find the defendant, Terrance Gary, guilty of manslaughter by culpable negligence." (C.P. at 54)

Two (2) issues are raised on appeal to this Court:

1. "Whether the trial court erred in denying [Gary's] motion for [a] directed verdict [made at the close of the State's case-in-chief."]

2. "Whether the trial court erred in denying [Gary's] motion for a new trial."

STATEMENT OF FACTS

On November 8, 2006, around 1:00 p.m., Louis Trevillion and Vernon Gary were engaged

in a "tussle" (R. 63) at the New Store off Highway 18 in Hermanville. Each was wrestled to the ground with Vernon Gary on top of Louis Trevillion. (R. 63, 125-26)

In the meantime, John Trevillion, Louis's brother, and Terrance Gary, Vernon's cousin, showed up at the scene of the altercation and began bickering with each other. (R. 64) Terrance Gary apparently wanted to break up the altercation while John Trevillion wanted to let them fight.

John Trevillion had a stick in his hand. (R. 65) Terrance Gary, perhaps in quest of an equalizer, walked over to Vernon's car, retrieved a 9 mm pistol and cocked it. (R. 66) Upon seeing that Terrance Gary had armed himself with a gun, John Trevillion pulled out his .45. After taking cover, both Terrance Gary and John Trevillion began shooting at one another across the parking lot. (R. 65-66) According to Edward Jenkins, an ear and eyewitness to the incident, four (4) to six (6) shots were fired.

Regrettably, Louis Trevillion was struck in the cross-fire.

Vernon Gary testified both he and Louis were still on the ground with Vernon on top when the shooting began. (R. 124) Vernon knew Louis had been shot because he heard Louis holler out. (R. 125 After Louis got shot, the shooting stopped (R. 125), and Terrance Gary, the defendant, was observed running up Highway 18. (R. 69)

According to Steven Hayne, the State's pathologist, Louis Trevillion died from a single gunshot wound to the left shoulder which penetrated his heart and both lungs resulting in massive blood loss.

Five (5) witnesses testified for the State during its case-in-chief, including **Carl Ray Fleming**, an investigator with the Claiborne County Sheriff's Department, who testified that shortly after the shooting Gary turned himself in (R. 49), and, in Fleming's presence, identified a 9 millimeter Luger hand gun as the pistol he was shooting that fateful day. (R. 50-51; State's exhibit

S-3)

Relevant portions of Deputy Fleming's testimony describing post-shooting events taking place the afternoon of November 8th are quoted as follows:

> Q. [By Prosecutor:] Prior to you getting a statement from Mr. Gary, did you read him his rights?
>
> A. Yes.
>
> Q. Did he waive his rights?
>
> A. Yes.
>
> Q. And did Mr. Gary give you any information concerning the shooting that took place out there?
>
> A. Yes, he advised me that it started out as a fist fight between Vernon Gary and Louis[.] [W]hat we call Chicken Man, John Trevillion, pulled a gun and he (Gary) pulled his gun and they end up shooting across the parking lot back at each other while Vernon and Louis was fighting.
>
> Q. Now, had you earlier received a gun from a member of Terrance Gary's family?
>
> A. Yes, I received a pistol.
>
> Q. I want to hand you and ask if you can identify what this is?
>
> **A. It's a Hi-Point Model C-9 9 millimeter Luger.**
>
> Q. Did you have that pistol when you talked to Terrance Gary?
>
> A. Yes.
>
> **Q. Did you ask him to identify it?**
>
> **A. Yes, I did.**
>
> **Q. What did Terrance Gary say concerning that pistol?**
>
> **A. He said that this was his gun.**

Q. And that was the gun he shot?

A. Yes. This is the gun he said. He said yes.

BY MR. ARRINGTON: Your Honor, I would like to ask [that] this pistol be introduced as Exhibit 3.

BY THE COURT: S-3.

(EXHIBIT N0. S-3, GUN, 9 MILLIMETER, MARKED FOR IDENTIFICATION AND ADMITTED INTO EVIDENCE.) (R. 50-51) [emphasis ours]

* * * * * *

Q. Did you also have an opportunity to recover a gun from John Trevillion?

A. Yes, one was recovered from John Trevillion.

Q. Sir?

A. Yes, it was. One was recovered.

Q. I want to hand you this and ask you if you can identify this. Make sure it's safe.

A. It's a High Point, but it's a model JHP and it's 45 caliber.

Q. Not a 9 millimeter?

A. Not a 9 millimeter.

Q. And you received this from John Trevillion?

A. Yes, Chicken Man.

Q. I would like this to be introduced as Exhibit [S-]4. (R. 51) [emphasis ours]

Stephanie Odom testified that Louis Trevillion, the victim, was her seventeen (17) year old son. (R. 46-47)

Carl Ray Fleming testified that on November 8, 2006, he was dispatched to Hermanville where a shooting had taken place at the New Store off Highway 18. (R. 48) When Fleming arrived at the scene he observed Louis Trevillion lying in the parking lot. (R. 48) Fleming photographed the scene and the body as well. (R. 48-49)

John Trevillion, a/k/a "Chicken Man," was brought into the station house with the gun he fired that day, "a model JHP and it's 45 caliber." (R. 51)

According to Fleming, all the witnesses, including Terrance Gary, claimed the only people with weapons were Terrance Gary, a/k/a "Poon Scoon", and John Trevillion. No one ever said the decedent, Louis Trevillion, had a gun. (R. 52)

During cross-examination the following colloquy took place:

> Q. [BY DEFENSE COUNSEL:] Now, when they were telling you about this shootout that was going on between John and Terrance, did they tell you who shot first?
>
> A. No, only somebody said, and I'm not perfectly sure on it, that a gun was pulled by John first.
>
> Q. John Trevillion pulled his gun first?
>
> A. Yes.
>
> Q. So Terrance Gary only pulled his gun after - - according to the statements you got, John Trevillion pulled his gun first?
>
> A. That's it. (R. 54)
>
> * * * * * *
>
> Q. * * * Now, you identified the gun that Terrance had to be a 9 millimeter; is that correct?
>
> A. Yes.
>
> Q. And that is the gun that Terrance told you he had?
>
> A. That's correct.

Q. He identified that as being his gun?

A. That's correct.

Q. As the gun he was shooting at the New Store?

A. Yes. (R. 55)

Edwards Jenkins, a resident of Hermanville, testified he observed Louis Trevillion and Vernon Gary at the Sonic around 12:00 o'clock. Vernon removed his shirt and told Louis to get out of the car. Louis waived him off and Vernon got into a car and left. (R. 60-61)

Jenkins thereafter left the Sonic and drove to the New Store on Highway 18. His subsequent observations are found in the following colloquy:

> Q. [BY PROSECUTOR:] What happened when you got there?
>
> A. I was just normally - - my cousin had left and left me her truck so I could take my stepson home, and we just stood around the store, I was talking to a couple of fellows, you know, just talking, you know, shooting the breeze. And Louis had came through and dropped his little friend off that was with him and came back to the store. About two minutes after that, Terrance pulled - - somebody dropped Terrance off. He walked into the store, came back out, and then walked across the street where the burger stand is. I'll say like roughly five minutes after that, Vernon pulled up like in front of the store, but up side the store and got out. When he got out, they didn't say nothing to each other, no arguments or nothing. They just started fighting.
>
> Q. When you say "they" started fighting. Who started fighting?
>
> A. Vernon [Gary] and Louis [Trevillion] started fighting.
>
> Q. Now, when you say "Vernon," is that Vernon Gary?
>
> A. Yes, sir.
>
> Q. And is he related to the defendant, Terrance Gary?

A. Yes, sir.

Q. And he started fighting with Trevillion, Louis Trevillion?

A. Yes, sir.

Q. And was he related to John Trevillion?

A. Yes, that's John's brother.

Q. Now, while Vernon Gary and Louis Trevillion are fighting, what happens? When they started fighting, what happened?

A. They got into a tussle, they rolled around the side of the car, around to the back of the car and onto the ground.

Q. And about what time of day was this?

A. Not having a watch or nothing like that, I'm saying maybe 1 o'clock. It was shortly after (unintelligible), so I'll say maybe 1:00, 1:15. I didn't have no time, no watch to see what time it started.

Q. Was it a rainy day, clear day?

A. The sun was out.

Q. And while they're tussling around on the ground, what happened after that?

A. Well, they were tussling around on the car, and Terrance comes from across the street, and just a whole crowd - - guys coming around just surrounding the fight. They fall on the ground - - they're holding each other in a bear lock, Louis on the bottom and Vernon is on top. Terrance come out and say, "Huh -uh, no, no, no," you know. (R. 63)

* * * * * *

Q. So Terrance - - what did you see Terrance do when he came over to the fight?

A. Well, he didn't do nothing. It's what he said. He said something. (R. 64)

* * * * * *

Q. After he made his comment, what did John Trevillion do?

A. John Trevillion made another comment towards him.

Q. And so now we have the two boys or the two young men on the ground fighting, and now we have John Trevillion and Terrance Gary making comments at each other.

A. Yes, sir.

Q. Now, after making comments to each other, what happened after that?

A. Terrance walked to Vernon's car. At that time I told my stepson to go around the side of the store because I'm seeing this escalating. So I tell him to go around the side of the store, and I'm pushing him around the side of the store. I look around and I seen Terrance bent over on the driver side and another guy on the passenger side. I hear Terrance tell the little guy, "Give me the clip."

Q. And so what were they doing there in that?

A. Getting the gun out of the car.

Q. Did you actually see a gun?

A. Yes.

Q. How many guns did you see?

A. I saw two.

Q. And who had these guns?

A. Terrance and David.

Q. And what did Terrance do after he got his gun?

A. He cocked it and backed up, like jumped to the side of the car on around to where the crowd was.

Q. What was John Trevillion doing while Terrance was getting his gun and cocking it.

A. He had a stick in his hand.

Q. And what did Terrance do after he got his gun?

A. After he got the gun, he ran to the side of the car and cocked it. When he cocked it, that's when John looked at him and said, "Oh, you got a gun for me?" And he went to his side. And when he went to his side and pulled his [gun] out, that's when the first shot popped off.

Q. First shot popped off?

A. When John pulled his gun out, that's when Terrance shot first, bam. Then he backed up. That's when John shot, bam. Then he ran up on the side of the hill. At that time I'm backing back to the side of the store. Now, I can't see the fight from the side of the store. I'm looking up the hill as I see Terrance shoot over the truck, like leaning over the truck shooting about four or five shots. After that I hear Louis out - - he hollered. When I ran around the side of the store, I seen Vernon back up off of him and looked like this here and run get in his car and backed up. I runs over there. Louis' other brother, Spanky - - Antwain - - I'm not for sure his name, he came from off the side of the RC truck and helped me with him. He asked me where is he shot at, where is he hit at. He said, take him to the hospital. I run back across the parking lot of the store to get my truck. By then he had collapsed in his brother's arms. I tried to get his brother to help me get him in the car, but he was shot too bad, so he just sat there and he was gone. (R. 64-67)

* * * * * *

Q. Now, who did you say fired the first shot?

A. Terrance.

Q. Terrance being the defendant?

A. Yes, sir. (R. 68-69)

* * * * * *

Q. Now, right after the shooting you said you went over and you were there with Trevillion, Louis Trevillion. Where was Terrance at that time?

A. After the shooting he ran up 18.

Q. "He" being - -

A. Took off running up 18.

Q. That's Terrance you said took off running?

A. Yes.

Q. Where was John Trevillion?

A. I don't know. After the shooting started, I didn't see him no more. (R. 69)

* * * * * *

Q. And when you gave your statement, did you tell them what happened?

A. Yes, sir.

Q. And who did you say shot first?

A. Terrance. (R. 69)

Dr. Steven Hayne, the State's pathologist qualified as an expert in the field of forensic pathology, testified that at the request of the Claiborne County coroner, he performed the autopsy on Louis Trevillion on November 8th and 9th, 2006. (R. 77-78)

"Mr. Trevillion died from a gunshot wound to the left shoulder." The bullet penetrated his heart and both lungs resulting in massive blood loss. (R. 82)

A projectile was recovered from the decedent's body and submitted to the Mississippi Crime Laboratory for analysis. (R. 83)

Dr. Hayne ruled the manner of death as a homicide. (R. 84)

During cross-examination Dr. Hayne was asked about his report which stated that he removed " . . . a Yellow Jacket bullet consistent with a .380 caliber projectile . . ." (R. 85) That colloquy is quoted as follows:

Q. All right. Now, what would be - - how would you differentiate between the .380 and the guns they just mentioned?

A. Well, first, Counselor, we only say it's consistent with. The final call is the firearm's division for the Mississippi Crime Lab. They'll make the final determination. The .380 is usually a slightly shorter round than the 9 millimeter. There is a short 9 millimeter that would have the same characteristics. They both have the same diameter. 45 caliber is fairly easy to differentiate from either the .380 or 9 millimeter; being a much larger bullet, having much greater mass.

Q. This bullet that was recovered in the autopsy was consistent with a .380 caliber projectile?

A. Yes, Counselor. (R. 85)

* * * * * *

Q. Dr. Hayne, you couldn't fire a .380 bullet from a 9 millimeter could you?

A. I wouldn't want to try, Counselor. It's shorter - - the casing is shorter, the projectile is shorter. You probably could fire it, but I wouldn't want to try. (R. 86)

During re-examination, Dr. Hayne acknowledged he was familiar with the weapons but conceded he was " . . . not a firearm expert." (R. 86)

Additional colloquy during re-examination is quoted as follows:

> Q. And you said that the bullet in your report was consistent with a .380 which is smaller than the 45?
>
> A. Oh, much smaller, Counselor.
>
> Q. And you said it was more consistent with a .380?
>
> A. It was consistent with it, but I always defer to the Mississippi Crime Lab to make a final call on the caliber and any other part of the examination of the weapon.
>
> Q. And at the time - -
>
> A. On any aspect of firearms, I would defer to the Mississippi

Crime Lab, Firearms Division to make the final call.

Q. At the time that you were writing your report, you were not looking at either weapon; is that correct?

A. No. All we had was the recovered projectile.

Q. And did I hear you say that was consistent also with a 9 millimeter?

A. It could be a short 9 millimeter, Counselor. They do make a 9 millimeter where the projectile is the same diameter to the .380, but the length of the projectile is shorter, and it's essentially impossible for me to tell them apart. (R. 87-88)

Starks Hathcock, a forensic scientist specializing in firearm examination and an employee for thirteen (13) years at the Mississippi State Crime Laboratory, was accepted as an expert in the field of firearms and tool marks identification. (R. 90)

Hathcock testified he examined the projectile removed from the body of Louis Trevillion as well as the two firearms submitted for examination, a semi automatic 9 millimeter (Exhibit S-3) and "a 45 auto caliber handgun"(Exhibit S-4). (R. 90-91)

Hathcock's findings and conclusions are described in the following colloquy:

Q. [BY PROSECUTOR:] Now, you were requested by the Claiborne County Sheriff's Department to do certain tests. What tests did you do with this submission 1, 2 and 5?

A. It was requested by the sheriff's department for me to compare that bullet or projectile in submission number 5 to determine if it was fired in the guns in submissions 1 or 2.

Q. And did you conduct these tests?

A. Yes, sir, I did.

Q. And as a result of those tests, as to firearm submission number 2, the 45 [caliber], what did you determine?

A. The projectile in submission 5 was not fired in the gun

of submission 2.

Q. And you can say that unequivocally it was not fired?

A. That's correct.

Q. How can you say that?

A. Well, the projectile in submission number 5 is a 9 millimeter caliber projectile The firearm in submission number 2 is a 45 auto caliber firearm.

Q. Now, you also fired the 9 millimeter you have here, submission number 1, and what were you able to determine concerning the bullet and that gun?

A. The bullet bears class characteristics consistent with that gun but cannot be positively included or excluded as having been fired from that gun.

Q. But you were able to determine it was done from a 9 millimeter gun?

A. Yes, it did come from a 9 millimeter gun which did have nine lands and grooves in the barrel of the gun. In other words, when a barrel is manufactured at the factory, they put grooves in the barrel and they give it a twist, either a left or right-hand twist. That's what makes the projectile spin as it's going toward the target. In other words, it's like throwing a football. The more you put a spin on it, the more accurate it will be. That's the purpose of these lands and grooves in the barrel. So when the projectile goes down this barrel, it imprints those number of lands and grooves on that projectile, and **this projectile did have nine lands and grooves, and that gun has also nine lands and grooves.** (R. 93) [emphasis ours]

During cross-examination, the following colloquy took place:

Q. [BY DEFENSE COUNSEL:] I'm going to hand you Exhibit D-9, and this is a final report of autopsy by Dr. Hayne, and I would like for you to look at the part about trace evidence. Would you disagree with Dr. Hayne on that?

A. Yes.

Q. You disagree with him?

A. Yes. (R. 95)

* * * * * *

Q. This right here in this particular case, we're talking about the difference between a 9 millimeter and a .380. And you're saying there's practically no difference at all?

A. The only difference is the weight of the projectile. A .380 caliber projectile can be fired in a 9 millimeter gun. The only difference is the length of the projectile.

Q. That's the only difference?

A. Yes, sir.

Q. So he could have possibly been shot with a .380.

A. No sir. This was a 9 millimeter caliber projectile. A 9 millimeter cannot be fired from a .380, but a .380 can be fired from a 9 millimeter. The 9 millimeter cartridge is too long to chamber in a .380 caliber pistol. (R. 96-97) [emphasis ours]

Re-examination was concluded as follows:

Q. Mr. Hathcock, as you told Mr. Dulaney on Dr. Hayne final thing, you disagree that that was a .380 bullet?

A. Yes, sir.

Q. But it would be consistent with a .380?

A. It's consistent with the family or the caliber class that it is in. They're all considered to be in the same class of calibers. In other words, .380, 9 millimeter, 38, 357 are all in the same family class characteristics. In other words, they're in the same - - they're the same caliber but the weights are different.

Q. But basically Dr. Hayne was wrong when he said that was a .380 bullet?

A. Yes. (R. 97)

At the close of the State's case-in-chief, the defendant's motion for a directed verdict of

acquittal voiced on the general ground the State failed to put on sufficient evidence to prove Gary's guilt beyond a reasonable doubt was overruled. (R. 98-99)

After being advised of his right to testify or not to testify Gary, in the end, elected not to testify. (R. 99-100, 135)

Terrance Gary called three (3) witnesses in his defense. (R. 101-132)

Ranvorius Shorter, testified Vernon Gary and Louis Trevillion were involved in a tussle. (R. 103) Terrance Gary was trying to break up the altercation. John Trevillion, a/k/a "Chicken Man," said, "Don't break up the fight. Let them fight." Trevillion then went to his vehicle and got a board. (R. 104)

While Shorter was watching the fight, John Trevillion pulled a gun from his pants after noticing Terrance with his gun. (R. 111) John Trevillion fired the first shot.

Terrance Gary also had a gun, and a fire fight ensued. (R. 106-07) Shorter never saw Terrance shoot because Shorter was too busy running.

Herbert Barber testified he knew both Louis Trevillion and Vernon Gary who were "fighting" at the New Store. (R. 115)

"They was just wrestling. Wasn't really no fight." (R. 115)

A crowd gathered. Terrance Gary was trying to get closer so he could break up the fight. John Trevillion, on the other hand, wanted to let them fight and prevented Terrance from breaking it up. (R. 117)

Terrance then went off and got a gun. (R. 117) John Trevillion also had a gun. (R. 117) Shots were fired and Barber ran. (R. 117)

"I just know it was John and Terrance [shooting.]"

Finally, **Vernon Gary,** the defendant's cousin, testified Terrance tried to break up the

altercation between Terrance and Louis but could not do so because John Trevillion was standing there with a stick. John thereafter ran to his van, got a gun, and came back. (R. 123-24)

Vernon's version of the shooting is found in the following colloquy:

> Q. [BY DEFENSE COUNSEL:] Now, when John went and got his gun, what happened after that?
>
> A. He came back over and Terrance was fixing to go try and break it up. He was still trying to break it up, and John just pulled his gun out and shot. I don't know where he shot at, but he shot, and that's when Terrance came out with his. They was shooting at each other. (R. 124)
>
> * * * * * *
>
> Q. Who did you see with a gun first?
>
> A. John.
>
> Q. And who did you see shoot the gun first?
>
> A. John shot first.
>
> **Q. And then what did Terrance do after John shot the gun?**
>
> **A. Ran behind a truck, and they just started shooting back and forth.**
>
> **Q. And during that time, where were you?**
>
> **A. Still on the ground.**
>
> **Q. And Louis was on the ground with you at that point?**
>
> **A. Yes, ma'am.**
>
> Q. Now, was there a point where they stopped shooting?
>
> A. Yeah.
>
> Q. And when was that?

A. When he got shot, that's when they stopped shooting.

Q. When Louis got shot?

A. (Witness nods head affirmatively.)

Q. How did they know he was shot?

A. I knew it because he hollered out.

Q. Where were you in relation to Louis at that time?

A. Where were we?

Q. You said you all were still on the ground, so where were you?

A. I was on top of him. (R. 125-26) [emphasis ours]

After stating initially he wanted to testify, Terrance Gary changed his mind and told Judge Pickard: "I don't want to testify." (R. 136)

The State produced no rebuttal and rested finally. (R. 136-37)

At the close of all the evidence (R. 136-37), Gary's motion for a directed verdict was *not* renewed. (R. 136)

Peremptory instruction was requested and denied. (C.P. at 53)

Following closing arguments, the jury retired to deliberate at 5:40 p.m. and returned with the following verdict twenty-five (25) minutes later at 6:05 p.m. : (R. 148)

> ""We, the jury, find the defendant, Terrance Gary, guilty of manslaughter by culpable negligence." (R. 150; C.P. at 54)

A poll of the individual jurors reflected the verdict returned was unanimous. (R. 150)

Following a presentence investigation and report, Gary, less than contrite, was sentenced on February 4, 2008, to serve twenty (20) years in the custody of the MDOC. (R. 151-52)

On February 19, 2008, Gary filed his "Motion For New Trial" claiming the verdict was, *inter*

alia, without sufficient evidence to support it and was against the weight of the evidence. (C.P. at 58)

In an order signed on March 26, 2008, the motion for a new trial was overruled. (C.P. at 31)

Sim Dulaney and Nikita Banks, practicing attorneys in Port Gibson, represented Gary very effectively during the trial of this cause.

Michael E. Robinson, a practicing attorney in Jackson, has been substituted on direct appeal. His representation has been equally effective.

SUMMARY OF THE ARGUMENT

Gary waived - forfeited, if you please - review of his motion for a directed verdict made at the close of the State's case-in-chief when he thereafter introduced evidence in his own behalf. **Holland v. State**, 656 So.2d 1192, 1197 (Miss. 1995). *See also* **Bonner v. State,** 962 So.2d 606, 609 (Ct.App.Miss. 2006).

But even if otherwise, the evidence was sufficient to prove each and every element of the crime charged.

Admittedly, there is a conflict in the testimony with respect to who fired the first shot, whether Terrance Gary or John Trevillion. (R. 64-67, 124-26)

No matter.

Accepting as true the testimony of Deputy Fleming that Terrance Gary identified the 9 millimeter Luger as Gary's pistol and the pistol that Gary was firing that day (R. 50-51, 55);

accepting as true the testimony of Edward Jenkins that John Trevillion and Terrance Gary exchanged words, armed themselves, and began shooting at one another (R. 64-67);

accepting as true the testimony of Jenkins that when the shots began Vernon Gary was on top of Louis Trevillion in the parking lot of the New Store (R. 63);

accepting as true the testimony of Jenkins that after Louis Trevillion was shot, Terrance Gary took off running up Highway 18 (R. 69);

accepting as true the testimony of Dr. Steven Hayne that he always defers to the firearms division of the Mississippi Crime Laboratory to make a final call on the caliber and any other part of the examination of the weapon (R. 85, 87-88);

accepting as true the *unequivocal* testimony of Starks Hathcock that the bullet removed by Dr. Hayne from the decedent's body *was not* fired in the .45 pistol received from John Trevillion (R. 92-93);

accepting as true the testimony of Hathcock that the bullet removed from the decedent's body was fired from a 9 millimeter gun and that the 9 mm fired by Terrance Gary could not be positively included or excluded as having been the source of that bullet (R. 93);

accepting as true the testimony of Vernon Gary that when the shots were fired he and Louis Trevillion were on the ground with Vernon on top of Louis at the moment Trevillion hollered out indicating he had been hit (R. 125-26);

accepting as true all reasonable inferences flowing sweetly therefrom, and

disregarding any evidence favorable to the defendant,

it is abundantly clear the State's evidence was legally sufficient to support Terrance Gary's conviction of manslaughter by culpable negligence.

Indeed, the question is not even close.

With respect to the question of "weight," as opposed to "sufficiency," the circuit judge clearly did not abuse his judicial discretion in overruling the defendant's motion for a new trial based, in part, on a claim the verdict of the jury was contrary to the evidence and strongly against the weight of the evidence. (C.P. at 58)

The evidence clearly does not preponderate in favor of Gary's theory of the case that he was trying to break up the fight between his cousin and Louis Trevillion and fired his gun in self-defense.

Any conflicts in the testimony of the experts - contrary to Gary's claim otherwise, there were no material conflicts - were questions for the jury to unravel.

"The jury is the *sole* judge of the weight and credibility of the evidence." **Byrd v. State**, 522 So.2d 756, 760 (Miss. 1988) [emphasis supplied]. *See also* **Schuck v. State,** 865 So.2d 1111, 1124 (Miss. 2003).

["The jury is the judge of the credibility of a witness."]; **Steen v. State,** 873 So.2d 155, 159 (Ct.App.Miss. 2004) ["(T)he credibility of a witness is a question for the jury."]; **Love v. State,** 829 So.2d 707, 709 (Ct.App.Miss. 2002) ["The jury is the judge of the weight and credibility of testimony and is free to accept or reject all or some of the testimony given by each witness."]

Contrary to Gary's claim otherwise, affirmation of his conviction would not work an unconscionable injustice.

ARGUMENT

I.

BY INTRODUCING EVIDENCE IN HIS OWN BEHALF, GARY WAIVED REVIEW OF THE DENIAL OF A MOTION FOR DIRECTED VERDICT MADE AT THE CLOSE OF THE STATE'S CASE-IN CHIEF.

II.

MOREOVER, THE VERDICT OF THE JURY WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The testimony supporting Gary's conviction of manslaughter by culpable negligence has been quoted verbatim in our Statement of Facts and summarized in our Summary of the Argument. We

decline to repeat it all here.

Gary, it appears, assails both the sufficiency and the weight of the evidence used to secure his conviction of manslaughter.

First, he argues "[t]he trial court should have granted [his] motion for directed verdict." (Brief of Appellant at 4) The only motion for directed verdict found in the record was made at the close of the State's case-in-chief. (R. 98)

The complete answer to this assignment of error is that Gary waived his motion for a directed verdict made at the close of the State's case-in-chief when he introduced evidence in his own behalf.

One of the latest expressions on the subject matter is found in **Bonner v. State,** 962 So.2d 606, 609 (Ct.App.Miss. 2006), where we find the following language:

> It is well settled that when a motion for a directed verdict is overruled at the conclusion of the State's evidence, and the appellant proceeds to introduce evidence in his own behalf, the point is waived. *Fields v. State,* 293 So.2d 430, 432 (Miss. 1974) (citing *Hankins v. State,* 288 So.2d 866, 867 (Miss. 1974); *Smith* v. *State,* 245 So.2d 583, 586 (Miss. 1971).) * * *

After his motion for a directed verdict was overruled at the close of the State's case-in-chief (C.P. at 98-99), Gary introduced three (3) witnesses who testified in his defense. He did not renew his motion for a directed verdict made at the close of all the evidence. (R. 136)

The waiver rule is applicable here. Argument targeting the insufficiency of the State's evidence at the time of Gary's motion for a directed verdict has been waived by virtue of this Court's holdings in **Wetz v. State,** 503 So.2d at 807-08, note 3 and **Holland v. State,** 656 So.2d 1192, 1197 (Miss. 1995).

Even if not, when the issue is one of legal sufficiency, any evidence favorable to the defendant must be disregarded. **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State,** 667

So.2d 599, 612 (Miss. 1995); **Hart v. State,** 637 So.2d 1329, 1340 (Miss. 1994); **Edwards v. State,** 615 So.2d 590, 594 (Miss. 1993); **Clemons v. State,** 460 So.2d 835, 839 (Miss. 1984); **Forbes v. State,** 437 So.2d 59, 60 (Miss. 1983); **Bullock v. State,** 391 So.2d 601, 606 (Miss. 1980).

This includes Gary's appellate claims there were contradictions by the experts concerning the fatal bullet, inconclusive ballistic results, the presence of a third handgun, and Terrance Gary's alleged role as a peacemaker allegedly reflecting his actions were in necessary self-defense.

In **Maddox v. State,** 230 Miss. 529, 93 So.2d 649, 650 (1947), citing **Manning v. State,** 188 Miss. 393, 195 So.319 (1940), we find the following language applicable to portions of Gary's complaint:

> Seldom do witnesses agree upon every detail. Indeed, their failure to do so is often strong evidence each is trying to accurately portray the situation as he saw it, and that is to the credit, rather than the discredit, of the witnesses.
>
> The State need not square to a proverbial "T' every discrepancy that raises its festered head. It need only produce enough evidence to prove the defendant guilty beyond a reasonable doubt. Dr. Hayne testified the bullet removed from the victim was "consistent with" a .380 caliber but that he would defer to the decision making of experts at the Mississippi Crime Laboratory for a final determination. (R. 85) Those experts concluded the bullet was a 9 mm.
>
> Starks Hatchcock agreed with Dr. Hayne the appearance of a .380 bullet was consistent with a 9 mm caliber, *viz.*, they were in the same class of calibers. (R. 85, 87-88, 97-98)
>
> Dr. Hayne also testified a person could probably fire a .380 projectile from a 9 mm pistol, but he would not want to try. (R. 86)
>
> Starks Hatchcock testified that a .380 caliber projectile can be fired in a 9 mm gun. (R. 96-97)

There is no material conflict in any of this testimony. Gary is guilty of majoring on the minors.

In any event, it is well settled that "[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity." **Jones v. State**, 381 So.2d 983, 989 (Miss. 1990). *See also* **Hill v. State**, 199 Miss. 254, 24 So.2d 737 (1946).

The jury was entitled to believe Hatchcock's testimony that the bullet removed from the victim was a 9 mm projectile and that a 9 mm bullet cannot possibly be fired from a .380 pistol. (R. 96-97)

Terrance Gary was the only person with a 9 mm the day of the shooting. John Trevillion had a .45 caliber pistol. According to Hatchcock the bullet removed from the victim was not fired by a .45. (R. 93)

It is enough to say that Gary's guilt or innocence was a matter for the 12 man jury who had all this information before it for consideration. All proof need not be direct and the jury, as fact finder, is entitled to consider not only facts testified to by witnesses but all inferences that may be reasonably and logically deduced from the facts in evidence. **Pryor v. State,** 349 So.2d 1063 (Miss. 1977). *See also* **Campbell v. State**, 278 So.2d 420 (Miss. 1973); **McLelland v. State,** 204 So.2d 158 (Miss. 1967).

Second, Gary assails the "weight" of the evidence as opposed to its "sufficiency."

"Weight" implicates the denial of a motion for a new trial while "sufficiency" implicates the denial of motions for directed verdict, peremptory instruction, and judgment notwithstanding the verdict. **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

The testimony of Deputy Fleming, Dr. Hayne, Edward Jenkins (an ear and eye witness) and Starks Hathcock, as well as all reasonable inferences to be drawn from the testimony of others, implicated Gary by placing a 9 millimeter in his hand. Louis Trevillion was shot and killed with a bullet fired by a 9 millimeter. John Trevillion had a .45 which could not have possibly fired the bullet that killed Louis Trevillion. (R. 92-93)

We respectfully submit the evidence does not preponderate in favor of Gary.

The applicable standard of review is found in **McCallum v. State** *supra*, No. 2007-KA-00992 decided December 9, 2008 (¶23-24) [Not Yet Reported] where we find the following language:

> McCallum also argues that the trial judge erred in denying his motion for a new trial because he claims that his conviction was against the overwhelming weight of the evidence. "Motions for [a] new trial challenge the weight of the evidence supporting the verdict." *Bridges v. State,* 807 So.2d 1228, 1231 (¶14)(Miss. 2002). In *Chambliss v. State,* 919 So.2d 30, 33-34 (¶10) (Miss. 2005) (quoting *Bush*, 895 So.2d at 844 (¶18)), the Mississippi Supreme Court held that:
>
> > When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State,* 691 So.2d 948, 957 (Miss. 1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Amiker v. Drugs for Less, Inc.,* 796 So.2d 942, 947 (Miss. 2000). However, the evidence should be weighed in the light most favorable to the verdict. *Herring,* 691 So.2d at 957. A reversal on the

> grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State,* 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.

We conclude that the jury's verdict was not against the overwhelming weight of the evidence. Additionally, as previously stated, Clark testified as to what happened on the day of the shooting, and Butler testified that he witnessed McCallum shoot Clark. McCallum's testimony is not sufficient to support a finding that the jury's verdict was against the overwhelming weight of the evidence. Given the weight of the evidence supporting McCallum's conviction, allowing the jury's verdict to stand will not "sanction an unconscionable injustice." There is no merit to this issue." (¶¶ 23-24, Slip Opinion at 11-12]

It is elementary that the jury, not the trial or reviewing Court, is the **sole judge of** the weight and credibility of evidence. **Harris v. State**, 532 So.2d 602 (Miss. 1988); **Byrd v. State**, 522 So.2d 756, 760 (Miss. 1988). "Under our system, the jury is charged with the responsibility for weighing and considering . . . the credibility of witnesses." **Harris v. State**, 527 So.2d 647, 649 (Miss. 1988).

This Court reviews the trial court's denial of a post-trial motion under the abuse of discretion standard. **Flowers v. State**, 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State**, 566 So.2d 1240, 1242 (Miss. 1990). No abuse of judicial discretion has been demonstrated here because the testimony of the witnesses for the State fully supports the verdict.

We reiterate.

The jury, not the reviewing Court, judges the weight and credibility of each witness's

testimony and is free to accept or reject it. **Bailey v. State**, 729 So.2d 1255 (Miss. 1999). Of course, the jury, in a criminal prosecution, is permitted to accept the testimony of some witnesses and reject that of others and may accept or reject in part the testimony of any witness or may believe in part the evidence on behalf of the State and the defendant. **Evans v. State**, 725 So.2d 613 (Miss. 1997).

We are of the opinion the verdict finding Gary guilty of manslaughter by culpable negligence was not against the overwhelming weight of the evidence and that to affirm his conviction would not sanction an unconscionable injustice.

"[I]t is not for this court to pass upon the credibility of witnesses, and where the evidence justifies the verdict it must be accepted as having been found worthy of belief." **Grooms v. State,** 357 So.2d 292, 295 (Miss. 1978) quoting from **Murphree v. State,** 228 So.2d 599, 601 (Miss. 1969). *See also* **Pinson v. State,** 518 So.2d 1220, 1224 (Miss. 1980) ["It is not our function to determine whose testimony to believe."] Put another way,

> "[w]e do not sit as jurors. That fact-finding body, while being overseen by the trial court, has the constitutional duty to decide which witnesses are relating an accurate account of the occurrences giving rise to the trial. * * * " **Griffin v. State,** 381 So.2d 155, 157 (Miss. 1980).

The following language found in **Hyde v. State**, 413 So.2d 1042, 1044 (Miss. 1982), quoting from **Evans v. State**, 159 Miss. 561, 132 So. 563, 564 (1931), is applicable here:

> We invite the attention of the bar to the fact that we do not reverse criminal cases where there is a straight issue of fact, or a conflict in the facts; juries are impaneled for the very purpose of passing upon such questions of disputed fact, and we do not intend to invade the province and prerogative of the jury.

In **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State,** 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983).

Contrary to Gary's position, the case at bar does not exist in this posture.

CONCLUSION

Gary, with the effective assistance of both his trial and appellate lawyers, has raised legitimate issues. Nevertheless, his claims are devoid of merit.

A reasonable and fair-minded juror, in the exercise of impartial judgment, could have found from the testimony that Terrance Gary was culpably negligent in the reckless handling of a firearm and was guilty of manslaughter. **Boone v. State,** 973 So.2d 237, 242 (Miss. 2009).

No complaint has been made that the jury was not properly instructed.

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgment of conviction of manslaughter, together with the twenty (20) year

sentence imposed in its wake, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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