

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**DONALD RAY TOBIAS**

**APPELLANT**

**V.**

**NO. 2008-KA-1687-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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**MISSISSIPPI OFFICE OF INDIGENT APPEALS**

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**CERTIFICATE OF INTERESTED PERSONS**

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

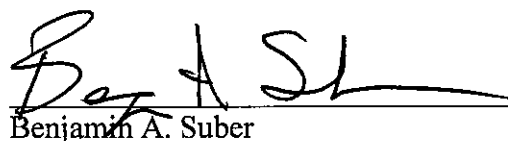
1. State of Mississippi
2. Donald Ray Tobias, Appellant
3. Honorable Ronnie Harper, District Attorney
4. Honorable Forrest A. Johnson, Circuit Court Judge

This the 20 day of January, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**DONALD RAY TOBIAS**

**APPELLANT**

**V.**

**NO. 2008-KA-01687-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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**STATEMENT OF THE ISSUE**

**THE TRIAL COURT ERRED IN DENYING TOBIAS'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

**STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Amite County, Mississippi, and a judgment of conviction for the crime of Armed Robbery against the appellant, Donald Ray Tobias. The trial judge subsequently sentenced the Appellant to serve a term of thirteen (13) years in the Mississippi Department of Corrections. After serving three (3) years of the sentence, the remaining ten (10) years to be served on post release supervision with the first five (5) non formal reporting supervision. The conviction and sentence followed a jury trial on January 31, 2008, Honorable Forrest Al Johnson, Circuit Judge, presiding. Tobias is currently in the custody of the Mississippi Department of Corrections.

## FACTS

On November 23, 2006, which was Thanksgiving Day, Davis Bell was going to meet his sons and grandson to hunt. Tr. 26. Bell belonged to a hunting club in Amite County. Tr. 25. Around three forty or three forty-five in the afternoon, Bell arrived at the hunting club. Tr. 26. According to Bell's testimony, the hunting club did not have a camp house, they had a mailbox on Springhill Church Road. *Id.* Members of the hunting club are required get the register log out of the mailbox and register the date, time, and location where they are going to be during their hunting activities. *Id.*

Bell testified that he had arrived at the camp mailbox and began to fill out the register log when someone approached him from behind and started striking him with a pipe. Tr. 27. Bell continued to state that he was aware that someone was behind him and as he began to turn around to see what the noise was behind him, someone struck him on the left shoulder. Tr. 28. As Bell was trying to dodge and get out of the way, the man was standing over him with a pipe. *Id.* Bell also trying to defend himself put his hands up to block the pipe, which resulted in breaking one hand and bruising the other one. *Id.*

Bell estimated that he was hit a total of eight times with the pipe. Tr. 29. Five times in the head, once on the shoulder, and once on each hand. *Id.* At some point during this incident, Bell either fell down or was knocked down on the ground. Tr. 28-29. Bell ended up on his stomach on the ground. Tr. 29. As soon as Bell was on the ground, the attacker started demanding Bell's wallet. *Id.*

Bell rolled over on his side and got his wallet out and pitched it as far as he could to

get the attacker away from him. Tr. 30. The man grabbed the wallet and ran to the road yelling "go, go, go." *Id.* Bell heard a door slam and the car drive off down the road, but did not see the car drive away from the scene. *Id.*

As soon as Bell heard the call leave, he called 911. Tr. 31. Bell feared that because he had lost a lot of blood that he might faint. Tr. 31-32. Bell then called Phillip Hewitt because he lived near the location of attack. Tr. 32. He told Hewitt what had happened and to come stay with him until the ambulance gets there. *Id.* Bell, who previously was to meet his sons at the hunting club, called one of his sons and told him what happened. *Id.* His son got there quickly. *Id.* Upon arrival of his son, he told his son to take pictures. *Id.* Bell stated that the attacker was wearing a gray-hooded sweat shirt. Tr. 29. The hood on the sweat shirt was up but the attacker's face was showing. *Id.* After being checked out at the scene, Bell was taken to the Southwest Mississippi Medical Center emergency room. Tr. 35. At the hospital they put stitches in the gashes on his head, and told him that his hand was broken. Tr. 36. Bell stated that he was only at the hospital around three hours. *Id.* Bell was treated and released; he did not have to stay the night in the hospital. *Id.*

While Bell was at the hospital, Sheriff Tim Perkins called him and asked for him to wait at the hospital. Tr. 37. Perkins was on his way to the hospital and had some photographs that he wanted Bell to look at and see if he could identify the assailant. *Id.* Bell identified Donald Ray Tobias from the photographs. *Id.*

However according to Gwendolyn Allen, she was with Tobias all day till about four or five that afternoon. Tr. 72. Allen has been Tobias's girlfriend for about three years. Tr.

75. Allen stated that they were in bed all day long. Tr. 72. Around four or five that afternoon, Allen got up and got ready to go have Thanksgiving Dinner with her daughter. *Id.* Tobias did not go to dinner with Allen at her daughter's house. *Id.* Allen testified that they were back from her sister's house by six or six-thirty. Tr. 73.

Allen did admit that Tobias did get up a few times during Thanksgiving Day. Tr. 75. She stated that Tobias would get up and go over to Ron's house or Lewis's house and get some cigarettes from some friends. *Id.* Allen continued to state that even though Tobias did get up a few times during the day, he was only gone five or ten minutes at a time. *Id.*

According to the testimony of Lois Caston, Tobias was at the same house she was at on Thanksgiving Day. Tr. 77. She lived in the house as did Allen. Tr. 78. She went into the bedroom around three-thirty and Tobias was in the bed with Allen. *Id.* Caston remembers the time because she was bringing Allen and Tobias some food. *Id.*

Caston stated that they went to Allen's daughter's house around five that afternoon for Thanksgiving dinner and arrived back the house around six-thirty. Tr. 79. She stated that Tobias was at the house when she left to go to Allen's daughter's house for Thanksgiving. *Id.*

Caston did state that the only times she saw Tobias was when she took him and Allen some food. Tr. 82. However, both times she went into the bedroom Tobias was in the bedroom. *Id.* Caston testified that those times were nine that morning and three-thirty that afternoon. *Id.*

Charles Rollins, who works for the McComb police department, testified that Tobias



came over to his house on a bicycle on Thanksgiving Day before dark. Tr. 83. Rollins stated that Tobias came by the house and told him someone had told him that the Sheriff's office was trying to get in touch with Tobias. Tr. 84. Rollins called the sheriff's office and Tobias talked to someone at the sheriff's office. *Id.*

Rollins stated that Tobias was wearing blue jeans or a blue jumpsuit or something similar. Tr. 85. Tobias then stayed at Rollins's house for a little while and then left on his bicycle. *Id.* He rode the bicycle two to three blocks to Rollins's house. *Id.*

According to Tobias's testimony, he lives with his mother on Springhill Road, but he was staying with his girlfriend in McComb. Tr. 88. His girlfriend lives at Ms. Louise's house. *Id.* Tobias testified that he stayed in bed with Allen all day on Thanksgiving Day until about four or five that afternoon. *Id.* They got out of bed because Allen was going to eat at her daughter's house. *Id.*

Tobias lives with his mother, but he had been staying over with Allen since Tuesday. Tr. 88-89. He had been doing some remodeling at the house. Tr. 88. On Wednesday night he was putting up paneling and putting tile on the floor. Tr. 89.

Tobias did state that on Thanksgiving Day that he did get up a few times to go get some cigarettes. *Id.* He testified that he got up around nine-thirty that morning and then again around one that afternoon. *Id.* He got up around forty-thirty that afternoon when Allen got up to go to her daughter's house for Thanksgiving dinner. Tr. 90.

Tobias contended that when he got up out of bed, that he tried to call his mother's house to check on his brother. *Id.* He then called a neighbor down the street from his

mother's house, and the neighbor stated that the police had went down toward his mother's house. *Id.* Tobias found out that the sheriff's office was looking for him, and he went to Rollins house to find out why they were looking for him. Tr. 92.

Tobias further testified that he does not have a car or access to a car. Tr. 96. He also stated that he was wearing blue jeans that day and does not own a gray sweatshirt or even a hooded sweatshirt. Tr. 98. Tobias strongly asserts that he did not come out to Amite County and take a pipe and hit Bell in the head and take his wallet. Tr. 99.

Tobias is currently incarcerated with the Mississippi Department of Corrections.

### **SUMMARY OF THE ARGUMENT**

The verdict was against the overwhelming weight of the evidence. The person that was attacked Bell had some questionable views of the attack. First, Bell identified Tobias with certainty even though his glasses fell off and the attacker was wearing a hood over his head.

Also, Bell said that his eyes were basically going right into the person's eyes that was attacking him. *Id.* Bell testified that he is five foot nine inches tall. *Id.* Tobias testified that he is six foot six inches tall. Tr. 95. The height difference is nine inches. It would almost be impossible for Bell and Tobias to be staring at each other face to face.

Besides, Tobias had numerous people testify that he was not the attacker because he was at the home of his girlfriend. In addition to Allen, testifying that Tobias was with her, Caston stated that Tobias was there all day and she took him and Allen food twice that day. Tr. 78. She brought Tobias and Allen food at nine that morning and again at three-thirty that

afternoon and both times Tobias was at the house. *Id.*

Furthermore, according to the times of the phone calls, and the times that everyone saw Tobias at the house with Allen, it would be impossible for Tobias to have been the one who attacked Bell.

The verdict was against the overwhelming weight of the evidence and this was reversible error. Tobias is entitled to a new trial.

### **ARGUMENT**

#### **THE TRIAL COURT ERRED IN DENYING TOBIAS'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

In trial counsel's Motion for Judgment Notwithstanding the Verdict (JNOV) or in the Alternative Motion for a New Trial, counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 41-42, R.E. 14. The trial judge denied this motion. C.P. 43, R.E. 16.

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

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State*, 691 So.2d 948, 957 (Miss. 1997). We have stated that on a motion for a new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Amiker v. Drugs For Less, Inc.*, 796 So.2d 942, 947 (Miss. 2000). However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight

of the evidence, “unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.” *McQueen v. State*, 423 So.2d 800, 803 (Miss. 1982). Rather, as the “thirteenth juror,” the court simply disagrees with the jury’s resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.

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

In the present case, Tobias is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence. The State presented the testimony of Bell. Bell had a few questionable comments in his testimony. First of all Bell stated that he wears glasses to read. Tr. 41. He also stated that he was wearing the glasses in order to fill out the hunting log. *Id.* Even though his bifocal glasses got knocked off, Bell was able to clearly see someone standing face to face with him in great enough detail to pick his picture out of a line-up?

Bell also stated that the man was wearing a sweatshirt with a hood on his head but that hood was not covering his face. Tr. 29. However, when Bell was asked what was that person doing when he turned around and he saw him Bell stated, “Striking me with a pipe.” If Bell was being struck by a pipe, he could not have seen the person’s face with such great detail as to determine who attacked him through a photo line-up of five people.

Bell continued to state that he was looking the person straight in the face during the attack. Tr. 43. Bell said that his eyes were basically going right into the person’s eyes that was attacking him. *Id.* Bell testified that he is five foot nine inches tall. *Id.* Tobias testified that he is six foot six inches tall. Tr. 95. The height difference is nine inches. It would

almost be impossible for Bell and Tobias to be staring at each other face to face. Furthermore, Bell would have acknowledged to the police that someone that tall would have attacked him, because of Tobias's unique height. Bell stated that Tobias was a little bit taller than him. Tr. 46. If Tobias had attacked Bell, when Bell turned around he would have very well be staring at the bottom of Tobias's head or neck.

In addition, the police never found any type of weapon that was used during the attack. Bell's wallet was never found, nor any anything else that was stolen other than a Sears Card. Tr. 45. No other evidence was presented at all that connected Tobias to the attacked other than the testimony of Bell. Bell picked Tobias out of a photo line-up presented by the Sheriff. Bell whose glasses fell off and was being hit by a pipe was still able to identify a person who was wearing a sweatshirt that had his head covered by a hood from the sweatshirt?

Tobias presented numerous witnesses who stated that he was at the house during the attack on Bell. Gwen Allen, Lois Caston, and Charles Rollins all stated that they saw Tobias on that Thanksgiving Day. Tr. 72, 77, 82. Allen stated that she was in bed with Tobias all day till around four or five that afternoon, except for a few occasions when Tobias stepped out to get some cigarettes from some nearby friends. Tr. 75.

Caston stated that Tobias was there all day and she took him and Allen food twice that day. Tr. 78. She brought Tobias and Allen food at nine that morning and again at three-thirty that afternoon and both times Tobias was at the house. *Id.*

Rollins, a McComb police officer, stated that Tobias rode his bicycle to his house

before dark. Tr. 83-84. Tobias came over asked Rollins to find out why the sheriff's office was looking for him. Tr. 84. Rollins called the sheriff's department and Tobias talked to the sheriff's department. Tr. 84-85. Tobias then left on his bicycle and went back Allen's house. Tr. 85.

Tobias also testified that he was not involved in the attack. Tr. 99. He also did not know why the Amite County Sheriff's Office was looking for him. Tr. 101. Tobias stated that he got out of bed around four-thirty or five that afternoon. Tr. 90. Allen was going to her daughter's house to eat Thanksgiving dinner. Tr. 88.

Tobias said that when he got up out of bed, that he tried to call his mother's house to check on his brother. Tr. 90. He then called a neighbor down the street from his mother's house, and the neighbor stated that the police had went down toward his mother's house. *Id.* Tobias found out that the sheriff's office was looking for him, and he went to Rollins house to find out why they were looking for him. Tr. 92.

According to the times of the phone calls, and the times that everyone saw Tobias at the house with Allen, it would be impossible for Tobias to have been the one who attacked Bell.

Bell stated that he arrived at the hunting club mailbox around three forty or three forty-five. According to the phone records that were presented into evidence, Tobias had called his house checking on his brother at four o'clock that afternoon. Exhibit 5, R.E. 17. According to Tobias's testimony it takes nearly twenty-five to thirty minutes to drive from his mother's house to Louise's house, where was staying. Tr. 108.

Officer Joe Hampton stated that from 1101 Wall Street, where Tobias was staying, to the hunting club was 12.7 miles. Tr. 113. Hampton stated that it took him approximately sixteen minutes driving fifty-five to sixty miles per hour. Tr. 113-115.

Even if Tobias had attacked Bell, according to the testimony of Bell and Hampton, it would have been impossible for Tobias to have made a phone call to his house to check on his brother at four o'clock. Bell stated that he was at the hunting camp around three forty or three forty-five and Hampton said it takes approximately sixteen minutes to get from one location to the other.

However, with Bell arriving at the earliest time that he said, by the time he parked the truck, got out walked over to the mailbox, began filled out the hunting log, and was attacked had to have been longer than four minutes.

According to Bell and Hampton, in order for Tobias to have attacked Bell, Tobias would have had to been there at exactly three forty waiting on Bell to get out the truck and begin to fill out the hunting log. Then attack Bell and take his wallet and drive, fifty-five to sixty miles per hour back to the house he was staying and ran straight in and called his house to check on his brother. Even if he did everything as fast as he could, he would not have had enough time. The times just do not match up for Tobias to have been the attacker of Bell.

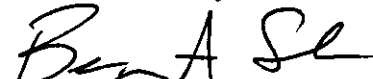
The verdict was against the overwhelming weight of the evidence. Tobias therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial.

**CONCLUSION**

Tobias contends that the verdict was against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,  
MISSISSIPPI OFFICE OF INDIGENT APPEALS  
For Donald Ray Tobias, Appellant

BY:



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**CERTIFICATE OF SERVICE**

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

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Circuit Court Judge  
Natchez, MS 39121

Honorable Ronnie Harper  
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This the 20 day of January, 2009.

  
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