IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00965 COA

RODARICO BUTLER, A/K/A "RICO, "A/K/A "PELO," AND THOMAS NAKIA WILLIAMS — **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

DATE OF JUDGMENT:	08/11/95
TRIAL JUDGE:	HON. ELZY JONATHAN SMITH JR.
COURT FROM WHICH APPEALED:	COAHOMA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	RICHARD B. LEWIS TOM T. ROSS, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	PHILLIP S. WEINBERG
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	BUTLER & WILLIAMS: CT 1 DRIVE-BY SHOOTING: CT 2 SHOOTING INTO A DWELLING: BUTLER: CT 1 30 YRS; WILLIAMS: CT 1 25 YRS; EACH: RUN CONSECUTIVE ANY PREVIOUS & NO PAROLE; CT 2 EACH: 10 YRS CONCURRENT CT I
DISPOSITION:	AFFIRMED - 11/4/97
MOTION FOR REHEARING FILED:	11/18/97
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

HINKEBEIN, J., FOR THE COURT:

After a joint trial, a jury in the Coahoma County Circuit Court found Rodarico Butler and Thomas Williams guilty of drive-by shooting and shooting into a dwelling pursuant to Miss. Code Ann. (Rev.

1994) Sections 97-3-109 and 97-37-29. Aggrieved by their convictions, Butler and Williams appeal separately but assign only the following common errors, which we will consolidate for efficiency:

> I. THE TRIAL COURT ERRED IN OVERRULING THE APPELLANTS' RESPECTIVE MOTIONS FOR DIRECTED VERDICT AND MOTIONS FOR JUDGMENT NOT WITHSTANDING THE VERDICT OR ALTERNATIVELY, FOR A NEW TRIAL.
>
> II. THE TRIAL COURT ERRED IN GRANTING INSTRUCTION S-1.

Holding these assignments of error to be wholly without merit, we affirm the judgment of the circuit court.

FACTS

During the early morning hours of February 24, 1995, three men stopped their vehicle outside a house in Clarksdale, Mississippi. The driver opened his door, stepped from the car, and pointed a handgun across the roof of the car toward the house. The front seat passenger pointed a shotgun through his open window in the same direction, and a third gunman pointed yet another weapon at the home from the back seat. After each fired into the dwelling, they sped away as quickly as they had arrived. Meanwhile, seven individuals, both adults and children, crouched behind furniture inside the house to avoid being struck by the bullets. But an eighth person watched from a bedroom window facing the street, from which he saw two of the three gunmen's faces.

Fortunately, all survived the ordeal, including the identifying witness, who at trial pointed to Butler and Williams as the front seat occupants. A second witness who watched the incident from a nearby house identified Butler and Williams as well. Thereafter, a third witness testified to having seen Williams leave his home that evening in a vehicle much like that used in the crime. After hearing this evidence, the jury convicted Butler and Williams.

ANALYSIS

> I. THE TRIAL COURT ERRED IN OVERRULING THE APPELLANTS' RESPECTIVE MOTIONS FOR DIRECTED VERDICT AND MOTIONS FOR JUDGMENT NOT WITHSTANDING THE VERDICT OR ALTERNATIVELY, FOR A NEW TRIAL.

Butler and Williams contend that the trial court committed reversible error in denying their requests for directed verdict/peremptory instruction and subsequent motions for judgment notwithstanding the verdict or in the alternative, new trial. They argue that a weighing of the "unimpeached, credible, consistent, and reasonable" testimony of their alibi witnesses with the "improbable, unreasonable, and self-contradictory" evidence provided by the State necessarily creates reasonable doubt as to their guilt, thereby contradicting the jury's verdict. In turn, the State contends that such a comparison is primarily the jury's responsibility, not that of this Court. The State then argues, "the testimony of the [prosecution's] eyewitnesses warranted the submission of this case to the jurors and undergirds their resolution of the factual issues." We agree with the State.

Both motions for directed verdict and motions for JNOV challenge the legal sufficiency of the evidence. *Noe v. State*, 616 So. 2d 298, 302 (Miss. 1993) (stating that a motion for directed verdict tests legal sufficiency of the evidence); *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993) (stating

that a motion for judgment of acquittal notwithstanding the verdict also tests legal sufficiency of the evidence). *See also Strong v. State,* 600 So. 2d 199, 201 (Miss. 1992) (stating that the trial judge is bound by the same law whether addressing a motion for directed verdict or addressing a request for a peremptory instruction). Since both require consideration of the evidence before the court when made, this Court properly reviews the ruling only on the last occasion that the challenge was made in the trial court. *McClain*, 625 So. 2d at 778. In this instance, that challenge was quelled when the circuit court denied Butler's and Williams' separate motions for JNOV/new trial. *See, e.g., Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987).

Where a defendant moves for JNOV, the trial court considers all of the credible evidence consistent with the defendant's guilt, giving the prosecution the benefit of all favorable inferences that may be reasonably drawn from this evidence. *McClain,* 625 So. 2d at 778. This Court is authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could not find the accused guilty. *Wetz,* 503 So. 2d at 808 n.3.

As distinguished from the motion for JNOV (as well as a motion for directed verdict), a motion for new trial requests that the jury's verdict be vacated on grounds related to the weight of the evidence, not its sufficiency. *May v. State*, 460 So. 2d 778, 781 (Miss. 1985). However, the jury bears sole responsibility for determining the weight and credibility of evidence. *Id.* Therefore a new trial is appropriate only where a verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand, would be to sanction unconscionable injustice. *Wetz,* 503 So. 2d at 812. Such a determination lies within the trial court's sound discretion. *McClain,* 625 So. 2d at 778. We will reverse and order a new trial only if, accepting as true all evidence favorable to the prosecution, we determine that the trial court abused that discretion. *Id.*

At trial, two prosecution witnesses identified Butler and Williams as the gunmen. First, Alfredo Rollins recalled stepping to a window from which he watched Butler and Williams shoot. Next, Jerrico Calvin, a neighbor who was standing on his nearby porch, identified Butler and Williams as the individuals he saw fire upon the home. Both placed Butler between the car and its open driver's door, leaning across the roof of the vehicle, unloading a handgun into the house. Likewise, both remembered Williams hanging a shotgun out of the passenger window, shooting it once in the same direction. Moreover, Clarksdale police officers discovered one shotgun shell and eight .9 millimeter shell casings at the scene, thereby providing persuasive physical evidence of the witnesses' truthfulness.

Regarding the alibi defenses Butler and Williams presented in response, the jury is never obligated to accept such, rather it simply raises an issue of fact. *Burrell v. State*, 613 So. 2d 1186, 1191 (Miss. 1993). In this case, the jury's ultimate rejection is galvanized by the untenable nature of the appellants' explanations. Butler called his sister, mother, cousin, and girlfriend to testify as to his whereabouts that night. Williams also called various family members to vouch for his presence at home throughout the evening. Then during rebuttal, the prosecution called another witness, who remembered watching Williams exit his home's driveway in a car similar to that used in the crimes, thereby casting doubt on at least Williams' claim of non-participation.

As for their attack below on the credibility of the State's witnesses, Butler and Williams first

suggested membership in a gang engaged in a fierce rivalry with their own, and then beckoned the jury to infer a motive for false accusation. On appeal, they resurrect these assertions by again disparaging the testimony of these witnesses. However, neither Butler nor Williams' attempts to direct our attention toward tangible evidence indicating ulterior motives for the accusations. In fact, jurors were presented with no evidence that anyone other than Butler and Williams, along with the unknown backseat passenger, shot into the home. Because the overwhelming weight of the evidence lies with the State, we perceive no injustice in either the jury's finding Butler and Williams guilty or the trial court's allowing the verdict to stand. Reasonable and fair-minded jurors might well have found both Butler and Williams guilty of drive-by shooting as well as shooting into a dwelling. Consequently, this assignment of error is without merit.

II. THE TRIAL COURT ERRED IN GRANTING INSTRUCTION S-1.

Butler and Williams also argue that the trial court erroneously granted jury instruction S-1 over the objections of their respective counsel. In response, the State reminds us that S-1 merely recited the charging information contained in the indictments which, rather than the instruction, appear themselves to be the actual target of complaint. The State proceeds by arguing that Butler's and Williams' protests are procedurally barred for lack of timely objection. We agree with the State. Jury instruction S-1 reads in pertinent part:

> In Count I, if you believe from the evidence in this case beyond a reasonable doubt that: (1) the defendants, Rodarico Butler and Thomas Nakia Williams, or either of them, while aiding and abetting or acting in concert with each other and/or another, (2) attempted to cause serious bodily injury to Alfredo Rollins, Lula Johnson, Louise Applewhite, Aaron Griffin, Aubrey Campbell, Dwight Johnson, Takia Wilkins, and/or Amber Saffold, (3) by discharging a firearm (4) while in or on a vehicle, then you shall find such defendant or defendants, as the case may be, guilty as charged in Count I. If the State has failed to prove any one or more of these elements beyond a reasonable doubt as to the defendants or either of them, then you shall find such defendant or defendants, as the case may be, not guilty in Count I.
>
> In Count II, if you find from the evidence in this case beyond a reasonable doubt that: (1) the house located at 208 Madison Street, Clarksdale, Mississippi, was used by Lula Johnson as her dwelling, and (2) on or about February 24, 1995, the defendants, Rodarico Butler and Thomas Nakia Williams, individually or while aiding and abetting or acting in concert with each other and/or another, (3) shot and discharged a pistol into said dwelling house, then you shall find such defendant or defendants, as the case may be, guilty as charged in Count II. If the State has failed to prove any one or more of these elements beyond a reasonable doubt as to either or both defendants, then you shall find such defendant or defendants, as the case may be, not guilty in Count II.

This language tracks that of the indictments except that each counts listed in the indictments ended with the words, "against the peace and dignity of the State of Mississippi." Butler and Williams object to the repeated use of the expression, claiming that since Section 169 of the Mississippi Constitution of 1890 requires a criminal indictment to "*conclude* " with the phrase, any counts following the magic words are necessarily void. (emphasis added). Both cite as authority *McNeal v. State*, 658 So. 2d 1345 (Miss. 1995), wherein the Mississippi Supreme Court noted the importance of the demand by

writing, "the provision appears to us to be idle and meaningless, but we find it in the fundamental law, and we cannot disregard it." *Id.* at 1349 (citing *Clingan v. State*, 135 Miss. 621, 100 So. 185 (1924)). In *McNeal,* language charging habitual offender status came after the words. *Id.* The Mississippi Supreme Court held that the defect did not affect McNeal's conviction because only the length of his sentence was altered. *Id.* at 1350-1 (citing *Osborne v. State*, 404 So. 2d 545, 548 (Miss. 1981)).

Butler and Williams predictably distinguish *McNeal* from the case sub judice by noting the involvement of substantive criminal charges, not merely habitual offender statutes. However, Butler and Williams fail to recognize another distinguishing fact -- McNeal contested the indictment prior to trial. Mississippi Code Annotated § 99-7-21 (Rev. 1994) requires such in that objections as to the form of indictments must be made prior to impaneling a jury, thereby allowing amendment without significant interruption. *See Brandau v. State*, 662 So. 2d 1051-1054 (Miss. 1995) (holding that formal defect waived for failure to comply with timing element of § 99-7-21). Nevertheless, Butler and Williams delayed their protests until the trial's conclusion, then complaining only under the guise of objections to instruction S-1. The crux of their challenge dealt with the indictment, not the proposed instruction reflecting its contents; therefore, Butler and Williams may not sidestep the statute's mandate in this manner. Since they failed to properly object to the form of the indictments below, Butler and Williams are procedurally barred from raising this issue on appeal. *Brandau*, 662 So. 2d at 1053. Accordingly, this assignment of error is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF RODARICO BUTLER OF COUNT I, DRIVE-BY SHOOTING, AND COUNT II, SHOOTING INTO A DWELLING, AND SENTENCE OF THIRTY (30) YEARS WITHOUT PAROLE TO RUN CONSECUTIVE WITH ANY PREVIOUSLY IMPOSED SENTENCE AND TEN (10) YEARS TO RUN CONCURRENT ON COUNT II IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED.

THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF THOMAS NAKIA WILLIAMS OF COUNT I, DRIVE-BY SHOOTING, AND COUNT II, SHOOTING INTO A DWELLING, AND SENTENCE OF TWENTY-FIVE (25) YEARS WITHOUT PAROLE TO RUN CONSECUTIVE WITH ANY PREVIOUSLY IMPOSED SENTENCE AND TEN (10) YEARS TO RUN CONCURRENT ON COUNT II IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED.

COSTS ARE ASSESSED AGAINST COAHOMA COUNTY.

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