

IN THE COURT OF APPEALS 10/3/95

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00497 COA

MICHAEL JOHNSON

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

TRIAL JUDGE: HON. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GEORGE T. KELLY, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: WAYNE SNUGGS, ASSISTANT ATTORNEY GENERAL

NATURE OF THE CASE: COUNT I: AGGRAVATED ASSAULT COUNT II: AGGRAVATED
ASSAULT COUNT III: MURDER

TRIAL COURT DISPOSITION: CONVICTION ON COUNT I, AGGRAVATED ASSAULT,
AND SENTENCE OF TWENTY YEARS; CONVICTION ON COUNT II, AGGRAVATED
ASSAULT, AND SENTENCE OF TWENTY YEARS, CONSECUTIVE TO COUNT I;
CONVICTION ON COUNT III, MURDER, AND SENTENCE OF LIFE IMPRISONMENT,
CONSECUTIVE TO COUNT I AND COUNT II.

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

THOMAS, P.J., FOR THE COURT:

Michael Johnson was convicted on a three count indictment charging him with one count of murder against Calvin Owens and two counts of aggravated assault, one on Angela King and one on Lamont Joseph. Johnson appeals, assigning one error, the weight of the evidence, as grounds to reverse. We decline Johnson's invitation and affirm the judgment of conviction and sentence imposed.

FACTS

Angela King, Lamont Joseph and Calvin Owens were all in the vicinity of the Shotgun Lounge in Greenville during the early morning hours of August 1, 1993, when the shooting which gave rise to the charges herein occurred. King and Joseph were sitting on a bench in front of the Shotgun Lounge. The lounge is located on Harvey Street at the intersection of Harvey and Nelson streets. Someone started shooting; King was shot in the upper arm and Joseph shot in both legs. Owens, in the center of the 900 block of Nelson Street, was shot in the right back and scrotum area and died after being taken to Delta Regional Medical Center.

At trial, neither King, Joseph or Owens (via a dying declaration given to one of the investigators) could identify who shot either of them, although King did place Johnson in the area.

Orton Porter testified that on August 1, 1993, he, Jarice Brown and others were "hanging around" Nelson Street when Johnson arrived and said something about shooting some Vice Lords. Johnson pulled a gun from beneath his shirt and started shooting and walking toward the corner of Harvey and Nelson Streets. Several people were standing in the area, but the only one that Porter knew was Lamont Joseph. About twenty shots were fired, and Porter did not see anyone else with a gun. The pistol that Johnson was firing looked like a nine millimeter.

On cross, Porter testified that he started running when Johnson pulled the pistol and that he did not see him shoot it. Approximately two to fifteen seconds elapsed between the time Johnson pulled the pistol and Porter heard the shots. The shots came from the direction of Johnson, and no one else was standing near him. Porter shoots a gun in the National Guard and knows where a shot comes from.

Jarice Brown, a high school student, testified that he saw Johnson near the Shotgun Lounge on August 1, 1993. Johnson seemed to be mad and said that he had seen some Vice Lords who had done something to him and that he was going to get them back. Johnson pulled a gun from the front of his pants and said he was going to "get his player." Brown said that this was gang talk; that Johnson had been shot one time by some Vice Lords, and that he was mad about it and was going to get his player. Lamont Joseph and Angie King were the Vice Lords Johnson saw. Johnson began shooting a nine millimeter pistol towards Joseph and King. No one else had a weapon.

On cross-examination, Brown admitted that at the preliminary hearing he testified as follows: that he did not see Johnson shoot, that he did not hear Johnson say that he was going to get someone, that he had not said that he saw Johnson pulling up a gun, and that he had seen Willie Banks running from the scene. He admitted that this testimony was not true and that he gave it because he did not want to

tell on his friend, Michael Johnson. He was telling the truth at trial because his mother told him to tell the truth and he wanted to see that justice was done. About three hours before the shooting, he had seen Melvin Wright, Kevin Lindsey and another man with guns at the Zodiac, but he did not see anyone but Johnson with a weapon at the time of the shooting.

Yolanda Mills testified for Johnson that in the early morning hours of August 1, 1993, she was at the Shotgun Lounge, sitting on a bench with Angela King, Kenny Norman and Lamont Joseph, when she heard some shooting. She saw Johnson in a brown car with tinted windows driving down the street shooting. She gave the police a statement about the shooting but did not tell them that Johnson was in the car.

LAW

In *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1983), our supreme court made the following statements concerning challenges to the weight of the evidence:

[T]he challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. Procedurally such challenge necessarily invokes *Miss. Unif. Crim.R. of Cir. Ct. Prac. 516*. 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 to the State. *Wetz v. State*, 503 So. 2d 803 (Miss. 1987)] at 807-08.

...

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.

In *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992), the court stated the scope of review of the claim at issue as follows:

In *Burge v. State*, 472 So. 2d 392 (Miss. 1985), this Court stated that all evidence, even that which does not support the State's case, must be considered in the light most favorable to the State. *Id.* at 396. See also *May v. State*, 460 So. 2d 778, 781 (Miss. 1984). "[T]his court must accept as true the evidence which supports the verdict." *Spikes v. State*, 302 So. 2d 250, 251 (Miss. 1974). The State must be given benefit of all reasonable inferences that may reasonably be drawn from the evidence. *Glass v. State*, 278 So. 2d 384, 386 (Miss. 1973).

Also, the Court said:

No formula dictates the manner in which jurors resolve conflicting testimony into findings of fact sufficient to support the verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict.

532 So. 2d at 604 quoting *Gandy v. State*, 373 So. 2d 1042, 1045 (Miss. 1979).

Johnson argues that his conviction cannot be sustained on Brown's testimony. He argues that, as the only eye witness to the fact Johnson was the shooter, Brown's testimony was unreasonable and his credibility successfully impeached.

Brown's individual testimony aside, Johnson overlooks the corroboration given Brown's testimony by King, Porter, and ironically, Mills. This case involves a classic jury question, decided adverse to Johnson; we are not at liberty to disturb the same.

THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY OF CONVICTION OF ONE COUNT OF MURDER AND TWO COUNTS OF AGGRAVATED ASSAULT AND SENTENCE OF LIFE IMPRISONMENT AS TO MURDER AND TWENTY YEARS FOR EACH COUNT OF AGGRAVATED ASSAULT TO RUN CONSECUTIVELY IS AFFIRMED. COSTS ARE TAXED TO WASHINGTON COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, MCMILLIN, PAYNE AND SOUTHWICK, JJ., CONCUR.