

IN THE COURT OF APPEALS 5/6/97

OF THE

STATE OF MISSISSIPPI

NO. 96-KA-00316 COA

GLENN RICE A/K/A GLEN RICE

A/K/A GLEN L. RICE

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. GRAY EVANS

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CLEVE MCDOWELL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: BILLY GORE

DISTRICT ATTORNEY: FRANK CARLTON

NATURE OF THE CASE: FELONY-COUNT I, POSSESSION OF A FIREARM BY A FELON;
COUNT II, SHOOTING INTO A DWELLING

TRIAL COURT DISPOSITION: CT I POSSESSION OF FIREARM BY FELON, HABITUAL: CT
II SHOOTING INTO DWELLING, HABITUAL: CT I SENTENCED TO 3 YRS. AS HABITUAL;

CT II SENTENCED TO 10 YRS. AS HABITUAL, TO RUN CONCURRENT WITH CT I, IN THE CUSTODY OF MDOC; PAY \$938.00 COURT COSTS

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

BRIDGES, C.J., FOR THE COURT:

Glen Rice (Rice) was indicted, tried, and convicted of possession of a firearm by a felon, and shooting into a dwelling in the Sunflower County Circuit Court. He was sentenced to serve three years in the custody of the Mississippi Department of Corrections (MDOC) as a habitual offender for possession of a firearm by a felon, and sentenced to serve ten years in the custody of the MDOC as a habitual offender for shooting into a dwelling, to run concurrent with count one. Additionally, Rice was ordered to pay court costs of \$938.00. On appeal, he presents the following issue:

I. WHETHER OR NOT THE JURY VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW.

This is the second time Rice's case has appeared before this Court. In his first appeal (94-KA-00839 COA), this Court reversed his conviction on a *Batson* violation, and remanded for a new trial. However, this Court clearly held that Rice's weight and sufficiency of the evidence issue was without merit. His argument is not any more convincing the second time around. His issue being meritless, we affirm.

FACTS

On November 11, 1993, in Indianola, Mississippi, a bullet pierced the window of Cynthia "Punky" Lay's mother's house while Lay, her mother and Lay's two small children, DeShane and Ricco, were watching television. The bullet passed within inches of one of Lay's children, and continued through the floor. The women grabbed the children and fled into another room. Meanwhile, outside in the front yard of the house, Timothy Johnson, DeShane's father, and Tracy Corner, a friend of Johnson's, witnessed the shooting and identified the shooter as Rice.

Johnson testified that while he and Corner were standing in the front yard, Rice and his two brothers came walking up the street. Rice and his brothers began talking about Corner, and as Corner responded, Rice began shooting. Johnson testified that there was sufficient light to identify Rice, and he saw a small caliber gun in Rice's hand. Johnson stated that the shots were aimed at the house because he could hear the bullets as they hit the house.

Corner testified that while he and Johnson were standing outside, Rice and three others came walking up the street and called out Corner's name. As he replied, Rice began shooting. Corner was able to positively identify Rice because he knew him, and there was a street light where Rice and his companions were standing.

Rice did not testify at his second trial, but his brothers testified that they were simply walking down

the street when they heard shots. According to their testimony, they did not have a gun, but only a bottle of whiskey. They stated that Rice did not shoot into the dwelling. Rice and his brothers were arrested shortly after the shooting at the Total Experience Lounge. Officer Charles Smith with the Indianola Police Department testified that he encountered the suspects at the lounge, but had a difficult time apprehending them because Rice refused to surrender himself.

Officer Smith also testified that he went to the scene of the shooting and examined the window where the bullet entered. Although he was unable to retrieve the bullet, there was shattered glass on the bed underneath the window, as well as on the windowsill and the floor. Officer Smith stated that due to the cluttered condition of the residence and because he had to leave to apprehend the suspects, he was unable to conduct a thorough search for the bullet.

I. WHETHER OR NOT THE JURY VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW.

While Rice's stated issue challenges the weight of the evidence, his argument blurs the distinction between the weight of the evidence and the sufficiency of the evidence. Therefore, we will address both arguments. 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). We review the ruling on the last occasion the challenge was made: Rice's request for peremptory instruction. There was direct testimony from both Johnson and Corner that they were in the front yard when Rice and his brothers approached them and addressed Corner. As Corner replied to their remarks, Rice exhibited a gun and shot at the house. Testimony from Cynthia Lay who was inside the house related that the bullet passed through the closed window, shattering the glass and coming within inches of her child. This evidence has to be taken in a light most favorable to the State. In so reviewing the evidence, we are unable to conclude that reasonable and fair-minded jurors could have found Rice not guilty.

Our standard of review for challenges to the weight of the evidence is dictated by *McClain*: [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). As stated above, there was eyewitness testimony of Rice's guilt. The jury was provided ample testimony, and it was the province of the jury to weigh the credibility of the witnesses. The trial court did not abuse its discretion in overruling Rice's motion for a new trial.

THE JUDGMENT OF THE SUNFLOWER COUNTY CIRCUIT COURT OF CONVICTION OF COUNT ONE POSSESSION OF A FIREARM BY A FELON AND SENTENCE OF THREE YEARS AS AN HABITUAL OFFENDER AND COUNT TWO SHOOTING INTO A DWELLING AND SENTENCE OF TEN YEARS AS AN HABITUAL OFFENDER, TO RUN CONCURRENT TO SENTENCE IN COUNT ONE, BOTH IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO SUNFLOWER COUNTY.

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