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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO. 2008-KA-00619-COA

TERRANCE GARY

APPELLANT

V.

STATE OF MISSISSIPPI

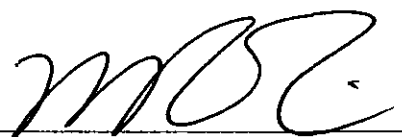
APPELLEE

I. CERTIFICATE OF INTERESTED PERSONS

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

- | | | |
|----|----------------------|-------------------|
| 1. | Terrance Gary | Appellant |
| 2. | Michael E. Robinson | Appellant Counsel |
| 3. | State of Mississippi | Appellee |
| 4. | Jim Hood | Appellee Counsel |
| 5. | Hon. Lamar Pickard | Trial Judge |

CERTIFIED this the 15th day of October, 2008.


MICHAEL E. ROBINSON, MSB
SMITH & ROBINSON, PLLC
POST OFFICE BOX 9366
JACKSON, MISSISSIPPI 39286
ATTORNEY FOR APPELLANT

II.

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III.

TABLE OF CASES, STATUTES AND AUTHORITIES

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ISSUES PRESENTED

1. WHETHER THE TRIAL COURT ERRED IN DENYING MOTION FOR DIRECTED VERDICT
2. WHETHER TRIAL COURT ERRED IN DENYING MOTION FOR NEW TRIAL

V.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from a conviction by jury of Mr. Terrance Gary in the Circuit Court of Claiborne County, Mississippi, on January 15, 2008. Gary was convicted of one (1) count of manslaughter by culpable negligence.

B. PROCEEDINGS BELOW

Terrance Gary was indicted on one (1) count of murder in May 2007, in the Claiborne County Circuit Court. [CP 3]. Gary was tried before a jury on January 15, 2008. [T 1]. Following the presentation of the State's case, Defense counsel's motion for a directed verdict was denied. [T 100]. The jury found Gary guilty of the lesser included offense of manslaughter. [T 150]. Gary was sentenced to twenty (20) years in the Mississippi Department of Corrections. [T 153].

Gary filed his Motion for New Trial on February 19, 2008 [CP 58]. Order denying the Motion for New Trial was entered on March 4, 2008. [CP 60].

Gary appeals from the trial court's denial of his motions for directed verdict and for new trial.

VI.

SUMMARY OF THE ARGUMENT

Reversible error was committed by the lower court when the trial judge denied the motion for directed verdict. Evidence presented and testimony from the state's own witnesses established that Terrance Gary acted in self defense, and his gun was not the weapon from which the fatal shot was fired, killing Louis Trevillion. For the same reasons, the Motion for New Trial should have been granted. Finally, considering the testimony of all the witnesses presented, both lay and expert, it is clear that Terrance Gary was acting as a peacemaker in trying to break up a fight. In addition, the state's own experts could not testify that Gary's gun was the weapon from which the fatal bullet was fired. The jury's verdict was against the overwhelming weight of the testimony and evidence.

Accordingly, this Court should reverse the trial court's denial of the motions for directed verdict and new trial. The jury verdict should be reversed, the charges against the Defendant dismissed and Defendant discharged; or in the alternative, this matter should be remanded to the trial court for a new trial on the merits.

VII.

ARGUMENT

A. TRIAL COURT SHOULD HAVE GRANTED MOTION FOR DIRECTED VERDICT

A motion for a directed verdict and a motion for a judgment notwithstanding the verdict challenge the sufficiency of the evidence. *Boone v. State*, 973 So.2d 237, 242 (Miss.2008). “When reviewing a case for sufficiency of the evidence, ‘the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Id.* “The evidence must show ‘beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.’” *Id.* “If, keeping in mind the reasonable-doubt standard, ‘reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense,’ the evidence will be deemed to have been sufficient.” *Id.*

1. EXPERT CONTRADICTION OF FATAL BULLET

The State called two expert witnesses at trial. The first witness was Dr. Steven Hayne. [T 75]. Dr. Hayne, at the time, was the State’s medical examiner. [T 75]. Dr. Hayne testified that the cause of death of Louis Trevillion was from a gunshot wound to the left shoulder, which after entering the body, traveled through Trevillion’s ribs, lungs and heart. [T 83]. Dr. Hayne retrieved the bullet from Trevillion’s body, and sent it to the state crime lab. [T 84].

Dr. Hayne noted that the bullet was consistent with a .380 caliber bullet. [T 86]. At trial, he testified that the bullet was consistent with that of a .380 caliber bullet. [T 86].

The second expert witness called was Mr. Starks Hathcock of the Mississippi Crime Lab. [T 89]. Mr. Hathcock was certified as an expert witness in the field of firearms and tool marks identification. He testified that he examined the bullet submitted by Dr. Hayne, and determined that it was consistent with a 9 millimeter caliber bullet. [T 95].

Both, Dr. Hayne and Mr. Hathcock, testified that a .380 caliber bullet and 9 millimeter caliber bullet were very similar, with the exception being the weight or length of the bullet. However, they again contradicted each other regarding the ability to fire a .380 caliber bullet from a 9 millimeter handgun. Dr. Hayne was of the opinion that it could not be done, while Mr. Hathcock opined that it was possible. [T 87, 97].

These contradictions are material and illustrate the insufficiency of the expert testimony proffered by the State in this case.

2. INCONCLUSIVE BALLISTIC RESULTS

Mr. Hathcock further testified that he conducted ballistics tests on the guns submitted, including the 9 millimeter handgun attributed to Terrance Gary, and compared those test results to the bullet retrieved from Louis Trevillion. [T 93]. After comparing the bullets fired from Gary's gun to the bullet retrieved from Trevillion, Hathcock's testimony was he could not include or exclude Gary's gun as being the weapon from which the fatal bullet was fired. [T 93]. In other words, he could not state with any certainty that Terrance Gary's gun fired the fatal shot. Hathcock could only conclude that the markings on the fatal bullet bore the

characteristics of a bullet fired from a 9 millimeter handgun. Such testimony is hardly sufficient to afford a reasonable jury of the belief that Gary could be guilty of manslaughter by culpable negligence beyond a reasonable doubt.

3. PRESENCE OF THIRD HANDGUN

Edward Jenkins, witness for the State, testified at trial that there was a third gun present at the scene of Louis Trevillion's killing. [T 72, 73]. He stated that he could not identify the model of the gun. [T 73]. When the shooting started, he ran away from the gunfire. [T 73]. He said he could hear the shots, but could not say how many guns were being fired. [T 73].

Testimony regarding the presence of a third handgun further illustrates the lack of sufficient evidence provided by the State to meet its burden that Gary is guilty beyond a reasonable doubt. Considering the experts' conflict regarding the caliber of bullet found to have killed Louis Trevillion, as well as the inability to include Gary's gun as the likely weapon to have fired the fatal bullet, the presence of a third gun creates more reasonable doubt for Gary. The record is void of any testimony to the contrary that there was not a third weapon. Its presence is uncontradicted.

4. GARY'S ROLE AS PEACEMAKER

Throughout the trial, witnesses testified that Gary made numerous efforts to break up a fight between Louis Trevillion and Vernon Gary. The State's first witness, Carl Ray Fleming of the Copiah County Sheriff's Department, who was lead investigator, testified his investigations found that Gary was trying to break up the fight, and he only pulled his gun

after John Trevillion pulled his gun. [T 55]. Ranvorious Shorter also testified that Gary made several attempts to stop the fight, but his efforts were thwarted by John Trevillion, who had a big board in his hands and dared Terrance Gary to stop the fight. [T 105, 106]. Herbert Barber testified to Gary's efforts to stop the fight and being prevented from doing so by John Trevillion, as well. [T 117, 118].

The testimony regarding Terrance Gary's role in the altercation leading to the shooting show that Gary had no intentions of harming anyone. His actions were taken in necessary self defense, as he only fired his weapon after being fired upon by John Trevillion.

B. TRIAL COURT SHOULD HAVE GRANTED MOTION FOR NEW TRIAL

A motion for a new trial challenges the weight, not the sufficiency of the evidence. *Boose v. State*, 851 So.2d 391, 394 (Miss. Ct. App.2003). The standard of review is abuse of discretion by the trial court. *Bradley . State*, 921 So.2d 385, 389 (Miss. Ct. App. 2005). "[T]he reviewing court must accept as true all evidence which supports the verdict and will reverse only if convinced that the trial court abused its discretion in not granting a new trial." *Id.* "A new trial will not be ordered unless we are convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice. *Id.*

In his Motion for New Trial, defense counsel pointed out to the trial court that convictions were against the overwhelming weight and sufficiency of the evidence presented at trial. [CP 58]. In addition to the preceding arguments, it must be noted that of all the witnesses to testify and evidence presented, nothing said or presented showed or identified

Terrance Gary as the shooter of Louis Trevillion. Gary simply tried to stop a fight between Louis Trevillion and Vernon Gary. For his efforts, he was shot at by John Trevillion and defended himself by shooting. The bullet that killed Louis Trevillion did not match Gary's gun. Adding all the relevant testimony and evidence, no reasonable juror could conclude that Terrance Gary is guilty beyond a reasonable doubt of manslaughter by culpable negligence. There has to be some causal connection between his actions and Louis Trevillion's death. There is none in this case.

CONCLUSION

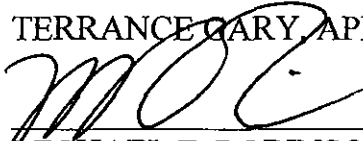
The preceding clearly illustrate that reversible error was committed by the trial court in the trial below. The lower court abused its discretion in denying the motions for directed verdict and for new trial. The testimony and evidence presented lacked sufficiency and weight to support a conviction beyond a reasonable doubt.

For these reasons, this Court should reverse the decisions of the trial court and discharge Gary from any criminal liability, or in the alternative, remand the matter to the Copiah County Circuit Court for a new trial on the merits.

Respectfully submitted, this the 15th day of October, 2008

TERRANCE GARY, APPELLANT

BY:


MICHAEL E. ROBINSON (REDACTED)
ATTORNEY FOR APPELLANT

OF COUNSEL:
SMITH & ROBINSON, PLLC
P. O. BOX 9366

JACKSON, MISSISSIPPI 39286
TELEPHONE: (601) 981-1218
FACSIMILE: (601) 981-1355

CERTIFICATE OF SERVICE

I, Michael E. Robinson, attorney for the Appellant, Terrance Gary, do hereby certify that I have this day delivered, by U. S. Mail, postage prepaid, a true and correct copy of the following Brief of Appellant to the following:

Jim Hood, Esq.
Mississippi Attorney General's Office
P.O. Box 22747
Jackson, Mississippi 39225-2747

Hon. Lamar Pickard
Copolah County Circuit Court Judge
P. O. Box 310
Hazlehurst, Mississippi 39083

This the 15th day of October, 2008.



Michael E. Robinson, Esq.
Attorney for Appellant