IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARVIN TERRELL KING — APPELLANT

VS. — NO. 2008-KA-1509

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARVIN TERRELL KING **APPELLANT**

vs. **CAUSE No. 2008-KA-01509-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Washington County, Mississippi in which the Appellant was convicted and sentenced for his felonies of **CONSPIRACY**, **AGGRAVATED ASSAULT**, and **MURDER**.

STATEMENT OF FACTS

Byron Jones, of the Black Dog quarter of the city of Leland, testified that he knew a Ja'Quarius Wright, who was his second cousin, one Woquin Robinson, a Derantez Blue, a Nacardis Williams, and two fellows bearing the names Marvin King and Jimmy Lowe.

On the night of 9 May 2004, Jones and a friend by name of Charles Thomas went to a club known as the L & L Lounge. Thomas left at some point. Jones then had a difficulty with someone named Roosevelt Mitchell. While there were no blows struck, Jones stormed out of the club, kicking the door as he did so. Jones then rang Marvin King and asked him if Wright was there. He then told

King about his altercation with Mitchell. King and Wright told Jones that they were on the way to pick him up. They did find Jones at the intersection of Broad and Seventh Street.

Roosevelt Mitchell was said to have been from some place known as New Town, which was another quarter of the city of Leland. The inhabitants of Black Dog and New Town do not enjoy friendly relations, according to Jones.

After Jones got into King's vehicle, King asked for his gun, an "SK" rifle, which was located behind the front seats of the car. Jones was given a .38 caliber handgun. They drove uptown toward a "Double Quick." There they espied Robinson's vehicle. King stated, "Let's get him." Jones saw Williams, Lowe and Blue in Robinson's car, but did not see Robinson. King asked Jones what he wanted to do; Jones told him he did not want to do anything. They rode through the parking lot of the Double Quick, went back to the L & L club, went to a car wash, and at about that time they saw Robinson's car leave the Double Quick parking lot. King told Wright to follow the car.

After driving through several streets of Leland, King told Wright to let him and Jones out of the car. Wright did so. Before getting out of the car, King told Jones that he would shoot at the car and that he wanted Jones to shoot Blue. King had the rifle and Jones had the revolver. King got into some bushes and Jones stood at the intersection of two streets. When Robinson's car arrived, Blue got out of the car. At that point, King began firing at the car as Jones fired at Blue. After Jones fired two shots, he ran away. Jones thought King fired five rounds at the car and then more as he was running away.

Jones ran to a wooded area near a Patton Drive. King joined him there. Wright called to find out they were and then came to pick them up. Wright drove to a house in which someone named Charles lived. King asked Jones if he would keep the rifle. Jones refused. King also took his rifle with him inside the house.

Wright and Jones left, Wright dropping Jones off at a place known as Don's Superette. Jones

managed to get to his home, where he later found out that Robinson was dead. He was arrested later that night.

As for the .38 caliber revolver, Jones had that after the shooting. He gave it to a brother, who traded it for another weapon.

Jones admitted that he did not give an accurate account of what had happened to the police after his arrest. He told them that King had called him to say that he had been the shooter and to ask him whether he would hold the gun. Jones then explained the terms of the plea bargain he made with the State. (R. Vol. 3, pp. 23 - 65).

Ja'Quarius Wright was then called to testify. He recounted the events of the night as he drove Jones and King through the streets of Leland. As he was about to drive with King to pick up Jones, King put an assault rifle into the car. After Wright and King picked Jones up, King gave Jones a handgun. He further testified that Jones and King wanted to be dropped off at a certain intersection because they wanted to shoot at Robinson's car. Jones and King were discussing shooting at the car before they were dropped off. Jones told Wright that he would call Wright when they were ready to be picked up.

Wright let Jones and King out of his car. The Appellant had his assault rifle with him. Wright drove off, intending to go to his home. As he did so, he saw Robinson's car and noticed that Blue was sitting in the passenger's side. Wright was not too far from his home when he heard gunfire.

Jones did not call Wright. Wright called Jones and told Jones where to go to pick them up. King had the assault rifle with him. Wright asked them what had happened. King simply asked to be put out at Charles' house, which was a short distance away. When they arrived at Charles' home, King gave Charles' the assault weapon and got out of the car. Wright and Jones drove off.

As Wright and Jones were driving away, Wright asked Jones what had happened. Jones merely replied that he had been hiding behind bushes and asked Wright to tell no one about it.

Wright told Jones that what happened, happened, that he did not want to be involved in it, and for that reason was not going to drop Jones off at his home. Wright put Jones out at Don's Superette and went home. Later that night, Jones rang Wright to say that Robinson had been killed

Some time later, after King had been interviewed by the police, King told Wright that he had told the police that he had been with Wright on the night of Robinson's death and that he wanted Wright to make up an alibi for them both. King wanted Wright to say that they had been together during the day but that they were not with Jones. Wright did in fact tell law enforcement this. However, after Wright was arrested, he told the police that he had seen Jones with a gun and that Jones had given the gun to Charles, which was untrue.

Later, Wright spoke with Jones. Jones told him that King had been the one who was shooting and that he had fired no shots. Wright told King what Jones had said. King gave him an expression to the effect that Wright could believe Jones if he wanted to. (R. Vol. 3, pp. 65 - 104).

Jimmy Lowe testified. He stated that Nacardis Williams, Derantez Blue and he were at the L & L Club on the night of 9 May 2004. The left at closing time. They saw Woquin Robinson passing by, so they flagged him down to get a ride home. Robinson picked them up.

They made a stop at a Double Quick. While there, Lowe noticed Byron Jones, Marvin King, Derrick Jones and Wright riding in Wright's car, circling the Double Quick. Lowe and his party jumped back into Robinson's vehicle, and they drove toward Black Dog, intending to go to Williams' girlfriend's house. Lowe was sitting behind Robinson.

When they arrived at their destination, they stayed in Robinson's car and talked. Lowe looked over toward some bushes and a house. He saw something glowing up, something that reminded him of cat's eyes glowing at night. It was at that point that the shooting began. It appears that Robinson tried to drive off but had been shot. His car sped up, then slowed down, and came to rest against a gate. Robinson was struck by something on the arm. Blue got out of the car; Lowe

discovered that Robinson was dead. They took Robinson's body inside a house and called the police. (R. Vol. 3, pp. 107 - 116).

Christina Grisby lived with her parents at 229 Hill Street in Leland on 9 May 2004. They were asleep but were awakened by the sound of gunfire. Because bullets were entering their home, they met in a hallway and crawled to a telephone to call the police. When the police arrived, they were asked where the shooting was coming from. The indicated that it was from the back of their home. Behind their home, in their backyard, was a car, its engine still running, which had hit the next door neighbor's fence. There was no one in the car, but Grisby could see bullet holes in it. Grisby saw someone carrying another person into the house behind her house.

Some three or four bullets entered Grisby's home. King, the Appellant, is related to her. (R. Vol. 3, pp. 117 - 124).

Charles Thomas then testified. He said that he knew King, Jones and Wright. At about eleven o'clock on the night of 9 May 2004, he was at Kings house. Also present were Wright and his brothers and someone's girlfriend. After about an hour, Thomas left and went to his home.

Later that night, at about three in the morning, Thomas received a call from Jones. In response to that call, Thomas got up and went outside. He saw Wright, Jones and King in Wright's car. Jones gave Thomas an "SK" rifle and asked him to "hold it down for him." Thomas had seen the rifle on previous occasions at King's residence. Thomas took the gun and put it in a traveling bag and put it beneath his bed.

After having hidden the rifle, Thomas went back outside. King was still present. King was a bit jittery but not "unusual." King got his sister's car; Thomas and he went to the Double Quick where King bought snacks and Thomas bought a "black." Thomas then went home, this being at about half past three.

Thomas was to get no rest, though. About an hour later Thomas' sister rang him to tell him

that something had happened. In light of that telephone call, Thomas contacted the police and gave them the rifle. (R. Vol. 3, pp. 125-134).

Sgt. Byron Dewayne Vaughn, an investigator with the Leland police department, was despatched to the scene of the shooting. As he conducted his investigation, he found seventeen shell casings there. He was then informed by a brother officer that one victim had been taken to hospital, Derantez Blue, and another, Woquin Robinson, had been killed, his body lying in a nearby house.

Vaughn went inside the house. He saw Robinson's body lying on the floor. There was what appeared to be a bullet wound to the back of Robinson's head. There was another injury to Robins's shoulder. He also observed that Robinson had but one shoe on and that Robinson's trousers had fallen down.

Vaughn then inspected Robinson's car. He noted that there were multiple bullet holes in it, in the rear of the vehicle and windshield. There was a bullet hole through the headrest of the driver's seat.

Vaughn's next action was to interview Jones and King, whose names he had acquired from Nacardis Williams. Jones told Vaughn that King was the one who was shooting and who killed Robinson. King told Vaughn he knew nothing about the shooting and that he had been home with his brother when the shooting occurred. King also allowed that he had been with Thomas earlier in the evening.

So Vaughn interviewed Thomas. Thomas told Vaughn that he had been with King and Wright earlier on the evening of 9 May 2004 but that he did not know where King and Wright went after he left. He stated that later in the night King came to his house and asked him to keep a weapon. Thomas turned that weapon over to Vaughn. The weapon was inside a duffel bag.

The shell casings and bullet recovered from Robinson's body, together with the rifle recovered by Vaughn, were sent to the Mississippi Crime Laboratory.

During Vaughn's investigation, Nacardis Williams told him that he had seen Byron Jones and Derrick Jones at the scene of the shooting when the shooting occurred. Vaughn found out, though, that Derrick Jones was in a motel with a woman in Greenville at the time of the shooting. (R. Vol. 3, pp. 135 - 150; Vol. 4, pp. 151; 160 - 162).

Lieutenant Juan Overton of the Leland police department then testified. On the night of 9 May 2004, he was on duty and outside the L & L nightclub, talking with a security guard, when he heard gunshots. He then received a report that shots had been fired at a particular address; another officer went to that address while he drove around the area to see if he could find anyone attempting to leave the scene of the shooting. The other officer then reported that he had found a car that had crashed into a backyard.

Overton went to join the other officer. When he arrived, he saw that the driver's side door was open, the engine still running, the headlights on, and music still playing from within the car. Overton was told that there were people inside a house nearby, screaming for help.

Overton went inside the residence. He spoke with Derantez Blue and Jimmy Lowe. Both indicated that they thought they had been injured in the shooting. An ambulance was summoned for them. Overton also spoke with Nacardis Williams. Williams described what had happened and told Overton that it was the Jones boys who had been shooting at the car.

Overton also saw Robinson's body. It had been laid upon the floor of back room, the body lying face up. Robinson's shirt had been taken off and his pants taken down to his ankles. There was a large amount of blood around the body Overton checked for a pulse but found none. Emergency medical personnel found no signs of life.

Byron Jones was brought in the next day. He told Overton and others that he had been present with King and that King had committed the shooting. King was then brought in. King stated that he had been in the company of Ja'Quarius Wright and Charles Thomas. They went to Double

Quick and bought some things. Wright then dropped Thomas off at his home and then King at his.

So then Thomas was interviewed. After initially lying, Thomas told the officers that he had visited King and Wright earlier on the night of 9 May. King and Wright left together; he went home. Later that night, Wright, Jones and King came to Thomas' house. King gave Thomas the SKS rifle and asked Thomas to hold it for him. However, in another statement Thomas said that Jones gave him the rifle. Thomas gave the rifle to the police officers.

While Overton was at the L & L nightclub, and before he heard the gunfire, he heard a loud thump. He turned to see what made the noise and saw that it was Jones, who was leaving the club. Jones was asked whether he had a problem with the door. Jones responded in a derogatory and profane manner and walked off.

Overton went on to explain what the department's investigation revealed with respect to Derrick Jones. (R. Vol. 4, pp. 163 - 188).

Starks Hathcock, a forensic scientist with the Mississippi Crime Laboratory specializing in the field of firearms identification, examined an SKS rifle, cartridge casings and a projectile and metal fragments that had been sent to the laboratory for analysis. The seventeen cartridge cases found at the scene of the shooting were fired through the SKS rifle. The projectile submitted for analysis could not be positively included or excluded as having been fired from the rifle. (Vol. 4, pp. 189 - 202).

Dr. Steven Hayne performed the autopsy on the body of Woquin Robinson. The defense stipulated that Robinson's death was a homicide. Robinson died of a gunshot wound to the back of the head. The gunshot wound was a "distant" gunshot wound, meaning that the shot was fired at least a foot and a half to two feet away. Hayne believed the bullet had been fired from a high velocity weapon, given the fact that the bullet went through two intermediate targets before striking Robinson. He felt that a round from a .38 caliber handgun would not have had sufficient velocity

to go through two intermediate targets and still cause the kind of injury Robinson suffered. (R. Vol. 4, pp. 202 - 218).

The defense recalled Charles Thomas. Thomas testified that Jones was the one who gave him the rifle. He denied ever telling Overton of Vaughn that it was King who gave him the weapon. On cross - examination, he stated that he once considered King to be a friend but no longer did so because King and the others in Wright's car had involved him in Robinson's murder. When asked whether he was frightened of King, Thomas replied that he could not be "a hundred percent" scared of him. He was aware that "the word on the streets" was that he was a snitch. (R. Vol. 4, pp. 223 - 230).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT?

2. DID THE TRIAL COURT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT; DID THE TRIAL COURT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION FOR A NEW TRIAL?

3. DID THE TRIAL COURT ERR IN PERMITTING THE FORENSIC PATHOLOGIST TO TESTIFY OUTSIDE HIS AREA OF EXPERTISE?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT; THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT; THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION FOR A NEW TRIAL

2. THAT THE TRIAL COURT DID NOT ERR IN PERMITTING THE FORENSIC PATHOLOGIST TO TESTIFY CONCERNING THE VELOCITY OF THE BULLET THAT STRUCK AND KILLED THE VICTIM

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT; THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT; THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION FOR A NEW TRIAL[1]

The Appellant, in his First and Second Assignments of Error, asserts that the verdict of murder was either unsupported by the evidence, such that the trial court should have granted a directed verdict or judgment notwithstanding the verdict, or that the verdict was opposed by the great weight of the evidence and that for that reason the trial court erred in failing to grant a new trial. The Appellant has expended most of his tedious forty-seven page brief on these two routine issues.

Interestingly, while the Appellant stands before this Court convicted of conspiracy, murder and two counts of aggravated assault (R. Vol. 2, pp. 151 - 152), the Appellant's argument in support of his notion that the trial court should have acquitted him or granted him a new trial extends only to his conviction of murder. We do not find in his arguments that he assails the other verdicts. In his "Conclusion," he speaks only of one conviction, that of murder. (Brief for the Appellant, at 46). Throughout the Appellant's forty -seven page tome, he speaks only of his murder conviction. Consequently, because the Appellant's arguments are directed to his murder conviction but not the other convictions, conspiracy in particular, we regard the Appellant's appeal as being one as against the conviction of murder only.

Sufficiency of the evidence

The standard of review appurtenant to a denial of relief on a motion for a directed verdict and a motion for judgment *non obstante veredicto* is the same. *Croft v. State*, 992 So.2d 1151, 1157 (Miss. 2008). This Court:

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[1] We will respond to the Appellant's First and Second Assignments of Error in this response.

> . . . must, with respect to each element of the offense, consider all of the evidence – not just the evidence which supports the case for the prosecution – in the light most favorable to the verdict. [citations omitted] The credible evidence which is consistent with . . . guilt must be accepted as true. [citation omitted] The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. [citations omitted] Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. [citations omitted] We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair - minded jurors could only find the accused not guilty. [citations omitted]

Wetz v. State, 503 So.2d 803, 808 (Miss. 1987).[2]

The Appellant concedes that Robinson was killed. (Brief for the Appellant, at 17). We take it, then, that the Appellant concedes that Robinson's death was occasioned by the criminal agency of another. The Appellant, moreover, does not appear to attempt to say that Robinson's death was not a product of a deliberate design. The Appellant's claim is that the State failed to prove that he was the one who shot Robinson, and he goes on to assert several specific reasons in support of this notion of his. On the other hand, he does not appear to claim that he was not one of those who committed conspiracy to murder Robinson.

At the conclusion of the State's case - in - chief, the Appellant moved for a directed verdict as to all counts of the indictment. (R. Vol. 4, pp. 218 - 219). However, he did not assert a lack of sufficient evidence as to his identity as the murderer as a ground for the directed verdict. In fact, he asserted no grounds at all in support of his motion. At the close of all of the evidence, the Appellant did not renew his motion for a directed verdict, though he did submit peremptory instructions, which were refused. (R. Vol. 1, pp. 52 - 55; Vol. 4, pg. 241). He did not assert any ground in support of

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[2] *Wetz* is apparently no longer good authority for the proposition that a reviewing court is required to accept as true the evidence in support of the verdict in the context of a weight - of - the - evidence issue — in other words, in the context of claim that the verdict is contrary to the great weight of the evidence. *Dilworth v. State*, 909 So.2d 731, 735 (Miss. 2005). However, nothing in *Dilworth* or in *Bush v. State*, 895 So.2d 836 (Miss. 2005) affects *Wetz* in the context of a sufficiency - of - the - evidence issue.

the granting of the peremptory instructions. (R. Vol. 4, pp. 232 - 252).

To the extent that the Appellant would be heard here to assert error in the denial of the motion for a directed verdict and the denial of his peremptory instructions, the Appellant may not raise that issue now. Motions for a directed verdict must allege with specificity where the State's evidence is thought to be insufficient. A general allegation is insufficient. Where there is a lack of specificity, the issue is not before the Court. *Banks v. State*, 394 So.2d 875, 877 (Miss. 1981); *Hoyne v. State*, 1 So.3rd 946, 951 (Miss. Ct. App. 2009). The Appellant may not be heard now to assert specific grounds in an effort to put the trial court in error in its denial of the motion for a directed verdict and of the peremptory instructions.

The Appellant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. In this motion, the Appellant, in general terms, asserted that the trial court should have granted a directed verdict at the close of the State's case or at the close of all of the evidence. (R. Vol. 1, pp. 158 - 159). However, other than asserting that "it was obvious that a number of the S[tate]'s witnesses were not telling the truth and that [the Appellant] believe[d] it could be proven [that] they perjured themselves," the Appellant asserted nothing in particular in support of the claim that the evidence was insufficient to permit a verdict of guilty.

There was a hearing on this motion, though. However, the Appellant did not show that Jones and Wright committed perjury. The Appellant examined Officer Overton about his efforts to locate Jones' brother, who was seen at the L & L club not long before Robinson met his end. (R. Vol. 4, pp. 280 - 287). He also called Nacardis Williams, who had originally reported that Jones' brother was involved in the shooting but who, by the time of the post - trial hearing, testified that he could no longer be sure whether Jones' brother was involved. (R. Vol. 4, pp. 299; Vol. 5, pp. 300 - 310). The Appellant asserted that a new trial should be ordered because he was not aware until trial that Jones' brother had an alibi. (R. Vol. 5, pp. 308 - 309). According to the defense, the

State failed to disclose certain documents concerning Jones' brother's alibi, and it was for this reason, according to the Appellant, that jury verdict was "tainted." (R. Vol. 5, pp. 312 - 318).

Here, the Appellant attacks the testimony of Jones and Wright, claiming that their testimony was contradictory and was impeached. The Appellant did not attack Jones' or Warren's testimony in his motions in the trial court. The specific points raised here were not raised in motion for judgment notwithstanding the verdict or for a new trial and in the hearing on that motion. Consequently, he may not now be heard to raise them. *Banks, supra.*

Assuming for argument, however, that the points raised here were somehow, somewhere raised in the trial court, there is no merit to the claim that the testimony given by Jones and Wright concerning the Appellant's act of murder was so contradictory or so impeached that no reasonable juror could have given credit to it.

Jones testified that he called the Appellant after he had his difficulty with Mitchell. The Appellant and Wright picked Jones up. There was a rifle in the car, and the Appellant asked for it. The Appellant gave Jones a weapon. Jones had seen the rifle previously at the Appellant's residence. The only people in the car were Wright, Jones and King.

After the Appellant saw Robinson, he directed Wright to a certain street. The Appellant told Jones that he was going to shoot into the car. The Appellant wanted Jones to shoot Nacardis Williams. The Appellant got out of the car with the rifle. Jones got out of the car, armed with the handgun. Wright left the scene after having been told that he would be called when they were ready. Robinson drove by and King began shooting into his car. Jones fired two shots and fled.

Wright was summoned. He picked Jones and the Appellant up. The Appellant asked Jones if he would take the rifle. Jones refused. Wright then drove to Thomas' house. Thomas was given the rifle and asked to hide it.

Jones admitted that he lied to law enforcement in his first statement. He lied because he did

not want to admit his involvement in the shooting. (R. Vol. 3, pp. 23 - 65). However, at no time did he lie about the Appellant's involvement.

Wright's testimony corroborated Jones' testimony. It was Jones who called the Appellant on the night of the shooting. It was the Appellant who put the rifle into Wright's car. Wright and the Appellant did locate Jones and picked him up. The Appellant did hand Jones a .39 caliber handgun. There was no one else in the case besides Wright, the Appellant and Jones.

Wright further corroborated Jones' testimony as to how they happened upon Robinson and the "Double Quick." He described how he was instructed to drop Jones and the Appellant off at an intersection and that they wanted to be dropped off in order to shoot into Robinson's car. Wright described the plan to pick Jones and the Appellant up. He also corroborated Jones that it was he who called Jones just after the shooting.

Wright picked Jones and the Appellant up. He did not see Jones with a gun, but he did see the Appellant with the rifle. Wright drove to Thomas' house. Thomas was given the rifle. Wright admitted that he told law enforcement several lies about Jones and the Appellant's involvement in Robinson's death, and why he lied. (R. Vol. 3, pp. 65 - 104).

The Appellant claims here that there were some discrepancies as to who saw Robinson first, whose idea it was to shoot into Robinson's car, who handed Thomas the rifle, and where the shooters were located at the time of the shooting. He further alleges that these witnesses were impeached by their admissions that they had initially lied to law enforcement. (Brief for the Appellant, at 19).

It may be that there were minor discrepancies. It is true that there was a discrepancy as to who gave the gun to Thomas. Jones testified that the Appellant did; Wright said that both Jones and the Appellant did. But this discrepancy is trivial. It does nothing at all to put the important facts of the case into doubt. It should be recalled that there was no discrepancy concerning how the rifle got into Wright's car and who had the rifle during and after the shooting. And there was no discrepancy

about the kind of bullet that cause Robinson's death.

The fact that lies were initially told to the police is hardly shocking. This kind of thing is common, as the Court well knows from the many criminal cases it has considered, especially in crimes of this kind. The witnesses explained their reason for having lied, and while perhaps their reason – self preservation – was not a particularly noble one it was certainly a common and understandable one.

The question of what weight and credit should be given to the testimony of witnesses is a matter left to the jury. *Christmas v. State*, 10 So.3rd 413, 423 (Miss. 2009). Inconsistencies are not unusual and are not a ground to reject the entire testimony of witnesses. It is for the jury to determine the credibility of witnesses. *Duncan v. State*, 939 So.2d 772, 782 - 783 (Miss. 2006).

The Appellant claims that Jones presented only self-serving, uncorroborated and not credible testimony. This is merely the Appellant's opinion. Jones' testimony was corroborated by Wright's testimony. The claim that Jones was the ringleader is claim without foundation in the record.[3] While it may be that Jones did state at one point that he did not pull the trigger, he may have been speaking of the trigger of the gun used by the Appellant. In any event, he later admitted having fired the handgun.

Continuing on with his microscopic examination of the testimony, the Appellant asserts that there was some discrepancy in the testimony as to whether it was he or Jones or perhaps both who gave the rifle to Thomas. There was a conflict in the evidence on this point, but this is meaningless in view of the fact that there was no dispute in the evidence that Wright, the Appellant and Jones and

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[3] Assuming for argument that Jones was the "ringleader" or instigator of the plan to shoot Robinson and company, this would work no benefit for the Appellant. Under that scenario, the Appellant, if not Robinson's killer himself, certainly knowingly aided and abetted the one who did. As such he would have been a principal to the offense and equally liable for it. *Swinford v. State*, 653 So.2d 912 (Miss. 1995). If it is the Appellant's theory that Jones wanted Robinson killed, the point is meaningless in view of the Appellant's actions: the Appellant had the same intention and actively participated in the killing.

no one else were in Wright's car when the gun was given to Thomas and given the fact that there was no dispute in the evidence that the Appellant had the gun and put it in the car just prior to the shooting. There was no dispute over the fact that the Appellant was the one who got out of the car with the rifle. And there was no conflict in the evidence that the Appellant fired the rifle at Robinson's car.

As for the whether Jones was the one who said he was tired of whatever he was tired of, this was of little importance in light of the uncontradicted testimony concerning the Appellant's possession of the rifle and the fact that he got out of Wright's car with it and returned with it. The Appellant took the rifle and shot at Robinson's vehicle. Who first had the idea to do so is neither here nor there in view of what the Appellant did.

The fact that the plan was that Jones was to call Wright when Jones and the Appellant were ready to be picked up but that it was Wright who called Jones means nothing. Wright may have decided to call Jones.

The Appellant then baldly claims that ". . . it is clear that Jones was the one who used [the rifle] during the shooting and then passed it off to Thomas." (Brief for the Appellant, at 22). This remarkable claim is wholly unsupported by the record and is nothing but a kind of desperate speculation on the part of the Appellant. One wonders, if this bold claim were so, why the Appellant did not testify to it, as he might have done. The testimony was that the Appellant and Jones got out of Wright's car, both armed, the Appellant with the rifle, and the Appellant had the rifle when Wright picked them up. The Appellant certainly knows what he did, and if he did not shoot or did not shoot the rifle at Robinson's vehicle, one would have certainly expected him to testify as to that. It is not "logical" to assume that, if Jones gave the rifle to Thomas, then Jones was the one who shot the rifle. If Jones gave the rifle to Thomas, it is as "logical" to suppose that the Appellant gave it to Jones to give to Thomas, or that in the course of getting away in Wright's car Jones for some reason

or another was in closer proximity to the weapon.

The Appellant then tells the Court that the fact that Jones told Wright that he was shooting means that Jones admitted to having shot the rifle and so killed Robinson. The statement quoted by the Appellant (R. Vol. 3, pg. 99) shows no such thing. Jones fired the handgun. His statement to Wright would have referred to that act. Jones did not say that he fired the rifle, and, again, it was the Appellant who left Wright's car just prior to the shooting with the rifle. The Appellant, apparently, would have this Court believe that after getting out of the car the Appellant gave the rifle to Jones and stood around while Jones fired the rifle and the handgun.

The Appellant then attempts to blame law enforcement, claiming that the investigation was "incomplete" and "highly questionable." (Brief for the Appellant, at 24).

The Appellant bases this claim on the fact that one person indicated that the shooters were Jones and his brother. Law enforcement followed up on this report, but found that Jones' brother was in Greenville at a hotel at the time of the shooting. Jones' brother was at the L & L club on the night of the shooting, but was seen to leave before the shooting occurred in the direction of Greenville. It should also be borne in mind that no one placed Jones' brother in Wright's car.

The essential complaint is that law enforcement's investigative report did not include the hotel card that was provided or the photographic line up by which Jones' brother was identified. The Court is told that the prosecutors should have required more detail, but of course the Appellant provides no authority for that statement. These alleged deficiencies in the police report were explored on cross examination. It was for the jury to determine to what extent, if any, these supposed deficiencies compromised the officer's testimony.

We will point out again, though, that while it may be that Williams did initially tell law enforcement that Jones' brother was the other person involved, neither Jones nor Wright ever testified that Jones' brother was with them or was involved in the shooting. There were three people

in Wright's car before and after the shooting. Jones' brother was not one of them. Jones' brother was not in the car when Wright went to Thomas' residence. We will also point out that while Williams did initially state that Jones' brother was present at the shooting, he was not so certain of that at all later.

As to the point that no one explained how law enforcement found out that Jones' brother was in Greenville, we should think that if the Appellant thought the point important he could have explored that on cross - examination. The rest of the Appellant's nitpicking of law enforcement's efforts in this regard require no response.

The balance of the Appellant's complaints concern the fact that Jones' brother was seen at the club and that he left the club in the direction of Greenville at about two o'clock in the morning. It is said that Jones' brother's whereabouts were not sufficiently accounted for. Once again, we point out that at no time was Jones' brother ever put into Wright's car. The only suggestion that Jones' brother might have been involved came from Williams, who later stated that he could not be sure of the matter. Once again, the Appellant was the one seen to put the rifle in the car. The Appellant was the one seen to leave Wright's car with the rifle, and the Appellant was the one with the rifle when Jones and he were picked up after she shooting. Jones' brother was not present and did not participate in the shooting. This business about Jones' brother is nothing but a diversion, a red herring. The defense might have argued this to the jury, claiming that law enforcement did a slovenly job in the investigation, but this was simply a matter for the jury to consider. In no way did the trial court err in refusing to grant a directed verdict or set aside the verdict and discharge the Appellant on account of these complaints by the Appellant.

And then the Appellant complains that the officer gave conflicting testimony as to how many statements the witness Thomas gave. He also complains that certain statement were not in the investigative file. All of this merely went to the credibility of the witness. It is no ground to set

aside the verdict.

The evidence in support of the verdict, taken as true, together with all reasonable inferences therefrom, was that the Jones called the Appellant or Wright to come pick him up. The Appellant put the rifle in Wright's car; Wright and he then found Jones and picked him up. The Appellant asked for his rifle and gave Jones a handgun. After they saw Robinson, the Appellant instructed Wright to drive to a certain location. Wright let the Appellant and Jones out. The Appellant took the rife with him, and Wright was told that he would be called when Jones and the Appellant were finished. There was discussion in the car about what the Appellant intended to do. The Appellant fired into Robinson's car, killing Robinson and injuring two others. Jones ran to a nearby wood; the Appellant, rifle in hand, followed him. Jones rang Wright and Wright picked Jones and the Appellant up. Wright drove to Thomas's residence, where Thomas was given the rifle. A reasonable juror could conclude from this evidence that the Appellant fired the fatal shot. The trial court, then, did not err in refusing to grant a directed verdict or in refusing to grant relief on the Appellant's motion for judgment notwithstanding the verdict.

The Appellant has not set out any argument concerning any insufficiency of the evidence concerning the verdicts on aggravated assault or conspiracy. Those verdicts not having been distinctly challenged, it will be unnecessary to present any argument in support of them. The Appellant, presumably, will tell this Court that he was not the one proven to have committed the aggravated assaults for the same reason he was not proven to have committed the murder. We think the evidence was entirely sufficient to show that he committed the assaults and the murder. As for conspiracy, there is no argument tendered that the Appellant was not shown to have entered into a conspiracy. The proof did show that Jones and the Appellant entered into one. It is an awkward position to be in to allege that the evidence was insufficient to demonstrate that the Appellant was guilty of murder, yet guilty of conspiracy to commit murder, under the facts of the case at bar.

The First Assignment of Error is without merit.

Weight of the evidence

The standard of review applicable to an allegation that a trial court erred in denying relief on a motion for a new trial is as follows:

A motion for new trial challenges the weight of the evidence. A reversal is warranted only if the trial court abused its discretion in denying a motion for new trial." (Citation omitted) . . .

[w]hen 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).... [T]he evidence should be weighed in the light most favorable to the verdict. *Herring,* 691 So.2d at 957.

Pruitt v. State, No. 2008-KA-01405-SCT, Slip Op. At 3 - 4 (Miss., decided 28 January 2010, Not Yet Officially Reported).

The Appellant, relying principally upon *Thomas v. State*, 92 So. 225 (Miss. 1922)[4], asserts that the testimony was so highly contradictory and unreasonable and so highly improbable of the truth that this Court should order a new trial. In support of this notion, he launches yet another attack on the testimony of the law enforcement officer and of Jones.

As for the supposed contradictory testimony by the witness Vaughn, it is true that the officer stated that he settled upon Byron Jones and the Appellant as his suspects. It is also true that he admitted in his report that Williams told him that Jones and his brother were the shooters. It is also true, though, that Vaughn explained the apparent discrepancy. Jones' brother was not present but was in Greenville or on the way to Greenville at the time of the shooting. (R. Vol. 3, pg. 150; Vol.

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[4] *Thomas v. State*, 129 Miss. 332, 92 So. 225 (1922). Rule 28(e)(2)(i) M.R.A.P.

4, pp.160 - 161). Simply stated, law enforcement found out where Jones' brother was at the time of the shooting. While not stated explicitly in the record, it is obvious that they determined that Williams was incorrect about Jones' brother.

The Appellant then attempts to say that officer Overton gave contradictory testimony when he was asked whether he had seen any of the people involved in the investigation at the club. He stated in response that he saw Jones. He did not say at that time that he also saw Jones' brother. (R. Vol. 4, pg. 176). Later, on cross - examination, he stated that he saw Jones' brother (R. Vol. 4, pg. 186). We fail to see any inconsistency. The witness was asked if he had seen anyone involved in the investigation at the club. Jones' brother was not one of those so involved. The witness answered the question asked. On other hand, when asked by the defense whether he saw Jones' brother, he readily admitted that he had. There are no "glaring inconsistencies" or "blatant contradictions" save in the Appellant's fervid imagination.

Then there is more carping about Byron Jones and the deal he made with the State. This was all fully explored at trial, and it was for the jury to determine whether or how much of his testimony was to be believed. It should recalled that Jones' testimony was corroborated by Wright. Whether Jones initially admitted having to Wright about what he was tired of is insignificant in view of the testimony concerning the Appellant's actions with respect to the rifle. To the extent that the Appellant means to suggest that Jones was the one who originated the idea to attack Robinson and his crew, there is nothing but the Appellant's rank speculation to support that notion. We would point out, too, that, assuming for argument that Jones was the one who brought up the idea of attacking Robinson and his fellows, the Appellant clearly participated in any such idea. If those were the facts, and they are not, they would work no advantage for the Appellant. The Appellant's actions under that theory would show aiding and abetting. One who aids and abets a felony is guilty as a principal. *Swinford v. State*, 653 So.2d 912 (Miss. 1995).

The Appellant then claims that Wright had reasons to lie. Again, this was a matter for the jury to consider.

The Appellant says that the town was "ravaged" by gang violence and that the jury, its members desperate to bring a halt to such, could not consider the evidence impartially. There is nothing but the Appellant's say-so to support the claim that the town is or was "ravaged" by gang violence. This factual allegation is thus to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983). There is no basis in this record to support the suggestion that the jurors were unable to consider the facts of the case impartially on account gang activity.

The facts of this case are utterly unlike those in *Thomas*, *supra*. In *Thomas*, the facts were that the body of a well regarded white man was found at the gate of his residence. There was a concerted effort in the community to find the perpetrator. That effort included seizing that appellant, taking him to a wood, and whipping him in the hope of extracting a confession from him. He protested his innocense all through that degradation. Some ten or so days later, a young girl was found who averred that she had seen Thomas lifting the body of a white man and that he carried that body into a wood. The child said she had seen this even though she was some 100 or more yards distant from the point where she said she saw Thomas, and even though it was between dusk and dark when she said she espied Thomas and the white man, and even though she said nothing of what she had seen until some ten days or so had passed. For these and other reasons set out in the opinion, the Mississippi Supreme Court set aside the verdict of murder against Thomas and remanded the matter for a new trial.

To set the basic facts of *Thomas* out is of itself sufficient to demonstrate the inapplicability of that decision here, if the facts of the case at bar are in mind. In the case at bar, the Appellant, after receiving the telephone call from Jones, put an assault weapon into Wright's car, Wright and he then proceeding to locate and pick up Jones. From that point they drove to a local business, and, after

seeing Robinson and his fellows, decided to track down Robinson. The Appellant had his rifle, or had it passed to him, and he gave Jones a handgun. Wright subsequently dropped Jones and the Appellant off. The Appellant carried his rifle with him. The Appellant shot at the vehicle Robinson was driving, killing Robinson and injuring two others. Wright picked Jones and the Appellant up; the Appellant had possession of the rifle. The three then drove to Thomas' residence, where Thomas took possession of the rifle.

The account of what the Appellant did came from three witnesses. It may be that there were conflicts in some minor and largely tangential areas, but the essential story of what occurred was not in conflict. While the Appellant attempts to make much of what he says the police officers did not do with respect to Jones' brother, the lone suggestion that Jones' brother could have been involved was found to be an erroneous report. Jones and his brother did not leave the club together. There was absolutely no testimony that anyone was present in Wright's car at any time prior to and after the shooting other than Wright, Jones and the Appellant. There is likewise no dispute in the record that it was the Appellant who had the high - powered assault rifle before and after the shooting.

Now, while the Appellant has complained mightily about what he considers to be the weakness of the State's case, we point out that the Appellant did not testify, a passing strange thing indeed if there be any truth to the suggestion that everyone committed perjury in order to pin the blame on him so as to protect a relation or friend. Be that as it may, though, one thing is certain and that is that the verdict cannot possibly be said to be opposed by the great weight of the evidence. There is little to no evidence opposed to verdict. The Appellant presented but one witness in his case - in - chief, and that witness merely went into whether it was Jones or the Appellant who gave the rifle to Thomas.

The Second Assignment of Error should is without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN PERMITTING THE FORENSIC PATHOLOGIST TO TESTIFY CONCERNING THE VELOCITY OF THE BULLET THAT STRUCK AND KILLED THE VICTIM

In the Third Assignment of Error, the Appellant contends that the trial court erred in permitting the forensic pathologist, Dr. Steven Hayne, to testify that the bullet that struck and killed Robinson was a high velocity bullet. It is said that this testimony was outside the field of forensic pathology.

The Appellant admits that there was no objection to Hayne's testimony. However, he attempts to invoke plain error to overcome this deficiency, citing *Wilson v. State*, 21 So.3rd 572 (Miss. 2009). However, this Court did not hold in *Wilson* that "plain error" cured the consequences of a lack of an objection to Dr. Hayne's testimony. In fact, it upheld the State's position that the issue was barred on account of the lack of an objection. It then went on to briefly discuss the issue concerning Dr. Hayne, a thing this Court often does after finding that an issue is procedurally barred on account of the lack of a proper and timely objection. *Wilson*, at 589.

Because there was no objection to Dr. Hayne's testimony, the issue embraced by the Third Assignment of Error may not be considered here. *Bell v. State*, 725 So.2d 836, 853 (Miss. 1998). Furthermore, the Appellant may not now be heard to complain of Hayne's testimony in view of the fact that the Appellant did not object to Dr. Hayne's qualifications and did not *voir dire* Dr. Hayne. (R. Vol. 4, pg. 203). *Keys v. State*, 2007-KA-02221-COA Slip Op. At 5 (Miss. Ct. App., decided 13 October 2009, Not Yet Officially Reported)(citing *Baine v. State*, 604 So.2d 249 (Miss. 1992)). As the so-called "plain error doctrine" has not circumvented the operation of a procedural bar resulting from the lack of a proper and timely objection with respect to testimony in the area of forensic pathology and with respect to Dr. Hayne in particular, it has no application here either.

Assuming for argument that the Third Assignment of Error is properly before the Court, there is no merit in it. Dr. Hayne testified that he was familiar with injuries caused by bullets fired by an

SKS rifle, and familiar with injuries caused by .38 caliber projectiles. He testified as to the velocities of the two firearms. He was of the opinion that a high velocity bullet, fired from a rifle, struck Robinson given distance involved, the fact that the bullet went through two objects before striking Robinson, and in view of the injury Robinson suffered. (R. Vol. 4, pp. 214 - 217). This kind of testimony has been held to be a subfield of forensic pathology. *Keys, supra; see also Williams v. State*, 964 So.2d 541 (Miss. Ct. App. 2007).

Furthermore, in *Dycus v. State*, 875 So.2d 140 (Miss. 2004), this Court held that Dr. Hayne was properly permitted to testify that a bullet he found in the decedent in that case in the course of autopsy was consistent with certain caliber bullet. This Court found that Dr. Hayne's experience in investigating deaths resulting from gunshot wounds was a sufficient basis to permit him to testify concerning the caliber of the bullet. *Dycus*, at 156

The testimony given by Hayne in the case at bar was that was familiar with the velocities of projectiles fired by an SKS rifle and a .38 caliber handgun. He also stated that he was familiar with injuries caused by such projectiles. On the other hand, as in *Dycus*, Hayne did not testify that Robinson was shot with the SKS rifle involved in the case at bar. All Hayne did here was to explain why he believed the injury was caused with by a high velocity bullet. The trial court committed no abuse of its discretion in permitting Hayne to so testify in view of Hayne's unchallenged testimony concerning his familiarity with the velocities of bullets fired from such guns and familiarity with the wounds caused by such bullets.

Hayne's testimony was not "off the cuff", and it was not remotely similar to the testimony he gave in *Edmonds v. State*, 955 So.2nd 787 (Miss. 2007)[5]. While we suppose the Appellant cannot be faulted in his attempt to shoehorn the case at bar into *Edmonds*, the fact is that Hayne

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[5] Testimony which, it ought to be pointed out, was elicited by the defense in that case.

clearly demonstrated his basis for his views and his competency to express his views in the case at bar. The trial court committed no abuse of discretion in permitting Hayne to so testify.

The Appellant suggests that the weapons examiner was the one who might have expressed an opinion concerning high velocity bullets. Perhaps this is so, perhaps it is not. But it is highly unlikely that that witness would have had the training and experience to testify to such from the perspective of a forensic pathologist. In any event, that another witness might have had knowledge of high velocity bullets is no basis to conclude that Dr. Hayne did not. The characterization of Dr. Hayne's testimony on the point as "incredible" is ludicrous, just as are the many similar characterizations concerning other witnesses in the Appellant's brief in the case at bar. The Appellant's self-serving opinions as to what he considers "incredible" testimony are of no assistance to this Court.

The Appellant then spends his last six pages of his brief in an attempt to demonstrate why the admission of Hayne's testimony cannot be harmless error. In this effort, the Appellant cites the dissent in *Haynes v. State*, 934 So.2d 983 (Miss. 2006), apparently for the purpose of having this Court re-define what will be considered harmless error. There is neither need nor purpose to be served in engaging in an academic exercise concerning statements made in a dissent here.

The Court is told that the admission of Hayne's testimony violated a substantial right of the Appellant's. However, the Court is left to itself to divine what right that might be. In any event, Hayne's testimony was not merely conjecture on his part. Nor did Dr. Hayne try to tie the Appellant to the murder weapon. Hayne merely testified as to why he thought the bullet that killed Robinson was a high velocity bullet. Hayne said nothing about the identity of the shooter.

In the event that this Court should find that the Third Assignment of Error is before the Court and that it was error to permit Hayne to testify as to the nature of the bullet that killed Robinson, any such error would be harmless. The record is very clear on the point that the Appellant was armed

with the SKS rifle just before and after the shooting, that the Appellant told Jones that he would be shooting at Robinson's car, and that Jones saw Appellant do just that. This evidence was more than enough to permit the Appellant's conviction for murder. Despite the Appellant's effort to cloud the matter, the fact of the matter is that this is not a close case. Hayne's testimony on this point cannot be reasonably said to have affected the final result in the case at bar in view of the eyewitness testimony against the Appellant. This being so, any such error – and we certainly do not concede that it was error to admit this testimony – was strictly harmless. *Ross v. State*, 22 So.3rd 400, 411 (Miss. Ct. App. 2009)(citing *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So.2d 216 (Miss. 1969)).

The Third Assignment of Error is without merit.

CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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:

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