IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EMERSON OSBORNE — APPELLANT

VS. — NO. 2009-KA-0658-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

I. OSBORNE WAS NOT ENTITLED TO A MISTRIAL BASED ON AN ALLEGED JUROR COMMENT.

II. THE STATE WAS PROPERLY PERMITTED TO IMPEACH ITS OWN WITNESS.

III. THE JURY'S VERDICT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

IV. THE APPELLANT FAILS TO SHOW THAT EVEN A SINGLE ERROR, HARMLESS OR OTHERWISE, OCCURRED AT TRIAL.

V. OSBORNE IS NOT ENTITLED TO RELIEF BASED ON CUMULATIVE ERROR.

STATEMENT OF FACTS

Lucy Jackson, age eighty-six, lived alone in her Shelby, Mississippi home. She was known as the pear lady, as passers-by would pick pears from the pear tree in her front yard. T. 341. Eighteen-year-old Jimmy Giles attended church with Ms. Jackson. T. 340. He would check on her every other Sunday at her home and often pick pears from the tree in her front yard. T. 340. Emerson Osborne and Otis Braboy took advantage of this relationship on the evening of January 15, 2006. Much more than pears would be taken from Ms. Jackson on this fateful evening.

Osborne had been watching Ms. Jackson's home for a couple of days before the murder. T. 367. He and Braboy planned to rob her, but needed access to her home. T. 367-368. When they saw Giles walking home that night, they demanded that he go and knock on Ms. Jackson's door. T. 341-342, 368. When Giles asked questions, Braboy punched him in the face. T. 342. Giles complied, and knocked on Ms. Jackson' door. Ms. Jackson asked who was there, and Giles replied, "Little Jimmy." T. 343. When Ms. Jackson opened the door, Osborne and Braboy beat the elderly lady with their fists and entered her home. T. 344. Before Giles took off running from the victim's home, he saw Osborne beating Ms. Jackson with a stick. T. 360.

Ms. Jackson's lifeless body lay undiscovered in her home over the weekend. T. 395-397. Osborne and Braboy left her home with only $35-$40. T. 369. The money they so desperately desired, $4816.10 to be exact, was in a little pink bag underneath Ms. Jackson's dressing gown, tied around her waist. T. 481.

Osborne was tried and convicted of capital murder. He was spared the death sentence.

SUMMARY OF ARGUMENT

After the guilt phase of the trial, Osborne moved for a mistrial after an allegation that a juror made an inappropriate comment was brought to the attention of the trial court. The court ultimately pulled the juror in question from sitting on the penalty phase. When questioned on the record, the juror denied making the inappropriate comment. Even if the juror did make the alleged comment, the trial court during voir dire repeatedly stated to the jury that it must be fair and impartial and base its decision only on the evidence and law. The jurors took an oath to do just that. Additionally, the jury was formally instructed as to the same. Accordingly, even if the juror made an inappropriate comment, the trial court's decision to deny a mistrial was not clearly erroneous, as the trial court was assured that the jury was fair and impartial.

A party may impeach its own witness when that witness becomes a hostile witness and gives trial testimony contrary to a prior statement give to the party. When the party claims to be surprised by the trial testimony, it may then impeach the witness with the prior inconsistent statement. Such occurred in the present case when the State was surprised by Robbye Braboy's trial testimony which was contrary to a statement she had given the State just one day prior. Simply because the trial court did not declare on the record that the witness was hostile is not determinative. The record shows that the State did in fact lay the foundation to impeach its own witness.

The appellant asks this Court on appeal to find that the State's witnesses, including an eyewitness, were not credible. That duty belongs exclusively to the jury. The witnesses' testimony corroborates each other's version of events, and both are corroborated by medical evidence. The jury's verdict is not against the weight of the evidence.

Osborne is not entitled to relief based on cumulative error where he has failed to show that even a single error was committed by the trial court.

ARGUMENT

I. OSBORNE WAS NOT ENTITLED TO A MISTRIAL BASED ON AN ALLEGED JUROR COMMENT.

The jury returned a verdict of guilty of capital murder at noon on the third day of trial. T. 554. The sentencing phase of trial commenced after lunch. T. 558. When court convened the next morning, defense counsel informed the trial court that a venireman who did not sit on the jury approached him and stated that during voir dire another juror allegedly made a prejudicial comment to the effect of "let's go ahead and fry his ass so we can go home." T. 559. The venireman, Christopher Hull, was located and questioned by defense counsel and the prosecutor. Hull reported the following.

> Uh, I was in the jury quarters, was it Tuesday, when we was reporting at 1 o'clock. And this was just before 1 p.m. and a lady said, "I wish we would just hang him and get it over with and get out of here." And I responded to her that this was a man's life that we're talking about here and she shouldn't have that kind of attitude.

T. 570. Hull further testified that no further exchange occurred. T. 571. When asked by defense counsel if he believed that the juror's comment was an expression that she was prepared to vote for the death penalty, Hull responded that her comment was likely just an expression of her desire to get out of jury duty. T. 571, 573. The trial court found that the panel's responses during voir dire indicated that all panel members could be fair and impartial and base their decision on the evidence presented. T. 576. Out of an abundance of caution, the trial court decided to remove juror Pitts from sitting on the jury during the sentencing phase, replacing her with an alternate. T. 579. The trial court also questioned Pitts for the purpose of making a record for appeal.

When questioned, Pitts testified that she did not recall making the statement alleged by Hull. T. 582. She did, however, admit that she "was just trying to get out of here." T. 582. Pitts went on to testify that she had not prejudged the case, she answered truthfully about being able to be fair and

impartial, and that she based her verdict only on the evidence presented at trial. T. 582-584.

The decision to grant or deny a mistrial lies within the sound discretion of the trial court. *Edwards v. State*, 856 So.2d 587, 593 (¶19) (Miss. Ct. App. 2003). The trial court is obligated to declare a mistrial only "when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case." *Sipp v. State*, 936 So.2d 326, 331 (¶7) (Miss. 2006). To the extent that the appellant argues that the alleged comment expressed a view about the death penalty, the issue is moot because Osborne did not receive the death penalty. *Jones v. State*, 841 So.2d 115, 139 (¶77) (Miss. 2003). Otherwise, this Court has repeatedly upheld trial courts' denials of motions for mistrial based on improper juror comments where the trial court has ensured that the jurors understood their duty to be fair and impartial and reach a decision based solely on the evidence. *Hopson v. State*, 625 So.2d 395, 402 (Miss.1993) (potential juror asked in the presence of entire panel how much cocaine was found on Hopson and, "how many people died from that cocaine?"); *Evans v. State*, 725 So.2d 613, 648-49 (¶¶112-116) (Miss. 1997) (prospective juror stated in presence of panel she would have difficulty sitting on jury because she "found 'it very difficult to be in the same room with [Evans]....'"); *Davis v. State*, 850 So.2d 176, 178-79 (¶¶7-12) (Miss. Ct. App. 2003) (potential juror stated in front of other jurors that she knew the victim to be a credible person). Even in cases where potential jurors made comments that arguably alluded to the defendant's past criminal conduct or prior bad acts, reviewing courts have upheld trial court denials of motions for mistrial where the trial court was satisfied that the empaneled jury was fair and impartial. *Clayton v. State*, 893 So.2d 246, 248 (¶5)(Miss. Ct. App. 2004) (*Shelton v. State*, 853 So.2d 1171, 1184 (¶42) (Miss. 2003); *Nelson v. State*, 839 So.2d 584, 587 (¶7) (Miss. Ct. App. 2003); *McDougle v. State*, 781 So.2d 909, 910 -911 (¶4) (Miss. Ct. App. 2000); *Edwards v. State*, 856 So.2d 587, 593-94 (¶21) (Miss. Ct. App. 2003).

In the present case, at the beginning of voir dire, the trial court explained that jurors must be fair and impartial and "free as humanly possible from bias, prejudice or sympathy." T. 63. During voir dire, the trial court asked each and every potential juror if they could be fair and impartial and base their decision on the evidence and applicable law. T. 83-169. The trial court concluded its voir dire of the potential jurors with the following.

> Can everyone assure the Court – the bottom line to all my questions – that they could render a verdict solely on the evidence as presented from the witness stand and presented through exhibits and the law that we are going to give you at the end of the case? We'll take an oath. I need a blank jury, to the degree I can get one, that can weigh the evidence like the blind lady of justice, apply the law, and render a fair and impartial verdict. . . . Is there anybody here, other than the ones that have spoken with me because of convictions - - and it's okay to have convictions - - that could not do that?

T. 169. Additionally, the jury took an oath to base its verdict on the evidence and the law. T. 307. Finally, the jury was instructed that it must base its verdict on the evidence and the law, and that it must not be influenced by bias, sympathy, or prejudice. C.P. 183. It is presumed that the jury follows the instructions of the trial court. *Walker v. State*, 671 So.2d 581, 622 (Miss. 1995). Even if juror Pitts made the alleged remark, the record is rife with acknowledgment from the jury of its duty to be fair and impartial and base its decision strictly on the evidence and applicable law. Osborne fails to show that the trial court's determination that the jury was fair and impartial was clearly erroneous. Osborne suffered no serious and irreparable damage from the juror's alleged remark, and a mistrial was not warranted.

Further, Osborne's reliance on *Odom v. State*, 355 So.2d 1381, 1383 (Miss. 1978), is misplaced. The *Odom* test only comes into play when a juror fails to respond to a relevant, direct, and unambiguous question. Osborne fails to show, nor does the record support, that Juror Pitts failed to respond to relevant question during voir dire. If Pitts in fact made the alleged comment, it was

unarguably a poor choice of words to express her desire to forgo her civic duty. "It is, of course, a judicial question as to whether a jury is fair and impartial, and the court's judgment will not be disturbed unless it appears that it is clearly wrong." *Doss v. State*, 882 So.2d 176, 183 (¶10) (Miss. 2004) (quoting *Odom* at 1383). Again, the trial court's repeated charge to the jury regarding its duty to be fair and impartial and to base its decision solely on the evidence remedied any prejudicial effect the alleged comment may have left in the mind of any juror.

II. THE STATE WAS PROPERLY PERMITTED TO IMPEACH ITS OWN WITNESS.

The State's first witness was Robbye Braboy, Otis Braboy's mother. The significance of her testimony was merely to show that she saw Osborne, Braboy, and Giles together near the victim's home on the night of the murder. Ms. Braboy testified that when she saw the three out that night, she told her son to go home. T. 322. She then testified that her son told her to go home, and Osborne stated to her, "I got you." T. 321-322. The prosecutor then asked Ms. Braboy if she remembered talking to him the day before and stating that Osborne said something else to her. T. 323. Defense counsel then objected to leading, and the trial court sustained. T. 323. The prosecutor then asked to approach, and informed the court that the witness's testimony was contrary to her previous statement. T. 323. Defense counsel then erroneously argued that a party cannot impeach its own witness. T. 323. The prosecutor responded that a party can impeach its own witness with a prior inconsistent statement when the party is surprised by that witness's trial testimony which differs from the previous statement. The prosecutor further stated, "And I can claim surprise and do claim surprise. T. 323-324. The trial court then ruled that the State could ask the witness if she had given a prior inconsistent statement. T. 324. Ms. Braboy then admitted that Osborne was the one who told her to go home, and that she complied because she was scared of him. T. 326.

As conceded by the appellant, a party may impeach its own witness with a prior inconsistent

statement after showing that the party is surprised by the witness's current trial testimony. *King v. State*, 994 So. 2d 890, 897 (¶24) (Miss. Ct. App. 2008) (citing *Hall v. State*, 250 Miss. 253, 264, 165 So.2d 345, 350 (1964)). The prosecutor did just that. Osborne's claim on appeal is simply that the trial court did not make an on-the-record determination that the witness was hostile. Even where trial courts employ faulty reasoning to reach a correct result, reviewing courts are bound to affirm the trial court's correct ruling. *Puckett v. Stuckey*, 633 So.2d 978, 980 (Miss. 1993). In the present case, the trial court did not employ faulty reasoning. Rather, it simply failed to state that it found the witness to be hostile before making a correct ruling. Nevertheless, the record supports a finding that the witness became surprisingly hostile by giving testimony contrary to a statement she had given the State just a day prior. Accordingly, the State was entitled to impeach its own witness.

Further, for the sake of argument only, even had the trial court improperly allowed the State to impeach its own witness, such a ruling would be considered harmless error. An error in the admission or exclusion of evidence is reversible only when a substantial right belonging to the defendant is violated by the ruling. *Ladnier v. State*, 878 So.2d 926, 933 (¶27) (Miss. 2004). Ms. Braboy simply acknowledged that Osborne told her to go home when she saw him on the night of the murder. The admission of such a statement can hardly be said to have violated a substantial right belonging to the defendant.

III. THE JURY'S VERDICT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

When reviewing a claim that a conviction is against the weight of the evidence, a reviewing court will not disturb the verdict unless allowing it to stand would sanction an unconscionable injustice. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005). Osborne claims on appeal, "this honorable Court must consider the credibility of the witnesses presented at trial." Appellant's brief at 17. However, the determination of witness credibility lies solely within the province of the jury.

Moore v. State, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007). The jury alone is responsible for resolving any conflicts in witness testimony which may arise. *Id.*

Jimmy Giles was an eyewitness to the fatal beating of the eighty-six-year-old victim. The jury was fully informed of Giles' role in the event and subsequent punishment. Giles acknowledged that he was not truthful in his first statement to police in which he claimed that he could not identify Osborne and that he ran from the scene immediately after Braboy hit the victim. T. 358. Giles' explanation for his lack of candor was that Osborne and Braboy twice threatened that they would kill his grandmother, with whom he lived, if he told anyone what happened. T. 345, 347, 362.

Osborne claims that Giles' testimony was "almost completely uncorroborated." Dr. Hayne's testimony confirmed Giles' assertion that Osborne and Braboy struck the victim numerous times with their fists and with some type of blunt object, such as a stick. T. 489. Wesley Jefferson's testimony also corroborated Giles' testimony. Osborne essentially argues that Jefferson's testimony should be automatically disregarded because he is a "jailhouse snitch." Jefferson had been previously incarcerated with Osborne and testified as follows. Jefferson asked Osborne why he was crying out in his sleep, and Osborne replied that he was under a tremendous amount of stress because "they" were trying to "hang" him for killing woman in Shelby. T. 367. Osborne proceeded to tell Jefferson that he and Braboy had been smoking crack on the night of the murder. T. 367. Osborne had been watching the victim's house for a few days and planned to rob her, but needed a lookout. T. 367. Osborne enlisted Giles, who knocked on the victim's door. T. 368. Osborne and Braboy then busted in the victim's home, and the victim scratched Osborne on the neck. T. 368. Osborne then pushed the victim to the floor and beat her with his fists. T. 368. Braboy then beat the victim with a 2x4. T. 368. When Giles looked in and saw what they were doing, he took off running. T. 368. Not only does Jefferson's testimony corroborate Giles' testimony, but also a very minute detail in Jefferson's

testimony was corroborated by Dr. Hayne's testimony. Jefferson testified that Osborne told him that the victim scratched him when they entered the house. T. 368. Jefferson even claimed that he remembered seeing the scratches on Osborne's neck. T. 370. Dr. Hayne testified that the victim had a torn fingernail on the fourth finger of her right hand. T. 483. This would be consistent with the victim having scratched Osborne. The corroboration of such a minute detail of Jefferson's testimony certainly lends to its credibility.

It is not the function of the reviewing court to determine whose testimony to believe. *Smith v. State*, 945 So.2d 414, 421 (¶21) (Miss. Ct. App. 2006) (citing *Taylor v. State*, 744 So.2d 306, 312 (¶17) (Miss. Ct. App. 1999)). So long as substantial credible evidence supports the jury's verdict, the verdict must be affirmed. *Id.* Giles' and Jefferson's testimony was wholly consistent. Their testimony was also corroborated by medical evidence. Osborne exercised his right not to testify or put on a case-in-chief. As a result, the defense in no way put on evidence contrary to that presented by the State. The jury's verdict is not against the weight of the evidence, nor does the verdict represent an unconscionable injustice. Accordingly, Osborne's claim that the verdict is against the weight of the evidence must fail.

IV. THE APPELLANT FAILS TO SHOW THAT EVEN A SINGLE ERROR, HARMLESS OR OTHERWISE, OCCURRED AT TRIAL.

&

V. OSBORNE IS NOT ENTITLED TO RELIEF BASED ON CUMULATIVE ERROR.

"Where there is no error in any one of the alleged assignment of errors, there can be no error cumulatively." *Hughes v. State*, 892 So.2d 203, 213 (¶29) (Miss. 2004). Because Osborne failed to show error in any of his individual assignments of error, his final issue necessarily fails.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Osborne's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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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