

IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 96-KA-00168 COA

ROBERT JACKSON A/K/A TERRY APPELLANT

JACKSON A/K/A "REDHEAD"

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. KENNETH LEVENE THOMAS

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: ALLAN D. SHACKELFORD

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: MELLEN, LAWRENCE Y.

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CT I AGGRAVATED ASSAULT: CT II AGGRAVATED ASSAULT: CT I SENTENCED TO SERVE 10 YRS CONSECUTIVE TO ANY SENTENCE PREVIOUSLY IMPOSED; CT II SENTENCED TO 10 YRS; CT II SHALL RUN CONCURRENT WITH CT I

MANDATE ISSUED: 8/19/97

BEFORE McMILLIN, P.J., COLEMAN, AND PAYNE, JJ.

McMILLIN, P.J., FOR THE COURT:

Robert Jackson has appealed his conviction for two counts of aggravated assault rendered by a jury in the Circuit Court of Coahoma County. Jackson raises two issues on appeal, both of which this Court concludes to be without merit. We, therefore, affirm the circuit court conviction and judgment of sentence.

## I.

### Facts

According to multiple witnesses presented by the State, Jackson, in the company of several young men, was standing on a street in the town of Jonestown in Coahoma County, when his group was approached by four young men who had been playing basketball together. Eyewitnesses from both groups testified that, as the other group approached, Jackson suddenly pulled a pistol and began shooting. Two members of the approaching group were struck by the bullets. Those who were physically able, fled the scene, though most returned to the shooting scene within minutes. Jackson did not return, however. All witnesses to the shooting testified that Jackson was wearing a white hooded sweatshirt. The Jonestown Chief of Police, whose residence was near the crime scene, testified that he was at home at the time and heard the report of seven or eight gunshots. When he looked out the window in an attempt to investigate, he saw Jackson, dressed in a white hooded sweatshirt, walking rapidly across his lawn.

The incident was reported to the Coahoma County Sheriff's Department by telephone, and deputies responded to the scene. Their investigation at the scene resulted in Jackson becoming a suspect. While deputies were still at the shooting scene, and approximately forty minutes after the first report had been telephoned in, Jackson called the sheriff's department from a neighbor's home to report that he had witnessed a shooting. The dispatcher radioed this information to the sheriff's deputy on the

scene, who went to the home where Jackson had placed the call. He found Jackson there still on the telephone and dressed in a green patterned shirt. Jackson was taken into custody and while in the patrol car, requested, without being prompted, that his hands be tested for gunpowder residue. No live testimony from the expert who performed the tests was presented at trial. By a stipulation, the jury was informed that the residue tests revealed no traces of gunpowder. The stipulation further informed the jury that the testing official, if called to testify, would express the opinion that gunpowder residue is normally found on the hands of a person discharging a handgun, but that the residue may be removed by washing one's hands.

Jackson testified in his own defense and said that he had been across the street when the shooting occurred. He said that originally he had been alone but had been joined by a young lady who had driven to Jonestown from Clarksdale to try to make contact with Jackson's younger brother. Jackson said that he and the young lady were conversing when the shooting began and that they both ran in fear for their own safety. The young lady had appeared as a witness for the defense before Jackson testified and had related a version of the shooting that essentially corroborated Jackson's version of the events.

On this conflicting evidence, the case was submitted to the jury, and the jury returned a verdict of guilty on both counts.

We will discuss Jackson's two issues raised on appeal in the same order presented in his brief.

## II.

### The Trial Court's Failure to Grant a Mistrial Motion

During the State's cross-examination of Jackson, the prosecutor was apparently trying to show that the young lady who had testified for the defense was biased or prejudiced in Jackson's favor by trying to get Jackson to admit that she had appeared at his request, or at least under a subpoena issued on his behalf. Jackson's responses were evasive, but it is unclear whether his non-responsive answers were an attempt to purposely misinform the jury or the result of a lack of understanding of the mechanics of securing the presence of a witness at trial. Ultimately, in the course of this exchange, the prosecution asked Jackson, "Did you tell your lawyer to subpoena this girl?"

Before Jackson answered, defense counsel objected, claiming this inquiry to be an invasion of the attorney-client privilege. The trial court sustained the objection. Out of the presence of the jury, defense counsel then moved for a mistrial, claiming the question itself was such a grievous and unwarranted invasion of the attorney-client privilege that Jackson had been substantially prejudiced. The trial court denied the mistrial motion. On appeal, Jackson claims the denial of his mistrial motion was reversible error, since the State's improper inquiry somehow made Jackson "appear to be hiding the true fact."

It is the opinion of this Court that the impropriety of the State's inquiry is as much a question of relevancy as one of invasion of attorney-client privilege. Every defendant has a constitutional right to invoke the power of the State to assist him in compelling witnesses to appear and testify for the defense. U.S. Const. amend. VI and Miss. Const. art. III, § 26. To suggest that the exercise of that

right may be turned against a defendant to demonstrate bias on behalf of those witnesses so produced is ludicrous. Even the most rigorous of cross-examinations ought to be limited to those areas that will produce information helpful to the jury in determining the facts of the case. This line of inquiry certainly did not have that prospect, and the trial court properly curtailed it.

Nevertheless, we are unable to determine in what way the question itself, or the entire line of inquiry, would suggest to the jury that Jackson was attempting to hide or conceal any facts. While the issue of who subpoenaed this witness was, in the opinion of this Court, largely irrelevant, we do not conclude that the verbal jousting on the question was so prejudicial as to prevent Jackson from receiving a fundamentally fair trial, which is the right we are charged to safeguard on appeal. *Fisher v. State*, 481 So. 2d 203, 216 (Miss. 1985). The jury could certainly understand that Jackson valued this witness's exculpatory testimony, and the fact that she had appeared at his request (or under the compulsion of the State exercised at his behest) would not seem to make her testimony more or less credible in the eyes of the jury.

Nothing that transpired in regard to this issue affected the fundamental fairness of Jackson's trial, and we, therefore, find it to be without merit.

### III.

#### The Weight of the Evidence

Jackson concedes that the evidence was sufficient to sustain his conviction, but argues that the conviction was so against the weight of the evidence that he should be given a new trial. The trial court denied this relief on Jackson's post-conviction motion, and Jackson claims on appeal that the trial court erred in doing so. In considering such a claim of error, our Court is required to view the evidence at trial in the light most favorable to the verdict and to permit the State those favorable inferences that could reasonably flow from that evidence. *Strong v. State*, 600 So. 2d 199, 204 (Miss. 1992). It is only when, viewing the record in that light, this Court becomes convinced that a manifest injustice has occurred that we are permitted to reverse a conviction and remand for a new trial. *Flowers v. State*, 601 So. 2d 828, 833 (Miss. 1992).

In this case, the evidence of Jackson's guilt was overwhelming. Jackson hinges his argument concerning the weight of the evidence on three points: (a) the lack of gunpowder residue on his hands; (b) the fact that only two spent shells were retrieved from the scene of the shooting, though witnesses reported hearing seven or eight shots; and (c) no witness testified to seeing Jackson actually produce the gun -- in Jackson's own words, nobody knew "whether he got it from his pocket, the ground or from another person."

The jury was told that gunpowder residue could be removed by the simple act of washing one's hands. The evidence that Jackson reported the shooting (claiming to be only a witness) approximately forty minutes after the first report of the incident was received by law enforcement, the evidence

indicating that he had changed his shirt in the interim, together with evidence that Jackson himself had suggested the test, could all combine to give rise to a reasonable inference that Jackson had taken advantage of the intervening time to wash away incriminating residue. The failure of law enforcement to recover spent shells in a number equal to the reported number of shots fired does nothing to lessen the likelihood that Jackson was the individual who wounded the two young men who were unquestionably wounded by gunfire. Finally, the State's inability to trace the source from which Jackson produced the weapon -- a weapon that a number of eyewitnesses reported seeing him use in the crime -- does not substantially weaken the probative value of these eyewitness accounts of the events that are heavily incriminating to Jackson.

The jury was presented with a classic case of conflicting versions of the same incident and elected to believe those witnesses whose testimony implicated Jackson in the crime. That is the proper role of the jury as the trier of fact, and there is no basis on this record for this Court to interpose its own assessment of where the weight of the evidence lies. *Morgan v. State*, 681 So. 2d 82, 93 (Miss. 1996)

**THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF COUNTS I AND II OF AGGRAVATED ASSAULT AND SENTENCE OF TEN YEARS FOR EACH COUNT TO RUN CONCURRENTLY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. THE SENTENCE IN COUNT I IS TO RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO COAHOMA COUNTY.**

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