IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TOMMY WHITE — APPELLANT

VS. — NO. 2009-KA-1155

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TOMMY WHITE **APPELLANT**

vs. **CAUSE No. 2009-KA-01155-SCT**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Yalobusha County, Mississippi in which the Appellant was convicted and sentenced for his felony of **FELON IN POSSESSION OF A FIREARM**.

STATEMENT OF FACTS

The Appellant had an argument with one Tony Buckley on 5 August 2008 on a public street in the town of Oakland. The argument might have lasted two minutes. Buckley left the scene and went to his residence. Some time later, Buckley's live - in girlfriend, Amanda Anderson, received a telephone call from a relative of some description of the Appellant's. This person told the Appellant or his girlfriend that the Appellant had armed himself with a baseball bat and a shotgun and that the Appellant was on his way to the Appellant's residence.

The Appellant arrived at Buckley's home about five minutes after the telephone call. The

Appellant walked by Buckley's home some three times. Buckley could see that the Appellant had something sticking out of the back of his shirt, but could not say what the object was. The Appellant also had something inside a sleeve of his shirt, but Buckley could not say what that object was either. Buckley's girlfriend was frightened and rang the police department. (R. Vol. 2, pp. 73 - 81).

Buckley's girlfriend testified. She stated that she received a telephone call from her sister, who is the Appellant's niece. Buckley's girlfriend's sister told her about the argument between the Appellant and Buckley had armed himself with a bat and a gun. The appellant's intention was to shoot Buckley. In due course the Appellant showed up at Buckley's residence. There was something "weird" about his left side. There was something stuck inside the Appellant left sleeve.

The Appellant walked back and forth. There were children playing outside, and Buckley's girlfriend was concerned for them. She left the house, got the children out of harm's way, and went to the town police department. She heard the Appellant telling people that he was going to blow this n_____'s chest off. (R. Vol. 2, pp. 82 - 93).

Paul Thomas, an officer with the Oakland police department on 5 August 2008, was assisting the chief of police of the town of Oakland on the evening of that day at a meeting of the board of aldermen. Amanda Anderson came into the meeting and said she wanted to speak with an officer. She spoke to the chief of police, but Thomas was present. She reported the threat made by the Appellant against Buckley.

Based upon this report, Thomas and his chief went to the area described by Anderson. They saw the Appellant in that area. He was standing in front of a residence belonging to a Denise Bradford. The Appellant was known to the officers. Thomas asked the Appellant to come over to speak with him and the chief. The Appellant hesitated a moment and then ran off.

Thomas and the chief gave chase. The Appellant fell down on to a driveway. As he did so,

Thomas heard something hit the driveway that sounded like it might have been a weapon. Thomas drew his weapon; by that time, the Appellant was back on his feet and running. At that point, the chief took the lead in the chase.

As the Appellant reached the side of a Troy White's house, the chief caught up with the Appellant. The chief yelled to Thomas to come up, that he needed assistance since he felt what he thought was a gun barrel beneath the Appellant's clothing. After the Appellant was finally subdued and placed in manacles, the officers found a shotgun in the area where the chief and the Appellant had their first encounter. The shotgun was a "sawed off" shotgun. Five shotgun shells were found in the Appellant's pockets. (R. Vol. 2, pp. 94 - 107).

Russ Smith, the chief of police of the town of Oakland, testified. He stated that he was attending a meeting of the board of aldermen of the town when Amanda Anderson and Mrs. Emma Jean Anderson approached him. They told him that there was trouble in the alley, that the Appellant had a gun and had threatened to kill Buckley because Buckley had a red hat on his dashboard. Chief Smith and Thomas then left the meeting to find the Appellant.

When they arrived in Spruce Street, in front of Denise Bradford's trailer, they espied the Appellant. He was standing there in the street, or alley as the case may be, dressed in shorts, a long-sleeved shirt and a black jacket, a bandana and a pair of sun glasses. Smith also noticed that there was a bulge in the Appellant's sleeve and that the Appellant had a shotgun barrel in his right hand. Thomas told the Appellant that he wanted to talk to him; the Appellant ran off.

While the Appellant was running, he tripped and fell. Smith saw the shotgun fall out of the Appellant's hand. The Appellant picked the gun up, picked himself up, and continued running. Smith chased the Appellant and caught up with him at the corner of Troy White's trailer. Smith grabbed the Appellant by the shoulder and spun him about. The shot gun went between Smith's vest

and stomach. Smith fought to get the gun away from the Appellant. Smith got control of the gun and threw it to the side. The Appellant ran off again but was finally captured.

The shotgun was a twelve gauge shotgun. Five shells were found in the Appellant's left - hand pocket. Smith saw no reason to try to obtain fingerprints from the gun since he had seen it in the Appellant's possession and had, in fact, relieved the Appellant of the gun. (R. Vol. 2, pp. 107 - 116).

The defense presented a case - in - chief, beginning with a Denise Bradford. She said she did not speak to the Appellant on the evening of 5 August 2008. She said she did see him on that evening, though, and she did not see a weapon on his person. But she did state that the Appellant was wearing a coat when she saw him, notwithstanding the time of the year, and that she did not know if the Appellant had put a gun up a sleeve. (R. Vol. 2, pp. 124 - 127).

Dantino Bradford saw the Appellant on the evening of 5 August 2008 and spoke to him too. He did not notice a gun in the Appellant's sleeve. Bradford stated that the Appellant was wearing a jacket and admitted that the wearing of a jacket in August in Mississippi was a peculiar thing to do. He admitted that a person wearing a jacket in August in Mississippi might be trying to hide something, but then he was also of the view that it might be just someone's idea of stylish dress. It so happened that the police showed up when he was talking to the Appellant. The Appellant did run away at that point. Bradford, himself a convicted felon, ran into his residence. He ran because he was under the impression that he was not to be talking with other convicted felons. Bradford admitted that he could not say that the Appellant did not have a gun, only that he did not see one on the Appellant. (R. Vol. 2, pp. 128 - 131).

The Appellant's brother testified. He said he had never seen the shotgun taken from the Appellant by Smith before, that the Appellant did not have that gun or any other gun on 5 August

2008, and that he would have know it if the Appellant had been in possession of the gun. However, the witness admitted that he did not know what his brother did every minute of the day and could not know whether the Appellant had the gun. The witness was sure, though, that the gun was not at his mother's house. The witness was sure that the Appellant did not have possession of the gun because he never saw the gun in his mother's house. He admitted that the Appellant might have kept the gun somewhere else. (R. Vol. 2, pp. 132 - 136).

The Appellant's mamma then testified. She stated that the Appellant did not live with her but lived in another house that belonged to her. She knew the Appellant never had possession of the shotgun because she never saw it in the house the Appellant lived in. She too, though, admitted that she was not with the Appellant every minute of the day, and she also admitted she did not know whether the Appellant had the gun, only that she had not seen it in his possession. She denied having called Amanda Anderson to tell her that the Appellant was armed and dangerous and was coming to kill somebody. (R. Vol. 2, pp. 136 - 140).

LaToya Anderson, Amanda Anderson's sister, then testified. She said she did not call her sister about the Appellant on the evening of 5 August 2008. (R. Vol. 2, pg. 141; Vol. 3, pg. 142).

The Appellant then testified. He said he had not seen the shotgun before trial. He said that his fingerprints were not on the gun because he never possessed the gun.

As for how he came to be charged with possession of the gun, the Appellant said he had been walking by his auntie's house, intending to visit his auntie and get a soda pop. He passed Buckley and another person, and Buckley asked him who he was looking at. According to the Appellant, he did not say anything to Buckley, even though Buckley continued to nag him. The Appellant said he just continued walking in the street.

The Appellant said he was wearing two shirts. One had long sleeves. He was also wearing

a pair of grey short pants and a pair of Nike shoes. The Appellant denied having had the shotgun up his sleeve. He admitted that he was a convicted felon but that he did not like being around guns.

The Appellant ran from the officers because he thought his life was in danger. According to the Appellant, the officers had "messed" with him before by arresting him after "planting" a pellet gun on him, which resulted in forty days of jail. The Appellant again denied having been in possession of the shotgun.

The Appellant thought the Oakland police had been harassing him since 2001, most likely because of the way he dressed. He admitted, though, that he had never been arrested for the way he dressed. The Appellant figured that the police chief committed perjury because he was out to get him. The Appellant thought the others who testified for the State also committed perjury. He thought Buckley and Anderson did not like him.

He thought he got charged on 5 August 2008 because he had tried to stay out of their way. He admitted that that did not make sense, but then, according to the Appellant, much of what was testified to by the State's witnesses did not make sense to him. He then decided that no one liked him because he did not speak to people and because of the way he dressed.

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR BY ADMITTING INADMISSIBLE HEARSAY INTO EVIDENCE?

2. WAS THE VERDICT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT COMMIT ERROR BY ADMITTING INADMISSIBLE HEARSAY TO EVIDENCE; THAT, IN THE EVENT THAT THIS COURT SHOULD FIND THAT THE TRIAL COURT DID COMMIT ERROR IN THE ADMISSION OF HEARSAY TESTIMONY, ANY SUCH ERROR IS HARMLESS

2. THAT THE VERDICT IS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

ARGUMENT

1. THAT THE TRIAL COURT DID NOT COMMIT ERROR BY ADMITTING INADMISSIBLE HEARSAY TO EVIDENCE; THAT, IN THE EVENT THAT THIS COURT SHOULD FIND THAT THE TRIAL COURT DID COMMIT ERROR IN THE ADMISSION OF HEARSAY TESTIMONY, ANY SUCH ERROR IS HARMLESS

In the First Assignment of Error, the Appellant asserts that the trial court committed error by allowing the witness Buckley to testify to a statement made by Amanda Anderson's niece to Anderson to the effect that the Appellant was armed with a shotgun and a baseball bat and was coming to Buckley's residence. The Appellant further alleges error in the admission of similar testimony through the witness Anderson.

In the course of the direct testimony of Buckley, the prosecutor asked Buckley whether Anderson's niece had called Buckley or Anderson. When Buckley testified that there was such a call, the prosecutor asked Buckley to relate the substance of the call. There was an objection on hearsay grounds. The prosecutor, in response, cited the excited utterance and present sense impression exceptions set out under M.R.E. 803. The trial court thereupon overruled the objection. (R. Vol. 2, pp. 75 - 76).

In the course of Anderson's testimony, the prosecutor asked Anderson whether she had received a telephone call. She responded that she had received one from her sister. Anticipating that the prosecutor was then going to ask Anderson to relate the substance of that call, the defense lodged another objection based on hearsay grounds. The prosecutor asserted the same exceptions as asserted previously with respect to Buckley's testimony. In this instance, though, the court indicated that it was going to sustain the objection. The prosecutor then stated that the proposed testimony was already before the jury. The court thereupon overruled the objection. Anderson went on to testify

that the Appellant was armed with a shotgun and a baseball bat and that he was coming to Buckley's residence. (R. Vol. 2, pp. 84 - 85).

During cross - examination, Anderson indicated that her sister did not live close to the Appellant. Her sister got her information from her cousin and an aunt. (R. Vol. 2, pp. 90 - 91)

Anderson's sister subsequently denied having made any such call. (R. Vol. 2, pg. 141).

In the motion for a new trial, the Appellant asserted that the admission of the statement testified to by Anderson was sufficient a ground for a new trial. However, he did not allege the same with respect to the statement testified to by Buckley. (R. Vol. 1, pp. 32 - 33). The trial court overruled the Appellant's motion for a new trial and, with respect to the allegation regarding the statement, held that, if it was error to have admitted the statement testified to by Anderson, any such error was "harmless error". (R. Vol. 1, pg. 43).

As we have said above, during Buckley's examination, the prosecutor asserted that the statements were admissible either as a present sense impression or an excited utterance under M.R.E. 803(1) and (2). As for the present sense impression exception, there was no testimony to demonstrate that the statement was made while the declarant was perceiving what she was reporting, or that she made the statement immediately after having perceived it. On the other hand, it would be a reasonable inference to make that the statement was made to Anderson or Buckley immediately after Anderson's sister perceived the Appellant's actions and intention. Anderson's sister called Anderson to report that the Appellant was armed and was coming to Buckley's residence. Shortly thereafter, the Appellant appeared. We submit that this fact was sufficient to show the spontaneity of the statement and that the statement was made either at the time of perception or immediately thereafter.

To the extent that Anderson's sister may not herself have seen or heard the Appellant, this

fact, if a fact, is of no consequence. It was not known, at the time Buckley testified, that Anderson's sister may have been simply relaying information she heard. Once there was testimony to suggest this, the Appellant did not move to strike Buckley's testimony and to have the jury admonished to ignore it.[1] Indeed, no complaint was raised about Buckley's testimony even at the time of the motion for a new trial. Buckley testified as to the statement. That was before the jury and no effort was made to strike his testimony on the point in light of anything Anderson testified to. Consequently, regardless of what defects may have existed with Anderson's testimony, the same testimony was already before the jury through Buckley. Any error on the part of the trial court in permitting Anderson to testify on the point is harmless since Anderson's testimony was merely cumulative of Buckley's. *Anthony v. State*, 23 So.3rd 611, 620 (Miss. Ct. App. 2009).

While the prosecutor did not attempt to explore whether the statement was made while Anderson's sister was perceiving the event, or immediately after having perceived the event, the small amount of time between the call and the Appellant's appearance at Buckley's residence demonstrates this.

As for the excited utterance exception, the prosecutor did not elicit testimony as to the degree or nature of stress of excitement of the declarant. We submit, however, that the fact that the declarant knew of what the Appellant was intent upon doing was enough to permit an inference that the declarant made the telephone call to her sister while under such stress.

In the event that this Court should find that the trial court committed error in allowing the

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[1] During Anderson's direct examination, the witness indicated that someone else had told her about the difficulty between Buckley and the Appellant. The defense objection on "double hearsay" grounds. This was sustained. The prosecutor, of the view, apparently, that the witness' knowledge of what the Appellant said and did was but one level of hearsay, guided the witness by subsequent questions to testify as to what she had been told by her sister.

statement into evidence, any such error should be considered harmless. The chief of police saw the Appellant in possession of the shotgun, and the shotgun was found at or quite near the point where the chief disarmed the Appellant. The Appellant was in possession of five shotgun shells, a strange thing indeed if indeed he had no shotgun. The Appellant's testimony was simply incredible and self - serving. The statement testified to by Anderson was not necessary to the conviction, and the jury would have certainly convicted the Appellant had it not been permitted into evidence. The Appellant was a felon, as he himself admitted, and he was in possession of a firearm. What his reasons were for having the shotgun were largely irrelevant. That he had a firearm and was a convicted felon were the operative facts, and nothing about the statement made to Buckley or his girlfriend affected those facts.

It may be that the Appellant presented witnesses to say that they did not see the Appellant with a gun, but, for reasons detailed below, the testimony of these witnesses was hardly compelling. Because the statement testified to by Buckley and Anderson was not critical to the State's case, because the evidence properly admitted was more than sufficient to demonstrate the Appellant's guilt, any error in the admission of that statement is harmless. *Edwards v. State*, 856 So.2d 587 (Miss. Ct. App. 2003).

The Appellant also suggests that no witness had personal knowledge of the statement. By this he means that no witness heard the "actual" declarant state that the Appellant was armed and was coming to Buckley's residence. There was no objection on this ground at trial. It may not be raised here. *Doss v. State*, 709 So.2d 369, 379 (Miss. 1996).

The Appellant points out that the trial court, in its Order denying relief on the motion for a new trial, held that it was harmless error at most, if it had been error to admit the statement. The Appellant asserts that he can find no authority which would permit a trial court to regard a putative

error committed by it as harmless error.

We submit that a trial court has the inherent authority to consider whether an error said to have been committed by it is harmless, if error, and so rule. The harmless error doctrine is a practical, common sense doctrine. Where an error may be safely said to have resulted in no prejudice to an accused, a conviction will not be reversed. A reversal of a conviction for reason of an error in the admission of evidence will only occur where there is error and where prejudice is shown. *Gray v. State*, 799 So.2d 53, 61 (Miss. 2001). Perfectly tried cases are relatively rare things, and it would be unreasonable and a waste of time and money to require a new trial in any case in which some error could be shown to exist, without regard to whether the error was harmful.

While it may be that the harmless error doctrine is most often seen appellate cases, the reason for the existence of the harmless error doctrine is no less applicable at the trial level than at the appellate level. If a trial court in a criminal case should find or suspect that an error occurred in the course of a trial, but that the error, if error, did not prejudice the accused, then no good purpose would be served in ordering a new trial. There is no reason in the world, and certainly no reason suggested by the Appellant, why a trial court would commit error in considering whether a putative error was harmless. Since a finding by a trial court that an alleged error was harmless would be reviewable here, it is difficult to see how it would be prejudicial to an accused to do so. A trial court would not in any way usurp this Court's authority by such a finding since that finding would in no way bind this Court.

The First Assignment of Error is without merit.

2. THAT THE VERDICT IS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

In the Second Assignment of Error, the Appellant alleges that the verdict is contrary to the

great weight of the evidence. We bear in mind the standard of review appurtenant to such a claim. *May v. State*, 460 So.2d 778 (Miss. 1984).

The Appellant was shown to have been a convicted felon. It was further clearly shown that the chief of police saw the Appellant in possession of a shotgun and that he in fact disarmed the Appellant. The State's evidence clearly showed the Appellant guilt under Miss. Code Ann. Section 97-37-5. Nonetheless, the Appellant would have this Court find that the verdict constitutes an unconscionable injustice because the Appellant testified that he did not have a shotgun and that his witnesses testified that they did not see the Appellant with the shotgun.

That the Appellant testified that he did not have a shotgun is not surprising, yet the most his testimony did was to create an issue of fact for the jury to resolve. As for the Appellant's witnesses, their testimony was simply that they did not see the Appellant with a shotgun. Since the Appellant had the gun in one of his sleeves, this testimony does not amount to very much. The Appellant's mother and brother admitted that the Appellant might very well have had the gun hidden somewhere, without their knowledge.

The Appellant could give no credible reason why the police chief would have committed perjury. The Appellant stated variously that the chief might have disliked the Appellant on account of the way he dressed, or it might have been because he was not liked. At one point in the testimony, the Appellant admitted that his notions in this regard did not make much sense. He tried to explain that by saying that nothing about the case made sense to him.

There was nothing about the testimony from the defense that put the State's evidence into serious question. There is nothing in this record that might be reasonably thought to put the police chief's testimony into significant doubt. The simple fact is that the Appellant was in possession of a sawed off shotgun and that he was at the time a convicted felon.

The Appellant then goes on again to attack Anderson's testimony. Whether Anderson's testimony was believable was a matter for the jury to decide. It seems of little significance to us, though, considering the fact that it is what the chief of police testified to that sealed the Appellant's fate. Why the Appellant had the shotgun was of no importance here, really, save perhaps to explain why the police were looking for him. What is of significance is that the Appellant, for whatever reason or no reason, had a shotgun. Since he was a convicted felon he was not permitted to possess the weapon.

The Second Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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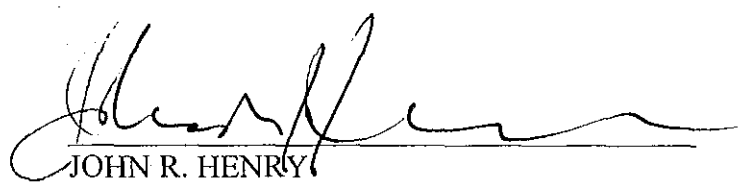
This the 4th day of February, 2009.



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