IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TYRONE FINCHIS — APPELLANT

VS. — NO. 2009-KA-0625-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The focus in this criminal appeal is upon the weight of the evidence used to convict Tyrone Finchis, a testifying defendant, of two (2) counts of aggravated assault and one (1) count of shooting into a dwelling house.

Pistol shots fired by Finches through the window of a dwelling house struck and wounded Tyrone Williams and his wife Jennifer. Tyrone Williams testified he saw the face of Finchis in the window (R. 112) and positively identified Finches in court as the assailant. (R. 113-14)

Finchis, who testified in his own behalf, proffered an alibi, at least of sorts, and a general denial in defense of the charges. (R. 187-88, 198)

TYRONE FINCHIS, a forty (40) year old male and resident of Renova (R. 186), prosecutes a criminal appeal from the Circuit Court of Bolivar County, Mississippi, Charles E. Webster, Circuit Judge, presiding.

Finches, in the wake of a three count indictment returned on September 21, 2007, was convicted of two counts of aggravated assault and a single count of shooting into a dwelling house.

(R. 242-43; C.P. at 43-46)

The indictment, omitting its formal parts, alleged in Count I that Tyrone Finchis

> " . . . on or about June 15, 2007, . . . did unlawfully, wilfully and feloniously shoot or discharge a firearm into the dwelling house of Tyrone Williams and/or Jennifer Williams located at 914 Smith Cove, in Cleveland, Mississippi, . . ." (C.P. at 4)

The indictment charged in Count II that Tyrone Finches

> " . . . on or about June 15, 2007, . . . did unlawfully, wilfully and feloniously and purposely or knowingly cause bodily injury to Tyrone Williams, with a deadly weapon, to-wit: a pistol, . . ." (C.P. at 4)

The indictment charged in Count III that Tyrone Finches

> " . . . [o]n or about June 15, 2007, . . . did unlawfully, wilfully and feloniously and purposely or knowingly cause bodily injury to Jennifer Williams, with a deadly weapon, to-wit: a pistol, . . ." (C.P. at 3)

Following a trial by jury conducted on December 8-9, 2008, the fact finder returned guilty verdicts in counts I, II, and III. *viz.*, shooting into a dwelling house, aggravated assault against Tyrone Williams, and aggravated assault against Jennifer Williams. (R. 242-43; C.P. at 44)

Finchis was thereafter sentenced to serve eight (8) years in the custody of the MDOC on Count I (shooting into a dwelling house), fifteen (15) years on Count II (aggravated assault on Tyrone Williams), to run concurrently with the sentence imposed in Count I, and fifteen (15) years on Count III (aggravated assault on Jennifer Williams), to run consecutive to the sentence imposed in Count II and Count I." (R. 250; C.P. at 45-50)

One issue is raised on appeal to this Court, *viz.*, "[t]he trial court erred in denying the motion for new trial." (Brief of the Appellant at 1)

STATEMENT OF FACTS

Appellant has articulated a fair and accurate recitation of the salient facts found in this case. We respectfully decline to plow the same ground in great detail here.

It is enough to elaborate somewhat on appellant's version of the incident as follows:

On June 15, 2007, before dawn, Tyrone and Jennifer Williams were both shot while inside their home in Cleveland. A lone gunman approached the married couple's bedroom window, pushed in the air conditioner unit seated in the window, and fired several shots into the bedroom. (R. 88,112-13)

Jennifer Williams was shot twice in her back while Tyrone Williams was shot once in the leg. (R. 113) Fortunately, Jennifer's one year old nephew who was lying in bed with both Williamses, was not injured. (R. 91)

Nine (9) witnesses testified on behalf of the State during its case-in-chief, including the two assault victims, **Tyrone Williams and Jennifer Williams.**

Tyrone Williams described the incident in the following colloquy:

> Q. [DIRECT EXAMINATION BY PROSECUTOR:] Where were y'all when this happened?
>
> A. Laying in the bed.
>
> Q. Okay. Was anybody else in there?
>
> A. Well, my little nephew - - well, her little nephew.
>
> Q. Okay. Were you asleep when the air conditioner got kicked out?
>
> A. A couple of minutes earlier, I had walked to the restroom and used the restroom. About five minutes after I came from the restroom, I laid down. About a couple of minutes later, I heard the air conditioner come in, and I heard a gunshot.

Q. Okay. Were you asleep when you heard the gunshot and the air conditioner?

A. No, ma'am.

Q. Okay. Where was your wife?

A. Right beside the window.

Q. Okay. How far was the window from the bed where you were laying?

A. Basically it wasn't too far. It was right there. The head of my bed was here; the window was here.

Q. The widow was right beside the bed?

A. The head of the bed was on the wall. The window was right like on the same [wall] where the bed was - - the head of the board was.

Q. Okay.

A. Probably like a couple - - it wasn't a couple inches. It wasn't too far.

Q. Okay. You said the air conditioner was pushed out. How do you know it was pushed out?

A. Because as - - I'm laying towards the window way. My wife had her back turned towards the window. She was looking towards me. I was looking towards her, and I just seen the air conditioner just - - [c]ome out the window.

Q. Okay. Did it come into the room?

A. Yes, ma'am.

Q. Okay. What happened after you saw the air conditioner come out?

A. Gunshots. I was trying too busy to get my wife and her little nephew out of the way, and in the process I got shot.

Q. Did your wife get shot?

A. Yes, ma'am.

Q. What did you see?

A. I seen a (sic) arm and a face, and as I'm trying to get them out of the way, when I called his name, everything stopped. Everything just went silent.

Q. When you called whose name?

A. Tyrone Finchis.

Q. What did you say to him?

A. "I know who you are. I know who you is."

Q. Okay. Where was he when you said that to him?

A. Ma'am?

Q. Where was he when you said that to him?

A. He - - when I said that, everything stopped. He took his arm out and ran. I was trying to get to him.

Q. All right. At the time that you told him that you knew who he was, where was he then?

A. Vanished. After - - when I said that, he was vanished.

Q. I'm not talking about when you said - - after you said it. At the time you said that to him, where was he that you - - that made you say that to him?

A. Outside the window, shooting into - -

Q. Did you see his face?

A. Yes, ma'am.

Q. What direction was his face pointing?

A. He just was - - had his face in the window.

Q. I'm sorry. You've got to speak into the mic.

A. Had his face in the window and his gun out shooting.

Q. Okay. Was there any light on in the room?

A. The TV shine right directly on the air conditioner.

Q. Okay. And how many times did you get shot?

A. Once.

Q. And do you know how many times your wife got shot?

A. Twice in the back.

Q. Now, the person who you said was firing the shots and who you saw shooting that night, is that person in the courtroom? I mean that morning.

A. Yes, ma'am.

Q. Would you point to him and describe what he's wearing right now?

A. He got on a white shirt with a striped tie.

BY MR. MITCHELL: Your Honor, we'd ask the record reflect that this witness has identified the defendant.

BY THE COURT: It will so reflect. (R. 110-14)

Jennifer Williams's version of the shooting is found in the following colloquy:

Q. [DIRECT EXAMINATION BY PROSECUTOR:] And did anything unusual happen that morning?

A. Yes.

Q. Will you tell us - - the jury what happened that morning?

A. Well, I was at home on the side of my bed in my room, and all of a sudden, I just heard the air conditioner come in, and the window broke, and he just started shooting in my house. For what reason, I don't know. And so when I got up, tried to run to the door,

I couldn't make it because he already shot me in my lower back, and so I just sat on the end of the bed, and my husband came around, tried to cross me, but he got shot in his leg, and we had my little two - - well, he was one at the time, my little nephew. He was in the bed. So my husband got him and put him on the outside of the door and just stood there, tried to pull me out, but I end up getting shot at the top up here in my back. So I got shot twice, and finally, when he - - my husband stated, "I know who you is," everything stopped. That's when my husband opened the door. I crawled out into the hallway and laid there until someone had called someone for us.

Q. You're saying - - let me just kind of go back a little bit. You said that you were sitting on the side of the bed?

A. Yes.

Q. Okay. Were there any lights on in the room?

A. No, just the TV.

Q. Could you see inside the room with the TV on?

A. Yes, you could see in there.

Q. Okay. And you said you heard a noise?

A. Yes.

Q. Okay. And I believe you said you heard some shots. Correct me if I'm wrong.

A. Yes.

Q. Okay. Which one did you hear first?

A. First I heard the air conditioner. It was like wiggling. So that's when I stood up, but I still didn't get a chance to run because it came in so fast, and the window crashed.

Q. You say it came in so fast. Was it knocked out of the window or pushed in or - -

A. Yeah - -

Q. - - something?

A. - - it was pushed in.

Q. Okay. And when that happened, what did you do then?

A. I stood up, tried to run, but at the time, he already started shooting. That's when I got shot in my lower back.

Q. In the lower back?

A. Yes.

Q. Okay. And what happened after that now?

A. I tried to run out the door, but I end up sitting on the end of my bed, facing the TV, and that's when I got shot up here, the top.

Q. You said the top. Are you talking about the top of your back?

A. Yes. Right up here.

Q. After you got shot, what did you do then?

A. I mean there was nothing I could do but holler at the time.

Q. Okay. Did you see who was firing the shots?

A. I , I didn't see him. (R. 87-98)

Jennifer also testified that at the time of the shooting she and Finchis's girlfriend Shondria Howard, formerly friends prior to Jennifer's marriage, had stopped talking to one another. (R. 910

At the close of the State's case-in-chief, the defendant moved the court for directed verdicts of acquittal " . . . on the grounds that the State of Mississippi has failed to prove a *prima facie* case of two counts of aggravated assault and one count of shooting into a dwelling." (R. 184)

This motion was overruled. (R. 184-85)

After being advised of his right to testify or not, the defendant advised his lawyer he desired to take the witness stand. (R. 185) Finchis proffered an alibi, at least of sorts, and general denial in

defense of the charge. (R. 187-88, 198)

At the close of all the evidence, Finchis renewed his motion for a directed verdict, and it was denied. (R. 212-13)

The jury retired to deliberate at 2:19 p.m. and returned verdicts of guilty two hours later at 4:18 p.m. (R. 241-43)

A poll of the individual jurors reflected the verdicts were unanimous. (R. 243-47)

Finchis was thereafter sentenced to serve eight (8) years in the custody of the MDOC on Count I (shooting into a dwelling house), fifteen (15) years on Count II (aggravated assault on Tyrone Williams), to run concurrently with the sentence imposed in Count I, and fifteen (15) years on Count III (aggravated assault on Jennifer Williams), to run consecutive to the sentence imposed in Count II and Count I. (R. 250; C.P. at 45-50)

On January 16, 2009, Finchis filed his motion for a new trial or, in the alternative, for judgment notwithstanding the verdict, alleging, *inter alia*, the verdict of the jury was against the overwhelming weight of the evidence. (C.P. at 51-52)

The motion was overruled in an order signed on January 26, 2009. (C.P. at 61)

Finchis filed an amended notice of appeal on February 3, 2009. (C.P. at 59)

Finchis received effective assistance from his trial attorney, Boyd P. Atkinson, a practicing attorney in Cleveland and Bolivar County.

Finchis has, likewise, received effective assistance from his appellate attorney, Erin Pridgen, a practicing attorney with the Mississippi Office of Indigent Appeals.

SUMMARY OF THE ARGUMENT

Finchis claims the verdicts of the jury were against the overwhelming weight of the evidence because "Tyrone Williams' identification [of] Tyrone Finchis was implausible at best." (Brief of

the Appellant at 8)

According to Finchis, he " . . . was a victim of being at the wrong place at the wrong time. His conviction is based on the faulty eye-witness testimony of one victim." (Brief of the Appellant at 5)

Our retort to these observations is found in **Passons v. State,** 239 Miss. 629, 124 So.2d 847-48 (Miss. 1960), where we find the following language controlling the posture of Finchis's lamentations:

> "The character and adequacy of evidence of identification of an accused in a criminal case is primarily a question for the jury, provided the evidence could reasonably be held sufficient to comply with the requirement of proof beyond a reasonable doubt."

The identification of Tyrone Finchis by Tyrone Williams passes the "proof beyond a reasonable doubt" test with flying colors.

The evidence implicating Finchis as the shooter includes Williams's eyewitness identification and in-court identification of Finchis as the assailant (R. 113); the black 9mm pistol used in the shooting which was observed in the hands of Finchis by his girlfriend, Shondria Howard, as well as by Derrick Jeremiah, shortly after the shooting (R. 126, 143); the presence of a black 9mm "high point" pistol and clip inside the drawer of a stove stored inside the shed where Finchis was found hiding (R. 69-71, 156-58); Finchis's reluctance to come out of hiding or to even respond to the commands of police investigator Serio (R. 163-64), and Finchis's telephone conversation with Shondria Howard from which a reasonable and fair-minded juror could rationally infer, if not find directly, that Finchis told Sondra he did the shooting. (R. 146-47)

We respectfully submit the evidence does not preponderate in favor of Finchis's alibi and general denial; rather, it is lopsidedly in favor of the State's theory of the case. **Bush v. State,** 895

So.2d 836, 844-45 (¶¶18-19) (Miss. 2005). Accordingly, the trial judge did not abuse his judicial discretion in denying Finchis's motion for a new trial. (C.P. at 51-52, 61)

A reasonable, fair-minded hypothetical juror could have found that Finchis was the early morning assailant. After all, the gun used in the shooting was observed in Finchis's hands shortly after the shooting and prior to his arrest. (R. 126, 143) In addition to this, the gun was found in a stove located next to Finchis's hiding place inside the shed.

The conflicting evidence in the form of eyewitness testimony identifying Finchis as the shooter versus Finchis's alibi testimony and general denial placed the question of his guilt or innocence squarely in the hands of the jury whose duty was to resolve any conflicts in the evidence.

Finchis testified he came to Cleveland at 4:30 in the morning and went straight to Bobbie Gill's home. (R. 186-87) He then left and went to a friend's house at the Cypress Woods Apartments. (R. 188) After leaving this location, he went " . . . to Eastgate to Searcy Street" and the home of Shondria Howard. (R. 189) Finchis denied firing a gun through the window of the Williams's home. (R. 198)

The jury, of course, was under no duty or obligation to accept Finchis's alibi defense, if any. (R. 187-88) **Lee v. State,** 457 So.2d 920 (Miss. 1984). Finchis's alibi simply raised an issue of fact to be resolved by the jurors. **Gray v. State,** 549 So.2d 1316 (Miss. 1989). **Hughes v. State**, 724 So.2d 893 (Miss. 1998); **Burrell v. State**, 613 So.2d 1186 (Miss. 1993); **Johnson v. State,** 359 So.2d 1371, 1373 (Miss. 1978) ["The jury was not under a duty to accept the alibi of appellant . . ."]; **Wingate v. State,** 794 So.2d 1039 (Ct.App.Miss. 2001), reh denied, cert denied.

We note with interest that defense counsel told the jury during his opening argument that Bobbie Gill " . . . is gonna testify that Tyrone Finchis was beating on the window of her car, . . . trying to flag her down." (R. 33) Although this may well have happened, Bobbie Gill did not testify.

(R. 188)

"The jury is the **sole judge** of the weight and credibility of the evidence." **Byrd v. State**, 522 So.2d 756, 760 (Miss. 1988). It's verdict will not be disturbed on appeal unless the failure to do so would sanction an "unconscionable injustice." **Groseclose v. State,** 440 So.2d 297, 300 (Miss. 1983).

Finally, the word "unconscionable" points to something that is monstrously harsh and shocking to the conscience. The verdicts returned in the case at bar do not exist in this posture. They are neither harsh nor shocking, and affirmation of Finchis's conviction(s) and sentence is the order of the day.

ARGUMENT

FINCHIS HAS FAILED TO DEMONSTRATE THE TRIAL JUDGE ABUSED HIS BROAD JUDICIAL DISCRETION IN OVERRULING FINCHIS'S MOTION FOR A NEW TRIAL GROUNDED, IN PART, ON A CLAIM THE JURY VERDICTS WERE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

NO UNCONSCIONABLE INJUSTICE EXISTS HERE.

In this appeal, Finchis assails the weight of the evidence as opposed to its legal sufficiency. He claims the police investigation was based on Tyrone Williams's faulty eyewitness account which places the guilty verdicts in jeopardy. Finchis suggests that Tyrone Williams's identification is outweighed by Tyrone Finchis's alibi and general denial.

The evidence implicating Finchis as the shooter includes Williams's eyewitness account and in-court identification of Finchis as the assailant (R. 113); the black pistol used in the shooting which was placed in the hands of Finchis by his girlfriend, Shondria Howard, shortly after the shooting (R. 143); the presence of a black pistol and clip inside the drawer of a stove stored inside the shed where

Finchis was found hiding (R. 69-71, 155-58); Finchis's resistance and reluctance to come out of hiding or to even respond to the commands of police investigator Serio (R. 163-64); Finchis's telephone conversation with Shondra Howard from which a reasonable and fair-minded juror could rationally infer, if not find directly, that Finchis told Shondria he did the shooting (R. 146-47), and the ballistics examination by McIntire which proved beyond a reasonable doubt the bullets fired into the Williams's bedroom, as well as into the Williams's themselves, were fired from the black 9mm handgun. (R. 181-82)

Serio testified "[w]e found Tyrone Finchis in a little shed, *hidden*." (R. 155) [emphasis ours]

The content of the post-incident telephone conversation taking place between Finches and Shondria Howard, with whom Finchis had a 5 ½ year relationship, is found in the following colloquy:

> Q. [BY PROSECUTOR MITCHELL:] Now, Ms. Howard, in the first sentence, what did he tell you right there where I'm pointing?
>
> A. (As read:) "I know, baby, but you know I had to do what I had to do."
>
> Q. Okay. And in this section right here, what did he tell you, those lines right there?
>
> A. (As read:) "What they say, I did it though. But they don't got no evidence that I done it. So it's going to be all good. Yeah, they say I did it, but I told the - - I didn't, so I don't know. I'll just have to wait."
>
> Q. Okay. So in there he said that he did it, but they didn't have any evidence?
>
> A. Yes, ma'am. (R. 147)

During cross-examination, defense counsel attempted to dilute the effect of Shondria's testimony by questioning her interpretation of Finchis's remarks. We quote:

Q. [BY DEFENSE COUNSEL ATKINSON:] But he didn't say that he did anything, did he?

A. [BY SHONDRIA:] Okay. What else could he be talking about?

Q. I don't know, ma'am, but Ms. Mitchell said that he said he did it, and you said, "Yes," but those words are not in there.

A. [BY SHONDRIA:] Well, it's - - I took it as if he was saying he did it. (R. 148)

Apparently, the jury did likewise.

We respectfully submit the evidence, viewed in its entirety, was clearly sufficient for a reasonable, hypothetical juror to find beyond a reasonable doubt that Finchis was the person who shot into an occupied dwelling house and wounded both Tyrone and Jennifer Williams. This finding is not outweighed by Finchis's alibi and general denial. Indeed, the 9 mm pistol used to inflict the wounds was placed in the hands of Finchis by Derrick Jeremiah (R. 126) and Shondria Howard a short time prior to Finchis's arrest while hiding inside a storage shed. (R. 143-44)

Finchis assails, quantitatively, the evidence on three different fronts.

First, Finchis argues that Tyrone Williams's identification of Finchis as the shooter was suspect and "implausible at best." (Brief of the Appellant at 8) This was a question for the jury and not for a reviewing Court.

Admittedly, Jennifer Williams, the second victim, never saw the shooter's face and was unable to identify Finchis or anyone else as her assailant.

No matter.

The jury is not controlled by the number of witnesses testifying as to the identification of an accused. *See* **Passons v. State,** *supra*, 239 Miss. 629, 124 So.2d 847, 848 (1960), where we find the following language:

> The character and adequacy of evidence of identification of an accused in a criminal case is primarily a question for the jury, provided evidence could reasonably be held sufficient to comply with the requirement of proof beyond a reasonable doubt. **The jury need not be controlled by the number of witnesses testifying to the identification of an accused. Identification based on the testimony of a single witness, if complying with the standard in criminal cases, can support a conviction, even though denied by the accused. The jury can appraise the truthfulness of an asserted alibi. In short, positive identification by one witness of the defendant as the perpetrator of the crime may be sufficient as in the instant case.** 23 C.J.S. Criminal Law § 920, p.192. [emphasis ours]

In **Passons,** *supra,* the evidence sustained a conviction of armed robbery as against the defense of alibi.

Same here.

The testimony of Tyrone Williams identifying Finchis as the shooter, even if uncorroborated and standing alone, would have been sufficient to support Finchis's convictions. *Cf.* **Blocker v. State,** 809 So.2d 640 (Miss. 2002); **Hill v. State,** *supra,* 805 So.2d 371, 379-80 (Ct.App.Miss. 2003).

This Court has long recognized that "... persons may be found guilty on the uncorroborated testimony of a single witness." **Doby v. State,** 532 So.2d 584, 591 (Miss. 1988). Williams's identification was certainly not *unreasonable, improbable, self-contradictory, or impeached by unimpeached witnesses. Cf.* **Clemons v. State,** 535 So.2d 1354 (Miss. 1988), rev'd on other grounds, 110 S.Ct. 1441, 1108 L.Ed.2d 725 (1990); **Evans v. State,** 460 So.2d 824 (Miss. 1984); **Fairchild v. State,** 459 So.2d 793 (Miss. 1984); **Winters v. State,** 449 So.2d 766 (Miss. 1984); **Rainer v. State,** 438 So.2d 290 (Miss. 1983). When Williams called out Finches's name while shots were being fired, Finches's arm was withdrawn from the window and the shooting stopped. (R. 88,

112)

Nevertheless, the identification made by Williams as the shooter was not uncorroborated; rather, it was fully supported by other evidentiary factors previously discussed.

Second, Finchis argues " . . . there were large inconsistencies in [Williams's] trial testimony." (Brief of the Appellant at 6)

Again. No matter.

In **Maddox v. State,** 230 Miss. 529, 93 So.2d 649, 650 (1947), citing **Manning v. State,** 188 Miss. 393, 195 So.319 (1940), we find the following language applicable to Finchis's observation:

> Seldom do witnesses agree upon every detail. Indeed, their failure to do so is often strong evidence each is trying to accurately portray the situation as he saw it, and that is to the credit, rather than the discredit, of the witnesses.

The State need not square to a proverbial "T' every discrepancy that raises its festered head. The State need only produce enough evidence to prove the defendant guilty beyond a reasonable doubt.

It did.

"The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of **perception, memory** and **sincerity**." [emphasis ours] **Jones v. State**, 381 So.2d 983, 989 (Miss. 1990). *See also* **Hill v. State**, 199 Miss. 254, 24 So.2d 737 (1946); **Lett v. State,** 902 So.2d 630 (Ct.App.Miss. 2005) reh denied. *Cf.* **Blocker v. State,** 809 So.2d 640, 645 (¶18) (Miss. 2002) ["I]t is up to the jury to weigh any inconsistencies or contradictions in [the testimony of an accomplice."]

In response to a "weight of the evidence" complaint where appellant argued that a witness's identification of the defendant was questionable, the Court of Appeals, in **Moore v. State,** 969 So.2d

153, 156 (¶11) (Ct.App.Miss. 2007), quoting from **Stephens v. State,** 911 So.2d 424, 436 (¶38) (Miss. 2005), stated the following:

> Jurors are permitted, and indeed have the duty to resolve the conflicts in the testimony they hear. *Gandy v. State,* 373 So.2d 1042, 1045 (Miss. 1979). Any conflicts in the testimony of witnesses is the province of the jury. *Groseclose v. State,* 440 So.2d 297, 300 (Miss. 1983). Who the jury believes and what conclusions it reaches are solely for its determination. As the reviewing court, we cannot and need not determine with exactitude which witness(es) or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. *Id.* at 300.

Again, the same is true here.

Third, Finchis complains about the lack of physical evidence connecting him with the shooting. Such is not an impediment to conviction. "The absence of physical evidence does not negate a conviction where there is testimonial evidence." **Graham v. State,** 812 So.2d 1150 (Ct.App.Miss. 2002), cert denied 828 So.2d 200 (2002).

This Court reviews the trial court's denial of a post-trial motion under the abuse of discretion standard. **Flowers v. State**, 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State**, 566 So.2d 1240, 1242 (Miss. 1990). No abuse of judicial discretion has been demonstrated here because the testimony of the witnesses for the State, including Tyrone Williams who made a positive in-court identification of Finchis as the assailant, weighs heavily in support of the verdicts. Put another way, the testimony and evidence, in toto, does not preponderate in favor of Finchis.

Appellant's spin on Williams's bedroom identification is an exaggeration - a hyperbole, if you please - of the strongest kind. He looks at the testimony in a light most favorable to Finchis.

In ruling on the defendant's motion for a new trial, the trial judge - and this Court on appeal as well - must look at the evidence in the light most favorable to the State's theory of the case, i.e.,

"in the light most favorable to the verdict." **Herring v. State,** 691 So.2d 948, 957 (Miss. 1997), citing **Mitchell v. State,** 572 So.2d 865, 867 (Miss. 1990). "We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State." **McClain v. State,** 625 So.2d 774, 781 (Miss. 1993). *See also* **Gibby v. State,** 744 So.2d 244, 245 (Miss. 1999 [On appellate review "[e]vidence is examined in a light most favorable to the state [and] [a]ll credible evidence found consistent with defendant's guilt must be accepted as true."] *See also* **Valmain v. State,** 5 So.3rd 1079, 1086 (¶30) (Miss.2009) quoting from **Todd v. State,** 806 So.2d 1086, 1090 (¶11) (Miss. 2001) ["(An appellate court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial.")]

In **Bush v. State,** *supra,* 895 So.2d 836, 844 (¶18) (2005), the Supreme Court penned the following language also articulating the true rule:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State,* 691 so.2d 948, 957 (Miss. 1997). We have stated that on a motion for new trial,
>
> > The court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.
>
> *Amiker v. Drugs for Less, Inc,* 796 So.2d 942, 947 (Miss. 2000)/2 However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State*, 423 So.2d

> 800, 803 (Miss. 1982). Rather, as the "thirteenth juror" the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial./3
>
> Sitting as a limited "thirteenth juror" in this case, we cannot view the evidence in the light most favorable to the verdict and say that an unconscionable injustice resulted from this jury's rendering of a guilty verdict. * * * " [text of notes 2 and 3 omitted]

See also **Chambliss v. State,** 919 So.2d 30, 33-34 (¶10) (Miss. 2005), quoting *Bush,* 895 So.2d at 844 (¶18).

In short, the jury's verdict was not against the overwhelming weight of the credible evidence which does not preponderate in favor of Finchis's alibi and general denial. Bobbie Gill, as previously noted, did not testify. Obviously, the evidence presented a jury question as to whether or not Finchis was present and shooting at the time and place testified about.

Our position on this issue can be summarized in only three (3) words: "classic jury issue."

In reviewing a claim the verdict of the jury is contrary to the weight of the evidence, this Court is duty bound to weigh the evidence in the light most favorable to the guilty verdict. **Bush v. State,** 895 So.2d. at 844-45. This includes the testimony of Tyrone Williams who positively identified Finchis as the assailant.

"[T]he scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict." **Herring v. State**, *supra*, 691 So.2d at 957 citing **Mitchell v. State**, 572 So.2d 865, 867 (Miss. 1990).

In **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> ..... we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983)

The case at bar certainly does not exist in this posture.

CONCLUSION

"In any jury trial, the jury is the arbiter of the weight and credibility of a witness' testimony, [and] [t]his Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light, could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." **Rainer v. State**, 473 So.2d 172, 173 (Miss. 1985).

Although Finchis, with the able and effective assistance of both trial and appellate counsel, has pursued his claim with great vigor, it is devoid of merit.

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgments of conviction and ensuing sentences imposed by the trial court should be forthwith affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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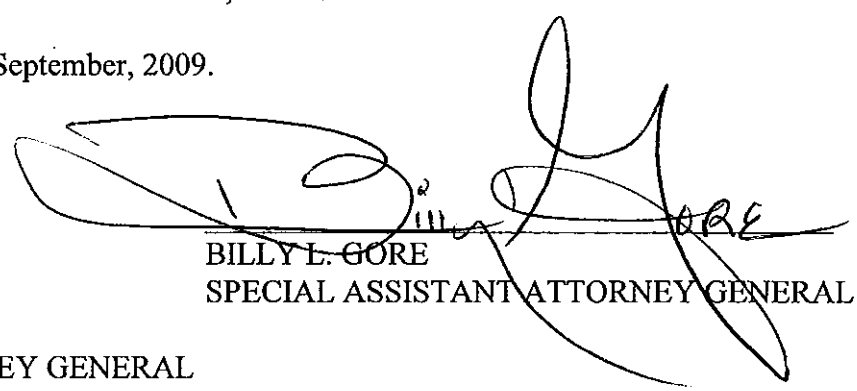
This the 29th day of September, 2009.



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