IN THE SUPRME COURT OF THE STATE OF MISSISSIPPI

CHRISTOPHER JOHNSON — APPELLANT

VS. — NO. 2008-KA-1542-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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CHRISTOPHER JOHNSON **APPELLANT**

VERSUS **NO. 2008-KA-01542-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

It took a jury of the defendant's peers only an hour to find Christopher Johnson guilty of firearm possession by a convicted felon. (R. 197-99) The defense stipulated that Johnson was a prior convicted felon (R. 2-3, 80-81; C.P. at 42), and three (3) ear and eye witnesses testified at trial that Johnson fired a single shot at his girlfriend from a small , black handgun. (R. 89-90, 95, 142, 151, 154, 158-59, 161-62)

On August 21, 2008, two (2) days following trial by jury on August 19th, the circuit judge sentenced Johnson to serve a term of ten (10) years in the custody of the MDOC. (R. 205; C.P. at 62)

CHRISTOPHER JOHNSON prosecutes a criminal appeal from his conviction of possession of a firearm by a convicted felon returned in the Circuit Court of Washington County, Ashley Hines, Circuit Judge, presiding.

Following a two count indictment returned on January 25, 2008, for aggravated assault (Count I) and possession of a firearm by a convicted felon (Count II), and after a trial

by jury conducted on August 19, 2008, Johnson was acquitted of aggravated assault but found guilty of possession of a firearm by a convicted felon. (C.P. at 35-36)

Sentencing took place on August 21, 2008, at which time the court sentenced Johnson to serve ten (10) years in the custody of the MDOC and ordered him to pay a $5,000 fine. (R. 205; C.P. at 62)

Johnson's indictment, omitting its formal parts, alleged in Count I that

> " . . . **CHRISTOPHER JOHNSON** , on or about the 25th Day of August, 2007, did unlawfully, willfully and feloniously cause or attempt to cause serious bodily harm to Vicky Carter by shooting at her with a deadly weapon, to-wit: a gun, or other means likely to produce death or serious bodily harm." (C.P. at 1)

The indictment charged in Count II that

> ". . . **CHRISTOPHER JOHNSON**, on or about the 25th Day of August, 2007, . . . did unlawfully, willfully and feloniously have or possess a firearm to wit: a gun, and he, the said CHRISTOPHER JOHNSON, having previously been convicted of the felony crime of Stalking in Cause Number 25,744 of the Circuit Court of Washington on the 1st Day of July, 2001, and having been sentenced to a term of two (2) years in the custody of the Mississippi Department of Corrections . . ." (C.P. at 1)

Following trial by jury conducted on August 19, 2008, the jury found Johnson not guilty of aggravated assault and guilty of firearm possession as a convicted felon. (C.P. at 198-99; C.P. at 35-36)

Only one (1) issue is raised on appeal to this Court:

Whether the trial court abused its judicial discretion in failing to grant Johnson's motion for judgment notwithstanding the verdict, i.e., whether the evidence in toto was sufficient to support the verdict of the jury that Johnson was guilty of firearm possession.

(Brief of the Appellant at 1)

STATEMENT OF FACTS

Christopher Johnson is a 37-year-old unmarried resident of Leland. He is the father of a six (6) year old son whose mother is Vickie Carter. Their domestic relationship has been a rather turbulent one.

Johnson's prior felony conviction for stalking, the target of his stipulation at trial, was a result of his previous threats and conduct toward Vickie. (R. 203)

According to Vickie Carter and two other witnesses, on August 25, 2007, Johnson fired a single shot at Carter with a small handgun. Fortunately, the bullet did not strike her or the automobile she was driving at the time.

Counsel opposite has recited the salient facts fairly and accurately in her brief, and we elect to defer to those facts here. (Brief of the Appellant at 1-3)

It is enough to say that the testimony of both Vickie Carter and her sister, Angela Ford, placed a handgun in the hands of Christopher Johnson who fired a single shot in the direction of Vickie Carter and the automobile she was driving at the time of her confrontation with Johnson. Levi Ford, Angela's husband, heard the shot.

The State produced seven (7) witnesses during its case-in-chief, including the intended victim and complainant, Vickie Carter. (R. 82-102)

Vickie Carter testified Johnson shot at her with " . . . a little black pistol." (R. 95)

Marjuan Overton, a Greenville police officer responding to the incident, testified he and Officer Evans found a shell casing in the street. (R. 108-09)

Gerald Evans, a Washington County deputy sheriff, testified he found a shell casing on 6th Street in the vicinity of where Johnson was "supposed to be standing." (R. 118-19)

Tammy Hudson, a Leland police lieutenant investigating domestic assault cases, identified a ".25 caliber casing" she placed in the evidence locker. (R. 126)

Mike Hood, a forensic expert specializing in latent print examination, testified that "[n]o ridge detail was found on this item." (R. 131)

Levi Ford, Vickie Carter's brother-in-law and the wife of Vickie's sister Angela Ford, testified he heard something that "sounded like a shot." (R. 142)

Angela Ford, Vickie's sister, and an ear and eyewitness to the incident, testified Johnson shot at Vickie with " . . . a small, black gun." (R. 151)

At the close of the State's case-in-chief, Johnson made a motion for a directed verdict of acquittal on the general ground " . . . the State has failed to make a *prima facie* case [against the defendant] in each count." (R. 163-64)

The motion was overruled by Judge Hines with the following observations:

> THE COURT: Well, the motion is overruled. I think by the stipulation and the testimony stipulated that the Defendant is a convicted felon. The testimony of the witness, Vickie Carter, establishes a *prima facie* case that the Defendant was in possession of a firearm and that he fired the firearm at Ms. Carter, so the motion is overruled. (R. 165)

After being advised of his right to testify or not, the defendant " . . . decided on his own that he does not wish to testify in this cause." (R. 167) Johnson produced no witnesses in his behalf. (R. 167)

At the close of all the evidence, peremptory instruction was requested and denied. (R. 169; C.P. at 171)

The jury retired to deliberate at 5:30 p.m. (R. 197) and returned an hour later at 6:30 p.m. with the following verdicts:

> "We[,] the jury[,] find the defendant guilty of possession of a firearm by a convicted felon in charge II of the indictment." (R. 198-99; C.P. at 35)
>
> "We[,] the jury[,] find the defendant not guilty of aggravated assault as charged in Count I of the indictment." (R. 198-99;C.P. at 36)

A poll of the jury reflected the verdict was unanimous. (R. 199)

Sentencing was deferred until August 21, 2008, at which time Judge Hines sentenced Johnson to serve a total of ten (10) years in the custody of the MDOC and imposed a $5000 fine. (R. 201-05)

On September 11, 2008, Johnson filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. He alleged, *inter alia,* the verdict of the jury was against the overwhelming weight of the evidence, and the State failed to prove he committed the crime as charged in the indictment. (C.P. at 65-66)

The motion for JNOV and for a new trial was overruled on September 16, 2008. (C.P. at 77)

The late Frank Carlton, a former district attorney and practicing attorney in Greenville, and George Kelly, a practicing attorney in Greenville, rendered effective assistance during Johnson's trial for firearm possession as a convicted felon.

Erin Pridgen, an attorney with the Mississippi Office of Indigent Appeals, has been substituted on appeal and has provided equally effective representation to Johnson.

SUMMARY OF THE ARGUMENT

A motion for a directed verdict and judgment notwithstanding the verdict challenge the sufficiency of the evidence. **Boone v. State,** 973 So.2d 237 (Miss. 2008).

Johnson argues the only evidence offered by the State to prove he possessed a

weapon came from the complainant, Vickie Carter; her sister, Angela Ford; and her brother-in-law, Levi Ford, "all interested and biased witnesses." (Brief of the Appellant at 4, 7)

Assuming this is true, such would have a bearing on their credibility. Obviously then, Johnson's guilt or innocence was a jury issue. **Townsend v. State,** 939 So.2d 796 (Miss. 2006) [The jury is the final arbiter of a witness's credibility.]

We agree with the observations of the circuit judge who denied Johnson's motion for a directed verdict at the close of the State's case-in-chief. Judge Hines opined:

> I think by the stipulation and the testimony stipulated that the Defendant is a convicted felon. The testimony of the witness, Vickie Carter, establishes a *prima facie* case that the Defendant was in possession of a firearm and that he fired the firearm at Ms. Carter, so the motion is overruled. (R. 165)

The defense stipulated that Johnson was a convicted felon, thus relieving the State of the necessity of proving this element of the offense charged. All the State was required to prove was that Johnson had a pistol in his hand.

Any rational finder of fact could have believed or disbelieved the witnesses for the State that Johnson possessed a firearm. Stated differently, reasonable and fairminded men in the exercise of impartial judgement could have reached different conclusions. **Bush v. State,** 895 So.2d 836, 843 (Miss. 2005).

The trial judge did not abuse his judicial discretion in denying Johnson's motion for judgment notwithstanding the verdict which, as stated, assails the sufficiency of all the evidence. This is not a case where reasonable and fairminded jurors could only have found the defendant not guilty. **Daniels v. State,** 742 So.2d 1140 (Miss. 1999).

A reasonable and fairminded juror could have found from Vickie Carter's testimony alone that Johnson fired a handgun in the direction of Carter, his ex-girlfriend and mother

of Johnson's six (6) year old son, at the time and place testified about.

The testimony of Carter's sister, Angela Ford, who saw with her own eyes Johnson fire one shot from a "small black gun" in the direction of Vickie Carter's automobile, together with the testimony of both Vickie Carter and Levi Ford, if true, was sufficient proof beyond a reasonable doubt that Johnson was in actual possession of a firearm.

A reasonable and fairminded juror could have found from the testimony and evidence that Johnson actually possessed the firearm on the streets of Leland. Indeed, there can be no question about it.

ARGUMENT

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN OVERRULING JOHNSON'S MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT.

Johnson assails the sufficiency, as opposed to the weight, of the evidence used to convict him of firearm possession. The gist of Johnson's complaint is that "[t]he sole 'evidence' that the State offered to prove Johnson possessed a weapon came from the complainant - [Vickie] Carter, her sister and brother-in-law, all interested and biased witnesses." (Brief of the Appellant at 4)

No matter.

"The standard of review for motions for directed verdict and JNOV is abuse of discretion." **Young v. State,** 962 So.2d 110, 116 (Ct.App.Miss. 2007) citing **Smith v. State,** 925 So.2d 825, 830 (¶10) (Miss. 2006) (citing **Brown v. State,** 907 So.2d 336, 339 (¶8) (Miss. 2005)).

No abuse of judicial discretion has been demonstrated here. Consider the following.

Vickie Carter, the victim; Angela Ford, Vickie's sister; and Levi Ford, Angela's husband were ear and eyewitnesses to the incident, either in whole or in part. Admittedly, their interest in the case, if any, may have had some bearing on their credibility. Credibility presents a factual matter for the jury to consider; it is not a legal issue for the trial judge to resolve.

The testimony that Johnson claims was insufficient to support his conviction for actual possession of a firearm is quoted - first from the intended victim and complainant, **Vickie Carter** - as follows:

> Q. [BY PROSECUTOR MERCHANT:] So when you put the car in reverse, tell us what happens next.
>
> A. [BY VICKIE CARTER:] Okay. When I put the car in reverse, it's like he's trying to find something - - something to grab a hold to, so by me backing up on the street, I'm kind of like doing this here (demonstrating), but when I see him again, he's still running towards me, and he kind of like reached in his pocket and pulls out, to me, a little black pistol. And he's running towards me just like this here, so I'm backing up trying to pay attention to what's coming, because cars can come from this direction, but I'm trying to keep my eye on him, too, because I don't know what's his next - - what he's fixing to do, so at this time I just - - just hear pow and like the fire from the gun. * * * (R. 89-90)
>
> * * * * * *
>
> Q. And you also said at one point he pulled something out of his pocket.
>
> A. Yes, ma'am.
>
> Q. Did you see what he got out of his pocket?
>
> A. It looked like a little black gun to me.
>
> Q. Okay. And did you actually see a shot fired from that gun?

A. Yes, ma'am. (R. 95)

* * * * * *

Q. And how many shots did you hear fire?

A. One.

Q. Do you see Mr. Johnson in the courtroom here today?

A. Yes, ma'am.

Q. Can you point to him for me and tell me what he's wearing, please, MS. Carter.

A. The beige vest with the yellow striped shirt.

MS. MERCHANT: Judge, may the record reflect that the witness has identified the defendant, Christopher Johnson.

THE COURT: Let the record so reflect. (R. 96)

Angela Ford described Johnson's possession in this colloquy:

Q. [BY PROSECUTOR MERCHANT:] Okay, so you say he [sic] backed up and - - what does he do as she's backing up her vehicle?

A. He began running towards her.

Q. Okay. And you say as he runs towards her vehicle, tell the jury again what you see.

A. He pulls out a small, black gun - -

Q. Okay.

A. - - and shot once in her direction. (R. 151)

* * * * * *

Q. What direction was Mr. Johnson pointing the gun when he fired the shot?

A. Straight.

Q. Straight? At what? What was he pointing at?

A. What was he pointing at?

Q. You look confused. Do you understand what I'm asking? When the shot was fired from his gun, you had already indicated you saw him pull a black handgun - -

A. Uh-huh.

Q. What direction [w]as the gun fired in?

A. Toward - - toward Vickie.

Q. Do you see Mr. Johnson in the courtroom today?

A. Yes, I do.

Q. Could you point to him and tell me what he's wearing.

A. White sweater with stripped, yellow-blue shirt.

MS. MERCHANT: Judge, may the Court reflect - - may the record reflect that the witness has identified the defendant Christopher Johnson?

THE COURT: Let the record so reflect. (R. 154)

Angela's testimony that she saw a gun in Johnson's possession was reinforced during cross-examination as follows:

Q. [BY DEFENSE COUNSEL KELLY:] Alright. So now she starts backing up in this direction, right?

A. Uh -huh.

Q. And he starts running toward her; is that correct?

A. Exactly.

Q. And about how far did she back up?

A. She backed up to the end of the street.

Q. Okay. And while she was backing up, at some point in time you say that you saw CJ, the big CJ, pull out what appeared to be a weapon, pistol.

A. Okay.

Q. Is that correct?

A. Uh-huh.

Q. And you say that you saw him then fire that weapon.

A. Yes.

Q. Is that correct?

A. Yes. (R. 158)

* * * * * *

Q. So you can't tell where he was pointing that gun, can you? You didn't see the gun when he shot did you?

A. Yes, I did.

Q. How did you see it through his body? How?

A. Through his body?

Q. Yes. I mean, weren't you looking at his back?

A. I was on the side door - - what - - I mean, I was on the side of him. I didn't have no back view. I had the side view. (R. 159)

More reinforcement took place during the re-cross examination of Angela Ford by Mr. Kelly.

Q. And what color is the gun that you saw the

defendant with?

A. Black.

Q. Is that what you told the police?

A. Uh-huh.

Q. And was the gun big or little?

A. Middle. Small.

Q. Is that what you told the police?

A. (Witness nodded affirmatively)

Q. How is it that you were able to tell the police that it was a little, black gun?

A. You could - - you could see the - - I mean, it was a small gun but you could see.

Q. Did you actually see the gun that he had in his hand?

A. Portion of it.

Q. Did you hear the shot?

A. Yes, I did. (R. 161)

* * * * * *

Q. Did you see the shot - - hear the shot when it was fired?

A. Yes, I did.

Q. Do you have any mistake in terms of whether or not that gun was fired?

A. It was fired. (R. 162)

Levi Ford, Angela's husband, corroborated the observations of both Vickie and

Angela in that he heard something that sounded like a shot.

> Q. [BY PROSECUTOR SMITH:] Okay, you didn't observe him. Okay. Did you hear anything besides what your wife said when he was at the car with Vickie?
>
> A. Sounded like - - it sounded like a shot in - -
>
> Q. I"m sorry. You said - -
>
> A. It sounded like a shot.
>
> Q. You heard something that sounded like a shot?
>
> A. Yes. (R. 142)

As is frequently the case, counsel opposite cites and relies upon some of the right case law but, in our opinion, draws the wrong conclusion.

Judge Waller's opinion in **Bush v. State,** *supra*, 895 So.2d 836, 843 (¶16) (Miss. 2005), makes it perfectly clear that in resolving sufficiency of the evidence issues the evidence must be viewed and considered in the light most favorable to the State's theory of the case. We quote:

> In *Carr v. State,* 208 So.2d 886, 889 (Miss. 1968), we stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." **However, this inquiry does not require a court to**
>
> > **'Ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact**

could have found the essential elements of the crime beyond a reasonable doubt.

> *Jackson v. Virginia,* 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (citations omitted) (emphasis in original.) Should the facts and inferences considered in a challenge to the sufficiency of the evidence "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty," the proper remedy is for the appellate court to reverse and render. *Edwards v. State,* 469 So.2d 68, 70 (Miss. 1985) (citing *May v. State,* 460 So.2d 778, 781 (Miss. 1984)); *see also Dycus v. State,* 875 So.2d 140, 164 (Miss. 2004). However, if a review of the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fairminded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence will be deemed to have been sufficient. *Edwards,* 469 So.2d at 70; *see also Gibby v. State,* 744 So.2d 244, 245 (Miss. 1999).
>
> * * * * * *
>
> In light of these facts, we find that any rational juror could have found beyond a reasonable doubt that all of the elements had been met by the State in proving capital murder with the underlying felony being armed robbery. This issue is without merit. **Bush v. State,** 895 at 843-44 (¶¶16, 17) [emphasis in bold print ours].

The **Bush** case is particularly notable for re-articulating the standards of review for both the sufficiency of the evidence and the weight of the evidence. In note 3 of the **Bush** opinion, the Court pointed out that the tests articulated in **Bush** differ " . . . from the tests articulated in some of our previous opinions." **Bush v. State,** 895 So.2d at 844, note 3.

The Court in **Bush** observed that in **Turner v. State,** 726 So.2d 117, 125 (Miss. 1998), it had stated an incorrect standard of review for weight of the evidence complaints.

The test for legal sufficiency, on the other hand, was correctly stated in **Turner,** 726 So.2d at 124-25 as follows:

> Turner's contention is that the State failed to prove beyond a reasonable doubt that he was the driver of the pick-up when the accident occurred. The standard of review for Turner's legal sufficiency argument, wherein he argues the trial court erred in denying his motions for directed verdict and his motion for j.n.o.v., is:
>
> > Where a defendant has requested a peremptory instruction in a criminal case or after conviction moved for a judgment of acquittal notwithstanding the verdict, the trial judge must consider all of the evidence - not just the evidence which supports the State's case . . . . The evidence which supports the case of the State must be taken as true . . . The State must be given the benefit of all favorable inferences that may reasonabl[y] be drawn from the evidence . . . If the facts and inferences so considered point in favor of the defendant with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the peremptory instruction or judgment n.o.v. is required. On the other hand, if there is substantial evidence opposed to the request or motion - that is, evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair minded men in the exercise of impartial judgment might reach different conclusions the request or motion should be denied.
>
> *Weeks v. State,* 493 So.2d 1280, 1282 (Miss. 1986)(citing *Gavin v. State,* 473 So.2d 952, 956 (Miss. 1985)) * * * * * *

A finding the evidence is insufficient results in a discharge of the defendant. **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

Can it be said in the case *sub judice* that no rational juror could have found beyond a reasonable doubt that all of the elements of firearm possession had been met by the State?

Absolutely not.

To the contrary, based upon the testimony of Vickie Carter, Angela Ford and her husband Levi Ford, " . . . any rational juror could have found beyond a reasonable doubt that all of the elements had been met by the State in proving [firearm possession by a convicted felon.]" **Bush v. State,** 895 So.2d at 844.

According to Johnson the testimony of Vickie, Angela, and Levi Ford was insufficient to prove the State's case beyond a reasonable doubt because ". . . the sole 'evidence' that Johnson had a weapon came from the testimonies of biased witnesses." (Brief of the Appellant at 4)

The problem with this argument is that when considering the sufficiency of the evidence on motion for judgment notwithstanding the verdict, evidence favorable to the State must be accepted as true and any evidence favorable to the defendant, i.e., potential bias, must be disregarded.

In judging the legal sufficiency, as opposed to the weight, of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to *disregard* evidence favorable to the defendant. **Anderson v. State,** 904 So.2d 973 (Miss. 2004), reh denied; **Lynch v. State,** 877 So.2d 1254 (Miss. 2004), reh denied, cert denied 125 S.Ct. 1299, 543 U.S. 1155, 161 L.Ed.2d 122 (2004); **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State,**

667 So.2d 599, 612 (Miss. 1995); **Clemons v. State,** 460 So.2d 835 (Miss. 1984); **Forbes v. State,** 437 So.2d 59 (Miss. 1983); **Bullock v. State,** 391 So.2d 601 (Miss. 1980). *See also* **Jones v. State,** 904 So.2d 149, 153-54 (Miss. 2005) ["The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."]

This includes any interest the witnesses for the State may have had in the outcome of this cause which must be disregarded.

Another problem with Johnson's complaint is that the issue is one of credibility. The Supreme Court, of course, does not pass upon the credibility of witnesses, and where the evidence justifies a verdict, it must be accepted as having been found worthy of belief. **Moore v. State,** 933 So.2d 910 (Miss. 2006), reh denied.

The evidence must be viewed in the light most favorable to the State, and the State must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. **Howard v. State,** 853 So.2d 781 (Miss. 2003), reh denied, cert denied 124 S.Ct. 1455, 540 U.S. 1197, 158 L.Ed.2d 113, post-conviction relief denied 945 So.2d 326, reh denied.

Even the federal courts agree that on motion for judgment of acquittal, the verdict will be affirmed if a reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. All the evidence, together with reasonable inferences, are viewed in the light most favorable to the prosecution. **United States v. Simmons,** 470 F.3d 1115 (5 Cir. 2006).

The rule in this State is no different.

If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict, request for peremptory instruction or motion for JNOV should be overruled. **Brown v. State,** 556 So.2d 338 (Miss. 1990); **Davis v. State,** 530 So.2d 694 (Miss. 1988).

Viewing the testimony of Vickie Carter, Angela and Levi Ford in its most favorable light, it is clear a rational trier of fact could have found beyond a reasonable doubt that Johnson possessed a firearm.

Indeed, the question is not even close.

Our position on this issue can be summarized in only three (3) words: "classic jury issue." Judge Hines concluded as much. (R. 164-65)

CONCLUSION

Counsel opposite opines in her excellent brief that "[i]n acquitting Johnson of the aggravated assault charge, the jury correctly found that there was not sufficient evidence to sustain Carter's claims that Johnson fired a weapon at her car." (Brief of the Appellant at 6)

We opine, on the other hand, that Johnson's acquittal of aggravated assault was more likely a by-product and direct result of the late Frank Carlton's infamous "kildee" argument (R. 191-92) which he used on many occasions in securing convictions during his tenure as district attorney for the 4th Circuit Court District.

Ms. Merchant's prosecutorial response to Frank's argument was also priceless:

> "He's trying to play you for a fool. He tells you to use your common sense, but then wants to insult your intelligence. You can't have it both ways. Now I don't have any cute little stories for you. I don't even know what a killdee is, but all I want to talk about is why we're here today. And it's not about whether or not Mr. Johnson is a good person. You'll never find that in any of these instructions. That's not for you to

> decide. We all know good people do bad things. Fathers do bad things. Boyfriends [d]o bad things. We've all dated someone and it turned out to be bad. People get divorces. But that's not what we're here about. He's talking about killdees and smoke screens, but that's what he's talking about. But listen to what they didn't tell you. What did they not tell you? None of them has said he didn't have that gun. * * * " (R. 193-94)

A reasonable and fairminded juror could have found from the testimony and physical evidence that Christopher Johnson was a felon in actual possession of a firearm.

Although the jury was not bound to accept the testimony of the State's witnesses who claimed they saw the defendant pull out " . . . a small black gun" [Angela Ford at R. 151] and " . . . a little black pistol" [Vickie Carter at R. 95] and shoot once in Vickie Carter's direction, nevertheless, it was the sole and exclusive prerogative of *the jury*, not *the trial judge*, to consider and weigh their testimony which, if true, fully supported a finding that Johnson possessed a firearm.

Appellee respectfully submits no reversible error took place during the trial of this cause. Accordingly, the judgment of conviction of possession of a firearm as a convicted felon, together with the ten (10) year sentence and $5000 fine imposed by the trial judge, should be forthwith affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

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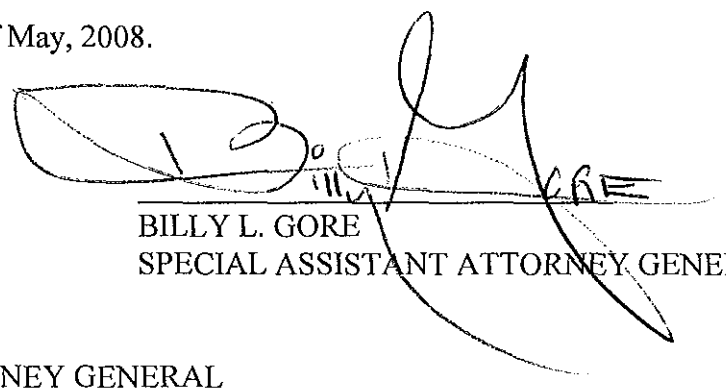
This the 19th day of May, 2008.



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