IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LAMAR KITCHENS — APPELLANT

VS. — NO. 2008-KA-1940-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LAMAR KITCHENS **APPELLANT**

VERSUS **NO. 2008-KA-01940-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The focal point in this appeal is the weight of the evidence used to convict Lamar Kitchens, a non-testifying defendant, of two (2) counts of aggravated assault.

Kitchens shot and wounded Jason Warner after Kitchens twice shot and missed Patrick Eubanks during a domestic dispute and physical altercation that Kitchens attempted to resolve with a pistol and a pair of channel-lock pliers.

Kitchens claimed in pretrial statements given to law enforcement he fired a warning shot into the air when Warner attacked him. The subsequent shooting of Warner allegedly took place by accident when the .25 pistol Kitchens introduced into the affray discharged after Warner grabbed his hand. (R. 60-61)

According to Eubanks, an ear and eyewitness to the shooting of Warner, Lamar Kitchens and Jason Warner were scuffling " . . . on the ground in the street" with Warner on top of Kitchens when Eubanks heard a gunshot. (R.68-70)

The extrajudicial statements given by Kitchens to law enforcement the day following the incident tell an entirely different tale. (R. 60-61; state's exhibit S-9a)

LAMAR KITCHENS, a forty-nine (49) year old Caucasian male and married resident of Louisville (C.P. at 5, 30), prosecutes a criminal appeal from the Circuit Court of Winston County, Mississippi, C. E. Morgan, III, Circuit Judge, presiding.

Kitchens, in the wake of a two count indictment returned on September 25, 2007, was convicted of two counts of aggravated assault. (R. 155; C.P. at 86, 88-89)

The indictment, omitting its formal parts, alleged in Count I that Lamar Kitchens

> " . . . [o]n or about the 8th day of July, 2007, . . . did wilfully, unlawfully, and feloniously attempt to cause or purposely or knowingly caused bodily injury to one Jason Warner with a deadly weapon or other means likely to produce death or serious bodily harm, by shooting the said Jason Warner in the abdomen with a handgun and by striking the said Jason Warner in the head with channel lock pliers, in violation of Section 97-3-7(2)(b) of the Mississippi Code Annotated, . . ." (C.P. at 3)

The indictment charged in Count II that Lamar Kitchens

> " . . . [o]n or about the 8th day of July, 2007, .. . did wilfully, unlawfully, and feloniously attempt to cause or purposely or knowingly caused bodily injury to Patrick Eubanks with a deadly weapon or other means likely to produce death or serious bodily harm, by shooting at the said Patrick Eubanks with a handgun and by striking him in the head with channel lock pliers, in violation of Section 97-3-7(2)(b) of the Mississippi Code Annotated, . . ." (C.P. at 3)

Following a trial by jury conducted on November 17, 2008, the fact finder returned, in both counts I and II, dual verdicts of "We, the jury, find the defendant Lamar Kitchens, guilty of aggravated assault." (R. 155; C.P. at 86)

Following a sentencing hearing conducted on November 20, 2008, Kitchens was sentenced to serve two terms of twenty (20) years, each consecutive to the other, in the custody of the MDOC, followed by ten (10) years to serve and ten (10) years on Post-Release

Supervision. (R. 160; C.P. at 122)

One issue is raised on appeal to this Court, *viz.*, whether the verdicts of the jury were against the overwhelming weight of the evidence.

STATEMENT OF FACTS

Sheena Dickinson and Chad Kitchens are married to each other. They live in the Greentree Place subdivision in Louisville with Sheena's two young daughters fathered by her former husband, Patrick Eubanks. (R. 47, 65, 87)

Lamar Kitchens is the 49-year-old father of Chad Kitchens who stays with his son and Sheena most of the time. *See* page 8 of the transcript of Kitchens's oral statement - State's exhibit S9a.

On July 8, 2007, Eubanks took his two young daughters to the home of Sheena Dickinson after a river outing the three had shared with Jason Warner, Warner's wife Christy, and the Warner's three children. After dropping off the children Eubanks left Sheena's home riding in a truck driven by Jason Warner and occupied by Christy and their children. They returned to Sheena's house after one of Eubanks's daughters telephoned him and told him she did not want to stay at her mother's home and wanted her grandparents to come and pick her up. (R. 67) Sheena and Eubanks argued over the telephone, and the argument continued in the front yard of Sheena's house upon Eubanks's return to her home. (C.P. at 67-68)

Meanwhile, Lamar Kitchens and his son Chad had gone to the store to purchase a pack of cigarettes for Sheena, Chad's wife. (R. 61) Sheena telephoned them and said that Eubanks was parked on the street in front of the house, and he was threatening to either kill Chad or give him a good whipping. (R. 61)

Lamar and Chad immediately returned to the house where words were exchanged. An altercation took place involving Eubanks, Lamar Kitchens, Chad Kitchens and Jason Warner. According to both Eubanks and Warner, Warner attempted to subdue Lamar Kitchens after Kitchens fired two shots at Eubanks. (R. 27-28, 68-70, 77)

Peacemakers must await their reward in heaven because Warner received nothing for his efforts but a gunshot wound to the abdomen during the ensuing scuffle with Lamar Kitchens. (R. 28-29)

Eight (8) witnesses testified on behalf of the State during its case-in-chief, including the two victims, **Jason Warner** and **Patrick Eubanks**.

Patrick Eubanks described the incident in the following colloquy:

> Q. [DIRECT EXAMINATION BY PROSECUTOR:] Let me stop you right there. When you say you pulled up, where did y'all park at?
>
> A. In the street.
>
> Q. In the street.
>
> A. In front of their house in the street.
>
> Q. And who all got out of the truck at that time, out of your truck?
>
> A. I was the only one to get out to start with. Jason got out to tell me, you know, let's go, come on, let's go. Because Sheena said she done called the law. So he come up and got me, and we went to get in the truck to leave.
>
> Q. All right. And then you say Lamar pulled up.
>
> A. That's when - - yes, sir. Him, him and Chad drove across, like, the grass or whatever up onto - - into their yard or whatnot, got out of the truck, come down the bank into the street to where I was at.

Chad was coming to me. And the next thing I know I, I got hit in the head, and I hit the ground. When I got up, me and Lamar started fighting. He backed up, pulled the gun on me. And that's when I asked him are you fixing to shoot me. He said yes.

Q. Where, where did he have the gun at?

A. In his left, back pocket. He pulled it out with his left hand and pointed it at me.

Q. And you said he said something to you.

A. Yes, sir. Well, I asked him was he fixing to shoot me, and he said yes, I'm fixing to shoot you.

Q. Then what happened?

A. The gun went off.

Q. How far away from you was he whenever that happened?

A. About from me to you.

Q. All right. What happened then after, after he fired that one shot?

A. Well, I turned like with my back half to him, you know, pulled my shirt up because I thought I was shot. That's when Chad hit me in the back of the head and me and him started fighting.

Q. What happened then?

A. We fought across the street to the other side of the road where the pine trees was at. And me and him fought. And I don't know, you know, how long it was or anything. But I know he got up and took off running back across the street. So I jumped up and took off running back across the street, and I seen Jason and Lamar on the ground in the street.

I heard a gun go off again. I seen Jason kind of stand up. I seen Chad hit him in the face, and then Lamar hit him in the face with the gun. They jumped up and run in the

house.

Q. And then what happened then?

A. I mean, I walked to the truck where his wife was. He come walking over there, Jason did. Came walking to the truck where me and his wife were standing, pulled his shirt up. He said I've been shot.

Q. He had a bullet hole right here, a little bitty hole. A little trickle of blood come out. He said I can't breathe. I can't breathe. And he laid across the seat of the truck on his back.

Q. Where, where was he shot at?

A. Like right here. (Indicated.)

Q. Upper part [of] his abdomen.

A. Yes, sir. (R. 68-70)

After pulling up his shirt following the first shot fired by Kitchens, Eubanks heard a second shot. (R. 77)

Jason Warner's version of the shooting is found in the following colloquy:

Q. [DIRECT EXAMINATION BY PROSECUTOR:] So y'all were all getting into the truck that was parked in front of the house, and they pulled up in the yard.

A. Yes, sir.

Q. All right. What happened then?

A. They come down the yard into the street. Patrick got out, went to the front of the truck. Lamar hit him in the side of the head with something - I didn't know what it was - and knocked him to the ground.

Q. All right. What happened then?

A. I got out of the truck and come around. They was fighting.

Q. Who was fighting?

A. Lamar and Patrick.

Q. And let me just stop you right there. When you say Lamar, is the person you are talking about, is he here in the courtroom today?

A. Yes, sir.

Q. Could you point him out please, sir?

A. (Pointed.)

MR. HOWIE: Ask the record to reflect he has identified the defendant, Lamar Kitchens.

THE COURT: Let the record reflect that.

Q. (By Mr. Howie:) So Lamar hit Patrick in the head with something. Then they got into a fight.

A. Yes, sir.

Q. What happened? What happened then?

A. I got out and walked up. Chad acted like he wanted to jump in. I told him it wasn't going to be two on one. I heard a gunshot. I did not see it; I heard it. I turned to look.

Lamar was standing there with a pistol. I seen - - I seen him shoot the second time. When I seen him shoot, I run to him and shoved him down, tried to knock him down, just shove him.

Q. What happened then?

A. I don't remember.

Q. So that's the last thing you remember is seeing him - -

A. Yes, sir.

Q. - - firing the pistol.

A. Yes, sir. I remember shoving him, that's it. I don't remember.

Q. What's the next thing you remember?

A. Mr. Graham coming up to me at the truck, asking me if I was all right.

Q. What happened then?

A. I woke up in the hospital.

Q. Where? Where? At what hospital?

A. I come to a little bit in Louisville. Then I remember the ambulance ride to Meridian.

Q. Meridian. And tell, tell the jury a little bit about your injuries.

A. I was shot in the chest, grazed my lung and went through my liver and lodged in my diaphragm in my back. They had to sew my liver up.

Q. How long did it take you to recuperate?

A. I stayed out of work for about a month and a half, two months. (R. 27-28)

Greg Clark, an investigator with the Louisville Police Department took two statements from Lamar Kitchens the day after the incident. (R. 51-52) A recording of Kitchens's oral statement was played for the benefit of the jury. (R. 55-56) A typewritten transcript of that statement (State's exhibit S-9a) gives an account of the incident that is in material conflict with the versions testified to by both Eubanks and Warner. According to that account it was one of the victims who struck the first blow, and the pistol discharged

by accident after Jason Warner grabbed the hand of Kitchens who had his finger on the trigger. *See* pages 11-12, 14 of State's exhibit S-9a.

In a handwritten statement read to the jury by Investigator Clark Kitchens gave yet another distorted version. (R. 61-62)

Greg Thompson, an ear and eyewitness to portions of the incident, testified that Lamar Kitchens passed the first lick. (R. 90)

The testimony of **Christy Warner**, the wife of Jason Warner, corroborates the versions given by both Eubanks and her husband. (R. 102-04)

At the close of the State's case-in-chief, the defendant moved the court for directed verdicts of acquittal of aggravated assault on the ground that " . . . reasonably fair-minded jurors in the exercise of impartial judgment could not have found beyond a reasonable doubt that the defendant is guilty." (R.124)

This motion was overruled. (R. 124)

After being advised of his right to testify or not, the defendant elected not to testify in his behalf. (R. 124-25) He did, on the other hand, recall to the witness stand, Greg Clark, the investigator who had testified as a witness for the State. (R. 46)

Kitchens's request for peremptory instruction made at the close of his own evidence was subsequently denied. (R. 126; C.P. at 78)

The jury retired to deliberate at 5:32 p.m. and returned dual verdicts of guilty an hour and thirty-three minutes later at 7:05 p.m. (R. 154-55)

A poll of the individual jurors reflected the verdicts were unanimous. (R. 156)

Following a sentencing hearing conducted on November 20, 2008, Kitchens was sentenced to serve two twenty (20) year terms in the custody of the MDOC, ten (10) years

to actually serve followed by ten years of post-release supervision. (R. 159-60)

On November 20, 2008, Kitchens filed his motion for a new trial or, in the alternative, for judgment notwithstanding the verdict, alleging, *inter alia*, the verdict of the jury was against the overwhelming weight of the evidence. (C.P. at 91-92) The motion was overruled on November 20, 2008. (C.P. at 93)

SUMMARY OF THE ARGUMENT

Kitchens claims the jury's twin verdicts were against overwhelming weight of the evidence.

Kitchens argues he was not the initial aggressor and had every right to defend himself and his family. He claims on appeal he shot in self-defense after Eubanks and Warner initiated the aggression. (Brief of the Appellant at 6, 11-12)

Kitchens did not testify in this cause. The only evidence of self-defense is supplied by Kitchens's handwritten and oral statements made to law enforcement authorities the day following the shooting, together with reasonable inferences, if any at all, to be drawn from the testimony of the victims and the other ear and eyewitnesses.

The jury, in the wake of proper jury instructions (C.P. at 72-77), rejected Kitchen's claim of self-defense and found him guilty of two counts of aggravated assault. *See* **Hampton v. State,** 910 So.2d 651, 656-57 (Ct.App.Miss. 2005), for a case involving nearly identical jury instructions.

We submit the evidence does not preponderate in favor of Kitchens; rather it is lopsidedly in favor of the State's theory of the case. **Bush v. State,** 895 So.2d 836, 844-45 (¶¶18-19) (Miss. 2005). Accordingly, the trial judge did not abuse his judicial discretion in denying Kitchens's motion for a new trial. (C.P. at 91-93)

A reasonable, fair-minded hypothetical juror could have found that Kitchens was the initial provoker and aggressor and introduced a pair of pliers, a .25 pistol, and a trio of bullets into a shouting match that simply began as a battle of words between Eubanks and Sheena Dickinson, Eubanks's ex-wife, and Lamar Kitchens's daughter-in-law.

The reasonableness of Kitchens's apprehension after confronting Eubanks and Warner and whether or not he used excessive force to repel any assault were questions for the jury and not for a reviewing court. **Robinson v. State,** 434 So.2d 206, 207 (Miss. 1983).

All of the witnesses for the State agree that Lamar Kitchens struck the first blow when he knocked Eubanks to the ground by smacking him in the head with a pair of channel-lock pliers. (Warner - R. 27; Eubanks - R. 68-69; Thompson - R. 90)

Indeed, the question is not even close.

Kitchens's handwritten statement even suggests Kitchens struck the first blow although Kitchens claims the target was Jason Warner, not Eubanks. (R. 61)

The trial judge did not abuse his judicial discretion in overruling Kitchens's motion for a new trial. The conflicting evidence in the form of trial testimony versus Kitchens's pretrial statements to law enforcement placed the question of his guilt or innocence squarely in the hands of the jury whose duty was to resolve any conflicts.

"The jury is the **sole judge** of the weight and credibility of the evidence." **Byrd v. State**, 522 So.2d 756, 760 (Miss. 1988). It's verdict will not be disturbed on appeal unless the failure to do so would sanction an "unconscionable injustice." **Groseclose v. State,** 440 So.2d 297, 300 (Miss. 1983).

The word "unconscionable" points to something that is monstrously harsh and shocking to the conscience. The verdicts returned in the case at bar are neither harsh nor shocking.

ARGUMENT

KITCHENS HAS FAILED TO DEMONSTRATE THE TRIAL JUDGE ABUSED HIS BROAD JUDICIAL DISCRETION IN OVERRULING KITCHENS'S MOTION FOR A NEW TRIAL GROUNDED, IN PART, ON A CLAIM THE JURY VERDICTS WERE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

THE REASONABLENESS OF THE DEFENDANT'S APPREHENSION AND THE MEASURE OF THE FORCE USED TO REPEL ANY ASSAULT WERE QUESTIONS FOR THE JURY AND NOT FOR THE REVIEWING COURT.

NO UNCONSCIONABLE INJUSTICE EXISTS HERE.

In this appeal, Kitchens assails the weight of the evidence as opposed to its legal sufficiency. He claims the evidence was such that no reasonable, hypothetical juror could have found he did not act in self-defense. Kitchens suggests the jury was bound to accept his extrajudicial versions of the shooting and that both verdicts should have been "not guilty" based on self defense and the defense of his family as well.

Kitchens also claims the pistol discharged by accident. (Brief of the Appellant at 6) The jury rejected both theories. (C.P. at 72-76)

We respectfully submit the evidence, viewed in its entirety, was clearly sufficient for a reasonable, hypothetical juror to find beyond a reasonable doubt that Kitchens did not act in self-defense or the defense of others and was guilty beyond a reasonable doubt of both counts of aggravated assault.

This Court reviews the trial court's denial of a post-trial motion under the abuse of discretion standard. **Flowers v. State**, 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State**, 566 So.2d 1240, 1242 (Miss. 1990). No abuse of judicial discretion has been demonstrated here because the testimony of the witnesses for the State weighs heavily in support of the verdicts. Put another way, the testimony and evidence, in toto, does not preponderate in favor of Kitchens.

Appellant's spin on the facts is an exaggeration - a hyperbole, if you please - of the strongest kind. He looks at the testimony in a light most favorable to him. We respectfully submit intoxication is a non-issue in this case.

In ruling on the defendant's motion for a new trial, the trial judge - and this Court on appeal as well - must look at the evidence in the light most favorable to the State's theory of the case, i.e., "in the light most favorable to the verdict." **Herring v. State,** 691 So.2d 948, 957 (Miss. 1997), citing **Mitchell v. State,** 572 So.2d 865, 867 (Miss. 1990). "We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State." **McClain v. State,** 625 So.2d 774, 781 (Miss. 1993).

In **Bush v. State,** *supra*, 895 So.2d 836, 844 (¶18) (2005), the Supreme Court penned the following language articulating the true rule:

> 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 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)/2 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./3
>
> Sitting as a limited "thirteenth juror" in this case, we cannot view the evidence in the light most favorable to the verdict and say that an unconscionable injustice resulted from this jury's rendering of a guilty verdict. * * * " [text of notes 2 and 3 omitted]

See also **Chambliss v. State,** 919 So.2d 30, 33-34 (¶10) (Miss. 2005), quoting *Bush*, 895 So.2d at 844 (¶18).

In short, the jury's verdict t'was not against the overwhelming weight of the credible evidence which does not preponderate in favor of Kitchens's theories of self-defense or accident. This is yet another case of "he [Kitchens] said, they [Eubanks and Warner] said," and the latter preponderates over the former.

The jury was sufficiently instructed on the issue of self-defense and accident. *See* jury instructions S-2, S-3, and D-6. (C.P. at 74, 75, 76, respectively) Kitchens does not take issue with any of the jury instructions which were granted without objection. (R. 126-132) (Brief of the Appellant at 6-12)

A reasonable and fair-minded, hypothetical juror could have found that after an exchange of words and perhaps verbal unpleasantries between Eubanks and Shenna, Eubanks and Warner were leaving the scene when Lamar Kitchens and his son, Chad Kitchens, drove up, exited their vehicle, and charged toward Eubanks. Prior to exiting their motor vehicle Kitchens had armed himself with a pair of channel-lock pliers and a small pistol which he placed inside a back pocket.

A fair-minded juror could have found that Kitchens did not have reasonable grounds to apprehend a design on the part of either Eubanks or Warner to kill Lamar Kitchens or do him great bodily harm or, if so, there was imminent danger of such design being accomplished. *See* jury instruction S-3 at 75.

Kitchens, contemplating trouble, pre-armed himself prior to exiting his vehicle. Immediately after Warner was shot, Kitchens and Chad " . . . jumped up and run in the house." (R. 70) Kitchens was standing behind Sheena when the authorities arrived. (R. 19) These observations are simply inconsistent with the idea Kitchens shot Warner by accident or in self-defense. Rather, the jury could have found that Warner was simply coming to the aid of Eubanks who had been the target of two gun shots fired by Kitchens at close range. (R. 27-28, 37) Defense of others is well-recognized as a legitimate objective. *See* **Shepard v. State,** 777 So.2d 659, 662-63 (Miss. 2000).

The defendant did not testify. Obviously, the jury did not believe the versions of the shooting given by Kitchens to law enforcement authorities which suggested the victims were the aggressors and that Kitchens shot Warner in self-defense and the defense of his family.

The versions given by Lamar Kitchens in his extrajudicial statements conflict greatly with the versions testified to by the witnesses for the State. Kitchens claimed in his oral

statement which was later transcribed that Warner was advancing toward him when Kitchens fired a warning shot into the air. According to Kitchens Warner was standing at arms length from Kitchens when the pistol discharged a second time after Warner grabbed Kitchens's grip on the gun. *See* page 14 of State's exhibit S-9a. Needless to say, "[t]he jury is . . . charged with the responsibility of balancing conflicting evidence." **Blocker v. State,** 809 So.2d 640, 645 (¶18) (Miss. 2002), citing **Winters v. State,** 449 So.2d 766, 771 (Miss. 1984).

Admittedly, a defendant is not required to prove he acted in self-defense; rather, if a reasonable doubt of his guilt arises from the evidence, including evidence of self-defense, he must be acquitted. **Smith v. State,** 754 So.2d 1159 (Miss. 2000); **Sloan v. State,** 368 So.2d 228 (Miss. 1979). The State has " . . . the burden of proving as an element of the crime that the defendant was not acting in necessary self-defense." **Carter v. State,** 858 So.2d 212, 214 (Ct.App.Miss. 2003), citing **Heidel v. State,** 587 So.2d 835, 843 (Miss. 1991).

In the case at bar, a reasonable hypothetical juror could have found that Kitchens's apprehension, under the circumstances, was neither reasonable nor the danger imminent. It could have, likewise, found that the force used by Kitchens to repel any assault was excessive.

Stated differently, the evidence presented a jury question as to whether or not the defendant was acting in self-defense when he smacked Eubanks up side the head with a pair of channel-lock pliers and shot Warner after Warner came to the defense of Eubanks by shoving Kitchens. *See* **Hall v. State,** 644 So.2d 1223 (Miss. 1994); **Johnson v. State,** 723 So.2d 1205 (Ct.App.Miss. 1998), both cases involving convictions for aggravated assault

returned in the wake of jury instructions defining self-defense.

The jury is the final judge of whether a defendant acted in justifiable self-defense. **Rush v. State**, 278 So.2d 456, 459 (Miss. 1973); **Yarber v. State**, 230 Miss. 746, 93 So.2d 851, 852 (1957). Put another way, "[i]t is for the jury to determine the reasonableness of the ground upon which the defendant acts." **Robinson v. State**, *supra*, 434 So.2d 206, 207 (Miss. 1983).

In **Rush v. State**, 278 So.2d 456, 459 (Miss. 1973), we find this language:

> The apprehension of such danger must be real and such as would or should, under the circumstances, be entertained by a reasonably well-disposed man of average prudence; and **whether the accused has, in a particular case, measured up to that standard of conduct is a question to be submitted to, and decided by, the jury . . .** [emphasis supplied]

It is uncontradicted that Kitchens got out of his truck after arming himself with a pair of pliers and a pistol. A jury could have found he was bent on mischief and intended to use these instruments upon approaching Eubanks. Eubanks testified in plain and ordinary English that Kitchens told Eubanks he was going to shoot Eubanks. (R. 69) After the first shot Eubanks turned his back on Kitchens and '[p]ulled my shirt up because I thought I had been shot." (R. 77) Eubanks then heard the gun go off again. (R. 77)

Greg Thompson, an ear and eyewitness not related to either of the parties, testified that Eubanks and Warner were preparing to leave the premises when Chad and Lamar Kitchens drove up and hastily approached the two men. Lamar Kitchens " . . . all of a sudden, he just swung and hit him (Eubanks) with his left hand and knocked him to the ground. (R. 90)

Q. [By Prosecutor:] And you said the first - - what was

the first lick that was thrown that you saw?

A. [By Thompson:] It was Lamar hitting Eubanks. (R. 90)

Although he did not testify, Kitchens's defense at trial was self-defense but, if not, assault by accident.

Who, other than the jury, could decide fully, fairly, and finally whether Kitchens ". . . had reasonable grounds to apprehend a design on the part of [Jason Eubanks] to kill him or do him some great bodily harm, and in addition to this, . . . [had] reasonable grounds to apprehend that there [was] imminent danger of such design being accomplished." *See* jury instruction S-3 at C.P. 75.

Kitchens points to inconsistencies in the testimony of the witnesses for the State.

No matter.

In **Maddox v. State,** 230 Miss. 529, 93 So.2d 649, 650 (1947), citing **Manning v. State,** 188 Miss. 393, 195 So.319 (1940), we find the following language applicable to Kitchens's observation:

> Seldom do witnesses agree upon every detail. Indeed, their failure to do so is often strong evidence each is trying to accurately portray the situation as he saw it, and that is to the credit, rather than the discredit, of the witnesses.

The State need not square to a proverbial "T' every discrepancy that raises its festered head. It need only produce enough evidence to prove the defendant guilty beyond a reasonable doubt.

It did.

"The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of **perception**, **memory** and **sincerity**."

[emphasis ours] **Jones v. State**, 381 So.2d 983, 989 (Miss. 1990). *See also* **Hill v. State**, 199 Miss. 254, 24 So.2d 737 (1946); **Lett v. State,** 902 So.2d 630 (Ct.App.Miss. 2005) reh denied. *Cf.* **Blocker v. State,** 809 So.2d 640, 645 (¶18) (Miss. 2002) ["I]t is up to the jury to weigh any inconsistencies or contradictions in [the testimony of an accomplice."]

Kitchens also laments that "[t]he evidence clearly shows that the injury suffered by Lamar had to be inflicted by Jason." Brief of the Appellant at 10. The testimony of Eubanks reflects that he saw "Jason and Lamar on the ground in the street." (R. 69) Kitchens was on the ground and Warner was on top of him when Warner was shot. (R. 78)

A fair-minded jury could have found that the abrasions depicted on the arms and hands of Kitchens were sustained as the two men tussled "on the ground in the street" and were not deliberately inflicted by Warner before that time or at any other time.

Our position on this issue can be summarized in only three (3) words: "classic jury issue." Testimony and evidence demonstrating that Kitchens did not act in self defense or the defense of others was not outweighed by any evidence to the contrary. A reasonable and fair-minded hypothetical juror could have found Kitchens guilty of aggravated assault.

In reviewing a claim the verdict of the jury is contrary to the weight of the evidence, this Court is duty bound to weigh the evidence in the light most favorable to the guilty verdict. **Bush v. State,** 895 So.2d. at 844-45. This includes the testimony of Eubanks, the Warners, and Thompson which negates the idea the shooting was in self-defense or accidental.

"[T]he scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict." **Herring v. State**, *supra*, 691 So.2d at 957 citing **Mitchell v. State**, 572 So.2d 865, 867 (Miss. 1990).

In **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983)

The case at bar certainly does not exist in this posture.

CONCLUSION

"In any jury trial, the jury is the arbiter of the weight and credibility of a witness' testimony, [and] [t]his Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light, could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." **Rainer v. State**, 473 So.2d 172, 173 (Miss. 1985).

Although Kitchens, with the able and effective assistance of trial and appellate counsel, has pursued his claim with great vigor, it is devoid of merit.

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgment of conviction and the two twenty (20) year consecutive sentences with ten (10) years to serve followed by ten (10) years of post-release supervision imposed by the trial court 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:

Honorable Clarence E. Morgan, III
Circuit Judge, District 5
P.O. Box 721
Kosciusko, MS 39090

Honorable Doug Evans
District Attorney, District 5
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Honorable Leslie S. Lee
Mississippi Office of Indigent Appeals
301 N. Lamar St., Ste 210
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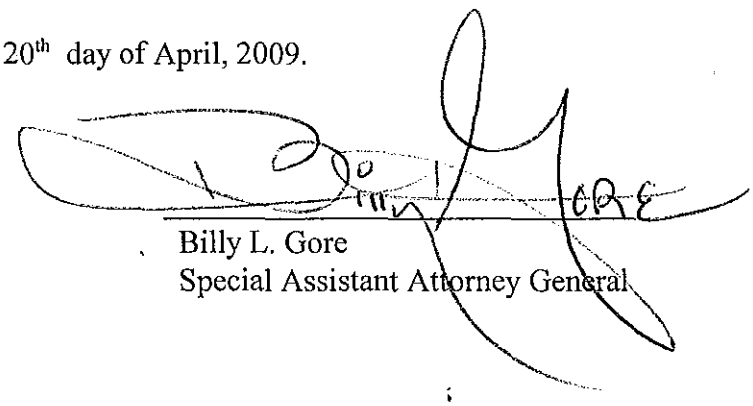
This the 20th day of April, 2009.



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