IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL EUGENE WELCH **APPELLANT**

V. **NO. 2009-KA-1064-COA**

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. Michael Eugene Welch, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Roger T. Clark, Circuit Court Judge

This the 18th day of December, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Justin T. Cook
COUNSEL FOR APPELLANT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL EUGENE WELCH — APPELLANT

V. — NO. 2009-KA-1064-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE ONE:

WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A CAUTIONARY INSTRUCTION REGARDING THE UNRELIABILITY OF ACCOMPLICE TESTIMONY.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT OVERRULED THE APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE THE OVERWHELMING WEIGHT OF THE EVIDENCE POINTED TOWARDS THE APPELLANT BEING NOT GUILTY OF THE CRIME OF AGGRAVATED ASSAULT.

STATEMENT OF INCARCERATION

Michael Eugene Welch, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the second judicial district of Harrison County, Mississippi, and a judgment of conviction on three counts of aggravated assault against Michael Eugene Welch, following a trial on July 29-30, 2008, the honorable Roger T. Clark, Circuit Judge, presiding. Welch was subsequently sentenced to forty years in the custody of the Mississippi Department of Corrections.

FACTS

On March 21, 2007, Tony Raiford ("Tony") was driving his car–a Chevrolet Caprice– with his two little brothers, Ladarius Raiford ("Ladarious") and Damion Raiford ("Damion"), his cousin, Kevin Harvey ("Kevin"), and a friend, Allen Barnett ("Allen"). (Tr. 53, 55, 69-70, 91, 161). Allen sat in the front passenger seat, Danion in the back passenger seat, Ladarius in the driver's side back seat, and Kevin in the middle of the back seat. (Tr. 55, 70-71, 91, 161). As they stopped at a red light at Airport Road, a young man later identified as Welch (passenger) and his sister, Jurinea Dunklin ("Dunklin") pulled up beside them in a grey Expedition; Dunklin was driving and Welch was in the passenger seat. (Tr. 53, 72-73, 92, 114-116, 162). Tony and Ladarius saw the two laughing and pointing at them, so Tony rolled down his window. (Tr. 54-55, 93). Ladarius asked Dunklin if she lived in Country Hills, a nearby subdivision. (Tr. 54, 93, 117). Dunklin asked where County Hills was, and asked "what's down there for me, a party or something[?]" (Tr. 54, 93). Allen then responded, "some dick if you want it." (Tr. 54, 74, 93). Dunklin testified that Allen told her to suck his penis. (Tr. 118).

When the light turned green, Tony pulled off headed north on Highway 49, and the Expedition came up behind Tony's vehicle flashing its lights. (Tr. 54). The Expedition then pulled beside Tony's vehicle at the next red light and the man (allegedly Welch) asked "what did you say?" (Tr. 54, 76-77, 94). Tony said' "he didn't say nothing." (Tr. 54, 76-77). According to Raiford, the man said, "fuck it," and started shooting. (Tr. 54-55, 77). Dunklin also testified that Welch "pulled out the gun, started shooting up the car, and I panicked and went back home." (Tr. 118). Tony then drove the car to hospital. (Tr. 79).

Tony was shot in his left shoulder; he was treated at the hospital and released the following morning. (Tr. 56). Damion was shot in the face; the bullet entered his jaw and lodged in the back of his neck. (Tr. 77-78). He was treated in the hospital for four days. (Tr. 79). Ladarius was shot in the arm. (Tr. 98).

Officer Gary Ponthieux ("Officer Ponthieux") went to the hospital and spoke with Ladarius and Barnett. (Tr. 128-30). No suspect was identified in these interviews, but the Expedition was identified. (Tr. 130). The following day, Officer Ponthieux located the Expedition and interviewed Lamay, the Expedition's owner. (Tr. 131, 150). Lemay told Officer Ponthieux that his vehicle stayed in his driveway on the night in question, and no one drove it until the next morning when he drove it to work. (Tr. 132, 152). A few days later Lemay contacted the police and told them that he located a .40 caliber shell casing in his Expedition when he was cleaning it out. (Tr. 132, 153). He also said that he suspected that Dunklin and Welch might have been using the vehicle on the night in question. (Tr. 133, 146-46). Although Lemay turned in a .40 caliber casing, Seargeant Bodie, a forensic officer, opined that the projectiles recovered were .38 caliber. (Tr. 144-45).

The vehicles were about three feet apart at the time of the shooting, and there were street

lights on Highway 49 where they were traveling. (Tr. 56, 75, 95). To this end, Tony and Ladarius claimed at trial that they got a good look at the shooter/passenger and the driver; Damion claimed he got a good look at the passenger, but not the driver. (Tr. 56, 75, 94-95). Tony and Ladarius both identified Dunklin as the driver in a photo lineup. (Tr. 95-96, 133, Ex. S-2, S-7). Tony, Damion, Ladarius, and Barnett picked Welch out of a picture lineup four or five days after the incident and identified him in court. (Tr. 60-61, 80-81, 84-86, 96-98, 137-42, Ex. S-3, S-5, S-8, S-9). Ladarius recognized the Explorer because he had seen it drive through his neighborhood before. (Tr. 98-99). Damion had seen the Explorer in his neighborhood before the incident. (Tr. 82, 88-89).

According to Damion, the windows were too dark to see in the back of the Explorer, and he would not have been able to see if there was a third person in the back. (Tr. 87). Ladarius testified that Lemay came to his house after the shooting and apologized. (Tr. 100).

Dunklin and her husband, Adam Lemay ("Lemay") had gotten into an argument, and she and Welch left the house in the Expedition to ride around and "cool off." (Tr. 115-16, 151). Lemay stayed at home. (Tr. 116, 122, 151). Dunklin testified that she did not tell Lemay because she was scared Welch would kill her. (Tr. 119, 124). At the time of the incident Lemay's head was shaved bald. (Tr. 150). At trial, Lemay denied any involvement in the shooting. (Tr. 151).

Barnett testified for the defense at trial. (Tr. 160). Barnett testified that there were three people in the Expedition at the time of the shooting. (Tr. 162). Barnett stated that Dunklin was driving, and, at first, Welch was in the front passenger seat, and a bald-headed man was in the back seat behind Welch . (Tr. 162-64, 167). However, Barnett testified that the bald-headed man and Welch switched places before the shooting occurred. (Tr. 167). Barnett testified that the bald-headed man was the shooter. (Tr. 165).

Welch's Mother, Melinda Welch ("Melinda"), also testified for the defense. (Tr. 178). Melinda testified that Dunklin called her shortly after the incident and told her that Lemay was setting her and Welch up. (Tr. 181). According to Melinda, Welch told her the same thing. (Tr. 181-82).

Welch also testified in his own defense. (Tr. 183). Welch testified that Dunklin was driving, Lemay was sitting in the front passenger seat, and he was sitting in the back passenger seat. (Tr. 185). According to Welch, when Barnett told Dunklin he had some dick for her, Dunklin told Lemay "you ain't going to let them talk to me like that." (Tr. 186). Welch testified that Lemay then pulled out the gun–a .38 caliber–and starting shooting. (Tr. 186). Welch explained that he was leaning over the front passenger and over Lemay seat when he talked to the passengers in the Caprice, and that's how the Caprice's passengers were able to see him and did not see Lemay. (Tr. 187). Welch testified that Lemay ponted the gun over his (Welch's) head to shoot. (Tr. 188). Welch also testified that, after the shooting, Lemay threw the gun off of a bridge as they drove over it. (Tr. 188). Welch denied shooting the gun. (Tr. 189).

On August19, 2008, the Appellant filed a Motion for Judgment Non Obstante Verdicto or for New Trial in the Alternative. (C.P. 62-64, 11-13). The motion was denied by the trial court on March 13, 2009. (C.P. 72-74, R.E. 14-16). On June 25, 200, feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 75, R.E. 17).

SUMMARY OF THE ARGUMENT

Trial counsel was ineffective for failing to request a cautionary in struction regarding the unreliability of accomplice testimony. A co-indictee testified against the Appellant. Her testimony

is the only evidence that specifically identifies Welch as the person who shot the gun on the night in question. Trial counsel's inability to adequately instruct the jury resulted in prejudice that warrants reversal.

Furthermore, the verdict was against the overwhelming weight of the evidence. The State's case rests solely on the testimony of a co-indictee. No other evidence establishes that Welch was the one who fired the gun that night. Rather, the evidence is consistent with Welch's defense that he was merely riding in the vehicle from which the gun was fired. The relative lack of evidence warrants reversal by this honorable Court and a remand for a new trial.

ARGUMENT

ISSUE ONE: WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A CAUTIONARY INSTRUCTION REGARDING THE UNRELIABILITY OF ACCOMPLICE TESTIMONY.

Trial counsel should have requested a cautionary instruction regarding the testimony of an accomplice.

In ***Madison v. State*** , 932 So.2d 252, 255 (Miss. Ct. App. 2006) the court reiterated:

> [the Supreme] Court applies the two-part test *from* ***Strickland v. Washington***, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel. ***McQuarter v. State***, 574 So.2d 685, 687 (Miss. 1990). Under ***Strickland***, the defendant bears the burden of proof to show that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* There is a strong but rebuttable presumption that counsel's performance fell within the wide range of reasonable professional assistance. *Id.* This presumption may be rebutted with a showing that, but for counsel's deficient performance, a different result would have occurred. ***Leatherwood v. State***, 473 So.2d 964, 968 (Miss. 1985). This Court examines the totality of the circumstances in determining whether counsel was effective.

Id.

If the issue of ineffective assistance of counsel is raised, as is here, on direct appeal the court

will look to whether:

> (a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed.

Id.

Welch hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

"The supreme court has held on numerous occasions that 'the trial court has broad discretion in deciding whether to grant a cautionary instruction regarding the testimony of an accomplice; and the refusal to give such an instruction does not constitute reversal error.'" ***Williams v. State***, 729 So.2d 1181, 1186 (Miss. 1998) (quoting ***Green v. State***, 456 So.2d 757, 758 (Miss. 1984)). "However, that discretion is subject to abuse when the State's evidence rests solely upon the testimony of an accomplice and there is some question as to the reasonableness and consistency of the testimony, or the defendant's guilt is not clearly proven. . ." *Id.*

. The Mississippi Supreme Court in ***Hussey v. State***, 473 So.2d 478 (Miss. 1985), reversed a conviction because the trial court failed to give a cautionary instruction concerning the alleged testimony of an accomplice. "[T]he prosecution in ***Hussey*** was based almost entirely on the testimony of the accomplice; 'the evidence (was) virtually irreconcilable with the verdict except for the testimony of the accomplice.'" ***Holmes v. State***, 481 So.2d 319, 323 (Miss. 1985) (quoting ***Hussey***, 473 So.2d at 480.) As in the cases of ***Hussey*** and ***Holmes***, in the case *sub judice* , except for the testimony of the accomplice, the credible and concrete evidence against Welch was nonexistent. "When faced with such a situation, the trial judge must accede to the accused's request

and grant a cautionary instruction. ***Holmes***, 481 So.2d at 323. *See* ***Catchings v. State***, 394 So.2d 869, 870 (Miss. 1981).

However, in this case, the trial judge never had the opportunity to grant or deny the cautionary instruction. Trial counsel should have asked for the instruction; unfortunately, it seems, the dubious nature of accomplice testimony was lost on trial counsel. "The uncorroborated testimony of an accomplice may be sufficient to sustain a guilty verdict." ***Catchings v. State***, 394 So.2d 869, 870 (Miss. 1981), ***Moore v. State***, 291 So.2d 187 (Miss. 1974.). "However, such testimony should be viewed with great caution and suspicion and must be reasonable, not improbable, self-contradictory or substantially impeached. ***Catchings***, 394 So.2d at 870, ***Moody v. State***, 371 So.2d 408 (Miss. 1979), ***Jones v. State***, 368 So.2d 1265 (Miss. 1979). In ***Feranda v. State***, 267 So.2d 305 (Miss. 1972), the Mississippi Supreme Court reversed the conviction of burglary and larceny as an accessory before the fact was reversed, the court found that the accomplice's testimony, upon which it was based, was inconsistent overly vague and almost completely uncorroborated.

Accomplice testimony should be viewed with great caution and suspicion; however, failure of trial counsel to ask for the cautionary instruction is in error. Welch was entitled to have the instruction but it was never presented to the trial court. Furthermore, it cannot be argued that trial counsel's failure to submit an accomplice instruction was trial strategy. By not offering such instruction, trial counsel did adequately call into doubt the accomplice testimony that was in conflict with Welch's theory of defense. Failure to ask for the instruction was

This Court should reverse and remand this case for a new trial since Welch was not afforded a fair trial based on the fact that the jury was not instructed to view the testimony of Dunklin with

great suspicion and caution.

ISSUE TWO: WHETHER THE TRIAL COURT ERRED WHEN IT OVERRULED THE APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE THE OVERWHELMING WEIGHT OF THE EVIDENCE POINTED TOWARDS THE APPELLANT BEING NOT GUILTY OF THE CRIME OF AGGRAVATED ASSAULT.

A motion for a new trial challenges the weight of the evidence; reversal is only warranted if the lower court abused its discretion in denying a motion for a new trial. ***Dilworth v. State***, 909 So. 2d 731, 737 (Miss. 2005). "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." ***Herring v. State***, 691 So. 2d 948, 957 (Miss. 1997).

A jury verdict will only be disturbed on appeal in exceedingly rare cases. ***Thomas v. State***, 92 So. 225, 226 (Miss. 1922). Despite the standard of review being so high, "this Court has not hesitated to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict." ***Dilworth v. State***, 909 So. 2d 731, 737 (Miss. 2005) (citing ***Lambert v. State***, 462 So. 2d 308, 322 (Miss. 1984)).

The evidence supporting Welch's convictions for aggravated assault is conflicting. None of the State's witnesses were able to conclusively testify that Welch was the shooter on the night in question, simply that he was a passenger in the vehicle. The sole testimony was that Welch was seen in the car. This does not conflict with Welch's theory of defense. Moreover, defense witnesses testified to concrete differences. Barnett testified that the bald-headed man, alleged to be Adam Lemay, and Welch switched places before the shooting occurred. (Tr. 167)

In ***Edwards v. State***, 736 So. 2d 475 (Miss. Ct. Ap. 1999), this Court concluded that because a crime's only eyewitness could not conclusively testify that the defendant was the culprit, the overwhelming weight of the evidence did not support the defendant's conviction, and warranted a new trial. ***Id.*** at 486.

In the instant case, the evidence was similarly conflicted and presented no clear picture of who did the shooting. That Welch was sitting in the passenger seat prior to the shooting provides no direct evidence of Welch being the shooter. The sole conclusive evidence of the Appellant's guilt comes from a co-conspirator and co-indictee. This testimony, as noted above, should be viewed with a significant amount of skepticism and does not support, when taken in consideration of the other evidence presented at trial, a guilty verdict.

Because the verdict is against the overwhelming weight of the evidence, this honorable Court should reverse Welch's conviction and remand for a new trial.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on three charges of aggravated assault, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from

custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

For Michael Eugene Welch, Appellant

BY: _____

JUSTIN T. COOK

MISSISSIPPI BAR NO [redacted]

CERTIFICATE OF SERVICE

I, Justin T. Cook, Counsel for Michael Eugene Welch, 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 **BRIEF OF THE APPELLANT** to the following:

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This the 18th day of December, 2009.

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