

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00235 COA**

FREDRICK LEE JONES A/K/A "FRED"

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:	02/16/96
TRIAL JUDGE:	HON. JOHN LESLIE HATCHER
COURT FROM WHICH APPEALED:	COAHOMA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ALLAN D. SHACKELFORD
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS
DISTRICT ATTORNEY:	LAWRENCE Y. MELLEN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT'S 1 & 2 AGGRAVATED ASSAULT: CT'S 1 & 2 LIFE IMPRISONMENT; SENTENCE SHALL NOT BE REDUCED, SUSPENDED NOR ELIGIBLE FOR PAROLE OR PROBATION; CT 1 SERVED CONCURRENTLY WITH CT 2; CT 1 CONSECUTIVE TO ANY PREVIOUSLY IMPOSED SENTENCES
DISPOSITION:	AFFIRMED - 2/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

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

BRIDGES, C.J., FOR THE COURT:

Jones was indicted, tried, and convicted of two counts of aggravated assault in the Coahoma County Circuit Court. He was sentenced to serve a term of life imprisonment as a habitual offender in the

custody of the Mississippi Department of Corrections on both counts. Jones was arrested after firing gunshots at an occupied vehicle in the parking lot of a nightclub and at several people at an apartment complex in Clarksdale, Mississippi. At trial he claimed that he did not do it, and that there was no way anyone could have identified him as the shooter. On appeal Jones presents the following issues:

I. DEFENDANT'S RIGHT TO COMPULSORY PROCESS FOR WITNESSES WAS VIOLATED.

II. THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Finding no error, we affirm.

FACTS

On the night of August 8, 1995, Jones and a number of his fellow gang members were hanging out at the Lean Mean Disco Club in Clarksdale, Mississippi. Jones is a member of the Vice Lords. Also at the club that night were members of a rival gang, the Black Gangster Disciples (B.G.D.). Andrez Maiden, a B.G.D., had several passengers in his car when he pulled up in front of the club. Jones and a fellow gang member began arguing with Maiden and the occupants of his car. As Maiden tried to leave the premises and pulled away, Jones fired several shots that hit the car. Andrew Hampton was standing in the parking lot of the Lean Mean when the argument erupted and saw Jones firing a gun at Maiden's car as it pulled away. Herman Jackson, another bystander also saw Jones open fire on Maiden's car as it pulled away.

Maiden and his passengers escaped injury at the Lean Mean and proceeded to the Wade Walton apartment complex where several of them lived. J. R. Vaughn, a passenger in Maiden's car, was very shaken as he got out of the vehicle when it pulled into the apartment parking area. Three other cars entered the apartment area, made u-turns, and pulled back out. When Vaughn tried to enter his apartment, he heard gunfire and ran. As he ran, Vaughn turned around and saw Jones firing a gun at him.

Herman Jackson was with Jones and two others when they followed Maiden to the Wade Walton apartments. Jackson testified that he rode in the same car as Jones, and that they entered the apartments, made a u-turn, and parked at the front. Jones and Jackson got out of the car and Jones grabbed a shotgun. Jones proceeded to fire at Vaughn and Maiden. The shooting at the apartments occurred between eleven and eleven-thirty p.m. After the shooting, Jones, Jackson, and the others got back in the car and left the apartments. Jackson and Jones ended up back at the club where they stayed until one or one-thirty in the morning. Several hours later, the police arrived at Jones's apartment to arrest him for the shooting. Jones would not open the door for the police and was found hiding in the back of a closet.

I. DEFENDANT'S RIGHT TO COMPULSORY PROCESS FOR WITNESSES WAS VIOLATED.

Jones's case was called for trial on February 12, 1996. Subpoenas were issued for several defense witnesses, some of which Jones's attorney had yet to interview. The case did not go to trial that day,

and Jones's attorney asked that defense witnesses be released. The trial was carried forward to the next day, and Jones's counsel objected because his witnesses had been released and he had not talked to all of them. The trial court, in an effort to prevent any prejudice to the defense, held that only jury selection and the state's case would be presented that day. Additionally, the trial court instructed law enforcement officials to go out and find the witnesses.

The next morning, three of the defense witnesses had not been located. Jones moved for a continuance or in the alternative, a mistrial. The trial court denied the motion because it was adduced that the testimony of the missing witnesses would be cumulative to other defense witness testimony. As it turned out, Earlene McCray, one of the three witnesses, showed up in time and testified that Jones was at her club all night long. McCray also testified that Jones was at her club at the time a fight broke out between two girls and Jones helped one of them to the hospital. The fight between the two girls occurred about one in the morning, however, several hours after the shootings took place. The two witnesses that could not be located were to testify to the same or similar account. Jones cites the United States Constitution and the Mississippi Constitution, but nothing else for the proposition that he was denied his right to compulsory process for obtaining witnesses in his favor. While an accused does have the right to compulsory process, that right is not absolute. *Hentz v. State*, 542 So. 2d 914, 915-16 (Miss. 1989)(citation omitted). In fact, the state may require a showing of colorable need, and whether colorable need is shown is left to the trial court's sound discretion. *Id.* at 916. The United States Supreme Court has held that the compulsory process clause prohibits the state from denying the defendant "the right to put on the stand a witness . . . whose testimony would have been relevant and material to the defense." *Id.* (quoting *Washington v. Texas*, 388 U. S. 14 (1967)). However, "the right to call witnesses is limited to relevant and material testimony." *Hentz*, 542 So. 2d at 916 (quoting *Washington v. Texas*, 388 U. S. 14 (1967)). The constitutional right to call witnesses is limited to relevant, material and vital testimony. *Hentz*, 542 So. 2d at 916 (citation omitted).

In Jones's case, he has failed to prove that the missing two witnesses' testimony would have been relevant, material, or vital to his defense. In fact, McCray testified to the same facts that the two missing witnesses would have testified to, and that testimony for the most part accounted for Jones's whereabouts after the shootings occurred. The trial court did everything it could to locate Jones's witnesses. There is no evidence of error before us, and we are not convinced that Jones's right to compulsory process was denied.

II. THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Jones states plainly that he is not seeking a judgment of acquittal, but a new trial. He claims that the witnesses' testimony was conflicting and not worthy of belief. "A motion for new trial is discretionary with the trial judge and this Court will not order a new trial unless it is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Johnson v. State*, 642 So. 2d 924, 928 (Miss. 1994) (citations omitted). In reviewing a challenge to the weight of the evidence, this Court must accept as true "the evidence which supports the verdict and will reverse only when convinced that the trial court has abused its discretion in failing to grant a new trial." *Id.*

Factual disputes are to be resolved by the jury and do not warrant a new trial. *Id.* As far as Jones's

contention that the witnesses' testimony was conflicting and not believable, "[i]t is enough to say that the jury, and not the reviewing court, judges the credibility of the witnesses as well as the weight and worth of their conflicting testimony." *Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993). In Jones's case, there was ample credible evidence that he fired shots at people both at the disco club and at the apartment complex. We are not convinced that the trial judge abused his discretion in denying Jones's motion for new trial. This issue is meritless.

THE JUDGMENT OF THE COAHOMA COUNTY CIRCUIT COURT OF CONVICTION OF TWO COUNTS OF AGGRAVATED ASSAULT AND SENTENCE OF LIFE IMPRISONMENT AS A HABITUAL OFFENDER IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ON COUNTS ONE AND TWO, COUNT TWO TO BE SERVED CONCURRENTLY WITH COUNT ONE AND COUNT ONE TO BE SERVED CONSECUTIVELY TO ANY PREVIOUSLY IMPOSED SENTENCE IS AFFIRMED. COSTS OF THIS APPEAL ASSESSED TO COAHOMA COUNTY.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.