

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**DEWAYNE LADALE TUGLE**

**APPELLANT**

**VS.**

**NO. 2010-KA-0171-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**BRIEF FOR THE APPELLEE**

**STATEMENT OF ISSUES**

- I. THE TRIAL COURT PROPERLY REFUSED TUGLE'S INSTRUCTION REGARDING IDENTIFICATION EVIDENCE.
- II. TUGLE FAILS TO SHOW PREJUDICE DUE TO ALLEGEDLY LATE DISCOVERY.
- III. TUGLE'S CONVICTIONS FOR ARMED ROBBERY AND FELON IN POSSESSION OF A FIREARM ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE.
- IV. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT OF GUILTY OF FELONY FLEEING.

## STATEMENT OF FACTS

Bonnie Brassel arrived at the Coahoma County home of her sister, Carolyn Garrett, expecting to take Carolyn out to lunch for her birthday. T. 132. However, the celebratory mood was ruined when Dewayne Tugle came from behind the Garrett's house and approached Bonnie, aiming a gun at her. T. 133. Bonnie screamed and ran to the opposite side of the house. T. 134. William Garrett, Carolyn's husband, had seen Bonnie pull up in the driveway, then heard her scream. T. 184, 278. When he opened the door to check on Bonnie, he saw Tugle standing on the steps pointing a gun at William's face. T. 278. William jumped back in the house and tried to pull the door shut, but Tugle attempted to barge into the house. T. 185, 278. Tugle continued his attempt to force his way into the Garrett home, but William finally managed to close and lock the door after putting all his weight against the door. T. 185, 279. William turned to his wife and yelled, "He's got a gun. He's got a gun. Go get the gun." T. 185. Tugle then peered in the couple's kitchen window. T. 186. Moments later, the Garretts saw Tugle drive off in an older model brown truck. T. 187, 279. Carolyn went outside to bring Bonnie into the house, then called 911. T. 187.

Sheriff's deputy Mario Magsby received a call from dispatch about the armed robbery attempt. T. 209. Magsby was advised that the suspect was black male with a bald head and a beard, wearing a white shirt and red hat, who had fled the scene in a dark colored pickup truck, traveling on Old Highway 61 toward Clarksdale. T. 209-210, 212. Deputy Magsby was en route to the crime scene when he saw a brown pickup truck which failed to stop at a stop sign. T. 211. As the driver, Tugle, passed Deputy Magsby, he turned and looked into the patrol car. T. 212. Magsby got behind Tugle and activated his blue lights intending to make an investigatory stop. T. 213. Instead of pulling over, Tugle sped up, hydroplaned twice, temporarily losing and regaining control of his vehicle. T. 214. The chase ended when Tugle crashed his truck into a parked car in front of 733

Lincoln Street. T. 216. Tugle jumped out of the truck and ran from the scene while Deputy Magsby was stuck in traffic. T. 216.

Deputy Magsby and other officers immediately began searching the residential area. A white shirt and red hat was found in the back yard of 719 Lincoln Street. T. 220. Deputy Otha Hunter then saw a bald headed, shirtless black male running through a nearby alley. T. 221. Officer Jimmy Wide caught Tugle running through a backyard on a street adjacent to Lincoln Street. T. 221. Tugle was escorted to his wrecked truck, where officers found his wallet with identification and a light colored sweatshirt. T. 224.

Tugle was convicted of armed robbery, possession of a firearm by a convicted felon, and felony fleeing. C.P. 22-23.

## **SUMMARY OF ARGUMENT**

Tugle was not entitled to an instruction dealing solely with identification evidence. Our case law clearly establishes that when the State proves the defendant's identity through more than the testimony of a single eyewitness, an instruction on identification evidence is properly refused. Additionally, where the trial court grants an instruction which informs the jury that the State is required to prove every element of the crime charged beyond a reasonable doubt, which was granted in the present case, a separate identification instruction is not warranted.

Tugle fails to show how we was prejudiced by the allegedly late discovery. Even if the State committed a discovery violation, the trial court properly followed Uniform County and Circuit Court Rule 9.04(I) to cure the alleged violation.

The jury's verdicts of guilty of armed robbery and felon in possession of a firearm not against the weight of the evidence. Tugle asks this Court on appeal to re-weigh the evidence presented and to discount the testimony of the State's eyewitnesses. However, the determination of witness credibility and the duty to resolve conflicts in the evidence lies within the sole province of the jury.

The State proved each and every element of felony fleeing beyond a reasonable doubt. Tugle's assertion to the contrary comes from a misunderstanding of the elements of the crime found in Mississippi Code Annotated § 97-9-72.

## ARGUMENT

### I. THE TRIAL COURT PROPERLY REFUSED TUGLE'S INSTRUCTION REGARDING IDENTIFICATION EVIDENCE.

When considering jury instruction issues, reviewing courts examine jury instructions as a whole with no one instruction taken out of context. *Wallace v. State*, 10 So.3d 913, 916 (¶9) (Miss. 2009). A criminal defendant is entitled to jury instructions which present his theory of the case. *Id.* However, this entitlement is limited by the trial court's ability to refuse instructions which incorrectly state the law, are without foundation in the evidence, or which are fairly covered by other granted jury instructions. *Id.* Tugle's claim that the trial court erred in granting an identification instruction fails for two reasons: there were two eyewitnesses to the armed robbery, and the instructions when read as a whole placed the issue of identification squarely before the jury.

This honorable Court has held that an identification instruction is not required unless the defendant's identification was based solely upon the testimony of a single witness. *Powell v. State*, 925 So.2d 878, 884 (¶20) (Miss. Ct. App. 2005); *Francis v. State*, 791 So.2d 904, 908-09 (¶12) (Miss. Ct. App. 2001); *Thomas v. State*, 766 So.2d 809, 811 (¶8) (Miss. Ct. App. 2000). Both Bonnie Brassell and Williams Garrett positively identified Tugle at trial as the man they saw commit armed robbery at the Garrett residence. Because Tugle's identification was not proven by a single eyewitness, the trial court did not err in refusing his identification instruction.

Tugle claims that although Bonnie and William positively identified him at trial but were unable to pick him out of a photo lineup, "it is just as likely that there were no eye-witnesses." Appellant's brief at 5. However, our reviewing courts have held that the failure of an eyewitness to identify the defendant pretrial, or even a pretrial misidentification, does not effect the admissibility of an in-court identification. *Wilson v. State*, 574 So.2d 1324, 132-27 (Miss.1990) (citing *Magee*

*v. State*, 542 So.2d 228, 232-33 (Miss. 1989)). Rather, any inconsistencies in identification go toward the weight and credibility of the evidence, which is assessed solely by the jury. *Id.*; *Coleman v. State*, 841 So.2d 1170, 1174 (¶18) (Miss. Ct. App. 2003); *Kimbrough v. State*, 379 So.2d 934, 936 (Miss. 1980). Bonnie explained at trial that she was unable to make a pretrial identification because she did not have her glasses when presented with the photographic lineup, and the pictures seemed blurry to her. T. 167. However, once she saw Tugle in person at a previous trial, she was certain that he was the man who pointed a gun at her and attempted to rob the Garretts. T. 165, 167. William Garrett also positively identified Tugle at trial as the man who aimed a gun at his face and attempted to force his way into the Garrett home. T. 283. William had in fact picked another individual from the photographic lineup. Williams stated at trial, “I was instructed to select the man who pointed the gun at me to the best of my ability.” T. 282. He further explained that Tugle had a beard at the time of the incident, but that his photograph in the lineup was not clear and showed no beard. T. 284. The individual William picked from the lineup was a black male with a bald head and a beard. Exhibit D-1. The supreme court in *Wilson* stated the following.

The initial misidentification on the part of these eyewitnesses to a crime did not completely destroy the value of their testimony or render it inadmissible. The jury was fully advised of the original mistake and had it as well as the subsequent testimony identifying appellant before them to weigh. The weight to be given this evidence was for the jury to determine.

*Wilson*, 574 So.2d at 1327 (quoting *U.S. v. O'Neal*, 496 F.2d 368, 372 (6th Cir.1974)). Both Bonnie and William explained the reason for the discrepancies between the pretrial identification, or lack thereof, and the in-court identification. The discrepancies do not change the fact that they were eyewitnesses to the crimes charged. Under the authority of *Powell*, *Francis*, and *Thomas*, because the State’s case did not rest upon the identification of a single witness, the trial court did not err in refusing Tugle’s identification instruction.

A second and equally compelling justification for the trial court's denial of an identification instruction exists. Where the jury is instructed that the State must prove each element of the crime charged beyond a reasonable doubt, the issue of misidentification is placed squarely before the jury, thereby rendering a separate instruction dealing solely with identification unnecessary. *Smith v. State*, 802 So.2d 82, 88 (¶20) (Miss. 2001) (citing *Robinson v. State*, 473 So.2d 957, 963 (Miss. 1985)). See also *Brunner v. State*, No. 2008-KA-00469-COA (Miss. Ct. App. Nov. 3, 2009) (rehearing denied); *Coleman v. State*, 841 So.2d 1170, 1174 (¶14) (Miss. Ct. App. 2003). Instruction C-15 informed the jury that the State has the burden of proving each element of the crime charged beyond a reasonable doubt. C.P. 75. Instruction S-1 informed the jury that the State must prove beyond a reasonable doubt that Dewayne Ladale Tugle committed each element of the crime charged, spelling out each element of the crimes charged. C.P. 78-79. Under the authority of *Smith*, the granting of instructions C-15 and S-1 placed the identification issue before the jury, and a separate identification instruction was properly refused.

For the foregoing reasons, Tugle was not entitled to a jury instruction dealing solely with the issue of identification.

## **II. TUGLE FAILS TO SHOW PREJUDICE DUE TO ALLEGEDLY LATE DISCOVERY.**

Bonnie was asked on direct if the man who pointed a gun at her and who attempted to rob the Garretts was present in the courtroom. T. 136. Defense counsel objected, and a bench conference ensued outside the hearing of the jury. T. 137. Defense counsel claimed that he had received nothing in discovery which indicated that Bonnie could identify Tugle. The prosecutor advised the court that he notified defense counsel verbally after the first trial that both Bonnie and William were able to positively identify Tugle after seeing him in person. T. 137-139. The trial court found that the evidence was not timely discovered and initially ruled that Bonnie's in-court identification of Tugle would be excluded. T. 140-141. Defense counsel then indicated that if he were able to view the transcript of the previous trial, the alleged discovery violation may be cured. T. 141. The trial court then decided to continue the case so that defense counsel could review Bonnie's prior testimony. T. 146. The trial court recessed on the afternoon of August 17, and the proceedings resumed on the morning of the 19th. T. 149. Defense counsel had examined Bonnie's prior testimony, restated its objection to her in-court identification of Tugle claiming that it would result in misidentification. T. 150. The trial court then asked defense counsel the following.

What if the prosecuting attorney had told you six weeks ago that Miss Brassel would be identifying this defendant? What if she had said that coming up to the initial trial, there would not be a discovery violation, so in view of your having been informed this past Monday, two days ago, it was a discovery violation as of that moment, but now that we have recessed the matter for two days, how does it continue to be a discovery violation?

T. 152. Defense counsel responded that he was no longer arguing a discovery violation, but instead arguing that the witnesses should not be able to make in-court identifications of Tugle since they were unable to identify him pre-trial. T. 152-153. The trial court ultimately ruled that the continuance cured the untimely discovery, and that defense counsel's concerns of misidentification

could be addressed through rigorous cross-examination. T. 152, 160, 162.

On appeal Tugle claims that his conviction should be reversed due to untimely discovery. Presuming that the trial court found that defense counsel was informed for the first time during trial that Bonnie could identify Tugle as the armed robber, the trial court complied with Uniform County and Circuit Court Rule 9.04(I) by granting a continuance. Under the rule, if during trial the court is made aware of a party's failure to comply with an applicable discovery rule, the court has the discretion to allow such evidence to be presented at trial, to grant a continuance, or to enter such an order as it deems just under the circumstances. URCCCP 9.04(I).

The supreme court has held that in some instances where a defendant is entitled to a continuance due to a discovery violation, "postponement of a day or two, or in some cases even an hour or two, will suffice." *Adams v. State*, 772 So.2d 1010, 1013 (§11) (Miss. 2000). In *West v. State*, this Court found that twenty-five minutes was a reasonable amount of time for defense counsel to review undiscovered evidence which the State produced on the day of trial. 969 So.2d 147, 150 (§13) (Miss. Ct. App. 2007). In the case *sub judice*, defense counsel had much longer than twenty-five minutes to review the recently discovered evidence. The trial court recessed early Monday and resumed trial on Wednesday morning, giving defense counsel ample time to respond to the alleged untimely discovered evidence. As such, the trial court properly followed the mandate of URCCCP 9.04(I), and the court's decision should be affirmed.

Additionally, "where a discovery violation results in the admission of evidence that is merely cumulative, the error is harmless." *O'Neal v. State*, 977 So.2d 1252, 1255 (§13) (Miss. Ct. App. 2008). Williams also identified Tugle as the armed robber, so Bonnie's identification of Tugle was cumulative. So in addition to the trial court correctly following URCCCP 9.04(I), any error which could have occurred was harmless. Tugle also fails to show how he was prejudiced by the allegedly

late discovery.

For the foregoing reasons, Tugle's second assignment of error must fail.

### **III. TUGLE'S CONVICTIONS FOR ARMED ROBBERY AND FELON IN POSSESSION OF A FIREARM ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE.**

When reviewing a claim that a conviction is against the weight of the evidence, a reviewing court will not disturb the verdict unless allowing it to stand would sanction an unconscionable injustice. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005). In raising claims that the verdict is against the weight of the evidence, appellant's most often attack witness credibility and draw the Court's attention to conflicts in the evidence. However, the determination of witness credibility lies within the sole province of the jury. *Moore v. State*, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007). Also, the jury is solely responsible for resolving any conflicts in witness testimony which may arise. *Id.*

In addition to a positive identification by two eyewitnesses, other credible evidence supports the jury's verdicts. Bonnie, Caroline, and William testified that the Tugle wore a light colored sweatshirt during the armed robbery. T. 133, 187, 280. A light colored sweatshirt was found in Tugle's truck after he fled on foot. T. 224. William also positively identified the gun recovered from Tugle's truck as the gun that was stuck in his face during the armed robbery. T. 280. Additionally, Tugle fled from Officer Magsby, which shows consciousness of guilt. Tugle testified on his own behalf to a pretty unlikely story. Tugle claimed that Officer Magsby did not have his blue lights or siren activated. T. 337. His story was that a patrol car behind Magsby had its blue lights on, and Tugle believed that that patrol car was attempting to pull over Magsby. T. 338. Tugle claimed that he fled on foot after the crash because he was scared and dazed. T. 341-42. He also claimed that he took off his shirt and used it to put pressure on his head because it was bleeding due an injury from the crash. T. 343. However, the State produced the t-shirt on rebuttal, and the shirt had no blood on it. T. 365.

Again, the jury is solely responsible for judging witness credibility and resolving conflicts in the evidence. It is not the function of the reviewing court to determine whose testimony to believe. *Smith v. State*, 945 So.2d 414, 421 (§21) (Miss. Ct. App. 2006) (citing *Taylor v. State*, 744 So.2d 306, 312 (§17) (Miss. Ct. App. 1999)). So long as substantial credible evidence supports the jury's verdict, the verdict must be affirmed. *Id.* Eyewitness and other physical evidence supports the jury's verdict. The verdict is not against the weight of the evidence.

#### **IV. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT OF GUILTY OF FELONY FLEEING.**

In determining whether the State presented legally sufficient evidence to support the jury's verdict, the reviewing court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005). Additionally, under this inquiry, "all evidence supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can be reasonably drawn from the evidence." *Wash v. State*, 931 So.2d 672, 673 (¶5) (Miss. Ct. App. 2006).

To obtain a conviction for felony fleeing, the State was required to prove, and did prove, beyond a reasonable doubt the following: Tugle was driving a motor vehicle; he was given an audible or visible signal to stop; the signal was given by a law enforcement officer acting in lawful performance of his duty; the officer had reasonable suspicion to believe that Tugle had committed a crime; Tugle wilfully failed to stop; and Tugle "operat[ed] a motor vehicle in such a manner as to indicate a reckless or willful disregard for the safety of persons or property, or ... operate[d] a motor vehicle in a manner manifesting extreme indifference to the value of human life . . . ." Miss. Code Ann. § 97-9-72. Tugle claims that he could not be guilty of felony fleeing because "there was no showing of [a] felony level 'extreme indifference' from the evidence in this case." Appellant's Brief at 11-12. According to the plain language of the statute, the State was not required to prove extreme indifference to the value of human of human life because the State proceeded under the theory that Tugle operated his vehicle in a manner which indicated a reckless or willful disregard for the safety of persons or property.

The State presented the following evidence to prove each element of felony fleeing beyond

a reasonable doubt. The evidence was undisputed that Tugle was driving a motor vehicle. Magsby had better than reasonable suspicion to believe Tugle committed a crime: he personally observed Tugle commit a crime, that is, failing to stop at a stop sign. T. 211, 245. See Miss. Code Ann. § 63-3-805. Magsby first activated his blue lights when he got behind Tugle. T. 213. When Tugle sped up, Magsby activated his siren. T. 218. Tugle still refused to pull over, and after speeding up, he lost and regained control of his vehicle twice, nearly running into a utility pole. T. 214. In a continued effort to evade Magsby, Tugle bypassed an intersection by cutting through a parking lot. T. 215. Tugle continued to evade Magsby until Tugle lost control of his vehicle a third time, crashing into a parked vehicle. T. 216. Clearly, Tugle was driving in manner which indicated a reckless or willful disregard for the safety of person or property, as evidence by the fact that his reckless driving caused him lose control of his car numerous times and ultimately damage another's personal property as well as his own.

Viewing the evidence the light most favorable to the verdict, it is clear that the State proved each and every element of felony fleeing beyond a reasonable doubt.

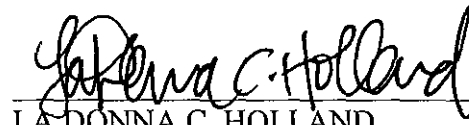
## CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Tugle's convictions and sentences.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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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