IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEWAYNE PRICE — APPELLANT

VERSUS — NO. 2008-KA-00624-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The two issues raised in this appeal focus squarely upon the sufficiency and relative weight of accomplice testimony used to convict Dewayne Price of grand larceny, *viz.,* the theft of two (2) four (4) wheel all-terrain vehicles having a value of more than $500.00.

The posture of this case is controlled fully, fairly, and finally by the Mississippi Supreme Court's decision in **Blocker v. State**, 809 So.2d 640 (Miss. 2002). *See also* **Hendrix v. State,** 957 So.2d 1023 (Ct.App.Miss. 2007), reh denied, which is equally controlling.

DEWAYNE PRICE, a 24-year-old non-testifying, African-American male, recidivist, and young resident of Pickens (C.P. at 28) at the time of his trial and conviction for grand larceny, prosecutes a criminal appeal from the Circuit Court of Attala County, Joseph H. Loper, Jr., Circuit Judge, presiding.

Price, in the wake of a two count, joint indictment returned on March 24, 2008 (C.P. at 6), was convicted of stealing two (2) four (4) wheel all-terrain vehicles each having a value of more than

$500.00 in violation of Miss.Code Ann. §97-17-41(1). (C.P. at 26)

Price apparently seeks a reversal and discharge but, if not, at least a remand for a new trial. (Brief of the Appellant at 7-9)

The defendant's criminal indictment, omitting its formal parts, alleged in Count I that Cordarron Buchanan, David Holmes, and Dewayne Price " . . . [o[n or about July 13, 2007, . . . either individually and/or while acting in concert with and/or aiding, abetting, assisting or encouraging each other and/or others, did wilfully, unlawfully, feloniously, and intentionally take and carry away one (1) Green 2006 Kawasaki Bayou 250, and one (1)Red 1999 Honda 300 TRX 4x4, a further and more complete description being to the Grand Jury unknown, being the personal property of Michael Kuhn, while located in Attala County, Mississippi, said property having a total and aggregate value of more than Five Hundred ($500.00) dollars . . ." (C.P. at 3)

Count II of the indictment, which was not prosecuted and plays no role in the present appeal, charged the same three (3) men with the theft of a third 4-wheeler and one dirt bike belonging to Paul C. Jones and Tammie Burrell. (C.P. at 6-7)

Following a one (1) day trial by jury conducted on March 18, 2008, the jury returned a written verdict of, "We, the jury, find the defendant guilty of grand larceny." (C.P. at 26)

At the close of a brief hearing on sentence-enhancement, the judge adjudicated Price a habitual offender by virtue of Miss.Code Ann. §99-19-81 and sentenced him to serve a term of ten (10) years in the MDOC without the benefit of probation, parole, or early release. (R. 107)

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

I. "Whether the trial court committed error in denying the motion of Price for a directed verdict [made at the close of the State's case-in-chief."]

II. "Whether the verdict of the jury is against the overwhelming weight of the evidence."

STATEMENT OF FACTS

During the late night hours of July 13, 2007, Cordarron Buchannon, David Holmes, and Dewayne Price, a/k/a "Scoop," drove into Attala County where they loaded two 4-wheel vehicles belonging to Michael Kuhn onto Buchannon's truck and trailer. (R. 27-31)

Buchannon, who gave inconsistent statements to law enforcement authorities, agreed to testify against Price after entering a plea of guilty to larceny and receiving five (5) years probation. (R. 30)

Six (6) witnesses testified for the State during its case-in-chief, including **Cordarron Buchannon**, a co-indictee who turned State's evidence and implicated Price as an aider and abettor, if not a primary perpetrator, in the theft from a lean-to shed (R. 17) of the two 4-wheelers that were the personal property of Michael Kuhn. (R. 17-18)

Relevant portions of Buchanan's testimony concerning the events taking place the night of July 13, 2007, is quoted as follows:

> Q. [By Prosecutor]: All right. Tell me a little bit - - what happened that night?
>
> A. Well, when I got off work, David Holmes had gave me a phone call.
>
> Q. Who did you say called you?
>
> A. David Holmes.
>
> Q. Okay.
>
> A. So he told me he know where some four wheeler was. So I came to his house. Then we went where the bike was. He showed me where they was. Later on that night, we went and got them.
>
> Q. Who's "we"?
>
> A. Me, Dave Holmes, and Scoop.

Q. Who is Scoop? What's his real name?

A. Anthony Price, I guess.

Q. What's his name?

A. That's all I know is Scoop Price.

Q. Is the person you know as Scoop in this courtroom today?

A. Yes sir.

Q. Would you stand up and point him out for me, please?

A. Over here.

BY MR. BERRY: Your Honor, let the record reflect that the witness has pointed out the defendant, Dewayne Price.

BY THE COURT: Let it so reflect. (R. 24-25)

According to Buchannon he and Holmes drove to Price's house in Holmes County where they picked him up around 11:00 or 12:00 p.m. (R. 26) The trio then drove into Attala County where the 4-wheelers were kept inside a shed. Additional colloquy is quoted as follows:

Q. [BY PROSECUTOR:] What – what was the defendant's participation in this? What did he do that night?

A. He helped push the bikes and load them up.

Q. All right. What about the fence? How did y'all get out the fence?

A. We cut them.

Q. What did you cut them with?

A. A wire cutter.

Q. Who had those?

A. Me.

Q. And once you - - y'all three pushed them out - -

A. Yes, sir.

Q. - - to the road, is that correct?

A. Yes, sir.

Q. All right. How do you get them - -how do [you] get them from where they're taken, somewhere else? How did you get them there?

A. My truck.

Q. Okay. Who helped load them up in the truck?

A. Us three.

Q. Who - - repeat who us three is for me.

A. Me, David Holmes, and Scoop.

Q. And Scoop is the person you identified as the person sitting right over here, the defendant; is that correct?

A. Yes, sir.

Q. And that's the same person?

A. Yes, sir. (R. 27-28)

* * * * * *

Q. What is that a picture of?

A. Four wheelers.

Q. What - - what four wheeler is it? Where did that four wheeler come from?

A. That house on the hill.

Q. Now, is this the same four wheeler that was taken the night you were with the defendant David Holmes?

A. Yes, sir.

Q. Are you certain?

A. Yes, sir.

Q. And you're certain that the defendant helped you take this four wheeler and helped you load it up and helped you get it through barbed wire?

A. Yes, sir.

Q. What happened after y'all - - you stated a minute ago that you loaded it up.

Where did y'all take this four wheeler to?

A. Scoop house.

Q. You left - - you took it there. What happened when you took it there?

A. Well, they unloaded it. The one he had. * * * (R. 28-29)

* * * * *

Q. One final question. Being that you were involved in this case, did you get charged as well?

A. Yes, sir.

Q. And what happened with your case?

A. Five years probation.

Q. Did you plead guilty?

A. Yes, sir.

Q. And you've already served your time; is that correct.

A. Yes, sir. (R. 30)

During cross-examination, the following colloquy took place:

> Q. [BY DEFENSE COUNSEL:] So you gave them a statement, and then you gave them another statement. And now you're up here to testify. How do we know what to believe?
>
> A. Well, they got it on paper, sir. The first statement was a lie, sir. And - - and I think the second one was a lie. But - - no. The third one. The second one, I think I told them the truth.
>
> Q. You think you told them the truth?
>
> A. Yes, sir. They got it on paper, sir.
>
> Q. You think you're telling the truth today?
>
> A. Yes, sir.
>
> Q. Okay. Who had those wire cutters that night?
>
> A. Me.
>
> Q. And your statement today is that the defendant, Dewayne Price, was with you that night, helped – three of y'all walked up to this house, pushed those four wheelers to your truck?
>
> A. Yes, sir.
>
> Q. It took three of y'all to do that?
>
> A. Yes, sir. (R. 31-32)

Michael Kuhn, the property owner and victim of the theft, identified photographs of the green Kawasaki 4-wheeler and the red Honda 4-wheeler taken from his father-in-law's lean-to shed the night of July 13, 2007. (R. 19) Kuhn testified the value of his Kawasaki Bayou 250 4-wheeler and his Honda 4-wheeler was $3,700 and $2,800 to $3,000, respectively. (R. 19)

Randy Blakely, an investigator with the Attala County Sheriff's Department, testified that after receiving a tip, they went to the defendant's mobile home in Holmes County where they recovered the green 4-wheeler from a pine thicket located across the road from the defendant's

residence. (R. 34-35) Blakey observed 4-wheeler trails leading from the street a few feet below Price's mobile home into the wooded area. (R. 34)

According to Blakely they recovered four (4) other 4-wheelers from locations in Holmes County.

> Q. Did - - how far was this four wheeler away from where the defendant's residence is?
>
> A. There's a - - there's a road between his residence and the pine trees. From the road, maybe 30, 40 yards out in the neck of the woods. But it's an open - - it's open pine. (R. 35)

Dewayne Price was later developed as a suspect. (R. 36-37)

David Holmes, the defendant's cousin and a direct perpetrator, testified that on July 13, 2007, he, Buchannon, and Dewayne Price went over on Highway 14 and got some 4-wheelers. (R. 55) According to Holmes, Price was present at the scene but remained inside the truck while Buchannon and Holmes captured the red Honda and green Kawasaki and loaded them both onto Buchannon's truck and trailer. (R. 58) Holmes did not know what happened to the green 4-wheeler but kept the red one himself. (R. 58)

Curtis Price, the defendant's brother, testified he told the authorities on July 18th that around the time of the theft he had observed the defendant riding a green 4-wheeler. (R. 60-62)

Finally, **Eric Price,** another brother of the defendant, testified he told the authorities on July 18th that Buchannon, Holmes, and Scoop " . . . came to the house and they had three 4-wheelers." (R. 66) The green 4-wheeler was left at the house, and Eric's brother, Dewayne, was riding it. (R. 67)

At the close of the State's case-in-chief, the defendant's motion for a directed verdict of acquittal voiced on the ground the State had failed to prove beyond a reasonable doubt Price was involved in the theft was overruled with the following observations:

BY THE COURT: Well, the Court, in reviewing this testimony, has heard the testimony of Cordarron, but that says he was involved in the theft of the motorcycles or the four wheelers, and I have heard the testimony of the deputy sheriff that they were recovered in close proximity to the home of the defendant. So I believe the case - - the State has made a *prima fascia* [sic] case of grand larceny.

And so, the Court overrules the motion for directed verdict. (R. 70-71)

Price called one witness, Cassie Wright, his girlfriend, who stood by her man. She testified in support of Price's alibi defense that the night of July 13, 2007, she had been talking with Price on the telephone from " . . . like, 6:00 in the night till, like, 4:00 in the morning." (R. 72)

Q. That's a pretty long time. Why were y'all talking so long?

A. Because we had met not too long ago, so I was getting to know him.

Q. During that conversation, did you hear anything that led you to believe that Mr. Price was being involved in taking away some property?

A. No, sir.

Q. You heard nothing?

A. No, sir.

Q. That sounded like a crime was being committed to you?

A. No, sir. (R. 72-73)

After being fully advised of his right to testify or not, Price personally elected not to testify in his own defense. (R. 76-77)

The State produced no rebuttal and rested finally. (R. 75)

At the close of all the evidence (R. 75-76), Price's motion for a directed verdict was *not* renewed. (R. 75-76)

In addition, peremptory instruction was *not* requested. (R. 78-80; C.P. at 13-25)

Following closing arguments, the jury retired to deliberate at 1:50 p.m. and returned with the following verdict eighteen (18) minutes later at 2:08 p.m. : (R. 102)

> ""We, the jury, find the defendant guilty of grand larceny." (R. 103; C.P. at 26)

A poll of the individual jurors reflected the verdict returned was unanimous. (R. 104)

Following the sentence-enhancement portion of the two stage trial, the court adjudicated Price a habitual offender and sentenced him to serve ten (10) years in the custody of the MDOC without the benefit of probation, parole, or any type of early release. (R. 105-06; C.P. at 27)

On March 24, 2008, Price filed his "Motion For New Trial" claiming the court erred in overruling his motion for a directed verdict made at the close of the State's case-in-chief and that the verdict was against the overwhelming weight of the evidence. (C.P. at 29-30)

Price never moved, either *ore tenus* or in writing, for judgment notwithstanding the verdict. (C.P. at 29)

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

Richard Carter, Attala County Public Defender, represented Price effectively during the trial of this cause.

Neysha Sanders, a practicing attorney in Greenwood, has been substituted on direct appeal. Her representation has been equally effective.

SUMMARY OF THE ARGUMENT

Price 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).

Because Price, at the close of all the evidence, did not renew his motion for a directed or request peremptory instruction or move for judgment notwithstanding the verdict, he has also waived any appeal seeking to address the sufficiency of the evidence tending to proving his guilt. Nothing found in Price's motion for a new trial was sufficient to preserve the question of sufficiency for appellate review. Indeed, there can be no question about it. **Wetz v. State,** 503 So.2d 803, 808 (Miss. 1987), note 3 at 807-08.

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

Accepting as true the testimony of Buchannon that Price was a direct perpetrator who helped push and load the two 4-wheelers (R. 27);

accepting as true the testimony of Investigator Blakely that the green 4-wheeler was located in a pine thicket near the defendant's residence (R. 34-35);

accepting as true the testimony of Holmes that Price was present at the scene of the theft at the time of the theft (R. 55-57);

accepting as true the testimony of Holmes that he kept the red 4-wheeler but did not know what happened to the green one (R. 58);

accepting as true the testimony of Curtis Price that Dewayne Price was observed riding around on a green 4-wheeler (R. 60-61);

accepting as true the testimony of Eric Price that Buchannon, Holmes and Dewayne Price " . . . came to the house and they had three four wheelers," and Eric's statement to law enforcement that Dewayne was seen riding the green one that was left there (R. 67);

accepting as true all reasonable inferences flowing sweetly therefrom, and

disregarding evidence favorable to the defendant,

it is abundantly clear the State's evidence was legally sufficient to support Dewayne Price's conviction of grand larceny.

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 law and against the overwhelming weight of the evidence. (C.P. at 29-31)

Price, through his girlfriend, proffered an alibi - at least of sorts - in Price's defense. An alibi simply raises an issue of fact to be decided by the jury. **Wingate v. State,** 794 So.2d 1039 (Ct.App.Miss. 2001), reh denied, cert denied

"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 testimony of a single witness whose testimony is not unreasonable and whose credibility is not successfully impeached, will sustain a conviction even if there is more than one witness testifying in opposition to the single witness testimony. **Clanton v. State,** 279 So.2d 599 (Miss. 1973). *See also* **Freeland v. State,** 285 So.2d 895 (Miss. 1973); **Nash v. State,** 278 So.2d 779 (Miss. 1973).

"[P]ersons may be found guilty on the uncorroborated testimony of a single witness." **Doby v. State,** 532 So.2d 584, 591 (Miss. 1988). Price contends, however, " . . . that where there is no corroboration, the testimony of an accomplice cannot sustain a conviction." (Brief of the Appellant at 7)

This is not true.

Where, as here, the single witness is an accomplice, his uncorroborated testimony will support a conviction if that testimony is not unreasonable, improbable, self-contradictory, or impeached by unimpeached witnesses. **Clemons v. State,** 535 So.2d 1354 (Miss. 1988), rev'd on other grounds, 110 S.Ct. 1441, 1108 L.Ed.2d 725 (1990); **Evans v. State,** 460 So.2d 824 (Miss. 1984); **Fairchild v. State,** 459 So.2d 793 (Miss. 1984); **Winters v. State,** 449 So.2d 766 (Miss. 1984); **Rainer v. State,** 438 So.2d 290 (Miss. 1983).

But Buchannon's testimony was not uncorroborated, thus foregoing the necessity that his testimony also be reasonable, not improbable, self-contradictory or substantially impeached. *See* **Hendrix v. State,** *supra*, 957 So.2d 1023 (Ct.App.Miss. 2007).

Corroboration was provided by the testimony of Investigator Blakely with respect to the discovery of the green 4-wheeler in a pine thicket near the defendant's residence and the testimony of Holmes and the two Price brothers with respect to Dewayne's presence at the scene of the theft and their observations of Dewayne riding a green 4-wheeler.

It is well settled " . . . that even slight corroboration will be sufficient to uphold a conviction." **Feranda v. State,** 267 So.2d 305 (Miss. 1972). *See also* **Young v. State,** 425 So.2d 1022, 1024 (Miss. 1983) ["Only slight corroboration of an accomplice's testimony is required to sustain a conviction."]

We reiterate.

["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 Price's claim otherwise, affirmation of his conviction would not work an unconscionable injustice.

ARGUMENT

I.

BY INTRODUCING EVIDENCE IN HIS OWN BEHALF, PRICE 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 Price's conviction for grand larceny has been quoted verbatim in our Statement of Facts and summarized in our Summary of the Argument. We decline to repeat it all here.

It's time for some law.

Price, it appears, assails both the sufficiency and the weight of the evidence used to secure his conviction of grand larceny.

First, he argues "[t]he trial court committed error in denying Price's motion for a directed verdict" made at the close of the State's case-in-chief. (Brief of the Appellant at 6)

The complete answer to this assignment of error is that Price 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 70-71), Price produced Cassie Wright, his girlfriend, as a witness in his behalf. He did not renew his motion for a directed verdict made at the close of all the evidence. Nor did he request peremptory instruction, move for judgment notwithstanding the verdict, or include in his motion for a new trial any ground assailing the sufficiency of the evidence at the close of all the evidence as opposed to the weight of the evidence.

This is fatal to any appellate complaint targeting the sufficiency/insufficiency of the evidence. **Wetz v. State,** *supra,* 503 So.2d at 807-08, note 3 and **Holland v. State,** *supra,* 656 So.2d 1192, 1197 (Miss. 1995).

Motions for a directed verdict, judgment notwithstanding the verdict, and requests for peremptory instruction all challenge the legal sufficiency of the evidence presented at trial. **Carter v. State,** 869 So.2d 1083 (Ct.App.Miss. 2004); **Richardson v. State,** 868 So.2d 389 (Ct.App.Miss. 2004).

Any argument targeting the insufficiency of the State's evidence. either at the close of the State's case-in-chief or at the close of all the evidence, has been waived by virtue of this Court's holding in **Wetz v. State,** *supra,* 503 So.2d at 807-08, note 3 and **Holland v. State,** *supra,* 656 So.2d 1192, 1197 (Miss. 1995).

Even if not, when the issue is one of legal sufficiency, 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 the testimony of Cassie Wright who, we note, was merely an "ear", as opposed to an "eye", witness in this case.

The gist of Price's evidentiary complaint is that the jury verdict was based upon uncorroborated accomplice testimony. Price points out that Buchannon had pled guilty to the crime in question and had received a favorable sentence of five (5) years probation.

While this is true, Price's guilt or innocence was still a matter for the 12 man jury who had all this information before it for consideration. (R. 30, 31-32)

This is especially true where, as here, Cordarron Buchannon, a self-confessed accomplice, described, in plain and ordinary English, the presence and participation of Price in this caper. His testimony is worth repeating here:

> Q. [BY PROSECUTOR:] What – what was the defendant's participation in this? What did he do that night?
>
> A. He helped push the bikes and load them up.
>
> Q. All right. What about the fence? How did y'all get out the fence?
>
> A. We cut them.
>
> Q. What did you cut them with?
>
> A. A wire cutter.
>
> Q. Who had those?
>
> A. Me.
>
> Q. And once you - - y'all three pushed them out - -

A. Yes, sir.

Q. - - to the road, is that correct?

A. Yes, sir.

Q. All right. How do you get them - -how do [you] get them from where they're taken, somewhere else? How did you get them there?

A. My truck.

Q. Okay. Who helped load them up in the truck?

A. Us three.

Q. Who - - repeat who us three is for me.

A. Me, David Holmes, and Scoop.

Q. And Scoop is the person you identified as the person sitting right over here, the defendant; is that correct?

A. Yes, sir.

Q. And that's the same person?

A. Yes, sir. (R. 27-28)

Price also points to inconsistencies generated by Buchannon's trial testimony and a pretrial statement given to local authorities which failed to implicate Price, a prior inconsistent statement, if you please. (Brief of the Appellant at 7) A somewhat similar argument was made and rejected in **Collier v. State**, 711 So.2d 458, 462 (Miss. 1998), where we find the following:

> "We are asked to reverse this case on the grounds that there are inconsistencies and contradictions in her testimony. If this be true, it would still be a question for the jury." *Blade*, 240 Miss. at 188, 126 So.2d at 280; *e.g. Allman*, 571 So.2d at 253. In the instant case, any inconsistencies found in C.H.'s testimony go [to] the weight and credibility of her testimony, clearly a jury question. In addition, C.H.'s testimony was not at all inconsistent on the issue at the heart of this matter - Collier's fondling of her. This contention is without merit.

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).

Moreover, "[t]hat an accomplice may on the witness stand vary his testimony from his pretrial statements neither renders the testimony *per se* inadmissible, nor does it vitiate a subsequent conviction." **Pearson v. State,** 428 So.2d 1361, 1363 (Miss. 1983), and the cases cited therein.

Buchannon testified his first statement to law enforcement authorities was a lie but he told the truth in his second statement which implicated Price. (R. 31) The jury was entitled to believe the latter.

The defendant's version of the facts, according to Cassie Wright, is simply that he was not there at the time and place testified about - an alibi, if you please.

It is equally well settled the jury is under no duty or obligation to accept an alibi defense asserted by the accused and his or her witnesses; rather, an alibi simply raises an issue of fact to be resolved by the jury. **Wingate v. State,** *supra*, 794 So.2d 1039 (Ct.App.Miss. 2001), reh denied, cert denied; **Hughes v. State**, 724 So.2d 893 (Miss. 1998); **Burrell v. State**, 613 So.2d 1186 (Miss. 1993); **Lee v. State**, 457 So.2d 920 (Miss. 1984).

Price is well aware this case presents disputed facts and conflicting testimony. (Brief of the Appellant at 9) This is neither unusual nor fatal to the State's case. It is the responsibility of the jury to resolve conflicting evidence and to determine the credibility of the witnesses. **Armstead v. State,** 869 So.2d 1052 (Ct. App.Miss. 2004) reh denied; **Reed v. State,** 863 So.2d

981 (Ct.App.Miss. 2003).

If the testimony of Buchannon and the other witnesses for the State is accepted as true, it is clear the State's evidence was legally sufficient to support Price's conviction as at least an aider and abettor, if not a direct perpetrator, of the crime of grand larceny.

Our position on this issue can be neatly summarized in only three (3) words: "classic jury issue." In short, evidentiary conflicts - alibi versus Price's participation in the caper - created a jury issue.

Price also 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 Buchannon, as well as inferences to be drawn from the testimony of others, implicated Price by placing him at the scene of the theft at the time of the theft. Cassie Wright's alibi testimony was rather weak. We respectfully submit the evidence does not preponderate in favor of Price.

The testimony of a single witness whose testimony is not unreasonable and whose credibility is not successfully impeached, will sustain a conviction even if there is more than one witness testifying in opposition to the single witness testimony. **Clanton v. State**, 279 So.2d 599 (Miss. 1973). *See also* **Freeland v. State**, 285 So.2d 895 (Miss. 1973); **Nash v. State**, 278 So.2d 779 (Miss. 1973). In fact, the testimony of a single *uncorroborated* witness is sufficient to sustain a conviction even though there may be more than one witness testifying to the contrary. **Williams v. State**, 512 So.2d 666 (Miss. 1987).

With respect to accomplice testimony, the true rule is found in **Johns v. State**, 592 So.2d

86, 88 (Miss. 1991), where we find the following:

> This Court has long held that the testimony of an accomplice must be viewed with "great caution and suspicion. Where it is uncorroborated, it must also be *reasonable, not improbable, self-contradictory or substantially impeached.*" [citations omitted] If the uncorroborated accomplice testimony does not suffer from these infirmities, such testimony may be found to adequately support a conviction. [citations omitted and emphasis ours]

See also **Jones v. State,** 740 So.2d 904 (Miss. 1999), reh denied; **Strahan v. State,** 729 So.2d 800 (Miss. 1998), reh denied; **Finley v. State,** 725 So.2d 226 (Miss. 1998); **Holly v. State,** 671 So.2d 32 (Miss. 1996); **James v. State,** 756 So.2d 850 (Ct.App.Miss. 2000).

Price, to be sure, received the benefit of a cautionary instruction in this case. (R. 86, C.P. at 20)

"In this state, the uncorroborated testimony of an accomplice may be sufficient to convict even when the charge is capital murder and the sentence imposed is death." **Gandy v. State,** 438 So.2d 279, 285 (Miss. 1983), citing **Oates v. State,** 421 So.2d 1025 (Miss. 1982).

But Buchannon's testimony was not uncorroborated, thus foregoing the necessity that his testimony also be reasonable, not improbable, self-contradictory or substantially impeached. *See* **Hendrix v. State,** *supra,* 957 So.2d 1023 (Ct.App.Miss. 2007).

Corroboration was provided by the testimony of Investigator Blakely with respect to the discovery of the green 4-wheeler in a pine thicket near the defendant's residence and the testimony of Holmes and the two Price brothers with respect to Dewayne's presence at the scene of the theft and their observations of Dewayne riding a green 4-wheeler. It is well settled " . . . that even slight corroboration will be sufficient to uphold a conviction." **Feranda v. State,** 267 So.2d 305 (Miss. 1972). *See also* **Young v. State,** 425 So.2d 1022, 1024 (Miss. 1983)

["Only slight corroboration of an accomplice's testimony is required to sustain a conviction."]

If the testimony of Buchannon is accepted as true, it is clear that Price not only participated in the theft, he was one of three primary perpetrators - a principal, if you please.

As stated previously, this Court has long recognized that " . . . persons may be found guilty on the uncorroborated testimony of a single witness." **Doby v. State**, 532 So.2d 584, 591 (Miss. 1988). Where, as here, the single witness is an accomplice, his uncorroborated testimony will support a conviction if that testimony is not *unreasonable, improbable, self-contradictory, or impeached by unimpeached witnesses*. **Clemons v. State**, 535 So.2d 1354 (Miss. 1988), rev'd on other grounds, 110 S.Ct. 1441, 1108 L.Ed.2d 725 (1990); **Evans v. State**, 460 So.2d 824 (Miss. 1984); **Fairchild v. State**, 459 So.2d 793 (Miss. 1984); **Winters v. State**, 449 So.2d 766 (Miss. 1984); **Rainer v. State**, 438 So.2d 290 (Miss. 1983).

In the case at bar, the testimony of Buchannon, even if uncorroborated, was none of the above. Admittedly, he gave a prior inconsistent statement and did not come clean until the prosecution agreed to cut a deal allowing him to plead guilty to grand larceny. The jury, we note, was well aware Price had been given a lenient sentence. (R. 30)

Nevertheless, a reasonable, hypothetical juror could have found Buchannon's testimony both reasonable and probable. (R. 24-30) All of this was fully explored during cross-examination of Buchannon who testified that as part of his plea agreement, he agreed to come and testify against Dewayne Price. (R. 30)

In **McNeal v. State,** 757 So.2d 1096 (Ct.App.Miss. 2000), a defendant's conviction was upheld in the wake of accomplice testimony despite the defendant's impeachment of the accomplices using prior inconsistent statements. There, as in the case *sub judice*, the State

refuted the notion the accomplices' statements implicating the defendant were recent fabrications.

Cassie Wright, the defendant's witness, on the other hand, gave reasonably improbable testimony concerning the duration of a telephone conversation she allegedly had with Price the night of the theft. (R. 72-75)

Accordingly, Judge Loper did not err in allowing the jury to be the ultimate fact finder and, in the end, the final arbiter of Price's guilt or innocence.

The credibility of Buchannon, of course, was a matter for the jury to resolve in the wake of jury instruction number 6 (D-1), a crisp cautionary instruction that succinctly admonished the jury, *inter alia*, to consider and weigh his testimony " . . . with great care and caution" and even with "suspicion." (C.P. at 20)

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 Buchannon and the other witnesses for the State supports the verdict.

Who, other than the jury, could decide, fully and finally, whether Buchannon was telling the truth on this occasion?

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 Price guilty of grand larceny was not against the overwhelming weight of the evidence and that to affirm his conviction would not be to sanction an unconscionable injustice.

We reiterate.

The resolution of conflicts in the evidence, such as are presented in this case, is peculiarly for the jury. **Murphree v. State,** 228 So.2d 599 (Miss. 1969); **Spikes v. State,** 302 So.2d 250, 251 (Miss. 1974); **Colvin v. State,** 431 So.2d 1134, 1137 (Miss. 1983). "It goes without saying that the jury is the final arbiter of a witness's credibility." **Morgan v. State,** 681 So.2d 82, 93 (Miss. 1996).

Stated differently, "[t]he jury, [not the reviewing Court,] judges the credibility of the witnesses as well as the weight and worth of their conflicting testimony." **McCormick v. State,** 279 So.2d 596, 597 (Miss. 1973). "[W]hen the evidence is conflicting, the jury will be the **sole** judge of the credibility of witnesses and the weight and worth of their testimony." **Gathright v. State,** 380 So.2d 1276, 1278 (Miss. 1980) [emphasis ours].

"[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 Price's position, the case at bar does not exist in this posture.

CONCLUSION

Price, with the effective assistance of both his trial and appellate lawyers, has raised legitimate issues. Nevertheless, his claims are devoid of merit because, *inter alia*, the question of his guilt or innocence turned on the credibility of a self-confessed accomplice.

A reasonable, hypothetical juror could have found the testimony of Buchannon both substantial and credible.

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgments of conviction of recidivism and grand larceny, together with the ten (10) year sentence without probation or parole imposed by the trial judge, 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 date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

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