IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TERRANCE KUYKENDALL — APPELLANT

VS. — NO. 2009-KA-1740

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TERRANCE KUYKENDALL **APPELLANT**

vs. **CAUSE No. 2009-KA-01740-COA**

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 Quitman County, Mississippi in which the Appellant was convicted and sentenced for his felony of **MURDER**.

STATEMENT OF FACTS

Ernestine Smith, who resided at 2800 Charley Pride, Marks, Mississippi, testified that the victim in this case, Tracey Smith, was her niece. Smith left Marks after the death of her mother and certain members of her family, moving from place to place. The Appellant was with Smith during her peregrinations. Tracey Smith's child was with her as well.

On the Friday prior to 13 April 2008, the victim called Smith to say that she and her son would be coming to stay with Smith. Smith agreed to take them in but indicated that she would not take the Appellant in. The victim and her son arrived late that night, sometime after midnight on that

Friday night.

On the following day, Saturday, the Appellant rang Smith. When Smith answered the telephone, she heard the Appellant tell someone, "You have to die today." After the Appellant said that, he told Smith, "Sister, you need to leave your house for a few hours." When Smith asked the Appellant why she should leave her house, the Appellant told her, "Don't ask me that right now. I can't tell you that right now." The victim and her son were not at Smith's home at the time. The child was with one of his cousins.

Some few hours after that telephone call from the Appellant, the victim came back to Smith's house. As they were beginning to retire for the night, the Appellant came into Smith's house. Smith told the victim that she did not want the Appellant in the house. The victim told the Appellant he had to leave the house. Smith then went to bed.

When Smith wakened the next morning, the victim was not in the house. Later that day, in the afternoon, Smith was told that the victim had been shot and killed. Smith testified that she was not aware of the victim ever having attempted to harm herself. Smith never knew the victim to have a firearm. The victim was not a violent person. (R. Vol. 2, pp. 49 - 67).

Roderick Mabry, Assistant Chief of Police in Marks, testified that he was summoned to a residence at 619 Anderson Street in Marks at about a quarter of three on the afternoon of 13 April 2008. He arrived some five or six minutes later after having been delayed by the passing of a train. Inside, he found a dead, black female sitting in a chair, a gunshot wound to the left side of her forehead. No one else was in the room besides himself and the body of the woman. Mabry then secured the scene and contacted the Mississippi Bureau of Investigation. Mabry did not see or find a weapon. He could not say whether anyone had been in the house between the time the victim was shot and the time he arrived.

After the crime scene was secured, Mabry began looking for the Appellant. The Appellant had been known to be dating the victim. One Dorothy Kuykendall indicated that the Appellant had been at the residence at some point on that day. The Appellant was found in Darling, Mississippi at about five o'clock that afternoon. The Appellant was with his aunt, his aunt driving. When Mabry turned on his blue lights, the aunt stopped her car. The Appellant got out of the car with his hands up and turned himself in.

The Appellant, without prompting or questioning, began talking as he was being transported "to Tallahatchie County." He told Mabry and another officer, "I fucked up. I fucked up. I killed her. I just wasn't thinking." The Appellant then asked the officers to shoot him. (R. Vol. 2, pp. 67 - 121).

Cora Lee Diggs then testified. She lived in the residence located at 619 Anderson Street in Marks and had lived there for some thirty - seven years. Dorothy Kuykendall lived with her for a time. So did the Appellant. Mrs. Diggs knew the victim since the victim came to her house from time to time. The victim and the Appellant lived together, but not with Diggs.

On 13 April 2008, the victim and the Appellant were at Mrs. Diggs' house. They were acting "normal"; the victim was sitting in a reclining chair. Dorothy told the victim that she should eat something, but the victim declined. Diggs was not feeling well so she took to her bed. Diggs was wakened by the sound of a gunshot. She tried to get up but between the three mattresses on her bed and a bad knee she reckoned it took her ten minutes to get out of bed.

When she managed to leave her bed, she smelled and saw gun smoke in the hall. As Mrs. Diggs proceeded, her daughter left the living room screaming, "Don't come in here!" Mrs. Diggs could see the victim and saw that she had slid in the chair. Mrs. Diggs' daughter, in between bouts of hooping and hollering and jumping up and down, managed to ring for help. At some point a man

came and told Diggs that the victim was dead, to which Mrs. Diggs said, "Well, Lord have mercy," and then she was told that she would have to leave the house, her daughter apparently already having done so. Before Diggs left the house, she went to the back door, which was open apparently, and shut it and secured it with either a weed eater or a part of a crutch. The Appellant was not present. Dorothy was outside the house, leaving Mrs. Diggs alone with the body of the victim.

Mrs. Diggs did not see which way the Appellant left the house, but she figured he must have left through the back door. On the Saturday before the Sunday of the victim's death, the Appellant told Mrs. Diggs that her house was to be blown up at half past five. The Appellant did not specify who was to blow her house up. Mrs. Diggs response was that she was going to stay with the house and pray. Mrs. Diggs thought that the Appellant's behavior was odd, that the Appellant had never acted in such a way before. However, the Appellant was not acting that way on Sunday, when the victim and he were present.

Mrs. Diggs did not see a gun or take a gun from her house. She did not see one in her daughter's possession. Diggs did not see anyone enter or leave her house through the back door. She did not see the Appellant after the shot was fired. (R. Vol. 2, pp. 122 - 150; Vol. 3, pp. 151 - 154).

Dorothy Kuykendall then testified. She was present at Mrs. Diggs' residence on 13 April 2008. Her child, Alexis, was present at Mrs. Diggs' residence that day as well, as well as the victim and the Appellant.

Early on the morning of April 13th, the Appellant rang Dorothy Kuykendall as said, "T.T., can you do something for me?". When Kuykendall told him that she might be able to do something for him, the Appellant said. "Come up Old Girl's house and pick us up." So Kuykendall went to get them and took them to Mrs. Diggs' house. Upon their arrival, the Appellant asked to be fed. The victim had a large bag of Dorritos but she did not eat anything.

After the breakfast was finished, the victim and the Appellant went to a bedroom. Mrs. Diggs' was in her bedroom. At around that time, Kuykendall heard a pow from the room the victim and the Appellant were in. When Kuyendall heard the pow, she said, "Mama, did you hear that?". She then got up. As she was going into the room, she saw the Appellant in the hallway. So Kuykendall went to peep in and see what was going on. She saw the victim lying in a recliner and stuff gushing out of the victim's head. The Appellant went to the back door; Kuykendall went to the telephone. Kuykendall said she was upset about what she saw, even crazy.

Paramedics and then police arrived. Kuykendall was put out of the house, just as was Mrs. Diggs. Kuykendall never saw a gun and she did not move a gun out of the room in which the victim was shot. The only people she saw entering the house after the shooting were the paramedics and the police. (R. Vol. 3, pp. 154 - 187).

Keon Hughery testified that he is related to the Appellant by marriage and is also his best friend. He recalled the afternoon of 13 April 2008. On that date the Appellant came to his house and began talking to him about "the situation." The Appellant appeared to be "thawed off," somewhat disoriented. The Appellant sat for about ten or fifteen minutes and then told Hughery, "Cuzo, I fucked up." He told Hughery that he killed her. The Appellant mentioned something about a breakup. Hughery asked the Appellant to leave the house, Hughery not wanting the police to break down his door to arrest the Appellant. The Appellant got up and paced and looked out of a window. The Appellant then left the house, and Hughery heard a car door slam.

On cross - examination, Hughery testified that he admitted the Appellant into his house, that the Appellant sat down and then paced and sat down again, and at that point the Appellant spoke of "the situation." The Appellant said, "I fucked up. I felt like I killed her." The Appellant spoke of breaking up with the victim and said that the victim shot herself. The Appellant said he ran from his

grandmother's house to Hughery's house. When the Appellant looked out of the windows, Hughery reckoned that he was looking for the police, there being sirens in the next street. The Appellant jogged or ran out of Hughery's house. (R. Vol. 3, pp. 188 - 215).

Shamika Smith testified that she is related to the Appellant. At about two o'clock on the afternoon of 13 April 2008, her mother, her brother and she were driving to a store. The Appellant flagged them down and asked to be taken to Sledge and to another aunt's house. The Appellant was near Hughery's residence. The Appellant gave Smith's mother money for gasoline. As they were driving to Sledge, Smith received a text message from a friend, who told her that the Appellant had shot the victim. Smith said nothing about the message to anyone in the car, but as soon as they arrived at the Appellant's aunt's house, the Appellant's aunt had heard about the shooting and told the Appellant that he had to surrender to the police. The Appellant got into his aunt's car for the trip back to Marks. Smith's mother was to "trail" the aunt's car, but she stopped in Darling for gasoline. When the Smith vehicle caught back up with the Appellant's aunt, the Appellant had been apprehended by the police. (R. Vol. 3, pp. 216 - 222).

Dywanna Broughton, a crime scene analyst with the Mississippi Bureau of Investigation, examined the crime scene along with another Bureau investigator and an officer with the Marks police department. In the course of her investigation, she found one nine millimeter shell casing on the floor in the bedroom in which the body of the victim was found. She found no other shell casings in the house and she found no gun in the house. The victim's hands were photographed and bagged. A number of photographs were made of the victim as she was found. While it appeared to Broughton that the victim sustained entrance and exit wounds, she found no projectile in the room or in the house. Broughton was sent to the scene of the murder at about a quarter of four on the afternoon of the shooting and she arrived at the scene at about five o'clock. (R. Vol. 3, pp. 223 -

246).

Terrence Paul Smith, one of the victim's cousins, testified that he had a conversation with the Appellant the day before the victim was shot. In that conversation, the Appellant told Smith about some incidents that occurred to him while the victim and he were in Texas. One of those incidents, according to the Appellant, involved meeting an Arab kingpin who offered the Appellant "so many kilos." The Appellant felt that he could not get into the game with the Arab kingpin except by killing the victim. Apparently, in that same conversation, the Appellant also told Smith that he had been having dreams about a house fire in which members of Smith's family died. In those dreams, certain family members, apparently deceased, told the Appellant that someone had been murdered, identifying who had committed the murder, and stating that the victim had her part in it as well. The Appellant told Smith that he was tired of the dreams and had decided to kill the victim.

The victim drove a Yukon SUV. A few days after the Appellant shot the victim, he called Smith and asked him to get his clothes for him. Smith went to the Yukon to do so. While gathering the Appellant's clothes, Smith found a partially full box of nine millimeter shells and a quantity of shotgun shells as well as a pawn receipt. He did not find a firearm.

Smith never saw the victim with a firearm. The victim had attempted to harm herself in the past on two occasions, when the victim was in her adolescence, both occasions involving overdoses of some drug or another. (R. Vol. 3, pp. 246 - 267).

The Appellant purchased a HiPoint model C9 nine millimeter handgun from a pawn shop in February of 2008. (R. Vol. 3, pp. 268 - 272).

The chief of police of Marks testified as to his participation in the investigation into the killing. He testified that he and other officers attempted to find the weapon used by the Appellant,

searching inside and outside Diggs' house and even under Hughery's house. Those efforts were not fruitful and the gun was never found. (R. Vol. 3, pp. 275 - 289).

The shell casing found in the house was for a nine millimeter bullet. An analysis of fragments of a projectile found in the course of the autopsy showed that it was a nine millimeter bullet. The lands and grooves imprinted on the fragments of the projectile were consistent with the projectile having been fired from a HiPoint weapon. No gunpowder residue was found on the victim's hands. (R. Vol. 4, pp. 301 - 328).

The victim's death was in consequence of cranial cerebral trauma resulting from a near - contact perforating bullet wound to the left side of the victim's head. The bullet was fired from a position slightly above the victim and traveled from front to back, downward from right to left at a thirty degree angle. The bullet would have been fired from four to six inches away from the victim. The pathologist considered the victim's death a homicide. Fragments of the bullet were found in the course of the autopsy. (R. Vol. 4, pp. 328 - 352).

The defense presented a case - in - chief, beginning with the testimony of the aunt the Appellant endeavored to visit after the victim was shot, Luvenia Mamon. She testified that on 13 April 2008, as she arrived at her home after having attended church and having visited a store, she saw someone jump off her porch. She asked the person for whom she was looking; Mamon was told that they were looking for her. At that point, Mrs. Mamon asked whether her nephew was in the car. She was told that he was.

Mrs. Mamon got out of her car and went to the car in which the Appellant was located. She told him that she had been informed that the victim was dead and wanted to know if he wanted to return to Marks with her or with the person who brought him to Sledge. She asked the Appellant that question because she assumed that people were going to assume that he killed the victim. She

told the Appellant that he needed to turn himself in.

The Appellant wanted Mrs. Mamon to carry him to Sledge. The Appellant appeared to be frightened but Mrs. Mamon did not notice anything unusual about the clothes he was wearing.

Mrs. Mamon turned her emergency signal on as she made her way to Marks. She was passed by police cars and she told the Appellant that the police were looking for him. By and by, a police cruiser's lights came on and Mrs. Mamon pulled over. She told the Appellant to put his hands up when he got out of the car because she figured he would get shot if the policemen thought he was about to run. The Appellant was then arrested. (R. Vol. 4, pp. 359 - 364).

The Appellant then testified. He stated the victim let it be known to him through one of her friends that she had an interest in him. Their relationship was simply a sexual one until the victim asked him to move in with her and her child. After about a year, they decided to move to Texas. Someone had tried to poison their food on one occasion, and on another, tampered with the gas heater. So, they moved to Killeen, Texas.

They did not live together in Texas. They began to have financial problems there. There were apparently problems with the victim's ex-boyfriend too. So the Appellant decided that he was ready to end the relationship, a decision that, according to the Appellant, was not well taken by the victim. They had no fixed place to stay upon their return to Quitman County.

According to the Appellant, things came rather to a head in February. The Appellant was continuing in his effort to break up with the victim. He had his clothes and was taking them into some house. The victim asked the Appellant whether he was going to be with her. He replied that he was not. He also stated that he was scared. She took a shotgun the Appellant happened to have and put it beneath her chin. He got the shotgun from her and she left.

The Appellant testified that the victim continued to ask him not to break up with her. He

finally agreed to let her go to Texas with him. They did not go, though. Instead they went with to his grandmother's house and talked.

As for the day of the victim's death, the Appellant said that the victim was still carrying on about being with him. He was non-committal. The victim had the Appellant's gun and went for a walk after breakfast. After about fifteen minutes, the Appellant went to get the victim and found her arguing with someone on the telephone. He took the gun from her and went back to the house, putting the gun behind a television set. The victim returned to the house. She sat in a chair, drinking a soft drink. The Appellant was on a bed, drinking a beer. The victim continued her talk about their relationship. The victim got the gun. At some point the Appellant got up and went to the bathroom.

After about fifteen minutes, the Appellant heard a "pow." The Appellant said he was shocked by the sound. He opened a bathroom window. As he did so, he claimed he heard footsteps running toward the back door of the house. The Appellant said he left the bathroom and saw that the victim had been shot. The Appellant said he cried and panicked and left the house, leaving from the back door. He went to Keon's house. He claimed he told Keon that she was dead, that the victim shot herself. One of the Appellant's aunt's came to get the Appellant and took him to his aunt Luvenia's house.

The Appellant denied having removed the gun from the room after the victim was shot. He admitted that he had purchased a nine millimeter gun from a shop in Batesville. He also admitted owning a shotgun. There were three other people in the house besides the Appellant and the victim at the time the victim was shot. The Appellant claimed that there had been other occasions in which the victim attempted to do herself harm. He denied having threatened the victim. He denied ever having stated that he was a member of a gang, and he denied having been a member of an Arabic organization. He denied having told Hughery that he had killed the victim. The Appellant did admit

that he felt some responsibility for the victim's death.

On cross-examination, the Appellant admitted that he had been threatened twice in Marks and in Texas. The Appellant admitted that he had been dating other women when he first started dating the victim, but he denied that the fact that the victim was bringing in $3400.00 a month had anything to do with being with her. He said he stayed with the victim because of her insistence. The Appellant did not think the victim was very intelligent but did think she was overweight.

The Appellant claimed that he left the house in which the shooting occurred because he needed to get some air. The others in the house at the time of the shooting were remained just outside of the house, though. He denied suggesting in his testimony on direct examination that maybe someone came into the house through the backdoor and shot the victim. (R. Vol. 4, pp. 364 - 423).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN REFUSING TO ORDER A PSYCHIATRIC EVALUATION OF THE APPELLANT?

2. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A DIRECTED VERDICT?

SUMMARY

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO ORDER A PSYCHIATRIC EXAMINATION OF THE APPELLANT

2. THAT THE SECOND ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A DIRECTED VERDICT ON THE BASIS OF *WEATHERSBY V. STATE*

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO ORDER A PSYCHIATRIC EXAMINATION OF THE APPELLANT

Prior to trial, counsel for the Appellant moved the trial court for a mental examination. The

attorney represented to the trial court that it did not appear that the Appellant understood what the proceedings against him were about, that the Appellant thought people were involved in a plot against him, and that he thought that Johnny Cochran represented him.

In response to questions put to him by the trial court, the Appellant stated that he did not know how it came about that his competency to stand trial had been questioned. The Appellant stated that he did not feel the need for an examination.

The Appellant's mother was present in the courtroom during the hearing on the motion. In response to questions put to the Appellant's mother, she told the court that the Appellant had no history of mental or emotional instability, that the Appellant played sports in high school and had finished high school and a year of college, and that the Appellant completed the regular high school curriculum. The Appellant's mother stated that the Appellant was well aware of the nature of the proceedings against him. As for the comment about Johnny Cochran, the Appellant's mother stated that there had been some thought of obtaining representation by the Cochran law firm. As for hearing voices, the Appellant's mother stated that if anyone was hearing voices it was the attorney for the Appellant.

The court then asked the Appellant several questions concerning the Appellant's place and date of birth and where the Appellant went to school. The responses to those questions were cogent. There was no indication of an inability to understand. The Appellant had a 3.5 grade point average in high school.

The Appellant also told the trial court that he understood that he was charged with murder. He also told the court that he had the ability to consult with his attorney and participate in his defense. He understood the consequences of being found guilty or not guilty.

Two law enforcement officers were then sworn. Both stated that they had been around the

Appellant while the Appellant was in jail awaiting trial. They each stated that they observed no unusual behavior on the part of the Appellant and had no indication that the Appellant was hearing voices.

The trial court denied relief on the motion, making an extensive finding of fact. (R. Vol. 2 - 24).

Under Rule 9.06 UCCCR, a trial court shall order an accused to submit to a mental examination by a competent psychiatrist if there are reasonable grounds to believe that the accused may not be competent to stand trial. One is competent to stand trial:

> (1) who is able to perceive and understand the nature of the proceedings; (2) who is able to rationally communicate with his attorney about the case; (3) who is able to recall relevant facts; (4) who is able to testify in his own defense if appropriate; and (5) whose ability to satisfy the foregoing criteria is commensurate with the severity of the case.

Martin v. State, 871 So.2d 693, 697 (Miss. 2004). Where a trial court has found that the evidence does not show a probability that the accused is incapable of making a rational defense, this Court will not overturn the trial court's findings absent a demonstration, from the evidence, that the finding was manifestly against the overwhelming weight of the evidence. *Id.*, at 698.

In the case at bar, the Appellant's responses to the trial court's questions were oriented, responsive, and showed that he clearly understood what was occurring. His mother indicated that he had been a good student, played sports, and had demonstrated no signs of mental incompetence. Two law enforcement officers testified that they had seen nothing to show or suggest that the Appellant was laboring under some kind of mental disability. A review of the Appellant's trial testimony shows nothing that would reasonably suggest that he was incompetent to assist in his defense and to testify in his defense. The Appellant actively participated in his defense. (R. Vol.

3, pg. 299).

The Court is told that the Appellant's comments to the effect that Arabs were telling him to kill the victim were a clear indication of a probability that the Appellant was not competent. However, the Appellant never testified to that, and in his testimony he denied involvement in an Arab gang. It may be that the Appellant did testify at one point that he thought someone had tried to poison his food and tamper with his heating, but this hardly required a conclusion that the Appellant was not competent. Having been threatened in the past would have hardly suggested incompetence, that being, unfortunately, a not so uncommon occurrence. He may well have been correct about having been threatened, or he might misconstrued things. But that one isolated instance hardly constitutes a reasonable ground to require a mental examination.

The Appellant then suggests that his response to the court. "I'm feeling pretty good, judge. Pretty good," in response to the court's question, showed the need for a mental examination. Yet, the only thing the trial court did was to ask the Appellant how he was feeling that morning. (R. Vol. 3, pg. 299). The Appellant's response seems to us to be a normal, natural response, just as it would have been a normal response to say he was feeling unwell had that been the case. That there had been testimony in the case showing the Appellant's guilt for murder would not have necessarily affected how the Appellant was feeling. After all, his first trial ended in a mistrial.

That the Appellant's first attorney was not in the habit of routinely seeking mental examinations is no reason to find that the trial court's decision was manifestly contrary to the overwhelming weight of the evidence. Furthermore, the simple fact that an attorney may raise the issue of competency does not require a mental examination. While it may be that the defendant's four attorneys impressions as to his mental competency bore some weight in *Howard v. State*, 701

So.2d 274 (Miss. 1997), the record here does not remotely compare with what occurred there. There were many examples of incoherence on the part of the defendant in *Howard*, many of which occurring at trial. All of it tended to support the attorneys' statements. Here, the Appellant's conduct and demeanor at before and at trial showed nothing to suggest a need for a competency hearing. It is not enough to assert that there is a need for a mental examination. There must be proof in support of such a request sufficient to show reasonable grounds to believe that the accused is incompetent. No such showing was made here.

The Appellant's responses to the trial court's questions, his trial testimony, and the fact that he actively participated in his defense in the course of the trial clearly show that he was able to perceive and understand the nature of the proceedings against him, was able to communicate with his attorney, was able to recall relevant facts, and was able to testify in his defense. All of this was commensurate with the severity of the case against him.

The First Assignment of Error is without merit.

2. THAT THE SECOND ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A DIRECTED VERDICT ON THE BASIS OF *WEATHERSBY V. STATE*

In the Second Assignment of Error, the Appellant asserts that the trial court erred in failing to grant a directed verdict on the basis of *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933).

The record demonstrates that the Appellant made a generic motion for a directed verdict at the conclusion of the State's case - in - chief. The Appellant did not assign specific grounds for such relief. (R. Vol. 4, pp. 353 - 354). Nor did he do so when he renewed his motion at the conclusion of the defense case - in - chief, (R. Vol. 4, pg. 428), and in his motion for judgment notwithstanding the verdict, (R. Vol. 1, pp. 57 - 58). A motion for a directed verdict, though, must allege with

specificity where the State has failed to make out a *prima facie* case. *Moore v. State*, 958 So.2d 824, 831 (Miss. Ct. App. 2007).[1]

The *Weathersby* rule is:

> where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

Weathersby, at 482. The record shows that the Appellant did not urge acquittal on account of this rule in his motion for a directed verdict made at the close of the evidence and in his motion for judgment notwithstanding the verdict. He did not mention the rule and did not argue facts in support of the application of the rule. The trial court, then, could not possibly have been on notice that the Appellant was asserting the rule. Since the Appellant failed to urge the *Weathersby* rule in his motions for acquittal in the trial court, he may not raise it now.

Assuming for argument that the *Weathersby* claim is properly before the Court notwithstanding the fact that it was not raised in the trial court, there is no merit in it.

The testimony for the defense, stated generally, was that the victim was distraught at the prospect of the Appellant leaving her. According to the Appellant, the victim had made one suicidal gesture prior to the day of her death. On the day of her death, the victim took possession of the Appellant's HiPoint nine millimeter gun. The Appellant took it away from her and put it behind a television set. However, just before or as he was going to the bathroom, the victim got hold of the gun again. While the Appellant was in the bathroom, he heard the report of the gun and then the

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[1] The Appellant wholly failed to assert any specific ground in the motion made at the conclusion of the State's case - in - chief. However, since that motion was waived by the fact of the introduction of a defense case - in - chief, *Gary v. State*, 11 So.3rd 769 (Miss. Ct. App. 2009), it is unnecessary to consider the deficiency in that motion.

patter or big or little feet in the hall. The Appellant left the bathroom, saw that the victim had been shot, and then left the house, going to a friend's house and then to an aunt's house. The Appellant claimed that he did not know what had happened to his gun

The testimony for the State, also stated generally, was that the Appellant told police officers at the time of his arrest that he had killed the victim and that he had not been thinking at that time. The Appellant's friend, Hughery, also testified that the Appellant told him that he had killed the victim. The Appellant did own a HiPoint nine millimeter gun; the victim was killed by a nine millimeter bullet fired from such a gun. While a shell casing was found in the room in which the victim died, the gun was not in that room, was not found in the house, and indeed was never located. There was no gun powder residue on the victim's hands. There were certain threats or comments about the victim's impending death made shortly before she was killed.

The Appellant's testimony suggested that the victim committed suicide. On the other hand, the strange tale of feet being heard in the hall after the shooting rather suggests some other scenario. While the Appellant here attempts to claim that the crime scene was unsecured and on that basis suggest that someone for some reason might have absconded with the gun, he gives no reason why or how that would have happened.

The Appellant's trial account was contradicted in material particulars, especially by his statement to police officers at the time of his arrest and his statements made the day before the victim's death concerning the victim. His trial testimony was contradicted by Hughery's testimony. Where an accused's statements made after the homicide are inconsistent with his trial testimony, the *Weathersby* rule is inapplicable. *Neese v. State*, 993 So.2d 837, 847 (Miss. Ct. App. 2008).

The Appellant's trial testimony was unreasonable. The Appellant's account suggested that the victim shot herself and then that somebody other than himself took the gun from her presence.

Yet, emergency personnel and law enforcement were quickly at the scene of the killing and secured it. The Appellant gives no hint as to who would have taken his HiPoint gun, or why it would have been taken. The jury was and this Court is left to suppose that some unknown person for unknown reasons came into the house at just the right time, went to the room in which the victim sat dying, took the gun from her presence and then left the house with it. An extraordinary coincidence of events suggested by the Appellant, yet hardly a reasonable scenario.

Given the material contradictions in the evidence and the unreasonableness of the Appellant's account of the shooting, the trial court would not have committed error in refusing to grant a motion for a directed verdict on the basis of the *Weathersby* rule had such a motion been made by the defense.

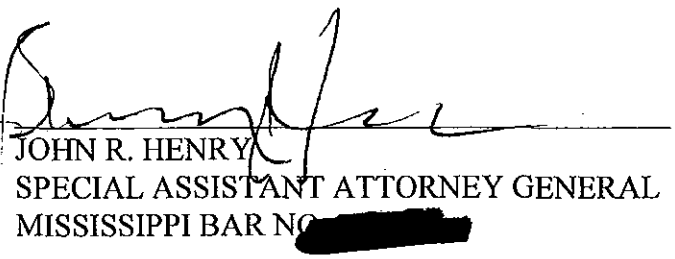
The Second Assignment of Error should be denied.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

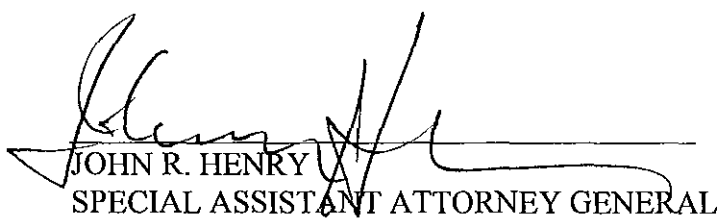
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Kenneth L. Thomas
Circuit Court Judge
P. O. Box 548
Cleveland, MS 38732

Honorable Brenda Mitchell
District Attorney
P. O. Box 848
Cleveland, MS 38732

W. Daniel Hinchcliff, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 4th day of June, 2010.



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