

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EMMERSON OSBORNE

APPELLANT

V.

NO. 2009-KA-0658-SCT

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Emmerson Osborne, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Albert B. Smith, III, Circuit Court Judge

This the 31 day of June, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:

Justin T Cook

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REPLY BRIEF OF THE APPELLANT

REPLY ARGUMENT

ISSUE ONE: JUROR STATEMENTS PRIOR TO VOIR DIRE WARRANTED MISTRIAL.

“I wish we would just hang him and get it over with and get out of here.” (T. 570). The State argues that the preceding statement, uttered by a juror prior to trial, does not warrant reversal in the instant case. Osborne respectfully believes that the State is wrong.

The State contends that whether the statements made by the juror warrant a mistrial is moot because Osborne did not receive the death penalty. (Brief for the Appellee P. 5). The State is correct that Osborne did not receive the death penalty; however, the State fails to take the logical extent of the juror’s comment into consideration. The statement expressed a clear view about what sentence should be imposed upon Osborne. However, the statement contained more than just a view of an

appropriate sentence, for, clearly, one cannot have a sentence imposed upon them if they are not already guilty.

The State states that, “[O]ut of an abundance of caution, the trial court decided to remove juror Pitts from sitting on the jury during the sentencing phase.” (Brief for the Appellee P. 4). This misses the point. If a juror’s statements indicating a predisposition towards the death penalty warrant removal for sentencing, how then could a juror’s statements which clearly express her predisposition towards guilt not warrant a mistrial when she sat on the jury that convicted?

The State also argues that, because juries are instructed and presumed to follow those instructions, no error exists. (Brief for the Appellee P. 4). What the State fails to recognize is that, in the instant case, there is clear evidence that a juror was not truthful when answering questions during voir dire. If the juror did not truthfully answer during voir dire, how then could that juror be presumed to have followed the instructions given to her by the Court.

Every criminal defendant is entitled to a jury that is not pre-disposed to either guilt or manner of punishment. Accordingly, Osborne’s conviction should be reversed and remanded to the lower court for a new trial.

ISSUE TWO: THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE BECAUSE OSBORNE’S CONVICTION IS BASED ON UNRELIABLE AND UNCORROBORATED TESTIMONY OF A JAIL-HOUSE SNITCH AND AN ALLEGED-ACCOMPLICE.

As stated in Osborne’s initial brief before the Court, the standard of review for any challenge of the verdict being against the overwhelming weight of the evidence is abuse of discretion. *Dilworth v. State*, 909 So. 2d 731, 736 (Miss. 2005). When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate court will only disturb a verdict when “it is so contrary to the overwhelming weight of the evidence that allowing it to stand would

sanction an unconscionable injustice.” *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005). In a hearing on a motion for a new trial, the trial court sits as a thirteenth juror, but the motion 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. *Id.* The evidence should also be weighed in the light most favorable to the verdict. The

Bush Court stated:

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. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Id.

The State argues that the determination of witness credibility lies solely within the province of the jury. (Brief for the Appellee P. 8-9). Respectfully, under the State’s reasoning, appellate courts should not be allowed to consider arguments that verdicts are against the overwhelming weight of the evidence. Osborne contends that the credibility of the witness testimony is wholly appropriate in instances in which criminal defendants are challenging the overwhelming weight of the evidence.

With the above being stated, the State’s arguments concerning the corroboration of testimony fail to adequately describe the material particulars of the instant case. The State argues that Giles’ testimony was corroborated by Dr. Hayne. (Brief for the Appellee P. 9). The State is at least partly correct in this assertion – Dr. Hayne did testify that the injuries to the victim could have happened from the way that Giles described. (T. 489). However, nothing from Dr. Hayne’s testimony corroborates any part of Giles’ testimony that Osborne was involved in the incident. The State’s assertion of corroboration rests on facts that do not directly or indirectly implicate Osborne. This

situation is analogous to the facts in *Holmes v. State*, 481 So. 2d 319 (Miss. 1985), wherein this Court found that a footprint at the scene matching an accomplice's shoes only corroborated that accomplice had committed the crime. *Holmes*, 481 So. 2d at 322. Similarly, Dr. Hayne's testimony only corroborates that the victim was beaten, but not that Osborne committed any crime. Therefore, the State's argument as to the corroboration of Dr. Hayne's testimony is misguided and misplaced.

The State further argues that Giles' testimony is corroborated by the testimony of Wesley Jefferson, a jail-house snitch. (Brief for the Appellee P. 9). This Court recently held that a confidential informant cannot corroborate an accomplice's testimony because both are inherently untrustworthy. *Williams v. State*, (2009-KA-00080-SCT)(¶21)(April 15, 2010). Therefore, it follows that a jail-house snitch's testimony cannot corroborate an accomplice's testimony. Consequently, all of Giles' testimony that tended to inculcate Osborne was uncorroborated, and, accordingly, unreliable.

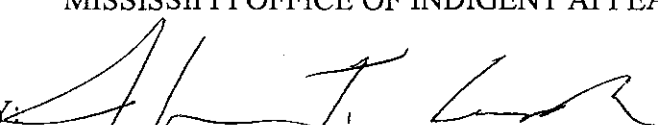
CONCLUSION

Based upon the foregoing, as well as the issues and arguments raised in his initial brief, Osborne contends that his conviction should be reversed.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


Justin T Cook

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Emmerson Osborne, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **REPLY BRIEF OF THE APPELLANT** to the following:

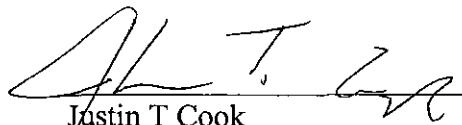
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This the 3rd day of JUNE, 2010.


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