

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BERTRUE JACKSON

APPELLANT

VS.

NO. 2009-KA-1549-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

| | |
|--|-----------|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF THE FACTS | 2 |
| SUMMARY OF THE ARGUMENT | 5 |
| ARGUMENT | 6 |
| PROPOSITION I | |
| THERE WAS CREDIBLE, SUBSTANTIAL PARTIALLY | |
| CORROBORATED EVIDENCE IN SUPPORT OF THE | |
| GUILTY VERDICT. | 6 |
| CONCLUSION | 14 |
| CERTIFICATE OF SERVICE | 15 |

TABLE OF AUTHORITIES

STATE CASES

| | |
|---|-------------------|
| Clemons v. State, 460 So. 2d 835 (Miss. 1984) | 12 |
| Doby v. State, 532 So. 2d 584, 591 (Miss. 1988) | 10 |
| Esparaza v. State, 595 So. 2d 418, 426 (Miss. 1992) | 10 |
| Fisher v. State, 481 So. 2d 203, 212 (Miss. 1985) | 10 |
| Gollott v. State, 672 So. 2d 744, 752 (Miss. 1996) | 12 |
| Hammond v. State, 465 So. 2d 1031, 1035 (Miss. 1985) | 10 |
| Harveston v. State, 493 So. 2d 365, 370 (Miss. 1986) | 10 |
| Jackson v. State, 580 So. 2d 1217, 1219 (Miss. 1991) | 12 |
| Jones v. State, 635 So. 2d 884, 887 (Miss. 1994) | 12 |
| McClain v. State, 625 So. 2d 774, 778 (Miss. 1993) | 5, 9 |
| Murphy v. State, 566 So. 2d 1201, 1206 (Miss. 1990) | 12 |
| Neal v. State, 451 So. 2d 743, 758 (Miss. 1984) | 10 |
| Noe v. State, 616 So. 2d 298, 302 (Miss. 1993) | 12 |
| Ragland v. State, 403 So. 2d 146 (Miss. 1981) | 10 |
| Spikes v. State, 302 So. 2d 250, 251 (Miss. 1974) | 10 |
| Wetz v. State, 503 So. 2d 803, 807-08 (Miss. 1987) | 10, 12, 13 |

STATE STATUTES

| | |
|--|----------|
| M C A Sect. 93-3-7(2)(b). C. P. 2 | 2 |
|--|----------|

STATE RULES

| | |
|--|-----------|
| Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16 | 12 |
|--|-----------|

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PROCEDURAL HISTORY:

On November 13, 2009, Mr. Bertrue Jackson, "Jackson" was tried for aggravated assault of Mr. Frederick Magsby and possession of firearm by a convicted felon before the Circuit Court of Coahoma County, the Honorable Albert B. Smith, III presiding. R. 1. Jackson was found guilty on both counts. R. 184. He was given two ten year concurrent sentences in the custody of the Mississippi Department of Corrections. R. 192.

Mr. Jackson perfected his appeal to the Mississippi Supreme Court. C.P. 24.

ISSUES ON APPEAL

I.

**WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT
OF THE DENIAL OF POST CONVICTION MOTIONS?**

STATEMENT OF THE FACTS

On November 19, 2008, Jackson was indicted for the aggravated assault of Frederick Magsby and possession of a firearm by a convicted felon on or about January 1, 2008 at a night club in Friar's Point, Coahoma County. This was under M C A Sect. 93-3-7(2)(b). C. P. 2.

On November 13, 2009, Bertrue Jackson was tried for aggravated assault of Mr. Frederick Magsby and possession of firearm by a convicted felon before the Circuit Court of Coahoma County, the Honorable Albert B. Smith, III presiding. R. 1. Jackson was represented by Mr. Allan D. Shackelford.

Ms. Ken'Shaundra Davis testified that she saw Jackson hit Magsby. He hit him in the head "with a dark object." R. 34. When Magsby moved toward him, Jackson pulled a gun out and shot him. R. 35. He pulled it out from under his shirt. Jackson did not just shoot him once. He shot him a second time. This was when Magsby ran, moving away from Jackson toward his truck. R. 35.

Mr. Frederick Magsby testified that he was shot twice. R. 61; 64-65. He identified Jackson as the person who shot him. R. 65. Magsby was outside the club. There was some kind of altercation occurring at the time.

While outside the club, Magsby was hit on the back of the head. When he turned to investigate, he saw Jackson. He testified to seeing him pull a gun out from "under his shirt." R. 65-66; 76. Jackson then shot him. When Magsby ran away from the gunman, Jackson shot Magsby a second time.

Mr. Magsby testified he was not armed. He was not threatening Jackson when shot. He was merely investigating why someone hit him in the head with something hard. Magsby believed it was a metal object since he had seen Jackson use a metal detector. This was when he or others went inside the club earlier in the evening.

Deputy Oliver Mitchell testified that he was on duty the night in question. R. 77-78. He was a police officer with the Friar's Point police department. He testified to hearing what sounded like shots from a fire

arm. It was coming from the “Diz Muz B De Plaz” night club. He went to investigate. He was nearby, and arrived there shortly after hearing shots.

Mitchell identified exhibit 9 as being the black 9mm Smith and Wesson handgun he removed from Mr. Jackson. The gun held ammunition which Mitchell removed. R. 84. The handgun was located “under his (Jackson’s) shirt.” R. 82.

Deputy Mitchell testified that Jackson admitted that he shot Mr. Magsby, but claimed he was doing so because someone pulled out a weapon. The other individual was allegedly a Mr. Jamarro Foster. Jackson admitted that the handgun he used was his. R. 86-87; 96.

After a **Miranda** warning and waiver, Mitchell testified that Jackson admitted that he shot his gun. However, he claimed he did so only after he saw someone pull out a handgun. He claimed he did not mean to shoot Mr. Magsby. R. 86.

The trial court denied a motion for a directed verdict. R. 154. After a **Culbertson** warning, Jackson decided not to testify. R. 149.

Defense witnesses Tim Pollard, and Sherman Tyler, who managed the night club, claimed that they had seen video images of the altercation outside, as well as the shooting. This was images from security cameras on the club premises. They claimed that Jackson picked a handgun up off the ground, and then fired it.

However, they admitted that they were not eye witnesses since they were inside the club when the shooting occurred. R. 110;145. They also admitted that the video tape no longer existed, and had never been shared with law enforcement. R. 146.

The trial court denied proposed jury instruction D-2. R. 153; C.P. 39. The court found a lack of record support for the instruction. R. 153. There was no objection to the denial of the instruction,

Mr. Jackson was found guilty. R. 184. He was given two ten year concurrent sentences in the custody

of the M. D.O. C. R. 192.

Jackson perfected his appeal to the Mississippi Supreme Court. C.P. 24.

SUMMARY OF THE ARGUMENT

There was credible, substantial partially corroborated eye witness testimony and evidence in support of the trial court's denial of peremptory, and post conviction motions. R. 154; C.P. 23. There was sufficient credible evidence in support of each element of the two felonies. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993).

Mr. Magsby identified Jackson as the person who shot him twice. R. 65. He testified that he was not armed and had not threatened Jackson in any way. R. 64- 65. Magsby was corroborated by Officer Mitchell who testified that Jackson admitted that he fired "my handgun." This was at the crime scene. R. 86. Mitchell also corroborated Magsby by testifying that he removed the concealed handgun from "under" Jackson's shirt. R. 82.

While there was defense testimony about images from a video tape, it was admitted not to exist at trial. It was also admitted that it had never been shared with law enforcement prior to trial. R. 146.

Jackson did not testify. R. 149. Jackson's own post-**Miranda** statement to law enforcement included an admission of firing "my gun." Jackson did not mention picking up a gun from the ground. R. 86.

The alleged images of Jackson picking up a gun and then defending himself against an alleged aggressor was contradicted by eye witnesses. This included the victim, his wife, and Officer Mitchell. R. 34-35; 64-65; 82. Therefore, there was insufficient evidence in support of finding that Jackson had acted in "necessary self defense."

ARGUMENT

PROPOSITION I

THERE WAS CREDIBLE, SUBSTANTIAL PARTIALLY CORROBORATED EVIDENCE IN SUPPORT OF THE GUILTY VERDICT.

Jackson argues that the trial court erred in denying his post conviction motions for a new trial, or a JNOV. Since the victim and his wife testified that he was first hit by Jackson with a metal detector and this was allegedly not shown on a video tape, Jackson believes this was sufficient for showing, consistent with his witnesses's testimony, that he was not the aggressor. Rather he was merely responding to what he thought was a threat to his life. He also believes that the trial court should have granted him an additional instruction on self defense for a convicted felon, D-2. C.P. 39. Appellant's brief page 1-13.

To the contrary, the record indicates that there was sufficient, credible partially corroborated evidence in support of the trial court's denying peremptory instructions. C.P.15; 23. There was corroborated eye witness testimony indicating that Jackson pulled out a hand gun and shot Mr. Magsby. Magsby was not armed and not confronting or threatening Jackson in any way. R. 34-35; 64-65. In addition, Deputy Mitchell testified that in Jackson's statement, he said, "I shot my gun." R. 86. He also admitted in his statement that he fired a handgun and hit Magsby. However, he claimed he did not mean to shoot him.

Ms. Ken'Shaundra Davis testified that she saw Jackson hit Magsby. He hit him in the head with "a dark object." When Magsby moved toward him, Jackson pulled a gun out of his pants and shot him. R. 35. Jackson did not just shot him once. He shot him a second time when Magsby ran away from him toward his truck. R. 35.

Q. Go ahead. After you see the guard hit him, what happened next?

A. After I saw the guard hit Frederick, Frederick hit the ground. Then a couple of seconds later, Frederick got up and started walking toward him. **After Frederick started walked toward Mr. Jackson, he stepped back in the doorway of the club. And a split second**

later, he came up like out of his pants with a gun and shot Frederick.

Q. And you saw that?

A. Yes, I did.

Q. **What did Frederick do afterwards?**

A. **He ran.**

Q. **Where did he run?**

A. Well, his exact words, he was like—he looked down. He was like, “Man you shot me.” **And Frederick—by the time Frederick said that, he aimed at him again and shot Frederick.**

Q. So if you were going to tell—tell this jury tell how many times you heard Mr. Jackson shoot. How many times did you hear?

A. I would say three. R. 35. (Emphasis by appellee).

Mr. Frederick Magsby testified that he was shot twice. R. 61; 64-65. He identified Jackson as the person who shot him. R. 65. He was outside the night club. While outside the club, he was hit on the back of the head. When he turned to investigate, he saw Jackson. He testified to seeing him pull a gun out from under his shirt. R. 65-66. He then shot him. When Magsby ran, he was shot a second time in his arm.

Mr. Magsby testified he was not armed. He was not threatening Jackson when shot. He was merely investigating why he, or someone near him, had hit him in the head with a hard metal object.

Q. —walk with the jury back from the time you were hit in the head onward.

A. As I was hit in the head, it really kind of dazed me. I turned around and swung not knowing who it was. I just knew somebody hit me from the back. As I swung, he—I seen him right behind me. He was backing up towards the doorway. **So I walked towards him. He point—he point—he pulled out the gun and shot me.** And that’s all like, I know you didn’t just shot me. And he pointed the gun towards my face and saying all right. ..

Q. And when you say him, who are we talking about?

A. The guy that shot me?

Q. Yes.

A. Beatrice Jackson. I can't pronounce his first name but I know Jackson. R. 65.

...

Q. Now, lets talk about this gun. You say you saw the gun go off; you felt yourself get shot. Where did the gun come from?

A. Out of his pants.

Q. Are you positive about that?

A. Positive about that.

Q. You saw him pull it out of his pants and point it at you?

A. **I saw him pull it-when he pulled it out, he shot.** R. 64-65. (Emphasis by appellee).

The record reflects that Mr. Magsby identified Jackson as the person who he saw shot him. He also testified that he was neither armed nor threatening Jackson when he was shot.

May the record reflect again that Frederick Magsby has identified the defendant, Mr. Jackson. R. 65.

Q. Did you threaten him beforehand in any way?

A. No. R. 66. (Emphasis by appellee).

Deputy Oliver Mitchell testified that he was on duty the night in question. He was a police officer with the Friar's Point police department. He testified to hearing what sounded like shots from a fire arm. He went to investigate. He identified Exhibit 9 as the black 9mm Smith and Wesson handgun he removed from Jackson's shirt. R. 82. He removed it from "under his shirt." R. 82. The gun held ammunition which he removed. R. 84. No other weapons were located. Mitchell's investigation determined that Mr. Magsby was not armed. R. 87-88.

He testified that Jackson admitted that he shot Mr. Magsby, but claimed he was doing so because someone had pulled out a weapon. The other individual was allegedly a Mr. Jamarro Foster. Jackson admitted that the handgun he used was his. R. 86-87; 96.

Q. Let's stop there. You retrieved him of the firearm which he was carrying. Will you tell the jury specifically how you went about that task?

A. **Okay, I asked him about the weapon. He did have it on him. He said he had it under his shirt. And he was going to remove it himself. But I told him, don't remove it, let me remove the weapon from him. And he raised up his shirt. I got the weapon from him, secured it at the time.** And I detained him at the time into the patrol car; also his weapon. And I proceeded to the Friars Point Police Department. R. 82.

After a **Miranda** warning and waiver, Mitchell testified that Jackson admitted that he shot his gun. However, he claimed he did so only after he saw someone pull out a handgun. He claimed he did not mean to shot Mr. Magsby. R. 86.

A. He has—he, uh—he also gave a written—he gave a written statement on the incident of what happened. And I mean, if I could read this statement, would

Q. Very well. If you could, go ahead and read it, sir.

A. His statement, he replied: Two gentlemen got into it—got into a fight. I was breaking the fight up but they jumped me. Jumped me. The officer pulled his shot gun and shot into the air. But they didn't stop—didn't stop. So I was pulling them apart. **Another gentlemen went for his gun and then I shot my gun but the officer didn't see the gentlemen with the gun.** He was on one side and I was on another—another side of the truck. R. 86.

Deputy Mitchell testified that his investigation indicated that Mr. Magsby was not armed.

Q. **And Magsby did not have a weapon?**

A. **No, sir.**

Q. Magsby got hit?

A. Yes, sir.

Q. And Bertrue Jackson says that he shot?

A. Yes, sir. R. 87-88. (Emphasis by appellee).

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence

was for the jury to decide, not an appeals court.

The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); **Wetz** at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. **Wetz**, at 808, **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); **May** at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. **Wetz** at 808; **Harveston** at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

When the testimony cited above was taken as true with reasonable inferences, there was more than sufficient, credible substantial partially corroborated evidence in support of the trial court's denial of all post conviction motions. C.P. 23. There was corroborated eye witness testimony identifying Jackson as the person who shot Mr. Magsby. R. 34-35; 64-65. Magsby was not armed and not threatening Jackson. Jackson's statement to law enforcement did not claim Magsby was armed or threatening him. R.86.

There was also corroborated testimony from law enforcement that Jackson pulled a concealed fire arm out from under his shirt. R. 82. It was concealed on his person, as eye witnesses had previously testified. In addition, Jackson admitted that he shot a firearm and struck Mr. Magsby. R.86-87.

In **Doby v. State**, 532 So. 2d 584, 591 (Miss. 1988) , the Supreme Court stated that the "uncorroborated testimony" of a witness under oath was sufficient for supporting a conviction on appeal.

With this reasoning in mind, the Court holds that the testimony of Conner was legally sufficient to support Doby's conviction for the sale of cocaine. This Court recognizes the rule that persons may be found guilty on the uncorroborated testimony of a single witness. See **Ragland v. State**, 403 So. 2d 146 (Miss. 1981);..

While Jackson's post **Miranda** statement indicated that he did not mean to shot Magsby, this merely created a conflict in the evidence the jury resolved during their deliberations.

His admission to law enforcement was contradicted by eye witnesses who testified to "seeing" Jackson shot Magsby, who was unarmed. R. 34-35; 64-65. Magsby was also corroborated by another eye witness. She testified that not only was Magsby not armed, but that Jackson shot Magsby a second time. R. 35. He shot him a second time while he was running away from him. R. 35.

Magsby testified that he was shot in the right and left arms. The bullet went through the flesh of his left arm, but the other bullet was still in his right arm at the time of trial. "It was still poking out of my arm." R. 62.

The record also reflects that while defense witness, Mr. Tim Pollard, testified about a video tape from the club, he admitted that the tape had been erased, and did not presently exist at the time of trial. R. 145-146.

In addition, according to defense witnesses, Jackson allegedly picked up a hand gun from the ground. This would be as opposed to already having a handgun concealed under his waist band. R. 107; 112; 131. They also claimed that Magsby allegedly reached under his shirt prior to Jackson shooting him. R. 131.

However, both witnesses admitted that they were not eye witnesses. They were "inside the club" when the shot was fired by Jackson. R. 110;145. They also admitted that the alleged video tape images were never shown to law enforcement. R. 146.

Q. And if Bertrue Jackson came up to you and if he told you that he shot Frederick Magsby in self defense, you still don't have a tape to held out your cousin, is that right?

A. **No, we don't because it had been erased.**

Q. **It doesn't exist right?**

A. If you say it doesn't exist—if that's your terms, it don't exist—it doesn't exist. But it has been erased, that's what I'm saying. R. 146.

The trial court denied proposed jury instruction D-2. R. 153; C.P. 39. This instruction was based the

alleged right of a convicted felon to access/use a weapon if he was acting in self defense. The court found a lack of record support for the instruction. R. 153. There was no objection to the denying of this instruction.

Does it have to be with the instruction?

In **Nicholson on behalf of Gollott v. State**, 672 So. 2d 744, 752 (Miss. 1996), the Court stated that where there was no contemporaneous objection to the failure to grant an instruction, the court need not consider that issue on appeal.

In **Murphy v. State**, 566 So. 2d 1201, 1206 (Miss. 1990), this Court stated that while a defendant was entitled to an instruction on his theory of the case, he was not entitled to an instruction that was without foundation in the evidence, or covered elsewhere by another instruction. The record reflects that the jury was instructed on the need to find that Jackson was not acting in "necessary self defense." C.P. 35-36.

In **Jones v. State**, 635 So. 2d 884, 887 (Miss. 1994), the Supreme court found that a motion for a new trial should be denied unless doing so would result in "an unconscionable injustice."

Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent "an unconscionable injustice." **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987). We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict." **Jackson v. State**, 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

In **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993), this Court stated that when the sufficiency of the evidence is challenged that the evidence favorable to the State must be accepted as true with all reasonable inferences. Evidence favorable to an appellant should be disregarded.

In judging the sufficiency of the evidence on a motion for a directed verdict, or request for peremptory instruction, the trial judge is required to accept as true all of the evidence that is favorable to the state, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant. **Clemons v. State**, 460 So. 2d 835 (Miss. 1984).

The appellee would submit that the trial court did not abuse its discretion in denying post convictions

motions. There was no “injustice” involved in denying that motion.

On a motion for post conviction relief, Jackson was not entitled to have evidence favorable to him taken as true with reasonable inferences. Rather it was the prosecution that was entitled to have the testimony taken as true with favorable inferences. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987).

This would include eye witness testimony identifying Jackson as the person they saw shoot the unarmed Mr. Magsby. It also included testimony that the handgun used in the shooting was concealed on Jackson’s person. It was concealed “under his shirt.” R. 35, 65-66, 76. This was where Deputy Mitchell found it and removed it. R. 82. This was shortly after the shooting.

The appellee would submit that this issue is lacking in merit.

CONCLUSION

The trial court's denial of Jackson's post conviction motions should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

A handwritten signature in cursive script, appearing to read "W. Glenn Watts", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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