6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00906 COA

BURNELL RUTLAND JACKSON AND ROSALIND MICHELLE CUTRER

APPELLANTS

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MELVIN KEITH STARRETT

COURT FROM WHICH APPEALED: PIKE COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

EDWARD A. WILLIAMSON FOR THE APPELLANT, BERNELL RUTLAND JACKSON

WAYNE DOWDY FOR THE APPELLANT, ROSALIND MICHELLE CUTRER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSSDISTRICT ATTORNEY: DUNN O. LAMPTON

NATURE OF THE CASE: CRIMINAL - CONSPIRACY TO COMMIT MURDER AND MURDER

TRIAL COURT DISPOSITION: DEFENDANTS FOUND GUILTY OF BOTH CONSPIRACY TO COMMIT MURDER AND MURDER, PURSUANT TO WHICH THE COURT SENTENCED BERNELL RUTLAND JACKSON PAY A FINE OF $10,000, TO SERVE TWENTY YEARS FOR CONSPIRACY TO COMMIT MURDER, AND LIFE IMPRISONMENT FOR MURDER, SENTENCES TO RUN CONCURRENTLY, AND ROSALIND MICHELLE CUTRER TO PAY A

FINE OF $10,000, TO SERVE TEN YEARS FOR CONSPIRACY TO COMMIT MURDER, AND LIFE IMPRISONMENT FOR MURDER, SENTENCES TO RUN CONCURRENTLY

MOTION FOR REHEARING FILED:7/15/97

MANDATE ISSUED: 9/30/97

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

A jury in the Pike County Circuit Court convicted a mother, Burnell Rutland Jackson (Burnell Jackson), and her daughter, Rosalind Michelle Cutrer (Michelle Cutrer), of two felonies, conspiracy to commit murder and murder of Wesley Winfred Jackson (Wesley Jackson). Wesley Jackson was Burnell Jackson's husband and Michelle Cutrer's stepfather. The trial judge sentenced Burnell Jackson into the custody of the Mississippi Department of Corrections to serve twenty years for the crime of conspiracy to commit murder and life imprisonment for the crime of murder, with these sentences to be served concurrently. The trial judge sentenced Michelle Cutrer into the custody of the Mississippi Department of Corrections to serve ten years for the crime of conspiracy to commit murder and life imprisonment for the crime of murder, with these sentences to be served concurrently. The trial judge further ordered both Jackson and Cutrer to pay fines each in the amount of $10,000. It is from the trial court's orders of their guilt of these two crimes that both Jackson and Cutrer appeal to this Court. While this Court acknowledges the gravity of the Appellants' issues, it nonetheless resolves those issues against both of them and affirms the trial court's orders of their guilt and respective sentences which it imposed on each of them.

I. FACTS

Midway of the afternoon of October 13, 1993, Michelle Cutrer finished her day's work as the bartender at "The Rebel," a bar near Progress, where that same afternoon she had met and befriended a patron of the bar, Michael Cutrer. Michael Cutrer and Michelle Cutrer were not related, either by blood or by marriage. After the two Cutrers left "The Rebel," they stopped at another drinking establishment for about fifteen minutes. They left this bar to go to the home of Michelle Cutrer's stepfather and mother, Wesley and Burnell Jackson, in Pike County, Mississippi. Michelle Cutrer also lived in her mother's and step-father's home.

Michelle Cutrer and Michael Cutrer were the first to arrive at the Jacksons' home on that day which was to prove fateful for Wesley Jackson. Sometime later, Burnell Jackson was the next person to return to her home. The last person to come home that evening was Wesley Jackson, an electrician by trade, who had been working all that day. Not long after he returned home, Wesley Jackson was shot in his buttock, back, neck and right shoulder, a total of four times, with a .32 caliber revolver. He died almost instantly. After Jackson had been shot, his wife first called 911 to report the shooting, and then she called George Wesley Jackson, Wesley Jackson's father, who lived nearby, to tell him that his son had been shot.

Percy H. Pittman, Jr., the coroner for Pike County, was attending services at the Rose Hill Church when he received a call on his pager, to which he responded on his cellular telephone. The dispatcher

at the Pike County Sheriff's office advised the coroner that there had been a possible suicide on Rabun Road. Pittman responded by traveling to the Jacksons' home. Once he was inside the home, he used swabs similar to Q-tips included in the one atomic absorption analysis kit that he had with him to wipe the hands of Michelle Cutrer because she told him that she was the one who had shot Wesley Jackson. He subsequently gave the kit with the swabs to officer Charles Chadwick, who had also come to the Jacksons' home in response to Burnell Jackson's call to 911. Chadwick then sent the kit to Southwestern Institute of Forensic Sciences in Dallas, Texas, where its employee, Vicky Hall, an expert in the field of trace evidence, tested the swabs for the presence of antimony and barium, the major components of any primer inside a cartridge.

Inconsistencies in the testimony of Michael Cutrer, Michelle Cutrer, and Burnell Jackson render uncertain in some respects what transpired between Jackson's return home and his death from the four gun shots. Both Michelle Cutrer's and Burnell Jackson's versions of the events which they related to various law officers who investigated the incident are also inconsistent. We reserve more detailed recitations of the testimony and evidence adduced during the trial for our review and resolution of the two Appellants' issues.

II. TRIAL

The Pike County grand jury indicted Burnell Jackson and Michelle Cutrer on March 8, 1993, for both conspiracy to commit murder and murder in the death of Wesley Winfred Jackson. Because Wayne Dowdy, an attorney whose office was located in Magnolia, the county seat of Pike County, represented both Burnell Jackson and Michelle Cutrer, the trial judge expressed his concern to Dowdy about a potential conflict of interest between his clients when they were arraigned on March 11, 1994. The record discloses the following colloquy among the trial judge, Dowdy, and his two clients:

BY MR. DOWDY: Judge, I had mentioned to Your Honor and to the Defendants the reservations the Court has had previously about joint representation of defendants. Do you wish to---

BY THE COURT: -- Yes, I do, Mr. Dowdy. Thank you for bringing that up. Ladies, any time that one attorney represents two co-defendants there is a potential for conflict, and Mr. Dowdy has told me that he has explained that to you, but I am required by law to go on the record with you that you have the right to have separate attorneys. By potential for conflict, this would mean that if your versions of what happened were different such as one of you implicating the other and that person denying that that was what happened, then your attorney would be required -- would have the obligation to represent both of you, and if those things are not -- if your defenses are not the same, then a conflict could exist and probably would exist. You have the right to have separate attorneys, and Mr. Dowdy tells me that he has explained all this to you in detail. Do you both understand it?

BY THE DEFENDANT JACKSON: Yes, sir.

BY THE COURT: Michelle?

BY THE DEFENDANT CUTRER: Yes, sir.

BY THE COURT: Do you both waive the right to have separate attorneys and request that Mr.

Dowdy represent the both of you?

BY THE DEFENDANT JACKSON: Yes, sir.

BY THE DEFENDANT CUTRER: Yes, sir.

BY THE COURT: Do you acknowledge the potential for conflict in having one attorney?

BY THE DEFENDANT JACKSON: Yes, sir.

BY THE COURT: And Mr. Dowdy knows should an actual conflict exist then he would have to withdraw as to some representation.

BY MR. DOWDY: We understand that, Your Honor.

BY THE COURT: All right.

BY THE DEFENDANT JACKSON: Thank you, Your Honor.

On March 17, 1994, the trial court conducted an omnibus hearing pursuant to then Rule 4.09 of the Uniform Rules of Criminal Procedure.As of May 10, 1995, Uniform Circuit and County Court Rule 9.08 superceded Rule 4.09. Relevant to one of the issues which this Court must resolve is the fact that the omnibus order which the trial court entered pursuant to that hearing provided that "[t]he defense states it has obtained full discovery and/or has inspected the prosecution file, (except) G.S.R. test results. Distance tests gun to clothing."

The trial began on Monday, April 4, 1994, and continued for four days until it ended on Thursday, April 7, 1994. Michelle Cutrer's defenses were those of insanity and defense of her mother, whom her stepfather had attacked. To support the first count of the indictment, conspiracy to commit murder, the State introduced evidence about an episode involving Michelle Cutrer, Burnell Jackson, and Wesley Jackson on the Monday evening before Jackson died the following Wednesday night. The essence of the episode was that Wesley Jackson had told Michelle Cutrer that he would help her arrange to keep her car, if she would meet him in the hay field that Monday evening and engage in sex with him. When Michelle Cutrer discussed Wesley Jackson's proposition with her mother, they decided that Michelle Cutrer and Burnell Jackson would drive to the hay field so that Michelle Cutrer could meet her stepfather to see if he was serious about his proposition. While Wesley Jackson was an electrician, he also managed a herd of cows on land that his father had given him; hence his being in the hay field late that Monday afternoon.

Michelle Cutrer and her mother devised the strategy that her mother would lie between the seats of Michelle Cutrer's car hidden beneath a blanket, but in the possession of a pistol. Sure enough, after Michelle Cutrer and Burnell Jackson had arrived at the hay field, Wesley Jackson drove up in his pick-up. Wesley Jackson and Michelle Cutrer engaged in some conversation about getting her a beer, but somehow Wesley Jackson discovered his wife's presence beneath the blanket and grabbed her leg. Thus the episode terminated. Burnell Jackson testified about the episode during the trial, but both she and Michelle Cutrer maintained that the pistol which she had taken with her was empty.

Charles Chadwick, a Pike County Deputy Sheriff who served as an investigator for the sheriff's

department, was called to testify both for the State and for Jackson and Cutrer. When the State cross-examined Chadwick as a witness for Jackson and Cutrer, Chadwick, without objection from the defendants, testified as follows about Michelle Cutrer's narration of that episode in the Jacksons' home the night that Wesley Jackson was killed:

[Michelle Cutrer] said, "I told mama all she had to do was get in the back seat of the car, get under the blanket with the gun. And when we get to the hay field, you get out and shoot the son of a bitch."

The outcome and consequences of the trial have previously been related.

III. ISSUES

Jackson, whom another lawyer, Edward A. Williamson, represents on her appeal, and Cutrer filed separate briefs in which each specified her own issues for the consideration of this Court pursuant to Mississippi Rule of Appellate Procedure 28a(3). We quote their issues verbatim from each of the briefs:

Burnell Jackson's Issue:

The lower court erred in failing to grant Burnell Rutland Jackson's motion for a new trial because the judge had not adequately questioned her prior to trial regarding her understanding of the apparent conflict of interest existing due to trial counsel representing both her and a co-defendant.

Michelle Cutrer's Issues:

1. Rosalind Michelle Cutrer did not knowingly and intelligently waive her constitutional right of undivided loyalty, and thus, her Sixth Amendment rights having been violated because of conflict of interest that resulted from joint representation of Appellant and her mother by the same attorney, she is entitled to a new trial;

2. The jury verdict is against the overwhelming weight of the evidence, and the motions for a directed verdict should have been granted.

IV. REVIEW, ANALYSIS, AND RESOLUTION OF THE ISSUES

Although the subject of Jackson's only issue and Cutrer's first issue is the same, *i. e.*, their defense counsel's conflict of interest at trial, this Court reviews and resolves Jackson's issue first.

A. General Statement of the law on defense counsel's conflict of interest

The Sixth and Fourteenth Amendments to the United States Constitution operate as sureties for the right to effective assistance of counsel. *Armstrong v. State*, 573 So. 2d 1329, 1331 (Miss. 1990). The Mississippi Supreme Court "readily recognizes the rule that effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties to other defendants . . . ." *Stringer v. State*, 485 So. 2d 274, 275 (Miss. 1986). However, "joint representation of co-defendants is not per se violative of the Sixth Amendment right to effective assistance of counsel." *Id.* (citations omitted). The United States Supreme Court has explained:

We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). As the Mississippi Supreme Court explained in *Stringer v. State*, 485 So. 2d 274, 275 (Miss. 1986): "It has been firmly established that a potential for conflict or hypothetical or speculative conflicts will not suffice for reversal. *The conflict must be actual.*" (emphasis added).

B. Sufficiency of the trial judge's actions to support the Appellants' waiver of this issue

Both Jackson and Cutrer maintain that the trial judge's pre-trial interrogation of them to determine their understanding of potential conflicts of interest was inadequate. Therefore, they assert that their waivers of potential conflicts of interest created by their joint representation were not knowing and intelligent. The trial court's procedure for determining whether joint defendants' waiver is knowingly and intelligently made is discussed in *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975), and is quoted by the Mississippi Supreme Court in *Armstrong v. State*, 573 So. 2d 1329, 1335 (Miss. 1990). The United States Court of Appeals for the Fifth Circuit has explained what a trial judge should do when he or she is confronted by the representation of defendants by an attorney who may have a conflict of interest between the two:

As in Rule 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections.

Garcia, 517 F.2d at 278.

The facts in *Garcia* and *Armstrong* can be distinguished from the facts in the case *sub judice*. In *Garcia*, the trial court became aware of the co-defendants' counsel's actual conflict of interest and the pitfalls which would result from that conflict if the dual representation of the co-defendants was to continue. *Garcia*, 517 F.2d at 274. After the defendants had consulted with the trial judge, they represented to the trial judge that they understood the conflicts but wanted to be represented by the attorney nonetheless. *Id.* at 275. The district court maintained that the Sixth Amendment guarantees of effective assistance of counsel could not be waived and disqualified the counsel in question. *Id.* The defendants appealed the court's order, and the Fifth Circuit reversed, holding that if "a defendant after thorough consultation with the trial judge knowingly, intelligently and voluntarily wishes to waive this protection, the Constitution does not prevent him from so doing." *Id.* at 278. In the *Armstrong case*, the defendants were appointed one attorney to represent both of them and were never informed of the potential for a conflict of interest in dual representation. *Armstrong*, 573 So. 2d at 1334. They were not told they had the right to be represented by separate attorneys even after the trial court became aware of the conflicts which existed. *Id.*

In the case *sub judice,* there were no actual conflicts between Jackson and Cutrer prior to and during trial. The trial judge informed both Jackson and Cutrer of the potential danger of dual representation, yet they decided to allow Mr. Dowdy to continue to represent them both. Neither Jackson nor Cutrer raised an objection about the efficacy of their "waiver" until after the trial had ended and the jury returned guilty verdicts against both of them. In *Garcia* the United States Court of Appeals for the Fifth Circuit elaborated about the importance of this waiver:

It is, of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language." Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloquy between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment "fundamental fairness" basis.

Garcia, 517 F.2d at 278.

In his denial of the motions for a new trial based on dual representation, the trial judge expounded on the record the reasons for his denial of those motions. He reasoned:

Maybe I shouldn't be so bold, but I recall that the defendants were questioned about the dual representation and admonished by the court. And they were certain that they wanted Mr. Dowdy as their attorney. I am familiar with Mr. Dowdy's ability and reputation, and, frankly, his knowledge of the problems caused by dual representation. And satisfied myself that he had cautioned his clients regarding the pitfalls of this. But for me to assume that these people, the defendants, couldn't exercise their own right, constitutionally given right, to counsel would be taking away from them a right that is given to them by the Constitution, that is the right to counsel. They chose their own attorney. This court was very interested in their being adequately and competently represented, and all of their Sixth Amendment rights protected, and other rights, Constitutional rights protected. And I satisfied myself that they had been intelligently informed, that they waived right to independent counsel, and accepted the services of Mr. Dowdy. And I think the record will speak for itself as to the trial strategy, the competence, and ability of counsel. And I don't -- Just assume that in the middle of the trial I had decided that no matter what they chose, I had to undo it. I would, in my opinion, have been committing a grievous error, taking away from these defendants the right to chose their attorney and to pursue the trial strategy that they apparently understood and wished to pursue. I don't think it was my place nor my right to do that. And I find that the issue of dual representation should not be grounds for a new trial.

This Court holds that the trial judge's questioning of Jackson and Cutrer on the record and his determination that they understood the potential problems of dual representation are sufficient to establish a valid waiver by Jackson and Cutrer under the circumstances of this case.

C. Analysis and resolution of Jackson's conflict of interest issue

Regardless of our determination that Jackson and Cutrer waived whatever conflict of interest there may have been between them, we now review their claims that there was in fact a conflict of interest

in Mr. Dowdy's representation of them. To support her position on this issue, Jackson argues that "the trial judge's inquiry, [the entirety of which we earlier quoted in this opinion], concerning [her] knowledge of a possible conflict of interest resulting from her attorney's joint representation of her and of a co-defendant . . . ." was so inadequate that it deprived her of her Sixth Amendment right to effective assistance of counsel. Jackson also asserts that the trial judge's inquiry was so inadequate that it cannot be maintained that she "knowingly and intelligently waived her constitutional right to conflict-free representation." She cites *Armstrong v. State* in which the Mississippi Supreme Court admonished the trial judges to

seek to elicit a narrative response from each defendant that he has been advised of his right to representation, that he understands that details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney . . . and that he voluntarily waives his Sixth Amendment protections.

Armstrong, 573 So. 2d at 1335.

Jackson characterizes the trial judge's inquiry of her as "only a few leading questions regarding the potential conflict" and then asserts that the trial judge "thereafter summarily accepted her attempt at waiver without any knowledge as to what Mr. Dowdy had explained to [her] regarding how the potential conflict could affect his representation of her during the trial." Of interest to this Court is Jackson's admission that "only a possibility exists that a proper inquiry by the trial judge . . . would have resulted in comments by Burnell indicating that she lacked sufficient knowledge as as to be able to waive any potential conflict."

Burnell Jackson testified in her own behalf during the trial. The record contains her description of the events which culminated in Wesley Jackson's death:

Michelle told him, Daddy, don't hit mama. And he hit me again. And she jumped up off the love seat, and him and her got into it and he hit her. And I told him to don't hit her. And he grabbed for me and I started running like in towards my bedroom. And I heard something and I looked around and they were scuffling over that gun. I don't know if, how Michelle got it. And I screamed and then Wesley made for me and I, I don't know what happened.

. . .

Q. Did you -- After you heard the shots what did you see? Tell me what you remember seeing.

A. I turned around -- Well, when I heard the first shot I turned around, and Michelle had the gun. And as Wesley, he was turning around like to get away from her, and she was shooting, and he fell on the floor.

When we consider Michelle Cutrer's arguments on this same issue, we will quote her version of these same events. This Court finds the similarity between Jackson's and Cutrer's versions striking.

Jackson argues that the testimony of her son, Michael Morgan, during the hearing on her motion for a new trial supports her position on this issue. During the hearing on the motion for new trial, Morgan testified that he had called his mother's home the evening that Wesley Jackson was killed and talked to his mother, Burnell Jackson. We quote Michael Morgan's testimony from the record:

Q. What did you hear at this phone conversation at this time?

A. Well, first when mama answered the phone and everything, there was, there was a lot of hollering and everything going on. They was fussing. And then I heard two shots that I can remember. And I heard mama scream out, Michelle, what are you doing?

Jackson's counsel then submitted a copy of Michael Morgan's telephone bill for the month of October, 1993, which reflected a long-distance telephone call from his residence to 601-783-5773, Magnolia, Mississippi, at 7:27 p.m. on October 13, 1993. Morgan identified this call as the one during which he heard the two gun shots, after which his mother screamed, "Michelle, what are you doing?"

It should be noted that Michael Morgan also testified as Jackson's witness at the trial. When the State inquired of Morgan about why he did not mention this information when he testified during the trial, Morgan replied, "Well, the way I understood, you didn't answer unless you was asked." He continued to profess that his mother's trial counsel knew about his telephone call to the Jacksons' home before the trial began.

Regardless of the foregoing testimony of Michael Morgan which he gave at the hearing on Burnell Jackson's motion for a new trial, this Court also quotes the following question to and answer from Burnell Jackson during the State's cross-examination:

Q Did you receive any phone calls?

A No, sir, not that I can remember.

To support her position on this issue, Jackson first argues:

In order to convince a jury that Michelle was entitled to a verdict of innocence based upon self-defense, Mr. Dowdy's trial strategy on her behalf had to center upon testimony that Burnell [Jackson] was retreating from Wesley [Jackson] and in *imminent danger* of bodily harm when Michelle fired the fatal shots into Wesley's back. Testimony at trial by [Michael] Morgan to the contrary (*i. e.*, that at the time the shots were fired, Burnell [Jackson] was not retreating but instead engaged in a telephone conversation) would have been detrimental to Michelle's claim of self-defense. Such is a certainty, not a possibility.

The record reflects the consistent defense strategy that Michelle Cutrer fired the fatal shots into Wesley Jackson's body in defense of her mother; thus her mother could be guilty of nothing. Burnell Jackson has not demonstrated that Dowdy's failure to question Michael Morgan about this telephone call adversely affected his defense of her.

Burnell Jackson next argues that her trial counsel "breach[ed] his duty of loyalty to [her] by refraining from introducing evidence to the effect that she was actually involved in a telephone conversation at the time that Michelle shot and killed Wesley, and thus, was *not* engaged as a participant in the altercation which resulted in his death." At best this argument complains only of Dowdy's decision not to use this evidence in behalf of Burnell Jackson. While this evidence of the telephone conversation would have corroborated Burnell Jackson's defense that she did not shoot her husband;

it would have impeached the testimony of both Burnell Jackson and Michelle Cutrer that Cutrer shot Wesley Jackson in the defense of her mother.

Burnell Jackson has established at most a "potential for conflict or hypothetical or speculative" conflict of interest between her and her co-defendant, Michelle Cutrer. Such hypothetical or speculative conflicts do not suffice for reversal. *See Stringer*, 485 So. 2d at 275. The conflict must be actual, and the defendant must establish that the conflict of interest "adversely affected his lawyer's performance." *See Cuyler*, 446 U.S. at 350. Regardless of whether the trial judge adequately questioned her about the potential conflict of interest between her daughter and her, Burnell Jackson has failed to demonstrate that this tenuous conflict of interest adversely affected her lawyer's representation of her. Therefore, we resolve her sole issue in his appeal against her and affirm the trial court's order of her guilt and its sentence to serve a term of life imprisonment.

C. Analysis and resolution of Cutrer's conflict of interest issue

The record contains the following narration of the final moments of Wesley Jackson's life as given by Michelle Cutrer:

They [Burnell and Wesley Jackson] were coming on through and they were -- and I got up and I got, I was going in between them and he hit me here and he hit me over here. And mama told him to leave me alone and she was -- As he come by the china hutch, here's the recliner, . . . and here's the love seat right here. The china hutch is against that wall. He reached up, mama was going into, right there at the, she was at, by the kitchen, she was headed out of the room, into her room because she was scared. And as he went by, he reached and I, he reached up at the gun, and I jumped on him, the gun fell, I knocked it out of his hand, I don't know, it ended up on the floor. And mama, well, mama was screaming and Wesley turned and was going at her, and right there at the kitchen area. And I hollered at him, and I heard the shot go off.

We have previously commented upon the similarity between Burnell Jackson's and Michelle Cutrer's recollection of these events.

Cutrer's argument on this issue is novel, to say the least. First, she notes that the negative results of the atomic absorption test, about which Vicky Hall testified, indicated that she did not fire the gun which claimed her stepfather's life. Then she asserts:

Obviously, this new evidence resulted in antagonistic defenses for the co-defendants, and should have alerted the trial judge to the existence of conflict that would have rendered a single defense lawyer's service ineffective. The prosecutor, after having obtained the new crime lab evidence, should have called the trial judge's attention to the possibility of prejudicial conflict as a result of same defense counsel's representation of the daughter and her mother on the same charges.

She cites *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948) to support her proposition that "[a] judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility." She then cites *Berger v. United States*, 295 U.S. 78, 88 (1935), to support her assertion that the interest of the prosecutor for the State was not that he should win the case, but that justice should be done. This Court interprets

Michelle Cutrer's argument as an appellate invitation to absolve her trial counsel from any responsibility for whatever conflict of interest there may have been between his two clients and to blame both the trial judge and the prosecutor for allowing her trial counsel to proceed in the face of such a conflict of interest.

The United States Supreme Court has held that state trial courts must investigate timely objections to multiple representation, but

[N]othing in our precedents suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case. Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. Indeed, as the Court noted in *Holloway*, trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. "An 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.

Cuyler at 346-347 (citations omitted). It appears that the foregoing quotation lends no credence to Michelle Cutrer's argument that it was the trial court's obligation to intervene about a potential conflict of interest after Vicky Hall opined that the atomic absorption test demonstrated that Michelle Cutrer had not fired the pistol.

We begin our consideration of this issue by noting that in the omnibus order which the trial court entered on March 17, 1994, counsel for Jackson and Cutrer stated that he "ha[d] obtained full discovery and/or ha[d] inspected the prosecution file, [except for the] G.S.R. test results [and the] [d] istance tests gun to clothing." Thus, the record documents that Jackson and Cutrer's lawyer knew of these tests more than two weeks before trial in this case began. We assume that he proceeded to trial confident of his defense strategy regardless of what the results of these tests might prove to be.

Secondly, Charles Chadwick, a Pike County Deputy Sheriff who also arrived at the Jacksons' home in response to the 911 call from Burnell Jackson, testified that after he arrived at the Jacksons' home, Michelle Cutrer approached the sink in the kitchen and reached for the faucet, whereupon he asked her what was she doing. When she replied that she was going to wash her hands to remove the blood that was on them, Deputy Chadwick instructed her not to wash her hands. Vicky Hall had testified that in her opinion Michelle Cutrer's hands were very clean when Coroner Pittman swabbed them. Finally, the record discloses the following cross-examination of Michelle Cutrer by the district attorney about whether she had washed her hands:

Q. How many times did you wash your hands before Percy Pittman administered the atomic absorption kit?

A. I do not know that.

Q. What is your best guess?

A Three or four times, because I had blood on them.

Thus, there is ample evidence to support the proposition that Michelle Cutrer's clean hands explained the negative results of the atomic absorption test.

Thirdly, when Burnell Jackson called 911 to report that her husband had been shot, she told the 911 operator that her daughter had shot him during a tussel over the gun which her husband had taken from the top of the hutch. When Michelle Cutrer testified, she admitted that she fired the gun, although she thought she had fired it only twice. Fourthly, Michelle Cutrer also relied on the defense of insanity, during which she called expert witnesses to opine that she met the *M'Naughton* concept of insanity. Implicit in this defense is the fact that she shot Wesley Jackson.

We offer all these recitations to support our conclusion that Michelle Cutrer's position on this issue is specious at best. The record contains absolutely no indication that any conflict ever arose during the course of the trial between Burnell Jackson and Michelle Cutrer. This Court repeats its conclusion to its resolution of this same issue as raised by Michelle Cutrer, *i. e.*, regardless of whether the trial judge adequately questioned Michelle Cutrer about the potential conflict of interest between her mother and her, Michelle Cutrer has failed to demonstrate that this specious conflict of interest adversely affected her lawyer's representation of her. Thus, we reject Michelle Cutrer's attempt to shift blame for a non-existent conflict of interest to the trial judge and the district attorney and resolve this issue against her.

D. Michelle Cutrer's second issue that the jury's verdicts were against the overwhelming weight of the evidence

The Uniform Criminal Rules of Circuit Court Practice applied to the trial of this case. Rule 5.16 of the Uniform Criminal Rules of Circuit Court PracticeBy order of the Mississippi Supreme Court the Uniform Circuit and County Court Rules became effective on May 1, 1995. Rule 10.05 of the Uniform Rules of Circuit and County Court is practically identical to Rule 5.16 of the Uniform Criminal Rules of Circuit Court Practice. then provided:

The court on written notice of the defendant may grant a new trial on any of the following grounds:

. . . .

(2) If the verdict is contrary to law or the weight of the evidence.

UCRCCP 5.16. Rule 5.16 required Appellant Cutrer to preserve this issue by including it in her motion for new trial. In her motion for judgment notwithstanding the verdict or, in the alternative, a new trial, Cutrer asserted: "The verdict was against the overwhelming weight of the evidence." By its order denying motion for J.N.O.V. or, in the alternative, a new trial rendered on August 30, 1994, the trial court denied Cutrer's motion for new trial. These preliminary observations are requisite to our recitation of the standard of review which the Mississippi Supreme Court has adopted for analyzing and reviewing the issue of whether a trial court errs when it denies a motion for a new trial. The supreme court's standard of review perforce becomes the appropriate standard of review for this Court.

Motions for a new trial challenge the weight of the evidence and "[implicate] the trial court's sound

discretion." *McClain v. State,* 625 So. 2d 774, 781 (Miss. 1993). New trial decisions rest within the discretion of the trial court. *Id.* at 781. A new trial motion should only be granted when 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. *Wetz v. State,* 503 So. 2d 803, 812 (Miss. 1987). This Court will reverse and order a new trial only upon its determination that the trial court abused its discretion when it denied the defendant's motion for new trial. *McClain,* 625 So. 2d at 781.

Michelle Cutrer relies exclusively on the *Weathersby* Rule to support her contention that the jury's verdict of her guilt of murder was against the overwhelming weight of the evidence, an argument which she omitted from her motion for a new trial. The "*Weathersby* Rule" states:

[W]here the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

Weathersby v. State, 165 Miss. 207, 147 So. 481, 482 (1933). In other words, Michelle maintains that the *Weathersby* Rule entitled her to a directed verdict since she and her mother were the only eyewitnesses to Wesley Jackson's death and their version of the facts is reasonable and not contradicted by a credible witness or witnesses for the State nor by physical facts or other credible evidence. In *Buchanan v. State,* 567 So. 2d 194 (Miss. 1990), the supreme court expressed the other side of the *Weathersby* Rule: "Where the physical facts and circumstances in evidence materially contradict the defendant's version of what happened, the Circuit Court is not required to direct a verdict under Weathersby. Rather, the matter then becomes a question for the jury." *Id.* at 197 (citations omitted).

Michelle readily admitted in her testimony that she fired the gun that killed Wesley Jackson. Burnell Jackson also testified that she saw her daughter shoot her husband while they tusselled with the gun which her husband had taken from the top of the hutch. She requested instructions, which the trial judge granted, on self-defense and the defense of others. These were issues which only the jury could resolve. Michael Cutrer, whom Michelle Cutrer had invited to the Jacksons' home that evening, testified that when he entered the room ten or fifteen minutes after he heard the shots, he saw Burnell Jackson holding the gun in her hand. Vicky Hall, the expert in trace evidence, testified that she found no trace of antimony nor of barium from the atomic absorption kit, yet Michelle Cutrer consistently testified that she -- and not her mother -- fired the gun. This evidence alone sufficed to create issues of fact which only the jury as fact finder could resolve. This Court holds that the *Weathersby* Rule could not possibly apply to this case and that Michelle Cutrer's reliance on it to support her argument on this issue is wholly misplaced. This Court resolves this issue adversely to the Appellant, Michelle Cutrer, by holding that the jury's verdicts of her guilt of conspiracy to commit murder and murder were not against the overwhelming weight of the evidence and that therefore the trial judge did not err when he denied her motion for a new trial.

Other than to recite in a footnote to her brief portions of the evidence relevant to the hay field episode, which we include as a footnote to this opinion, Michelle Cutrer's argument on this issue was directed solely to her conviction of murder.The following is the entire footnote which Michelle Cutrer included in her brief:

The only evidence pertaining to the so-called conspiracy concerned the events which occurred on Monday night, October 11, 1993. Wesley Jackson said for Michelle to meet him "in the field and have sex with him." No one else heard the conversation. Her mother said that she wanted Michelle to meet Wesley in the hayfield. "I went and got Mama and we went over. She got in the car, laid on the back of the floorboard, and put a blanket around her or over her. And she did carry the gun. We went to the hayfield, and he was sitting there in the corner. Then I drove around there where he was. I drove up. He got out of the truck, and I got out of the car. He put his arms around me, and he tried to kiss me, and I turned my head. And he kissed me right there. And I looked up at him, and I asked him did he have a beer. He said, No, hun, I don't, he said, but we'll go get one. And then he asked me what I had in the back of the car. And I 'said, "Oh, just some clothes." And he reached in and he grabbed Mama on the leg, and that's when she came out from under the cover, because she knew that he had knowed that she was there." Her mother "raised up." "He seen the gun, but it wasn't loaded, and she never pointed it at him." Her mother said, "I wouldn't shoot you for nothing in the world. She said, I wouldn't kill you. She said, because you're not worth it." They were in the field for just a few minutes. Wesley got in his truck and left. They went back to the house.

Her recitation of the evidence omits Deputy Chadwick's testimony which we have quoted in this opinion. His testimony and the other evidence of the episode were sufficient to establish that Jackson and Cutrer had conspired to murder Wesley Jackson that Monday evening in the hay field and thus to support the jury's verdict that Burnell Jackson and Michelle Cutrer conspired to murder Wesley Jackson.

V. SUMMARY

Not until after their trial had ended catastrophically for them did Burnell Jackson and Michelle Jackson charge that their defense counsel represented them in a conflict of interest. This Court has found that the trial judge's pre-trial inquiry of both Jackson and Cutrer was sufficient to support their respective waiver of whatever conflict of interest in their defense counsel might have existed. Regardless of the waiver issue, this Court further finds that there was no conflict of interest. The strategy of the defense was to persuade the jury that Michelle Cutrer had shot Wesley Jackson in the defense of her mother and that her mother, Burnell Jackson, had nothing to do with his death. Both Michelle Cutrer and Burnell Jackson testified in support of this strategy. Neither was there any conflict between Michelle Cutrer's defense of insanity and Burnell Jackson's defense that she simply did not shoot her husband.

Neither was the jury's verdict of Michelle Cutrer's guilt of murder against the overwhelming weight of the evidence. She testified that she shot her stepfather in the defense of her mother. Her testimony alone established an issue for the jury to resolve. Deputy Chadwick's testimony that Michelle Cutrer told him about arranging for her mother to shoot Jackson in the hay field placed the jury's verdict beyond criticism that it was against the overwhelming weight of the evidence. The trial court's orders of the Appellants' guilt of conspiracy to commit murder and murder and its sentences which it imposed upon both Burnell Jackson and Michelle Cutrer are affirmed.

THE PIKE COUNTY CIRCUIT COURT'S JUDGMENT OF THE APPELLANTS' GUILT OF CONSPIRACY TO COMMIT MURDER AND MURDER AND ITS SENTENCES OF

TWENTY YEARS FOR CONSPIRACY AND LIFE FOR MURDER AND THE PAYMENT OF A FINE OF $10,000 IMPOSED ON BURNELL JACKSON AND TEN YEARS FOR CONSPIRACY AND LIFE FOR MURDER AND THE PAYMENT OF A FINE OF $10,000 IMPOSED ON MICHELLE CUTRER, SENTENCES TO BE SERVED CONCURRENTLY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, ARE AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.