IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DERRICK TURNER — APPELLANT

VS. — NO. 2009-KA-0330

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

DERRICK TURNER **APPELLANT**

vs. **CAUSE No. 2009-KA-00330-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 Oktibbeha County, Mississippi in which the Appellant was convicted and sentenced for his felony of **CAPITAL MURDER**.

STATEMENT OF FACTS

The instant case is a companion case to *Prater v. State*, 18 So.3rd 884 (Miss. Ct. App. 2009) and *Hudson v. State*, 977 So.2d 344 (Miss. Ct. App. 2007).

Mr. Dalton L. Miller and his wife, Juanita, resided at 226 Reed Road in Starkville in August of 2001. On the morning of 20 August 2001, Mr. Miller and his wife arose, followed their morning schedule, and at about a quarter of nine Mr. Miller left the house to drink coffee at a local bank and to visit car wash businesses that he owned. When he left the house, Mrs. Miller

was cleaning up after breakfast. Mr. Miller left the door unlocked as he left the house. Mr. Miller thought he returned home at about a quarter of ten that same morning.

When Mr. Miller returned home, he found smoke coming out of his house and his wife being attended to be emergency personnel. His wife, who was seventy - nine years of age, died in hospital that afternoon.

The interior of the Miller home was quite in disarray, and several fires had been started throughout the home. A desk at which Miller attended to his business had been ransacked. The house was not in such a condition when he left it earlier that morning. The sum of $600.00 was missing from the house. The fires in the house were detected by smoke detectors within the house; a security company contacted the fire department. Photographs of the interior of the house after it had been ransacked were admitted to evidence. (R. Vol. 3, pp. 133 - 149).

One Bentore Cornelius Riley, once known as Marquelius Tigger, Q. Peppy, Bubba, and Tupac, but not Allah, was then brought round to testify. He stated that he stood charged with capital murder and with two assaults on law enforcement officers. He worked with the Appellant at a business known to the record as Hodges and Crane Company; he met the Appellant some six months prior to the death of Mrs. Miller.

At about nine o'clock on the morning of 20 August 2001, Riley saw the Appellant with a group of young men standing at the corner of Northside and Southside Drives in Starkville. Besides the Appellant, these others were Demarcus Evans, James Pastor, Willie Prater, Devail Hudson and a Josh Wood. These young men were talking and smoking. One of this group, a Destiny Moore, was wearing a pair of tennis shoes that Riley had been missing. Riley told Moore he wanted his shoes back. Moore refused to return the shoes, and so, predictably, an argument and a "scuffle" resulted. The matter was resolved when Hudson and Prater told Moore

to return the shoes. So Moore gave Riley the shoes and went off to a house for another pair.

Either during the scuffle or just after it, Devail Hudson said to the group, "Let's go." Willie Prater asked, "What you going to do?" Hudson, presumably, responded, "We fixing to go over there to that woman's house and see what she's got in there." Riley did not know which house was being referred to at the time. Prater then asked, "What we going to do if she finds us in there?" Hudson responded, "We're going to kill her." Riley was appointed to act as a "watch out man" because Moore had Riley's shoes on and the group was afraid that Riley "was going to tell."

The group "broke off and ran to the old woman's house" and entered the back door. Riley ran to a nearby trailer park.

Riley then saw the Appellant "burst out of the house" as though something had scared him, the Appellant falling onto the grass. Then the rest of those who broke in the Miller home ran from the house, Hudson and Prater being the last to leave. They made their way to the trailer park. They sat for a minute. The Appellant was present. There was talk of someone having been cut. Riley stated that he went to the house and unsuccessfully tried to call the police. He then went to his grandmother's house and again attempted to call the police. The Appellant and his compadres were in the trailer park when Riley left. About two hours later Riley went by the old woman's house. He noticed smoke coming out of it.

On 6 January 2002, Riley had occasion to call the police on account of the fact that his stepfather and he had gotten into a difficulty. Riley stated that he did not want to leave his mother, knowing that the people who had broken into the old woman's home were around. He was afraid of them and they had threatened his family and him. Riley gave a statement to the police. He was arrested after giving the statement.

Riley stated that he was not married under the name of Marquelius Tigger. However, he admitted that he had once represented that he was married to a Terry Abdul Tigger. He had also represented that his mother's name was Mariel, whereas in fact her name was Ethel Rice. He had also represented that he had children though in fact he had none. These representations were apparently made in court filings, though it is obscure what filings were involved. He stated that his actual name was Bentore Riley and not one of the others he had used, though he admitted that there had been times when he denied that his name was Bentore Riley. The court filings were an attempt by Riley to get the case against himself concluded quickly, to get someone to listen to him.

Riley denied having made up the story about the events on the morning of 20 August 2001 and persons involved. He also denied having given different versions of his account. He did state that he did not name the Appellant as one of the perpetrators in his January, 2002 statement, but this was because he did not know the Appellant's name at the time. He only knew the Appellant by the name "Smooch." At the time he thought the Appellant's actual name was "Derwin" or some other name beginning with a "D." The Appellant gave a second statement on the afternoon of the first statement. By that time he knew the Appellant's actual name. It was possible that someone had given him the Appellant's name.

The witness stated that it was possible to see the Miller residence and the back door of the Miller residence from his location.

In a statement given four days after the first two, the Appellant said that his shoes were thrown at him and that he had told the Appellant and his fellows to go to hell when he was asked to be a "watch out man." Riley testified that he did actually give a statement to police on the killing, but he admitted that that testimony did not appear in the transcript of the trial in the

prosecution of Hudson. Bentore stated that Devail Hudson went into the Miller home twice, but admitted that he had not testified to that fact on direct examination.

In one of Riley's statements to law enforcement, he stated that he thought the Appellant was scared when he came out of the Miller home. In that statement, he was said to have referred to the Appellant's eyes; however, on cross-examination Riley stated that he could not see the Appellant's eyes. He denied having said what was said to have said about the Appellant's eyes in the statement. Riley knew Devail Hudson, James Pastor, Josh Williams and Willie Prater much better than he knew the Appellant

Riley identified the Appellant at trial as being one of those who broke into and entered the Miller home, regardless of his possible initial confusion as to the Appellant's name. He further stated that he saw the Appellant and his cohorts enter the Miller home as he was going up a hill toward a trailer park. The Appellant and his gang threatened Riley and his family if Riley informed on them. (R. Vol. 4, pp. 152 - 235).

Mrs. Miller suffered many abrasions and contusions and a number of fractures, which resulted from the infliction of many blows with a blunt object, such as an iron. She had extensive defensive injuries. Her skull was fractured in at least two places and she died in consequence of swelling of the brain and bleeding about the brain. Her death was ruled a homicide. (R. Vol. 4, pp. 236 - 260).

A Denise Stephens testified. She stated that she participated in a Meals-on-Wheels program in August, 2001 in Starkville. She knew a person by name of Destiny Moore because she delivered meals to his grandmother. She typically delivered those meals at about ten or half past ten in the morning. Destiny Moore's grandmother lived close to the Lander's Trailer Park.

On 20 August 2001, she delivered a meal to Moore's grandmother. As she was

attempting to drive away, she attempted to turn her car about at the trailer park. She found her way blocked by a group of four or five black males. Among them were Devail Hudson and Bentore Riley. She was unable to proceed until this group broke up and went their way. (R. Vol. 4, pp. 262 - 268).

Stuart Teague of the Starkville Fire Department testified as to Mrs. Miller's location and condition when he and other went into her house to search for her. In the course of carrying Mrs. Miller out of the house, he became covered in blood. Mrs. Miller was unclothed; she did "not [have] much face left." (R. Vol. 4, pp. 270 - 282).

Rodger Mann, fire chief of the city of Starkville, testified as to his role in extinguishing the fires set in the Miller home. A further went on to testify as to the location of those fires, some six fires in all. The fires were intentionally set. Mann further noted drawers had been opened and their contents strewn about in some of the rooms of the house. The firemen would not have done this in the course of extinguishing the fires. (R. Vol. 4, pp. 285 - 300); Vol. 5, pp. 301 - 331).

Kirk Rosenhan, a registered fire protection engineer, testified that the Miller home had two smoke alarms. He further testified that, as to fire number three, one set in the master bedroom of the house, it would have taken forty one seconds after ignition of the fire to set off the smoke detector. As for another fire in another room, it would have taken forty six seconds after ignition of that fire to set off the other alarm. Both alarms were connected to an alarm company. As for the bedroom, "flashover" – meaning, apparently, the point in time in which the room would have been engulfed in flame, would have occurred some 316 seconds after ignition. However, the fire or fires in that room were put out prior to that point in time. The fire set in the livingroom would have engulfed the living room 574 seconds after ignition. This did not occur

either, however, the that fire having burned out for reason of lack of fuel. The fire department would have been contacted by the alarm company in about two minutes from the time the smoke alarms in the home were set off. (R. Vol. 5, pp. 331 - 343).

A forensic scientist with the Mississippi Crime Laboratory testified. He stated that no useable fingerprints were found inside the house. This was not uncommon in houses in which fire had broken out. He stated that he found no indication of an outer door having been forced, other than the front door which had been used by the firemen.

He found that the eyelets of the stove had been stacked on a counter, as though someone were going to clean them. The eyelets of the stove, though, an electric stove, had been turned on to their highest position.

No accelerants were used to start the fires in the house, only paper materials or cloth.

A considerable amount of blood and blood spatter was found in a room referred to as a sewing room. Given the nature and pattern of the blood splatter, Mrs Miller was either lying on the floor or was beaten down to the floor and struck at that point. Also found in that room was a blood stained steam iron, a pair of glasses and a clump of hair. A pair of panties covered in blood were also found in the room. A blood handprint was found on a sheet of a daybed located in the room. A drawer in a desk in the room had been pulled out and its contents dumped on the floor. The house had been ransacked. Yet, the Appellant and his fellow criminals did not find the large amounts of money that were in the house, in filing cabinets located in the master bedroom.

Some 202 objects from the home were examined in an effort to retrieve fingerprints, without success. The blood in the house was human blood; there was no indication of rape. Fingernail scrapings were negative. It was the opinion of the scientists that there were a number

of persons involved in the commission of the crimes and that they left the scene very quickly, so quickly that they left about four hundred dollars they did find lying on the floor. (R. Vol. 5, pp. 347 - 380).

A dog handler was called to testify. She and her dog were summoned to the Miller home at about ten of two on 23 August 2001. A scent article belonging to one of the Appellant's brothers in murder, Devail Hudson, was provided. The dog and its handler were put out in the trailer park. The dog tracked that creature from the trailer park to the backdoor of the Miller home. The dog then tracked the scent to Hudson's girlfriend's trailer. (R. Vol. 5, pp. 380-391).

Lieutenant Bill Lott of the Starkville Police Department explained the efforts made by the department and himself to track down the perpetrators of Mrs. Miller's murder. Though they suspected Devail Hudson as having been involved, their investigation was stymied by the lack of information until 6 January, 2002, when Benetore Riley showed up.

Riley made a statement to Lott, which was as follows:

> The day the old lady was killed, August 20th of 2001, before she was killed at Reed Road and Westside, the lady was a white lady who lived at the corner of Reed and Westside. I don't know the lady's name, but I knew that white folks lived at that house. I had walked to my grandma's, and I got a pear.
>
> When I was walking back down Northside, I came to the corner of Northside and Westside. Standing at the stop sign at the corner were James Pastor, Willie Prater, Destiny Moore, Little Mark – "real name unknown", Devail Hudson and another tall, skinny, black male with two front teeth missing named Derwin. I noticed Destiny Moore had on a pair of gray Nautica tennis shoes without laces stolen from my house. Destiny and I started to get into it, because he had my shoes. Devail told Destiny to give me my shoes while I was there.
>
> Devail was talking about robbing that lady. Someone said: Are you going to–what are you going to do to the lady. Devail said: I am going to rob that old white bitch. I know she got something.

Then Willie Prater said to Devail: Are you going to kill that old lady? Devail said: Yeah, I'm going to kill her. Devail wanted to see what the old lady had.

After I got my shoes from Destiny, Devail said, "Let's go". And James Pastor, Willie Prater, Destiny Moore, Little Mark, Devail Hudson and Derwin started going to the old lady's house at the corner of Reed and Westside.

I was walking towards my house at Lander's Trailer Park. I got to the gate at the entrance to the west side of Lander's Trailer Park. I saw them all go into the lady's house. Then a little later I saw Derwin run out of the house and fell (*sic*) down. Then Prater went on Reed from the house. Destiny went to his house.

Devail and the other guys ended up in Lander's Trailer Park, but Little Mark and Destiny went to Destiny's house. I went to my house, but I saw Devail go back into the house again. I didn't see him leave this time.

I walked down to the store to meet my mother. I think Devail went back to the house to kill the old lady and burn the house down.

Then I later saw Devail give Derwin a watch that Devail had. It was a silver watch, a Nautica watch. Devail gave this watch to Derwin, because he was talking about what they got out of the house, meaning the old lady's house. Derwin told Devail: I had to get out of there for what y'all were doing. Devail said: You like this watch? Derwin said: You got it free - handed. Devail didn't say anything.

One of the guys said: There goes Bubba. I said: Y'all are going to get caught, in my mind. They were going to get the same thing done to them for killing the old lady.

Devail had changed clothes the second time I saw him after he went back into the old lady's house. Devail was wearing blue-colored clothes and changed into something different other – other than he robbed the house.

When Devail said he was going to kill the old lady, I had no doubt in my mind he would kill, but I wasn't around to see it. Devail was saying at the stop sign he didn't want to wear a particular shoe when he robbed the old lady. Destiny went to his house and got another pair of shoes.

* * * *

Riley made a second statement later that same day, after he learned that the one he identified as Derwin was actually the Appellant. In that statement, the Appellant told the officer:

> On August 20th, 2001, Devail Hudson, Willie Prater, Destiny Moore, James Pastor, Demarcus Evans and [the Appellant] threatened me. Destiny Moore was wearing my gray Nautica shoes. They told me I was going to be the lookout for robbing the old lady at Reed and Westside. They said my shoes had already been there.
>
> I didn't want to be the lookout. I was scared. Willie said to suck it up, stop being a bitch. Devail said: Let's go. And they all went into the old lady's house.
>
> I did watch out for them, but I didn't want to. [The Appellant] was the first to run out, and he fell down.
>
> They all later came out of the house and met up at Lander's Trailer Park. Then Devail went back to the house by himself. I saw him go in the back door as I went up the road. I didn't want to be around them anymore. I didn't want any cut from the money. I knew Devail was going to kill her.

The Appellant was located on 14 January 2002. The Appellant agreed to come to the police station and, while there, voluntarily made a statement. He stated that he was at work on the morning of 20 August 2001, having gone to work that morning at seven of the clock. He stated that he did not leave work until half past four of the clock that afternoon. He allowed that he might have been at the corner of Westside and Northside, behind the Miller's home, on the morning of the 20th, but if he was he could not recall who was there or even if he stopped. The officer checked into the Appellant's account and, finding that it was inaccurate in several respects, asked the Appellant to return to the station.

The Appellant corrected the name of his employer and again stated that he was working on 20 August 2001. When the Appellant finished this statement, the officer informed him that he

had not been working that day, that in fact he did not work for that employer until 11 September 2001. The Appellant then responded that he must have been sleeping on the morning of 20 August 2001. The Appellant left the police station. The Appellant was not arrested until after Willie Prater was arrested.

Lott also went to the area Riley claimed he was able to see the back of the Miller home. Lott testified that he was able, from that place able to view the back door of the home.

Lott stated that he knew of four lies that Benetore Riley told him. He thought Riley lied about having called emergency services on the day of the murder, lied about having spoken to a policeman at the trailer park, initially lied about the Appellant's identity as "Derwin," and lied about his involvement as the "lookout." (R. Vol.5, pp. 394 - 450; Vol. 6, pp. 451 - 459).

Dina Addy was employed as a business manager at Hodges Construction in January of 2002. The Appellant's first day at work was 11 September 2001. Bentore Riley was also employed by the company and was working the same week the Appellant began employment with Hodges Construction. Riley and the Appellant worked together on the same job. A Derwin Ferguson was employed by the company as well. (R. Vol. 6, pp. 459 - 463).

The defense presented a case - in - chief, beginning with the testimony of the Appellant's mother. The Appellant's mother testified that the Appellant took her to Tupelo on the morning of 20 August 2001, leaving Starkville at about nine or a quarter past nine in the morning. The purpose of the visit was to visit the Appellant's sister. The Appellant was unemployed at the time and he filled out a job application while in Tupelo. The Appellant drove his mother back to Starkville, arriving there at a little past noon. She claimed that she recalled the date of the trip to Tupelo because people were talking about the murder of Mrs. Miller the next day at her place of employment.

The Appellant's mother admitted that she did not think about the date of the trip to Tupelo until some six months later, when the Appellant was arrested. She admitted that her daughter told her that the visit was on the 20th of August. She could not recall, though, where she was or what she was doing on certain dates, such as 11 September 2001, or on certain dates on which notorious homicides were committed in Oktibbeha County. She admitted that the Appellant's two front teeth were missing, that he was tall, skinny and light - colored. (R. Vol. 6, pp. 473 - 488).

A Shannon Williams testified. She stated that she was a shift leader at the restaurant in Tupelo which employed the Appellant's sister in August of 2001. She stated that she recalled that the Appellant's sister mentioned that her mother and the Appellant were coming to visit and that the Appellant needed a job. This occurred in August of 2001. Two people thought by Williams to have been the Appellant and his mother came into the restaurant, and the male filled out a job application. Williams did not speak with the person she thought was the Appellant and did not take the application from him. She never saw the person said to have been the Appellant again.

On cross-examination, the witness admitted that she could not say that the Appellant was the man who came into the restaurant. She could not say if the person said to have been the Appellant was in the restaurant on 20 August 2001. (R. Vol. 6, pp. 492 - 503).

The Appellant's sister testified. She stated that the Appellant and their mother came to Tupelo on 20 August 2001. The Appellant filled out an application for employment. Applications for employment were kept ninety days. The witness admitted that they could be taken from the restaurant, filled out, and returned later, dating it with whatever date the applicant chose. No attempt to locate the application said to have been filled out by the Appellant was

made until he was arrested, which was some six months after Mrs. Miller's murder. The witness could not recall the date the Appellant was arrested, but she stated that she could recall the 20th of August 2001. She had no explanation as to why she did not contact the police department after her brother was arrested to inform the detective that the Appellant had been in Tupelo on 20 August 2001; she was not aware that the Appellant had told the detective that he was sleeping on 20 August 2001. (R. Vol. 6, pp. 505 - 519).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT; WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?[1]

2. DID THE TRIAL COURT ERR IN REFUSING THE APPELLANT'S IMPEACHMENT INSTRUCTION?

3. DID THE TRIAL COURT ERR IN REFUSING AN INSTRUCTION WHICH WOULD HAVE REQUIRED THE JURY TO ACQUIT THE APPELLANT WHERE THE ACCOMPLICE'S TESTIMONY WAS ALLEGEDLY IMPEACHED, UNREASONABLE OR SELF - CONTRADICTORY?

SUMMARY OF ARGUMENT

1. THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

2. THAT THE TRIAL COURT DID NOT ERR IN REJECTING THE APPELLANT'S IMPEACHMENT INSTRUCTION

3. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT INSTRUCTION D-8

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[1] We will respond to the Appellant's First and Fourth Assignments of Error in this response.

ARGUMENT

1. THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

In the First Assignment of Error, the Appellant contends that the evidence was insufficient to permit a reasonable juror to find the him guilty of the capital murder of Mrs. Miller. The Appellant's argument in support of this claim is based entirely upon an attack on the credibility of Benetore Riley. In considering the Appellant's claim, we bear in mind the standard of review applicable to claims of this kind:

> [This Court] must, with respect to each element of the offense, consider all of the evidence-not just the evidence which supports the case for the prosecution-in the light most favorable to the verdict. *Harveston v. State,* 493 So.2d 365, 370 (Miss.1986); *Callahan v. State,* 419 So.2d 165, 174 (Miss.1982); *Sadler v. State,* 407 So.2d 95, 97 (Miss.1981). The credible evidence which is consistent with the guilt must be accepted as true. *Spikes v. State,* 302 So.2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Hammond v. State,* 465 So.2d 1031, 1035 (Miss.1985); *May v. State,* 460 So.2d 778, 781 (Miss.1984); *Glass v. State,* 278 So.2d 384, 386 (Miss.1973). Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. *Neal v. State,* 451 So.2d 743, 758 (Miss.1984); *Gathright v. State,* 380 So.2d 1276, 1278 (Miss.1980). We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Harveston v. State,* 493 So.2d 365, 370 (Miss.1986); *Fisher v. State,* 481 So.2d 203, 212 (Miss.1985).

Wetz v. State, 503 So.2d 803 (Miss. 1987).

The facts of the case at bar in support of the verdict, taken as true, together with all reasonable inferences therefrom, was that the Appellant and several others decided to break into the Miller home in order to steal whatever they found of interest. The plan specifically included a plan to kill "the old lady." This was in fact what these people did. There is simply no question but that there was a murder committed in the course of a robbery

The Appellant, though, would have this Court find that the testimony concerning his identity as one of those who committed this crime was not sufficiently established. It is said that Benetore Riley was an accomplice and that, as such, his testimony should have been received with great caution and suspicion. It is said that Riley's testimony was uncorroborated, unreasonable, contradictory and impeached, and that for those reasons the trial court should have granted a judgment of acquittal. In other words, according to the Appellant, the trial court should have effectively stricken Riley's testimony.

Riley's testimony was not uncorroborated. In his first statement to the police, Riley described the Appellant as being a "tall, skinny, black male with two front teeth missing." The Appellant's mother confirmed that the Appellant had two front teeth missing. The jury would have noted the Appellant's physical appearance. Riley's testimony was also corroborated by the fact that entry to the Miller home was gained through the very door he described. The detective also corroborated Riley's testimony as to what Riley could see from the location Riley said he occupied.

The Appellant claims that Riley could have obtained his information from the press or from other sources. It seems unlikely, though, that a physical description of the Appellant would have been reported in the press, or would have been otherwise generally known. In any event, the Appellant's point simply goes to the weight and credibility of Riley's evidence, and that is a matter for the jury to determine. *Nelson v. State*, 10 So.3rd 898 (Miss. 2009).

The Appellant then says that Riley's testimony was impeached. In this respect, the Appellant points out that there were discrepancies as to whether Riley rang emergency services on the day the murder occurred and whether Riley spoke to a police officer on the afternoon of that day, and whether Riley was frightened of the Appellant's group. While there were some

discrepancies in Riley's testimony, those were on tangential matters. Whether he did or did not call for help or speak to a policeman did not adversely affect his account of what he saw and heard just before the murder occurred. These matters were for the jury to consider. It cannot be said that no reasonable juror would have given no credit to Riley's testimony on account of these discrepancies. Again, these considerations went to the weight and worth of Riley's testimony. This Court will not re-weigh the testimony. *Spurlock v. State*, 13 So.3rd 301 (Miss. Ct. App. 2008). It was for the jury to determine whether Riley's testimony was impeached to such an extent as to have no weight or worth.

The Appellant then contends that Riley's testimony was contradictory and unreasonable. This was so, according to the Appellant, on account of the Appellant's use of various aliases and his peculiar account of whether he was married and had children. The Appellant further points to the fact that Riley, in some document he wrote in 2004 or 2006, erroneously stated that the murder occurred two days prior to the date it actually occurred, and then points to some inconsequential statement concerning a telephone call with or to someone in Atlanta.

That the Appellant might make a small error as to the date of the murder some three to five years after the murder occurred is hardly shocking. As to the aliases and other personal misinformation the Appellant gave in court filings while he languished in jail, these in no way affected his account of what transpired on 20 August 2001. The business about a telephone call to Atlanta was as inconsequential. Again, the most that might be said for all of this is that it was a matter for the jury to consider when assessing what weight and worth to give to Riley's testimony. The testimony the Appellant gave concerning what occurred on the 20th of August 2001 was not impeached and was corroborated. It may be that the defense attempted to show that Riley could not have seen what happened at the house, but the State demonstrated that Riley

could have seen what he said he saw. That conflict was for the jury to resolve.

In the Fourth Assignment of Error, the Appellant asserts that the trial court erred in failing to grant a new trial on the claim that the verdict was contrary to the great weight of the evidence. The standard of review appurtenant to this claim is a familiar one. *See, e.g. Herring v. State*, 691 So.2d 948, 957 (Miss. 1997). In the case at bar, the verdict cannot be reasonably said to constitute an unconscionable injustice; consequently, the trial court did not abuse its discretion in denying relief on the motion for a new trial.

The Appellant first suggests that he was not involved in the murder of Mrs. Miller. He points to the testimony that Hudson re-entered the house and supposes that Miller was killed then. This specific point was not raised in the motions for a directed verdict (R., Vol. 6, pp. 464 - 471; 525 - 526). Since it was not, it cannot be asserted here. *Hoye v. State*, 1 So.3rd 946, 951 (Miss. Ct. App. 2009).[2]

Assuming this point is before the Court, there is no merit in it. In his first statement, Riley did indicate that Hudson re-entered the Miller home. Smoke was seen coming from the home afterwards. It would not have made much sense for there to have been a re-entry into the house if Mrs. Miller had not already been beaten with the iron, and thought to be dead or dying. It is highly unlikely that Mrs. Miller had been left undisturbed when the gang broke into her house and looted it. Had Mrs. Miller not been beaten during the first entry into the home, it is

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[2] The point may or may not have been raised in the motion for judgment notwithstanding the verdict or for a new trial. To the extent, though, that the Appellant means to include this as reason to find that the trial court erred in refusing to grant a judgment of acquittal, this point may not be raised now since it was not raised in the motions for a directed verdict. It would be illogical to suppose that grounds for acquittal could be enlarged in the motion for judgment notwithstanding the verdict. If so, then why have a rule regarding the necessity of specific grounds with respect to motions for a directed verdict?

difficult to imagine a reason why it would have been thought necessary to re-enter it and set it afire. The only purpose in re-entering the house would have been to set the fires in a pathetic attempt to disguise what had been done.

The Appellant, in any event, was clearly shown to have been aware of the plan, which included killing Mrs. Miller. His participation in the execution of the plan was clearly shown.

The defense offered was not one to the effect that he may have participated in the robbery and in breaking into the house, but not murder. The defense was that he simply was not present when the crimes occurred. That the Appellant was present was clearly shown by Riley's testimony and by the fact that the Appellant lied about his whereabouts when the murder was committed.

The Appellant then calls the Court's attention to his alibi witnesses. He states that the Appellant's mother and sister clearly established that he was in Tupelo on the morning of the 20th of August.

The Appellant neglects to tell the Court that the Appellant lied to the police about his whereabouts on that day. He first told them he was at work. When this story was shown to be incorrect, he stated that he was sleeping. He never mentioned to the police detective that he was in Tupelo.

Beyond this, we think the prosecutor fairly well demolished the attempt at an alibi. The Appellant's mother admitted that her daughter was the one who told her that the visit to Tupelo was on the 20th. The Appellant's sister claimed that even though she could not remember when the Appellant was arrested she was sure he was in Tupelo on the 20th. She had no explanation as to why she did not tell law enforcement about that when or just after the Appellant was arrested. As for an application for employment, the witnesses admitted that it could have been filled out

and dated the 20th at any time.

The verdict in this case was supported by the evidence. The verdict in this case cannot be said to constitute an unconscionable injustice. Riley testified in the prosecutions against Hudson and Prater. *Prater v. State*, 18 So.3rd 884 (Miss. Ct. App. 2009); *Hudson v. State*, 977 So.2d 344 (Miss. Ct. App. 2007). Riley's testimony figured as prominently in those trials as it did in the case at bar. The Court should find here, as it did in *Prater*, that evidence was sufficient to support the verdict and that the verdict was not contrary to the great weight of the evidence.

The First and Fourth Assignments of Error are without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN REJECTING THE APPELLANT'S IMPEACHMENT INSTRUCTION

The Appellant requested an instruction which would have instructed the jury that it had the right to give the testimony of a witness whatever weight it thought it deserved, if it believed that a witness had been discredited by a showing that the witness had testified falsely or that he had made statements inconsistent with his trial testimony. (R. Vol. 1, pg. 132). The State objected to the instruction because it was a comment on the weight of the evidence and because the court had already granted instructions concerning the jury's duty to weigh the testimony of witnesses. (R. Vol. 6, pg. 534).

The trial court gave instruction C.01, which, in part, instructed the jurors that they were the sole judges of the facts of the case and that it was their exclusive province to determine what weight and credibility should be assigned to the testimony and evidence of each witness in the trial. (R. Vol. 1, pg. 113). The trial court also gave instruction D-3, which instructed the jury that Riley was an accomplice in the case and that his testimony was to be considered and weighed with great care, caution and suspicion. The instruction further told the jurors that they

were to give Riley's testimony such weight and credit they deemed it to be entitled. (R. Vol. 1, pg. 130).

The Appellant tells the Court that his instruction has been approved by the Fifth Circuit Court of Appeals. He then tells the Court that a different form of that instruction has been approved by the Mississippi Supreme Court in *Ellis v. State*, 790 So.2nd813 (Miss. 2001), leaving one to wonder why he did not attempt to have that in *Ellis* given rather than one approved in federal practice. In *Ellis*, a bare majority of the Supreme Court held that an impeachment instruction like that set out in *Ellis* should be given at the request of the defense where a witness' courtroom testimony is "directly contradicted" by his prior statement. In that case, the State's witness initially told law enforcement that he had not seen anyone shooting and later told law enforcement that he had seen the defendant in that case had shot someone. The witness admitted that he lied to law enforcement at first; he testified at trial consistent with his second statement to police.

Since the instruction tendered by the Appellant was one used in federal practice, but not authorized in State practice, the trial court cannot be faulted for having refused it.[3] Nonetheless, assuming for argument that the instruction tendered was substantially the same as that in *Ellis*, the trial court committed no error in denying the instructions for the following reasons.

In the case at bar, while it may be that Riley lied about whether he rang emergency services, perhaps lied about whether he spoke to a policeman not long after the murder occurred,

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[3] We note, though, that the instruction concluded with a curious comment concerning an accused's right not to testify and the comment that, where an accused does testify, his testimony should be weighed in the same way as any other witness. The Appellant did not testify, so it is unclear why those statements should have been made to the jury. The instruction was not tailored to the evidence and was thus confusing, and might have been properly denied for that reason.

lied about his name and other personal matters while in jail, and perhaps lied about his involvement in the crime, none of these things "directly contradicted" his statements to law enforcement as what occurred and as to whom was involved. His trial testimony was consistent with those statements. It may or may not be that Riley lied about the Appellant's name. It is at best equivocal whether he did. He may as well have been merely mistaken when he gave an incorrect name for the Appellant in the first statement. He did, on the other hand, give an accurate description of the Appellant. In *Ellis*, by way of contrast, the initial lie went to the very heart of the case. That is not so here.

The Appellant cites *Swann v. State*, 806 So.2d 1111 (Miss. 2002) in support of his argument, yet there, as in *Ellis*, the witness' prior statement directly contradicted her trial testimony. That testimony contradicted by the prior statement was essential to the State's case.[4]

Since the decision in *Ellis*, the Mississippi Supreme Court has emphasized that the kind of instruction set out in *Ellis* may be given only where there is "direct contradiction." What is more, though, the Court appears to have moved away from a position that that instruction must, upon pain of reversal, be given in case in which there is a "direct contradiction." In *Harris v. State*, 861 So.2d 1003 (Miss. 2003), the supposed contradiction involved was whether a witness' statement that she was beside a car was contradicted by her statement that she was down behind the car. The Court found no error in the refusal of the impeachment instruction, finding that the contradiction was not material. The Court further stated that the giving of a general instruction concerning weight and credibility of witnesses, together with cross - examinations on the

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[4] A rather detailed jury instruction was given in the case, which informed the jury what matters it might consider in assessing witness credibility, and it was that instruction that saved the conviction from reversal.

inconsistencies, and a closing argument in which such inconsistencies are brought to the attention of the jury will remove such error as there may be in the refusal to give an impeachment instruction. *Harris*, at 1020 - 1021.

In *Bolden v. State*, No. 2008-KA-00108-COA (Miss. Ct. App. Decided 7 April 2009, Not Yet Officially Reported), the defense called witnesses who were impeached by their prior statements. The Court found no error in the refusal by the trial court to give an impeachment instruction, noting that the witnesses involved had been extensively examined, that the summations addressed the issue, and that the jury instruction or instructions granted concerning the jury's role and duty in assessing credibility were sufficient. While the Appellant would have this Court believe that *Bolden* has little or no use here, because the defense called those witnesses, we think his attempted distinction is one without significance. The identity of the party calling the witness cannot be a matter of importance.

The Appellant reads *Ellis* to mean that an impeachment instruction must be given where the witness admits having lied, or where the State concedes that the witness lied. (Brief for the Appellant, at 16). That is not what the Court held in *Ellis*. It may be that the witness in that case admitted having lied, but that fact was not what the decision turned upon. The decision turned upon the fact that the lie went to the very heart of the case. It was because of the "direct contradiction" and the materiality of the issue that the Court found error. The lie involved whether he did or did not see the defendant in that case shoot someone. The lies involved are not remotely similar.

The instructions given in the case at bar, together with the fact that Riley was extensively cross - examined about his prior statements and that the subject his credibility or lack of it was extensively argued to the jury, were more than sufficient to apprise the jurors of what they should

consider when weighing Riley's testimony. The trial court expressly instructed the jury that Riley was an accomplice and that as such his testimony was to be considered and weighed with great care, caution and suspicion. This was surely sufficient, and no further instructions on issue of Riley's credibility were needed.

The Appellant contends that Riley committed perjury while testifying in the case at bar. We find no instance of perjury, and the Appellant points to no example. That a witness may be mistaken, confused, or his memory affected by the passage of time is not evidence of perjury.

The Second Assignment of Error is without merit.

3. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT INSTRUCTION D-8

The Appellant, in his proposed instruction D8 (R. Vol. 1, pg. 135), would have had the jury instructed that the uncorroborated testimony of an accomplice that is unreasonable, self - contradictory or substantially impeached at trial is not enough to convict an accused of an offense. The instruction went on to say that if the jury found Riley's testimony to be so afflicted, then Riley's testimony alone could not be used to convict the Appellant.

The prosecution objected to the instruction on the basis that the instruction cited a rule of law to be used by a court, rather than a jury, to assay sufficiency of the evidence issues. The prosecution further objected on the basis that the proposed instruction was repetitious. The trial court appeared to agree with the prosecution, but it also noted that the instruction was a comment on Riley's testimony. (R. Vol. 6, pg. 537).

The Appellant relies here upon *Riley v. State*, 1 So.3d 877 (Miss. Ct. App. 2008) and *Jones v. State*, 368 So.2d 1265 (Miss. 1979). It is true enough that the courts in those decisions stated that convictions based upon accomplice testimony should not be upheld where such

testimony is uncorroborated and improbable, self - contradictory or impeached. But, as the prosecutor noted at trial, this is an appellate rule applicable in sufficiency - of - the - evidence issues arising after conviction. The very language the Appellant cites in his brief demonstrates this, as do the opinions cited by the Appellant. Since this rule cited by the Appellant clearly applies only in the context of a review of a conviction, it clearly has no place in an instruction to a jury.[5]

Sufficiency - of - the evidence issues present pure questions of law. *Hughes v. State*, 735 So.2d 238, 279 (Miss. 1999). Jurors are empaneled to try facts, to weigh the credibility of witnesses and evidence. They do not, however, decide questions of law. Once a trial judge has decided that, as a matter of law, sufficient evidence has been presented by the State to permit a jury to pass on the case, the rule cited by the Appellant has no further application until, in the event of conviction, a claim of insufficiency of the evidence is renewed.

The accomplice instruction granted in the case at bar is the one to be given to juries to aid them in weighing the credibility and worth of accomplice testimony. Specifically, the jury in the case at bar was instructed to consider and weigh Riley's testimony with "great care, caution and with suspicion." (R. Vol. 1, pg. 130). This was completely sufficient to alert the jurors as to the need to consider Riley's testimony very carefully. The jurors were further instructed that they were the judges of the facts of the case, and that they were to acquit the Appellant if they found that the State had failed to prove its case against the Appellant.

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[5] It may be that a trial court may be presented with a claim that accomplice testimony is insufficient to allow a jury to consider an accused's guilt in motions for a directed verdict. However, when a trial court considers whether the State has produced sufficient evidence to permit the jury to consider the case, that question is a question of law, not of fact. It is the court, not the jury, that makes that decision.

The Appellant claims that instruction D-8 was "very similar" to the instruction cited in *Riley, supra*. It is not similar at all. The instruction in *Riley* simply told the jury in that case how they were to consider the accomplice's testimony in that case in the event that found that his testimony was uncorroborated. D-8 did no such thing: that instruction would have informed the jury of a principle of law used in considering sufficiency - of - evidence questions in accomplice testimony cases. The jury would have been told that uncorroborated testimony that is unreasonable, self - contradictory or substantially impeached may not be used to convict an accused. In any event, the Court in *Riley* did not pass on the propriety of the instruction cited in the opinion. It merely set the instruction out. *Riley* is not authority that the instruction in that case should or must have been given. Much less is *Riley* relevant concerning D-8.

The accomplice instruction given in the case at bar, taken in conjunction with the other instructions, adequately informed the jury of the principles of law applicable to the case. While the Appellant claims that no particular instruction told the jury in so many words that they were to acquit him if they found that Riley's testimony was uncorroborated and unreasonable, self - contradictory or substantially impeached, the instructions granted surely were sufficient to inform the jury that if it did not believe the testimony presented in the case it was their duty to acquit the Appellant. That was sufficient.

The Appellant then cites cases concerning the necessity that jury instructions in cases in which self - defense is raised as a defense must inform the jury of its duty to acquit the accused in the event it finds that the accused acted in self - defense. Defense of self was not raised in the case at bar. The decisions cited by the Appellant are specific to that defense and have no application beyond homicide or aggravated assault cases in which that defense is raised.

The Third Assignment of Error is without merit.

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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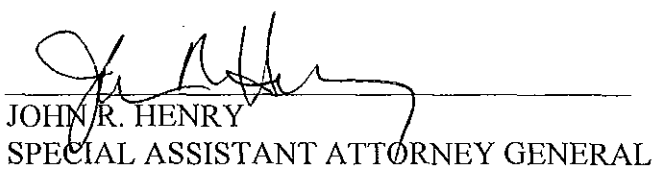
This the 28th day of December, 2009.



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