IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ELLIS GRISBY — APPELLANT

VS. — NO. 2008-KA-1915-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

I. THE STATE PROVED VENUE BEYOND A REASONABLE DOUBT.

II. NO REVERSIBLE ERROR OCCURRED BY READING INSTRUCTION D-7 OUT OF SEQUENCE TO THE JURY.

III. THE STATE PROVIDED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT. THE VERDICT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

STATEMENT OF FACTS

On August 1, 2005, Howard Sanders arrived home to find that his burglar alarm had been triggered. T. 30. Sanders entered the rear door of his home and attempted to turn off the alarm when he was pushed from behind. T. 30. Sanders turned to see two men with covered faces. T. 30. The taller perpetrator placed a gun in Sanders' face, while the shorter perpetrator who was wearing a green shirt, held a gun to the side of Sanders' head. T. 33, 46. Sanders was ordered to turn the alarm off, but he refused. T. 32. Sanders' telephone rang, and he warned the intruders that the police would be arriving momentarily. T. 32. The man in the green shirt then fired his gun. T. 34.

Sanders fell in his bedroom doorway pretending to be shot. T. 34. The men fled the house, and Sanders answered the phone call from the alarm monitoring company and advised them to contact the police. T. 34. Sanders ran outside to see what direction the intruders ran. T. 35. He saw a group of boys across the street from his house and asked them if they saw anything. T. 35. The boys informed Sanders that after hearing the shot, they saw a man known as "Peanut" running out of Sanders's house and through the gate behind his house. T. 35. The boys also advised that they had seen Peanut, who was wearing a green shirt, and a guy in a red shirt walking toward Sanders' home just prior to the attempted armed robbery. T. 102-103, 127-128, 131, 154, 166. Peanut was later identified as Ellis Grisby. T. 110-111, 137, 155. The green shirt described by the victim and group of boys was later found less than two hours after the attempted armed robbery in Grisby's home.

A Washington County Circuit Court found Grisby guilty of attempted armed robbery. He was sentenced to thirteen years with eight to serve. C.P. 216. His co-defendant Joby Pam was found not guilty.

SUMMARY OF ARGUMENT

Venue was established through the victim's testimony. The victim unequivocally testified that the home in which the attempted armed robbery occurred was in Washington County, Mississippi.

Grisby cannot claim error for the first time on appeal regarding an instruction to which he raised no objection at trial. Alternatively, to the extent that Grisby jointly offered the instruction in question, a party who offers an instruction at trial cannot claim on appeal that it was erroneously granted. Grisby cites no authority for the proposition that reading an instruction out of sequence amounts to an improper comment on the evidence.

The State proved each element of the crime charged beyond a reasonable doubt. The fact that

Grisby's co-defendant was found not guilty is of no consequence to Grisby's claim that the evidence was legally insufficient to support his own verdict. The State's evidence against Grisby was much stronger than that against Pam.

ARGUMENT

I. THE STATE PROVED VENUE BEYOND A REASONABLE DOUBT.

Proper venue lies in the county in which the crime is committed. Miss. Code Ann. §99-11-3. Venue is a jurisdictional requirement and must be proven by the State beyond a reasonable doubt. *McBride v. State*, 934 So.2d 1033, 1035 (¶10) (Miss. Ct. App. 2006). Venue may be proven by either direct or circumstantial evidence. *Id.* "Where there is sufficient evidence to lead a reasonable trier of fact to conclude that part or all of the crime occurred in the county where the case is being tried, then evidence of venue is sufficient." *Id.* (citing *Hill v. State*, 797 So.2d 914, 916 (¶12) (Miss. 2001).

As the victim of the attempted armed robbery, there is no question that Sanders was an eyewitness to the attempted armed robbery which occurred in his home. Sanders unequivocally stated on the record that his home at 614 North Morgan Street in Hollandale was located in Washington County in the State of Mississippi. T. 29. Sanders then went on to describe the attempted armed robbery which occurred in his home. T. 30-34. Grisby claims on appeal that the State did not prove that the 614 North Morgan Street home and the location of Sanders' house on the day of the attempted armed robbery was one in the same. The record belies the appellant's claim. During his direct examination, Sanders was shown Exhibit 1, a diagram of North Morgan Street and North Simmons Street, which depicted the location of Sanders' home. T. 38-39. The State published this diagram to the jury while questioning Sanders about the attempted armed robbery in his home. T. 39-43. During this questioning, Sanders again clarified that his home from which the

perpetrators fled is located at 614 Morgan Street. T. 41. Additionally, Hollandale Police Department Officer Travis Robinson testified as follows regarding being dispatched to the crime scene. "We received a 911 call from Mr. Sanders, stated that he was attempted -- he was robbed at gunpoint at his residence at 614 North Morgan." T. 81. Police Chief Jimmy Taylor also testified that he responded to the attempted armed robbery which occurred at Sanders' residence at 614 North Morgan Street. T. 92. Although neither Officers Robinson nor Taylor explicitly stated that 614 North Morgan Street was in Washington County, that fact had already been established by Sanders.

Clearly, the State presented sufficient evidence to lead a reasonable trier of fact to conclude that the attempted armed robbery in question occurred in Washington County, Mississippi.

II. NO REVERSIBLE ERROR OCCURRED BY READING INSTRUCTION D-7 OUT OF SEQUENCE TO THE JURY.

During the jury instruction conference, Grisby's counsel submitted only one instruction, an alibi instruction, on his client's behalf. T. 333-335. When Pam's instructions were brought before the court for consideration, Grisby's counsel made the following request, "Any place where it draws attention to the name 'Joby Pam,' I would ask the Court to consider 'Ellis Grisby.' So, I ask if you will refuse that one from Mr. Walls and then address that as far as Mr. Grisby as well." T. 438. The court replied, "But, you know, you are suppose to file jury instructions, your own jury instructions, but I will consider that." T. 439. During the discussion of instruction D-7, an identification instruction submitted by Pam, defense counsel for Grisby offered no input. T. 443. The trial court then stated that it would add a sentence to the end of Pam's instruction regarding Grisby. T. 444. Defense counsel for Grisby still offered no input. The trial court, counsel for Pam, and the State further discussed an amendment to Pam's D-7 instruction. T. 444-445. At the conclusion of the discussion, defense counsel for Grisby asked the trial court, "Judge, how are you going to address

Mr. Grisby." T. 446. The trial court then read aloud its proposal to include Grisby in Pam's instruction as follows,

> The same issues of identity as explained above relate to your consideration of whether Ellis Grisby was the person who committed the crime charged. Should you have a reasonable doubt as to the Ellis Grisby's identity as the person who committed the crime charged, then you must find Ellis Grisby not guilty.

T. 446. Grisby's counsel did not object to the court's modification of Pam's instruction D-7.

At the conclusion of the jury instruction conference, the jury was recalled and the trial court read the instructions to the jury. T. 448. After closing arguments however, counsel for Pam informed the court that in reading the instructions to the jury, the court did not read instruction D-7. T. 483. The jury, which had just left the courtroom for deliberations, was recalled, and the court read instruction D-7 aloud.[1]

Grisby's complaint on appeal regarding instruction D-7 is two-fold. First, he claims that the instruction only mentions him as an afterthought and effectively amounted to an instruction for a directed verdict against Pam, thereby shifting the focus of the jury's attention to Grisby. Grisby also claims that the trial court's reading of instruction D-7 out of sequence was reversible error. It appears that Grisby argues that the combination of these errors amounted to an impermissible comment on the evidence by the trial court.

Regarding Grisby's first contention, he is procedurally barred from challenging the content of instruction D-7 for the first time on appeal. Grisby offered no input whatsoever during the discussion of instruction D-7 which was offered by his co-defendant. After the trial court offered to include Grisby in the identification instruction and read its proposal to do so aloud, Grisby's

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[1]The record shows that the jury retired to deliberate at 12:25. T. 482. After the court recalled the jury and read instruction D-7 aloud, it was only 12:30 when the jury returned to deliberations. T. 483.

counsel did not object or give any input as how to include his client in instruction D-7. "Failure to make a contemporaneous objection and allow the trial court opportunity to cure the defect is a procedural bar and constitutes a waiver of the argument on appeal." *Baker v. State*, 930 So.2d 399, 412-13 (¶30) (Miss. Ct. App. 2005). Because Grisby failed to object to the adequacy of instruction D-7 at trial, he is procedurally barred from arguing its alleged deficiency for the first time on appeal. Alternatively, to the extent that this honorable Court may find that the instruction was jointly offered by Pam and Grisby, it is well-settled that an appellant cannot complain on appeal of an instruction which he requested and which was granted at trial. *Caston v. State*, 823 So.2d 473, 508 (¶121) (Miss. 2002). Additionally, no reasonable reading of the instruction in question lends itself to an interpretation of D-7 as a directed verdict as to co-defendant Pam.

Regarding Grisby's claim that it was reversible error for the trial court to read the instruction out of sequence, Grisby cites several cases which discuss improper comments on the evidence, but fails to provide an analysis which shows how reading instruction D-7 out of sequence could possibly be a comment on the evidence.[2] Mississippi Code Annotated § 99-17-35 proscribes trial courts from summing up or commenting on the evidence and giving instructions which single out or give undue prominence to certain evidence. Cases which address instructions which amount to an improper comment on the evidence deal with the substance of the instructions. Grisby has not cited, nor has the appellee found, a single case which suggests that reading an instruction out of sequence amounts to a comment on the evidence. The failure to cited legal authority in support of a claim on appeal eliminates this Court's obligation to consider the issue. *Glasper v. State*, 914 So.2d 708, 726 (¶40) (Miss. 2005); *Jones v. State*, 740 So.2d 904, 911 (¶22)(Miss. 1999). The trial court's mistake in

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[2]To the extent that Grisby argues that the substance of instruction D-7 was an improper comment on the evidence, such a claim is procedurally barred for the reasons stated above.

not reading instruction D-7 to the jury until after closing arguments if error is harmless at best. A criminal defendant is "entitled to a fair trial but not a perfect one, for there are no perfect trials." *Lynch v. State*, 24 So.3d 1043, 1048 (¶19) (Miss. Ct. App. 2010) (quoting *Brown v. U.S.*, 411 U.S. 223, 231-32 (1973)).

Grisby does cite one case which states, "[T]he correct practice, under our system, is for the court to pass on all instructions asked on both sides before the argument to the jury begins." *Montgomery v. State*, 85 Miss. 330, 37 So. 835 (Miss. 1905). The *Montgomery* holding dealt with the timing of granting instructions, not reading instructions. The holding in *Montgomery* was clarified in a later case. "The rule, therefore, is that there is no error in the granting of proper instructions, either during or after the close of the argument of a case, unless the instructions were granted secretly." *Goss v. State*, 205 Miss. 177, 188, 38 So.2d 700, 702 (Miss. 1949). In *Goss*, the trial court granted two of the State's instructions after the other instructions had already been read to the jury and after commencement of the State's closing argument. *Id.* These two instructions were never read to the jury, and defense counsel had no opportunity to object to them. *Id.* If the supreme court found no error in *Goss*, then surely no error lies in the mere reading out of order an instruction of which all parties were aware and which had already been granted.

For the foregoing reasons, Grisby's second assignment of error must fail.

III. THE STATE PROVIDED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT. THE VERDICT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

In determining whether the State proved each element of the offense beyond a reasonable doubt, all evidence supporting the guilty verdict must be accepted as true. *Wash v. State*, 931 So.2d 672, 673 (¶5) (Miss. Ct. App. 2006). Additionally, the State is given the benefit of all inferences which may reasonably be drawn from the evidence. *Id.*

The following evidence supports the jury's verdict. Jake Winder, Alfred Seals, and Ken Vallery testified that while they were playing football across the street from Sanders' house, Grisby and Pam walked past them and toward an alley near Sanders' house which connected to a field behind Sanders' house. T. 102-103, 127-128, 131, 154, 166. Winder and Seals testified that Grisby was wearing a green t-shirt and Pam was wearing a red t-shirt. T. 110, 128, 134. Vallery remembered that one of the defendants was wearing a green t-shirt and one was wearing a red t-shirt, but could not remember who wore what. T. 156. Although the victim could not see the faces of the men who attempted to rob him, he did testify that one of the attackers wore a green shirt. T. 46. After hearing Sanders' burglar alarm go off and a gunshot, Seals ran toward Sanders' house to see what was going on. T. 133. Seals testified that he then saw Grisby running out of the back door of Sanders' house and through a gate behind the house. T. 134, 144. Although Winder and Vallery did not share Seals' vantage point, when they ran toward Sanders' house after the gunshot, they both heard the fence behind Sanders' rattling and could see people running in the field behind Sanders' house, but could not make them out due to the tall grass obstructing their view. T. 116, 121-122, 170-171. After the police were advised that Grisby had been seen running from Sanders' home, a search warrant was executed on Grisby's home less than two hours after the robbery, and a sweaty green t-shirt was found in a clothes hamper. T. 209, 239, 264. Viewing the evidence in the light most favorable to the verdict and considering all reasonable inferences which may be drawn from the evidence, the State presented legally sufficient evidence to support the jury's verdict of guilty of attempted armed robbery.

The heart of Grisby's legal sufficiency argument is that the evidence against he and Pam was essentially the same, yet Pam was found not guilty. The record does not support Grisby's assertion. Although Grisby and Pam were seen together immediately prior to the attempted armed robbery,

only Grisby was seen running from the victim's house. Additionally, all of the boys who saw Grisby and Pam prior to the attempted armed robbery recognized Grisby by sight as he passed and knew his street name, but did not know or recognize Pam at that time. T. 103, 134, 166-167.[3] Additionally, the victim testified that one of the perpetrators wore a green shirt, and Winder, Seals, and Vallery testified that Grisby was wearing a green shirt when they saw him. Less than two hours after the attempted armed robbery, a sweaty green shirt was found in Grisby's house. Although the three boys testified that Pam had on a red shirt when they saw him, the victim never gave testimony regarding what the second perpetrator wore. A review of the record shows that the evidence against Pam was not as strong as that against Grisby.

Grisby's conviction must be upheld, because when viewing the evidence in the light most favorable to the verdict and considering all reasonable inferences which may be drawn from the evidence, the State presented legally sufficient evidence to support the jury's verdict of guilty of attempted armed robbery.

The verdict is also not against the weight of the evidence. To the extent that any conflicts in witness testimony arose, the jury is solely responsible for settling such conflicts. *Moore v. State*, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007). Further, only the jury is charged with assessing witness credibility. *Id.* It is not the function of the reviewing court to determine whose testimony to believe. *Smith v. State*, 945 So.2d 414, 421 (¶21) (Miss. Ct. App. 2006) (citing *Taylor v. State*, 744 So.2d 306, 312 (¶17) (Miss. Ct. App. 1999). So long as substantial credible evidence supports the jury's verdict, the verdict must be affirmed. *Id.* The jury's verdict is not against the weight of the evidence and represents no unconscionable injustice. It must therefore be affirmed.

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[3]All three did, however, pick Pam from a line-up as the individual seen with Grisby immediately prior to the commission of the crime.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Grisby's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna c. Holland, 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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This the 8th day of March, 2010.

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