2009-KA-02018-COAT

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KESHIA GILMER **APPELLANT**

V. **NO. 2009-KA-2018-COA**

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. Keshia Gilmer, Appellant
3. Honorable Dewitt (Dee) T. Bates, Jr., District Attorney
4. Honorable Michael M. Taylor, Circuit Court Judge

This the 12th day of April, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF INCARCERATION

Keshia Gilmer, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lincoln County, Mississippi, and a judgment of conviction on one count of third degree arson against Keshia Gilmer, following a trial on December 2, 2009, the honorable Michael M. Taylor, Circuit Judge, presiding. Gilmer was subsequently sentenced to three years in the custody of the Mississippi Department of Corrections.

FACTS

According to the testimony presented at trial, on June 10th, 2008, Officer Fred Perkins of the Brookhaven Police Department was dispatched to 1803 Brignall Road. (T. 73). The initial call was for a burglary, but upon arrival, it appeared that someone had entered the residence and removed some items, and taken them outside. (T. 73). Upon further investigation, Officer Perkins discovered what appeared to be trash that had been burned and was still smoking. (T. 74).

Upon closer a look of the burn pile, Officer Perkins saw what he believed to be a shoe and some small pieces of jewelry. (T. 75). Officer Perkins testified that four rings and a herringbone necklace were pulled from the fire and laid out to be photographed by Captain Joe Portrey. (T. 75). Perkins further testified that Luciana Thadison took the jewelry from the scene and brought it to Assistant Chief Nolan Jones.

Assistant Chief Jones testified that on June 11th, Bruce Robinson and Luciana Thadison came to his office, and he took a statement from them. (T. 76). Jones was given some jewelry alleged to have been recovered from the burn pile on the day in question. (T. 76). Jones also received a tag number, which, when run through the system, came back as registered to Keshia Gilmer. (T. 77-78).

Bruce Robinson testified that on June 10th, 2008 testified that Keshia Gilmer was his ex-girlfriend. (T. 80-81). At 11:30 on the day in question, Robinson received a phone call from Gilmer

saying that she had come to Brookhaven to return some money that was Robinson's, and asking where she could leave it. (T. 81). Robinson testified telling Gilmer that she could leave it on the step, and the conversation ended. (T. 81).

Robinson later testified that Gilmer called him and told him to meet her at a truck stop. (T. 82). Soon thereafter, Robinson received a phone call from Thadison. (T. 82). Robinson met Gilmer at the truck stop, and Thadison subsequently arrived, prompting Gilmer to leave. (T. 82). Robinson testified attempting to detain Gilmer as she tried to drive away in a small blue car. (T. 82-83).

According to Robinson, prior to arriving at the truck stop, on the phone, Gilmer told him that she had burned Thadison's jewelry. (T. 83). When Robinson returned to Brignall Road, he noticed jewelry in a burned-out fire. (T. 83-84).

Luciana Thadison testified that she was living at Brignall Road in Brookhaven with Robinson on the date in question. (T. 86). Thadison testified that she did not know Gilmer personally, but met her before the alleged incident in question. (T. 86). Thadison testified that when she was living with Robinson, Gilmer called phone once, and Thadison happened to answer. (T. 86-87). Thadison testified that this phone conversation happened a few days prior to the day of the alleged incident. (T. 87).

On the day in question, Thadison testified she came home from school, and when she pulled into the driveway, she saw a blue four-door cavalier in the yard. (T. 87). Thadison testified she saw a woman coming down the step, and called Robinson. (T. 87). Robison, in turn, informed Thadison that Gilmer drove a blue car. (T. 88).

After Thadison got off of the phone with Robinson, Thadison testified to getting Gilmer's tag number, and told the tag number to Robinson. (T. 89). Thadison then went to the truck stop, and when she arrived, saw Robinson leaning over Gilmer's vehicle. (T. 89). According to Thadison,

when Gilmer saw her drive up, Gilmer pulled off. (T. 89).

Thadison testified that she called Robinson and Robinson told her that Gilmer had burned her jewelry in his yard. (T. 90). Thadison testified she then called Gilmer who confessed to burning the jewelry. (T. 90).

Thadison testified that she purchased one of the rings and when she bought it she paid about one-hundred and seventy five dollars. (T. 91). Thadison testified that her family had given her the other jewelry. (T. 91). Thadison also stated that an outfit and a pair of sandals were also burned and that she paid about thirty dollars for it all together. (T. 92).

Gilmer took the stand in her own defense. Gilmer testified that she has been involved in a personal and intimate relationship with Robinson prior to and after the date of the incident in question. (T. 101-102). Gilmer testified that at trial was the first time in her life she had ever seen Luciana Thadison, but confirmed that she had talked to her on the phone. (T. 102-03). Gilmer denied ever coming to a truck stop in Brookhaven to give Robinson money. (T. 103). Gilmer further denied ever setting anything on fire at Robinson's house. (T. 103-110).

Gilmer was subsequently found guilty and sentenced to three years in prison with two suspended. (C.P. 28, R.E. 6). On December 7, 2009,, the Appellant filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial (C.P. 29-30, R.E.7-8). The motion was denied by the trial court on December 7, 2009 (C.P. 31, R.E. 9). On December 17, 2009, feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 32, R.E. 10).

SUMMARY OF THE ARGUMENT

The State presented no evidence of the value of the items alleged to have been burned by

Gilmer. Under ***Williams v. State***, 763 So. 186, the State must present evidence of the actual market value of the items in question at the time of the alleged event. The sole evidence presented at trial was the purchase value of some of the items in question. Gilmer respectfully contends that said evidence was insufficient to support a conviction of third-degree arson.

The verdict was also against the overwhelming weight of the evidence. The only evidence linking Gilmer to the alleged crime is the testimony of jilted lovers. Gilmer's conviction is the result of a love triangle gone bad. Accordingly, the testimony provided at trial does not support Gilmer's conviction for third-degree arson and warrants a new trial.

ARGUMENT

ISSUE ONE: WHETHER THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

The only evidence of the value of the property in the instant case came from the victim, Thadison, who simply testified that she had purchased one of the rings for one-hundred and seventy five dollars. (Tr. 91). Thadison further testified that an outfit alleged to have been burned was purchased for thirty-five dollars. (T. 91). Thadison was unable to testify as to the value of any of the other items.

Under the reasoning of this Court's holding in *Williams v. State*, 763 So. 2d 186, 187-88 (¶¶4-10) (Miss. Ct. App. 2000), the State failed to present sufficient evidence to establish beyond a reasonable doubt that the value of the property was $25 or more. Thus, Gilmer is entitled to have her conviction and sentence for third-degree arson reversed.

In reviewing the sufficiency of the evidence, the relevant inquiry is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bush v. State*, 895 So. 2d 836, 843

(Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will not be disturbed where the evidence so reviewed is such that "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense." *Id.* (citing *Edwards v. State*, 469 So. 2d 68, 70 (Miss.1985)). However, the proper remedy is to reverse and render where the evidence "point[s] in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty[.]" *Id.*

In *Willaims v. State*, the defendant was convicted of possession of stolen property of a value greater than $250. *Williams v. State*, 763 So. 2d 186, 187 (¶¶1-3) (Miss. Ct. App. 2000). There, the owner of the stolen property–a stereo and a flashlight–testified that he paid $600 dollars for the stereo two-and-a-half years before the theft, and he paid $110 for the flashlight one year before the theft; he also stated that both items were in good condition. *Williams*, 763 So. 2d at 188 (¶6). This Court identified the proper measure of value in a larceny case as "the property's market value on the date of the crime." *Id.* at (¶7) (citing *Barry v. State*, 406 So. 2d 45, 47 (Miss. 1981)). Similarly, the appropriate measure of value in a third-degree arson case should be the property's market value on the date of the crime.

In holding that the victim's testimony was insufficient to establish that the market value of the items at the time of the theft was $250 or more, this Court found that the owner's testimony alone was not competent evidence. *Id.* at (¶8). To this end, this Court concluded that "[w]ithout evidence from *someone familiar with the market value of the used stereo or flashlight*, there was nothing for the jury to consider in deciding whether this property was worth more than $250. *Id.* at 189 (¶10). This Court added that "[the jury] could speculate, but that is insufficient." *Id.*

As in *Williams*, the only evidence of the value of the property in the instant case came from

the victim. As in *Williams*, Thadison's testimony as to value was not sufficient evidence for the jury to find that the property was worth at least twenty-five dollars. As in *Williams*, without someone familiar with the market value of the used goods, there was nothing for the jury to consider in deciding whether this property was worth more than twenty five dollars. The jury could speculate, but that is insufficient. *Id.* Thus, under *Williams*, the State failed to provide sufficient evidence to establish beyond a reasonable doubt that the value of the property was twenty five dollars or more.[1]

Accordingly, the State's failure to present sufficient evidence on the charge warrants reversal of Gilmer's conviction and sentence for third-degree arson.

ISSUE TWO: WHETHER THE TRIAL COURT ERRED WHEN IT OVERRULED THE APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE THE OVERWHELMING WEIGHT OF THE EVIDENCE POINTED TOWARDS THE APPELLANT BEING NOT GUILTY OF THE CRIME OF AGGRAVATED ASSAULT.

A motion for a new trial challenges the weight of the evidence; reversal is only warranted if the lower court abused its discretion in denying a motion for a new trial. ***Dilworth v. State***, 909 So. 2d 731, 737 (Miss. 2005). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." ***Herring v. State***, 691 So. 2d 948, 957 (Miss. 1997).

A jury verdict will only be disturbed on appeal in exceedingly rare cases. ***Thomas v. State***, 92 So. 225, 226 (Miss. 1922). Despite the standard of review being so high, "this Court has not

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1. Applying this Court's holding in *Williams* to the instant case, is especially warranted in the instant case, where the property to be valued is jewelry. This is so because of the significant possibility that the jewelry could be costume jewelry. Although, Thadison claimed that the jewelry was real, there is a very reasonable possibility that she was mistaken; someone familiar with the market for jewelry was necessary to make an informed determination on this point, and provide a reliable valuation of the jewelry for the jury to consider.

hesitated to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict." ***Dilworth v. State***, 909 So. 2d 731, 737 (Miss. 2005) (citing ***Lambert v. State***, 462 So. 2d 308, 322 (Miss. 1984)).

Gilmer's conviction rests solely on the testimony of two people involved in what could only be described as a love triangle. Robinson's relationship with both Gilmer and the alleged victim creates a situation in which his word should be taken with a grain of salt. The testimony of jilted lovers and ex-lovers rendered the jury with no concrete evidence as to what exactly happened.

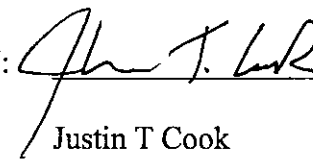
While this evidence may be sufficient to support a conviction, it certainly does not rise to the standard to warrant the deprivation of a defendant's liberty. Gilmer respectfully requests that this honorable Court reverse her conviction and remand to the lower court for a new trial.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on one charge of third degree arson, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Keshia Gilmer, 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:

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