IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOEL JONES **APPELLANT**

VS. **NO. 2014-KA-1356**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: ALICIA AINSWORTH
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 102996

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

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STATEMENT OF THE ISSUES

I. The instruction on accomplice liability was proper.

II. The State presented sufficient evidence to support the trial court's granting of the accomplice liability instruction.

III. The trial court did not err by granting a cautionary instruction regarding accomplice testimony.

STATEMENT OF THE CASE

This appeal by Joel Jones proceeds from the Circuit Court of Lowndes County, Mississippi, with the Honorable James T. Kitchens, Jr. presiding. On October 25, 2012, Jones was indicted on two counts of aggravated assault and one count of intimidating a witness. (C.P. 37-38).

Following a jury trial commencing on August 19, 2014, Jones was convicted of both counts of aggravated assault and found not guilty of the charge of intimidating a witness. (C.P. 100). He was sentenced to serve twenty years for Count One, with eight years suspended and five years of post-release supervision. (C.P. 114-116). He was sentenced to twenty years for Count Two, to run consecutively to Count One. (C.P. 117).

STATEMENT OF THE FACTS

On the morning of June 14, 2012, Zach Johnson and Tomarcus Thomas were outside at Vivian Hodge's house in Columbus, Mississippi, when Joel Jones rode up on a bike and asked Zach if he had seen Zach's brother, Alvin Johnson. (Tr. 132). Jones has children with Alvin's daughter, Chantal. (Tr. 132). Zach said he did not know where Alvin was and Jones left. (Tr. 133). Alvin arrived at Vivian's house sometime later and Jones came back around 3:00 that afternoon and confronted Alvin. (Tr. 133). Vivian came outside and made Jones leave. (Tr. 133). Supposedly, Alvin owed Jones money. (Tr. 214). Chantal testified she and Jones both had called Alvin several times that day because Jones wanted his money. (Tr. 459).

Later that evening, as it was getting dark, Joel came back and got into a physical fight with Alvin. (Tr. 134). Deondray Tillman and Kamall Conner[1] jumped the fence to help Jones fight Alvin, so Zach and Alson Glenn joined in to fight those two men. (Tr. 134). Zach did not know why they were fighting, but he, Alson and Alvin won the fight and Jones, Conner and Tillman left. (Tr. 134, 135, 191). Alvin and Zach left and drove around for a few blocks before Zach asked Alvin to drop him back off at Vivian's house. (Tr. 135).

About twenty to twenty-five minutes after the fight, Jones, Conner and Tillman returned to Vivian's house in Jones's blue Buick Road Master. (Tr. 135, 137). Jones was driving, Conner was in the passenger seat and Tillman was in the backseat. (Tr. 136, 218). Zach testified Jones was speeding up to the house, spinning his tires and he said Jones pointed a shotgun out of the car. (Tr. 134, 136). Vivian testified she heard Jones say he was going to "shoot up in the crowd" and he did

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[1] Both Tillman and Conner's names are spelled differently through the record, so Deondray will be referred to as "Tillman". Kamall's real name is Taylor Conner, but everyone refers to him as Kamall. The State will refer to him as "Conner" in this brief.

not care who he hit. (Tr. 240). Vivian told Jones to leave and he did. (Tr. 240).

Vivian's son, Demontrell Hodges, said everyone should leave his mother's house and go somewhere else before something bad happens. (Tr. 192). Several people from Vivian's house— including Zach, Demontrell, Alson, Tomarcus Thomas and Vivian— began walking to a nearby convenience store. (Tr. 136). When they reached the corner of Vivian's street, Ash Street, Zach saw the Jones's car at the store. (Tr. 140). He testified the three guys left the store and they parked the car near them by some mailboxes. (Tr. 140). Zach's back was turned until Alson said "they got a gun" and, as Zach turned around, he saw Jones and Conner running through an alleyway toward him and he saw Jones point a .12 gauge shotgun at him. (Tr. 140). Zach threw his hands up as he was shot in the face. (Tr. 140-141). Zach testified he had no doubt that Jones was the one who shot him. (Tr. 143). He was permanently blinded by the shot. (Tr. 131).

Tomarcas Thomas was behind Zach when he was shot and Thomas was also hit with pellets in his face. (Tr. 164). Thomas testified he saw Jones and Conner running down the alleyway and he saw Jones with the shotgun. (Tr. 164-165). He stated Jones is the one who shot him. (Tr. 164, 166). Thomas also testified that Conner had a handgun but never wavered in his testimony that Jones shot him with a shotgun. (Tr. 182, 183).

Alson Glenn testified at trial that he saw both Jones and Conner get out of the car and come toward the alleyway and he told Zach they had a gun. (Tr. 194, 196). He said he kept walking, but Zach stopped, and that's when he heard the gunshot. (Tr. 207). He testified he did not see who pulled the trigger but he saw Conner with the shotgun and that is the only gun he saw. (Tr. 194, 196, 201). Demontrell saw Jones's car parked and saw two figures walking toward the alleyway. (Tr. 228). He testified he could see one of the figures wearing the hat Conner was wearing earlier. (Tr. 227). Demontrell never saw a gun because he ran before the gun was fired. (Tr. 222, 228).

Keith Brooks arrived approximately fifteen to twenty minutes before the shooting occurred. (Tr. 252). Brooks testified he saw Jones's car at the corner of the street, then he saw the car's headlights turn off. (Tr. 254-255). He testified he saw Jones get out of the driver's side of the car with a shotgun. (Tr. 255). As Brooks turned around to warn the others, he heard the gunshot, so he ran. (Tr. 256). Brooks testified he verbally told police that Jones had the shotgun, but it was not in his written statement to police. (Tr. 260, 267).

Diesha Walker and some friends were walking to the store the night of the shooting when she saw Jones and Conner in Jones's car. (Tr. 273). Jones and Conner asked the girls if they had seen a Yukon or Suburban (Alvin drove a similar vehicle, a Tahoe). (Tr. 138, 273). The girls replied no and Walker asked what they were looking for and Jones replied, "trying to handle some business." (Tr. 273). Conner then added, "serious business." (Tr. 273). Walker testified they let down the back window of the car and she saw Jones had a shotgun in the back seat. (Tr. 273, 276). She said Jones and Conner were smoking marijuana. (Tr. 274). She said Jones then had a "little smirk" and said "y'all be light," which she testified means to be careful. (Tr. 276). Walker testified that she was under the impression that by Jones showing her the gun, their "business" was going to involve the gun. (Tr. 275). She said she knows Jones deals with guns because he and her boyfriend "are all in it," "the same little boat with guns." (Tr. 278).

After the shooting, someone called 911 and Columbus Police Department responded to the scene. After talking to witnesses, investigators gathered information that Jones was the shooter and they also developed Tillman and Conner as suspects. (Tr. 302, 316). A man at the scene, who would not give police his name, told investigators Jones was involved. (Tr. 302). Even Chantal, Jones's girlfriend at the time of the shooting, testified that everyone at the scene was saying Jones was the shooter. (Tr. 467). About an hour later, investigators apprehended the Jones, Conner and Tillman

and placed them under arrest. (Tr. 317).

Investigators searched Jones's house with his consent and they recovered a handgun case and some shotgun shell boxes and shotgun shells. (Tr. 368). They never found the shotgun used in the shooting. (Tr. 388). The following day, a spent shotgun shell casing was found at the scene. (Tr. 396). Gunshot residue tests were performed on Jones, Conner and Tillman. (Tr. 430). Jones tested negative for gunshot residue and both Tillman and Conner's tests came back as indicative of gunshot residue, but not positive. (Tr. 436-437).

Jones called Tillman to testify on his behalf. Tillman said after the fight, he started getting drunk and high. (Tr. 479). He testified that Conner had a gun and he "guessed" it was a shotgun. (Tr. 480). He said he never saw Jones with a gun. (Tr. 481). He said he never got out of the car and did not see the shooting. (Tr. 481). He testified he could not remember if Jones got out of the car, but he said Conner got out of the passenger side of the car, left the door open and he came running back to the car. (Tr. 487). All three men left the scene together after the shooting. (Tr. 481).

SUMMARY OF THE ARGUMENT

The instruction on accomplice liability, the *Milano* instruction, is not improper. Jones did not object to the instruction at trial, therefore, he is procedurally barred from raising the issue on appeal. Notwithstanding the procedural bar, statutory provision for accomplice liability, as well as relevant case law, are sufficient to put Jones on notice that an accomplice liability instruction may be proper, if there is evidence to support the instruction, even if the indictment does not contain any accomplice liability allegations.

There was sufficient evidence to support the trial court's granting the accomplice liability instruction. There was evidence to show, at a minimum, that Jones, Conner and Tillman had a plan, or acted in concert, to commit aggravated assault, and Jones aided and abetted by driving his car to

and from the crime scene.

Last, the trial court did not err in granting the State's cautionary instruction regarding the accomplice testimony. The trial court had the discretion to grant the instruction, even though the accomplice testimony was corroborated by other evidence, and it was not reversible error to do so.

ARGUMENT

I. The instruction on accomplice liability was proper.

Jones first argues that the instruction on accomplice liability was an impermissible constructive amendment of the indictment which gutted his theory of defense and violated his constitutional right to notice and due process. The trial court granted the State's instruction on accomplice liability, S-5, known as the "*Milano* instruction." *See Milano v. State*, 790 So.2d 179, 185 (¶21) (Miss. 2001). Jones argues that the *Milano* instruction was an improper constructive amendment to the indictment because the variance between the instruction and his indictment broadened the grounds upon which he could be found guilty of the aggravated assault charges.

First, Jones failed to allege at trial that the indictment had been improperly constructively amended by the *Milano* instruction, and thus, the issue is waived on appeal. *Stewart v. State*, 839 So.2d 535, 539 (Miss. Ct. App. 2002) (citing *Doss v. State*, 709 So.2d 369, 387-88 (Miss. 1996)); *See Rubenstein v. State*, 941 So.2d 735, 774 (Miss. 2006) (finding that the defendant's failure to object to a jury instruction as constructively amending the indictment waives the issue). Notwithstanding the procedural bar, the instruction was proper.

In reviewing challenges to jury instructions, "[t]he instructions actually given must be read as a whole." *Williams v. State*, 803 So.2d 1159, 1161 (Miss. 2001). "When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Id.*

Jones's theory of defense at trial was that he was not the shooter and, therefore, could not be

guilty of aggravated assault as charged in the indictment. He argues the State's *Milano* instruction gutted his theory of defense because the jury was allowed to consider a theory of accomplice liability. He also argues the record is devoid of any notice indicating the State would be proceeding under a theory of accomplice liability, which violated his constitutional rights to notice and due process.

This Court has held that the Mississippi statutory provision on accomplice liability, Miss. Code Ann. §97-1-3, as well as the holdings of this Court and the Mississippi Supreme Court interpreting that provision, "provide sufficient notice to felony defendants that although they may be indicted as a principal, a jury instruction based on accomplice liability is proper, provided that 'the evidence presented supports the instruction given." *Johnson v. State*, 956 So.2d 358, 363 (Miss. Ct. App. 2007) (quoting *Pratt v. State*, 870 So.2d 1241, 1250 (Miss. Ct. App. 2004)). In *Johnson*, the Court stated that "Johnson cannot claim prejudice by a jury instruction that properly instructed the jury in accordance with section 97-1-3 simply because the indictment did not contain any allegations regarding accomplice liability." *Id.*

There was sufficient evidence presented at trial, as discussed in the next assignment of error, to support a jury instruction based on accomplice liability. According to *Johnson*, Jones had sufficient notice that although he was indicted as a principal for the aggravated assault charges, the an accomplice liability instruction would be proper. Regardless of whether the jury found Jones was guilty of aggravated assault because he was the shooter, or because he was an accomplice in accordance with statutory and case law, he is still guilty of aggravated assault as a principle, as indicted. "In this state, that is a distinction without difference." *State v. Peoples*, 481 So.2d 1069, 1070 (Miss. 1986).

Furthermore, the record indicates that Jones was aware that his accomplices, Tillman and

Conner, were both also indicted on aggravated assault charges as co-defendants in Jones's case. Tillman testified on behalf of Jones at trial, and Jones's attorney, in his questioning of Tillman, acknowledged that Tillman was charged as a co-defendant on the same aggravated assault charges as Jones. (Tr. 477). Jones's attorney also questioned Investigator Cockrell regarding Conner's aggravated assault charges as well. (Tr. 319). Based on his knowledge that his three co-defendants were charged and indicted on the same aggravated assault charges as principals, he cannot now claim he had no notice that his case presented a theory of accomplice liability.

Based on the foregoing reasons, and because the instructions, when read as a whole, fairly instructed the jury and create no injustice, the trial court committed no reversible error in granting the *Milano* instruction.

II. The State presented sufficient evidence to support the trial court's granting of the accomplice liability instruction.

Jones next argues that the State presented insufficient evidence to instruct the jury on accomplice liability. He points out that the State did not believe its own theory of accomplice liability based on several statements made during closing arguments that Jones was the shooter. However, as mentioned above, Jones failed to object to the instruction at trial, therefore, he is barred from now raising the issue on appeal. *Carr v. State*, 655 So.2d 824, 831 (Miss. 1995). Notwithstanding the procedural bar, this is issue has no merit.

"Before an instruction can be given, as a general rule it must be supported by the evidence otherwise, it should not be given." *Ballenger v. State*, 667 So.2d 1242, 1255 (Miss. 1995) (citations omitted). In Jones's case, Instruction S-5, the *Milano* instruction, states, in part:

> If another person is acting under the direction of the Defendant or if the Defendant joins another person and performs acts with the intent to commit a crime, then the law hold the Defendant responsible for the acts and conduct of such other persons just as though the Defendant had committed the acts or engaged in such conduct.

. . .

> Of course, mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the Defendant either directed or aided and abetted the crime, unless you find beyond a reasonable doubt that the Defendant was a participant and not merely a knowing spectator.

(C.P. 74-75). "[A]ny person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense is an 'aider and abetter' and is equally guilty with the principle offender." *Hooker v. State*, 716 So.2d 1104, 1110 (Miss. 1998).

The *Milano* instruction is supported by the evidence. Alvin, Zach's brother, owed Jones money and Jones admitted at his sentencing that he wanted the money for a baby shower for Chantal, who was pregnant at the time. (Tr. 630). Jones's friends, Conner and Tillman, helped him fight Alvin and the other men. After the confrontation and then the fight with Alvin, Jones was mad. Vivian testified that she saw Jones in front of her house after the fight, pacing back and forth and he looked mad. (Tr. 238). Jones made threats that he was going to shoot up the crowd. (Tr. 240). He drove by in his car with Conner and Tillman and showed a gun out of the window. (Tr. 134-136). Diesha Walker's testimony that they were going to handle some business, some "serious business," and showed her the shotgun, was evidence that they were planning to commit the aggravated assault. Both Jones and Conner were seen walking down the alleyway together immediately before the shooting. There is conflicting testimony about which one was carrying the gun, but there is evidence to support a theory that each of them had the gun. They were all arrested in Jones's car together after the shooting.

The evidence indicates the three men, including Jones, were involved in a plan together, and acted in concert, to commit the aggravated assault. If the jury believed Conner was the shooter, there is an evidentiary basis to believe Jones aided and abetted Conner, at a minimum, by driving his car

to search for Alvin and to flee the scene. The evidence supported an instruction on accomplice liability and the trial court did not err by granting such an instruction.

III. The trial court did not err by granting a cautionary instruction regarding accomplice testimony.

Last, Jones argues that the trial court erred in granting Instruction S-6, the cautionary instruction regarding Tillman's testimony as an accomplice. "Clear law in the State of Mississippi is that the jury is to regard the testimony of co-conspirators with great caution and suspicion." *Williams v. State*, 32 So.3d 486, 490 (Miss. 2010) (citations omitted). The Court stated that "for a defendant to be entitled to a cautionary jury instruction, it is only necessary that the accomplice's testimony be uncorroborated." *Id.* At 491.

Jones first argues that the trial court erred in granting the cautionary instruction because Tillman's testimony was corroborated by Alson's Glenn's testimony that Conner had the shotgun. He argues the testimony was not uncorroborated, as *Williams* holds is necessary to entitle the defendant to the cautionary instruction. "However, if the accomplice's testimony is corroborated, whether to give the cautionary instruction is within the trial judge's discretion." *Stribling v. State*, 81 So.3d 1155, 1161 (Miss. Ct. App. 2011) (citing *Williams* at 490). Therefore, the fact that Tillman's testimony may be corroborated by Glenn's testimony does not automatically require the trial court to refuse the instruction — the trial court still has the authority to exercise its discretion in determining whether to grant the instruction.

The concurring opinion in *Williams* discussed the issue of when a trial judge has doubt as to whether the accomplice's testimony is uncorroborated, for the purposes of granting a cautionary instruction. *Williams* at 494. The Court suggested a form instruction for those circumstances to alleviate the issue. *Id.* That form instruction is verbatim the instruction that the trial court granted

in Jones's case, Instruction S-6, which states, as follows:

> The Court instructs the Jury that DEANDRE TILLMAN is an alleged accomplice in this case. The Court has already instructed you that you, as jurors, are the sole judges of the weight and credit to be assigned the testimony and supporting evidence of each witness who has testified in this case. However, since DEANDRE TILLMAN is an alleged accomplice in this case, any testimony of DEANDRE TILLMAN which you find to be uncorroborated by other evidence should be viewed with great caution and suspicion if you find such uncorroborated testimony to be unreasonable, self contradictory or substantially impeached.

(C.P. 76). Although the defendant typically requests the cautionary instruction and not the State, the fact that an accomplice's testimony should viewed with caution and suspicion still stands and the trial court may still exercise its discretion in granting such an instruction. Furthermore, the instruction granted specifically calls attention to any *uncorroborated* testimony and, accordingly, any testimony of Tillman's that *is corroborated* by the evidence is to be given the weight and credit the jury's sees fit.

Jones points out that cautionary instructions are typically given in cases where the testifying accomplice has something to gain and he argues that is not the case with Tillman's testimony. However, Tillman testified that Jones did not have the gun, that Conner did. He pointed the finger at the third accomplice. He may not have gained anything by testifying. But he may have gained the possibility of reciprocal testimony from Jones at Tillman's trial. Regardless, his testimony should be viewed with just as much suspicion and caution as if he had testified on behalf of the State by implicating Jones.

Even if the State may not *entitled* to a cautionary instruction on accomplice testimony, as typically envisioned by this Court, the State is not prohibited from requesting and being granted one. The trial court did not abuse its discretion in granting the cautionary instruction in this case and, as such, no reversible error has been committed.

CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests that this Honorable Court affirm Joel Jones's conviction and sentence.

Respectfully submitted,
JIM HOOD, ATTORNEY GENERAL

BY: s/ Alicia Ainsworth
ALICIA AINSWORTH
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 102996

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

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed (and mailed by United States Postal Service) the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable James T. Kitchens, Jr.
Circuit Court Judge
Post Office Box 1387
Columbus, Mississippi 39703

Honorable Forrest Allgood
District Attorney
Post Office Box 1044
Columbus, Mississippi 39703

Justin T. Cook, Esquire
Attorney At Law
MS Office of the State Public Defender
Indigent Appeals Division
Post Office Box 3510
Jackson, Mississippi 39207-3510

This the 13th day of October, 2015.

s/ Alicia Ainsworth
ALICIA AINSWORTH
SPECIAL ASSISTANT ATTORNEY GENERAL

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