IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 94-KP-01050 COA

FRED TUCK **APPELLANT**

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:	09/01/94
TRIAL JUDGE:	HON. ROBERT LEWIS GIBBS
COURT FROM WHICH APPEALED:	YAZOO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PRO SE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	EDWARD J. PETERS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	MANSLAUGHTER - SENTENCED TO SERVE 20 YRS; SENTENCE TO RUN CONSECUTIVELY TO ANY SENTENCES PREVIOUSLY IMPOSED
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

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

PAYNE, J., FOR THE COURT:

Fred Tuck was convicted of manslaughter by a jury in the Circuit Court of Yazoo County, Mississippi and was sentenced to twenty years with the Mississippi Department of Corrections.

Feeling aggrieved, Tuck filed this appeal asserting nine assignments of error. Having considered appellant's issues, we find them to be meritless and affirm the lower court's decision.

STATEMENT OF THE FACTS

During the early morning hours of Sunday, August 29, 1993, Fred Tuck, a sixty-one-year-old lifelong resident of Yazoo County, Mississippi, shot and killed eighteen-year-old Frederick Johnson outside Club 66, a nightclub in Yazoo City. The evidence showed that Johnson intervened in a fight between John Allen and Tuck which had occurred inside Club 66 immediately preceding the shooting.

Eyewitnesses testified that Johnson and Allen left the club to go home after the altercation. Johnson was standing next to his car talking with Earl Moorehead when a bystander shouted that Tuck had a gun. Johnson attempted to duck behind his automobile to avoid being shot when Tuck turned the shotgun toward Johnson and pulled the trigger.

According to his testimony, Tuck was acting in self-defense when he shot Johnson outside the nightclub. "I had to pull it and shoot it because [Johnson] was crowding me. I thought he was going to kill me."

Tuck's witness, Larry Johnson, testified that Tuck and the victim were arguing outside the club; however, the victim had no weapon and was not threatening Tuck. Tuck went to his car, entered through the back door, retrieved his gun, and shot Johnson.

Johnson died on September 12, 1993, from the wound inflicted. Tuck was indicted on a charge of murder. After a jury trial, Tuck was convicted of manslaughter and sentenced to twenty years with the Mississippi Department of Corrections.

ANALYSIS

I. WHETHER TUCK WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Tuck cites numerous allegedly prejudicial deficiencies in trial counsel's performance. Specifically, defense counsel (1) failed to perform an adequate investigation of the case, (2) failed to subpoena certain defense witnesses, (3) did not seek to impeach the credibility of the State's witnesses, (4) prejudiced the trial judge by having Tuck reject a plea bargain before the judge, (5) offered no instructions or withdrew instructions embracing Tuck's defense, and (6) failed to object to sentencing without the benefit of a presentencing investigation.

The Mississippi Constitution's right to counsel (Miss. Const. art. 3, § 26) embraces all rights guaranteed to a criminally accused defendant by the Sixth and Fourteenth Amendments to the United States Constitution. ***Triplett v. State,* 666 So. 2d 1356, 1358 (Miss. 1995)**. Thus, Tuck is guaranteed the right to the effective assistance of counsel. ***McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).**

Mississippi applies the test delineated by the United States Supreme Court in ***Strickland v. Washington*, 466 U.S. 668, 686 (1984),** when reviewing a claim of ineffective assistance of counsel: "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Gilliard v. State,* 462 So. 2d 710, 714 (Miss. 1985).** Under the two-prong test enunciated in *Strickland*, Tuck must demonstrate that his counsel's performance was deficient and that there is a reasonable probability that but for his attorney's errors,

Tuck would have received a different result in the trial court. ***Strickland,* 466 U.S. at 687.** Unless Tuck can meet both prongs of *Strickland*, it cannot be said that the adversarial process was unreliable and his claim of ineffective assistance of counsel fails. ***Id.***

Whether trial counsel's performance was deficient and prejudicial must be based upon the totality of the circumstances. ***Frierson v. State*, 606 So. 2d 604, 608 (Miss. 1992).** "When litigated on its merits, the ineffective [assistance of counsel] issue is first and foremost a factual inquiry. But it is one conducted en gross. . . . [T]he Court is concerned with the totality of the performance of defense counsel." ***Read v. State,* 430 So. 2d 832, 839 (Miss. 1983).**

In reviewing defense counsel's performance, "every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." ***Foster v. State*, 687 So. 2d 1124, 1130 (Miss. 1996).** Furthermore, Tuck faces the strong yet rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. ***Frierson,* 606 So. 2d at 608.** Tuck also must overcome the presumption that decisions made by defense counsel are strategic. ***Armstrong v. State*, 573 So. 2d 1329, 1334 (Miss. 1990)*; Leatherwood v. State,* 473 So. 2d 964, 969 (Miss. 1985).**

In support of his allegation of inadequate investigation by counsel, Tuck points to trial counsel's inability to recognize B. J. Wright's name as shown by the colloquy following the submission of questions to the judge during jury deliberations:

> BY MR. ROGERS: Who is B. J. Wright?
>
> BY MR. HEDGEPETH: Your defendant said he was there. Mr. Tuck said he was
>
> there.
>
> BY MR. ROGERS: Oh, okay.
>
> BY MR. HEDGEPETH: I didn't know about him until he testified.

Tuck is entitled to a basic defense which requires the trial counsel to learn the names of, and interview every possible eyewitness, and get statements from each. ***Triplett,* 666 So. 2d at 1361.** "[A]t a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case." ***Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985).** However, trial counsel's actions are properly based on information supplied by the defendant. ***Ferguson v. State*, 507 So. 2d 94, 96 (Miss. 1987).** Although the questions submitted to the judge during jury deliberations specifically addressed the absence of B. J. Wright at the trial, the record does not show that Tuck informed his attorney of B. J. Wright's presence prior to trial. Furthermore, the first time the State knew of B. J. Wright's presence at Club 66 on the fatal morning was when Tuck testified at trial.

Tuck contends trial counsel's failure to subpoena witnesses deprived him of a fair trial. Tuck relies on ***Triplett,* 666 So. 2d at 1356**, in which defense counsel's failure to conduct basic pretrial discovery and investigation, including interviewing and subpoenaing possible witnesses on critical issues, was the basis for reversal and remand. The record in this case reveals Tuck's defense counsel attempted to

interview witnesses Lid Baker and Josephine Jackson, and in fact, requested subpoenas for Baker and Jackson. Thus, Tuck's defense counsel used due diligence to secure the witnesses' presence at trial.

Tuck's assertion of ineffective assistance of counsel regarding trial counsel's failure to call Gene Adcock as an expert witness and failure to impeach the credibility of the State's witnesses on cross-examination is without merit. Presentation of testimony and cross-examination of adverse witnesses are properly considered a trial tactic within the discretion of counsel. "[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." ***Buckelew v. U.S.*, 575 F.2d 515, 521 (5th Cir. 1978).**

Tuck contends that his trial attorney offered no instructions factually embracing his defense. The record shows to the contrary. In addition to a self-defense instruction (D14), the jury was instructed on presumption of innocence (D7), unanimous verdict (D8), reasonable doubt (D11), credibility of witnesses (D13), how the jury "should determine what an ordinary and reasonable person might have reasonably inferred from all the facts and circumstances which surround [sic] Fred Tuck at the time . . . " when deciding upon Tuck's guilt or innocence (D18), and the offense of manslaughter, i.e., a killing without malice aforethought but done in a sudden heat of passion (D25).

Defense counsel competently presented instructions for consideration to the trial court. Therefore, Tuck's argument that defense counsel ineffectively assisted him in the presentment of jury instructions is without merit.

Tuck contends that forcing him to reject the State's offer of a twenty-year sentence in exchange for a guilty plea to manslaughter in the presence of the judge was improper conduct by defense counsel.

Rule 8.04(B)(3) and (4) of the Uniform Circuit and County Court Rules provides:

> (3) Defense attorneys shall not conclude any plea bargaining on behalf of the defendant without the defendant's full and complete consent, being certain that the decision to plead is made by defendant. Defense attorneys must advise defendant of all pertinent matters bearing on the choice of plea, including likely results or alternatives.
>
> (4) . . . After a recommended disposition on the plea has been reached, it may be made known to the court, along with the reasons for the recommendation, prior to the acceptance of the plea. The court shall require disclosure of the recommendation in open court, with the terms of the recommendation to be placed in the record.

Contrary to Tuck's assertion, trial counsel properly had the record reflect that Tuck consented "to conclude any plea bargaining," and that trial counsel had "advise[d] defendant of all pertinent matters bearing on the choice of plea, including likely results or alternatives."

Tuck claims that defense counsel's performance was deficient because he failed to object to sentencing without the benefit of a presentencing investigation. Presentence reports are given only at the discretion of the circuit judge. **Miss. Code Ann. § 47-7-9(3)(a) (Rev. 1993).** The decision not to request a presentence investigation is a matter of trial strategy. There is no evidence before this Court that the trial court would have ordered the investigation had trial counsel requested it. Because Tuck

was not automatically entitled to a presentence report, trial counsel's failure to request a presentence report does not constitute ineffective assistance of counsel. ***Coleman v. State,* 378 So. 2d 640, 647 (Miss. 1979).**

Tuck cites ***Barnes v. State,* 577 So. 2d 840 (Miss. 1991)**, in support of his argument that the result of the trial would have been different but for trial counsel's substandard performance. In overturning Barnes's conviction, the court found the record replete with instances in which trial counsel's substandard performance prejudiced Barnes's right to a fair trial necessitating reversal and remand for a new trial. ***Id.* at 843-44.** However, the factual situation in *Barnes* is distinguishable from that presented in this case. Tuck's counsel conducted discovery, filed motions, cross-examined witnesses, and presented twenty-five jury instructions on behalf of Tuck. Trial counsel's performance was within the wide range of reasonable conduct, thus rising to the level of effective assistance of counsel.

After carefully considering the trial record and the briefs of the parties, Tuck fails to meet the *Strickland* test. Accordingly, we find no merit to this assignment of error.

II. WHETHER THE JURY WAS IMPROPERLY INSTRUCTED.

Tuck correctly argues that he is entitled to have an instruction embracing his theory of the case. ***Triplett,* 666 So. 2d at 1361**. The trial court may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions. ***Murphy v. State,* 566 So. 2d 1201, 1206.** The trial court is not required to give repetitive or inapplicable instructions to the jury. If one instruction is denied, and the essence of the rejected instruction is granted via another instruction, then the issue has been fairly presented to the jury. ***Billiot v. State,* 454 So. 2d 445, 461 (Miss. 1984).**

Tuck's theory of the case, self-defense, was included in Instruction D-14. Additionally, the record reveals that Tuck's manslaughter instruction, Instruction D-25, was granted. Thus, the jury was properly instructed regarding Tuck's theory of the case.

Tuck further contends that the trial court erred in granting Jury Instruction S-2 because he did not raise intoxication as a defense. Instruction S-2 reads:

> The Court instructs the Jury that if a defendant, when sober, is capable of distinguishing between right and wrong, and the defendant voluntarily deprives himself of the ability to distinguish right from wrong by reason of becoming intoxicated and commits a crime while he is in that condition, he is criminally responsible for his acts.

Tuck testified that he consumed intoxicants on August 28 and 29. Witnesses for the prosecution testified that Tuck was behaving in a drunken manner. The jury could reasonably infer from the testimony of Tuck that his "ability to distinguish right from wrong" was impaired because of intoxication. Therefore, the evidence justified the granting of Jury Instruction S-2 over the objection of Tuck. ***Norris v. State,* 490 So. 2d 839, 842 (Miss. 1986).** The jury was properly instructed that voluntary intoxication is not a defense to a crime. ***McDaniel v. State,* 356 So. 2d 1151, 1160 (Miss. 1978).**

Tuck argues that the trial court erred in failing to give an instruction on circumstantial evidence. The

rule in Mississippi is that a circumstantial evidence instruction should be given only when the prosecution can produce neither eyewitnesses nor a confession to the offense charged. ***Stringfellow v. State,* 595 So. 2d 1320, 1322 (Miss. 1992).**

In the present case, five eyewitnesses testified that Tuck shot Johnson. Further, Tuck admits to shooting Johnson. A circumstantial evidence instruction was not appropriate. This assignment of error is without merit.

III. WHETHER THE TRIAL JUDGE IMPROPERLY PARTICIPATED IN PLEA BARGAIN DISCUSSIONS.

Tuck maintains the trial judge improperly participated in plea negotiations when the judge heard Tuck's rejection of the State's proffered plea bargain. Rule 8.04(B)(4) of the Uniform Circuit and County Court Rules prohibits participation by the trial judge in any plea discussion. Here trial counsel wanted the record to reflect that the prosecution's offer of twenty years in exchange for a plea of guilty to manslaughter had been relayed to Tuck along with "all pertinent matters bearing on the choice of plea, including likely results or alternatives" in conformity with Rule 8.04(B)(3). In turn, the trial court confirmed that Tuck was making an informed decision to accept or reject the plea bargain and that Tuck had carefully weighed the possible results of his choice. Nothing in the record supports Tuck's claim that the trial judge was involved in plea negotiations between the State and defense counsel. ***Johnson v. State,* 666 So. 2d 784, 797 (Miss. 1995).** Nor does the record indicate that upon Tuck's rejection of the plea bargain, the trial court retaliated by sentencing Tuck to the maximum period of time allowed by statute. The trial court merely placed Tuck's rejection of the State's proffered plea bargain on the record. This assignment of error is without merit.

IV. WHETHER THE TRIAL JUDGE'S FAILURE TO CONDUCT A PRESENTENCING INVESTIGATION BEFORE IMPOSING THE MAXIMUM SENTENCE EVINCED PARTIALITY.

Tuck claims he is entitled to a new trial because the trial judge sentenced Tuck to the maximum penalty provided in the statute without first ordering a presentence investigation. **Miss. Code Ann. § 47-7-9(3)(a) (Supp. 1997)** provides for presentence investigations: "Presentence investigators shall conduct presentence investigations on all persons convicted of a felony in any circuit court of the state, prior to sentencing and at the request of the circuit court judge of the court of conviction."

Rule 11.02 of the Uniform Circuit and County Court Rules provides "Upon acceptance of a plea of guilty, or upon a finding of guilt, and where the court has discretion as to the sentence to be imposed, the court may direct that a presentence investigation and report be made."

The sentence imposed by the trial court is within the statutory limits set out in **Miss. Code Ann. § 97-3-25 (Rev. 1993)**, which provides that "[a]ny person convicted of manslaughter shall be . . . imprisoned . . . in the penitentiary not less than two years, nor more than twenty years." When the "[i]mposition of a defendant's sentence is within the discretion of the trial court . . . generally, this Court will not review the sentence if it is within statutory limits." ***Johnson,* 666 So. 2d at**

797(citations omitted). "Sentencing is 'purely a matter of trial court discretion' as long as it is within the statutory guidelines." ***Berdin v. State,*** **648 So. 2d 73, 80 (Miss. 1994);** ***Wallace v. State,*** **607 So. 2d 1184, 1188 (Miss. 1992).** Where, as here, the evidence is sufficient to sustain a verdict finding the defendant guilty of manslaughter and where, as here, the sentence imposed is within the limits prescribed by statute, this Court has no authority to reduce it or to reverse it on account of excessiveness of the sentence imposed. ***Griffin v. State,*** **195 So. 472 (Miss. 1940).**

There is nothing in the record to support Tuck's contention that the trial judge abused his discretion by imposing the maximum sentence allowed for the crime of manslaughter in retaliation of Tuck's rejection of the plea bargain offered by the State.

Tuck argues that the trial court should have engaged in a proportionality analysis before imposing the maximum sentence. The three-pronged test for evaluating proportionality was articulated in ***Solem v. Helm,*** **463 U.S. 277, 296-99 (1983)**, as (1) the gravity of the offense and the harshness of the penalty, (2) comparison of the sentence with sentences imposed on other criminals in the same jurisdiction, and (3) comparison of sentences imposed in other jurisdictions for commission of the same crime with the sentence imposed in this case. However, *Solem* was overruled in ***Harmelin v. Michigan,*** **501 U.S. 957, 965-66 (1991)**, to the extent it found a guarantee of proportionality in the Eighth Amendment. "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather it forbids only extreme sentences that are 'grossly disproportionate' to the crime." ***Id.*** **at 1001** (Kennedy, J., concurring). Proportionality analysis is "appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality" but not in the usual case where no such inference arises. ***Id.*** **at 1005.**

In ***Hopson v. State,*** **625 So. 2d 395 (Miss. 1993)**, the court concluded that *Harmelin*indicates that a "gross proportionality analysis is still in order." ***Id.*** **at 404.** The threshold requirement of "an inference of gross disproportionality" was not met by the defendant in ***Hoops v. State,*** **681 So. 2d 521 (Miss. 1996),** and thus, extended proportionality review under *Solem* was not warranted. In *Hoops*, the validity of two fifteen-year sentences for aggravated assault for shooting two people was upheld on appeal. "The trial judge was statutorily empowered to sentence Hoops to twenty years on each count, but he did not." ***Id.*** **at 538.**

Tuck was sentenced to twenty years for the crime of manslaughter. Comparing the crime committed with the sentence imposed does not lead to an inference of gross disproportionality, which is necessary before this Court will apply a proportionality analysis. Tuck did not receive a sentence that is disproportionate to the crime he committed. Accordingly, this assignment of error is rejected.

V. WHETHER THE TRIAL JUDGE IMPROPERLY RESPONDED TO QUESTIONS SUBMITTED TO THE COURT DURING JURY DELIBERATIONS.

Tuck claims the trial judge improperly responded to questions submitted to the court during jury deliberations. After deliberating for less than two and one-half hours, the jury submitted four questions to the trial judge:

1. Was B. J. Wright at the scene of the crime?

2. Why wasn't B. J. Wright subpoenaed?

3. Why weren't the defendant's witnesses subpoenaed?

4. How long [sic] it take for the police to arrive on the scene?

The judge responded to the inquiries with a written note stating "The Court cannot respond to these questions. Your verdict must be based on the evidence that was presented during the trial." Defense counsel had no objection to this response. Tuck claims that the questions presented by the jury demonstrated that the jury was confused and without adequate factual information to determine Tuck's guilt or innocence intelligently. Therefore, Tuck's argument continues, the trial court erred in failing to declare a mistrial.

Tuck cites ***Smith v. State,* 198 So. 2d 220 (Miss. 1967)**, in support of his argument. In reviewing whether the trial court in *Smith* abused its discretion when it sustained the prosecution's motion for a mistrial after the bailiff overheard a juror express an opinion that the defendant was insane, the supreme court refused to lay down a hard and fast rule as to when a mistrial must be declared. "The trial court has the power and the duty to order a mistrial" if the ends of justice will be best served. ***Id.* at 223.** Whether the ends of justice will be served by declaring a mistrial is within the trial judge's wise discretion. ***Id.* at 224.**

The record shows that at 10:00 p.m. a recess was taken, and the jurors, after being instructed, were sent home for the evening. The trial court reconvened at 11:15 a.m. the following morning. The jury returned with its verdict at 11:28 a.m. The verdict was returned within a reasonable amount of time. The record does not support Tuck's claim that the jury was "hopelessly hung up and [could] not reach a verdict."

Further, Tuck contends the trial judge erred by charging the jury to continue deliberations after responding to the written questions. In ***Sharplin v. State,* 330 So. 2d 591 (Miss. 1976)**, the supreme court approved the procedure employed by the trial court when informed that no verdict had been reached by the jury. The trial judge's mere request and receipt of the jury's numerical division without reference to guilt or innocence did not coerce the jury and was not error. The court found that the possibility of coercion lies in the trial judge's conduct and comments after he receives the note from the jury. "If the trial judge feels that there is a likelihood that the jury might reach a verdict, he may return the jury for further deliberations by simply stating to the jurors: 'Please continue your deliberations.'" ***Id.* at 595.**

In the present case, the trial judge did not attempt to force a verdict by suggestive comments or coercive measures. The record shows that the trial judge properly responded to the juror's questions by reminding the jurors to only consider the evidence presented during the trial and instructing the jury to continue deliberations. Accordingly, we find no merit to this assignment of error.

VI. WHETHER THE NON-SEQUESTRATION OF THE JURY IS REVERSIBLE ERROR.

Tuck asserts that the trial judge's failure to sequester the jury is reversible error. In support of his argument, Tuck relies on ***Cox v. State,* 365 So. 2d 627 (Miss. 1978)**, a capital murder case in which the supreme court found reversible error when the trial court allowed the jury to disperse and go to

their respective homes after adjournment of the court at the end of the first day of trial. "[I]n a 'capital case' where the crime charged is punishable by death or a maximum of imprisonment for life in the state penitentiary, the jury shall be sequestered during the entire trial and this right cannot be waived either by the attorney for the accused or at the discretion of the trial court." ***Id.* at 629**.

Non-sequestration of jurors was reexamined in ***Barnes v. State*, 374 So. 2d 1308 (Miss. 1979)**. Applying Rule 5.07 of the then newly-approved Rules of Criminal Procedure (now Rule 10.02 of the Uniform Circuit and County Court Rules), the court held that Barnes had waived his right to have the jury sequestered when the jurors were allowed to separate for the night by agreement of the State, the attorney for the defendant, and the defendant. ***Id.* at 1309.**

Rule 10.02 of the Uniform Circuit and County Court Rules provides:

> In any case where the state seeks to impose the death penalty, the jury shall be sequestered during the entire trial.
>
> In all other criminal cases, the jury may be sequestered upon request of either the defendant or the state made at least 48 hours in advance of the trial. The court may, in the exercise of sound judicial discretion, either grant or refuse the request to sequester the jury. In the absence of a request, the court may, on its own initiative, sequester a jury at any stage of a trial.

Tuck was charged with the crime of murder under **Miss. Code Ann. § 97-3-19(1) (Rev. 1993).** The maximum penalty for murder is imprisonment for life in the state penitentiary. **Miss. Code Ann. § 97-3-21 (Rev. 1993).** Therefore, the procedure to sequester the jury in a criminal case described in the second paragraph of Rule 10.02 applies to the case at bar.

Tuck failed to request that the jury be sequestered at all times during the trial or object to non-sequestration at least 48 hours prior to the beginning of the trial. Tuck waived his right to have a jury sequestered. Discharging the jury to go home over night in the present case was within the discretion of the trial court. Accordingly, this assignment of error is without merit.

VII. WHETHER THE TRIAL JUDGE ERRED IN FAILING TO GRANT TUCK'S MOTION FOR A DIRECTED VERDICT.

At the close of the State's case-in-chief, Tuck moved for a directed verdict of acquittal on the ground that the State had failed to "prove beyond a reasonable doubt all the essential elements of the crime of murder." This motion was overruled. Tuck's renewal of that motion was later denied at the close of all the evidence. His subsequent request for peremptory instruction was also denied.

In judging the legal sufficiency of the evidence on a motion for a directed verdict, all evidence introduced by the prosecution is accepted as true, together with any reasonable inferences that may be drawn from that evidence, and to disregard evidence favorable to the defendant. ***Ballenger v. State*, 667 So. 2d 1242, 1252 (Miss. 1995)**. If there is sufficient evidence to support the verdict of guilty, the motion for a directed verdict and request for peremptory instruction should be overruled. ***Brown v. State*, 556 So. 2d 338, 340 (Miss. 1990).**

The evidence in this case was legally sufficient to support Tuck's conviction of manslaughter. The

denial of the motion by the trial judge is beyond the authority of this Court to disturb. The testimony established Tuck's identity as the person who shot Johnson. The only question was whether, at the time Tuck fired the fatal shotgun blast, Tuck had reasonable grounds to fear that his life was in danger and that there was imminent danger of death or serious bodily harm at the hands of Johnson. Therefore, the trial court properly denied the motion for a directed verdict and allowed the question to go to the jury. This assignment of error is without merit.

VIII. WHETHER THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE EVINCING BIAS, PASSION AND PREJUDICE.

Tuck's motion for JNOV or, in the alternative, for a new trial contains a distinct claim that the jury verdict was against the overwhelming weight of the evidence.

This Court will not reverse a jury verdict and order a new trial unless it is convinced that the verdict was contrary to the overwhelming weight of the evidence and that to allow it to stand would sanction an unconscionable injustice. ***Johnson v. State,*** **642 So. 2d 924, 928 (Miss. 1994).** "In determining whether a jury verdict is against the overwhelming weight of the evidence . . . this Court must accept as true the evidence which supports the verdict and will reverse only when convinced thaJt the trial court has abused its discretion in failing to grant a new trial. Any factual disputes are properly resolved by the jury and do not mandate a new trial." ***Id***. (citations omitted).

Tuck testified he was assaulted in Club 66 by Johnson and others. As Tuck left Club 66 to go home, Johnson followed him to Tuck's vehicle and was "crowding" him. Tuck grabbed a shotgun and fired it purportedly in self-defense at a time when death or serious bodily harm was imminent. A different account was given by the State's witnesses who testified that Tuck shot Johnson when Johnson was seeking cover. "[W]hen the evidence is conflicting, the jury will be the sole judge of the credibility of witnesses and the weight and worth of their testimony." ***Gathright v. State,*** **380 So. 2d 1276, 1278 (Miss. 1980).** The conflicting testimony was resolved by the jury. The evidence is sufficient to support the jury verdict of manslaughter. There is no merit to this assignment of error.

IX. WHETHER THE CUMULATIVE EFFECT OF THE ERRORS CAUSED A DEPRIVATION OF TUCK'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

Tuck argues the cumulative effect of the individual errors at trial undermined his fundamental right to a fair trial. However, where there is no error in any one of the alleged assignment of errors, there can be no error cumulatively. ***Davis v. State*****, 660 So. 2d 1228, 1261 (Miss. 1995);** ***Foster,*** **687 So. 2d at 1141**. Accordingly, there is no merit to this assignment of error.

CONCLUSION

For all the above noted reasons, we find no reversible error in the trial below, having reviewed the record as submitted from the Circuit Court of Yazoo County. Therefore, we affirm the conviction of manslaughter and sentence of twenty years in the Mississippi Department of Corrections.

THE JUDGMENT OF THE CIRCUIT COURT OF YAZOO COUNTY OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SENTENCE TO RUN CONSECUTIVELY TO ANY SENTENCES PREVIOUSLY IMPOSED IS AFFIRMED. ALL COSTS OF APPEAL ARE ASSESSED TO YAZOO COUNTY.

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