

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT L. SANDERS

APPELLANT

V.

NO. 2008-KA-0787-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

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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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Robert L. Sanders, Appellant
3. Honorable Ben Creekmore, District Attorney
4. Honorable Henry L. Lackey, Circuit Court Judge

This the 15 day of December, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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ROBERT LOUIS SANDERS

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUE

THE TRIAL COURT ERRED IN DENYING SANDERS MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lafayette County, Mississippi, and a judgment of conviction of Simple Robbery. Robert L. Sanders was sentenced to fifteen (15) years in the custody of the Department of Corrections, with three (3) years suspended and twelve (12) to serve, following a jury trial on April 15-16, 2008, Honorable Henry L. Lackey, presiding. Sanders is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On or around 1:00 a.m. on December 16, 2007, an individual came into the Subway in Oxford, Mississippi, and took money from the cash register. Tr. 78. According to the testimony of Kelly Bergmann and Edward Dominic McNeil an individual walked into Subway on University Avenue. Tr. 78, 107. The individual walked up to the counter and was speaking very low. Tr. 108.

Unable to understand what the individual was saying, Bergmann kept asking the individual to repeat himself. *Id.* She thought that the individual was asking for change of a dollar. *Id.*

McNeil came over to assist Bergmann, but McNeil was unable to understand what the individual was saying also. Tr. 117. However, the individual pulled out some change and McNeil figured that the individual wanted to make some sort of change. *Id.* Since McNeil was handling the situation, Bergmann decided to leave and go to the restroom. Tr. 109, 118.

McNeil walks over to the cash register and the individual acts like he is going to give McNeil some change. Tr. 118. McNeil hits the cash drop button on the cash register to open up the register. *Id.* After the register is open, the individual tells McNeil to give him all of the money in the register. *Id.* McNeil did not believe him at first, thought he was kidding. *Id.*

McNeil points up to the camera and told the alleged robber that the camera was on him and that he would not get very far. *Id.* The individual puts his hand in the front pocket of his shirt and demands the money in the register. *Id.* McNeil told the person that it only looked like his finger and not a weapon and that he did not want to do this. *Id.* The individual indicated that there was more than just his hand. *Id.* McNeil ultimately gave the individual the money from the register. McNeil stated that he was not willing to die for Subway. *Id.* After getting the money, the individual left Subway and went towards University Avenue. *Id.*

The police were called and they reported to Subway. Tr. 112. Bergmann and McNeil told the police that the alleged robber was a black male in his late thirties or early forties. Tr. 114. He was wearing a dark blue sweatshirt with a hood and a ball cap. *Id.* The hood was over the top of the ball cap. Tr. 108. His hands were very rough looking and very gray as if he worked in the construction industry or outside. *Id.* McNeil stated that the individual was stuttering and very hard

to understand. Tr. 114-15. McNeil also stated that the individual was taller than him. Tr. 118. The alleged robber also had some facial hair, and a space in his teeth. *Id.*

Officer Williams reported to Subway on the morning of December 16, 2007. Tr. 78. Patrol Officers, along with a dog, were looking for the suspect. *Id.* Officer Williams presented an array of various photographs that met the description that McNeil had given him. Tr. 80. McNeil could not identify the suspect from the photos that Officer Williams presented. Tr. 81.

A few days after the incident, Officer McAllister was conducting an investigation around River Hills in Oxford and ran across a person that matched the description of the person that had robbed the Subway. Tr. 105. Officer McAllister contacted Officer Stark to identify the person. Tr. 105-106.

Officer Stark recognized the picture of the person, but could not identify him by name. Tr. 99. Officer Stark rode up to an area called River Hills to try to encounter the person that met the description of the person that allegedly robbed subway. Tr. 100. Officer Stark ran into the person sitting on the porch at a house located at 157 Vaughn Circle. *Id.*

The person sitting on the porch was Robert Sanders. Tr. 101. Officer Stark noticed that Sanders had a gap in his teeth and had somewhat of a speech impediment. *Id.* Officer Williams then attained a photograph of Sanders from the Lafayette County Detention Center and showed it to McNeil at Subway and McNeil identified Sanders as the man that robbed Subway. Tr. 89.

Petsey Sanders testified that Robert Sanders did not rob the Subway. Tr. 137. She stated that they live on the other side of town and on the night in question; her husband Robert Sanders was at home asleep. *Id.* Petsey stated that she was at home with her husband and their two children. Tr. 137-138. Everyone was in bed and she was up cleaning the house. Tr. 138.

Robert Sanders was arrested and charged with armed robbery. He was found guilty of simple robbery and is presently incarcerated with the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The Appellant, Robert L. Sanders, is entitled to a reversal of his case and a new trial. The evidence presented did not warrant a verdict of guilty. Bergmann could not with certainty identify Sanders as the alleged robber.

Also no scientific or physical evidence was presented at trial linking Sanders to the alleged robbery on the night in question. The only evidence identifying Sanders was from McNeil. The verdict was against the overwhelming weight of the evidence and this was reversible error and Sanders is entitled to a new trial.

ARGUMENT

ISSUE

THE TRIAL COURT ERRED IN DENYING SANDERS MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

In trial counsel's Motion for a New Trial, counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 31, R.E. 8. The trial judge denied this motion. C.P. 39, R.E. 9.

In *Bush v. State*, the Mississippi Supreme Court set forth the standard of review as follows:

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.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005) (footnotes omitted).

In the present case, Sanders is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence. No evidence was presented to connect Sanders to the robbery at Subway other than McNeil picking Sanders out of a photo lineup. The other eyewitness, Bergmann, could not even identify Sanders in court with certainty. Tr. 112. In fact Bergmann was never asked by police to try and identify the alleged robber in person or by any photograph prior to trial. Tr. *Id.*

After the alleged robbery, the police were called to Subway. Tr. 112. Bergmann and McNeil told the police that the alleged robber was a black male in his late thirties or early forties. Tr. 114. He was wearing a dark blue sweatshirt with a hood and a ball cap. *Id.* The hood was over the top of the ball cap. Tr. 108. His hands were very rough looking and very gray as if he worked in the construction industry or outside. *Id.* McNeil stated that the individual was stuttering and very hard to understand. Tr. 114-15. McNeil also stated that the individual was taller than him. Tr. 118. The alleged robber also had some facial hair, and a space in his teeth. *Id.* So basically the police were looking for an individual that was slightly taller than a 5'7" McNeil, with some facial hair, that had a small gap in his teeth, spoke with a slight stutter, and had a grayish look to his hands like he worked in the construction industry possibly cement.

The description of the alleged robber still leaves the door wide open to numerous individuals. Many men are over 5'7" and have facial hair. Many men will have a small gap in their teeth and

possibly work outside with their hands. Also, from the testimony of Bergmann and McNeil, neither one could understand the alleged robber, but that is more than likely because he was trying to disguise his voice or hide it from them best he could. Tr. 108, 117-18.

Coincidentally a few days after the robbery at Subway, the police just happen to find an individual that matched the description of the suspect perfectly? As Officer McAllister was conducting an investigation around River Hills in Oxford, he ran across a person that matched the description of the person that had robbed the Subway. Tr. 105. Officer McAllister contacted Officer Stark to identify the person. Tr. 105-106.

Officer Stark recognized the picture of the person, but could not identify him by name. Tr. 99. Officer Stark rode up to an area called River Hills to try to encounter the person that met the description of the person that allegedly robbed Subway. Tr. 100. Officer Stark ran into the person sitting on the porch at a house located at 157 Vaughn Circle. *Id.*

The person sitting on the porch was Robert Sanders. Tr. 101. Officer Stark noticed that Sanders had a gap in his teeth and had somewhat of a speech impediment. *Id.* Officer Williams then attained a photograph of Sanders from the Lafayette County Detention Center and showed it to McNeil at Subway and McNeil identified Sanders as the man that robbed Subway. Tr. 89. No other evidence was introduced that collaborated McNeil's identification.

No physical or scientific evidence was presented at trial to show that Sanders was present during this alleged robbery. No fingerprints were taken from the Subway. No videos of inside the store were attained and no video from the parking lot were presented at trial that show Sanders as the alleged robber. In fact McNeil stated that he showed the camera to the individual that was trying to get the money, but the video camera did not work. Tr. 118. The alleged gun that was used in the

alleged robbery was never recovered. *Id.* No evidence was presented other than the testimony of McNeil that connects Sanders to the alleged robbery in the Subway in Oxford. Tr. 121-22.

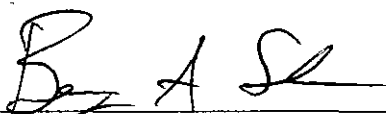
According to both Bergmann and McNeil, the assailant was wearing a ball cap and a hooded sweatshirt. Tr. 108, 114. The alleged robber had the hood over his ball cap on top of his head. Bergmann was not able to identify the individual because he was trying to hide himself, but McNeil was able to with certainty? It would be a great injustice for this conviction to stand in that no reasonable jury could convict Sanders based on the testimony of the witnesses McNeil, the identification, and the lack of any other type of evidence implicating Sanders. Plus the fact that Bergmann could not identify Sanders as the one who robbed the Subway. Tr. 112.

The verdict was against the overwhelming weight of the evidence. Sanders therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See Hawthorne v. State*, 883 So.2d 86 (Miss. 2004).

CONCLUSION

Robert L. Sanders requests that the verdict was against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,
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BY: 
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CERTIFICATE OF SERVICE

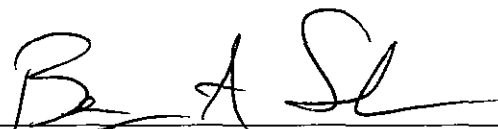
I, Benjamin A. Suber, Counsel for Robert L. Sanders, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Henry L. Lackey
Circuit Court Judge
Calhoun City, MS 38916

Honorable Ben Creekmore
District Attorney, District 3
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Honorable Jim Hood
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This the 15 day of December, 2008.



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