

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL EUGENE WELCH

APPELLANT

VS.

NO. 2009-KA-1064

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

MICHAEL WELCH

APPELLANT

VERSUS

NO. 2009-KA-1064-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Michael Welch was convicted in the Circuit Court of the First Judicial District of Harrison County on three counts of aggravated assault and was sentenced to three 20-year terms in the custody of the Mississippi Department of Corrections. (T.59-60) Aggrieved by the judgment rendered against him, Welch has perfected an appeal to this Court.

Substantive Facts

THE STATE'S CASE IN CHIEF

Tony Raiford, 18 years old at the time of trial, testified that at about 9:30 p.m. on March 21, 2007, he drove his younger brothers, Ladarius and Damion Raiford, as well as

his younger cousins, Kevin Henry and Allen Barnett, to visit Tony's father.¹ At approximately 11:30, as they were on their "way back" on Airport Road, they saw "a young gentleman and a lady in a gray Expedition." This pair "pulled on the side" of Tony's vehicle and began "laughing and pointing." Tony "rolled down" his window and told the driver that he (Tony) had mistaken her for someone else. Ladarius then said that the woman resembled a resident of Country Hills, adjacent to the Raiford brothers' neighborhood. (T.53-54)

The parties in both vehicles continued their discussion about Country Hills. At one point, the driver asked something to the effect of, "What's down there for me, a party or something?" Someone in the Raiford brothers' vehicle said, "some dick if you want it." The passenger in the Expedition made a retort, more words were exchanged, and "then he [Michael Welch] started shooting." Tony was wounded in his left shoulder. He drove the car straight to the hospital. (T.54-57)

Tony was able to get a good, clear view of the driver and the passenger. (T.56) He identified each from photographic lineups, and made an in-court identification of Welch as well. (T.59-61)

Damion, 15 years old at the time of trial, corroborated Tony's testimony about the preliminary events of the day. (T.67-74) He went on to testify that he remembered "Allen talking to the dude" in the Expedition, and that "Allen asked them were they going to

¹ Because the victims share the last name "Raiford," the state will refer to them by their first names.

Country Hills. Then he said what's in Country Hills, and Allen say I got some dick for the girl." (T.74)

After the vehicles stopped at another red light, Welch suggested that Allen's comments had offended him, and "pulled out the gun, started shooting." Damion took the first bullet, which went into his jaw. (T.75-77)

Although Damion had not obtained a "good look" at the driver, he had gotten "a good look at the man." He, too, identified Welch from a photographic lineup and at trial. (T.83-86)

Ladarius, 17 years old at the time of trial, corroborated his brothers' testimony. One of the shots grazed his arm. Ladarius also identified the driver and Welch from photographic lineups, and he testified positively that the defendant was the shooter. (T.90-99)

Jurinea Dunklin, the driver of the Expedition, testified that she lived with her husband and two children in Gulfport. About a month before the day in question, she learned that she had a half-brother named Michael Welch. Ms. Dunklin made his acquaintance, had his identity verified by their father, and "accepted him" into her house after he told her that he was homeless. (T.111-14)

On March 21, Ms. Dunklin had a row with her husband, and she and Welch "left the house to cool off." She was driving the Expedition, and Welch was sitting in the passenger's seat. When they encountered Tony's car, the occupants of that vehicle started a conversation with her and Welch about Country Hills. At one point, "[o]ne of the kids on the passenger side" told her that he didn't care about Country Hills, but invited her

"to suck his penis." The "next thing" Ms. Dunklin knew, "Michael pulled out the gun [and] started shooting up the car." Ms. Dunklin "panicked and went back home." (T.115-18)

Afraid that "Michael was going to kill" her, she "didn't tell" her husband what had happened. In fact, Welch told her "not to say anything" and that he would kill her if she did. Ultimately, Ms. Dunklin was arrested, charged and indicted as an accessory in this case.² After she spent two weeks in jail, she "gave a true statement on what happened." (T.119-21)

Detective Gary Ponthieux of the Gulfport Police Department was the chief investigator of this case. Having been notified of the report of these shootings, Detective Ponthieux first went to the hospital, where he initially interview Ladarius, "the least injured" of the brothers. Ladairus was able to provide a description of the driver, the passenger and the Expedition, and a BOLO was put out for the vehicle, "a black female light skinned driver in her 20's," and "a black male light skinned in his 20's with braids." (T.127-29)

The detective went on to interview Allen Barnett, who gave information consistent with what he had "found out at the hospital." The next day, officers located the Expedition parked at the residence of Ms. Dunklin and her husband. Detective Ponthieux and a fellow detective then went to that residence, where they interviewed the husband, Allen Lemay, the owner of the vehicle. Based on this interview, the detectives discounted him as a suspect. (T.130-32)

² Ms. Dunklin testified that she was aware that the state had made a recommendation in her case for possible sentence consideration by the court. (T.122)

A few days later, Mr. Lemay "contacted the Gulfport Police Department and notified the lieutenant and he had located a shell casing, .40 caliber shell casing in his vehicle." The casing was retrieved and placed in the department's property room. Thereafter, Detective Ponthieux conducted another interview of Mr. Lemay. (T.132-33) Regarding that interview, the detective testified as follows:

I asked him, you know, how he came in possession of the shell casing and some other things, and he told me that he had suspected that his wife Jurinea Dunklin and her half brother Michael Welch had been using his car and involved in this incident.

(T.133)

Detective Ponthieux "obtained a driver's license photograph" of Ms. Junklin and assembled a photographic lineup, from which "Tony and Ladarius both positively identified" her as the driver of the vehicle.³ All three victims identified the Expedition and Welch from photographic lineups. Specifically, "Tony Raiford was immediately without hesitation able to identify Mr. Welch as the shooter that night. Ladarius Raiford also was able to immediately pick out Mr. Welch without any hesitation." Damion, who had gotten "the least look," was able to identify Welch "after several minutes." A couple of months later, Allen Barnett was presented with a lineup from which he, too, identified Welch. (T.133-42)

Mr. Lemay corroborated his wife's testimony about the circumstances surrounding Welch's moving in with them. (T.148-50) He went on to testify that he (Mr. Lemay) had been bald since 1996, that he shaved his head every day, and that he had not worn braids

³ Damion had been "unable to get a good look at the female so he was unable to identify Jurinea as the driver." (T.133)

since 1992. (T.150)

Mr. Lemay went on to testify that on March 21, 2007, he and his wife had argued. He "went to bed with the kids and stuff, but she did leave." He denied committing the shootings and also denied having any firsthand knowledge of it. In his words, "Nobody told me anything about the shooting." (T.151)

A few days after this incident, the police came to his house to interview him. At this point, he still was unaware of the assaults. Some time later, he and Ms. Dunklin "had another argument" which prompted him to leave the marital residence and go "back to Waveland." At some point, while he was cleaning his truck, he found the casing and turned it over to the police. (T.152-54)

THE DEFENDANT'S CASE

Allen Barnett testified that it was not Welch, but "another dude in the front seat" who committed these crimes. He described this "dude" as "bald headed, kind of light skinned." A third man, unknown to Barnett, was in the back seat of the Expedition. (T.162-63)

On cross-examination, Barnett acknowledged that he previously had identified Welch and that he had not told Detective Ponthieux anything about "some other bald-headed dude." (T.169-70)

Melinda Welch, the defendant's mother, testified that Welch and Ms. Dunklin told her that Mr. Lemay was "setting [them] up, and that the shell casing that was found in Jurinea's and them [sic] car, Adam turned in into the police." (T.178-81)

Welch testified he and Mr. Lemay did not get along well with each other.⁴ On the

night in question, according to Welch, he was sitting in the back seat of the expedition while Ms. Dunklin drove and Mr. Lemay was in the “[f]ront passenger” seat. He went on to testify that Mr. Lemay was the shooter and that he threw the gun over a bridge. (T.184-88)

THE STATE'S CASE IN REBUTTAL

Disputing Barnett's testimony, Detective Ponthieux testified that during the interview of June 6, 2007, Barnett was presented with a photographic lineup and that he positively identified Welch as the shooter. (T.197-98) Moreover, he never mentioned any “bald headed ... dude” during the interview. (T.199)

SUMMARY OF THE ARGUMENT

Welch has not shown that his trial counsel rendered ineffective assistance in failing to request a cautionary instruction on Ms. Dunklin's testimony. The state's case was not based solely on that testimony. Had such an instruction been proffered, the court would have been within its discretion in refusing it.

Furthermore, Welch has not shown an abuse of discretion in the court's denial of his motion for new trial. The verdict is not against the overwhelming weight of the evidence.

⁴ Mr. Lemay had admitted that he did not like Welch at all. (T.154-55)

PROPOSITION ONE

WELCH HAS NOT DEMONSTRATED THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A CAUTIONARY INSTRUCTION ON MS. DUNKLIN'S TESTIMONY

Welch argues first that his trial counsel was ineffective in failing to request a cautionary instruction regarding the accomplice testimony. To prevail, he "must demonstrate that his attorney's performance was deficient and that this deficiency deprived him of a fair trial." *Bynum v. State*, 929 So.2d 324, 334 (Miss. App. 2005), citing *Strickland v. Washington*, 466 U.S. 668, (1984). The burden is on the defendant to satisfy both prongs. *Id.* There exists "a strong presumption that counsel rendered adequate assistance." *Id.* Moreover, because this point is raised for the first time on direct appeal, Welch must shoulder the additional burden of demonstrating that whether counsel's alleged error was so egregious as to require the trial court to declare a mistrial or to order a new trial sua sponte. *Colenburg v. State*, 735 So.2d 1099, 1102 (Miss. App. 1999). Accord, *Townsend v. State*, 933 So.2d 986, 989 (Miss. App. 2005)

"It is within the discretion of the trial court to grant a cautionary instruction pertaining to the testimony of an accomplice witness." *Slaughter v. State*, 815 So.2d 1122, 1134 (Miss. 2002), cited in *Vardaman v. State*, 966 So.2d 885, 893 (Miss. App. 2007). The court abuses that discretion only where the state's evidence rests solely on the testimony of an accomplice. *Vardaman*, 966 So.2d at 893. See also *Johnson v. State*, 976 So.2d 387, 394 (Miss. App. 2003). The state's case was not based entirely on Ms. Dunkins's testimony, but was built on the testimony of the three eyewitness-victims who positively identified Welch as the man who shot them. It follows that had a cautionary instruction been tendered, the court would not have abused its discretion in denying it. Nor has Welch

demonstrated that the granting of such an instruction would have affected the outcome of his trial. See *Vardaman v. State*, 966 So.2d at 893. Thus, it is clear that Welch has satisfied neither element of the *Strickland* test with respect to this issue. His first proposition should be denied.

PROPOSITION TWO:

**THE VERDICT IS NOT CONTRARY TO THE OVERWHELMING
WEIGHT OF THE EVIDENCE**

Contending that the verdict is contrary to the overwhelming weight of the evidence, Welch finally challenges the denial of his motion for new trial on that ground. In its order denying the motion, the court rejected that argument with the following analysis:

In ruling on a motion for new trial evidence which supports the verdict is accepted as true, and only where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will it be disturbed. ***Anderson v. State***, 904 So.2d 973, 977-78 (Miss.2004); ***Montana v. State***, 822 So.2d 954, 967 (Miss.2002). ...

Welch argues the testimony of the witnesses conflicted on major points. "Matters regarding the weight and credibility of evidence are to be resolved by the jury. ***Fisher v. State***, 481 So.2d 203, 212 (Miss.1985). Jurors may accept the testimony of some witnesses and they may accept in part and reject in part the evidence on behalf of the State and on behalf of the accused.

(C.P.72-73)

The state submits the trial court correctly analyzed this issue and did not abuse its discretion in denying the motion for new trial. See *Dilworth v. State*, 909 So.2d 731, 737 (Miss.2005).

The controlling standard of review of this issue is set out below:

"[T]his 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." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182. "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss. Ct. App. 2001).

Smith v. State, 868 So.2d 1048, 1050-51 (Miss. App. 2004),

Furthermore,

The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).

(emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss. App. 1999).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As this Court recently reiterated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not

intend to invade the province and prerogative of the jury. " [citations omitted]

Incorporating by reference the evidence recounted under our Statement of Substantive Facts, we submit the prosecution presented substantial credible proof that Welch was guilty of three counts of aggravated assault. Contrary to Welch's suggestion, all three victims positively identified Welch as the person who did the shooting. (T.54-56, 61-62, 77-78, 82-86, 93, 97-99). Welch's presentation of conflicting evidence simply created an issue of fact which was properly resolved by the jury. No basis exists for disturbing the court's disposition of his motion for new trial. Welch's second proposition should be denied.

CONCLUSION

The state submits the arguments presented by Welch have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
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BY: DEIRDRE McCRORY
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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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