IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NATHANIEL COLEMAN — APPELLANT

VS. — NO. 2008-KA-2095

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NATHANIEL LAVELL COLEMAN **APPELLANT**

vs. **CAUSE No. 2008-KA-02095-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Jackson County, Mississippi in which the Appellant was convicted and sentenced for his felony of **MURDER**.

STATEMENT OF FACTS

Officer Tiffany Dees of the Moss Point police department was despatched to 3520 Kimberly Drive at about 3.45 on the afternoon of 13 October 2006. When she arrived, she found a body covered in blood lying in the yard of the residence. Officer Dees began securing the scene, awaiting the arrival of other officers. Someone in the residence brought a comforter to cover the body at Dee's request. After detectives arrived, Dees assisted in the collection of evidence. Specifically, she assisted in the collection of a number nine millimeter shells found at 3517 Kimberly Drive, in a drain, the nearby roadway, and the driveway of 3517 Kimberly Drive. There were four shells found as well in the roadside drainage and roadway of 3515 Kimberly Drive. (R. Vol. 2, pp. 99 - 124).

Vida Anderson, of 3528 Kimberly Drive, testified that she did not know one Deadrick Franklin, who was said to have resided at 3520 Kimberly Drive. She also did not know the man who shot the victim, Yvette Dott. But she was able to say that a diagram accurately showed her position, Dott's position and the shooter's position at the time Dott was shot.

As for the shooting, Anderson testified that she went out to her mailbox to get her mail. She heard a shot fired and looked in the direction from which it was fired. She saw a white tee - shirt, but could not identify the shooter. In any event, the next thing she saw was "the girl" coming around the front of a car and then falling to the ground. By that time the shooter was gone. Anderson went over to help the victim, but by then the victim was covered in blood and making gurgling sounds. Anderson asked for a blanket to keep the victim warm. The person who shot Dott was standing at the back wheel of the car when he fired.

The person who got the blanket was located at 3520 Kimberly Drive. When he brought the blanket, he appeared to be in shock. He had a gun in his hand. Anderson told him to put the gun up several times before he complied. She had not seen that person outside the residence at 3520 Kimberly Drive during the shooting. (R. Vol. 3, pp. 125 - 136).

Carla Dott was then called to testify. She stated that she was Yvette Dott's mother. Her daughter was nineteen years old when she was killed. The victim and Deadrick Franklin were thought to be cousins, though it might have been that they were not. The victim wanted to stop and see Franklin on the day she was killed. (R. Vol. 3, pp. 140 - 142).

Thelma Reece was brought round to testify. She stated that the lived at 3528 Kimberly Drive. On 13 October 2006 she was sitting outside her house, sitting on the back of her nephew's car. She saw the person who shot the victim, but did not know who he was. She could only say that he wore a white tee-shirt. She saw the victim at the corner of the house at 3520

Kimberly Drive, and then saw her when she was shot. The victim was toward the back of the house. There was a car in the driveway. The witness stated that there were two shots fired from the back of the house. There was another man involved in the shooting, though this witness' testimony was unclear as to his involvement. That man was said to have been shooting at the back of the house. The man who lived next door to her was not involved in the shooting. She could not identify the Appellant as the shooter. (R. Vol. 3, pp. 152 - 174).

Dr. Paul McGarry testified that the victim had been shot in the center of the back and in the left buttock. The projectile that struck her in the back went up into her neck and jaw. The bullet that struck her in the left buttock went out of the left thigh. The fatal wound was the one to the center of the back. That bullet passed through the victim's right lung, the aorta, the right main bronchus, and then into her jaw, breaking her jaw. The victim was in a bent position, going away from the person who shot her. Cause of death was massive bleeding from the aorta. The wounds were made by a nine millimeter bullet. (R. Vol. 3, pp. 180 - 195).

Deadrick Leon Franklin, also known as "Head," was brought to trial from a federal penitentiary in Texas to testify. On 13 October 2006, he was living at the residence at 3520 Kimberly Drive. On that day he received a call from his girlfriend at the time to say that his home had been broken into. When he arrived he found that the back door had been forced. He noticed a trail of his clothing leading the house of the person who broke into his home. So, armed with his own gun, he followed that trail of his clothing to that person's house and demanded return of his clothing. The person he demanded this of was named Nicholas Barnes. Barnes was in no mood to comply and began "mouthing off." So Barnes' mama and them came and started calling people on their telephones. Franklin left and went back to his house. He did not shoot his gun.

When Franklin returned to his house, he went inside it. At about that time the victim appeared. She came into his house and then left and went toward her best friend's house, which was across the street from Barnes' house. She then came back toward Franklin's house, and as he opened the door he saw that she had been shot. About ten minutes passed between the confrontation with Barnes and the shooting of the victim.

While inside his house, Franklin heard shots being fired. After the firing stopped, he went out to the victim. When shown a picture of a car, he stated that that car arrived after the victim was shot. Another car, a black car, was present when the victim was killed.

Franklin knew the Appellant. He stated that he saw the Appellant in Kimberly Drive after the shooting, speeding past Franklin's house. Franklin stated that he had heard six to seven gunshots while the victim was being shot. He also saw someone with a shotgun, who fired two shots. He did not know the man with the shotgun. (R. Vol. 3, pp. 205 - 219).

David Lawson was then called to testify. He was an investigator with the Moss point police department on 13 October 2006. When he arrived at 3520 Kimberly Drive, he found a large number of people in the area. Chaos and pandemonium reigned. He also found the body of the victim. After some measure of order was restored, he began his investigation. In the course of this work, he found expended twelve caliber shotgun shells and six expended nine millimeter shells. He also found a bullet fragment in the area of 3528 Kimberly Drive.

Lawson also found evidence that Franklin's back door had been forced.

Lawson spoke to witnesses on the scene and then attended the autopsy of the victim. In the course of the autopsy, the bullet in the victim's jaw was recovered, and Lawson took possession of her clothing.

Lawson took a statement from the Appellant on 13 October 2006. In this statement

(Exhibits 45 and 46), the Appellant said that someone named Andrew called him and told him to come over there to see what was going on, to become involved. So the Appellant drove to that place with someone named Hiawatha. When they arrived, they found Nikki Barnes and Terrance Barnes standing outside of their house. There was talk of a gun having been pulled by "Head." The Appellant and Terrence were riding to someone's house. Terrence thought he saw "Head" and jumped out of the car and began shooting. According to the Appellant, he told this Terrence to stop shooting, that the person he was shooting at was not "Head," but to no avail. The Appellant said he realized that it was his cousin Yvette Dott who was being shot at. At that point, the Appellant claimed that he told Hiawatha to come on, and they left the scene. He would not let someone named Andrew, a person said to be a "homeboy," in the car. Terrance Barnes and Nicki Barnes, with their "homeboys" and someone named Mike got into a truck and left.

The Appellant was armed during this shooting. He claimed that he brought the gun just to scare "them." According to the Appellant, Nikki Barnes was armed with a shotgun. Terrance Barnes had a .38 caliber revolver. Terrance Barnes fired five times, the other with the shotgun fired three or four times.

Terrence, while on the way to Kimberly Drive, stated that he intended to shoot "Head." After the shooting, Terrance said, "I got that mother. I got him. I got him."

After leaving the scene of the shooting, the Appellant took the pistol he had with him, which he said he had stolen from his uncle, back to his uncle, who was not actually his uncle but his mother's boyfriend. After that, the Appellant went to his grandmother's house. It was there that he learned that law enforcement wished to speak with him.

It turned out, though, that the Appellant did not return the gun he stole from his uncle/mother's boyfriend. (R. Vol. 3, pp. 219 - 253).

Jeff Smith was employed by the Moss Point police department on 13 October 2006. He located two of the guns used in the shooting in consequence of information given to him by a person charged in the shooting. He found a nine millimeter gun in some bushes in a park located near Kimberly Drive. He believed that the gun was unloaded when he found it. He also found a twelve gauge shotgun which had two rounds in it.

Smith interviewed Nicki Barnes. The defense, on cross - examination, brought out that this Barnes told Smith that Laterrice Barnes, also known as Terrance Barnes, shot the victim. The defense also brought out the fact that Nicki Barnes told Smith that the Appellant was one of those involved in the shooting. (R. Vol. 4, pp. 254 - 266).

Terry Davis, a special agent with the Drug Enforcement Agency, testified that he interviewed the Appellant late on the afternoon of 13 October 2006. In that interview, the Appellant said that Hiawatha Green, his girlfriend and he went to WIN job center on Highway 90 in Pascagoula at about 3.14 in the afternoon. The Appellant said that he received a telephone call from an Andrew Barnes while driving back to his house, this call occurring at 3.35 p.m. Andrew Barnes called to say that "Head" had stuck a gun in his brother Nick's face and that he wanted the Appellant to come to Kimberly Drive. The Appellant said that he refused to go to Kimberly Drive, that instead he ran an errand for his grandmother. The Appellant further stated that he received a call from Terrance Barnes about three minutes after Andrew Barnes' call to say that someone was shooting on Kimberly Drive. The Appellant denied having gone to Kimberly Drive on 13 October 2006. (R. Vol. 4, pp. 267 - 272).

The Appellant presented a case in chief, beginning with a finger print examiner who testified that tests for fingerprints on one of the guns found after the shooting were inconclusive. (R. Vol. 4, pp. 288 - 295).

A Tierra Dantzler was then called to testify. She stated that she resided at 3515 Kimberly Drive on 13 October 2006. She knew the two boys who lived across the street, the Barnes brothers. They were in their yard prior to the shooting. She saw the Appellant there on the morning of the 13th but not in the afternoon. He appeared to be alone; she did not see him with a car. She thought the Appellant left the Barnes home at about noon.

She saw the Barnes boys running to the house where the shooting took place on the afternoon of the shooting. She heard about six gunshots. She did not see the Appellant. After the shooting, she saw the Barnes brothers run to their house and get into a vehicle. She told law enforcement that she saw a blue car leaving the area after the shooting. (R. Vol. 4, pp. 295 - 311).

The Barnes brothers were called to testify. They each invoked their privilege against self - incrimination. (R. Vol. 4, pp. 311 - 316).

A Kedarius Lee was called to testify. He said that Nicholas Barnes had asked him to keep a shotgun for him since Barnes' mother would not let Barnes keep it in her house. This occurred on the morning of 13 October 2006. Lee agreed to do so. In the afternoon, before 3.20, Barnes came for his shotgun. (R. Vol. 4, pp. 316 - 321).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT DENY THE APPELLANT EFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING TO GRANT THE DEFENSE A CONTINUANCE?

2. WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT DENY THE APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING TO GRANT A CONTINUANCE

2. THAT THE SECOND ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

ARGUMENT

1. THAT THE TRIAL COURT DID NOT DENY THE APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING TO GRANT A CONTINUANCE

Trial in the case at bar commenced on 27 October 2008. (R. Vol. 2, pg. 1). However, when the trial court enquired of the parties if they were ready for trial, the defense indicated that it was not ready to proceed "on 655". The reason for this announcement, according to the defense, was that it had received an "election of cases" on 18 September 2008, in which cause number 2007-10,377 was set to be tried.

The district attorney explained that the original indictment against the Appellant, returned in 2007, alleged deliberate design murder. However, in August of 2008, the grand jury returned another indictment against the Appellant alleging felony murder. The district attorney further stated that the defense attorney was informed from the beginning that the State's theory would be felony murder. The cause number of the second indictment was 08-10,655.

The district attorney also stated that the defense attorney was aware of the State's theory of the case, indicated that he agreed with it and had stated that he was not going to bring up time or notice issues. The notice of election filed by the State was filed on 17 October 2008. Except for the change from deliberate design murder to felony murder, everything else in the case was the same.

The defense attorney admitted that he waived arraignment as to the indictment in 08-10,655 in September, 2008. The trial court overruled the Appellant's objection as to proceeding to trial. (R. Vol. 2, pp. 7 - 12; Vol. 1, pp. 5 - 7).

Later, after peremptory challenges to veniremen were made, the Appellant moved *ore tenus* for a continuance "due to the conflict between cause number 07-10,377 and 08-10,655. The defense alleged and wished to produce witnesses to establish that it never received written notice that the 10,655 cause was to be tried, and further alleged that the defense attorney was not prepared to try the indictment in that cause number, he having done no research on felony murder.

The State responded that the defense attorney had had the case since July, 2007 and had gotten discovery from August, 2007. The prosecutor further represented to the court that he had explained the new theory of the case to the defense lawyer, even going so far as to show him the statute concerning felony murder. The defense attorney was aware that the felony murder indictment was to be tried beginning 27 October 2008 and had expressed no objection to that trial date. The prosecutor stated that he did not know whether the defense attorney received a copy of the notice of election. The prosecutor believed that if the court was inclined to grant a continuance, any such continuance should be for no more than a day, that period of time being sufficient for any research in the law. The facts of the case, the witnesses, th discovery, all of this was unchanged.

The Circuit Court administrator was called to testify. She stated that she did receive a notice of election from the district attorney's office with respect to cause number 07-10,377, but did not receive such a notice concerning 10,655. It was not a part of her work to forward notices of election to anyone. The docket would have been the same even if she had received a notice with respect to 10,655.

The defense attorney's paralegal was called to testify. She said she did not receive a notice of election with respect to the felony murder case, but did receive a notice under the

deliberate design murder cause number. She was then examined about having gone through the State's evidence prior to trial.

The trial court found no prejudice to the defense but nonetheless followed the State's suggestion and granted a continuance until the next morning. The defense lawyer responded that that would be fine. He appeared to be about to say that while he wished for more time he thought he could make do, but he was interrupted at that point. The defense lawyer agreed that there was not a change of facts or of witnesses involved, only a change of legal theory. (R. Vol. 2, pp. 46 - 65).

The Appellant correctly notes that it is a matter left to the discretion of a trial court whether to grant a continuance. This Court will not find error in the denial of a continuance unless the trial court abused its discretion or unless some injustice has been shown. *Harris v. State*, 999 So.2d 436 (Miss. Ct. App. 2009).

Here, the trial court did grant a one - day continuance. The defense attorney indicated that that amount of time would be sufficient. In any event, he did not complain at the time of the motion for a continuance or later that he had not had enough time. Given the fact that the defense attorney was allowed a continuance and given the fact that he did not complain of the length of it, we do not think the Appellant is in any position to assert that the trial court abused its discretion in this regard.

Nonetheless, the Appellant claims that his attorney was ineffective because he was not given enough time to prepare for the change in the State's theory of the case. As to this claim, though, the record does not bear this out, and the Appellant wholly fails to show in what specific respects his defense was compromised by his allegedly ineffective attorney. It may be that the defense in a criminal case is entitled to a reasonable amount of time to prepare for trial, but

surely a one day continuance here was reasonable, given the facts of this case.

The Appellant's attorney had been involved in the case for at least a year prior to trial. He had the State's discovery, knew who the State's witnesses would be, and had had ample time to prepare. The defense attorney was aware that the State would be proceeding under a felony murder theory of the case at the time the case was re-presented to the grand jury, if not before. The change in theory did not involve a change of facts or of witnesses. Thus, there was no necessity for time to interview new witnesses or to find new defense witnesses.

The only thing the attorney had to do, if he had not done so already, was familiarize himself with felony murder. The felony murder statute, Miss. Code Ann. Section 97-3-19(1)(c) (Rev. 2006), is neither lengthy nor complicated. A day given to research of felony murder would have been sufficient.

This Court should not find that the trial court abused its discretion in granting a one - day continuance, given these considerations. Nothing about the case from an evidentiary standpoint was different, and a day would have been entirely sufficient to "bone - up" on the legal principles of felony murder. The Appellant has wholly failed to point to a single instance in which his attorney was ineffective on account of the fact that he was not granted a lengthier continuance. Nor has he demonstrated why a lengthier period was necessary.

The First Assignment of Error should be denied.

2. THAT THE SECOND ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

In the Second Assignment of Error, the Appellant asserts that the evidence of his guilt in aiding and abetting the attempted aggravated assault upon Deadrick Franklin weak, so weak that this Court should find that the trial court abused its discretion in denying him a new trial.

Preliminarily, we note that while the Appellant did file a motion styled "Motion for a New Trial," nowhere in that motion did he assert that the verdict was contrary to the great weight of the evidence such that a new trial ought to be granted. He asserted a number of grounds for a new trial, and he also alleged that the evidence was insufficient to permit a verdict. But he did not assert that a new trial should be granted on the allegation that the verdict was opposed by the great weight of the evidence. (R. Vol. 1, pp. 56 - 57).

There is a substantive distinction between a claim of insufficiency of the evidence and a claim that the verdict is opposed by the great weight of the evidence. *May v. State*, 460 So.2d 778 (Miss. 1984). Consequently, the allegation in the Appellant's motion that the evidence was insufficient was insufficient to allege a weight of the evidence issue. Since the Appellant did not seek a new trial on the claim that the evidence was contrary to the great weight of the evidence, the trial court may not be put in error for having refused to grant a new trial on that claim. *Aderson v. State*, 203 Miss. 850, 33 So. 790 (1948). The mere fact that the pleading was styled a "Motion for New Trial" did not necessarily raise a weight of the evidence issue, particularly in view of the fact that several specific issues having nothing to do with a weight of the evidence issue were raised. Given the specific issues raised, a fair reading of the motion would indicate that the Appellant did not intend to raise a weight of the evidence issue.

Assuming *arguendo* that the Second Assignment of Error is before the Court, there is no merit in it.

The evidence in this case demonstrated that, while the Appellant may not have been the one who fired the fatal shots, he did aid and assist the one who did. The Appellant, in one statement, told law enforcement that he knew that the Barnes brothers were intent upon exacting vengeance on Franklin. The Appellant, while claiming at one point that he did not want to be

involved, admitted that he was armed and was armed for the purpose of scaring someone. It was the Appellant's car that the shooter jumped out of when he began shooting at the victim. (State's Exhibits 45, 46).

The Appellant was conscious of his knowing and purposeful involvement. He lied to law enforcement about what he did with the gun after the shooting. He lied to one investigator about even being present when the shooting occurred.

The Appellant was not a mere spectator at the shooting. He was driving the car for the killer. He was armed. He knew what the plan was and he knowingly assisted it. He was an aider and abettor. *Stevenson v. State*, 738 So.2d 1248 (Miss. Ct. App. 1999).

The Appellant tells this Court that there was insufficient evidence to establish that he was present at the scene when the killing occurred. It is true that some of the witnesses were unable to definitely say who they saw, but this was not fatal to the State's case. The Appellant's admissions, taken with the fact that the victim was undoubtedly shot and killed, was enough. It was for the jury to weigh the testimony of the witnesses. As for the claim that the Appellant had no direct connection with the shooter, this claim is contradicted by the Appellant's statement.

The Appellant then makes a glancing comment about the *corpus delicti*, citing *Bullock v. State*, 447 So.2d 1284 (Miss. 1984). The *corpus delicti* in the case at bar was certainly proved in that the State clearly showed that (1) there was a death of a human being (2) caused by the criminal agency of another. As *Bullock* points out, identity of the criminal agent is not a part of the *corpus delicti*. *Bullock*, at 1286. It was not necessary for the State to prove, by evidence independent of the Appellant's statement, that the Appellant was present and assisting the commission of the offense. Nonetheless, aside from the Appellant's statement, Franklin testified that he saw the Appellant driving away from the scene of the shooting just after it occurred. The

Appellant's presence was established by evidence independent of his statement. The Appellant's knowing participation in the commission of the murder was established by his statement. There is no authority of which we are aware, and certainly the Appellant presents none, to indicate that it was necessary for the State to prove the Appellant's acts of aiding and abetting murder by evidence independent of his statement. An aider and abettor is a principal in the commission of a crime, indistinguishable under the law, in terms of criminal responsibility, from the person who actually commits the crime. *Pleasant v. State*, 701 So.2d 799 (Miss. 1997). The *corpus delicti* of the crime does not include the identity of the criminal agents, nor the specific roles the perpetrators played in the commission of the crime.

The Second Assignment of Error should be denied.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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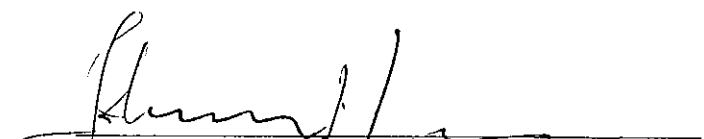
This the 14th day of August, 2009.



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