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# IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**DERRICK TURNER** **APPELLANT**

**VS.** **CAUSE NO. 2009-KA-0330**

**STATE OF MISSISSIPPI** **APPELLEE**

## REPLY BRIEF OF APPELLANT

After taking issue with Appellant's arguments regarding the sufficiency and weight of evidence and the admissibility of various jury instructions, the State argues in its brief, and requests that this Court so finds, that the trial court below did not commit any error. In reply, Appellant now submits his brief demonstrating the error of the State's legal position as applied to the facts of the case.

## SUFFICIENCY OF THE EVIDENCE

With respect to the sufficiency of the evidence, the State is correct in its characterization of Appellant's argument: the evidence that Derrick Turner participated in the murder of Juanita Miller was not sufficiently established beyond a reasonable doubt. Brief of the Appellee, p. 15. However, Appellant recognizes that this Court must review the evidence in the light most favorable to the State to see if any rational trier of fact could have found reasonable doubt. Sneed v. State, 2007-KA-00381 (Miss. App. 8-25-2009).

### A. CORROBORATION EVIDENCE

In support for and against this proposition, the parties squabble about whether the State provided corroborated evidence that supported Riley's testimony. Perhaps lost in the shuffle is that the trial court, by granting the accomplice instruction, D-3, essentially acknowledged that

Riley provided **uncorroborated** testimony.[1] This is so given that an accomplice instruction should not be given unless it is determined that the accomplice provided uncorroborated evidence. Smith v. State, 907 So.2d 292,298 (Miss. 2005); Ellis v. State, 790 So.2d 813,816 (Miss. 2001) (uncorroborated testimony of an accomplice may be sufficient to convict an accused, but a cautionary instruction is warranted where the testimony is unreasonable, self-contradictory, or substantially impeached). By granting the instruction, therefore, the trial judge had determined, in the end, that this case hinged upon the uncorroborated testimony of Riley. There is no need, then, for this Court to entertain the State's arguments that Riley's testimony was in fact corroborated.

Even if the Court decides to review the issue of corroboration, the State's position is meritless. For instance, the State pointed out that in Riley's first statement (i.e., the first of many inconsistencies) he described Turner as a "tall, skinny, black male with two front teeth missing." Brief of the Appellee, p. 15. The State, unfortunately, provided its edited version of what Riley said. The complete version was a "tall skinny black male with two front teeth missing named **Derwin**." R. 74. Curiously, Riley not once, but at least six (6) times referred to "Derwin" in the same statement (i.e., given the morning of January 6, 2002 at 8:30 a.m.). R. 74-77. But then, compare his subsequent statement given at 4:10 p.m. (i.e., the same day) at which time he mentioned Appellant by his first and last name. (R.78). The State conceded in its brief that [it] was possible that someone had given him the Appellant's name. Brief of the Appellee, p. 4. This concession had to be made since Riley's own testimony indicated that he only knew

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[1]The State did not object to the proferred instruction as follows:
Instruction D-3
Bentore Riley is an accomplice in this case and the testimony of an accomplice is to be considered and weighed with great care, caution and with suspicion. You may give it such weight and credit as you deem it is entitled.

Appellant during this period by "Smooch," not "Derrick Turner" or "Derwin." T. 174. What Riley actually did was to supply an additional name to the sequence of events to fit his own storyline or the storyline of others. Riley did not make a mistake or suffer from a lack of memory, but suffered from the tendency to manufacture evidence to the disadvantage of Appellant. Because he knew Turner before the incident, he, therefore, knew that he had two front teeth missing. Therefore, Riley's description did little to add to the information not already known.

Additionally, the State takes a leap of faith in arguing that Detective Lott corroborated Riley's testimony as to what Riley could see from the location Riley said he occupied. **What location?** It certainly was not from the corner of Northside and Westside Drive, (T. 436), or the back entrance gate of Lander's Trailer Park. T. 436-439. Detective Lott testified just the opposite: there were obstructions that would have prevented Riley from seeing the back door of the Miller's residence, particularly from the gated entrance. T. 438.

Thus, the testimony of Riley was not corroborated. Next, the State takes issue as to whether Riley's testimony was self-contradictory, or substantially impeached.

## B. IMPEACHMENT EVIDENCE

As forecasted, the State, while admitting discrepancies in Riley's testimony, has held fast to its position that Riley's testimony was not impeached in his account of what he saw and heard just before the murder occurred. Brief of the Appellee, p. 16. However, the State failed to acknowledge that in Appellant's Brief, there were several instances, wherein, Riley was impeached. For instance, recall Riley's response to the co-defendants' request that he be a look-

out for them. His first written statement was inconsistent with his trial testimony that he told them to "go to hell".[2] R. 32. Riley was impeached, further, as to whether he mentioned Appellant's name in this same statement. He claimed at trial that he did, but upon reviewing this statement, he acknowledged that he did not. In addition to the other instances referred to in Appellant's Brief, Riley's testimony was substantially impeached.

C. UNREASONABLE AND CONTRADICTORY EVIDENCE

Moreover, Riley's testimony was replete with inconsistencies on his account of what happened at the time of the murder. The State, in its brief, refused to acknowledge the greatest inconsistency of them all: Riley's characterization of his involvement in the murder. In Riley's first account of what occurred, he essentially denied that he participated. R. 74-77. In his second statement, he admitted being a lookout. R. 78. Then at trial, he once again denied any involvement whatsoever, (T. 215 ), but acknowledged that if the State would let him go, he would tell all he knew. I.d.

Curiously, the State, too, has argued in its brief that at least one part of Riley's testimony was unreasonable. In his first written statement, Riley indicated that Devail Hudson entered the Miller's residence a second time with intent to kill her. In other words, Ms. Miller was not dead when he, Riley, and the others entered the residence the first time. The State's response was that it could not possibly have happened that way. See Brief of the Appellee, pp. 17-18. While this testimony will be reviewed later, the uncertainty of the State's position can be seen: where Riley's testimony points to Turner's involvement, it is said to be "reasonable", but that part of

[2]Appellant makes reference here to Riley's response to demonstrate that Riley was not afraid of the other participants, as suggested by the State, to cause him to be a lookout during the commitment of the murder.

Riley's testimony that leads to his noninvolvement (even acquittal), it is considered "unreasonable." In any event, Riley's version of what occurred was unreasonable and contradictory and, therefore, was not sufficient to serve as a basis for the jury to find Turner guilty of capital murder.

## THE OVERWHELMING WEIGHT OF EVIDENCE

Next, the State attacks Appellant's position that the verdict was contrary to the overwhelming weight of the evidence. The record does not point out specifically that Appellant argued for a directed verdict or judgment of acquittal concerning Devail Hudson's reentry to the Miller's house a second time. It was, however, placed before the trial court judge and jury, via, Riley's testimony and his written accounts. Because of plain error doctrine, this Court can, nevertheless, consider the issue: that Hudson entered the residence of Miller in order to kill Miller and he did so **alone**. Timmons v. State, 2008-KA-00696 (Miss.App. 1-26-2010). ("The plain-error doctrine has a two part test which requires: (1) an error of the trial level and (2) such an error resulted in a manifest miscarriage of justice.")[3]

The argument that Devail Hudson's reentry into the Miller's house as an grounds for a new trial (even acquittal) was inescapable. The only way the State could possibly diffuse the impact of this testimony was to discredit Riley's testimony, its star witness. The State essentially argued that Riley's account of what happened was "unreasonable." Consider, for just a moment, the State's argument thereon:

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[3] Appellant recognizes that where the overwhelming weight of the evidence is against the accused, even constitutional errors may be deemed harmless. Clark v. State, 891 So.2d. 136,142 (Miss. 2004). As argued in Appellant's Brief, the weight of the evidence overwhelmingly favored Appellant. Certainly, given that the only witness for the State testified as to when Mrs. Miller was killed, it would be a miscarriage of justice, if this information was not considered.

"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..." Brief of the Appellee, pp.17-18.

If the State had difficulty digesting Riley's testimony, no reasonable trier of fact could find that reasonable doubt did not exist.

## THE IMPEACHMENT INSTRUCTION

In this part of the State's brief, there is no argument by the State that Appellant's proposed impeachment instruction, D-2, was an incorrect statement of the law.[4] Instead, the State argues that no impeachment instruction was required because the lies told by Riley did not relate to any material aspect of the case; that is, with respect to what occurred and who was involved during the murder. Brief of the Appellee, p. 21. Because other jury instructions, according to the State, were sufficient to inform the jury as to the weighing of Riley's credibility, no error was committed by the lower court.

First, Riley gave inconsistent statements about what occurred during the murder, particularly, with respect to the conversation leading up to the murder, and Devail Hudson's return entry into the Millers' residence. Second, and more significantly, the very person who was involved (i.e., Riley) lied at trial that he was not. To say that Appellant and others were involved in the murder, but that he was not, goes to the heart of the case. Recall that even Riley admitted that the State did not believe his version of what occurred. No wonder that the testimony of an accomplice must be weighed with great care and suspicion. Thus, even though the jury was

[4]Because the instruction, D-2, was not an incorrect statement of the law, the language contained therein, will not be detailed here.

instructed that Riley was an accomplice, his fabrication of the sequence of events and/or his role in the offense, required an impeachment instruction. It was an abuse of discretion for the trial court not to do so.

## UNCORROBORATED TESTIMONY INSTRUCTION

In reply to the State's argument, herein, Appellant would simply reaffirm its arguments in his brief.

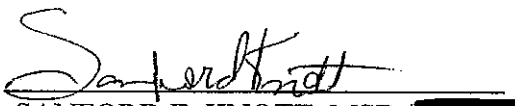
## CONCLUSION

Derrick Turner was convicted of the capital murder of Mrs. Juanita Miller. As tragic as the circumstances of the death were, those circumstances should not have been attributable to Derrick Turner who has maintained his innocence. Based upon the arguments herein, and, particularly, this Court's review of Bentore Riley's statements, Derrick Turner's conviction should be reversed and he discharged. In the alternative, Turner requests a new trial.

FOR THE FOREGOING REASONS, Appellant prays that the Court will grant the relief sought in herein.

RESPECTFULLY SUBMITTED, this the 16th day of February, 2010.

DERRICK TURNER, APPELLANT

BY: 

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## CERTIFICATE OF SERVICE

I, Sanford Knott, attorney for Appellant Derrick Turner, do hereby certify that I have on this date caused to be electronically filed a true and correct copy of the foregoing document to the following:

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This the 16th day of February, 2010.

Sanford Knott

SANFORD KNOTT, ESQUIRE