

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2014-KA-00615-COA**

WILLIAM MICHAEL JORDAN

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

Comes now, Defendant, William Michael Jordan, and requests oral argument. Oral argument would be beneficial to the Court's understanding of the facts as they apply to the law on the issues raised in this appeal. This case involves numerous Constitutional issues and potential issues of first impression that would make oral argument even more beneficial to this Court's understanding of this case.

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SUMMARY OF THE REPLY ARGUMENT

Defendant Jordan contends that the trial court erred in the admission of the YouTube video into evidence. The trial court erred in admitting the YouTube video without proper authentication, only verified by witness Knight based on hearsay. Also, the trial court did not view the video before admitting it into evidence, and did not conduct a balancing test as to prejudicial effect versus probative value. Defendant Jordan's counsel made continuous timely objections to the admission of the YouTube video based on hearsay, relevance, and admissibility under MRE 403. Further, the trial court erred by allowing the State to present improper opinion testimony of Investigator Knight, a lay witness, as to the truthfulness of witnesses' hearsay testimony, and to his speculative interpretation of the YouTube video.

Defendant Jordan contends the trial court erred in not properly instructing the jury as to applicable law. Specifically, the trial court erred in denying cautionary informant or accomplice instruction. In addition, the trial court erred in denying Defendant's proposed theory of defense alibi instruction.

Defendant Jordan contends that there was not sufficient evidence to support the guilty verdict against him, the verdict was strongly against the overwhelming weight of the evidence, and the verdict evidenced bias and prejudice against Defendant Jordan. The uncorroborated and contradicted testimony of admitted accomplices Baker and Smith, served as the only evidence against Defendant Jordan.

Defendant Jordan, respectfully submits that because of the errors set out hereinabove, this case should be reversed and rendered, or in the alternative reversed and remanded to the lower court for a new trial.

REPLY ARGUMENT

I. THE TRIAL COURT ERRED BY ADMITTING YOUTUBE VIDEO INTO EVIDENCE.

A. THE YOUTUBE VIDEO WAS NOT PROPERLY AUTHENTICATED.

In response to the issue of whether the trial court erred in admission of the YouTube video into evidence without proper authentication, the State alleges no error. (Appellee/State's brief ("State's brief"), 4-6). Citing Rule 901 of the Mississippi Rules of Evidence, the State provides, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." M.R.E. 901. The State purports that the YouTube video consisted of a rap music video "starring" Defendant Jordan and Co-Defendant Henderson, wherein Defendant Jordan and Co-Defendant Henderson rapped lyrics which were perceived by State witnesses Smith and Baker as a threat (State's Brief at 4-5). Further, the State alleges that the YouTube video was presented to show why Smith and Baker felt threatened and scared to initially come forward to police with information about the death of Coleman, and were reluctant to testify (State's Brief at 4). The State points out, "[e]vidence may be authenticated through the testimony of a witness with knowledge that 'the matter is what it is claimed to be.'" M.R.E. 901(b)(1)." (State's Brief, 4).

The State first cites to Defendant Jordan's testimony at trial to support the proper authentication. (State's brief, 4-5). The State contends, "[t]he defendant himself acknowledged that Exhibit 8 [YouTube video] was a rap video starring Henderson, himself, and others. T. 494-495." (State's brief, 4-5). The State's assertion that the video was properly authenticated by Defendant Jordan's testimony is problematic considering the fact that he was the last witness to testify at trial. T. 2-5, 436-510. The video had already been admitted into evidence. In further support of the contention that the YouTube video was properly authenticated, the State cites to the trial testimony of State witness Investigator Knight, but also to State witness Smith's trial testimony during cross examination, and State witness Baker's

trial testimony during direct examination. State Brief at 5, citing T.151, 286-87, 348-349. Again, the use of Smith and Baker's trial testimony to show that the State properly authenticated the YouTube video is problematic considering the video was already admitted into evidence before they testified, thus provides support for Defendant Jordan's assertion that the trial court erroneously admitted the YouTube video without proper authentication. In determining whether the State showed that the YouTube video was what it claimed to be, the State's brief emphasized the importance of Baker and Smith's perception of the YouTube video as a threat (State's brief, 5). Baker and Smith's perception of the video as a threat was not in evidence when the trial court admitted the YouTube video during the direct examination of State witness Knight (R. 151-158). In his objection to the admission of the YouTube video which included continuing objection to Knight's hearsay testimony and lack of authentication, Defendant Jordan pointed out to the trial court that there was no statement from Baker or Smith in evidence that they had viewed the video and perceived the video as a threat (R. 152-53). Also, Baker and Smith had not testified at trial to their perception of the video as a threat. (R. 152-53). In fact, Baker and Smith's failure to provide police with information and reluctance to testify were not yet at issue before the court, and originated in Knight's testimony from the State. (R. 151).

Mississippi Rule of Evidence 901 governs the requirements of authentication of evidence, stating that the authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." M.R.E. 901(a). Authentication is a condition precedent to admissibility. *Smith v. State*, 2012-CT-00218-SCT, (Miss. 2014). Authentication can be accomplished through someone with knowledge of the events depicted on a videotape or, in this case, the DVD. *Pruett v. Prinz*, 2007-CA-00156-COA, (Miss. Ct. App. 2008), citing, *Trull v. State*, 811 So.2d 243, 246(¶ 8) (Miss.Ct.App.2000). In *Pruett*, this Court reviewed the authentication issue from *Trull* and explained, the trial court asked the witness if the video evidence on DVD accurately depicted her home and vehicle, as well as her vehicle in front of her house. *Id.* She positively identified all three items. Additionally, she

explained to the trial court that Davis did not sleep at her house the night before the video, but he arrived that morning to help her with her children. Therefore, the DVD was properly authenticated, and no error occurred. *Id.* It is clear that the witness in *Trull* had significant knowledge of the content depicted in the video, including her personal knowledge and ability to identify her own house and car. The present case is distinguishable from *Trull*, in that Knight did not have sufficient knowledge of the events depicted on a videotape or DVD requisite to authenticate it. Knight was not present during the filming of the video, did not know when it was made or uploaded onto YouTube, how it was copied from the internet, or how it was edited and transmitted onto DVD disc format. (R.2/220-223, RE12/38-41).

Defendant Jordan challenged the authenticity of the YouTube music video with numerous objections throughout trial, in a Motion outside the presence of the jury, and during his Motion for Mistrial. (R. 152-158, 220, RE12/38-41). In response to Defendant Jordan's objection to the lack of proper authenticity from Knight, the State proclaimed, "we know when it was posted on YouTube." (R. 222). The record is clear that witness Investigator Knight never testified to having knowledge of when the YouTube video was published to the internet website, or how the YouTube video was copied or edited from the internet. (R.220-223, RE12/38-41) Over defense counsel's objection to the video being admitted, the trial court admitted it into evidence for showing. (R. 222, RE12/40). Since the YouTube video was never authenticated by the State, its showing therefore rendered a violation of the Defendant Jordan's right to a fair trial. *See* Brief of Appellant at 16-17 for further discussion of this issue.

B. THE TRIAL COURT ERRED IN ADMITTING IMPROPER OPINION TESTIMONY OF LAY WITNESS INVESTIGATOR KNIGHT, CONCERNING THE TRUTHFULNESS OF WITNESSES' HEARSAY TESTIMONY AND HIS SUBJECTIVE INTERPRETATION OF THE YOUTUBE VIDEO.

According to the State, Knight's testimony, which was used to lay the foundation for the video and authenticate, was admissible opinion testimony. The State asserts that Knight's opinion testimony was not erroneous because "... it appears that Knight could have misspoken..." (State's brief, 5). Also,

the State explains that Knight's interpretation of the video actually was not his own interpretation, but was the interpretation of Baker and Smith. It is impermissible for a witness "to place his own subjective interpretation of events transpiring in the video based on nothing beyond the witness's own inspection of the contents of the videotape." *Pulliam v. State*, 873 So. 2d 124, 127 (¶18) (Miss. Ct. App. 2004). When Knight testified as to his subjective interpretation of the video, there was no statement of Baker and Smith in evidence that they had viewed the video and perceived the video as a threat. R. 152-53. Also, Baker and Smith had not testified at trial to their perception of the video as a threat. R. 152-53. The error goes toward whether Knight's statement was properly admitted, as well as to whether the video was properly admitted.

The trial court overruled Defendant Jordan's objections to the inadmissible testimony of Investigator Knight as to the veracity of witness statements, and concerning the YouTube video. The State used witness Knight to introduce the YouTube video through uncorroborated, self-serving, hearsay statements of State witnesses Baker and Smith. (R. 133). Considering Knight was not presented as an expert witness, he was a lay witness. Prior to the admission of the YouTube video into evidence, Knight testified as to its authenticity, despite his inability to have personal first-hand knowledge of the opinion testimony he presented to the jury. (R. 133). Before the video's admission, Knight testified to the jury as to the contents of the YouTube video. (R. 133). He told the jury exactly what they would find in the video and stated it was, **"of a mock killing," "It's a reenactment, in my opinion, of the killing of Aaron Coleman,"** and it starred **"William Jordan and Charlie Henderson."** (R. 133).

. The State failed to address Knight's inadmissible testimony as to the veracity of witness statements. Over defense counsel's objections, the trial court also allowed Knight to testify as the veracity of the statements of Defendant Jordan, Co-Defendant Baker, and Co-Defendant Smith. The trial court also allowed Investigator Knight to give improper opinion testimony relating to details

discovered through witness's prior statements during investigation, and comment as to their validity and truth. (R. 133). The State elicited this testimony and asked Knight about the veracity of witness statement during investigation. (R. 133). The trial court overruled defense counsel's objection, and admitted Knight's testimony to the jury. (R. 133). Knight responded that Baker and Smith's prior statements correlating their account of the events that took place the night of the victim's murder, **"fit like a glove"** (R. 133). Since their statements alleged Defendant Jordan murdered Coleman, Knight's testimony essentially instructed the jury that Baker and Smith's testimony was true and Defendant Jordan was guilty of murder. (R. 133). The Court was presented with a similar factual situation in *Rose v. State*, 556 So. 2d 728, 733 (Miss. 1990). The Court stated that the lay opinion testimony of an investigator was inadmissible, and to do so would in essence be telling the jury what to believe. *Rose*, 556 So. 2d, 733. "There are two reasons that this type of testimony is unacceptable. First, it is more prejudicial than probative; second, it is not based on firsthand knowledge." *Rose*, 556 So. 2d, 733. In another similar case, *Edwards v. State*, 97-DP-00566-SCT, (Miss. 1999), defense counsel attempted to elicit the opinion of an investigator as to whether a witness was telling the truth when said witness had admitted to shooting the victim, and warned, "[t]here is a very real danger that, due to his position as a law enforcement officer, he might unduly influence the jury when the time came to evaluate the testimony of the other witnesses" *Edwards v. State*, 97-DP-00566-SCT, (Miss. 1999).

It is permissible for a witness to narrate video evidence when the narration simply describes what is occurring in the video, but it is impermissible if the witness 'attempts to place his own subjective interpretation of events transpiring in the video based on nothing beyond the witness's own inspection of the contents of the videotape. *Pulliam v. State*, 2002-KA-01446-COA, (Miss. Ct. App. 2004).

Following this Court's holding in *Pulliam*, 873 So. 2d, 12718) (Miss.Ct.App.2004), Investigator Knight's testimony concerning the YouTube video and the veracity witness statements not in

evidence were impermissible. Specifically, Knight's testimony that the YouTube video was a reenactment of the killing of Aaron Coleman. After the admission of Knight's testimony, the jury lost the ability to make their own factual determinations about the events on the YouTube video. Thus, the admission of Knight's opinion testimony by a lay witness was highly prejudicial to Defendant Jordan, in violation of his Constitutional right to a fair trial.

The State alleges this error would be harmless at most (State's brief, 6). In support the State relies on *Wells v. State*, 604 So. 2d 271, 280 (Miss. 1992), arguing that the admission of Knight's opinion testimony and its use in authenticating the YouTube video for admission into evidence was a harmless error (State's brief, 6). However, the present case lacks the totality of evidence which was present in *Wells*, and is distinguishable. The only testimony that supports a conviction in Counts I and IV are the testimony of Baker and Smith which are contradicted and uncorroborated. Baker said that the distance between Aaron Coleman and Defendant Jordan was some 4-6 feet and Smith states that there were approximately 3 feet distance between Defendant Jordan and the victim. At the time of the shooting, neither witness stated it was a contact shot, which the autopsy report shows in Exhibit 4, and the testimony of the medical examiner stated that in his opinion that it was a contact shot that killed Aaron Coleman. (R. 123, RE.9/17) The scientific evidence does not corroborate the testimony of Smith and Baker. There was absolutely no evidence of Defendant Jordan's possession of a firearm, shotgun, other the uncorroborated testimony of Baker and Smith. Therefore, the error was highly prejudicial and not harmless.

C. THE YOUTUBE VIDEO WAS HEARSAY.

The State argues that the YouTube video was not hearsay, because it was not offered to prove the truth of any statements made in the video, but to show that witnesses Baker and Smith were fearful to come forward with information about Coleman's death. (State's brief, 5). The State offers no further authority and fails to address the specific hearsay issues brought forth in Defendant Jordan's brief.

Hearsay evidence is inadmissible to establish a fact. *Pevey v. Alexander Pool Co.*, 244 Miss. 25, 139 So. 2d 847 (1962). “Hearsay” is a statement, other than one by declarant while testifying in trial, offered to prove the truth of the matter asserted. M.R.E. 801(c). *Eselin-Bullock & Associates Ins. Agency, Inc. v. Nat'l Gen. Ins. Co.*, 604 So. 2d 236 (Miss. 1992). As discussed above in relation to the State’s failure to properly authenticate the YouTube video, Baker and Smith’s perception of the video as a threat was not in evidence when the trial court admitted the YouTube video during the direct examination of State witness Knight. (R. 151-158). In his objection to the admission of the YouTube video, including continuing objection to Knight’s hearsay testimony and lack of authentication, Defendant Jordan pointed out to the trial court that there was no statement of Baker and Smith in evidence that they had viewed the video and perceived the video as a threat. (R. 152-53). Also, Baker and Smith had not testified at trial to their perception of the video as a threat. (R. 152-53). The fact that Baker and Smith perceived the video as a threat was not in evidence, and therefore all of Knight’s trial testimony purporting such was inadmissible hearsay.

The YouTube video, including Defendant Henderson’s rap lyrics and conduct in the short film at the end of the video, constitute inadmissible hearsay in violation of Rule 801 of the Mississippi Rules of Evidence and should have been excluded from Defendant Jordan’s trial. Henderson wrote and performed his song on the YouTube video and did not testify at Defendant Jordan’s trial. The State used the rap lyrics found within the YouTube video against Defendant Jordan throughout his trial. During cross-examination of Bell, the State questioned Bell at length as to why the YouTube video contained rap verse threatening to kill snitches (R. 390). Defense witness Randall, Defendant Jordan’s father, was also questioned about the YouTube video and whether he knew it was a threat to kill snitches (R. 427). Despite Defendant Jordan’s testimony that he did not write the rap lyrics and did not know what they meant, the State went through dozens of rap lyrics and verses from the YouTube video, requiring Defendant Jordan to answer the same over and over (R. 494-501).

Although the State argued to admit the YouTube video into evidence to show Defendant Jordan was practicing witness intimidation, it is apparent by the State's extensive use of the YouTube video and rap lyrics throughout the trial that the purpose it was set forth was to introduce character evidence. In light of Knight's testimony that the YouTube video starred Defendant Jordan and it was a reenactment of the killing of Aaron Coleman the video was also improperly used to prove the matter asserted. (R. 133). Defendant Jordan was on trial for the matter of Coleman's murder, and Knight testified to the jury that the video was a reenactment of the murder of Coleman. Evidence of the YouTube video should have been excluded as inadmissible hearsay, not relevant to the crime charged, improper proof of the matter asserted, and the probative value of its use as character evidence was substantially outweighed by the prejudicial effect.

When determining whether to admit evidence under Rule 404(b), the Court utilizes a two- part analysis. "The evidence offered must (1) be relevant to prove a material issue other than the defendant's character; and (2) the probative value of the evidence must outweigh the prejudicial effect." *Crawford v. State*, 1998-KA-01578-SCT, (Miss. 2000).

To be sure, evidence admissible under Rule 404(b) is also subject to the prejudice test of Rule 403; that is, even though the Circuit Court considered the evidence at issue admissible under Rule 404(b), it was still required by Rule 403 to consider whether its probative value on the issues of motive, opportunity and intent was substantially outweighed by the danger of unfair prejudice. In this sense Rule 403 is an ultimate filter through which all otherwise admissible evidence must pass. *Hoops v. State*, 681 So. 2d 521, 530 (Miss. 1996)—31 (Miss.1996).

In *Brooks v. State*, the Mississippi Supreme Court held that it was reversible error to admit evidence of a defendant's tattoo of a grim reaper armed with a pitchfork, and rap lyrics discussing murder. *Brooks*, 2001-CT-01826-SCT, *Brooks v. State*, 2001-CT-01826-SCT, (Miss. 2005)—700 (¶¶ 29–35) (Miss. 2005). The lyrics which were presumed to be written by Brooks did not mention gangs,

and did not discuss murder by use of a fork, but with a gun. *Id.* at 700(¶ 34). The trial judge did not make any attempt to weigh the probative value and prejudicial harm of such evidence. *Id.* at (¶ 35).

Similar to *Brooks*, the YouTube video and rap lyrics were presented to the Jury as if Defendant Jordan wrote them, and also attempted to elicit testimony at trial that Defendant Jordan was throwing hand signals, or gang signs. The YouTube video was admitted into evidence without proper foundation and without analysis of whether probative value of evidence outweighed its prejudicial harm. Thus, the admission violated M.R.E. 403, 404(b). Considering the trial court's failure to review the YouTube video prior to admitting it into evidence (R. 222), combined with the trial court's failure to conduct a balancing test as to whether probative value outweighed its prejudicial harm, the errors in admission of the video cannot be harmless.

The YouTube video was not relevant and should not have been admitting into evidence. Defendant Jordan was charged with Murder and Felony in Possession of a Firearm. Although Jordan makes a small appearance in the YouTube video, his actions and screen time are minimal, and are not similar or relevant to any of the elements of the crimes charged. Without viewing the YouTube video, the trial court overruled defense counsel's relevancy based objections to admitting the YouTube video (R. 156-157) and thus the trial court erred in admitting the irrelevant YouTube video and committed an abuse of discretion.

The trial judge overruled Defendant Jordan's objections, but did not state explicitly that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice ruling objection and mistrial (R. 220-223, RE12/38-41). Defendant Jordan did not direct the music video, write the rap lyrics, assist in writing the rap lyrics, or discuss the meaning of the rap lyrics with the author. Although Defendant Jordan took the witness stand and testified to these facts in his trial, the prejudicial harm and irreparable damage had already been done. The trial court did not give a limiting instruction to cure any harm done, plus there was a severe lack of sufficient evidence, therefore, this

error cannot be considered harmless.

D. THE TRIAL COURT ADMITTED YOUTUBE VIDEO INTO EVIDENCE WITHOUT VIEWING, WITHOUT CONDUCTING A BALANCING TEST AS TO PREJUDICIAL EFFECT VERSUS PROBATIVE VALUE, AND IN OVERRULING CONTINUOUS OBJECTIONS OF DEFENDANT BASED ON HEARSAY, RELEVANCE, AND ADMISSIBILITY UNDER M.R.E. 403.

The State alleges that counsel did not request the court to do a balancing test pursuant to MRE 403, and therefore the trial court cannot be held in error. (State's brief, 6). In support, the State cites *McLaurin v. State*, 31 So. 3d 1263, 1269 (¶30) (Miss. Ct. App. 2009). However, the present case is distinguishable from *McLaurin*. *McLaurin* argued the trial court erred by not sua sponte conducting a Mississippi Rule of Evidence 403 balancing test on testimony regarding *McLaurin's* prior bad acts. *McLaurin v. State*, 2008-KA-00814-COA, (Miss. Ct. App. 2009). However, *McLaurin's* counsel admittedly did not object to this testimony. *Id.* As supported by the record, Defendant Jordan made many contemporaneous objections to the admission of the YouTube video, specifically objecting to the lack of proper authentication, hearsay, relevance, and probative value. (R. 151-58).

Moreover, Defendant Jordan requested a Motion outside the presence of the jury when the State initially elicited testimony from Knight pertaining to the YouTube video, wherein he objected to any YouTube video testified or shown to the jury (R. 152). During this Motion outside the presence of the jury, Defendant Jordan specifically objected to the YouTube video's lack of authentication, lack of statement in evidence from Baker or Smith that they ever viewed it or were frightened by it, lack of relevance as to the guilt or innocence of the Defendant, and lack of probative value under the rules of evidence. (R. 152). The State responded to Defendant's objection pertaining to lack of authenticity and lack of statement in evidence from Baker and Smith having viewed the video and that it frightened them. (R. 153). The State responded that he had not gotten to the question relevant to Baker's knowledge of the YouTube video, but "the testimony will be that Mr. Baker is the one who, because he was nervous leading up to trial setting, said, you want to know why I am nervous. Look at this...And that's how it

came to be. So obviously Mr. Baker knew about it.” (R. 153). The State did not respond to Defendant’s objection to relevance or lack of probative value under the rules of evidence. Following the State’s response, the trial court ruled on Defendant’s motion and stated, “all right, well, I will have it marked at this time as Exhibit 7 for ID only... And if you want to show it to Mr. Baker, and then we can authenticate it” (R. 153). The trial court did not address or rule on Defendant Jordan’s Motion objecting to the YouTube video’s relevance and lack of probative value under the rules of evidence. Also, the State failed to respond to the video’s relevance or probative value as to the guilt or innocence of Defendant. For the foregoing reasons, the trial court erred in admitting the YouTube video into evidence.

II. THE TRIAL COURT DID NOT PROPERLY INSTRUCT THE JURY AS TO APPLICABLE LAW.

A. THE TRIAL COURT ERRED IN DENYING DEFENDANT A THEORY OF DEFENSE ALIBI INSTRUCTION.

In response to the issue of whether the trial court erred in denying Defendant Jordan’s proposed alibi theory of defense jury instruction, the State acknowledge that a criminal defendant is entitled to an instruction on his theory of the case. (State’s brief, 6). Citing *Banyard v. State*, 47 So.3d 676, 681 (¶12) (Miss. 2010), the State points out that an instruction on the defendant’s theory of defense must be granted even where the evidence which supports the granting of the instruction is “weak, inconsistent, or of doubtful credibility.” Despite acknowledging the defendant’s entitlement to an instruction on his theory of defense, the State failed to address the trial court’s error in denying Defendant Jordan’s alibi instruction as it was essential to his theory defense. The State alleges that the trial court properly refused Defendant Jordan’s proposed alibi jury instruction because there was no evidentiary foundation in the record to support the instruction. (State’s brief,). The State cites *Owens v. State*, 809 So. 2d 744 (Miss. Ct. App. 2002), as support that the Defendant’s alibi was actually a denial of guilt, and therefore the alibi jury instruction was properly refused (State’s brief, 7-8). In *Owens*, the Defendant testified on his

own behalf and served as the only defense witness. *Id.* The Defendant in *Owens* was charged with burglary of an apartment, and the State produced a witness at trial that testified to seeing the Defendant lowering stolen goods from the apartment window and carrying them away. *Id.* The Defendant testified that he was present in the same apartment complex at the time of the burglary, but was asleep on a couch in another apartment in the same complex. *Id.* He did not present an alibi witness, other than himself. *Id.* Considering that no further evidence was presented to corroborate Owens testimony, the court reasoned that it would have been entirely possible for the defendant to have temporarily left the apartment, participated in the crime, and returned to the other apartment. *Id.*

The present case is distinguishable from *Owens v. State*, 809 So. 2d 744 (Miss. Ct. App. 2002). Defendant Jordan opened his case with supporting alibi defense witness, Bettshay Bell (Bell), his longtime girlfriend and alibi the night of the alleged crime. (R. 379-415). Bell testified that during the night of February 27, 2011, Defendant Jordan was at home with her, and did not leave the entire night. (R. 385). Defendant Jordan also called his father William Randall, who testified to facts contradictory to the testimony of Baker and Smith (R. 416-428). Supporting his alibi and theory of defense, Defendant Jordan testified to such at trial (R. 426-509). Unlike in *Owens*, there was evidentiary foundation in the record to support Defendant Jordan's alibi, including the testimony of his alibi witness Bell. Also, in the present case there was no evidence presented by the State, other than the uncorroborated testimony of Baker and Smith, that the location of the the murder of Coleman took place at Defendant Jordan's home.

In *Holmes v. State*, 481 So. 2d 319, 322 (Miss. 1985), the Mississippi Supreme Court reversed a burglary conviction, where the jury received no instructions on the co-defendants' alibi theory of defense. In *Holmes*, the Court reasoned that the trial judge should have allowed the jury to determine the weight and credibility of the conflicting testimony, and found that the trial court's refusal of the defendants' alibi instruction was error and required reversal.

According to Baker's testimony concerning the night of Coleman's murder, Defendant Jordan and Co-Defendant Henderson accompanied Baker and dumped the body on Hwy 80, dumped a car, stopped by Defendant Jordan's parents' house, and stopped by a neighbor's to burn their clothes and the victim's cell phone in a barrel (R. 338-343, 367). Bell testified that during the night of February 27, 2011, Defendant Jordan was at home with her and did not leave the entire night. (R. 385). Based on Bell's testimony it would be physically impossible for Defendant Jordan to have participated in the events that Baker and Smith alleged. Other than the testimony of Baker and Smith, no further evidence that the murder took place at Defendant Jordan's home was presented. It is established in evidence that the body of Coleman was found on Hwy 80. [R. 116] Investigator Knight testified that Baker and Smith's statements to police during investigation revealed their knowledge of certain aspects of the crime that nobody would have known because the body wasn't found until a week later, and thus provided the requisite evidence against Baker and Smith to charge them with accessory after the fact. (R. 205). Although there is evidence in the record that Baker and Smith were present at the scene of the crime, there is no evidence outside Baker and Smith's testimony as to where the scene of the crime occurred. (R. 205). Defendant Jordan should have been granted the alibi instruction as it formed the basis for his theory of defense.

Based on the foregoing error Defendant Jordan, respectfully requests this Honorable Court reverse his conviction and sentence.

B. THE TRIAL COURT ERRED IN DENYING INFORMANT/ACCOMPLICE CAUTIONARY INSTRUCTION FOR THE DEFENDANT.

The State submits that the trial court properly refused Defendant Jordan's proposed cautionary accomplice or informant jury instruction because Baker and Smith were not accomplices and there was no evidence whatsoever which was presented from which it could be reasonably inferred that either Baker or Smith murdered Coleman or assisted Jordan in murdering him (State's brief, 8). The case law

the State cites in support, *Bailey v. State*, 960 So. 2d 583, 591 (¶¶35-37) (Miss. Ct. App. 2007), *Smothers v. State*, 756 So. 2d 779, 786-87 (Miss.Ct. App. 1999), are distinguishable from the present case. In *Bailey*, this Court looked at the specific facts of the case, and concluded that no evidence was presented that showed Tharpe, who had plead guilty to accessory-after-the-fact, helped or encouraged the perpetration of the crime at any time during the crime, but did assist after the crime. *Bailey v. State*, 960 So. 2d 583, 590 (Miss. Ct. App. 2007) Thus, the Court found Tharpe's actions to be considered those of an accessory-after-the-fact, not an accomplice. *Id.* The Court also found that Tharpe's testimony was corroborated. *Id.* Also, in *Smothers v. State*, 756 So. 2d 779, the Court assessed whether Carney, who was indicted for accessory after the fact but later the charge was dismissed, met the Derden test for giving cautionary instructions. "A cautionary instruction about accomplice testimony is not required unless there is a reasonable inference that the witness is an accomplice." *Smothers v. State*, 756 So. 2d 779, 787 (Miss. Ct. App. 1999). Since Carney was neither an accomplice nor a co-defendant Smothers failed to present any evidence to the contrary, the Court found that the cautionary instruction requested was correctly denied. *Smothers v. State*, 756 So. 2d 779, 787 (Miss. Ct. App. 1999). Further, her testimony was corroborated by other witnesses.

In the present case, evidence was presented at trial from which it could be reasonably inferred that Baker and Smith may have been co-perpetrators or sole perpetrators of the crime, they assisted during the commission of the crime, and their testimony was uncorroborated. Knight testified that Baker and Smith's statements to police during investigation revealed their knowledge of certain aspects of the crime that nobody would have known because the body wasn't found until a week later, and thus provided the requisite evidence against Baker and Smith to charge them with accessory after the fact. R. 205. Although there is evidence in the record that Baker and Smith were present at the scene of the crime, there was no evidence other than Baker and Smith's testimony that Defendant Jordan was the perpetrator of the crime (R. 205). Also, Baker and Smith testified at trial to the alleged fact that both

were present at the scene of the crime when the victim was shot but was still alive, and did not call 911 for assistance (R. 271, 324-329). Baker also testified at trial to the alleged fact that he aided Defendant Jordan and Co-Defendant Henderson in putting Coleman in a car while he was still alive, but did not attempt to take him for medical treatment or call 911 for assistance. (R. 324-329). Considering their assistance before the crime, Baker and Smith were accomplices as defined by the Court.

Further, according to the Mississippi Supreme Court, “a confessed accessory after the fact is considered an accomplice within the rule that the testimony of an accomplice must be considered with caution. *Jones v. State*, 381 So. 2d 983 (Miss. 1980). In *Jones*, the Court does not misstate the law, as the State suggests. (State’s brief, 9).

In *Moore v. State*, 787 So. 2d 1282 (Miss. 2001), the Court found that the trial court erred in refusing cautionary jury instruction, and that it was an abuse of discretion to deny Moore a cautionary instruction in the face of sufficient evidence of favorable treatment in exchange for his testimony to support the granting of the requested cautionary instruction.. *Moore v. State*, 787 So. 2d 1282, 1287-88 (Miss. 2001). Like in *Moore*, Baker and Smith provided information to authorities and received favorable treatment in exchange for their testimony, are therefore considered informants as contemplated by cautionary informant instructions, and should not have been denied a cautionary instruction. Smith and Baker changed their account of the events on February 27, 2011, after they implicated themselves to police of their connection to the murder of Coleman, and were subsequently arrested, (R. 161-171). In fact, Baker and Smith changed their story of the events that took place on February 27, 2011, multiple times. (Exh.9, Exh. 14, Exh.15, Exh.16, Exh.17, R3/292-293, R4/351- 353, 362, 369, 374). Smith did not cooperate with the MPD or the MBI’s investigation until the MBI requested his extradition from Michigan to Mississippi. (R. 169-171). Both gave contradicting statements to the police, and Baker admittedly lied to the victim’s own mother. (R. 352). In the presence of their attorneys, Baker and Smith gave statements that alleged Defendant Jordan accidentally shot Coleman in the stomach.

(R. 161-171). In consideration for his testimony against Defendant Jordan, Baker received a three year suspended sentence of probation upon his guilty plea to accessory after the fact. (R. 12-13). Despite the plea bargain stated above, Baker testified in trial that he did not have a deal, was not offered a deal, and was just going to plead guilty and take whatever punishment he got. (R. 355).

In reference to whether two accomplices can corroborate each other, the Court explained that if a confidential informant cannot corroborate an accomplice's testimony because both are inherently untrustworthy, it follows that testifying accomplices cannot corroborate each other for the same reason. *Austin v. State*, 2000-KA-00234-SCT, (Miss. 2001), (citing *Edwards v. State*, 630 So. 2d 343, 344 (Miss. 1994); *Parker v. State*, 378 So. 2d 662, 663 (Miss. 1980)). In *Williams v. State*, 2009-KA-00080-SCT, (Miss. 2010), the Court found that because the trial court failed to grant Williams's cautionary jury instruction regarding the uncorroborated testimony of his co-defendants, reversed the conviction and remanded the case for further proceedings. Baker and Smith's testimony was uncorroborated and inconsistent to prior statements to police. (Exh.9, Exh. 14, Exh.15, Exh.16, Exh.17, R3/292-293, R4/351-353, 362, 369, 374). In addition, Baker and Smith received favorable treatment for their testimony. The trial court erred in denying the cautionary instruction, and the defendant respectfully requests this Court to reverse his conviction, and remand for further proceedings.

III. THE EVIDENCE PRESENTED AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURY VERDICTS; THE VERDICTS EVIDENCED BIAS AND PREJUDICE AGAINST DEFENDANT, AND WERE STRONGLY AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The State argues that the evidence presented at trial was legally sufficient to prove beyond a reasonable doubt that Defendant Jordan committed all of the elements of the alleged offenses.

However, the State presented no evidence in the case, other than the uncorroborated co-defendant testimony of Baker and Smith, who were charged and plead guilty to accessory after the fact to murder. Defendant Jordan, who is presumed innocent pursuant to our Constitution in §1 of

the U.S. Constitution and the Mississippi Constitution was required to defend the charge of murder based on the unsubstantiated and uncorroborated statements of Baker and Smith, some year and a half after the alleged murder of Coleman. There was absolutely no evidence of Defendant Jordan's possession of a firearm, shotgun, other the uncorroborated testimony of Baker and Smith. The testimony of Baker and Smith was unreasonable, self-contradictory, and substantially impeached, therefore was legally insufficient.

The only testimony that supports a conviction in Counts I and IV are the testimony of Baker and Smith which are contradicted and uncorroborated. Baker said that the distance between Aaron Coleman and Defendant Jordan was some 4-6 feet and Smith states that there were approximately 3 feet distance between Defendant Jordan and the victim. At the time of the shooting, neither witness stated it was a contact shot, which the autopsy report shows in Exhibit 4, and the testimony of the medical examiner stated that in his opinion that it was a contact shot that killed Aaron Coleman. (R.2/123, RE.9/17) The scientific evidence does not corroborate the testimony of Smith and Baker. There was absolutely no evidence of Defendant Jordan's possession of a firearm, shotgun, other the uncorroborated testimony of Baker and Smith.

Defendant Jordan notified the State of his intent to use an alibi and presented in evidence of his wife, Bettshay Bell that he was with her on Sunday, April 27, 2011. (R1/40) She stated that there was no evidence of blood, or shotgun shot, or the fact that Defendant Jordan had a shotgun that night. (R4/395-415) This is in direct contradiction of Baker's and Smith's testimony. Defendant presented evidence of his father, William Randall that contradicted that defendant, Baker and Henderson came to his house that night. (R4/420-427). The Court denied an alibi defense instruction and denied a cautionary informant or accomplice instruction. Informant and accomplice testimony should be weighed with suspicion and caution.

The lack of evidence during this trial is very substantial wherein the investigators failed to carry

out their duties and responsibilities to not only prosecute the guilty, but to protect the innocent by the lack of evidence. In addition, the court failed to sustain the objections to the use of a YouTube video that was produced and submitted on the internet on April 9, 2013, some two and one-half years after the death of Coleman that implied that Defendant Jordan, was part of a gang that committed murder which was not authenticated.

The Constitution protects a defendant from being convicted of a crime as serious as murder and requires that the State through each of the elements of the offense beyond a reasonable doubt and never shifts the burden of proof to the defendant under the Constitution. Based on the foregoing, the case should be reversed and rendered.

CONCLUSION

Based on the foregoing errors, Defendant, William Jordan, respectfully requests this Honorable Court reverse and render his conviction and sentence, and in the alternative reverse and remand the case for further proceedings, not inconsistent with the Court's opinion, including a new trial.

RESPECTFULLY SUBMITTED, this the 16th day of March, 2015.

**WILLIAM MICHAEL JORDAN,
APPELLANT**

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CERTIFICATE OF SERVICE

I do hereby certify that I have on the 16th day of March, 2015, I electronically filed the above and foregoing document with the Clerk of the Court using the MEC system, which sent notification of such filing to the following:

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Further, I hereby certify that on this day I have mailed by United States Postal Service the document to the following non-MEC participants:

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This the 16th day of March, 2015.

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