IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHRISTOPHER THOMAS — APPELLANT

VS. — NO. 2008-KA-1081

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR [redacted]

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

STATE RULES

IN THE COURT OF APPEALS OF MISSISSIPPI

CHRISTOPHER THOMAS — APPELLANT

VERSUS — NO. 2008-KA-1081-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Christopher Thomas was convicted in the Circuit Court of Yazoo County on three counts of armed robbery and was sentenced to three 15-year terms of imprisonment to be served concurrently. (C.P.42) Aggrieved by the judgment rendered against him, Thomas has perfected an appeal to this Court.

Substantive Facts

Terry Collins testified that on January 21, 2006, he went to the Game Room, also known as the "pool hall," in Yazoo City. He and ten to 15 other people were in attendance, playing pool and cards. Collins admitted that he was gambling at the time. Christopher Thomas, with whom Collins was acquainted, was "standing on the back right behind" Collins' table, "[j]ust observing." After "about 30 minutes," Thomas left, but returned approximately 20 minutes later wearing a black tie around his face. Collins recognized him by his shoes. "Then he shot in the

air." Frightened for his life, Collins "got up under the pool table." Thomas then demanded, "'Give me the mother-fucking money.'" Collins handed him $800. Thomas approached Jody Clark and made the same demand. Clark "gave him his money." (T.116-23)

Clark corroborated Collins's testimony, and testified additionally that he, too, was afraid for his life when he handed Thomas almost $500. Having been acquainted with Thomas for most of his life, some 34 years, Clark recognized him by "[b]y his voice and the clothes he had on and his shoes." (T.131-36)

Arthur Jones, a brother of Collins, testified that on the night in question, he (Mr. Jones), Clark, Wanda Collum and several others were "setting [sic] around playing cards" and "shooting pool" at the Game Room. Thomas was already inside the Game Room when Jones arrived. Thomas left at one point. When he returned, he "stood on the side of the wall." After he "heard a shot," Jones "looked up" and saw Thomas holding a gun. Thomas "didn't say nothing [sic] but just pointing around asking for money." At this time, Thomas's face was covered, but Jones recognized him by his clothing, shoes and height. When Thomas demanded money, Jones had what he thought was about $100 "on the table." After the shot was fired, Jones decided that Thomas could "have it." In other words, Jones was afraid that he was going to "get shot" if he attempted to keep his cash. (T.147-52)

Officer Jason Bright of the Yazoo City Police Department testified that he was dispatched to the Game Room that night. When he arrived, he spoke with several people, including Jones, Collins, Clark, Collum and a "Mr. Brown." He observed a bullet casing on the floor and "a bullet hole in the ceiling above the pool table." (T.162-64) Thomas, the only suspect in the case, turned himself in to the police department four days later. (T.168)

Thomas and his mother, Rosie Thomas, attempted to establish the defense of alibi. They also testified that he was not wearing the clothes described by the victims on the night of the armed robberies. Thomas denied having committed them. (T.177-85)

SUMMARY OF THE ARGUMENT

Thomas's challenge to the multi-count indictment is procedurally barred and substantively without merit. First, Thomas waived this argument by failing to present it below. Alternatively, the state contends the indictment was not required to set out the language of MISS.CODE ANN. § 99-7-2(1) (Rev.2007). Furthermore, the crimes charged were clearly based the same act or transaction.

Moreover, the court did not err in allowing the indictment to be amended to clarify the name of the victim in Count III. A change in the name of the victim goes to form rather than substance.

Furthermore, the record does not support Thomas's assertion that the trial court allowed the jury to observed him in restraints. In any case, Thomas may not put the court in error for failing to grant a mistrial which he did not request.

Additionally, the state contends the defense was not prejudiced by the granting of Instruction D-5 as amended. The language deleted from the first paragraph was adequately conveyed by the second paragraph.

The challenges to the overruling of several objections interposed by the defense have no merit. Thomas's attempt to predicate reversible error on prosecutorial misconduct also lacks merit.

Moreover, the verdicts are based on legally sufficient proof and are not against the overwhelming weight of the evidence. The testimony created a straight issue of fact which was properly resolved by the jury.

Finally, Thomas's invocation of the cumulative error doctrine is procedurally barred. It lacks substantive merit as well.

PROPOSITION ONE:

THOMAS'S CHALLENGE TO THE MULTI-COUNT INDICTMENT IS PROCEDURALLY BARRED AND SUBSTANTIVELY WITHOUT MERIT

Thomas contends first that the multi-count indictment returned against him was fatally defective for failing to "state any reason that would allow multiple offenses to be charged in one indictment." (Brief for Appellant 3) At the outset, the state counters that this argument has been waived because it was not presented below. *Wilson v. State*, 990 So.2d 798, 801 (Miss.App.2008), citing *Patrick v. State*, 754 So.2d 1194, 1195-96 (Miss.2000).

In the alternative, the state submits this proposition lacks substantive merit as well. First, Thomas has cited no authority[1] holding that a multi-count indictment must include the language

---

[1]*Tran v. State*, 962 So.2d 1237, 1241 (Miss.2007), does not address this specific issue.

of MISS. CODE ANN. § 99-7-2(1) (Rev.2007).[2] Moreover, in *Miller v. State*, 973 So.2d 319, 321 (Miss.App.2008), this Court rejected an argument identical to the one presented by Thomas. Furthermore, the evidence clearly showed that these crimes were based on the same act or transaction. Accordingly, even if Thomas had filed a motion to sever the counts, the court would not have erred in denying it. *Wilson*, 990 So.2d at 801. Finally, as in *Wilson*, "the trial court instructed the jury to evaluate each count separately and return separate verdicts." *Id.* (C.P.18-20)

For these reasons, Thomas's first proposition is procedurally and substantively without merit. It should be denied accordingly.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ERR IN ALLOWING THE INDICTMENT TO BE AMENDED TO CLARIFY THE NAME OF THE VICTIM IN COUNT THREE

Count Three of the indictment charged in pertinent part that Thomas committed an armed robbery against "Arthur James AKA Jones." (C.P.3) On the day of trial, after the qualification of the jurors by the court, the prosecutor asked to be heard at the bench. Thereafter, he asked permission to leave the courtroom and ask the alleged victim "whether his last name is James or

---

[2]That statute provides in pertinent part the following:

> (1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

Jones." After a pause in the proceedings, the prosecutor moved the court to amend the indictment to show that this victim's name was Arthur Jones. Defense counsel objected, stating, "It's at the last minute, Your Honor, and we are entitled to some type of due process and notice ahead of time." The court asked, "Do you have any evidence that there is an Arthur James as opposed to a Jones?" Defense counsel answered, "Not beyond what's in the indictment, Your Honor, no." The court then ruled, "Okay. Objection is overruled. Motion granted." (T.9-11)

"It has been held by this Court and the Mississippi Supreme Court that a change of the name of the victim in an indictment goes to form not substance." *Ivy v. State*, 792 So.2d 319, 321 (Miss.App.2001), citing *Burson v. State*, 756 So.2d 830 (Miss.App.200), and *Evans v. State*, 499 So.2d 781, 784 (Miss. 1986). Accord, *Speagle v. State*, 956 So.2d 237, 243 (Miss. App. 2006). In this case, the indictment initially notified the defense that the alleged victim in Count Three was "Arthur James AKA Jones." Moreover, the court gave Thomas an opportunity to show that his defense would be compromised by the amendment. See *Evans*, 499 So.2d at 784. He did not do so. It follows that the court did not err in overruling the defendant's objection to the amendment. Thomas's second proposition should be denied.

PROPOSITION THREE:

THE RECORD DOES NOT SUPPORT THOMAS'S ASSERTION THAT THE TRIAL COURT ALLOWED THE JURY TO OBSERVE HIM IN RESTRAINTS

After the court granted a recess during voir dire, the court conducted a bench hearing which was not transcribed. (T. 68) Thereafter, the following was taken:

> MR. HOLLOMAN: Your Honor, I– let me state this for the record.
>
> THE COURT: I just told them to remove those.

MR. HOLLOMAN: You did, Your Honor. I will state this, though. He was seated during the entire time the jury came back into this courtroom, and I would be very surprised if any of them have seen his feet because he's been seated ever since he came in here.

THE COURT: Okay. They took them off his hands?

MR. HOLLOMAN: They did, Your Honor.

MR. WALDRUP: He doesn't have any on his hands. I just noticed he's got 'em on his ankles.

THE COURT: Make sure you keep him seated, and once the jury's out, I'll make sure they take them off.

MR. HOLLOMAN: Thank you, Your Honor.

THE COURT: Defense may proceed.

(T.68)

The foregoing excerpt demonstrates that the defense did not request a mistrial or any further action on the part of the court as a result of this occurrence. It is axiomatic that the appellate court "will not put the trial court in error for failing to grant relief which was never requested." *Scott v. State*, 829 So.2d 688, 693 (Miss.App.), citing *Ross v. State*, 603 So.2d 857, 862 (Miss.1992). The defense apparently was satisfied that the venire had not observed the restraints. The trial court did not err in failing to grant a mistrial which was not requested. Thomas's third proposition lacks merit.

PROPOSITION FOUR:

THE TRIAL COURT MADE ADEQUATE FINDINGS WITH RESPECT TO THE MERITS OF THE REASONS GIVEN BY THE STATE FOR ITS EXERCISE OF ITS PEREMPTORY CHALLENGES

After the state had exercised its peremptory challenges and the panel was tendered to the defense, defense counsel interposed this objection: "Your Honor, at this time we raise a Batson challenge to the ... peremptory challenges exercised by the State as to Juror 2, 10, 12, and 17 and would urge that there appears to be a pattern of excluding African-American jurors from the panel." (T.87) The court found a prima facie case of a *Batson* violation and asked the state to provide racially neutral bases for the strikes. (T.90) At that point, the prosecutor did so, and the court considered and ruled on each reason as follows:

> MR. WALDRUP: Yes, ma'am. The race-neural reason for S1, Your Honor, is that Ms. Florsheme Thomas stated that she was close personal friends with the whole family. I went back and asked her about her last name being Thomas. We got into a conversation about that. Because of her statement about being close friends with the family or knowing the family, that's our reason for striking her.
>
> THE COURT: Court finds a race-neutral reason and will accept Thomas as S1.
>
> S2?
>
> MR. WALDRUP: Dedrick Deonne Woodberry. We have two or three cases in our office right now on a Woodberry– spelling the last name– for selling cocaine to MSN agents, and that's our basis for the challenge on Woodberry.
>
> THE COURT: Court finds a race-neutral reason for Woodberry and will accept S2.
>
> Harris?

MR. WALDRUP: Linda Harris is the one I tried to strike for cause. She knew three of the victims and she knew the defendant as well.

THE COURT: Court finds race-neutral reason for Harris and will accept her as S3.

Rodney Jefferson?

MR. WALDRUP: Rodney Jefferson stated in questioning that he had seen the defendant around in the community, and during the process of picking the jury, I was informed by law enforcement officers that he was good friends with the defendant.

THE COURT: Court finds a race-neutral reason for Jefferson and will accept him as S4.

S5, Austin.

MR. WALDRUP: Mr. Austin, Your Honor, his wife was first cousin with one of the parties involved. He was ... related by marriage to the defendant ... But he said he was related to the defendant by marriage and then his wife was related to one of the victims by marriage but that he didn't really know either one of them. But it's because of that relationship that we chose S5.

THE COURT: Court finds a race-neutral reason for Austin and will accept him as S5.

Panel is tendered to the defense.

(T.92)

As shown by the foregoing excerpt, the state provided racially neutral reasons which were valid on their face. The court considered each one separately and made a specific finding that each strike was racially neutral. The defense did not offer any rebuttal, nor did it object to the procedure utilized by the court.

Thomas now cites *Hatten v. State*, 628 So.2d 294, 298 (Miss.1993), in contending that the trial court erred by not making an on-the-record factual determination on the merits of the

state's reasons for the challenges. The state counters that where the defense fails to offer rebuttal, "the trial judge may base his decision only on the reasons given by the State." *Coleman v. State*, 697 So.2d 777, 786 (Miss.1997), quoted in *Woodward v. State*, 726 So.2d 524, 533 (Miss.1997). Where, as here, the defense does not attempt to refute the state's reasons, no genuine factual issue is created. Under these circumstances, the court's findings were adequate under *Hatten. Kohlberg v. State*, 829 So.2d 29, 86 (Miss.2002); *Spann v.* State, 771 So.2d 883, 903 (Miss.2000); *Bolton v. State*, 752, 40, 483 (Miss.App.1999). Thomas's fourth proposition has no merit.

PROPOSITION FIVE:

THOMAS'S ATTEMPT TO PREDICATE REVERSIBLE ERROR ON PROSECUTORIAL MISCONDUCT IS WITHOUT MERIT

Under his fifth proposition, Thomas contends he was denied a fair trial due to prosecutorial misconduct.

A. Thomas first attempts to predicate error on the following, which was taken during the state's opening statement:

> [MR. McNAIR:] After this robbery took– took place, one of the victims reported it. You had officers from the Yazoo Police Department to arrive. I believe Jason Bright was the first officer on the scene. He came and he took statements and he observed the location of the bullet and he talked with witnesses to see if he could get a description of the person who did the shooting and robbing the people.
>
> MR. HOLLOMON: If the Court please, I object to any testimony about a shooting.
>
> THE COURT: Let's approach the bench.
>
> MR. HOLLOMON: If it please the Court, Your Honor, he's charged with armed robbery.

THE COURT: And exhibition of a weapon. Did he actually fire the weapon?

MR. McNAIR: He shot into the ceiling.

MR. HOLLOMON: Is that what you're talking about?

MR. WALDRUP: Yes.

THE COURT: Objection overruled.

MR. HOLLOMON: Okay. I'll withdraw my objection.

(T.111-12)

As shown by the Statement of Substantive Facts in this brief, that is exactly what the state's proof showed: that Thomas fired the weapon into the ceiling during the court of the armed robberies. This act was part of the complete story of the crime, which the prosecution was entitled to introduce to the jury. E.g., *Williams v. State*, 991 So.2d 593, 607 (Miss.2008). Furthermore, "[t]he purpose of an opening statement is to inform the jury what a party to the litigation expects the proof to show." *Crenshaw v. State*, 513 So.2d 898, 900 (Miss.1987), quoted in *Slaughter v. State*, 815 So.2d 1122, 1131-32 (Miss.2002). At the time in question, the state expected to show that the defendant fired the weapon into the ceiling and, in fact, the state did elicit proof of this fact. It was absolutely proper for the prosecutor to refer to this act during opening statement. Even if defense counsel had not withdrawn his objection, the court would not have erred in overruling it.

B. Thomas argues next that the court erred in allowing the prosecutor to define "exhibiting" during opening statement. Near the conclusion of that statement, the prosecutor told the jury in pertinent part, "[W]e're talking about ... [a]rmed robbery. Not just robbery, armed robbery. Exhibiting a weapon. See, when you point and wave, you're exhibiting a weapon."

(T.114) No objection was interposed to this statement, and it may not be made for the first time here. *Rubenstein v. State*, 941 So.2d 735, 779 (Miss.2006); *Moore v. State*, 938 So.2d 1254, 1265 (Miss.2006), citing *Thorson v. State*, 895 So.2d 85, 112 (Miss.2004); *Rushing v. State*, 711 So.2d 450, 455 (Miss.1998).

Alternatively, the state submits the gist of Thomas's argument is that the jury might have "depended upon his [the prosecutor's] definition" rather than applying the court's instructions to the evidence presented. (Brief for Appellant 14) The state counters that the court instructed the jury that arguments of counsel were not evidence, and that any statement of counsel not based on evidence should be disregarded. (C.P.15) This charge obviated any conceivable error. E.g., *Lee v. State*, 837 So.2d 781, 785 (Miss.App.2003). In any case, because "exhibiting" is hardly an arcane legal term, it strains credulity to submit that the prosecutor told the jurors anything they did not already know. The state maintains that this point is procedurally barred.

C. Next, Thomas claims the court committed reversible error in allowing the state to argue that his face was not completely covered during the commission of these crimes. Defense counsel objected on the ground the comment was contrary to the evidence. The court overruled the objection. The prosecutor went on to state, "Y'all determine what the evidence shows, not the lawyers." (T.213) As shown in the previous paragraph of this brief, the court's instruction gave the jury the same admonition. Accordingly, there is no error with respect to the court's ruling on this objection.

D. Additionally, the defense contends the court erred in allowing the state to attempt to impeach Rosie Thomas during its questioning of Thomas. On cross-examination of the defendant, the state conducted the following line of inquiry:

Q. Mr. Thomas, are you aware that on the night this robbery took place, your mama clocked in for work at eleven o'clock in the evening at the Yazoo City Police Department?

A. No, sir. I don't keep up with her schedule.

Q. Were you aware that the police department keeps up with those records?

A. I'm quite sure they do, sir.

Q. So she couldn't have been there to see you, could she, the way she testified if that's right, could she?

(T.186-87)

At that point, defense counsel objected on the ground the state was trying to impeach Thomas with another witness's testimony, stating that this tactic was "improper." The court overruled the objection. (T.187)

For the first time on appeal, the defense argues that the state was attempting to impeach Rosie Thomas, rather than Thomas himself, and that this procedure violated M.R.E. 613(b).[3]

---

[3]That subsection is set out below:

> (b) **Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

The state counters first that this contention was not made below and therefor has been waived.[4] "It is elementary that different grounds than the objections presented to the trial court cannot be presented for the first time on appeal," *Russell v. State*, 607 So.2d 1107, 1117 (Miss.1992), and that "[t]he trial court will not be held in error on a legal point that was not presented for its consideration." *White v. State*, 809 So.2d 776, 777 (Miss.App.2002).

Solely in the alternative, the state submits M.R.E. 613(b) has no application here. The state did introduce or even attempt to introduce any "statement" of Rosie Thomas. This point plainly lacks substantive as well as procedural merit.

As for the complaint about the prosecutor's comments transcribed at T.202, the defense did not object or ask the court for any curative action. The attempt to predicate error on this occurrence is procedurally barred. E.g., *Randolph v. State*, 852 So.2d 547 (Miss.2002).

E. Thomas contends additionally that the prosecution committed misconduct during the sentencing hearing, when the assistant district attorney stated, "Normally, I don't speak at sentencing like this, but I ask the Court to take into consideration that he put his through this trial ... He should have taken his plea offer." The defense responded, "I think it's unconstitutional for him to be punished for exercising his right to a trial." The court stated, "I agree. I would not consider that as part of the sentencing." (T.235) Under these circumstances, Thomas cannot show that the prosecutor's comment prejudiced him in any way.

---

[4]At trial, the defense objected on the ground the state was attempting to impeach the defendant, not Rosie Thomas. (T.187)

F. Finally, the state submits the lack of merit in claims A. through E. show the lack of merit in claim F.

For the reasons set out in the foregoing argument, the state submits Thomas's fifth proposition should be denied.

PROPOSITION SIX:

THE DEFENSE WAS NOT PREJUDICED BY THE GRANTING OF INSTRUCTION D-5 AS AMENDED

Thomas argues additionally that the trial court erred in amending Instruction D-5 to strike the last phrase of the first paragraph therein. The instruction as tendered read as follows:

> It is a question of fact whether the gun claimed to have been used by Christopher Thomas was a deadly weapon *in the manner claimed to have been used.*
>
> A deadly weapon may be defined as any object, article or means which, **when used as a weapon under the existing circumstances** is reasonably capable of producing or likely to produce death or serious bodily harm to a human being upon whom the object, article or means is used.
>
> (emphasis added) (C.P.30)

The state objected to the first paragraph on the ground that it was superfluous to the second. Over the objection of the defendant, the court struck the language set out in italics above and granted the instruction as amended. (T.206-07)

The state submits that while the stricken language was not an incorrect statement of law, the point was adequately conveyed by the language set out above in bold. Both phrases required a finding that the instrument was a deadly weapon under the specific facts of this case. Under these circumstances, the granting of the instruction as amended could not have prejudiced the defense. Thomas's sixth proposition should be denied.

PROPOSITION SEVEN:

THE CHALLENGES TO THE OVERRULING OF SEVERAL OBJECTIONS INTERPOSED BY THE DEFENSE HAVE NO MERIT

Thomas goes on to argue that the court erred in overruling certain objections interposed by the defense. The first challenge implicates the following, which was taken during the direct examination of Collins:

> Q. Now, after this happened, did you have an opportunity to talk to law enforcement officers?
>
> A. Yeah. I told 'em what happened.
>
> Q. And has any of that– has that version changed since what you told them until today?
>
> MR. HOLLOMON: Court please, object to that.
>
> THE COURT: Overruled.
>
> MR. WALDRUP: (Continuing.)
>
> Q. Have you changed it?
>
> A. No.
>
> (T.122-23)

The foregoing excerpt demonstrates that the defense interposed a general objection to this testimony. Such objection is insufficient to preserve this issue for appeal. As the Mississippi Supreme Court stated in *Seeling v. State*, 844 So.2d 439, 445 (Miss.2003),

> Counsel must make specific objections in order to preserve a question for appellate review. This Court has said many times that general objections will not suffice. Objections to the admissibility of evidence must specifically state the grounds; otherwise, the objection is waived. [citations omitted]
>
> As considered in Oates v. State, 421 So.2d 1025, 1030 (Miss.1982), there are three basic considerations which underlie

> the rule requiring specific objections. It avoids costly new trials. [citation omitted] It allows the offering party an opportunity to obviate the objection. [citation omitted] Lastly, a trial court is not put in error unless it had an opportunity to pass on the question. [citation omitted] These rules apply with equal force in the instant case....
>
> Accord, *Sturkey v. State*, 946 So.2d 790, 795 (Miss.App.2006).

Although no further discussion is necessary, the state briefly addresses the merits of Thomas's argument. Thomas claims that the state improperly elicited evidence of a prior consistent statement. The short and dispositve answer to that contention is that no such evidence was brought out. The state did not bring out proof that Thomas had made prior consistent statements; Thomas simply testified that he had never given an inconsistent account of his initial version of the events in question. Thomas's first challenge therefore lacks substantive as well as procedural merit.

Thomas next points to the question posed to Officer Bright, "Was there ever any– another suspect?" Officer Bright answered, "No." The defense objected on the ground the question called for speculation. The court overruled the objection. (T.167-68) The state fails to ascertain, and Thomas fails to assert, how this testimony had any effect on the outcome of the trial. With respect to this point, Thomas has clearly failed to sustain his burden on demonstrating reversible error on the part of the trial court. See *McDonald v. State*, 881 So.2d 895, 901 (Miss.App.2004).

The final challenge under this proposition implicates the following, which was taken during the state's cross-examination of Thomas:

> Q. You've never owned a pistol?
>
> A. I never owned a 40 caliber.
>
> Q. What kind have you owned?

MR. HOLLOMON: If the Court please, object to relevance.

THE COURT: Sustained.

A. Thirty-eight.

MR. HOLLOMON: Court, please, object.

THE COURT: Sustained.

(T.192)

As shown by this portion of the transcript, the court sustained the only objections interposed to this line of questioning, and the defense requested no further action. "It is the rule in this State that where an objection is sustained, and no request is made that the jury be told to disregard the objectionable matter, there is no error." *Perry v. State*, 637 So.2d 871, 874 (Miss.1994), quoted in *Minor v. State*, 831 So.2d 1116, 1123 (Miss.2002).

For these reasons, Thomas's seventh proposition should be denied.

PROPOSITION EIGHT:

THE VERDICTS ARE BASED ON LEGALLY SUFFICIENT PROOF AND ARE NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Under his sixth proposition, Wilson argues that the proof is legally insufficient to sustain the verdicts and alternatively that he is entitled to a new trial because the verdicts are against the overwhelming weight of the evidence. To prevail on his challenge to the sufficiency of the evidence, he must satisfy the following formidable standard of review:

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and

> inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> *Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

Moreover,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss.App.1999).

See also *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991) (on appellate review the state "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence"), and *Noe*, 616 So.2d at 302 (evidence favorable to the defendant should be disregarded). Accord, *Harris v. State*, 532 So.2d 602, 603 (Miss.1988) (appellate court "should not and cannot usurp the power of the fact-finder/ jury"). "When a defendant challenges the sufficiency of the evidence to support a conviction, the evidence which supports the verdict is accepted as true by the reviewing court, and the State is given the benefit of all reasonable inferences flowing from the evidence." *Dumas v. State*, 806 So.2d 1009, 1011 (Miss.2000).

This rigorous standard applies to the claim that the defendant is entitled to a new trial:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss.Ct.App.2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss.App.2004),

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss.App.1999).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As the Mississippi Supreme Court reitereated in *Hales v. State*, 933 So.2d

962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

We incorporate by reference the proof set out in our Statement of Substantive Facts to support our position that the prosecution presented substantial credible evidence of Thomas's guilt on three counts of armed robbery. The testimony presented a straight issue of fact which was properly resolved by the jury. The trial court correctly submitted this case to the jury and did not err in refusing to disturb its verdict. Thomas's eighth proposition should be denied.

PROPOSITION NINE:

THOMAS'S INVOCATION OF THE CUMULATIVE ERROR DOCTRINE IS PROCEDURALLY BARRED AND SUBSTANTIVELY MERITLESS

Thomas finally contends that the cumulative errors of the trial court mandates reversal of the judgment rendered against him. He did not present this argument below and may not raise it for the first time on appeal. *Maldonado v. State*, 796 So.2d 247, 260-61 (Miss.2001); *Gibson v. State*, 731 So.2d 1087, 1098 (Miss.1998). His ninth proposition is procedurally barred.

In the alternative, the state incorporates its arguments under Propositions One through Eight in asserting that the lack of merit in Thomas's other arguments demonstrates the futility of his final proposition. *Gibson*, 731 So.2d at 1098; *Doss v.* State, 709 So.2d 369, 400 (Miss.1997); *Chase v. State*, 645 So.2d 829, 861 (Miss.1994). See also *Brown v. State*, 682 So.2d 340, 356 (Miss.1996) ("twenty times zero equals zero"). Thomas's invocation of the cumulative error doctrine lacks substantive merit as well.

CONCLUSION

The state respectfully submits that the arguments presented by Thomas have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

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

Honorable Jannie Mr. Lewis
Circuit Court Judge
P. O. Box 149
Lexington, MS 39095

Honorable James H. Powell, III
District Attorney
P. O. Box 311
Durant, MS 39063

Leigh Anne Cade, Esquire
Attorney At Law
P. O. Box 821887
Vicksburg, MS 39182

This the 15th day of January, 2009.

DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

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