IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TOMMY WHITE **APPELLANT**

V. **NO. 2009-KA-1155-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. Tommy White, Appellant
3. Honorable John W. Champion, District Attorney
4. Honorable Jimmy McClure, Circuit Court Judge

This the 4th day of November, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Hunter N Aikens
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

I. **THE TRIAL COURT ERRED IN ALLOWING INADMISSIBLE HEARSAY EVIDENCE THAT PREJUDICED WHITE'S DEFENSE.**

II. **THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Yalobusha County, Mississippi, and a judgment of conviction for possession of a firearm by a convicted felon, entered against Tommy White following a jury trial held on May 18-19, 2009, the Honorable James McClure, III, Circuit Judge, presiding. (C.P. 27, 30-31, Tr. 179, R.E. 3-5). The trial court adjudged White a habitual criminal pursuant to Mississippi Code Annotated Section 99-19-81, sentenced him to serve a term

of ten (10) years in the custody of the Mississippi Department of Corrections, and ordered him to pay a fine in the amount of $1,000. (C.P. 35-36, Tr. 199-201, R.E. 6-8). The trial court denied White's motion for judgment notwithstanding the verdict or, alternatively, motion for new trial. (C.P. 32-34, 43-44, Tr. 184-88, R.E. 9-13). White is presently incarcerated and now appeals to this Honorable Court for relief.

STATEMENT OF THE FACTS

On August 5, 2008, Tony Buckley ("Buckley") and Roger Smith ("Smith") were parked outside of B.J.'s corner store when Tommy White ("White") walked past them on the way to his aunt's house. (Tr. 144). Buckley asked White what he was looking at, and White did not respond. (Tr. 144). Buckley kept nagging White, but he (White) walked away, "up by [his] mama's house, by [his] garage, [and] then [he] just started walking, walking the street." (Tr. 144).

According to Buckley, he got into an argument with White, which lasted "about two minutes;" no fists were thrown, and White did not threaten Buckley. (Tr. 73-5, 78). Buckley then went to his house. (Tr. 75).

At trial, Buckley was allowed to testify, over objection, that later that evening, his girlfriend, Amanda Anderson ("Anderson"), answered the phone at Buckley's house and the caller told Anderson "that [White] came home and got a baseball bat and a shotgun and was coming back around there to my house [Buckley's house]." (Tr. 75-76). Anderson was also allowed to testify, over objection, to this phone call. (Tr. 83-85). Anderson claimed that the caller was her sister, LaToya Anderson ("LaToya"), and LaToya told her that she (LaToya) received a call "from up about where [White] stay at," and the caller told her (LaToya) that White "was going to come over [to Buckley's house] and shoot." (Tr. 83-85). Anderson testified that LaToya said that she got this information from "her cousin and an aunt." (Tr. 91). However, LaToya testified that she did not

make any such call to Anderson. (Tr. 142).

Buckley and Anderson later noticed White walking up and down the street near Buckley's house. (Tr. 76, 78, 85). Buckley testified that White was wearing the same clothes he had on during the argument--"something with long sleeves"--and he saw something in White's sleeve but could not tell what it was. (Tr. 77, 78). Anderson claimed that "something was weird about his left side." (Tr. 86). She also claimed that she heard White tell someone that "he was fixing to blow this ni****'s chest off." (Tr. 87). However, this claim did not appear in Anderson's statement to police. (Tr. 89-90).

Anderson left the house and went to the Oakland Town Hall; which was located less than a mile away from Buckley's house. (Tr. 77, 87, 96, 109-10). There, she reported the situation to Chief Russ Smith ("Chief Smith") and Officer Paul Thomas ("Officer Thomas"), of the Oakland Police Department, and the officers went to Buckley's house right away. (Tr. 87-88, 95-97, 109-10).

Upon their arrival, the Officers saw White standing on Spruce Street in Denise Bradford's trailer wearing shorts and long sleeves; Chief Smith claimed that White was also wearing a black jacket. (Tr. 96-98, 110). Officer Thomas testified that it was dark outside and he did not notice anything unusual about White when he first saw him. (Tr. 98). However, Chief Smith claimed that he saw "a bulge in [White's] sleeve" and also saw "the barrel of the shotgun" in White's right hand. (Tr. 110).

Officer Thomas asked White to come talk to him and exited the vehicle. (Tr. 97, 110-11). According to the officer's testimony, White hesitated for a moment and then ran behind Bradford's house, toward Troy White's house; Officer Thomas and Chief Smith chased White. (Tr. 97-98, 110-11). The officers testified that White fell in Troy White's driveway. (Tr. 98, 111). Officer Thomas claimed that he "heard a noise;" he also testified that "he heard "something hit the ground" and

"based on [his] training and experience, [it] sounded like [it] would be a weapon." (Tr. 98-99). Officer Thomas admitted that he never saw a gun in White's possession. (Tr. 102). Chief Smith did not hear any such noise, but he claimed to see the shotgun. (Tr. 88, 111-12). Officer Thomas then stopped and drew his weapon, White continued running, and Chief Smith chased White around the side of Troy's White's house, where he (Chief Smith) caught up with him. (Tr. 99, 112). According to Chief Smith, he grabbed White and spun him around, at which point, "the shotgun went between [his] vest and his stomach." (Tr. 112-13). Chief Smith testified that he wrestled the gun away, and threw it aside, and White got loose and ran again. (Tr. 112-13).

The officers ran White down and handcuffed him a short distance away, in Troy White's back yard. (Tr. 99-100, 113-14). As the officers walked White to the car, they allegedly picked up the gun near the side of Troy White's house. (Tr. 100, 114). The officers also allegedly found five shotgun shells in the front pocket of White's shorts. (Tr. 101, 114, Ex. 3). The shotgun was not loaded. (Tr. 104, 117). The gun was not tested for fingerprints. (Tr. 116, 118).

White testified at trial and called five other witnesses to testify on his behalf. White testified that he did not possess the firearm in question, and he had never seen the gun until the day of trial. (Tr. 143). White explained that Buckley and Roger Smith were parked outside of B.J.'s when he walked past them on the way to his aunt's house. (Tr. 144). Buckley asked White what he was looking at, and White did not respond. (Tr. 144). Buckley kept nagging White, but he (White) walked away, "up by [his] mama's house, by [his] garage, [and] then [he] just started walking, walking the street." (Tr. 144). White testified that it is not unusual for him to walk the street. (Tr. 144).

White testified that he was wearing two shirts, a t-shirt and a long sleeve Nike shirt. (Tr. 144). He testified that he was not wearing a jacket on the day in question. (Tr. 145). White stated

that he did not like guns, he does not carry weapons, and he did not have any kind of weapon on the day in question. (Tr. 145).

White testified that he was standing outside talking to Dantino Bradford when the officers pulled up, and he explained that he ran because the police have been harassing him for years because of the way he dresses and the police previously charged him with possession of a firearm after they found a broken pellet gun in a pile of junk in his garage. (Tr. 146-48, 153-54). White testified that he had no idea where the gun at issue came from, and pointed out that his fingerprints were not recovered from the gun. (Tr. 150-51).

Dantino Bradford testified that he was talking to White at the time the police pulled up, and he never saw a gun in White's possession. (Tr. 128-29). Denise Bradford testified that she saw White from only seven or eight feet away at the time and she also did not see a weapon on him. (Tr. 124-25).

Troy White, the defendant's brother, testified that he would know if White had a gun, and he had never seen the gun at issue before the day of trial. (Tr. 133-34). Mattie White, the defendant's mother, testified that she lived right next to White, and she had never seen any gun in White's possession. (Tr. 138). Mattie also testified that she and White "talk about[] stuff like that," and she would know if White possessed a gun. (Tr. 138). Mattie also testified that, on the evening in question, she was at church, and she did not make any kind of phone call to Anderson or anyone else saying that White was armed and/or coming to Buckley's house. (Tr. 138-39).

As stated above, LaToya Anderson, Amanda Anderson's sister, testified that, on the evening in question, she was at work and did not make a call to Anderson saying that White was armed and/or coming to Buckley's house. (Tr. 142).

SUMMARY OF THE ARGUMENT

The trial court erred in allowing inadmissable hearsay testimony from both Buckley and Anderson regarding an alleged phone call that Anderson received claiming that White had grabbed a gun and was coming over to Buckley's house. Buckley and Anderson's testimony as to this phone call contained multiple layers of hearsay, and the actual declarant of the statement that White was coming to Buckley's house with a gun was not even specifically identified. Further, no witness had any personal knowledge regarding the making of this statement. In fact, even the identity of the caller was unclear. Anderson claimed that the caller was her sister, LaToya, and LaToya told Anderson that she received a call from another person, who told her (LaToya) that White was coming to Buckley's house with a gun. However, LaToya testified that she did not make any such call to Anderson.

Buckley and Anderson's testimony as to this statement contained multiple layers of hearsay, and was clearly inadmissible. The trial court acknowledged as much in its order denying White's motion for a new trial; however, the trial court itself deemed it's own error harmless.

White's theory of the case was that he did not possess the gun; therefore, Buckley and Anderson's hearsay testimony that White was coming to Buckley's house with a gun prejudiced his defense. Because there is a reasonable possibility that this evidence could have contributed to the jury's verdict, the error was not harmless. Accordingly, the trial court erred in admitting this testimony and White respectfully submits that he is entitled to a new trial.

Additionally, the verdict was against the overwhelming weight of the evidence. Of all the State's witnesses, including Officer Thomas, only one witness, Chief Smith, testified as to actually seeing a gun in White's possession. Numerous other witnesses, including White himself, testified that White did not have a gun on the evening in question. Furthermore, Anderson's testimony was unreliable as she claimed that LaToya called her and told her that someone told her that White was

coming to Buckley's house with a gun, while LaToya testified that she did not even call Anderson on the evening in question. Also, there was no evidence that White's fingerprints were on the gun.

Because the overwhelming weight of the evidence tends to show that White did not possess the gun, White respectfully submits that he is entitled to a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING INADMISSIBLE HEARSAY EVIDENCE THAT PREJUDICED WHITE'S DEFENSE.

At trial, Buckley was allowed to testify, over objection, that Anderson answered the phone at his house and the caller (unidentified by Buckley) told Anderson "that [White] came home and got a baseball bat and a shotgun and was coming back around there to my house [Buckley's house]." (Tr. 75-76). Later, Anderson was also allowed to testify, over objection, that the caller was her sister, LaToya, and LaToya told her that she (LaToya) received a call "from up about where [White] stay at," and the caller told her (LaToya) that White "was going to come over [to Buckley's house] and shoot." (Tr. 83-85). Anderson testified that LaToya told her that she got this information from "her cousin and an aunt." (Tr. 91). However, LaToya testified that she did not make any such call to Anderson. (Tr. 142). Therefore, the caller's identity is unclear and the source of the statement at issue is unknown.

Defense counsel objected to the testimony of both Buckley and Anderson on the grounds of hearsay; the State claimed that the statement was admissible as a present sense impression and/or an excited utterance under Mississippi Rules of Evidence 801(1) and/or 803(2); and the trial court overruled both objections. (Tr. 75-76, 83-84).

White raised this issue in his motion for a new trial. (C.P. 32-34, R.E. 9-11). In the trial court's order denying the motion for new trial, the trial court acknowledges that this testimony was

hearsay. (C.P. 43, R.E. 12-13). However, the trial court went on to deem its own error in admitting the hearsay testimony harmless. (C.P. 43, R.E. 12-13).

From the outset, White submits that he is unable to find any authority for a trial court to deem its own error harmless. To the best of White's understanding, determinations of whether an error is reversible, harmless, plain, etc. . . is a function reserved for the appellate courts of this state. To condone such a practice, would allow trial courts to usurp this Court's function on appeal by preemptively determining that an error made at trial was harmless, thereby insulating such a ruling with the deference afforded to trial court's under the applicable standard(s) of review on appeal.

"This Court reviews a trial court's decision regarding the admissibility of evidence under an abuse of discretion standard of review." *Young v. State*, 987 So. 2d 1074, 1076 (¶8) (Miss. Ct. App. 2008) (citing *Edwards v. State*, 856 So. 2d 587, 592 (¶12) (Miss. Ct. App. 2003)). Reversal is proper where "the error adversely affects a substantial right of a party." *Mingo v. State*, 944 So. 2d 18, 28 (¶27) (Miss. 2006).

Mississippi Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M.R.E. 801(c). Rule 801(a) provides that "[a] 'statement' is (1) an oral or written assertion." M.R.E. 801(a)(1).

The hearsay exceptions relevant to this issue are Rules 803(1) and 803(2), which provide as follows:

> (1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.
>
> (2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

M.R.E. 803(1) and (2).

The statement at issue was buried under multiple layers of hearsay. A statement comprised of multiple layers of hearsay, i.e., hearsay within hearsay, is inadmissible unless "each part of the combined statements conforms with an exception to the hearsay rule." *Jackson v. State*, 962 So. 2d 649, 681 (¶120) (Miss. Ct. App. 2007) (quoting M.R.E. 805); *Jones v. State*, 763 So. 2d 210, 213-16 (¶¶10-17) (Miss. Ct. App. 2000).

In *Jones v. State*, the Mississippi Court of Appeals addressed a very similar issue. *Jones*, 763 So. 2d at 213-16 (¶¶10-17). There, a witness ("bystander1") was allowed to testify as to statements identifying the defendant that the victim allegedly made to another bystander ("bystander 2"), who then told bystander 1, although bystander 1 never heard the victim make the statements. *Jones*, at 211 (¶5). In reversing, the court stated that "what [bystander 1] actually heard about who shot [the victim] came not from the [victim] but from the "other lady" [bystander 2] who in essence acted as a verbal conduit of the dying victim." *Id.* at 215 (¶15).

In the instant case, Anderson was also allowed to testify that the caller, LaToya, told her that she (LaToya) received a call from another person ("her cousin and an aunt") who said that White was coming to Buckley's house with a gun. (Tr. 83-85, 91). Thus, what Anderson actually heard about White coming to Buckley's house with a gun, came not from the actual declarant but from the caller who "acted as a verbal conduit" of the declarant, which was essentially unidentified. Buckley's testimony as to what Anderson told him that the caller said she heard the other person say, added yet another layer of hearsay.

Additionally, no witness had personal knowledge of the statement, i.e., no witness heard the actual declarant make the alleged statement that White was coming to Buckley's house with a gun. Therefore, their testimony was impermissible under Mississippi Rule of Evidence 602. See M.R.E.

602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter); see also M.R.E. 602 cmt. (In order for a witness to testify as to hearsay statements, he must "show that he has personal knowledge regarding the making of the statements.").

Buckley and Anderson's testimony as to the phone call was inadmissible hearsay, and the trial court erred in allowing it. White's theory of defense was that he did not possess a gun. He had two witnesses who were standing very close to him when the police arrived, and both witnesses testified that they never saw a gun in White's possession. Of all the witnesses, only one, Chief Smith, testified that he saw White with a gun. The testimony regarding the phone call was presented to the jury twice, once through Buckley and again through Anderson, neither of which personally saw White possess a gun. White submits that this evidence substantially prejudiced his case, and "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967). Therefore, White respectfully submits that the error is not harmless and he is entitled to a new trial.

II. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (¶18) (Miss. 2005). The evidence is viewed in the light most favorable to the verdict. *Id.* (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss.1997)). This Court "sits as a hypothetical thirteenth juror." *Lamar v. State*, 983 So. 2d 364, 367 (¶5) (Miss. Ct. App. 2008) (citing *Bush*, 895 So. 2d at 844 (¶18)). "If, in this position, the Court disagrees with the verdict of the jury, 'the proper remedy is to grant a new trial.'"

Id.

The verdict was against the overwhelming weight of the evidence, and the trial court erred in denying White's motion for a new trial. White was charged with possession of a firearm by a convicted felon, which required the State to prove "(1) possession of a firearm; (2) by one who has been convicted of a felony." *Short v. State*, 929 So. 2d 420, 427 (¶21) (Miss. Ct. App. 2006); Miss. Code Ann. § 97-37-5(1) (Rev.2006). There was no dispute at trial (and no dispute on appeal) that White was a convicted felon. Therefore, the critical issue was whether White was in possession of a firearm.

The State produced four witnesses: Buckley, Anderson, Officer Thomas, and Chief Smith. At trial, neither Buckley, Anderson, nor Officer Thomas could testify that they saw a gun in White's possession on the night in question. The only witness that claimed to see a gun on White was Chief Smith.

However, White himself testified that he did not have a gun, and he called two eyewitnesses who testified accordingly. Dantino Bradford was talking to White at the time the police pulled up, and he did not see a gun in White's possession. (Tr. 128-29). Denise Bradford also testified that she saw White from only seven or eight feet away at the time and she did not see a weapon on White either. (Tr. 124-25).

White's mother and brother also testified that they would know if he had a gun, and they had never seen the gun in White's possession. (Tr. 133-34, 138). Furthermore, there was no evidence that White's fingerprints were on the gun.

As explained above, the alleged phone call from the unidentified caller stating that White was coming to Buckley's house was inadmissible and prejudicial. While testimony regarding this alleged phone call prejudiced White's defense, it also impeached Anderson's credibility as a witness. To

this end, Anderson testified that her sister, LaToya, was the caller who warned her that someone else told her (LaToya) that White was coming with a gun; however, LaToya testified that she did not make any such phone call on the night in question. (Tr. 142).

Although Chief Smith claimed that he saw the gun in White's possession, the weight of the evidence, discussed above, tended to show that White did not possess the gun. Therefore, the verdict was against the overwhelming weight of the evidence and White is entitled to a new trial.

CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, White respectfully requests that this honorable Court reverse the conviction, sentence and fines entered against him in the trial court and remand this case for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Hunter N Aikens
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Tommy White, 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:

Honorable Jimmy McClure
Circuit Court Judge
Post Office Box 5010
Senatobia, MS 38668

Honorable John W. Champion
District Attorney, District 17
365 Losher Street, Suite 210
Hernando, MS 38632

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 4th day of November, 2009.

Hunter N Aikens
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200