

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**PAUL MOORE**

**APPELLANT**

**VS.**

**NO. 2009-KA-0063-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE CASE**

The grand jury of Hinds county indicted Paul Moore for the crime of Witness Intimidation in violation of Miss. Code Ann. § 97-9-113. (Indictment, c.p.4) After a trial by jury, the Hon. W. Swan Yerger presiding, the jury found defendant guilty. (Jury Verdict, c.p.44). The trial court sentenced defendant to 5 years, with credit for time served. (Sentence Order, c.p.46).

After denial of post-trial motions this instant appeal was timely noticed. (C.p.47-49). A motion was filed to supplement the record for purposes of appeal, which was granted by the Court of Appeals. A hearing was had by the trial court and the transcript supplemented this record. Further a trial court order was included in the record. (C.p. 72-76),

Defendant is presently incarcerated in the custody of the Mississippi Department of Corrections with a tentative release date of October, 2011.

### **STATEMENT OF FACTS**

Defendant sought to intimidate a fact witness regarding the killing of Officer Robert J. Washington. Defendant (armed and wearing a bullet proof vest) confronted the witness, Howard Hackett and threatened to kill him unless he told the investigating police something different. This was done in the presence of witnesses.

The jury heard the evidence and found defendant guilty.

## **SUMMARY OF THE ARGUMENT**

### **I.**

**KNOWLEDGE OF THE IMMUNITY AGREEMENT BETWEEN THE STATE AND THE VICTIM OF THE CRIME WAS NOT PREJUDICIAL TO DEFENDANT.**

While defense counsel was not aware of an immunity agreement with the victim of the crime -- such was not relevant to defendant's guilty, innocence or punishment. Any error was harmless in light of the overwhelming evidence of guilt by other credible eye-witnesses.

### **II.**

**THE JURY VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

While the testimony of the victim did not provide much evidence of the crime two other eye-witnesses, plus prior statements of the victim, provided credible, collaborative testimony of the guilt of each element of the offense of witness intimidation.

## ARGUMENT

### I.

#### KNOWLEDGE OF THE IMMUNITY AGREEMENT BETWEEN THE STATE AND THE VICTIM OF THE CRIME WAS NOT PREJUDICIAL TO DEFENDANT.

In this initial allegation of error defendant argues that he and his trial counsel did not know of an 'immunity agreement' (c.p.55-56), between the victim of the crime for which defendant was convicted and the office of the district attorney. The trial judge had also signed off on the agreement.

In the hearing held during the pendency of the appeal, (transcript of hearing Supplemental volume 1 of 1), the trial judge looked at the applicable law.

After hearing arguments the trial court ruled from the bench (supp. Tr. 37-44) denying the motion. The order was memorialized and filed and is to be found in the clerk's papers at pages 72-75.

The rationale of the trial court is correct and will now be adopted, whole cloth, by the State:

"Where the prosecutor fails to do so, regardless of whether the omission was intentional or a product of bad faith, the defendant is entitled to a new trial ... provided that **the withheld materials were material to guilt or innocence or to punishment.**" *Marshall v. Hendricks*, 307 F.3d 36 (3<sup>rd</sup> Cir. 2002 (Emphasis added by trial court))(immunity agreement non-material court decision upheld).

The trial judge looked to the testimony of the eye-witnesses (other than the victim) and found the evidence overwhelming.

Further, it is worth repeating, the victim Harold Hackett, essentially testified for the defense, claiming he'd never made statements or a complaint to police. Tr.193-222. Further, defense counsel impeached the victim witness in several ways during the cross examination.

The trial court considered the evidence and the lack of knowledge about the immunity agreement with the victim and found the same to be harmless. The court cited *Jefferson v. State*, 818 So2d 1099 (¶ 36)(Miss. 2002), for the proposition that:

[A]n error is harmless only when it is apparent on the face of the record that a fair minded jury could have arrived at no verdict other than that of guilty.

*Gray v. State*, 799 So.2d 53, 61 (Miss.2001)

Therefore, there being no prejudicial error but harmless error, if at all – the State would ask this Court to adopt the rationale of the trial court and deny any relief in affirming the conviction and sentence below.



II.  
THE JURY VERDICT WAS NOT AGAINST THE OVERWHELMING  
WEIGHT OF THE EVIDENCE.

Interestingly, in this second and last allegation of error defendant cites to the record of only one witness – the victim, who was clearly and obviously conflicted. Be that as it may, other witnesses were not in doubt when they testified. Tamara Cheatham (tr. 225-245), within three pages (231-233) testified of a threat to kill the victim Mr. Hackett, saw the gun, felt that he had a bullet-proof vest on, and that the threat was to change statement he made to police about an ongoing investigation. Further, she established venue!

Next witness Cory Brown elicited similar testimony whilst further identifying defendant as the man who pulled the gun. Tr. 253.

There was further corroborating evidence including prior statements of the victim that provided further evidence to support the jury verdict.

¶ 24. A motion for a directed verdict and a motion for a judgment notwithstanding the verdict both question the sufficiency of the evidence. *Bush v. State*, 895 So.2d 836, 843(¶ 16) (Miss.2005). On review of a trial court's denial of such motions, "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test[,] it is insufficient to support a conviction.' " *Id.* (citing *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). That is not to say that this Court should ask itself whether it agrees with the conclusion of guilt; rather, the inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational \*440 trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

*Wallace v. State*, 9 So.3d 433 (Miss.App. 2008).

While according to the victim not much happened, the testimony of the other witnesses clearly fulfilled the statutory requirements for intimidating a witness. Consequently, the jury verdict is not against the overwhelming weight of the evidence and the trial court was not in error.

The State would ask this Court to deny any relief based on this claim of error.

## CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I, Jeffrey A. Klingfuss , 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:

Honorable W. Swan Yerger  
Circuit Court Judge  
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Honorable Robert Shuler Smith  
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This the 11th day of February, 2010.



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