

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01265 COA

OTIS JOHNSON

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. JANNIE M. LEWIS

COURT FROM WHICH APPEALED: HOLMES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROSS R. BARNETT, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUS DISTRICT ATTORNEY: CROOK, NOEL D.

NATURE OF THE CASE: MURDER

TRIAL COURT DISPOSITION: MURDER: SENTENCED TO SERVE A TERM OF LIFE IN THE CUSTODY OF THE MDOC

MOTION FOR REHEARING FILED: November 6, 1997 MANDATE ISSUED: 6/10/97

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

PER CURIAM:

Otis Johnson (Johnson) was indicted, tried, and convicted of murder in the Holmes County Circuit Court. He was sentenced to serve a term of life in the custody of the Mississippi Department of corrections. On appeal, he presents the following issue: "The motion for judgment notwithstanding the verdict and/or for a new trial should have been granted because the evidence was insufficient to support a conviction of murder." Additionally, Johnson argues that the state did not prove motive; Johnson did not have a gun; Johnson's behavior was consistent with innocence; and mysterious elements compound the doubt surrounding the state's case. Finding no error, we affirm. On April 22, 1995, John Davis (John) threw his girlfriend, Lorene Bell (Lorene), a birthday party at the Hilltop Lounge in Holmes County, Mississippi. Among the guests was the victim, Michael Hibbler (Hibbler). Also in attendance were Johnson and his cousin, Andre Powell (Powell). At some point during the night, Hibbler and Powell got into an argument. John broke up the argument and pulled Hibbler aside to cool him off. While Hibbler and John were standing in the entrance area of the restroom, Johnson appeared with a gun and shot Hibbler in the face. Hibbler died as a result of the gunshot. John and his cousin, Cory Davis (Cory) both testified that they were standing with Hibbler when he was shot. John and Cory both identified Johnson as the shooter. Additionally, Lorene saw Hibbler get shot, and saw the back of the shooter's head. Although Lorene passed out soon after the shooting, she identified Johnson as the shooter based on what she saw before she passed out.

Johnson countered this evidence by presenting numerous witnesses that saw him at various other locations in the club at the time of the shooting. Moreover, Johnson argues on appeal, there was a bouncer scanning people for guns as they entered the club, and the bouncer testified that Johnson did not have a gun when he entered the club. However, Johnson admittedly left the club at one point before the shooting, and when he returned, the bouncer had left his post at the door, and Johnson was not scanned upon reentry.

On appeal, Johnson argues that the verdict was against the overwhelming weight of the evidence, and therefore the judgment should be reversed. Alternatively, Johnson argues that he should be granted a new trial. Our standard of review for a challenge to the weight of the evidence is dictated by *McClain v. State*:

[T]he challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. . . . New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

....

The jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed.

McClain v. State, 625 So. 2d 774, 780 (Miss. 1993).

Johnson also argues that the trial court erred in overruling his motion for judgment notwithstanding the verdict. The standard of review for challenges to the sufficiency of the evidence is set forth in *McClain v. State*:

The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. In appeals from an overruled motion for JNOV the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with McClain's guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are 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 only find the accused not guilty.

McClain v. State, 625 So. 2d 774, 778 (Miss. 1993). There was eyewitness testimony that Johnson approached Hibbler, exhibited a gun, and shot Hibbler in the face, killing him. The witnesses testifying on behalf of Johnson presented conflicting testimony, and it was the jurors' responsibility to judge the credibility of the witnesses, including Johnson who testified in his own defense. The trial court did not abuse its discretion in denying a new trial, nor was the evidence such that reasonable and fair-minded jurors could only find Johnson not guilty. Additionally, Johnson's arguments that the state did not prove motive, did not produce a murder weapon, that Johnson's behavior was inconsistent with guilt, and additional mysterious circumstances existed are meritless. Additionally, these arguments are unsupported by any authority, thereby rendering them procedurally barred. "When an argument is not supported by any legal authority, this Court need not hear it on appeal." *Thomas v. State*, 645 So. 2d 1345, 1349 (Miss. 1994) citing *Allman v. State*, 571 So.2d 244, 254 (Miss.1990).

THE JUDGMENT OF THE HOLMES COUNTY CIRCUIT COURT OF CONVICTION OF MURDER AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL TAXED TO APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HINKEBEIN, J., NOT PARTICIPATING.