IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICK FRANKLIN — APPELLANT

VS. — NO. 2008-KA-1923

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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II. THE STATE PROPERLY USED MISTY BOLING'S PRIOR INCONSISTENT STATEMENT TO IMPEACH HER TRIAL TESTIMONY, NOT AS SUBSTANTIVE EVIDENCE OF FRANKLIN'S GUILT.

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STATEMENT OF THE CASE

This is a direct appeal from the Circuit Court of Tunica County, Mississippi. The Circuit Court, Honorable Albert B. Smith, III, presiding, adjudged Franklin guilty of depraved heart murder and sentenced Franklin to a term of life.

COURSE AND DISPOSITION OF THE CASE IN THE CIRCUIT COURT

The Grand Jury indicted Patrick Franklin for the crime of depraved heart murder. The Court tried Franklin before a jury. The jury returned a verdict of guilty as charged. T. 176. The Court sentenced Franklin to a term of life. T. 192-193. Franklin filed a notice of appeal.

STATEMENT OF THE FACTS

On May 20, 2006, people were gathered outside in White Oak Subdivision, in Tunica County, Mississippi. Derrick Taylor, Patrick Franklin, Misty Boling and others were at Misty Boling's home cooking and drinking. T. 113. At some point during the night, Taylor began playing with Misty Boling's hair. She told him to stop. Franklin also told Taylor to stop. T. 116. Franklin threatened to kill Taylor in the presence of Boling. T. 117-118.

After the party was over, Franklin left the area, leaving his truck parked in Misty Boling's front yard. He later returned in a car. He got into the truck and then got back out. T. 121.

After Franklin left, Derrick Hughes and Derrick Taylor left Misty Boling's house. Hughes went to someone else's house and left Taylor standing on the corner. Taylor got into an argument with Lenario Davis in the street in front of the house. Davis punched Taylor in the face and left. Taylor went to his house and came back outside with a shotgun. He fired the gun into the air.

Hughes heard gunshots. He looked outside and saw people running and screaming. T. 158-159. Hughes saw Patrick Franklin standing in front of his home holding a rifle. T. 173. Hughes said he did not actually remember it at trial, but he had given a statement to law enforcement soon after the shooting stating that he saw Franklin holding the rifle. T. 160. Franklin walked toward Taylor and shot him. T. 212.

Taylor fell to the ground, got up, and walked to the carport of his house on Cypress Drive. Taylor then fell down on the carport and died. Taylor died from a single .22 caliber gunshot to the

left side of his chest Taylor bled to death as a result of the bullet penetrating his heart. An autopsy was performed and the medical examiner found a metal object that was consistent with a .22 caliber bullet. T. 89, 90, 181-182, 188.

SUMMARY OF THE ARGUMENT

Franklin claims the evidence was not sufficient to support a verdict of guilty or was so weak that the court erred when it denied Franklin's motion for a new trial; however, there was direct evidence from an eye witness that Franklin walked toward Taylor and shot him with a rifle. Any inconsistencies in the evidence were properly resolved by they jury.

The State did not use Boling's prior inconsistent statement as substantive evidence of guilt. Both in a prior statement to police and at trial, Boling admitted that Franklin threatened to kill Taylor on the day of the murder. However, she opined for the first time at trial that Franklin was only joking when he made this threat. The prosecutor, who was surprised by Boling's testimony, merely used the prior statement to impeach Boling's testimony regarding her opinion as to the nature of Franklin's threat, not as substantive evidence of guilt.

Additionally, the trial court was not required to *sua sponte* instruct the jury that prior inconsistent statements can only be used for impeachment purposes. Instead, it is trial counsel's duty to request limiting instructions. Further, such an instruction could not have assisted the jury because the portion of the prior inconsistent statement used by the prosecutor can in no way be considered substantive evidence of guilt.

Franklin claims the trial court erred denying Franklin a new trial due to the recantation of testimony given at trial which revealed an alleged discovery violation. The evidence of Hughes's pending arson charge did not rise to the level of causing a reasonable probability to have arisen that, had the evidence been revealed to the defense, the result would have been different. The testimony

by Hughes, the recanting witness, was directly refuted by the two law enforcement officers whom were named to have offered Hughes a deal on a charge which was pending against Hughes. Hughes said the officers wanted Hughes to testify that he saw Franklin holding a gun. The Judge was the finder of fact on the credibility of the witnesses, and he denied the motion. Additionally, Hughes testified on direct examination that he did not see Franklin holding a gun. In other words, Hughes gave testimony before the jury that was contrary to what he claimed the officers asked him to give.

The jury instructions given in this case regarding self-defense did not constitute plain error as there was no error in granting any of the instructions. The jury was instructed on each element of the crime including the "not in reasonable self-defense" element. Additionally, the jury was fully instructed that Franklin did not have to prove that he acted in self-defense, but instead that the State had to prove that he did not act in self-defense. Further, Franklin's trial counsel was not ineffective in failing to object to these instructions as they were correct statements of the law.

Allowing the State's closing arguments in this case did not constitute plain error as there was no error. Even if there were error, the arguments did not result in a manifest miscarriage of justice. The arguments in question were all within the wide latitude given during closing argument. Again, Franklin's counsel was not ineffective in failing to object to the arguments as they were not improper arguments.

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT A VERDICT OF GUILTY.

Franklin argues that the evidence was not sufficient to prove his guilt. He argues that the State must first prove that Franklin shot the fatal bullet and, second, must prove that Franklin was not acting in self-defense. He claims that even if the evidence proved that he shot and killed Taylor, he had the right to do so because he was acting in defense of himself or of others. Franklin claims

that when Taylor fired his shotgun at or near a crowd of people, that he, Franklin, was justified in believing that Taylor intended to inflict serious bodily harm on Taylor or others in the crowd.

The Circuit Court Judge did not abuse his discretion when he denied Franklin's motion for a directed verdict. The evidence was sufficient to prove each element of the crime of murder. The issue of self-defense or defense of others was given to the jury. The jury had evidence that Taylor fired first. Franklin claims it was into or over the crowd of people. There is no evidence that anyone else was injured; so, it was not into the crowd. The jury heard all the witnesses and evaluated the evidence in its determination of the proof of defense of self or others. They rejected the proof of defense of self or others. A reasonable hypothetical juror could have found each element of the crime of murder.

Motions for directed verdict and JNOV are reviewed for abuse of discretion. *Robinson v. State*, 967 So.2d 695, 697, ¶ 8 (Miss. Ct. App. 2007). *Howell v. State*, 860 So.2d. 704, 764,¶ 212 (Miss. 2003). The Court must ask 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. *Robinson,* 967 So.2d at ¶17.

Proof of Franklin's intent:

There was evidence that Franklin threatened to kill Taylor earlier that day. Misty Boling heard him but thought he was kidding. T. 117-118. Immona Davis testified that Franklin said, "You all don't have to run. I got this." T. 213.

Proof That Franklin Shot Taylor:

The evidence proves that Franklin shot and killed Derrick Taylor. Immona Davis testified that she saw Franklin shoot Taylor. Taylor then fell down, got up, and ran to his carport where he collapsed and died. T. 208-209, 212, 216, 221.

After stating on direct examination that he did not remember seeing Franklin holding a gun, Derrrick Hughes then gave testimony on cross-examination from which a reasonable inference arose that he did see Franklin holding a gun on the night Taylor was shot and killed. Counsel asked Hughes if he saw Franklin holding a gun on the night Taylor was killed. The record only indicates that Hughes shook his head, which did not tell the reader of the transcript if Hughes was indicating "yes" or "no". The next question, however, was if the rifle had a scope. Hughes said "No." T. 173.

A reasonable inference arises from Hughes's testimony that he did see Franklin holding a gun that night. When Hughes said "no" to the question about the gun having a scope immediately after being asked if he saw Franklin hold the gun that night, the only reasonable conclusion is that Hughes saw Franklin hold the gun, and when he shook his head he must have been shaking it to indicate that he did see Franklin with the gun.

Defense of Self or Others:

The evidence of defense of self or others is a question for the jury to decide. The record supports a finding that, after being punched in the mouth, Taylor went into his home, came outside, and shot the gun. Then Franklin walked toward Taylor and shot him with the fatal gunshot.

Whether Taylor's acts were sufficient for Franklin to believe that he or others were in imminent danger of death or serious bodily harm was a question of fact for the jury to decide. Both the Mississippi Supreme Court and the Mississippi Court of Appeals have held that ". . . the issue of justifiable self-defense presents a question of the weight and credibility of the evidence rather than sufficiency and is to be decided by the jury." *Williams v. State,* 2009-KA-00900-COA, June 15, 2010, ¶31. *Wade v. State,* 748 So.2d 771, 774, ¶11 (Miss. 1999).

Weight and Credibility of Immona Davis's Testimony:

Franklin argues that the testimony of Immona Davis that she saw Franklin shoot Taylor

should be discounted. He claims he testimony should not be believed because she was Lenario Davis's sister, and claiming that her testimony was improbable, internally inconsistent and contradicted by her mother and brother on the material point of where she was when the crime occurred. It is a well-settled principle of law that credibility and weight of the testimony of the witnesses are solely within the province of the jury as fact-finder. *King v. State,* 798 So.2d 1258, 1261, ¶14, (Miss. 2001); *Price v. State,* 23 So.3d 582, 586, ¶17 (Miss. Ct. App. 2009). The jury was present, heard the witnesses testify, and saw their demeanor. They were in the best position to determine the credibility Immona Davis as well as the other witnesses. Defense counsel cross-examined Davis with great vigor attempting to impeach her and to demonstrate that she should not be believed by the jury, but Davis continued to maintain that she saw Franklin shoot Derrick Taylor.

The jury had the opportunity to see and hear Davis testify. They were instructed to evaluate the credibility of the witnesses. The law presumes that the jury followed the instructions of the Court. *McLarty v. State*, 842 So.2d 590, 602 (Miss. Ct. App. 2003).

Testimony of Derrick Hughes:

Franklin argues that the only witness who gave any evidence supporting a finding that Franklin shot Derrick Taylor was Immona Davis. This ignores the testimony of Derrick Hughes.

Hughes testified on direct examination when called by the State that he did not remember seeing Franklin holding a gun. On cross-examination, however, Franklin gave testimony from which a reasonable inference arose that he did see Franklin holding a gun on the night Taylor was shot and killed. T. 173.

Hughes's testimony corroborated Immona Davis's testimony. Franklin's gun was never found, just the butt of the rifle. Also, .22 caliber shells were found on Franklin's property. Hughes

testified that over time he saw Franklin shooting his gun from near his house.

Dr. Hayne testified that he performed an autopsy, and found a piece which was consistent with a .22 caliber bullet.

The trial judge did not abuse his discretion when he denied Franklin's motions for directed verdict and JNOV. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the State proved the elements of murder beyond a reasonable doubt.

II. THE STATE PROPERLY USED MISTY BOLING'S PRIOR INCONSISTENT STATEMENT TO IMPEACH HER TRIAL TESTIMONY, NOT AS SUBSTANTIVE EVIDENCE OF FRANKLIN'S GUILT.

Misty Boling hosted the barbeque that Franklin and the victim attended on the day of the murder. T. 111-112. Boling, the State's witness, was hesitant at trial to even admit that Franklin and Taylor had spoken at the party. T. 113. When asked if there was any tension between Franklin and the victim at the party, Boling claimed that she could not remember because "it's been so long ago and I had drank too much." T. 114. Boling recalled giving a statement to police, but first claimed she could not remember if it was a true statement before finally admitting that the statement was a true statement "to the best of my knowledge." T. 114-115. After being provided with a copy her statement[1] to refresh her memory, Boling testified that it did "get tense" between Franklin and Taylor on the day of the murder. T. 116. Taylor had been playing with Boling's hair at the party, and Boling twice told him to stop. T. 116. Franklin, who was "trying to go with" Boling, also told Taylor to stop. T. 116. Boling admitted that she did hear Franklin threaten the victim that day. T. 117. However, she opined for the first time at trial that Franklin was only joking, despite having

[1] The statement in question is State's Exhibit 8. It was used for identification only and is contained in the clerk's papers.

opined in her prior statement that she though Franklin was serious when he made the threat. T. 117-118.

Franklin claims that the State impermissibly used Boling's prior inconsistent statement as substantive evidence of guilty during closing argument. During closing argument, the prosecutor stated the following.

> We heard from Misty Boling, who told the truth in her statement when she didn't know what was going to happen, when she didn't know she was going to be on that stand in front of him. And then she tried to back up. But that statement was down in writing. We know the defendant threatened Derrick Taylor and that she thought he meant it. She said that.

T. 313-314. The inconsistency highlighted by the prosecution was not the fact that a threat was made. Boling admitted this much both in her testimony and in her prior statement. The inconsistency was Boling's **opinion** about that nature of that threat. Such can hardly be considered substantive evidence of guilty. Rather, the State merely used Boling's prior statement to impeach the opinion she offered at trial that Franklin was only joking when he threatened the victim on the day of the murder. Such is wholly permissible. "It is well-established law in Mississippi that 'unsworn prior inconsistent statements may be used for impeachment of the witness's credibility regarding his testimony on direct examination.'" *King v. State*, 994 So. 2d 890, 898-99 (¶30) (Miss. Ct. App. 2008) (quoting *Moffett v. State*, 456 So.2d 714, 719 (Miss. 1984)). A party may impeach his own witness with a prior inconsistent statement where that party is surprised by the witness's trial testimony. *Id.* at 897 (¶24). The record supports the fact that the State was surprised by Boling's testimony, and Franklin advances no argument that the State was aware that Boling had changed her story prior to trial. Accordingly, the State was entitled to treat Boling as a hostile witness and impeach her with her prior inconsistent statement.

The cases relied on by Franklin involve witnesses' prior inconsistent statements being used

as substantive evidence of the defendant's guilt. In *Brown v. State*, the State introduced two witnesses' prior inconsistent statements which included admissions from Brown that he committed the burglary for which he was tried. 556 So. 338, 340-41 (Miss. 1990). In *Moffett v. State*, a witness's prior inconsistent statement was used to place Moffett at the crime scene at the time of the murder, although the witness provided Moffett with an alibi defense at trial. 456 So.2d 714 (Miss. 1984). In *Moore v. State*, prior inconsistent statements of co-defendants implicating Moore in the crime spree were the only evidence of Moore's guilt. 755 So. 2d 1276 (Miss. Ct. App. 2000). In *Bailey v. State*, the prior inconsistent statement admitted into evidence concerned whether the victim's car door was opened or closed, a fact that went to the heart of Bailey's claim of self-defense. 952 So.2d 225, 236-38 (¶ ¶ 24-32) (Miss. Ct. App. 2006). The prior inconsistent statements in the aforementioned cases included either an admission by the defendant or went toward proving an element of the offense charged. The only inconsistency between Boling' s trial testimony and prior statement highlighted by the prosecutor involved Boling's opinion as to whether Franklin was serious or only joking when he threatened to kill Taylor. Boling's perception of the seriousness of Franklin's threat could in no way be considered substantive evidence of guilt. The State's comment in closing regarding Boling's prior inconsistent statement went toward impeaching Boling's assertion that Franklin was joking when he made the threat. As such, Franklin's contention that the State used the prior inconsistent statement as substantive evidence of guilt is without merit.

Relying on *Flowers v. State*, 842 So.2d 531, 551-53 (Miss. 2003), Franklin also claims that the prosecutor had no good faith basis for asking Boling whether she remembered previously telling him that she thought Franklin was serious when he threatened to kill Taylor. *Flowers* is distinguishable from the present case. In *Flowers*, the supreme court found that it was error for the State ask three defense witnesses on cross whether they attempted to persuade State's witness

Clemmie Fleming to give false testimony where the State had no good faith basis for the line of questioning. *Id.* at 551 (¶53). The *Flowers* court stated that after this line of cross-examination, "the State was required to either continue with the impeachment by showing a basis in fact for the questions or offer a witness in rebuttal to prove the truth of the prior statement." *Id.* at 552 (¶57). Because the State called Fleming in rebuttal and failed to ask her whether the defense witnesses pressured her to give false testimony, it was "prejudicial error for [the] questions on cross-examination to contain insinuations and intimations of such conduct when there [was] no basis in fact." *Id.* at 553 (¶61).

In the present case, the combination of Boling's admission that she had spoken with the prosecutor at least once prior to trial along with the substance of Boling's statement to police and her differing trial testimony establishes a good faith basis for the prosecutor's question. Boling admitted to speaking with the prosecutor at least once prior to trial, but claimed she did not remember telling him that she though Franklin was serious when he threatened to kill Taylor. T. 119. However, Boling's statement to police suggests that she though the threat was serious. It is clear from the record that the first time she indicated otherwise was at trial. Therefore, it is only reasonable to believe that when the prosecutor spoke with Boling after she had given the statement to police but before her inconsistent trial testimony, her version of events would have matched her statement to police. As such, a good faith basis existed for the prosecutor's question.

Franklin also erroneously alleges that the portion of Boling's prior statement in which she opined that Franklin did in fact kill Taylor was improperly admitted. Appellant's brief at 18. First, the prior statement was never admitted into evidence. Additionally, the trial court clearly ruled that the State could not question Boling about that specific opinion contained in her prior statement. T. 122. As such, Franklin's wavering opinion that she believed Franklin in fact Taylor was never

placed before the jury.

For the foregoing reasons, Franklin's second assignment of error is without merit.

III. THE TRIAL COURT WAS UNDER NO OBLIGATION TO *SUA SPONTE* INSTRUCT THE JURY THAT PRIOR INCONSISTENT STATEMENTS ARE ADMISSIBLE ONLY FOR IMPEACHMENT.

Franklin acknowledges that defense counsel failed to ask the trial court to instruct the jury regarding the permissible use of prior inconsistent statements. He claims that it was plain error for the trial court to not *sua sponte* instruct the jury that the statement could only be considered as impeachment evidence. However, Franklin does not cite to a single case which stands for the proposition that the trial court is required to *sua sponte* instruct the jury that prior inconsistent statements may only be used as impeachment evidence. As a general rule, the trial court is not required to *sua sponte* instruct the jury. *Lindsey v. State*, 29 So.3d 121, 123 (¶¶6-7) (Miss. Ct. App. 2010); *Westbrook v. State*, 29 So.3d 828, 832 (¶12) (Miss. Ct. App. 2009). Rather, it is defense counsel's duty to request limiting instructions. *Id.*

Furthermore, Franklin argues that the trial court should have *sua sponte* instructed the jury that the prior inconsistent statement could only be considered as impeachment evidence while at the same time claiming that such instructions amount to "a pious fraud." Appellant's Brief at 28. In any event, the portion of the prior inconsistent statement alluded to by the prosecutor could in no way be considered substantive evidence of Franklin's guilt, as it did not involve an element of the crime, an admission by Franklin, or any aspect of Franklin's defense. As such, it would have been nonsensical for the trial court to tell the jury that the statement could not be used as substantive evidence of guilt.

IV. FRANKLIN CLAIMS THAT THE COURT ERRED NOT GRANTING HIS JNOV WHEN HE OFFERED EVIDENCE POST-TRIAL THAT ONE WITNESS, HUGHES, WAS OFFERED BETTER TREATMENT BY LAW ENFORCEMENT ON A PENDING CHARGE TO INDUCE HIM TO TESTIFY THAT HE SAW FRANKLIN HOLDING A GUN.

Franklin argues that the Court erred in denying his motion for JNOV when Franklin offered evidence that two law enforcement officers offered him a better deal on a pending arson charge in order to induce him to testify that he saw Franklin with a gun.

The two officers both denied that they even talked about Hughes's pending arson charge when he was with them the day of the trial. Even assuming *arguendo* that Hughes told the truth about being offered better treatment to induce him to say that he remembered seeing Franklin holding the gun on the night of the killing, Hughes did not give the testimony that he claimed the state wanted.

Hughes did not initially testify on direct examination at trial that he saw Franklin holding the gun the night Taylor was killed. When the State was questioning Hughes, he testified that he did not remember seeing Franklin holding the gun.

Further, the fact of Hughes remembering seeing Franklin holding the gun is not in issue. Franklin holding the gun would only be relevant and material if Franklin were claiming that he did not have the gun and did not shoot Taylor. Taylor's theory, however, was that he shot Taylor and did so in the defense of self or others. Franklin asked for, and received, a jury instruction on defense of self and others.

Franklin is not denying that he was holding the gun; that fact is not in issue. After Hughes denied on direct examination that he remembered seeing Franklin with the gun, Franklin brought out on cross-examination facts that support a finding that Hughes did see Franklin holding the gun on the night Taylor was killed. Hughes testified that he did not see a scope on the gun.

A. Exculpatory Evidence

Franklin argues that the State failed to give evidence in discovery which was exculpatory and required to be given to the defense pursuant to the requirement to do so in *Brady v. Maryland*, 373 U.S. 83 (1963). Exculpatory evidence is evidence the suppression of which would "undermine confidence in the verdict."*Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

The question is not whether the defendant more likely than not would have received a different verdict with the evidence but whether in its absence he received a fair trial understood as a fair trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. *U.S. v. Bagley,* 473 U.S. 667, at 678 (1985). *Bagley's* touchstone of materiality is a "reasonable probability"of a different result. *Kyles,* 514 U.S. at 434. One aspect of *Bagley* materiality that is stressed is its definition in terms of suppressed evidence being considered collectively, not item by item. The Constitution is not violated every time the prosecution fails or chooses not to disclose to the defense evidence that might prove helpful to the defense. *Kyles,* 514 U.S. at 436.

The Constitution does not demand an open file. Showing that the prosecution knew of an item of favorable evidence, unknown to the defense does not amount to a *Brady* violation without more. The prosecution, however, must 'gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.' *Kyles,* 514 U.S. at 437.

The question to be answered here is, if the evidence is looked at in toto, is there a reasonable probability that a different result would have occurred undermining confidence in the outcome of the trial? As noted above, Hughes actually testified on direct that he did not remember seeing Franklin holding the gun. This was more favorable to Franklin than the statement would have been

which Hughes originally gave to law enforcement. Hughes's original statement said he saw Franklin holding the gun on the night Taylor was killed.

If evidence that Hughes had a pending arson charge had been disclosed to the defense, is there a reasonable probability that a different result would have been reached. Evidence of the pending charge would have presumably led to counsel for Franklin deciding whether or not to ask Hughes if he had been promised anything in exchange for giving certain testimony.

Hughes did not want to cast doubt on Hughes's credibility because Hughes did not hurt Franklin's case. The State called Hughes to support the State's theory that Franklin had the gun the night Taylor was killed. Hughes, however, testified on direct examination for the State that he did not remember seeing Franklin holding the gun that night. Hughes did later on cross-examination, however, seem to change his testimony to say he did see Franklin holding the gun that night.

When the evidence is looked at in toto, with Immona Davis's direct testimony that she saw Franklin shoot Taylor, with Boling's testimony that Franklin threatened to kill Taylor earlier that day, and with Franklin's theory being that he shot Taylor in self-defense, there is not a reasonable probability that a different outcome would have been reached undermining the confidence in the trial.

Since Franklin put the issues of self-defense and defense of others before the jury, Hughes's charge of arson was not material. Franklin received a fair trial. If Hughes had given testimony more damaging to Franklin, he would have a stronger argument. Since Hughes testified as he did, however, the failure to disclose Hughes's pending charge of arson did not deny him a fair trial.

B. Recanted Testimony

As a general rule recanted testimony " . . . is exceedingly unreliable and regarded with suspicion; and it is the right and duty of the court to deny a new trial where it is not satisfied that

such testimony is true." *Howell v. State*, 989 So.2d 372, 384 ¶33 (Miss. 2008). The fact that a witness changes his testimony after trial does not necessarily entitle the defendant to a new trial. Recanted testimony does not require a new trial. The appellate court will not overturn a decision to grant or deny a new trial based on recanted testimony unless the Circuit Court Judge abused his discretion. *Russell v. State,* 849 So.2d 95, 107, ¶15 (Miss. 2003).

Derrick Hughes signed an affidavit which said detectives took him to lunch and promised to help him on his arson case if he gave certain testimony. T. 337-338. Ricky Isabel and Eugene Bridges testified that they were with Derrick Hughes before he testified. They both testified, however, that no promise was made about a lighter sentence on his arson charge to induce Hughes to give certain testimony at Franklin's trial. T. 342 and 348.

Hughes had testified at trial on direct examination that he did not remember seeing Franklin holding a gun the night Taylor was killed.. Taylor admitted that he gave a statement the night of the killing that said he saw Franklin holding a gun that night. T. 160. On cross-examination by Franklin's lawyer, Hughes, when asked if he saw Franklin holding the rifle specifically on the night of the killing, responded by shaking his head. He was then asked, "Did he have a scope. This would have been dark, right?" Hughes responded, "No." He was then asked if it was light outside, and Hughes said, "No, it was dark." T. 173.

Hughes's affidavit does not require setting aside the guilty verdict of the jury and judgment of the court. Recanted testimony is looked at with suspicion. *Howell,* 989 So.2d at 384. Hughes testimony was inconsistent from the beginning. The State called him as a witness, and he testified on direct examination that he did not remember seeing Franklin holding a gun on the night Taylor was killed or seeing Franklin kill Taylor. If the State had offered Hughes help on his arson charge, it obviously did not affect Hughes testimony on direct examination.

Hughes did testify on direct that he gave a statement saying he saw Franklin holding a gun on the night Taylor was killed, but he continued to testify that he did not remember seeing Franklin with the gun. If there was some error in this testimony, it was harmless because Hughes was denying that he saw Franklin with a gun on the night Taylor was shot and killed.

When Franklin's lawyer cross-examined Hughes, however, he asked Hughes if he had seen Franklin with the gun before. Hughes said "Yes" he had seen him shoot the gun. Counsel asked him if he specifically saw him with the gun on the night Taylor was killed. The record reflects that Hughes shook his head. It does not indicate if he was answering yes or no.

The very next question was did the gun have a scope. Hughes immediately answered that the gun did not have a scope. With all due respect, a reasonable inference arises that Hughes was already changing his testimony when he was on cross-examination.

The judge was the finder of fact and had the discretion to determine if he believed that the officers offered to help Hughes with his arson charge in exchange for testimony. *Howell,* 989 So.2d at 384. The Judge was not satisfied that Hughes's affidavit was true. With all due respect, the trial judge did not abuse his discretion when he denied Franklin's post-trial motion.

V. THE JURY WAS PROPERLY INSTRUCTED WITH REGARD TO SELF-DEFENSE.

Franklin argues that "the instructions given by the trial court on self-defense were plain error." Appellant 's Brief p. 29. In order to establish that the instructions given constituted plain error, Franklin must establish that there was: "(I) an error at the trial level and (ii) such an error resulted in a manifest miscarriage of justice." *Johnson v. State,* 19 So.3d 145, 147 (Miss. Ct. App. 2009) (quoting *Stephens v. State*, 911 So.2d 424, 432 (Miss.2005)). The jury instructions in this case did not constitute plain error as there was no error.

Jury instructions are within the sound discretion of the trial court. *Shumpert v. State,* 935

So.2d 962 (Miss. 2006) (citing *Goodin v. State,* 787 So.2d 639, 657 (Miss. 2001)). "In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Johnson v. State,* 19 So.3d 145, 146 (Miss. Ct. App. 2009) (quoting *Johnson v. State*, 823 So.2d 582, 584 (Miss. Ct. App. 2002)). The instructions given in this case, when read as a whole, fairly announced the law on self-defense.

In asserting that the instructions constituted plain error, Franklin argues that Instruction S-1, the elements instruction, "fails to require the State to prove beyond a reasonable doubt that the defendant did not act in self-defense." Appellant's Brief p. 30. While the "elements instruction" itself did not list this element, Instruction D-1 fully addressed the element:

> Instruction D-1
> The killing of a human being by the act, procurement or omission of another shall be justifiable when committed in the lawful defense of one's own person or any other human being, where there shall be reasonable grounds to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished.
> If, you, the jury finds that Patrick Franklin is justified in the killing of Derrick Taylor you will return a verdict of not guilty.

(Record p. 172). Instruction D-1 was very straightforward and instructed the jury that if they found that Franklin was acting in self-defense or defense of others, they should return a verdict of not guilty. This instruction was read to the jury immediately after the "elements instructions." Transcript p. 306. "[E]rror will not be found if one instruction lacks an element but that element is found in another instruction given by the court." *Shirley v. State,* 942 So.2d 322, 330 (Miss. Ct. App. 2006). As such, the jury was fully instructed on the elements of the crime.

Franklin further argues that "there is no instruction placing the burden on the State to prove the absence of self-defense." Appellant's Brief p. 31. However, the instructions must be read as

whole. The actual instructions given in this case instructed the jury to consider the instructions as a whole:

> Instruction C-1
> * * *
> You are not to single out one instruction alone as stating the law, but you must consider these instructions as a whole.
> * * *

(Record p. 161). They also instructed the jury that the defendant did not have to prove anything:

> Instruction C-25
> The Court instructs the jury that the Defendant in a criminal case has no burden of proof whatsoever. The State of Mississippi, on the other hand, must prove beyond a reasonable doubt that the Defendant committed the acts as alleged in the indictment.
> * * *

(Record p. 168).

> Instruction C-7
> The law presumes every person charged with the commission of a crime to be innocent. This presumption places upon the State the burden of proving the defendant guilty of every material element of the crime with which he/she is charged. Before you can return a verdict of guilty, the State must prove to your satisfaction beyond a reasonable doubt that the defendant is guilty. The presumption of innocence attends the defendant throughout the trial and prevails at its close unless overcome by evidence which satisfies the jury of the defendant's guilt beyond a reasonable doubt. The defendant is not required to prove his/her innocence.

(Record p. 163). Thus, the jury was fully and completely instructed that the State had to prove the elements of the crime and that Franklin had no burden of proof whatsoever.

Franklin also takes issue with Instruction D-1. Appellant's Brief p. 31. However, this instruction was requested by Franklin; therefore, he cannot now argue that it was error for the trial court to have given it. *See Harris v. State,* 861 So.2d 1003, 1015 (Miss. 2003) (holding that "a defendant cannot complain of an instruction which he, not the State, requested.") Further, there was no error in giving the instruction. Franklin argues that Instruction D-1 shifted the burden to him to

prove that he was acting in self-defense and was similar to the instruction in *Reddix v. State*, 98 So. 850 (Miss. 1924) which the Mississippi Supreme Court held was erroneous. Instruction D-1 did not shift the burden to Franklin. It did not indicate in any way whatsoever that Franklin had to prove that he acted in self-defense or defense of others. In that way, it was dissimilar to the instruction in *Reddix* which is set forth below:

> The court charges the jury, for the state, that in order to justify the killing of deceased on a plea of self-defense it was incumbent on the defendant to show: That at the time of the homicide he was in imminent danger, at the hands of deceased of his own life, or of great bodily harm.

98 So. 850, 850 (Miss. 1924). The *Reddix* instruction clearly stated that it was the defendant's duty to show that he acted in self-defense. Instruction D-1 did not instruct the jury that it was Franklin's duty to show he acted in self-defense and was, therefore, a correct statement of the law. Moreover, Instructions C-7 and C-25, set forth above, clearly instructed the jury that Franklin had no burden of proof.

Franklin also argues that Instructions D-1 and S-6 deprived him "of the right to act if he reasonably believes the danger is imminent." Appellant's Brief p. 32. However, these instructions were not improper statements of the law. Instruction D-1 mirrors the self-defense statute, Miss. Code Ann. § 97-3-15(f). The Mississippi Supreme Court has "consistently held that instructions in a criminal case which follow the language of a pertinent statute are sufficient." *Rubenstein v. State,* 941 So.2d 735, 772 (Miss. 2006)(quoting *Byrom v. State*, 863 So.2d 836, 880 (Miss.2003)). Also, an identical instruction to S-6 was upheld by this Court in *Ellis v. State*, 956 So.2d 1008, 1014 (Miss. Ct. App. 2007). These instructions did not misstate the law on self-defense with regard to the reasonableness of the defendant's actions. *See Woods v. State*, 996 So.2d 100, 102 (Miss. Ct. App. 2008)(citing *Ellis v. State*, 708 So.2d 884, 885-87 (Miss. 1998)). As such, there was no error in

giving these instructions. Accordingly, the jury was properly instructed.

There can be no plain error without error. Therefore, Franklin's contention that the instructions constitute plain error is without merit.

Alternatively, Franklin argues that trial counsel "rendered constitutionally ineffective assistance of counsel in failing to object" to these instructions. Appellant's Brief p. 29. Franklin wholly fails to establish his claim of ineffective assistance of counsel as not only were the instructions properly given, which shows no deficiency in counsel's performance, but also there is nothing in the record indicating that the failure to object to these instructions would have changed the outcome of the case.

VI. THE STATE'S CLOSING ARGUMENTS DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

Finally, Franklin argues that "in closing arguments the prosecutor made numerous improper remarks, which taken singly, or cumulatively constituted reversible plain error because they deprived [him] of a constitutionally fair trial and impinged on other constitutional rights." Appellant's Brief p. 33. Because there were no contemporaneous objections made at the trial court, Franklin again argues that allowing these arguments constituted plain error. "The plain-error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." *Tarver v. State,* 15 So.3d 446, 454 (Miss. Ct. App. 2009). Allowing the State's closing arguments in this case did not constitute plain error as there was no error. Even if there were error, the arguments did not result in a manifest miscarriage of justice.

In reviewing claims of prosecutorial misconduct in closing arguments, this Court has previously set forth the following standard:

> The standard used in reviewing closing arguments is "whether the natural and probable effect of the prosecuting attorney's improper argument created unjust

> prejudice against the accused resulting in a decision influenced by prejudice." *Rushing v. State*, 711 So.2d 450, 455(¶ 15) (Miss.1998) (quoting *Taylor v. State*, 672 So.2d 1246, 1270 (Miss.1996)). In reviewing whether a prosecutor's closing remarks constitute reversible error, we are to employ a two-part test. *Spicer v. State*, 921 So.2d 292, 318(¶ 55) (Miss.2006). First, we review the remarks and determine whether the remarks were improper. *Id.* If we find that the prosecutor's statements during summation were improper, then we analyze whether the remarks prejudicially affected the accused's rights. *Id.* "It must be clear beyond a reasonable doubt, that absent the prosecutor's comments, the jury could have found the defendant guilty." *Id.*

Moss v. State, 977 So.2d 1201, 1211 (Miss. Ct. App. 2007). Here, this Court need not look past the first part of the test as the State's closing arguments were not improper. Further, even if the arguments were improper, not one rises to the level of prejudicially affecting the outcome of the trial.

To support his claim that the State's arguments were improper, Franklin first asserts that the portion of the State 's closing argument set forth below was "designed to suggest that there were other witnesses who were not called who substantiated the prosecution's theory:

> [t]hen they [the police] went out and they talked to other witnesses. They found relatives. They found friends. They found unrelated people in the community, people who had been out there. They talked to everybody they could find and got statements from them. And you heard from some of those witnesses here.

Appellants's Brief p. 33, (quoting Tr. 311). However, when read in context, this argument was clearly a brief summary of the police officers' investigation into this crime. The prosecutor was simply reminding the jury of some of the steps taken by officers in their investigation of the crime. There is nothing improper about such a statement. Additionally, Franklin provides no authority to support his claim that this was improper.

Secondly, in support of his allegation of prosecutorial misconduct, Franklin claims that the State, during closing argument, "identified numerous witnesses who were available and interviewed by the police whom the defendant did not call." (Appellant's Brief p. 35). It is, in fact, improper to comment on a party's failure to call a particular witness who was equally accessible to both

parties. *Ross v. State*, 603 So.2d 857, 864 (Miss. 1992). However, such did not occur in the present case. The State never once claimed that Franklin failed to call a particular witness. Nor does Franklin point out in his appellate brief a single witness which the State argued he could have, but did not, call at trial. Instead, Franklin selectively quotes a portion of the State's closing argument and claims that it was "designed to suggest" that he did not call certain witnesses because they would have provided unfavorable testimony. Appellant's Brief at 35. Read in context, it is clear that the State was merely summarizing the police investigation of Taylor's murder, not pointing out potential witnesses who were available to both parties and who Franklin did not call.

Franklin next argues that during closing argument the State commented on his failure to testify. Although not entirely clear, it seems that Franklin suggests that because the State, in summarizing the police investigation, mentioned the fact that the police interviewed Franklin, effectively commented on his failure to testify. "Although a direct reference to the defendant's failure to testify is strictly prohibited, all other statements must necessarily be looked at on a case-by-case basis." *Marshall v. State*, 22 So.3d 1194, 1197 (¶13) (Miss. Ct. App. 2009) (*Strahan v. State*, 729 So.2d 800, 807(¶27) (Miss. 1998). When read in context, it is again clear that the State's passing reference to the fact that Franklin was interviewed was nothing more than part of the State's summation of the police investigation, not a comment on Franklin's failure to testify.

Franklin also claims that the State commented on his right to not testify elsewhere in closing argument. After pointing out that two State's witnesses placed a gun in Franklin's hand immediately prior to and during the murder, the prosecutor stated the following:

> So I ask you, who puts a gun in anyone else's hand, anyone? Forget Lenario Davis or keep him in. Who else puts a gun in any other person's hand, the gun that killed Deck Taylor? Who? What evidence? Where? When? How? Where are they? Nowhere. Nowhere. What evidence do you have to contradict the State's case?

T. 328. This honorable Court has repeatedly recognized the difference between commenting on a defendant's failure to testify, and commenting on the defendant's failure to put on a successful defense. *Id.*; *Hart v. State*, 965 So.2d 721, 724 (¶9) (Miss. Ct. App. 2007) (citing *Jimpson v. State*, 532 So.2d 985, 991 (Miss.1988); *Stubbs v. State*, 878 So.2d 130, 136-37 (¶18) (Miss. Ct. App. 2004). Read in context, it is clear that the State was arguing for the credibility of the State's witnesses who testified that they saw the defendant with a gun prior to and during the murder and contrasting that with Franklin's failure to put on a successful defense.

Franklin also argues that the State improperly vouched for one of its witnesses, Misty Boling. Appellant's Brief p. 36. However, "[r]arely does reversal result from bolstering or vouching by the prosecutor." *Hollis v. State,* 724 So.2d 403, 404 (Miss. Ct. App. 1998). This is certainly not one of those cases requiring reversal. The portion of the argument in question is simply a comment on facts in evidence. *See Chase v. State,* 645 So.2d 829, 855 (Miss. 1994) (citing *Johnson v. State*, 416 So.2d 383, 391 (Miss.1982)) (holding that "during closing argument, the prosecutor, as well as defense counsel, may comment on facts in evidence and may draw proper deductions from those facts"). Here the State was noting that Ms. Boling initially gave a statement about her opinion of the seriousness of Franklin's threat but when facing Franklin in court opined that the threat seemed more like a joke. Counsel "may draw whatever deductions seem to him proper" from the evidence. *Goff v. State,* 14 So.3d 625, 654 (Miss.2009) (quoting *Bell v. State*, 725 So.2d 836, 851 (Miss.1998)). Moreover, "[t]rial counsel is granted wide latitude during closing argument." *Manning v. State,* 735 So.2d 323, 345 (Miss. 1999). "[T]he court cannot control the substance and phraseology of counsel's argument; there is nothing to authorize the court to interfere until there is either abuse, unjustified denunciation, or a statement of fact not shown in evidence." *Id.*

Not one of Franklin's claims about the State's closing arguments being improper are

substantiated by the record and Mississippi law. Thus, there was no error in allowing the arguments at trial. There can be no plain error without error. Furthermore, the record does not evidence that, absent the State's comments, the jury would have found Franklin not guilty. Therefore, Franklin's contention that allowing the State's closing arguments constituted plain error is without merit.

Alternatively, Franklin argues that trial counsel "was ineffective in failing to object" to these arguments. Appellant's Brief p. 33. Franklin wholly fails to establish his claim of ineffective assistance of counsel as not only were the State's closing arguments within the realm of proper closing arguments, which shows no deficiency in counsel's performance for failing to object, but also, there is nothing in the record indicating that the failure to object to these arguments would have changed the outcome of the case.

CONCLUSION

The State asks the Court to affirm the judgment of the Circuit Court of Tunica County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LaDonna Holland, Stephanie B. Wood, and Scott Stuart, Special Assistant Attorney Generals for the State of Mississippi, do hereby certify that we 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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