IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JENNIFER WEATHERSPOON — APPELLANT

VERSUS — NO. 2010-KA-00221-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR N[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JENNIFER WEATHERSPOON **APPELLANT**

VERSUS **NO. 2010-KA-00221-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The focal point in this appeal is the sufficiency and weight of the evidence used to convict Jennifer Weatherspoon of murder less than capital.

Her conviction of aggravated assault is not contested. (Brief of the Appellant at 4-6)

During the early morning hours of September 23, 2005, a shooting took place in Cleveland at the Hurricane Club, an establishment that on this occasion lived up to its name.

According to the testimony of Seagram Bacardi Foster, he observed Damien Johnson, Weatherspoon's boyfriend, punch his brother, Carlos White, in the face. As Foster ran over to intervene in the fracas, he passed by Weatherspoon who said: "You running that way, you need to watch me." (R. 124, 133, 140)

Ear and eye witnesses to the shooting of Foster testified that Weatherspoon removed a small pistol from her purse and began shooting. Two shots were fired initially followed by several more shots, all in rapid succession. (R. 106, 200) Bacardi Foster was shot in the back and wounded;

Derrick McKinney who had also run over to intervene, perhaps as peacemaker (R. 227), was shot twice and died from his wounds. McKinney attempted to get out of harms way by running from the altercation. He ran past his friend, Rodya Nicks, who heard McKinney exclaim: "She shot me!" (R. 230)

According to Jessie Robinson, the mother of Foster and White, Weatherspoon told her several months after the incident that she shot Foster, who was wounded, but was not responsible for shooting Derrick McKinney who died from his wounds.

Weatherspoon, a non-testifying defendant, contends on appeal her murder conviction was based upon "extremely weak and tenuous evidence" and should be reversed and the case remanded for a new trial. (Brief of the Appellant at 4, 7) She claims there was " . . . enough reasonable doubt that no reasonable jury should have convicted Weatherspoon of murder." (Brief of the Appellant at 6) We respectfully submit, on the other hand, that affirmation of the guilty verdict(s) returned by the jury, quite clearly, would not work an unconscionable injustice. Whether or not the fatal shot came from Weatherspoon's gun or from another source was a question resolved adversely to Weatherspoon by the jury, as was its exclusive prerogative.

JENNIFER WEATHERSPOON, a young African-American female, prosecutes a criminal appeal from the Circuit Court of Bolivar County, Mississippi, Albert B. Smith, III, Circuit Judge, presiding.

Following a two count indictment returned on September 19, 2006, for aggravated assault (Count I) and murder (Count II), Weatherspoon was convicted on November 5-7, 2007, of both aggravated assault (Count I) and murder (Count II), charged under Miss.Code Ann. §97-3-7 (2)(b) and 97-3-19, respectively. (C.P. at 7-8)

The indictment, omitting its formal parts, alleged in Count I

> "[t]hat **JENNIFER WEATHERSPOON** . . . on or about September 23, 2005, . . . did unlawfully, wilfully, and feloniously, and purposely or knowingly cause bodily injury to Seagram Bacardi Foster, with a deadly weapon, to-wit: a pistol, . . . " (C.P. at 7)

The indictment charged in Count II that Weatherspoon

> " . . . on or about September 23, 2005, . . . did unlawfully, wilfully and feloniously, without the authority of law, and with deliberate design to effect death, kill and murder a human being, to-wit: Derrick McKinney, . . ." (C.P. at 7)

Following a trial by jury conducted on November 5-7, 2007, the fact finder returned dual verdicts of guilty of aggravated assault and murder less than capital. (R. 376-77; C.P. at 64-65)

On January 15, 2008, following a presentence investigation and report and during a sentencing hearing at which the defendant " . . . expressed great remorse for the loss of life in this case," Weatherspoon was sentenced by the trial court to serve twenty (20) years in the custody of the MDOC for the aggravated assault and to life imprisonment for the murder, both sentences to run consecutively. (R. 379-83)

One issue is raised on appeal to this Court.

"Weatherspoon is entitled to a new trial because the trial court abused its discretion when it failed to grant her motion for a new trial" which was grounded, in part, on claims (1) "[t]he evidence did not support a murder conviction;" (2) "[t]he Court erred in not granting the Defendant's Motion for a Directed Verdict," and (3) "[t]he verdict was against the overwhelming weight of the evidence." (C.P. at 60)

STATEMENT OF FACTS

Jennifer Weatherspoon and Damien Johnson were girlfriend and boyfriend. Both were hanging out during the early morning hours of September 23, 2005, at a nightclub in Cleveland known as the Hurricane Club. Carlos White and Derrick McKinney, a/k/a "Rell," were standing at

a table inside the club when Weatherspoon began flirting with the two men. (R. 84) Weatherspoon's mother told Weatherspoon not to mess with them because her boyfriend was outside. (R. 84) About that time, Johnson walked in, began cursing, and grabbed Weatherspoon by the neck. (R. 85) He said nothing to White and McKinney until they got outside at which time White and Johnson began to argue.

McKinney walked away while words were exchanged between White and Johnson in the parking lot. When White told Johnson it was Weatherspoon who was hitting on them and not vice versa, Johnson punched White in the face with his fist. (R. 85)

Several people were either standing outside the club that night or seated inside an automobile. One of those men was White's brother, Seagram Bacardi Foster, who was seated inside his car when he observed Johnson punch his brother. Foster jumped out of his car and ran over to assist his brother. (R. 123-24) As he ran past Weatherspoon who was standing nearby, she said, "You running that way, you need to watch me." (R. 124) According to Foster, he never threw a punch before he got shot in the back by someone. He did not see Weatherspoon shoot him but she was the only person in a position to do so, and he was informed by White, his brother, who hollered, "Yeah, she shot you." (R. 87)

Prior to the fisticuffs, Foster had observed Derrick McKinney across the street. (R. 122) Upon seeing the altercation between Johnson and White, McKinney attempted to intervene as a peacemaker. (R. 227) As he approached the combatants, McKinney was shot twice, once in the chest and once in the shoulder. The fatal wound to the chest was caused by a .22 bullet. McKinney, while trying to get out of harms way, was heard to say, "She shot me." (R. 230)

Thirteen (13) witnesses testified for the State during its case-in-chief, including Carlos White, an ear and eyewitness who described the incident as follows:

Q. [BY PROSECUTOR FLINT:] But you saw - you saw her?

A. Yes, ma'am.

Q. What did you see her do, again?

A. I saw - - she went in her purse and got a gun and started shooting.

Q. Did you see the gun?

A. Yes, ma'am.

Q. Do you recall what kind of size gun it was?

A. No, ma'am. I couldn't tell you.

Q. Do you recall hearing shots?

A. Yes, ma'am.

Q. Now, when you heard the shots did you know where the shots were coming from?

A. From Jennifer.

Q. Did you hear any other shots at that time?

A. Not at that time.

Q. Where was your brother when the shots were fired?

A. Well, he - - he got shot in the back. We ran - - we didn't know he was shot. We ran around the back of the building when she started shooting.

Q. When did you realize that your brother was shot?

A. When we got around to the back. He said, "That blank didn't shoot me? He turned around and I hollered, "Yeah, she shot you."

Q. Did you see her shoot - -

A. Yes, ma'am.

Q. - - the gun?

So you knew it was her?

A. Yes, ma'am.

Q. Did you see Derrick McKinney? Did you see Rell up during this time?

A. No, ma'am. (R. 86-87)

Seagram Bacardi Foster, testified he was seated inside his car when he observed Johnson strike his brother, Carlos White, in the face. Foster got out of his car and ran toward the combatants: "I was going to help my brother out - - and she shot me in my back." (R. 124)

When Foster ran past Jennifer Weatherspoon who was standing "right on the side of my car" (R. 143), she said, "You running that way, you need to watch me." (R. 124) Before Foster could reach the combatants and pass a lick, " . . . she shot me in the back." Foster did not actually see Weatherspoon shoot him "[b]ut I seen her on the side of the car [and] [s]he told me, 'You need to watch me.' " After Foster was shot, Foster and White ran behind the building at which time Foster heard four or five more shots fired by a small gun. (R. 125)

According to Foster, McKinney, a/k/a "Rell," must have come from across the street. (R. 143) Foster testified during cross-examination that "I seen Jennifer going in her purse." (R. 151)

Jessie Robinson, the mother of Carlos White and Bacardi Foster, had known Jennifer Weatherspoon for years. (R. 155) She was not at the Hurricane Club on the night of September 23, 2005, but went to the hospital where she observed her son's wound. (R. 155) The bullet was not removed and to her knowledge is still there. (R. 156)

In November of 2005 (R. 166), Weatherspoon told Robinson that " . . . she didn't shoot Rell

[McKinney] but she shot Bacardi [Foster.]" (R. 157-58) Weatherspoon was upset and crying when she said this to Mrs. Robinson. (R. 172) Weatherspoon also said she didn't remember shooting "Rell." (R. 173)

Romayel Patton, a twenty-four (24) year old resident of Cleveland, former high school classmate of Weatherspoon (R. 174), and an ear and eyewitness, testified he and Reginald Brown were at the Hurricane Club the night of September 23, 2005. Patton and Brown were sitting in a car, Patton on the passenger side (R. 179), when a fight broke out several feet in front of their vehicle. (R. 175-76) Patton saw Weatherspoon holding a gun. (R. 179) He observed several shots fired by Weatherspoon, and immediately thereafter saw "Rell" run past his vehicle away from the fight as shots were still being fired. (R. 177, 181) "Rell's" posture at the time of flight was "[i]n a leaned over position." (R. 181) Patton heard "[a]bout six shots" all behind each other. (R. 178, 185) There were people in her way as Weatherspoon was firing. Patton saw fire coming from the muzzle of the gun. (R. 183) He did not see anyone else with a gun. (R. 181) All of the shots came from the same direction. (R. 182)

Reginald Brown, the thirty-nine (39) year old cousin of Romayel Patton and an ear and eyewitness to the events that transpired, was seated in the driver's side of the vehicle when the fight broke out. (R. 193-94) He observed Weatherspoon, who was standing in front of Brown's car, with a gun in her hand and yelling at the two combatants. (R. 196, 203-04) Weatherspoon was only "[t]wo or three feet" from the combatants. (R. 207) Brown heard her say: "Why y'all paying attention to him? You need to be paying attention to me." (R, 195)

Brown " . . . just seen the fire coming from the gun." (R. 196, 221) Brown heard between five and seven shots. (R. 197) There were two shots followed by five more. (R. 215)

Brown saw "Rell" run by the driver's side door contemporaneously with the shooting. (R. 199)

> Q. [BY PROSECUTOR FLINT:] He ["Rell"] ran by your car?
>
> A. [BY BROWN:] Right by it.
>
> Q. How was he looking when he ran past your car?
>
> A. He was - - you know, he was in a panicked state like he was just running. I thought he was going to jump in the car. I didn't know he had been shot, you know. (R. 201)

When the shooting stopped, and as "Rell" ran by "the driver's side door of [his] car", Brown saw Weatherspoon turn and leave. "I seen her walking." (R. 198) Brown got out of his car and went across the street where he observed "Rell" lying in the grass - "he was alive for a minute." (R. 201-02)

During cross-examination, Brown testified as follows:

> Q. [BY DEFENSE COUNSEL:] Could you see what kind of gun Jennifer supposedly had?
>
> A. No, I just seen the fire coming out of it.
>
> Q. Okay. You saw fire coming out of it. Was this right after you looked at the fight to see who was fighting?
>
> A. It pretty much happened at the same time. Once the fight started, was when you know I look up and see her shooting and I say to myself, no, she can't be doing this. And then, yes, she is.
>
> Q. Okay. Well, at first, you thought she was shooting in the air, didn't you?
>
> A. Yes, blank ones. Thinking that it's not happening in front of me.
>
> Q. And then you say Rell come running your way, is that

correct?

A. Yes. (R. 209)

Brown did not see anyone else with a gun, only Weatherspoon. (R. 220-210)

Rodya Nicks, a twenty-six (26) year old resident of Cleveland and yet another ear and eyewitness to the events taking place, went to the Hurricane Club that evening with Derrick McKinney a/k/a "Rell." He observed an altercation between Damien Johnson and Carlos White. (R. 225) During the argument "Rell" was "back there by the car with me." (R. 227) "Rell" then decided to intervene in the argument and "[t]o break it up." (R. 227) Nicks saw Weatherspoon remove a gun from her purse and start shooting. (R. 228) Both Nicks and "Rell" ran across the street together. (R. 228)

Nicks had said in an earlier statement to law enforcement that Weatherspoon had a revolver. (R. 229-30) Before crossing the street, "Rell" exclaimed: "She shot me!" (R. 230) After crossing the street, "Rell" fell on the other side of Nicks's car. (R. 230)

Stig Peterson, an investigator with the Cleveland police department, investigated the incident. (R. 238) Peterson found a .380 shell casing at the scene but found no others. (R. 241)

A month after the shooting Weatherspoon, in the company of Damien Johnson, came to the station house and told Peterson she had found a box of .25 caliber shells at her home and wanted to bring them to me. She said they had been loaded into a gun they bought from a guy from Memphis who came by their house. (R. 239) She also told Peterson she had told Investigator Serio in an earlier statement that it was a .22 caliber. (R. 240)

Maurice Jones, a crime scene technician with the Cleveland police department, identified a .22 " . . . bullet that was taken from the body of Derrick McKinney and was examined at the crime

lab." (R. 245)

George Serio, a crime scene investigator for 25 years with the Cleveland police department, testified he received a call around 2:00 a.m. " . . . that there had been a shooting at the Hurricane Club, and I went out and went directly to that location." (R. 247) Serio checked on the conditions of both victims, one who was injured and the other who was dead. (R. 247)

The following morning, Weatherspoon admitted to Serio she had fired a gun. (R. 250) She claimed that Bacardi Foster also pulled out a gun and fired. (R. 251) A gunshot residue test on Foster, however, came back negative. (R. 254)

Weatherspoon stated her gun was inside her purse. The description of the gun she gave to Serio " . . . indicate[d] that it was a revolver and not an automatic weapon." (R. 251) She told Serio that as she was running away from the scene, she dropped the gun. She and her boyfriend jumped in the car and took off. (R. 252) The gun was searched for but never found. (R. 252)

Serio testified that if Weatherspoon had shot a revolver it would not have ejected any shell casings. Serio had never heard of a .25 revolver. (R. 252) He was familiar with a .22 revolver which could easily fit into a purse. (R. 253)

David Whitehead, a trace evidence technician, testified the kit associated with Seagram Bacardi Foster was negative for gunshot residue. (R. 281) This was consistent with him not having fired a gun. (R. 288)

Byron McIntire, a forensic scientist specializing in firearm and toolmark identification, testified that the projectile removed from the body of Derrick McKinney, a/k/a "Rell," " . . . was a .22 caliber projectile . . ." (R. 295-96) This projectile was not fired from the gun that McIntire was given to examine which was a revolver. (R. 296-97) That gun, a semi-automatic, belonged to Henry

Taylor and was obtained in another investigation. (R. 271-72, 298-300)

McIntire was not aware of the existence of any .25 revolver. (R. 297, 306-07)

Dr. Steven Hayne, the State's pathologist, conducted the post-mortem examination on Derrick McKinney. Dr. Hayne observed two gunshot wounds on McKinney, a non-lethal one in the left shoulder and a fatal wound " . . . located over the mid-chest wall slightly to the right of the mid-line . . ." (R. 312) He removed the projectile causing death which was consistent with a .22 caliber projectile. (R. 319)

The cause of McKinney's death was " . . . a gunshot wound to the chest [that was] penetrating in that [it] went into the body but did not exit and produced a gunshot wound of the right lung leading to massive bleeding into the chest cavity." (R. 320)

The manner of death was homicide, " . . . the taking of another - - a human beings life by another human being." (R. 321).

At the close of the State's case-in-chief, the defendant moved for directed verdicts of acquittal on both counts and a reduction of the murder charge to manslaughter.

The motion was denied. (R. 326)

After being advised of her right to testify or not to testify, Weatherspoon elected to remain silent. (R. 326-28) The defense thereafter rested without producing any witnesses. (R. 328)

The State produced no rebuttal. (R. 328)

Peremptory instruction was denied. (R. 331; C.P. at 53)

The defendant requested and received self-defense instructions and instructions submitting to the jury the lesser offense of manslaughter. (C.P. at 46-47, 48-49)

Following closing arguments on November 7, 2007, the jury retired to deliberate at 9:48 a.m.

(R. 375)

An hour and a half later, at 11:08, the jury returned with the following verdicts:

> Count I: "We, the jury, find the defendant guilty of Aggravated Assault in Count II of the indictments." (R. 376; C.P. at 64)
>
> and
>
> Count II: "We, the jury, find the defendant guilty of Murder in Count II of the indictments." (R. 376; C.P. at 65)

A poll of the jury, individually by number, reflected both verdicts were unanimous. (R. 377)

Sentencing was deferred until January 15, 2008, at which time Judge Smith sentenced Weatherspoon to serve twenty (20) years in the custody of the MDOC for aggravated assault and to life imprisonment for murder. (R. 379-83)

On November 13, 2007, Weatherspoon filed a motion for new trial, alleging, *inter alia*, the verdict was against the overwhelming weight of the evidence. (C.P. at 60-62)

The motion was denied on November 19, 2007. (C.P. at 70)

Weatherspoon received constitutionally effective representation at trial from Stan Perkins, a practicing attorney in Greenville.

Appellate representation by Erin Pridgen, an attorney with the Mississippi Office of Indigent Appeals, has been equally effective.

SUMMARY OF THE ARGUMENT

Weatherspoon's three exclamations uttered during the course of this tragic incident, when viewed in harmony with McKinney's exclamation after being hit, to wit: "she shot me!" (R. 230), point unerringly to Weatherspoon as the person who fired the .22 bullet that struck and killed McKinney. *See* Brief of the Appellee at p.16.

The evidence was clearly sufficient to sustain a finding by a reasonable, fair-minded, hypothetical juror that Weatherspoon shot and killed Derrick McKinney.

The trial judge did not abuse his judicial discretion in overruling Weatherspoon's motion for a new trial because the testimony and evidence concerning the identity of the shooter placed that question in the capable hands of the jury. The evidence fails to preponderate heavily, if at all, in Weatherspoon's favor.

Admittedly, there are some slight differences in the trial testimony and the extrajudicial statements given to crime scene investigator Serio.

No matter.

Lest we forget, "[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity." **Jones v. State,** 381 So.2d 983, 989 (Miss. 1980). *See also* **Blocker v. State,** 809 So.2d 640, 645 (Miss. 2002), (¶ 18) ["(I)t is up to the jury to weigh any inconsistencies or contradictions in [a witnesses] testimony"]; **Greer v. State,** 819 So.2d 1 (Ct.App.Miss. 2000), reh denied.

In **Young v. State,** 420 So.2d 1055, 1057 (Miss. 1982), quoting from **Maddox v. State,** 230 Miss. 529, 533, 93 So.2d 649, 650 (1957), this Court pointed out that "[s]eldom do witnesses agree upon every detail. Indeed, their failure to do so is often strong evidence each is trying to accurately portray the situation as he saw it, and that is to the credit, rather than the discredit of the witnesses."

"The jury is the **sole judge** of the weight and credibility of the evidence." **Byrd v. State**, 522 So.2d 756, 760 (Miss. 1988). The evidence in the case at bar, viewed and weighed in the light most favorable to the verdict, clearly does not lead to a conclusion that an unconscionable injustice would result from allowing to stand Weatherspoon's convictions of murder and aggravated assault.

The standards of review for weight and sufficiency of the evidence are fully articulated in **Chambliss v. State,** 919 So.2d 30, 33-34 (¶¶ 10-16 (Miss. 2005), citing **Bush v. State,** 895 So.2d 836, 844 (Miss. 2005). The evidence in this case passes these tests with flying colors.

Allowing the verdicts of murder and aggravated assault to stand where, as in this case, the defendant admitted to another person she fired the shot that struck Carlos White, would not be sanctioning an unconscionable injustice. **Groseclose v. State,** 440 So.297, 300 (Miss. 1983).

ARGUMENT

THE EVIDENCE, VIEWED IN ITS ENTIRETY, WAS LEGALLY SUFFICIENT TO SUSTAIN A CONVICTION OF MURDER.

WEATHERSPOON HAS FAILED TO DEMONSTRATE THE TRIAL JUDGE ABUSED HIS JUDICIAL DISCRETION IN OVERRULING HER MOTION FOR A NEW TRIAL GROUNDED, IN PART, ON A CLAIM THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

THE REASONABLENESS OF THE DEFENDANT'S APPREHENSION WAS A QUESTION FOR THE JURY AND NOT FOR THE REVIEWING COURT AS WAS THE GRADE OF THE OFFENSE, WHETHER MURDER OR MANSLAUGHTER.

AFFIRMATION OF THE JURY'S VERDICT WOULD NOT SANCTION AN UNCONSCIONABLE INJUSTICE.

The focal points in this appeal from her convictions of aggravated assault and murder less than capital are the strength, sufficiency and weight of the evidence used to convict Jennifer Weatherspoon of murder less than capital.

Weatherspoon, upon observing her boyfriend, Damien Johnson, and Carlos White engaged in some fisticuffs outside the Hurricane Club, pulled a pistol out of her purse (R. 86, 197, 251), shot

White in the back, and twice shot Derrick McKinney as he was attempting to intervene as a peacemaker.

Jennifer Weatherspoon claims the evidence supporting her conviction of murder is "extremely weak and tenuous" and that she is entitled to a new trial. (Brief of the Appellant at ii, 4, 7)

Her conviction of aggravated assault is not contested.

We note at the outset the jury was properly instructed on the issues of self-defense and manslaughter, a lesser, if not a lesser included, offense. (C.P. at 46-47, 48-49) The jury, as was its prerogative, rejected both theories and found that Weatherspoon was the shooter who fired the .22 bullet that killed Derrick McKinney as well as the bullet that wounded Bacardi Foster.

Weatherspoon argues that other people had guns that night and during the early morning hours and that the bullet that killed McKinney could have come from another source.

According to Jessie Robinson, the mother of White and Foster, Weatherspoon admitted to Robinson she shot Foster but claimed she was not responsible for shooting McKinney. Thus, Weatherspoon admitted shooting a gun that night. She told Investigator Serio this as well. (R. 251) McKinney was killed with a .22 bullet. No .22 cartridges were found at the scene. A .22 revolver does not eject the cartridges automatically.

Where did Weatherspoon's other bullets go? The jury was entitled to reject any theory the bullet that killed McKinney came from another source. There is simply no credible evidence from which a jury could reach this conclusion.

Weatherspoon assails both the *sufficiency* and the *weight* of the evidence. (Brief of the Appellant at 3-8) *See also* Weatherspoon's motion for a new trial at C.P. 60-61, grounds 1., 5., and

7.

She claims "... the fact there were no eyewitnesses to McKinney's shooting provide enough reasonable doubt that no reasonable jury should have convicted Weatherspoon of murder." (Brief of the Appellant at 6)

We submit, on the other hand, that reasonable minds could have differed. The evidence, viewed in its entirety, was clearly sufficient for a reasonable, fair-minded, hypothetical juror to find beyond a reasonable doubt that Weatherspoon was the person who shot McKinney and that she did not act in self-defense or in a heat of passion and was thus guilty of murder.

Four (4) exclamations precipitated by this unfortunate incident, three (3) from Weatherspoon and one from McKinney, the deceased, highlight this altercation. These utterances, standing alone, defeat Weatherspoon's sufficiency and weight of the evidence arguments.

From the mouth of Weatherspoon we point specifically to the following:

"You running that way, you need to watch me!" [Exclamation made to victim, Foster, who was running up to assist his brother. (R. 124)]

"If y'all going to mess with my man, you're going to mess with me!" [Exclamation overheard by eyewitness Patton as Weatherspoon was shooting. (R. 180)]

"Why y'all paying attention to him? You need to be paying attention to me!" [Question and exclamation overheard by eyewitness Brown just prior to the shooting. (R. 195, 202)]

From the mouth of McKinney, we point to the following:

"She shot me!" [Final words of McKinney overheard by eyewitness Nicks as McKinney sought refuge immediately after being shot. (R. 230)]

When these four exclamations are viewed in harmony with the eyewitness testimony of

Carlos White, Bacardi Foster, Romayel Patton, Reginald Brown, and Rodya Nicks, each of whom, identified Weatherspoon as the shooter, it is clear that any rational trier of fact could have found beyond a reasonable doubt that Weatherspoon shot and killed Derrick McKinney. No other rational conclusion can be reached from testimony that placed a gun in her hands and described threats from her mouth.

It has been said that malice may be implied or inferred from the unlawful and deliberate use of a deadly weapon. **Russell v. State,** 497 So.2d 75 (Miss. 1986) [Malice could be inferred from defendant's use of a knife]; **Fairchild v. State**, 459 So.2d 793 (Miss. 1984); **Shields v. State**, 244 Miss. 543, 144 So.2d 786 (1962); **Stokes v. State**, 240 Miss. 453, 128 So.2d 341 (1961). *See also* **Hendrieth v. State**, 230 So.2d 217 (Miss. 1970). Stated differently, a killing done with a deadly weapon is presumed to have been done maliciously. **Johnson v. State**, 140 Miss. 889, 105 So. 742 (1925).

We find in **Brown v. State**, 98 Miss. 786, 54 So. 305 (1911) , the following language applicable here:

> * * * * * * The malice essential to a conviction of murder may be ascertained from **previous threats** and measures taken in preparation, **and too, may arise suddenly and be implied from circumstances, as from the intentional use at the outset of a deadly weapon.** * * * * * [emphasis supplied]

Cf. **Gibson v. State,** 895 So.2d 185 (Ct.App.Miss. 2004) [Granting of jury instruction stating that intent may be inferred from use of a deadly weapon not error.]

There is no credible evidence in the record suggesting that Derrick McKinney, the victim, or anyone else, was armed at the time of the verbal altercation which preceded the shooting.

The jury was generously instructed by the trial judge with respect to the defendant's theory

of self-defense and manslaughter. (R. 349-51; C.P. at 46-47, 48-49)

Sufficiency.

Weatherspoon's motion for a new trial claimed the trial court erred in " . . . not granting the Defendant's Motion for a Directed Verdict" and "[t]he evidence did not support a murder conviction." (C.P. at 60)

Where, as here, the issue presented is the denial of a directed verdict, peremptory instruction, or judgment notwithstanding the verdict, any evidence favorable to the defendant must be disregarded. **Stewart v. State,** 986 So.2d 304 (Miss. 2008); **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996). This includes Weatherspoon's suggestion that someone else could have fired the fatal shot.

We note that Weatherspoon's post-trial motion targeting sufficiency was nonspecific in nature and was properly overruled for this reason if for no other. *Cf.* **Porter v. State,** No. 2009-KA-00657-COA decided April 27, 2010 (¶12) [Not Yet Reported] ["A motion for a JNOV must be specific regarding the movant's challenge of the sufficiency of the evidence. (Citation omitted) When a movant fails to specify how the evidence was insufficient, we will not find that the circuit court erred in denying a motion for a JNOV."

In any event "[r]equests for a directed verdict and motions JNOV implicate sufficiency of evidence." **Franklin v. State**, 676 So.2d 287, 288 (Miss. 1996). This Court must review the trial court's finding regarding sufficiency of the evidence at the time the last motion therefor was overruled. **Holloman v. State**, 656 So.2d 1134, 1142 (Miss. 1995), citing **Wetz v. State**, 503 So.2d 830, 868-68 (Miss. 1987).

"The standard of review for motions for directed verdict and JNOV is abuse of discretion."

Young v. State, 962 So.2d 110, 116 (Ct.App.Miss. 2007) citing **Smith v. State,** 925 So.2d 825, 830 (¶10) (Miss. 2006) (citing **Brown v. State,** 907 So.2d 336, 339 (¶8) (Miss. 2005)).

No abuse of judicial discretion has been demonstrated here.

In judging the legal sufficiency, as opposed to the weight, of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to *disregard* evidence favorable to the defendant. **Stewart v. State,** 986 So.2d 304 (Miss. 2008); **Anderson v. State,** 904 So.2d 973 (Miss. 2004), reh denied; **Lynch v. State,** 877 So.2d 1254 (Miss. 2004), reh denied, cert denied 125 S.Ct. 1299, 543 U.S. 1155, 161 L.Ed.2d 122 (2004); **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State,** 667 So.2d 599, 612 (Miss. 1995); **Clemons v. State,** 460 So.2d 835 (Miss. 1984); **Forbes v. State,** 437 So.2d 59 (Miss. 1983); **Bullock v. State,** 391 So.2d 601 (Miss. 1980). *See also* **Jones v. State,** 904 So.2d 149, 153-54 (Miss. 2005) ["The relevant question is whether, after 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."]

If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict and request for peremptory instruction or JNOV should be overruled. **Brown v. State**, 556 So.2d 338 (Miss. 1990); **Davis v. State**, 530 So.2d 694 (Miss. 1988). A finding the evidence is insufficient results in a discharge of the defendant. **May v. State**, 460 So.2d 778, 781 (Miss. 1984).

Judge Waller's opinion in **Bush v. State,** 895 So.2d 836, 843 (¶16) (Miss. 2005), makes it

perfectly clear that in resolving sufficiency of the evidence issues the evidence must be viewed and considered in the light most favorable to the State's theory of the case. We quote:

> In *Carr v. State,* 208 So.2d 886, 889 (Miss. 1968), we stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." **However, this inquiry does not require a court to**
>
> > **'Ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after 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.**
>
> *Jackson v. Virginia,* 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (citations omitted) (emphasis in original.) Should the facts and inferences considered in a challenge to the sufficiency of the evidence "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 proper remedy is for the appellate court to reverse and render. *Edwards v. State,* 469 So.2d 68, 70 (Miss. 1985) (citing *May v. State,* 460 So.2d 778, 781 (Miss. 1984)); *see also Dycus v. State,* 875 So.2d 140, 164 (Miss. 2004). However, if a review of the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fairminded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence will be deemed to have been sufficient. *Edwards,* 469 So.2d at 70; *see also Gibby v. State,* 744 So.2d 244, 245 (Miss. 1999).
>
> * * * * * *
>
> In light of these facts, we find that any rational juror could

> have found beyond a reasonable doubt that all of the elements had been met by the State in proving capital murder with the underlying felony being armed robbery. This issue is without merit. **Bush v. State,** 895 at 843-44 (¶¶16, 17) [emphasis in bold print ours].

Our position on the issue of the identity of the shooter of "Rell" can be summarized in only three (3) words: "classic jury issue." In short, it was a jury issue, and the twelve juror's have spoken.

Weight.

Weight of the evidence complaints implicate the denial of a motion for a new trial. **May v. State,** 460 So.2d 778, 781 (Miss. 1984). This Court reviews the trial court's denial of a post-trial motion, e.g., a motion for a new trial, under the abuse of discretion standard. **Flowers v. State,** 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State,** 566 So.2d 1240, 1242 (Miss. 1990). No abuse of judicial discretion has been demonstrated here because the testimony of the ear and eye witnesses for the State weighs heavily in support of the verdict. Put another way, the testimony and evidence, in toto, does not preponderate in favor of Weatherspoon. While not saying so directly, she suggests that to allow this verdict to stand would sanction an unconscionable injustice." (Brief of the Appellant at 4)

We think not.

The evidence does not preponderate in favor of Weatherspoon's claim the fatal shot may have come from another source. Rather, it is lopsidedly in favor of the State's theory of the case. **Bush v. State,** 895 So.2d 836, 844-45 (¶¶18-19) (Miss. 2005). Accordingly, the trial judge did not abuse his judicial discretion in denying Weatherspoon's motion for a new trial. (C.P. at 70)

"The jury is the **sole judge** of the weight and credibility of the evidence." **Byrd v. State**, *supra*, 522 So.2d 756, 760 (Miss. 1988). It's verdict will not be disturbed on appeal unless the failure to do so would sanction an "unconscionable injustice." **Groseclose v. State,** 440 So.2d 297, 300 (Miss. 1983).

The word "unconscionable" points to something that is monstrously harsh and shocking to the conscience. The verdict returned in the case at bar does not exist in this posture. It is neither harsh nor shocking, and affirmation of Weatherspoon's conviction(s) and sentence is the order of the day.

In ruling on the defendant's motion for a new trial, the trial judge - and this Court on appeal as well - must look at the evidence in the light most favorable to the State's theory of the case, i.e., "in the light most favorable to the verdict." **Herring v. State,** 691 So.2d 948, 957 (Miss. 1997), citing **Mitchell v. State,** 572 So.2d 865, 867 (Miss. 1990). "We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State." **McClain v. State,** 625 So.2d 774, 781 (Miss. 1993). *See also* **Gibby v. State,** 744 So.2d 244, 245 (Miss. 1999 [On appellate review "[e]vidence is examined in a light most favorable to the state [and] [a]ll credible evidence found consistent with defendant's guilt must be accepted as true."] *See also* **Valmain v. State,** 5 So.3rd 1079, 1086 (¶30) (Miss.2009) quoting from **Todd v. State,** 806 So.2d 1086, 1090 (¶11) (Miss. 2001) ["(An appellate court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial.")]

In **Bush v. State,** *supra*, 895 So.2d 836, 844 (¶18) (2005), the Supreme Court penned the following language articulating the true rule:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it 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). We have stated that on a motion for new trial,
>
> > The court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.
>
> *Amiker v. Drugs for Less, Inc,* 796 So.2d 942, 947 (Miss. 2000)/2 However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State*, 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror" the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial./3
>
> Sitting as a limited "thirteenth juror" in this case, we cannot view the evidence in the light most favorable to the verdict and say that an unconscionable injustice resulted from this jury's rendering of a guilty verdict. * * * " [text of notes 2 and 3 omitted]

See also **Chambliss v. State,** 919 So.2d 30, 33-34 (¶10) (Miss. 2005), quoting *Bush,* 895 So.2d at 844 (¶18).

The jury's verdict was not against the overwhelming weight of the credible evidence which does not preponderate heavily, if at all, in favor of Weatherspoon's theory of a separate

shooter.

This is not a case where, as appellant suggests, a reviewing court, sitting as a thirteenth juror, is compelled to disagree with twelve jurors's resolution of conflicting evidence.

In **Grooms v. State,** 357 So.2d 292, 295 (Miss. 1978), we find the following language:

> It is not for this Court to pass upon the credibility of witnesses, and where the evidence justifies the verdict it must be accepted as having been found worthy of belief. [citations omitted] It is obvious that this Court cannot set aside a verdict of guilty unless it is clear that the verdict is the result of bias, passion or prejudice or is manifestly against the overwhelming weight of the credible evidence. [citations omitted] *Furthermore, all the proof need not be direct and the jury may draw any reasonable inferences from the evidence in the case.* [citation omitted; emphasis ours]

In **Griffith v. State,** 381 So.2d 155, 157 (Miss. 1980), the Court opined:

> * * * [W]e do not sit as jurors. The fact-finding body, while being overseen by the trial court, has the constitutional duty to decide which witnesses are relating an accurate account of the occurrences giving rise at the trial. * * *

And, in **Hyde v. State,** 413 So.2d 1042, 1044 (Miss. 1982), this Court, quoting from **Evans v. State,** 159 Miss. 561, 132 So. 563 (1931), further opined:

> We invite the attention of the bar to the fact that we do not reverse criminal cases where there is a straight issue of fact, or a conflict in the facts; juries are impaneled for the very purpose of passing upon such questions of disputed fact, and we do not intend to invade the province and prerogative of the jury.

In **Maiben v. State,** 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State, *supra***, 440 So.2d 297, 300 (Miss. 1983).

Contrary to Weatherspoon's's suggestion (Brief of the Appellant at 4), the case at bar does not exist in this posture.

CONCLUSION

The Bible says "Blessed are the peacemakers." Matthew 5:9 (King James Version) In this case, the deceased awaits his reward in heaven.

The evidence presented at trial fails to preponderate heavily, if at all, in Weatherspoon's favor. Giving the State, as we must, the benefit of all favorable inferences, the verdict was not against the overwhelming weight of the evidence.

"In any jury trial, the jury is the arbiter of the weight and credibility of a witness' testimony, [and] [t]his Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light, could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." **Rainer v. State**, 473

So.2d 172, 173 (Miss. 1985).

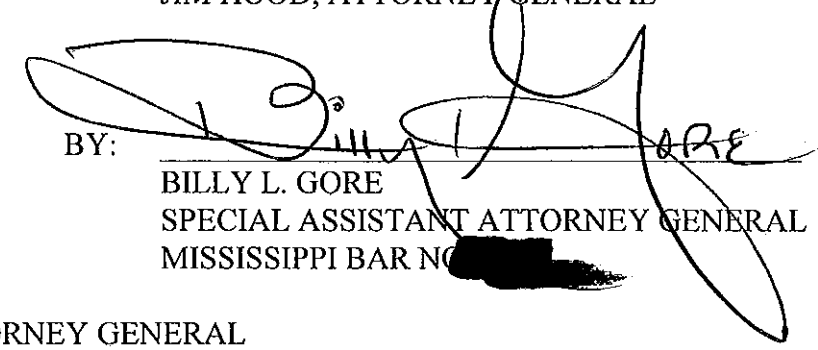
The case at bar does not exit in this posture.

Although Weatherspoon, with the able and effective assistance of trial counsel, claimed the State failed to prove beyond a reasonable doubt she was the shooter who, whether intentionally or not, shot and killed Derrick McKinney, the testimony of the ear and eye witnesses for the State, if accepted as true, proves beyond a reasonable doubt she was indeed that person.

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgments of conviction of aggravated assault and murder, together with the twenty (20) year sentence and consecutive life sentence imposed by the trial court, should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

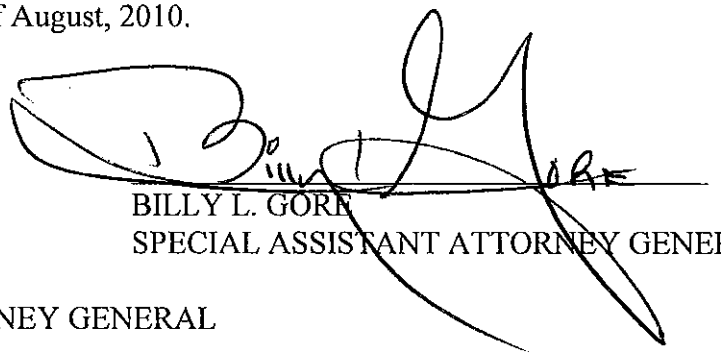
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Albert B. Smith, III
Circuit Court Judge, District 11
Post Office Drawer 478
Cleveland, MS 38732

Honorable Brenda Mitchell
District Attorney, District 11
Post Office Box 848
Cleveland, MS 38732

Erin E. Pridgen, Esquire
Attorney at Law
P.O. Box 3510
Jackson, MS 39207-3510

This the 19th day of August, 2010.



BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680