

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JERRY MOSES

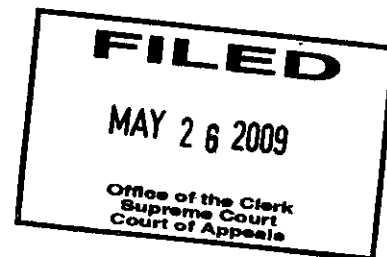
APPELLANT

VS.

CASE NO. 2008-KA-01285-COA


STATE OF MISSISSIPPI

APPELEE



APPELLANT'S BRIEF

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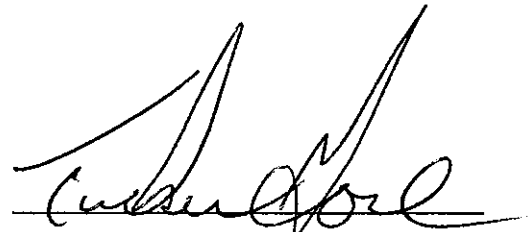
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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of the record certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that the Justice of this Court may evaluate possible disqualifications of recusal.

1. **JERRY MOSES, Appellant**
2. **Hon. Jim Hood, Attorney General for the State of Mississippi**
3. **Hon. E. Tucker Gore, Attorney for Appellant**
4. **Hon. Dewayne Richardson, District Attorney for the Fourth
Circuit**
5. **District of the State of Mississippi, Circuit Judge, Hon. Richard
Smith**

A handwritten signature in black ink, appearing to read 'E. Tucker Gore', is written over a horizontal line.

**E. TUCKER GORE, Attorney for
JERRY MOSES, APPELLANT**

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STATEMENT OF ISSUES

- 1.) When the state rested at the close of its case chief, it had failed to prove that JERRY MOSES had committed the crimes charged in the indictment.**
- 2.) The Lower Court erred by failing to sustain Defendant's motion for directed verdict.**
- 3.) The Lower Court's overruling of Defendant's motion for directed verdict was against the interest of justice and against the overwhelming weight of the evidence.**
- 4.) The Court erred in the admission of certain evidence.**
- 5.) At the close of the evidence the State had still failed to prove the facts beyond a reasonable doubt.**
- 6.) The Lower Court erred to grant defendant's jury instruction as to this being a circumstantial case.**
- 7.) The Lower Court erred by failing to grant Defendant's motion for judgment not withstanding the verdict of the jury, or, in the alternative, a new trial.**

STATEMENT OF THE CASE

This is an appeal from the Circuit Court of Washington County, Mississippi where an appellant JERRY MOSES, was convicted of one (1) count of car jacking. The Court sentenced Moses to serve a term of 15 years with the Mississippi Department of Corrections. In addition, the Court imposed court cost in the amount of \$294.00 in attorney fees, \$824.58 in restitution and a \$2, 500 fine.

The State called as its witnesses: Verna Thomas, Roven Belue, Ken Trader Archie Lee, Greenville Police Officers, Hattie Wilson, Louis White, and Robert Gibson. The State also called Thelma Miller, Charlie Stevenson, Co- Defendant Corderro Kennedy, and Linda Gatewood.

The witness Verna Thomas testified that on April 7, 2007 (R-60) that she parked on the levee in Greenville, MS in front of the Jubilee Casino a little after 12:00 noon. Ms. Thomas said that as she stepped from the car and two men suddenly appeared. She testified that she dropped her keys, fell to the ground and one of the men picked up her keys. Ms. Thomas stated that she did not recognize either of the two men (R-62; 73; 124). Ms. Thomas went on to testify that one of the men said "Ill kill you" and that he had a sack, but she didn't know what was in the sack. The two men then drove away in her car. Ms. Thomas then proceeded to the casino and told a security guard what happened.

Ms. Thomas testified that her car was recovered in Arlington, Texas and that she went there to retrieve it and after she arrived home she found a picture in her car and turned it over to the investigator Gibson of the Greenville Police

Department. This picture was entered into evidence as State's Exhibit S-1(R-71).

Ms. Thomas again stated she saw one man with a bag, but she did not testify that she saw a gun. Ms. Thomas went on to testify that she did not know the defendant JERRY MOSES.

On cross examination Ms. Thomas testified she did not see the two men's faces and was unable to choose anyone from a photo lineup for that reason (R-73). Additionally she was unable to identify anyone during the course of three separate interviews (R-74).

Next the State called Roven Belue the Surveillance manager at Lighthouse Casino. Ms. Belue testified that she was on duty at 12:00 noon on April 7, 2007. Ms. Belue produced a VHS tape that contained footage of Jubilee's parking and the incident as described by Ms. Thomas. The VHS tape was admitted into evidence as State's exhibit S-2 (R-82). The two suspected men could not be identified from the tape.

The State next called Ken Trader Jubilee Casino security director. Mr. Trader testified he viewed the VHS tape on April 7, 2007 and saw the scene showing a woman getting out of a car, two men assaulting her, then the two men driving off in her car (R-87). On cross-examination Mr. Trader testified that he could not identify either man from viewing the video.

The State then called Archie Lee a security supervisor at Jubilee Casino. Mr. lee stated that he was the first security guard that Ms. Thomas first told about to two black males jumping her and taking her keys and car (R-94, 95). On cross

examination Mr. Lee testified that Ms. Thomas was unable to identify or describe the two black males that had approached her (R-98).

The State then called police officer Hattie Wilson who was the first responding officer (R-99) at approximately 12:15 on April 7, 2007. The officer was asked about her written report which drew an objection from defense counsel concerning hearsay in the document in which Ms. Thomas supposedly alleged that the two men had a shotgun at the time of the assault. The Court sustained defense counsel's objection (R- 101 thru 113).

On cross examination Officer Wilson testified that at no time did Ms. Thomas identify JERRY MOSES as one of the two black men that approached her on April 7, 2007 (R-120 thru 121).

Officer Louis White with the Greenville Police Department was next called by the State (R-121). Officer White had responded to the subject scene on April 7, 2007 and among other things interviewed Ms. Thomas. Officer White testified that Ms. Thomas was unable to identify either subject that had approached her, in particular JERRY MOSES (R-124).

Lead investigator Robert Gibson was then called by the State (R-125). Officer Gibson testified that Jubilee's security staff showed him a white car, type Mercury Tracer. From running the tag Officer Gibson learned that ownerships came back to a Thelma Miller at 338 Reed Road, Greenville, Ms. Officer Gibson had the car towed to the Greenville Police Station and then inventoried the same. The inventory among other things revealed a bag of clothing and an alleged little

piece of paper that was supposed to have the defendant's JERRY MOSE'S social security number on it. Under cross examination officer Gibson testified that he had no idea where the alleged piece of paper with JERRY MOSE'S social security number on it was located and it was never entered into evidence (R-161).

Next the state began to question Officer Gibson about his interview of co-Defendant. Corderro Kennedy after he was extradited from Albuquerque New Mexico. Officer Gibson identified the audiotape and transcript of Mr. Kennedy's statement and some were marked for identification.

Defense then objected to the use of Mr. Kennedy's statement in the State's case in chief to prove the guilt of Defendant JERRY MOSES. The Court properly ruled that the statement of a co-defendant such as Corderro Kennedy, can not be used to prove the guilt of another Defendant such as JERRY MOSES, when the co-defendant has already pled guilty and been sentenced in the same case. (R-144 thru 150). Later in Officer Gibson's testimony the Court erred and allowed Officer Gibson to quote a part of Mr. Kennedy's statement which places JERRY MOSES on Greenville Levee front on the morning of April 7, 2007. This improper testimony is the only evidence in the State's case that puts JERRY MOSES at the subject scene. (R-162 thru 165)

Officer Gibson went on to testify about the lack of evidence in the investigation. Officer Gibson stated that at no time did Ms. Thomas identify JERRY MOSES as one of her attackers (R-156) and they had no photo lineup identification (R-157). JERRY MOSES fingerprints were not recovered from either Ms.

Thomas's car or co-defendants Corderro Kennedy's car. The picture of JERRY MOSES's mother alleged recovered by Ms. Thomas was outside of the police's chain of custody and there are no other eyewitnesses to the assault other than Ms. Thomas (R156 thru 161). Finally Officer Gibson agreed that defendant JERRY MOSES voluntarily turned himself in to the Greenville Police Department.

The State then called Thelma Miller the mother of co-defendant Corderro Kennedy (R169). Ms. Miller stated that she owned the white 1990 Mercury Tracer that had been towed from the levee by the Greenville Police Department and that her son Corderro Kennedy had been driving it. Ms. Miller stated that on or about April 7, 2007 she would not have recognized defendant JERRY MOSES (R-173). Ms. Miller went on to say that she saw her son Corderro Kennedy about 9:00 a.m. on April 7, 2007 but did not mention seeing anyone else (R-173).

Under cross examination Ms. Miller testified that the Co Defendant Corderro Kenny had suffered from mental illness since high school and was being treated for such by Delta Mental Health (R-175 thru 181).

The State next calls Charlie Stevenson who stated that he had been friends with Defendant JERRY MOSES and co-defendant Corderro Kennedy since junior high school (R-185). Mr. Stevenson stated that on April 6, 2007 Defendant JERRY MOSES walked around the corner to his house and they visited. A short time later. co-defendant Corderro Kennedy pulls up in a white car. According to Mr. Stevenson the three stayed at his house and that the Defendant JERRY MOSES and Co-defendant Corderro Kennedy spent the night at his house. JERRY MOSES and

Corderro Kennedy were gone when he woke up the next morning. Mr. Stevenson testified that he had never seen JERRY MOSES and Corderro Kennedy with a gun and that they did not have one with them on the night of April 6, 2007 (R-189 thru 197).

The Co-defendant Corderro Kennedy is called next by the State. After questioning by the Court the State informs that should Mr. Kennedy refuse to testify or testifies differently from a statement he had given police earlier in this case that they intended on using his statement to prove the guilt of the Defendant JERRY MOSES even though Kennedy had pled guilty and been sentenced in this matter. The Court reverted back to his original ruling disallowing the use of the statement (R-199 thru 204) .

Mr. Kennedy testifies that he does not remember what happened on April 7, 2007 and that he doesn't know Defendant JERRY MOSES. Mr. Kennedy goes to admit he is a mental patient and that he hears voices in his head which causes his memory problems (R-207 thru 220).

Linda Gatewood who is the mother of Defendant JERRY MOSES was next called by the State (R-220). Ms Gatewood testified that police came to her on April 7, 2007 and said they were looking for Defendant JERRY MOSES because he might be involved in an armed car jacking that had taken place earlier that day. Ms. Gatewood told the police she did not know where JERRY MOSES was at the time.

Ms. Gatewood later testified that on the following Monday April 9, 2007, she

learned from her brother Glen, who lives in Louisville, KY that he had picked up JERRY MOSES in Greenville, Ms on the morning of April 7, 2007 and had taken him back to Louisville, KY. Ms. Gatewood went on to testify that the picture that had allegedly been found in Ms. Tomas's car and entered into by the State, Exhibit S-1 was a picture of her, her ex-husband and some friends some years earlier when she was pregnant with her son Defendant JERRY MOSES. Ms. Gatewood stated Ms. Thomas's daughter named Debbie Thomas was present when the picture was taken. Ms. Gatewood and Ms. Thomas were at a mutual friend's house in Fort Worth, TX and that Ms. Thomas's daughter Debbie had access to the photo. Ms. Gatewood stated that she never had possession of the picture.

Ms. Gatewood testified that once she learned JERRY MOSES had a warrant for his arrest she called him and told him to come home. She then bought him a bus ticket from Louisville, KY to Memphis, TN which entered into evidence as Defense Exhibit D-1. (R-222 thru 245).

At the conclusion of Ms. Gatewood's testimony the State rested its case at which time the Defendant moved the Court for a directed verdict (R-248). The Court after hearing argument from both, the Defendant and the State, denied Defendant's motion for directed verdict. (R-254) Afterwards the defense rest (R-256) and renews its motion for directed verdict. (R-257)

After receiving the jury instructions from the Court (R-257 thru 267) and hearing closing arguments of counsel (R-267 thru 288) the jury returned a verdict against JERRY MOSES wherein they found MOSES guilty of carjacking (R-290).

As a result of MOSES conviction the Court at 1:08 P.M. on June 16, 2008 sentenced MOSES to a term of 15 years with the Mississippi Department of Corrections and Court Cost of \$294.00, a fine of \$2,500, and \$300 in attorney fees

SUMMARY OF THE ARGUMENTS

JERRY MOSES argues that the evidence was insufficient to support the verdict of the jury and the verdict was against the overwhelming weight of the evidence; therefore the Lower Court erred by failing to sustain Defendant's motion for directed verdict and to grant Defendant's motion for not withstanding the verdict of the jury, or the jury, or in the alternative, a new trial.

The lower Court correctly ruled during the States direct examination of Officer Robert Gibson that the guilt of a defendant such as JERRY MOSES can not be proven with a statement given by a co-defendant such as Coderro Kennedy when such co-defendant had pled guilty and been sentenced in the same case. (R145-150). The lower Court erred when it reversed itself later on and allowed Officer Gibson to quote part of Kennedy's statement which supposedly placed JERRY MOSES at the Greenville Levee front on the morning of April 7, 2007. This erroneously admitted evidence is the only evidence throughout the States entire case that places MOSES at the crime scene that morning. (R162 thru 165).

The lower Court also erred when it allowed the State's witnesses Charlie

Stevenson to be questioned concerning JERRY MOSES possessing a shotgun on the evening of April 6, 2007. The court earlier ruled that since the victim Ms. Thomas had testified that she did not see a gun at the time of the incident that such testimony would be more prejudicial than probative. (R-101 thru 106)

The lower Court then finally found during its over ruling of Defense's motion for a directed verdict that this was a circumstantial case. The lower court erred when it reversed itself and denied giving defenses circumstantial jury instruction, D-3A. (R-261 thru 262)

Based on the errors cited above MOSES argues that his conviction is in error.

ARGUMENT

When the sufficiency and weight of the evidence are questioned, the allegation is really being directed against the accuracy of the jury's verdict. King v. State, 798 So.2d 1258, 60 (Miss. 2001) (citing, May v. State, 460 So. 2d 778, 780-82 (Miss. 1994)

On the issue of legal sufficiency, a reversal can only occur when evidence of one or more of the elements of the charged offence is such that "reasonable and fair minded jurors could only find the accused not guilty". Dickey v. State, 819 So.2d 1253, 1256 (Miss. 2002) The standard of review for a denial of a directed verdict, peremptory instruction and JNOV are identical. Coleman v. State, 697 So.2d 777, 787 (Miss. 1997) In McClain v. State, 625 so.2d 774, 778 (Miss. 1993) this Court held that a motion for JNOV, motion for directed verdict and a request for peremptory instruction challenge the legal sufficiency of the

evidence.

It is well established that matters regarding the weight of the evidence are to be resolved by the jury. Brown v. State, 829 So.2d 93, 103 (Miss. 2002) (citing Neal v. State, 451 So.2d 743, 758 (Miss. 1984); Danner v. State, 748 So.2d 844, 846 (Miss. Ct. App. 1999) A motion for a new trial challenges the weight of the evidence. Sheffield v. State, 749 So.2d 123, 127 (Miss. 1999) in Winston v. State, 626 So.2d 197, 100 (Miss. App. 1998) (citing, Brook v. State, 695 So. 2d 593, 594 (Miss. 1997) the Court stated:

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 quiet limited. We proceed by considering all of the evidence - - not just that supporting the case for the prosecution - and the like most consistent with the verdict. We give the prosecution the benefit of inferences that may be reasonably being drawn from the evidence. If the facts and inferences so considered 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 authority to disturb. McClain v. State, 625 So.2d 774, 778 (Miss. 1993); Wetz v. State, 503 So.2d 803, 808 (Miss. 1987); Smith v. State, 503 So.2d 803, 808 (Miss. 1987); Smith v. State, _____ So.2d _____ (Miss 2003) 2001-KA-01235-SCT (Emphasis added)

The next error committed by the lower Court was allowing a part of co-defendant Coderro Henry's hearsay statement given to the police to prove the elements of the crime that JERRY MOSES was charged with. The lower court violated MOSES Sixth Amendment right to confront his accusers. MOSES submits that by allowing this testimony to come in, reversible error has

occurred. Hillard v. State 950 So.2d 224 (MS 2207); Crawford v. Washington 541 U.S.36, 124 S.Ct.1354, 158 L.Ed. 2d 177 (2004). In Crawford, the United States Supreme Court held that “the Confrontation Clause of the Federal Constitution’s Sixth Amendment bars the admissibility of out of court “testimonial” statements by an unavailable witness offered in a criminal trial to prove the truth of a matter asserted (hearsay) unless the Defendant has had a prior opportunity to cross-examine the witness about the statement.” Frazier v. State, 907 So.2d 985(P36) (Miss. Ct. App. 2005)

According to the examples of the “testimonial” evidence provided by Crawford, 541 U.S. at 68, S.Lt., amongst others, prior testimony during police interrogations, such as this case, is an example of “testimonial evidence” Id. Kennedy’s erroneously admitted a statement about MOSES being at the Greenville levee front on the morning of April 7, 2007 is the only evidence that pulls the State’s case together and such should be reversible error. Hillard 950 So.2d at 230.

Another case dealing with the use of hearsay evidence is Flowers v. State, 773 So.2d 309 (Miss. 2000). “Counsel may not use a prior inconsistent statement as a ‘guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible’ ”. 773 So. 2d at 326-327.

The lower Court also erred when it allowed the prosecution witness Charlie Stevenson to be questioned concerning JERRY MOSES possessing a shotgun on the evening of April 6, 2007. The Court earlier ruled that since the

victim Ms. Thomas had testified that she did not see a gun at the time of the incident that such testimony's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury. Miss. R. Evid.403, U.S. V. Renfro, 620 f.2d 497 (5th Cir. 1980).

The lower Court found during its overruling of Defense's motion for a directed verdict that the case at hand was in fact a circumstantial case. The Court committed error when it reversed itself and denied to give defense's circumstantial jury instruction, D-3A.

The Court based its reasoning for denial on the erroneously admitted statement of Corderro Kennedy and the viewing of the Jubilee's Casino's VHS tape showing two men approaching the victim. It should be pointed out that neither defendant was ever identified from this tape

The lower Court having heard this testimony and being aware of the major discrepancies as to the offense for which DAVIS is charged should have granted a new trial. Gleaton v. State, 716 So.2d 1083 (Miss. 1998) Failure to grant a new trial to DAVIS would result in an unconscionable injustice by allowing the verdict to stand. Groseclose v. State, 440 So. 2d 297, 300 (Miss. 1983); Danner v. State, 748 So.2d 844, 846 (Miss. Ct. App. 1999); Collier v. State, 711 So.2d 458, 461 (Miss. 1998) the verdict entered by this jury is clearly a result of prejudice, and is manifestly against the weight of the creditable evidence. Cromeans v. State, 261 So. 2d 453 (Miss. 1972); Marr v. State, 248 Miss. 281, 159 So.2d 167 (1963).


CONCLUSION

JERRY MOSES submits that based on the foregoing authorities that his conviction before the Circuit Court of Washington County, Mississippi and the sentence imposed as a result thereof should be reversed and his case remanded.

RESPECTFULLY SUBMITTED, this, the 26th day of May 2009

JERRY MOSES

BY: 

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CERTIFICATE OF SERVICE

I, E. TUCKER GORE , attorney for Appellant, JERRY MOSES hereby certify that I have on this date mailed, postage prepaid, the original and four (4) copies of the Appellant's Brief to the Clerk of the Mississippi Supreme Court, P.O. Box 249, Jackson Mississippi 39205-0249, one (1) copy to Hon. JIM HOOD, Attorney General for the State of Mississippi, P.O. Box 220, Jackson , Mississippi 39205-0220, one (1) copy to Hon. DEWAYNE RICHARDSON, District Attorney for the 4th Circuit District of the State of Mississippi, P.O. Box 426, Greenville, Mississippi 38702-0426 and one (1) copy for JERRY MOSES, #140436 CCF, MAYERSVILLE Appellant, C/O Mississippi Department of Corrections, Mississippi 39113.

SO CERTIFIED, this, the 26th day of May 2009


E. Tucker Gore

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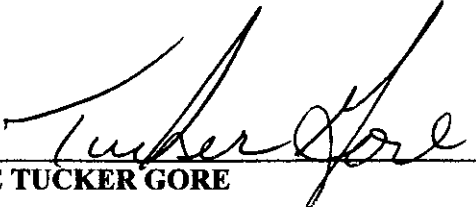
STATE OF MISSISSIPPI

APPELEE

CERTIFICATE OF SERVICE

I, E. TUCKER GORE, attorney for Appellant, JERRY MOSES, do hereby certify that I have on this date mailed, postage prepaid, one (1) copy of the Appellant's Brief to Hon. RICHARD SMITH, Circuit Court Judge for the 4th District of the State of Mississippi, P.O. Box 1953 Greenwood, Mississippi 38935.

SO CERTIFIED, this, the 26th day of May 2009


E TUCKER GORE