IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-KA-00167-COA

KAREY WHITTINGTON — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

# APPELLANT'S REPLY BRIEF

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
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Jackson MS 39201
601 576-4200

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## TABLE OF AUTHORITIES

**CASES**:



**STATUTES**

none

**OTHER AUTHORITIES**

## REPLY ARGUMENT

*Issue No. 1: Prejudicial Hearsay*

The state stakes a large portion of its position under this issue on the premise that the claimed hearsay violations were not really hearsay at all, rather, merely background information not offered for the truth of the matter asserted. The flaw in this position is that the state wholly ignores the objective "reasonable person" test for such evidence required by *Turner v. State,* 573 So. 2d 1335, 1338 (Miss. 1990). The testimony here was not offered to explain what the officers did in their investigation. The purpose was to reinforce the questionable identification of Whittington by LeBlanc who merely repeating what unidentified third party jail inmates told him. [T. 143-45, 187-93, 200, 205-08 ].

The purpose of the incompetent evidence here was similar to the purpose in *Houston v. State*, 752 So. 2d 1044,1045 (¶4) (Miss. Ct. App. 1999), where the Court found fault with the admission of police investigators stating they went to Houston's house after an attempted burglary, knocked on the door and heard an unidentified voice say, "I ain't going to lie; I ain't telling them nothing." The *Houston* court found no other purpose for this hearsay than to impute the guilty conscience of the defendant. *Id.*

The state also takes the position that any error was cured by verbal admonition from the trial judge. However, this assumes an innocent purpose for the introduction of the evidence. The instruction came after a direct question to Assistant Police Chief Perry

Ashley as to whether Temple identified another person involved in the shooting. [T. 142-44]. After the admonition, Ashley said Temple named Karey Whittington. *Id.*

Thereafter, Ashley was asked to identify Karey Whittington in the courtroom which he did for the record. *Id.* After this, there was no discussion of what the officer did with the information. *Id.* So, the hearsay was not offered to explain the investigation, the testimony was offered so that Ashley could identify Whittington in the courtroom through repeating what Temple said. Incidently, there was no limiting instruction to all the other hearsay which the jury was arbitrarily free to use as it saw fit.

The state did not distinguish the facts of this case from the application of *Murphy v. State*, 453 So. 2d 1290, 1294 (Miss.1984). Accordingly, as in *Murphy*, a reversal is required.

*Issue No. 2: Exclusion of defense evidence.*

The state argues that Whittington was attempting to present testimony through proxy witnesses. This argument misdirects the court from the real purpose of the offered testimony tendered to present defense evidence as to whether or not certain conversations occurred. If this were another kind of case, for example, a bank robbery, the defendant would be free to bring in witnesses to describe what transpired during the claimed robbery, including what the defendant said. The same logic applies here.

Impeachment of hearsay with hearsay is allowed. *Nalls v. State,* 651 So. 2d 1074,

1076 (Miss. 1995). When a hearsay statement has been admitted into evidence, the credibility of the hearsay declarant may be attacked to the extent that is allowable had the hearsay declarant actually testified at trial." *Id.* See Miss. R. Evid. 806 and 801(d)(2).

Otherwise, Whittington relies on *Le v. State,* 913 So. 2d 913, 941-42 ( (Miss. 2005) and *Hall v. State,* 691 So. 2d 415 (Miss. 1997), cited previously.

Issue No. 3: *Bad Character Evidence*

The state argues that Whittington opened the door to allowing the jury to hear about alleged child abuse charges. However, a careful reading of the testimony shows that the only arguable topic to which the door could have been opened concerned Whittington's relationship with his ex-wife, not his relationship to his children.

The state cites *Hodges v. State*, 912 So. 2d 730 (Miss. 2005), but *Hodges* should not apply. In *Hodges*, the defendant opened the door to character evidence by offering evidence of good character. Such is not the case here. Whittington never offered evidence of good character. Defense counsel merely sought to explore an improper motive for Whittington's ex-wife to testify against him. Nor was the examination of the ex-wife offered for mitigation as suggested by the state, so its cite to *Wiley v. State,* 750 So. 2d 1193 (Miss. 1999) misses the mark as well.

*Issue No. 4: Manslaughter Instruction*

The state suggests that there was no evidentiary basis for a manslaughter instruction. In this argument, the state ignores testimony that the shooting, if committed by Whittington, was unplanned, impulsive, and not the product of deliberate design, committed with a weapon that just happened to be in the car. [T. 260-61, 264]. Moreover, there was evidence that Whittington had no intent to kill anyone, just scare drug dealers. [T. 265-66]. Plus there was testimony from Temple who heard Whittington say the victim had a gun. [T. 275-76, 283]. Candy Berry testified that Whittington said the victim had pulled a weapon on Whittington and that Whittington shot in the air. [T. 358-59 ]. The court cannot ignore this testimony nor mischaracterize it either. A manslaughter instruction was required. *Williams v. State*, 729 So. 2d 1181,1186 (Miss. 1998).

*Issue No. 5: Self Defense Instruction*

The state once again asks the court to ignore the evidence about Temple hearing Whittington say the victim had a gun. [T. 275-76, 283]. The strongest evidence in favor of giving a self-defense instruction came from Candy Berry who testified that Whittington said the victim had a gun. [T. 358-59 ]. The state also implies that the Court should forget that Mr. Frith had a bottle of gin and crack cocaine paraphernalia on him, and alcohol and cocaine metabolites in his system. [T. 157-60, 166-67, 178, 180-81, 244;

Ex.12]. The state does not distinguish the facts of this case from the application of *Williams v. State*, 803 So. 2d 1159, 1161(¶ 6) (Miss. 2001), *Calhoun v. State*, 526 So. 2d 531, 532-33 (Miss. 1988) and *Manuel v. State*, 667 So. 2d 590, 593 (Miss.1995).

*Issue No. 6: Weight of Evidence*

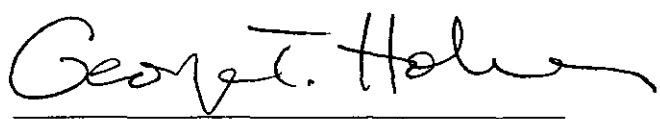
Whittington relies on the arguments and authorities cited in his initial brief under this issue.

*Conclusion*

Karey Whittington is entitled to have his conviction reversed with remand for a new trial.

Respectfully submitted,

KAREY WHITTINGTON, Appellant

By: 

George T. Holmes,
Mississippi Office of Indigent Appeals

## CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 2nd day of October, 2009, mailed a true and correct copy of the above and foregoing Reply Brief to Hon. Michael Taylor, Circuit Judge, P. O. Box 1350 Brookhaven MS 39602, and to Hon. Dewitt Bates, Dist. Atty. 284 E. Bay St. Magnolia MS 39652, and to Hon. Laura H. Tedder, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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