IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2010-KA-00171-COA

DEWAYNE LADALE TUGLE — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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

Counsel for Appellant

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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. Dewayne L. Tugle

THIS 15th day of March, 2010.

Respectfully submitted,

DEWAYNE LADALE TUGLE

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

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STATEMENT OF THE ISSUES

ISSUE NO. 1: **WAS IT ERROR TO REFUSE AN IDENTIFICATION EVIDENCE INSTRUCTION?**

ISSUE NO. 2: **WHETHER APPELLANT WAS PREJUDICED BY LATE DISCOVERY?**

ISSUE NO. 3: **WHETHER THE CONVICTIONS FOR ATTEMPTED ARMED ROBBERY (COUNT 1) AND BEING A FELON IN POSSESSION OF A FIREARM (COUNT 3) ARE SUPPORTED BY THE WEIGHT OF EVIDENCE?**

ISSUE NO. 4: **WHETHER THE EVIDENCE IS SUFFICIENT FOR A FELONY CONVICTION FOR RECKLESS FLIGHT FROM LAW ENFORCEMENT UNDER COUNT 4?**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi where Dewayne L. Tugle was convicted of attempted armed robbery, being a felon in possession of a firearm, and reckless flight from law enforcement in a motor vehicle. A jury trial was conducted August 17-20 2009, with Honorable Kenneth L. Thomas, Circuit Judge, presiding. Tugle was sentenced to twenty-four (24) years imprisonment for the attempted armed robbery, eight (8) years for the felon in possession and five (5) years on the reckless flight conviction, all to be served consecutively. Tugle is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the testimony, on October 24, 2007, around 11:00 a. m., someone tried to barge into the back door of the home of William and Carolyn Garret on Hopson Pixley Road, just south of Clarksdale, while they were inside. [T.131-33] Mr. Garret was able to keep the intruder from actually entering the house. [T. 185].

Immediately prior to the incident, Ms. Garret's sister, Bonnie Brassel, had just arrived at the Garret's and exited her vehicle in the driveway and approached the Garret's back door. [T. 131-34, 183-84, 277-78]. As she turned to enter the carport, she said she was approached by a balding black man with a beard brandishing a pistol, wearing a light colored sweatshirt. [T. 133, 168, 72-73]. Ms. Brassel ran towards the opposite end of the house. [T. 134].

Having seen Ms. Brassel drive up, Mr. Garret opened the door only to see his sister-in-law startled and in a frightened state. [T. 277-79]. Mr. Garret thought a dog scared her, but said he then saw the man in the carport at the bottom of the steps now pointing the pistol at him and demanding money. [*Id.*, T. 284]. Mr. Garret said he jumped back inside and braced himself against the door while the man tried to gain entry, but failed as Mr. Garret was able to engage the dead-bolt lock. [T. 278].

Mrs. Garret who was nearby in the house heard the commotion and came to the kitchen, while Mr. Garret looked for a gun. [T. 184-86, 188]. Mrs. Garret said she looked out of a window and saw the man looking in, then saw him skedaddle. *Id.* Both

Mr. And Mrs. Garret, as well as Ms. Brassel, testified they watched a brown pickup truck drive off before calling authorities. [T. 169-70, 188-89, 279].

A responding Coahoma Sheriff's investigator, in an unmarked car, said he spotted a brown pick up truck on the way to the Garret's house traveling in the opposite direction. [T. 208-12]. The truck failed to come to a complete stop at a stop sign and the driver looked back at the investigator as they passed each other. [T. 210-12].

The sheriff's investigator turned around and followed the truck and turned on his dash board blue law enforcement light; but the pick-up truck did not stop. [T. 213-16, 218]. Rather, the investigator said the truck drove away and eventually ran into parked vehicle. *Id.*

The occupant of the truck, Dewayne Tugle, reportedly made a short dash, but was captured. [T. 216, 220, 267-69]. A pistol and carrying case were recovered nearby in different locations from the ground. [T. 220, 228-29; Exs. S-5, S-8]. A sweatshirt was recovered from the back of the brown pick-up. [T. 224-25; Ex. S-2].

Tugle offered the testimony of the lady who owned the car he ran into. [T. 307-11]. She said that Tugle had on different clothing than that described by the investigator and the Garret's. *Id.* She also said she watched Tugle exit his truck and did not see a gun or anything in his hands. *Id.*

Tugle testified that he was not at the Garret's house. [T. 335]. He did not see any blue lights behind him. [T. 337]. Tugle said he did not know his uncle's pistol was in the

truck. [T. 340, 344]. Tugle testified that he ran away because he was dazed and afraid of encountering the lady who owned the car into which he crashed. [T. 341, 366-56].

The jury returned guilty verdicts, as charged, in Counts 1, 3 and 4, convicting Tugle of attempted armed robbery of Mr. Garret, of being a felon in possession of a firearm, after the defense stipulated to Tugle's prior conviction, and of reckless flight from law enforcement in a motor vehicle. The trial court had granted a directed verdict under Count 2, being an attempted armed robbery charge of Mrs. Garret, since she was in another room when the intruder tried to come in the house. [T. 304-05].

SUMMARY OF THE ARGUMENT

Tugle's jury was not properly instructed on identification evidence. There was a prejudicial discovery violation. The evidence was insufficient to present the flight offense and the weight of evidence does not support any of the three convictions.

ARGUMENT

ISSUE NO. 1: WAS IT ERROR TO REFUSE AN IDENTIFICATION EVIDENCE INSTRUCTION?

The trial court initially intended to give the jury an instruction on identification evidence and Tugle offered one as well, D-2, a standard instruction regarding identification evidence as authorized in *Davis v. State*, 568 So. 2d 277 (Miss. 1990) *and Warren v. State*, 709 So. 2d 415 (Miss. 1998). [R. 84-85; R. E. 13; T. 373-77, 383-85].

However, the learned trial court reluctantly refused the instruction in response to the state's argument that since there was, arguably, more than one eye witness, the instruction was not proper. [T. 373-77, 383-85]. See *Grayer v. State*, 928 So. 2d 905 (Miss. Ct. App. 2006).

Tugle's position is that the trial court erred in its withdrawal of the court's identification instruction and in the refusal of D-2. The argument that the instruction might not be required because there was possibly more than one eye-witness is not valid under the testimony of this case. The trial court even recognized that under the facts of this case, denial of the instruction was rather "harsh." [T. 384].

Both of the Garret's and Ms. Brassel had all failed to make an identifications on prior occasions. [T. 193, 243]. First, just after the incident, all failed to pick Tugle out of a photo line-up. *Id.* In fact, Mr. Garret identified another person. [T. 254, 265, 282-84, 287-88]. Secondly, at Tugle's first trial, which ended in a hung jury, Ms. Brassel did not identify Tugle at all. [T. 141-64, 166-67, 178-79; Ex. D-1].

Based on these facts, it is just as likely that there were no eye-witnesses. For the trial court to have assessed more than one an eye-witness required a finding of fact which was strictly the province of the jury. The same principle would apply on appeal, an appellate court would be without authority, under the fact of this case, to qualify someone who failed to identify the accused on a prior occasion as an eye witness for purposes of deciding whether an identification instruction should have been given.

It has long been established that "the jury is the judge of the weight and credibility of testimony and is free to accept or reject all or some of the testimony given by each witness." *Meshell v. State*, 506 So. 2d 989, 991 (Miss. 1987). "The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity." *Noe v. State*, 616 So. 2d 298, 303 (Miss. 1993).

In *Davis v. State*, 568 So. 2d 277, 280-81 (Miss. 1990), the supreme court ruled that it was error to refuse essentially the same instruction offered by Tugle. However, the *Davis* court found the error harmless there. *Id.* In *Warren v. State*, 709 So. 2d 415, 421 (¶28) (Miss. 1998), the Court found that trial court's refusal of a jury instruction on the law of identification was reversible error in adherence to *Davis, supra. Id.*

The trial court here in Tugle's case made its ruling under the rational set out in *Francis v. State*, 791 So. 2d 904, 908-09 (Miss. Ct. App. 2001) and *Thomas v. State*, 766 So. 2d 809, 811 (Miss. Ct. App. 2000).

In *Francis*, the Court of Appeals ruled that, because the identification of the defendant was not based solely on the testimony of one eyewitness the trial court was not required to give an identification instruction. *Francis*, 791 So. 2d at 908. The other evidence in *Francis* was that the defendant gave a statement disclosing to police the location of a gun used in a robbery.

In *Thomas*, the Court of Appeals noted that *Warren, supra*, holds that failure to

give a requested identification instruction is reversible error if the identification of the accused is based entirely on the testimony of a single witness. *Thomas*, 766 So. 2d 811.

The *Thomas* court found that the one eye witness there was not the only evidentiary which supported the identification of Thomas. Thomas was near the location of a stolen vehicle and he fled from law enforcement. *Id.* So, it was not error to refuse the identification instruction. *Id.*

The present facts are distinguishable from *Francis* and *Thomas*. As stated before, it is indeterminable whether Tugle's convictions are based on the testimony of one witness or more. More importantly, there is no other independent basis for Tugle's convictions. Tugle was not found near the crime seen, and even though his pick-up truck was similar to that described by the witnesses, the descriptions varied to the point that such evidence could not be said to be an independent basis for the verdicts. [T. 169-70, 250; Ex. S-1a].

So, under the facts of this case, because of the lack of prior identification by any of the state's witnesses, and with a lack of other independent basis for the jury to deliberate the identification of the perpetrator of the attempted robbery of the Garrets, the trial court erred in ruling that the state's case was based on more than one eye-witness. It follows that Mr. Tugle is entitled to a new trial, which is respectfully requested.

ISSUE NO. 2: WHETHER APPELLANT WAS PREJUDICED BY LATE DISCOVERY?

Just after the incident, Bonnie Brassel, Mrs. Garret's sister, was shown a photo line up which included a picture of Dewayne Tugle. [T. 137-67, 173-74, 176, 178-79; Ex. D-1]. She failed to identify Tugle. [T. 141-64, 166-67, 178-79; Ex. D-1]. At Tugle's first trial, Ms. Brassel was never asked to identify Tugle. *Id.* Over objection, the trial court allowed Ms. Brassel to now say that she recognized Tugle. *Id.*

Tugle's trial counsel claimed surprise and a discovery violation because he did not know the witness was there to identify Tugle having twice previously failed to do so. [T. 137-40, 141-66]. The prosecutor said that he had verbally advised counsel of Ms. Brassel's "refreshed" memory, but this was not acknowledged by defense counsel and there was definitely nothing in writing provided. *Id.*

Pre-trial discovery is required "to avoid ambush or unfair surprise to either party at trial." *Blanton v. State,* 727 So. 2d 748, 752 (Miss. Ct. App. 1998). See also *Frierson v. State,* 606 So. 2d 604, 607 (Miss. 1992). Rule 9.04 of the Uniform Circuit and County Court Rules proscribes that the disclosure of the state's evidence and witnesses in chief.

Tugle respectfully suggests that his case is akin to the facts in *Box v. State*, 437 So. 2d 19, 20 (Miss. 1983), where the defendant was charged with armed robbery, and the State failed to disclose the information on the identity of the owner an automobile used to perpetrate the robbery who was to be a state witness, until the evening before trial. *Id.* In the present case, Tugle asserts that the state failed to disclose a witness who could

purportedly identify him as the perpetrator of the attempted robbery at the Garret's home.

In *Box*, the court found the late disclosure deprived the defendant of adequate time to prepare for trial. *Id.* at 21. The *Box* court recognized that "[a] rule which is not enforced is no rule" and reversed. *Id* .

In *Fulks v. State*, 18 So. 3d 803, 805 (Miss. 2009) the State was tardy in disclosure of the content of a witness's testimony which was found to be tantamount to a trial by ambush, because, the defense counsel did not have time investigate or make preparation to deal with the testimony. Citing *Box*, the *Fulks* court reversed because of the prejudice to the defendant; and, the Court is now respectfully requested to, likewise, reverse Mr. Tugle's convictions for the same reasons. *Id.*

ISSUE NO. 3: WHETHER THE CONVICTIONS FOR ATTEMPTED ARMED ROBBERY (COUNT 1) AND BEING A FELON IN POSSESSION OF A FIREARM (COUNT 3) ARE SUPPORTED BY THE WEIGHT OF EVIDENCE?

The standard is that the court on appeal will not reverse under a weight of the evidence challenge unless, accepting as true the evidence supporting the verdict, the record shows that the jury's verdict "is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. " *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997). See also, *Boone v. State*, 973 So. 2d 237, 243 (Miss. 2008).

In addition to all of the state's "eye-witnesses" not previously identifying Tugle,

here there is little or no consistency in descriptions of the perpetrator's clothing matching what Tugle was wearing when he exited his vehicle. [T. 212, 257, 311]. No hat was described by the Garrets or Ms. Brassel. The owner of the car that Tugle ran into, disputes the attire described by state witnesses and she saw nothing in Tugle's hands to indicate that he knowingly possessed the firearm found on the ground. [T. 308]. No fingerprints were shown to be on the weapon. [T. 247]. The descriptions of the pick-up truck did not match. [T.169-70, 250].

The investigating officer said he ran a computer check on the registration of the truck, but the print-out of the report was dated the day prior to the incident. [T. 248; Ex. D-2]. The blue law enforcement lights are not clearly visible in the investigators vehicle. [T. 252; Ex. S-7].

In this case the testimony and physical evidence are, at best, unreliable and insufficient to support the conviction, and a reversal with acquittal is called for. See *Edwards v. State,* 736 So. 2d 475 (Miss. 1999), *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994), and *Guilbeau v. State*, 502 So. 2d 639, 641 (Miss. 1987).

ISSUE NO. 4: WHETHER THE EVIDENCE IS SUFFICIENT FOR A FELONY CONVICTION FOR RECKLESS FLIGHT FROM LAW ENFORCEMENT UNDER COUNT 4?

Tugle's position is that the trial court should have sustained his motion for directed verdict under Count 4, or granted his motion for JNOV or New Trial. As to the review of the denial of directed verdict, the appellate court should consider the sufficiency of the evidence. *Gleeton v. State*, 716 So. 2d 1083, 1087(¶ 14) (Miss. 1998). All of the evidence must be construed in the light most favorable to the state. *Id.*

If the facts and inferences therefrom "point 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," the appellate court must reverse and render. *Bush v. State*, 895 So. 2d 836, 843(¶ 16) (Miss. 2005) (citing *Edwards v. State*, 469 So. 2d 68, 70 (Miss. 1985)). If, on the other hand, reasonable jurors could have reached different conclusions on all of the elements of the charged offense, the evidence is deemed sufficient. *Id.* The state should be given the benefit of all "favorable inferences that may be reasonably drawn from the evidence." *Smith v. State*, 839 So. 2d 489, 495(¶ 12) (Miss. 2003).

Failing to respond to a law enforcement officer's signal to stop can result in a misdemeanor or felony under MCA § 97-9-72. (Rev. 2004).[1] There was no showing of an

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[1] MCA § 97-9-72. (Rev. 2004) Driver failing to stop motor vehicle pursuant to signal of law enforcement officer; penalty; defenses
(1) The driver of a motor vehicle who is given a visible or audible signal by a law

felony level "extreme indifference" from the evidence in this case.

The testimony was that Tugle failed to come to a complete stop at a stop sign. [T. 212]. The vehicle vaguely matched the description given following the incident at the Garret's house. [T.210-12]. After the sheriff's investigator purportedly turned on the dashboard blue light in his unmarked vehicle, it was stated that merely Tugle did not stop. [T.213-16]. Tugle's speed was estimated to be no higher than 40 mile per hour. [T. 214, 259]. No radar was used. *Id.*

The photographs of the truck once it finally came to a rest do not indicate a high rate of speed. [Ex. S1a]. There was no testimony that Tugle was driving on the wrong side of the road, or ever endangered any pedestrians or other traffic on the right of ways as in *Betts v. State*, 10 So. 3d 519, 524 (Miss. Ct. App. 2009) nor *Cole v. State*, 8 So. 3d 250, (Miss. Ct. App. 2008).

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enforcement officer by hand, voice, emergency light or siren directing the driver to bring his motor vehicle to a stop when such signal is given by a law enforcement officer acting in the lawful performance of duty who has a reasonable suspicion to believe that the driver in question has committed a crime, and who willfully fails to obey such direction shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed One Thousand Dollars ($1, 000.00) or imprisoned in the county jail for a term not to exceed six (6) months, or both.

(2) Any person who is guilty of violating subsection (1) of this section by operating a motor vehicle in such a manner as to indicate a reckless or willful disregard for the safety of persons or property, or who so operates a motor vehicle in a manner manifesting extreme indifference to the value of human life, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not to exceed Five Thousand Dollars ($5,000.00), or by commitment to the custody of the Mississippi Department of Corrections for not more than five (5) years, or both.

CONCLUSION

Dewaye Tugle is entitled to have his convictions under all counts reversed, with a new trial for Counts 1 and 3. An acquittal should be rendered under Count 4 or a new granted with the other Counts.

Respectfully submitted,

DEWAYNE LADALE TUGLE

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 15th day of March, 2010, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Kenneth L. Thomas, Circuit Judge, P. O. Box 548, Cleveland MS 38732, and to Hon. Charles W. Kirkham , Asst. Dist. Atty., 115 1st Street, Clarksdale MS 38614, and to Hon. Jim Hood, Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

George T. Holmes

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