IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-KA-00155-COA

SHAE HUGHES **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	01/23/2009
TRIAL JUDGE:	HON. W. ASHLEY HINES
COURT FROM WHICH APPEALED:	WASHINGTON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ERNEST TUCKER GORE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: STEPHANIE BRELAND WOOD
DISTRICT ATTORNEY:	WILLIE DEWAYNE RICHARDSON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF COUNT I, ARMED ROBBERY, AND SENTENCED TO FORTY YEARS AND COUNT II, AGGRAVATED ASSAULT, AND SENTENCED TO TWENTY YEARS, WITH THE SENTENCE IN COUNT II TO RUN CONSECUTIVELY TO THE SENTENCE IN COUNT I, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS
DISPOSITION:	AFFIRMED - 09/07/2010
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LEE, P.J., FOR THE COURT:

PROCEDURAL HISTORY

¶1. On January 16, 2009, a jury in the Washington County Circuit Court found Shae Hughes guilty of Count I, armed robbery, and Count II, aggravated assault. Hughes was

sentenced to serve forty years on the armed-robbery charge and twenty years on the aggravated-assault charge. The trial court ordered the twenty-year sentence to run consecutively to the forty-year sentence, with both sentences served in the custody of the Mississippi Department of Corrections. The trial court subsequently denied Hughes's post-trial motions.

¶2. Hughes now appeals, asserting the following issues: (1) the State failed to prove the crimes charged in the indictment; (2) the trial court erred in failing to grant his motion for a directed verdict; (3) the State failed to prove the facts beyond a reasonable doubt; and (4) the trial court erred in failing to grant his motion for a judgment notwithstanding the verdict or, in the alternative, a new trial. As all of Hughes's issues are related, we find it appropriate to address his issues as follows: (1) whether the evidence was sufficient to support the guilty verdict and (2) whether the verdict is against the overwhelming weight of the evidence. Finding no error, we affirm.

FACTS

¶3. On October 13, 2006, Roscoe McCoy was at a gas station in Leland, Mississippi, and was attempting to find a ride to Greenville, Mississippi. McCoy was told by Nathaniel Winder that he could ride with someone driving a white Grand Am. McCoy got in the back passenger side of the car. McCoy did not know the driver of the car or any of the other passengers. It was later determined that Hughes was the driver of the Grand Am. The other passengers included Hughes's girlfriend, who was seated in the front passenger seat; Terika Cartlidge, who was seated behind Hughes; and Darian Hughes, who was seated in the middle of the backseat.

¶4. McCoy testified that at one point during the drive, Hughes stopped the car, opened the door, and grabbed McCoy by his shirt. At the same time, Darian pushed McCoy out of the car. McCoy stated that Hughes then pressed a gun to McCoy's forehead and demanded money. At that point, Darian searched McCoy's pockets and took his shoes. McCoy was able to take approximately twenty dollars, gum, and lip balm from his pocket and keep it in his fist during the altercation. Unable to find any money, McCoy then heard Hughes say, "I'm going to shoot this MF anyway." Hughes then shot McCoy in the chin. After Hughes drove away, McCoy was able to walk to a nearby house where the police and emergency services were contacted. McCoy stayed in the hospital for two weeks and had to undergo several operations. McCoy was able to identify Hughes and Darian after watching security tapes retrieved from the gas station where McCoy got into the white Grand Am.

¶5. Cartlidge, who is related to Hughes, testified that when McCoy and Darian began fighting, Hughes stopped the car and pulled both men out of the backseat. Cartlidge stated that she heard a gunshot but could not see what had happened because the car door was closed. However, Cartlidge told the police that she saw Hughes rob and shoot McCoy.

¶6. Winder testified that he told McCoy to catch a ride with Hughes. Winder stated that he saw McCoy approach Hughes and show him some cash. Winder thought it looked as if Hughes was asking to be paid for driving McCoy to Greenville.

¶7. Officers with the Washington County Sheriff's Department responded to the crime scene. Officer Mack White testified that he followed the trail of blood McCoy had left to the initial crime scene. Officer White found a twenty-dollar bill, a one-dollar bill, and lip balm on the ground.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

¶8. Hughes argues that the evidence was insufficient to support a guilty verdict. Our standard of review in regard to challenges to the sufficiency of the evidence is well settled. "[T]he 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[.]'" *Bush v. State*, 895 So. 2d 836, 843 (¶16) (Miss. 2005) (citation omitted). If, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found, beyond a reasonable doubt, the essential elements of the crime existed, this Court will affirm the conviction. *Id*. If we find that reasonable, fair-minded jurors could have concluded that the defendant was guilty of the accused crime, the evidence will be deemed sufficient. *Id.* Although Hughes makes general arguments concerning the legal sufficiency of the evidence, we will discuss the armed-robbery conviction and the aggravated-assault conviction.

¶9. Pursuant to Mississippi Code Annotated section 97-3-79 (Rev. 2006), "[e]very person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery . . . ." McCoy testified that Hughes pointed a gun to his head and demanded money. Cartlidge made a statement to the police that she saw Hughes rob and shoot McCoy.

¶10. In regard to the aggravated-assault charge, Mississippi Code Annotated section 97-3-

7(2) (Supp. 2009) states that a person is guilty of aggravated assault if he "attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm . . . ." McCoy testified that Hughes shot him in the face, and Cartlidge told the police that she saw Hughes shoot McCoy.

¶11. Hughes's argument in regard to this issue concerns discrepancies in statements made by McCoy and Cartlidge. However, it is well-settled law that the jury determines the credibility of witnesses and resolves conflicts in the evidence. *Evans v. State*, 725 So. 2d 613, 680-81 (¶293) (Miss. 1997). From the evidence presented, reasonable jurors could have found Hughes guilty of armed robbery and aggravated assault. This issue is without merit.

II. OVERWHELMING WEIGHT OF THE EVIDENCE

¶12. Hughes also argues that the verdict is against the overwhelming weight of the evidence. "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." *Bush*, 895 So. 2d at 844 (¶18). When reviewing the weight of the evidence, this Court sits as a "thirteenth juror." *Id.*

¶13. Hughes's argument in regard to this issue is the same as his argument concerning the previous issue, namely that there were discrepancies in witnesses' testimonies. As previously stated, the jury resolved any conflicts in the evidence in favor of the State.

¶14. Viewing the evidence in the light favorable to the verdict, we find that the verdict is not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. This issue is without merit.

¶15. **THE JUDGMENT OF THE WASHINGTON COUNTY CIRCUIT COURT OF CONVICTION OF COUNT I, ARMED ROBBERY, AND SENTENCE OF FORTY YEARS AND COUNT II, AGGRAVATED ASSAULT, AND SENTENCE OF TWENTY YEARS, WITH THE SENTENCE IN COUNT II TO RUN CONSECUTIVELY TO THE SENTENCE IN COUNT I, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WASHINGTON COUNTY.**

KING, C.J., MYERS, P.J., IRVING, GRIFFIS , BARNES, ISHEE, CARLTON AND MAXWELL, JJ., CONCUR. ROBERTS, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY GRIFFIS AND MAXWELL, JJ.

ROBERTS, J., SPECIALLY CONCURRING:

¶16. While I concur with the majority's resolution of the issues in this case, I write separately to express my disdain over the often-used characterization of an appellate court's role when reviewing the weight of the evidence – namely our self-assigned role of the "thirteenth juror." It is a moniker I could not disagree with more.

¶17. My review of this state's jurisprudence on the matter shows that the first appearance of "thirteenth juror" used by a Mississippi appellate court in the context of an appellate court's role in a review of the weight of the evidence was in *McQueen v. State*, 423 So. 2d 800 (Miss. 1982). In *McQueen*, the Mississippi Supreme Court quoted a lengthy passage from *Tibbs v. Florida*, 457 U.S. 31 (1982), in which the United States Supreme Court discussed the procedural consequences and differences between reversing a conviction based upon insufficiency of the evidence and the weight of the evidence. *McQueen*, 423 So. 2d at 803-04 (quoting *Tibbs*, 457 U.S. at 41-45). In so doing, the Supreme Court stated that "[a] reversal [based upon the weight of the evidence], unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a 'thirteenth juror' and disagrees with the jury's resolution of the conflicting

testimony." *Tibbs*, 457 U.S. at 42. Post *McQueen*, the phrase was bounced around in the opinions of the supreme court, and later, this Court, before ultimately settling as a favorable description of an appellate court's role. But the Supreme Court never used the phrase "thirteenth juror" again.

¶18. Nine years after *McQueen* was handed down, the supreme court again used the phrase. However, this time it was much less favorable and tended to disagree with *Tibbs*. The supreme court stated: "The appellate court's role is to see that there is a fair trial given to both sides. We are not result oriented. The [supreme court] will not be the thirteenth juror." *Walker v. Graham*, 582 So. 2d 431, 433 (Miss. 1991). This sentiment was continued over the next several years as "thirteenth juror" was singularly used in a number of dissents in a negative connotation describing the role the dissenting author believed the majority was incorrectly filling. *See Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1193 (Miss. 1994) (McRae, J., dissenting)*; Lloyd Wood Constr. Co., Inc. v. Little*, 623 So. 2d 968, 974 (Miss. 1993) (McRae, J., dissenting)*; Stonecipher v. Kornhaus*, 623 So. 2d 955, 967-68 (Miss. 1993) (McRae, J., dissenting); *New Hampshire Ins. Co. v. Sid Smith & Assocs., Inc.*, 610 So. 2d 340, 348 (Miss. 1992) (McRae, J., dissenting); *State Highway Comm'n of Miss. v. Hyman,* 592 So. 2d 952, 958 (Miss. 1991) (McRae, J., dissenting).

¶19. Then, in *Allen v. State*, 749 So. 2d 1152, 1159 (¶19) (Miss. Ct. App. 1999), this Court, reciting the standard of review utilized when reviewing a denial of a motion for a new trial, stated that: "It has been said that on a motion for new trial the [trial] court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the [trial] court . . . ." This language and standard, implying that the *trial court* is the theoretical "thirteenth juror," was

echoed time and time again.

¶20. This all led us to the current use of the term as first penned in *Bush v. State*, 895 So. 2d 836 (Miss. 2005). There the supreme court quoted *Amiker v. Drugs For Less, Inc.,* 796 So. 2d 942 (Miss. 2000) and stated: "[On a motion for a 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." *Bush*, 895 So. 2d at 844 (¶18). This passage was interpreted for the proposition that "when the trial court (and subsequently the appellate court) reviews a verdict that is alleged to be against the overwhelming weight of the evidence, this presents a distinctive situation which necessitates the court sitting as a 'thirteenth juror.'" *Id.* at 844 n.2. The *Bush* court, labeling itself as a "thirteenth juror," then resolved the issue of whether Kanynne Jamol Bush's conviction was supported by the weight of the evidence by beginning its conclusion with "[s]itting as a limited 'thirteenth juror' in this case . . . ." *Id.* at (¶19). But *Amiker* simply does not mandate or otherwise suggest that it is proper for an appellate court to sit, review the evidence, and make a judgment call of credibility and other matters germane to the role of a juror.

¶21. In *Amiker*, the central issue was whether a successor judge could vacate his predecessor's order granting a new trial. *Amiker*, 796 So. 2d at 946 (¶8). In arriving at the conclusion, the supreme court in *Amiker* stated:

> It has long been recognized that the trial judge is in the best position to view the trial. "The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire." *Gavin v. State*, 473 So. 2d 952, 955 (Miss. 1985). Using

> a cold, printed record of a case, if that, a successor judge sits in an inferior position to the judge who presided over the trial of the case.

Id. at 947 (¶16). Further, it was identified that:

> If we allowed a successor judge to change a decision granting a new trial, we would invest power in one in no better position than this Court to do what this Court does not do. This Court justifiably refuses to review grants of a new trial based in part on the superior position of the trial court to decide such matters. *Dorr v. Watson*, 28 Miss. 383, 395 (1854) ("The granting a new trial rests in a great measure upon the sound discretion of the court below, to be exercised under all the circumstances of the case with reference to settled legal rules as well as the justice of the particular case. If a new trial be refused, a strong case must be shown to authorize the appellate court to say that it was error; and so, if it be granted, it must be manifest that it was improperly granted."). *See also Rayner v. Lindsey*, 243 Miss. 824, 832-33, 138 So. 2d 902, 905-06 (1962). Surely, a successor trial judge is in no better position than this Court.

Id. at 948 (¶21). I do not find these pronouncements can form the basis for the establishment of an appellate court as a "thirteenth juror" when reviewing the denials of motions for a new trial as surmised in *Bush* and utilized in the litany of cases following it (including cases from this Court – some even authored by myself). In fact, *Amiker* successfully pleads the case for the alternative and only reestablishes that it is the trial court alone that can fill the role of "thirteenth juror."

¶22. The role of an appellate court when reviewing the denial of a motion for a new trial is, simply stated, to determine whether the trial court abused its discretion in doing so. *Sheffield v. State*, 749 So. 2d 123, 127 (¶16) (Miss. 1999). This is so for the exact reasons expounded in *Amiker*. It is the trial judge who sits and observes the evidence and witnesses' demeanor throughout the trial; who hears the witnesses' testimonies; and who, ultimately, is the closest thing a trial has to a "thirteenth juror." That title and point of view are simply

inappropriate for an appellate court armed only with "a cold, printed record of a case."

¶23. My last point goes to the realistic ramifications of a reversal by an appellate court of a trial court's denial of a motion for a new trial. As touched upon in Justice White's dissent in *Tibbs*, given an appellate court's reversal on the weight of the evidence, "[t]he defendant has already demonstrated that a conviction based on the State's case, as so far developed, is 'against the weight of the evidence.'" *Tibbs*, 457 U.S. at 50 (White, J., dissenting). Therefore, the State and trial court are put in a precarious situation on remand. Assuming the State chooses to prosecute again, with no better or worse evidence at its disposal, and the defense does not make any substantive changes in its presentation of evidence or trial strategy, and the same result occurs, by the "rule of the case", the trial court is all but required to grant a second new trial. If not, when the defendant appeals his conviction arguing that the weight of the evidence is not sufficient and, of course, cites the reversal of his previous conviction as authority, an appellate court would similarly have no choice but to reverse and remand once more or be guilty of intellectual dishonesty.

¶24. The majority in *Tibbs* argues otherwise stating in response to Justice White's dissent that:

> Although reversal of a first conviction based on sharply conflicting testimony may serve the interests of justice, reversal of a second conviction based on the same evidence may not . . . . While the interests of justice may require an appellate court to sit once as a thirteenth juror, that standard does not compel the court to repeat the role.

Tibbs, 457 U.S. at 43 n.18. However, in my opinion, this line of reasoning does nothing more than muddle and dilute the standard of review that an appellate court must apply. If there have been no substantive changes from one trial to the next and the same outcome is

reached by a second jury, a failure on an appellate court's part to, once again, remand the case for a new trial can be viewed as nothing more than arbitrary and capricious. Quite clearly, all other things equal, if the weight of the evidence would not support a finding of guilt after the first conviction, the same evidence, when presented during subsequent trials, must still be deemed inadequate to support a conviction. Contrary to the statement quoted from *Tibbs* above, our role as an appellate court does not change.

¶25. Therefore, I respectfully suggest to the members of our appellate judiciary that we are not, and can never be, the hypothetical "thirteenth juror." The closest judicial entity identifiable as a possible "thirteenth juror" must be the trial judge. When we review a claim on appeal that the verdict is contrary to the weight of the evidence, we simply determine based upon the cold record whether the trial judge abused his discretion. Nothing more, nothing less.

GRIFFIS AND MAXWELL, JJ., JOIN THIS OPINION.