

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-KA-01186-SCT

RODNEY SANDS

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

George T. Holmes, MSB No. [REDACTED]
MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REQUEST FOR ORAL ARGUMENT	1
REPLY ARGUMENT	1
Facts	1
Issue 1	1
Issue 2	3
Issue 3	5
Issue 4	6
Issue 5	6
Issue 6	6
Issue 7	6
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

CASES:

<i>Anderson v. State</i> , 856 So. 2d 650 (Miss. Ct. App. 2003)	4
<i>Byrom v. State</i> , 863 So. 2d 836 (Miss. 2003)	6
<i>Gary v. State</i> , 11 So. 3d 769 (Miss. Ct. App. 2009)	2
<i>Goodyear Tire & Rubber Co. v. Brashier</i> , 298 So. 2d 685 (Miss. 1974)	5
<i>Martin v. State</i> , 818 So. 2d 380 (Miss. Ct. App. 2002)	2, 3
<i>Masonite Corporation v. Hill</i> , 170 Miss. 158, 154 So. 295 (1934)	4, 5
<i>McGee v. State</i> , 820 So. 2d 700 (Miss. Ct. App. 2000)	6
<i>Palm v. State</i> , 748 So. 2d 135 (Miss. 1999)	5
<i>Phillips v. State</i> , 794 So. 2d 1034 (Miss. 2001)	5
<i>Scott v. State</i> , 446 So. 2d 580 (Miss. 1984)	6

STATUTES

none

OTHER AUTHORITIES

<i>Black's Law Dictionary</i> , (8th Ed.)	4
Miss. R. App. Proc. Rule 34	1
Miss. R. Evid. 404(b)	6

REQUEST FOR ORAL ARGUMENT

Pursuant to M. R. A. P. Rule 34, Appellant respectfully requests oral argument, because, the evidence suggestively supporting the guilty verdicts is so lacking that to allow Rodney Sands' convictions to survive appellate review would amount to a miscarriage of justice. Oral argument is also requested, because, the trial court concluded it was compelled to give a jury instruction which it found to be confusing to the jury.

REPLY ARGUMENT

Facts:

The state strayed from the testimony when it asserted that, “[d]efendant Sands, joined in the fray.” [State’s Brief p. 3]. There is no testimony or other evidence to support this statement.

Issue No. 1: Lack of Sufficiency Requiring Directed Verdicts

The charges against Rodney Sands should never have gone to the jury. The state rests its entire argument under this issue on Jason McNair’s stating, “I seen him [Rodney Sands] with his gun” and “[i]t was pointed.” [T. 309]. McNair did not say in what direction the purported gun pointed. To conclude that any weapon Rodney might have had was pointed towards the Pontiac requires rank speculation.

The pertinent testimony in quoted below:

Q. ... I never heard you once say you saw Rodney Sands fire his gun?

A. I seen him with his gun.

Q. Did you – you say you saw him with a gun, but did you ever see him fire a gun?

A. It was pointed.

Q. I didn't ask that. Did you ever see him shoot the gun?

A. No, sir. [T. 309-10].

The state cites *Gary v. State*, 11 So. 3d 769, 772-73 (¶10-11) (Miss. Ct. App. 2009), as comparable authority. Yet there are glaring differences between *Gary* and Rodney Sands' case. In *Gary*, the court found the evidence to be legally sufficient to support a conviction of manslaughter by culpable negligence. *Id.*

Contrary to the present case, Gary admitted shooting a nine millimeter pistol in a fight with the victim. *Id.* There is no admission or other reliable evidence in this case that Rodney Sands used any weapon that he might have had to commit a crime or further any offenses being committed by his co-defendant.

The state also argues, under *Martin v. State*, 818 So. 2d 380, 382 (¶8) (Miss. Ct. App. 2002), that the use of a deadly weapon supplies the necessary grist for finding heat of passion for Rodney Sands' manslaughter conviction. But the state misreads *Martin*, particularly where court stated, “[w]e conclude that the *use of* a knife to stab the victim to death, *if found to have been done in the heat of passion* without malice and not in necessary self-defense, would be sufficient evidence to convict of manslaughter through the use of a deadly weapon without the necessity of a specific finding that the stabbing was undertaken in a cruel or unusual manner.” [Emphasis added.].

“Use of” being the operative language for the Court in *Martin*, begs the question, how did Rodney Sands use the alleged weapon here? That is a question that neither the jury nor this Court can answer, based on the evidence. To attempt an answer, again, requires an exercise in speculation and conjecture. The only conclusion that the evidence supports is that Rodney Sands was merely present at the scene of the crime.

Issue 2: The Verdicts Lack Evidentiary Support

A rendering of acquittal is required here, or at a minimum, a new trial for Rodney Sands. The state said in its brief, “[t]here was evidence that two men almost independently committed these crimes simultaneously. [State’s Brief 10]. Yet there is not the slightest crumb of evidence that Sands acted independently, or in conjunction with his co-defendant, to commit any act which proximately resulted in the death of either victim nor the shooting of Jason McNair. In fact, as pointed out in Sands initial brief, there is a likelihood that McNair’s shooting caused the death of Randolph Sands and Roberto McInnis, remembering that it is an undeniable fact that McNair was shooting a pistol, even though he misrepresented this to the trial court and jury under oath. [Sands’ Brief p. 19].

In trying to explain why there were no spent shells on the spot where Rodney Sands was crouched behind his car, the state asserts that the court and jury could conclude that Sands was using a revolver. [State’s Brief p. 9]. This flawed suggestion requires yet

another leap of judgement not based in the evidence.

Under this issue the state cites *Anderson v. State*, 856 So. 2d 650, 652-53 (Miss. Ct. App. 2003); but, *Anderson* does not compare. The testimony in *Anderson* was overwhelming. Anderson had a Glock 9mm pistol. *Anderson* (§6) p. 652. He pulled the gun out of his pants after getting knocked down in a nightclub. *Id.* A witness saw “fire” coming from the muzzle of Anderson’s gun. Spent shell casings matched Anderson’s Glock. *Id.* The evidence supporting the verdict in *Anderson* was definitive and concrete. Here, the evidence, is just the opposite.

What the state asks the Court to do under both issues 1 and 2 is to decide this case based on inferences which are themselves the product of inferences. Adjudication of facts based on an inference-on-inference approach is allowed in Mississippi on a very protracted and extremely cautious basis. *Masonite Corporation v. Hill*, 170 Miss. 158, 154 So. 295 (1934).

Black’s Law Dictionary, (8th Ed.), defines “inference” as,

1. A conclusion reached by considering other facts and deducing a logical consequence from them. 2. The process by which such a conclusion is reached; the process of thought by which one moves from evidence to proof.

In *Masonite v. Hill*, *supra*, the Mississippi Supreme Court stated:

we must, in allowing inference upon inference, do so with the firm limitation that the probabilities thereby permitted to be entertained are safe and dependable probabilities, measured by legal standards, for they involve more than the simple and generally unimportant affairs of everyday life; they involve in court procedure the liberty and property of others.

Obviously every inference drawn from another inference produces a result wherein the quality of probability becomes weaker and sooner or later a stage is reached when serious doubt arises whether, under legal standards, the ultimate inference in the chain of inferences is a legally safe and dependable probability or has become only a more or less strong possibility, and, when that stage is reached, the proof is insufficient, so far as concerns judgments at law. 154 So. at p. 298.

See also *Goodyear Tire & Rubber Co. v. Brasher*, 298 So. 2d 685, 688 (Miss. 1974).

In *Palm v. State*, 748 So. 2d 135, 142-43 (Miss. 1999), the Supreme Court reversed a grand larceny conviction based on admission of defendant's confession to unrelated crimes. Palm did not confess to the theft charge being tried. The *Palm* court found that admission of other thefts might have created an inference of guilt, but to base the conviction on an inference upon that inference was reversible error. *Id.* The *Palm* court found there was no basis in Palm's confession of other thefts which supported a fair inference of admission of guilt on the charge being tried. The *Palm* court said, "[t]o find otherwise would be to place inference upon inference to reach a conclusion." The reasoning in *Palm* appears to control the Court's analysis of the present case.

Issue No. 3: The Aiding and Abetting Instruction

S-9 was improper for two reasons, and the state failed to offer convincing argument otherwise. Rodney Sands respectfully asks to the Court to apply the principle that, "[a]n instruction must not be given to the jury if there is no evidence to support the instruction." *Phillips v. State*, 794 So. 2d 1034, 1036-38 (Miss. 2001). Further, it is

reversible error to give instructions which misstate the law, which are confusing, or which have no factual basis. *Scott v. State*, 446 So. 2d 580 (Miss. 1984), *Byrom v. State*, 863 So. 2d 836, 874 (Miss. 2003), *McGee v. State*, 820 So. 2d 700, 704-06 (Miss. Ct. App. 2000). Here the trial court found S-9 to be confusing, but gave the instruction nonetheless.

Issue No. 4: 404(b) Evidence

Appellant relies on initial arguments.

Issue No. 5: Juror Misconduct Taint

Appellant relies on initial arguments.

Issue No. 6: Indictment Defect

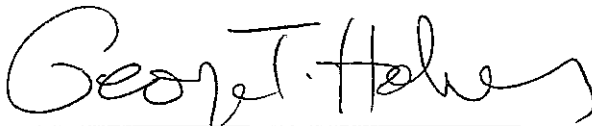
Appellant relies on initial arguments.

Issue No. 7: Ineffective Counsel

Appellant relies on initial arguments.

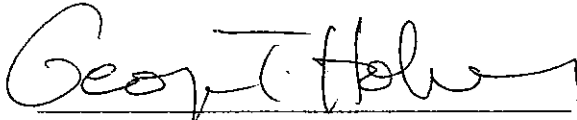
Respectfully submitted,

RODNEY SANDS

BY: 
GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 27th day of April, 2010 mailed a true and correct copy of the above and foregoing Reply Brief to Hon. Prentiss G. Harrell, Circuit Judge, P. O. Box 488, Purvis MS 39475, and to Hon. Michael Horan, Asst. Dist. Atty. , 500 Courthouse Sq., Columbia MS 39429, and to Hon. Jeffrey A. Klingfus, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.


George T. Holmes

George T. Holmes, MSB N [REDACTED]
MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200