

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-KA-00866-SCT

DONTORIUS WARE a/k/a TORIE

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	05/10/2019
TRIAL JUDGE:	HON. ALBERT B. SMITH, III
TRIAL COURT ATTORNEYS:	JAMIE MARIE BANKS ALISON LESLIE FLINT EDGAR DALE WILLIAMS, JR. BRENDA FAY MITCHELL THOMAS MORRIS CHRIS POWELL
COURT FROM WHICH APPEALED:	BOLIVAR COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	MERRIDA COXWELL CHARLES RICHARD MULLINS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BARBARA WAKELAND BYRD
DISTRICT ATTORNEY:	BRENDA FAY MITCHELL
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 09/03/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE RANDOLPH, C.J., ISHEE AND GRIFFIS, JJ.

GRIFFIS, JUSTICE, FOR THE COURT:

¶1. Dontorius Ware appeals his murder conviction. Because sufficient evidence supports the verdict, because the verdict is not against the overwhelming weight of the evidence, and because Ware did not receive ineffective assistance of counsel, we affirm the conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2. Ware was indicted and charged with the murder of Roy Lee Washington. At trial, the following testimony was presented:

¶3. On the evening of December 24, 2011, Ware met some friends at Larry Drake's Corner Store in Shaw, Mississippi, to hang out and to shoot dice. When he arrived, Ware purchased some items from the store. While paying for the items, those present, including James Coleman Jr. (James Jr.) noticed that Ware was carrying a lot of cash. According to Ware, his mother had given him the cash as an early Christmas gift.

¶4. Ware and others, including James Jr., began to gamble and shoot dice. While shooting dice, James Jr. pulled out a gun, pointed the gun at Ware, and said, "who's the 'B' now." Ware thought James Jr. was just playing and brushed it off. James Jr. put away the gun, and the men continued to shoot dice and gamble. At some point while gambling, Ware pulled out his cash. James Jr. "snatched" the money and ran out of the store. Ware went outside to look for James Jr. but James Jr.'s car was gone. According to Ware, James Jr. took \$787 in cash.

¶5. Ware contacted James Jr. in an effort to get his money back. When James Jr. did not return the money, Ware went to the Shaw police department. Ware and a local police officer then went to James Jr.'s apartment. James Jr. advised that he had given the money to his mother.

¶6. The next day, December 25, 2011, Ware and his mother went to James Jr.'s parents'

house. James Jr.'s brother Roy¹ answered the door. Roy advised that James Jr. was not there. According to Ware's mother, when she asked to speak to his parents, Roy said no. But Roy's mother testified that she spoke to Ware and his mother but that she could not recall the substance of the conversation. Ware and his mother then left the Colemans' residence.

¶7. Later that day, Ware returned to the Shaw police department and filled out a report for the stolen money. According to Shaw Police Officer Teresa Watkins, Ware was enraged and "very upset about" losing his money.

¶8. On Christmas night, Roy and Roy's sister Evelene Denise Coleman Carr (Carr) were at their parents' house sitting in the living room. Their parents, Evelene and James Coleman Sr. (James Sr.) were in their bedroom. James Jr. was not there. Between 10:00-11:30 p.m., they heard a knock at the door. When they asked who it was, Ware responded, "Torie."² Roy answered the door and went outside. Carr could hear Roy and Ware talking outside. Minutes later, Carr heard gunshots. Evelene and James Sr. also heard the gunshots from their bedroom.

¶9. Carr, Evelene, and James Sr. all ran outside. They saw Roy lying on the front porch with gunshot wounds. At the same time, Carr and Evelene saw Ware running to his car, a white Monte Carlo. Although James Sr. did not see Ware, he saw Ware's car leaving the scene. According to James Sr., the car turned right and was headed toward Highway 61 and Washington County. James Sr. then called 911 and the local police department.

¹ Ware and Roy were acquaintances. According to Ware, he saw Roy the night James Jr. stole his money. Ware talked to Roy about the situation, and Roy seemed helpful.

² The record reflects that Ware was known as and was often referred to as "Torie."

¶10. Shortly after 11:00 p.m., Officer Gary Liggins with the Washington County Sheriff's Department was on routine patrol on Highway 61 near Old Whitestone Church. He observed a white Monte Carlo parked behind the church. Because there had been a lot of church vandalism in the area, Officer Liggins turned his patrol car around to investigate. As he approached the car, Officer Liggins noticed an individual, later identified as Ware, running from a treeline or wooded area behind the church to the trunk of the car. Ware closed the trunk, got into the car, and then drove off in an attempt to flee. Officer Liggins pulled behind the car and activated his blue lights and siren. Once the car stopped, Officer Liggins ran the car tag. The car was registered to Donna Ware, Ware's mother.

¶11. Officer Liggins approached the vehicle and asked Ware what he was doing behind the church. Ware responded that he was "rolling up a blunt." But according to Officer Liggins, no evidence suggested that Ware had been smoking marijuana. After confirming that there were no signs of disturbance at the church, Ware was released.

¶12. In response to James Sr.'s 911 call, Investigator Jeff Joel with the Bolivar County Sheriff's Department was contacted around 11:00 p.m. regarding a shooting. He arrived at the Colemans' residence around 11:30 p.m. and surveilled the scene. He noticed a hole in the metal framing of the window on the front porch of the house. He then recovered a projectile from inside the window frame.

¶13. Investigator Joel spoke with James Sr. and Carr, who identified Ware as the suspect. The Bolivar County Sheriff's Department put out a "BOLO" for a white Monte Carlo. Around 12:45 a.m. on December 26, 2011, Ware's vehicle was located, and Ware was taken

into custody. Ware was transported to the Bolivar County Sheriff's Department where Investigator Joel conducted a gunshot-residue test.

¶14. After Ware's arrest, Investigator Joel was contacted by the Washington County Sheriff's Department regarding the traffic stop at the church. Investigator Joel and two other law-enforcement officers went to the church and searched the wooded area behind the church for evidence. Several items were found, but the items were wet. The items were transported to the sheriff's department and were hung up to dry. These items were later inadvertently discarded and, as a result, were unavailable at trial. The murder weapon was never located, despite multiple searches.

¶15. An autopsy was performed on December 27, 2011. According to forensic pathologist Dr. Erin Barnhart, Roy died from multiple gunshot wounds. Dr. Barnhart explained that Roy suffered three gunshot wounds, one to the right arm, and two to the torso, specifically, the chest and abdomen. All three projectiles were recovered during the autopsy.

¶16. The three projectiles recovered during the autopsy and the one projectile recovered from the Colemans' residence were transported to the Mississippi Forensics Lab. Felicia McIntyre, an expert in firearm and toolmark examination, opined that all four projectiles were consistent with a 38-caliber firearm and that all four projectiles were fired from the same firearm.

¶17. The gunshot-residue test conducted by Investigator Joel was also transported to the Mississippi Forensics Lab. Jacob Burchfield, a forensic scientist and an expert in gunshot-residue analysis, opined that no particles of gunshot residue were identified on Roy but that

particles indicative of gunshot residue had been identified on Ware's right palm and left palm.

¶18. Ware testified in his own defense and denied shooting Roy. Ware stated that he went looking for James Jr. "several times . . . about 7 or 8 times" to recover his money but that he had been unsuccessful. According to Ware, after he and his mom left the Colemans' residence, he returned "around 1:00 or 2:00 on December the 25th" and "finally caught up with [James Jr.] at his mom's house." Ware testified that James Jr. "pulled a gun" and told Ware to "get the hell out of [his] yard." As a result, Ware left and "didn't return."

¶19. Ware admitted to being at the church shortly after the shooting but stated that he was waiting on James Jr. Ware explained,

Defense counsel: Why did you go down to White Stone Church?

Ware: Because I called . . . I called James [Jr.] and he told me that, "I got your money," because it went from texts at first. And then he called me and he told me, I got your money. I'm just coming from Jackson. I am in Greenwood now. We went to Jackson, me and my wife. And so give me time, you know, like I'll be there. I said, okay, I'm close, I'm close to Greenville now so where do you want me to meet you. I can meet you there, like I'm already in the area. And so, he was like, okay, I'm going to call you back. I'm going to call you back.

Defense counsel: Okay. Was there a reason you picked White Stone Church?

Ware: Yes. Because from his wife's house and Choctaw, Mississippi, it's like a back way, it's a back way from Shaw. And so once you come to the back way, I seen that [he] wasn't parked there. So I was like okay, he's not at his wife's house here. So instead of me taking the highway, I took that way just so I can check the . . . his

wife's house first. And so then I proceeded up to the highway and the reason why I stopped at White Stone Church is because there was a . . . it's a roundabout that you kind of like park in and I could see the highway really good. Like he . . . if he was coming from Greenville, I would be able to see him there like . . . because he have a big red truck.

When asked why he would not just wait and meet James Jr. in Shaw, Ware explained that his

best out was, okay, if I could just get him to tell me that, "ah, I'm headed right now, I'm leaving from Greenville." My chances are better seeing him on the highway than actually going to the City. Because I would never see him like in the City. And that's why . . . that's why I had went to Washington.

¶20. Ware testified that after his arrest, he gave a detailed statement to Investigator Scott Garcia with the Bolivar County Sheriff's Department regarding "the incident that transpired." But Investigator Garcia testified during rebuttal that Ware never gave a statement to him regarding the facts of this case or the murder of Roy.

¶21. Ware was convicted of murder and sentenced to serve life in the custody of the Mississippi Department of Corrections. Ware filed a motion for a judgment notwithstanding the verdict (JNOV) or, alternatively, for a new trial. The circuit court denied the motion. Ware timely appealed.

¶22. On appeal, Ware argues (1) the evidence was insufficient to support the verdict, (2) the verdict was against the overwhelming weight of the evidence, and (3) he received ineffective assistance of counsel.

ANALYSIS

I. Sufficiency of the Evidence

¶23. Ware first argues that the evidence was insufficient to support the verdict. He asserts

that the circuit court “committed reversible error by failing to grant [his] motion for a [JNOV].” “When reviewing a challenge for sufficiency of the evidence, this Court must determine whether, ‘after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Naylor v. State*, 248 So. 3d 793, 796 (Miss. 2018) (internal quotation marks omitted) (quoting *Ambrose v. State*, 133 So. 3d 786, 791 (Miss. 2013)). “The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence.” *Id.* (internal quotation marks omitted) (quoting *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993)).

[I]f a review of the evidence reveals that it is of such quality and weight that, “having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense,” the evidence will be deemed to have been sufficient.

Id. (alteration in original) (quoting *Shelton v. State*, 214 So. 3d 250, 256 (Miss. 2017)).

¶24. “That the only evidence supporting a conviction is circumstantial does not mean the evidence is insufficient.” *Walton v. State*, 642 So. 2d 930, 932 (Miss. 1994). “We have consistently held that the State may prove a crime solely by circumstantial evidence.” *Id.* But the circumstantial evidence must be “sufficient to prove the defendant’s guilt beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with innocence.” *Id.* (citing *Fleming v. State*, 604 So. 2d 280, 288 (Miss. 1992)).

¶25. Ware was convicted of murder under Mississippi Code Section 97-3-19(1)(a) (Rev. 2006), which provides, “[t]he killing of a human being without the authority of law by any

means or in any manner shall be murder . . . [w]hen done with deliberate design to effect the death of the person killed, or of any human being[.]”³ Ware asserts that “[t]he prosecution did not prove [he] [was] guilty beyond a reasonable doubt and to the exclusion of every hypothesis consistent with innocence.” This Court disagrees and finds sufficient evidence was presented to support the guilty verdict.

¶26. The trial testimony shows that on the day of the shooting, Ware was very upset about the stolen money. According to Officer Watkins, when Ware arrived at the police station to fill out his report, he was enraged and “adamant about” getting his money back. Ware acknowledged at trial that it was “all the money [he] had” and described the money as “[his] livelihood.”

¶27. The trial testimony further shows that on the night of the shooting, Ware was at the Colemans’ residence. James Sr., Evelene, and Carr all testified that just before the shooting, they heard a knock at the door, and it was Ware. Roy answered the door and went outside to talk to Ware. Moments later, they heard gunshots. Immediately after hearing gunshots, they all ran outside. Evelene and Carr saw Ware running to his car. They both described Ware as wearing a black or gray hoodie. Evelene testified that Ware “was running so fast, he nearly fell.” Ware got into the driver’s side of the vehicle and drove off.

¶28. While neither Evelene nor Carr actually saw Ware shoot Roy, they testified that Ware and only Ware had been talking to Roy on the front porch immediately before the shooting, that within seconds after the shooting they saw Roy lying on the porch with gunshot wounds,

³ Section 97-3-19(1)(a) was amended after Ware was indicted. S.B. 2377, Reg. Sess., 2013 Miss. Laws ch. 555, § 1.

and that they saw Ware running to his car.

¶29. Although James Sr. did not see Ware, he saw Ware's car leaving the scene, apparently headed toward Highway 61 and Washington County. Shortly thereafter, Washington County Sheriff's Officer Liggins noticed Ware's car parked behind a church near Highway 61. He saw Ware running from the woods to the trunk of his car. Ware closed the trunk and sped off.

¶30. While Ware admits to being at the church on the night in question, he asserts Officer Liggins lied about his observations because "officers help each other." But Officer Liggins was employed with the Washington County Sheriff's Department, not the Bolivar County Sheriff's Department, and, at the time of the traffic stop, Officer Liggins was unaware of the shooting or the BOLO issued for Ware's car. Based on Officer Liggins's observations, multiple officers, including Investigator Joel, searched the area the next day and recovered various items of evidence. While the items had been inadvertently discarded, Officer Liggins's testimony supports the inference that Ware disposed of evidence after the shooting.

¶31. Additionally, Burchfield opined that particles indicative of gunshot residue were identified on Ware's right and left palm. Burchfield explained that one can get gunshot residue from either firing a weapon, handling a weapon, or being in close proximity of a weapon at the time of discharge. While Burchfield was unable to tell the jury where the gunshot-residue particles came from, he confirmed that he conclusively found particles indicative of gunshot residue on Ware.

¶32. Ware asserts he shot fireworks on Christmas Eve while at Larry Drake's Corner Store,

explaining the gunshot residue on his hands. But according to Burchfield, in order for particles indicative of gunshot residue to be detected, the gunshot-residue test would need to be performed within four hours of discharge. Here, the gunshot-residue test was performed on December 26, within four hours of the shooting and Ware's arrest. Even if Ware had shot fireworks on December 24, such action would not likely cause the presence of gunshot residue more than twenty-four hours later.

¶33. Ware also asserts that the testimony shows there was "supposedly another man with [him]" at the time of the shooting. He argues "a reasonable inference is that [he] was present but another suspect shot Roy." While James Sr. indicated to law enforcement that he thought another man was in the car with Ware after the shooting, no other suspect besides Ware was identified. James Sr. later testified that he did not recall saying that another man was outside with Roy. Moreover, neither Evelene nor Carr indicated that someone else besides Ware was in the area. In fact, according to Carr, the only voices she heard just before the shooting were Roy's and Ware's. Carr continued that no one else was in the area immediately after the shooting, and she did not see anyone else in or around Ware's car. Additionally, Officer Liggins saw Ware shortly after the shooting and did not testify that anyone else was with Ware or in the car with Ware.

¶34. "[W]hen the evidence is conflicting, the jury will be the sole judge of the credibility of witnesses and the weight and worth of their testimony." *Little v. State*, 233 So. 3d 288, 292 (Miss. 2017) (internal quotation marks omitted) (quoting *Gathright v. State*, 380 So. 2d 1276, 1278 (Miss. 1980)). The record shows that Ware's theory of the case was presented

to the jury, and the jury was given the proper circumstantial-evidence instructions. Additionally, the jury was instructed on the difference between direct evidence and circumstantial evidence, and it was advised that “[y]ou, as the jury, should decide how much weight to give to any evidence.”

¶35. Considering the evidence and in light of our standard of review, this Court finds sufficient evidence was presented to support the verdict.

II. Weight of the Evidence

¶36. Ware next argues that “the verdict was against the overwhelming weight of the evidence” and that “[t]o allow [his] conviction to stand would . . . sanction an unconscionable injustice.” “In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict” *Boone v. State*, 973 So. 2d 237, 243 (Miss. 2008) (quoting *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997), *disagreed with by Dilworth v. State*, 909 So. 2d 731 (Miss. 2005)). “When the weight of the evidence is challenged, this Court ‘will reverse only when the verdict [is] so contrary to the weight of the evidence that to allow it to stand would sanction an unconscionable injustice’” *Naylor*, 248 So. 3d at 796 (alteration in original) (internal quotation marks omitted) (quoting *Christian v. State*, 207 So. 3d 1207, 1214 (Miss. 2016)).

¶37. In support of his argument, Ware relies on *Edwards v. State*, 736 So. 2d 475 (Miss. Ct. App. 2015). Edwards was convicted of murder. *Id.* at 477. At trial, the State’s key witness testified that he “believed” or “thought” it was Edwards who shot the victim, but he was not certain. *Id.* at 478, 483. The only other evidence against Edwards was that Edwards

was in the vicinity of the crime both before and after the shooting. *Id.* at 483. But other people were also present. *Id.* The court found that the witness’s testimony was “simply inadequate by itself to permit a conviction.” *Id.* Specifically, the court found, “[i]f only one person makes the identification and there is no other evidence that adds to it, then if that witness himself is not convinced beyond a reasonable doubt, neither may be the jury.” *Id.*

¶38. Ware admits that “[t]here are some differences in *Edwards* from this case,” but he asserts that the differences “are not meaningful.” This Court disagrees and finds that *Edwards* is distinguishable.

¶39. Here, unlike in *Edwards*, both Roy’s mother and sister were certain about whom they saw. Evelene testified that there were “no ifs, ands, or buts” about whom she saw running to the car after the shooting. Carr stated that she had no difficulties seeing Ware running to his car, that she saw Ware’s face as he was running, and that she saw Ware enter the driver’s side of the vehicle and drive off. Additionally, unlike in *Edwards*, Carr testified that she did not see anyone else in the area nor did she see anyone else in or around Ware’s car.

¶40. Although Ware questions the credibility of the State’s witnesses, the credibility of a witness is for the jury to determine. “[T]his Court consistently has stood by the precept that the credibility of a witness is solely for the jury to weigh and consider.” *Miller v. State*, 983 So. 2d 1051, 1054 (Miss. 2008) (citing *Harris v. State*, 970 So. 2d 151, 156 (Miss. 2007)).

¶41. Here, the jury was presented with testimony from both the State and Ware and rendered its decision after the presentation of all evidence.

Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject, the

utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into findings of fact sufficient to support their 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. It is enough that the conflicting evidence presented a factual dispute for jury resolution.

Boone, 973 So. 2d at 243 (quoting *Givens v. State*, 967 So. 2d 1, 7 (Miss. 2007)).

¶42. Based on the evidence presented, this Court finds that “the verdict [is] [not] so contrary to the weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” *Naylor*, 248 So. 3d at 796 (first alteration in original) (internal quotation marks omitted) (quoting *Christian*, 207 So. 3d at 1214).

III. Ineffective Assistance of Counsel

¶43. Ware last argues he received ineffective assistance of counsel. Specifically, Ware argues that his trial counsel was ineffective because (1) he failed to request a manslaughter jury instruction, (2) he failed to request an aiding-and-abetting or a concert-of-action jury instruction, and (3) he failed to object to the State’s gunshot-residue expert.

¶44. Every criminal defendant has a state and federal constitutional right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Miss. Const. art. 3, § 26. To prove ineffective assistance of counsel, the defendant must show (1) that counsel’s performance was deficient and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show deficient performance, a defendant must show that counsel’s performance “fell below an objective standard of reasonableness.” *Id.* at 688. But a strong presumption exists that counsel’s

performance constituted trial strategy and was “within the wide range of reasonable professional assistance.” *Id.* at 689. Prejudice is demonstrated by showing “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

¶45. Ordinarily, claims of ineffective assistance of counsel are not addressed on direct appeal. *Wilcher v. State*, 863 So. 2d 776, 825 (Miss. 2003). Under Mississippi Rule of Appellate Procedure 22(b), “[i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record.” Additionally, this Court has explained,

It is unusual for this [C]ourt to consider a claim of ineffective assistance of counsel when the claim is made on direct appeal. This is because we are limited to the trial court record in our review of the claim[,] and there is usually insufficient evidence within the record to evaluate the claim. . . . [W]here the record cannot support an ineffective assistance of counsel claim on direct appeal, the appropriate conclusion is to deny relief, preserving the defendant’s right to argue the same issue through a petition for post-conviction relief. This Court will rule on the merits on the rare occasions where “(1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge.”

Wilcher, 863 So. 2d at 825 (citations omitted) (quoting *Aguilar v. State*, 847 So. 2d 871, 878 (Miss. Ct. App. 2002)).

¶46. Here, the issue of whether Ware received ineffective assistance of counsel is based on facts fully apparent from the record. The record does not affirmatively show ineffectiveness of constitutional dimensions, and the parties stipulate that the record is adequate to allow this Court to make the finding without consideration of the findings of fact

of the trial judge. Thus, this Court will consider and address Ware’s claim of ineffective assistance of counsel.

A. Manslaughter

¶47. Ware argues his counsel “was ineffective for not offering a manslaughter instruction.” Ware claims that even if the State’s theory of the case is true and he was mad at James Jr. and therefore shot Roy in retaliation, “[t]his would not be deliberate design murder but heat of passion manslaughter.” This Court disagrees and finds a heat-of-passion manslaughter instruction is not supported by the facts or evidence.

¶48. “Heat of passion” is defined as follows:

[A] state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

Givens v. State, 967 So. 2d 1, 11 (Miss. 2007) (quoting *Mullins v. State*, 493 So. 2d 971, 974 (Miss. 1986)). Here, no evidence demonstrates that Ware shot Roy in the heat of passion. Ware testified at trial and denied shooting Roy. He further denied being at the Colemans’ residence at the time of the shooting. Because Ware denied any and all participation in and involvement with Roy’s murder, no factual basis supports a heat-of-passion manslaughter instruction.

B. Aiding and Abetting or Concert of Action

¶49. Ware further argues that his counsel “failed to object to the lack of [an] aiding and abetting or a concert of action instruction.” But, like the manslaughter instruction, the facts

and evidence do not support an aiding-and-abetting or a concert-of-action instruction.

¶50. An “aider and abettor” is “[a]ny person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense[.]” *Sayles v. State*, 552 So. 2d 1383, 1389 (Miss. 1989) (internal quotation marks omitted) (quoting *Bullock v. State*, 391 So. 2d 601, 614 (Miss. 1980)), *superseded on other grounds by rule as discussed in Lacy v. State*, 629 So. 2d 591 (Miss. 1993). Here, no evidence indicates that Ware aided or abetted and/or acted in concert with another to shoot and murder Roy. As noted, Ware denied shooting Roy and further denied being present at the time of the shooting. In fact, Ware testified that he first learned about the shooting when he was arrested. Additionally, Carr testified that no one else was in the area at the time of the shooting, and she did not see anyone else in or around Ware’s car. As with a manslaughter instruction, there is no factual basis to support an aiding-and-abetting or a concert-of-action instruction.

¶51. Moreover, “an ‘aider and abettor’ . . . is equally guilty with the principal offender.” *Id.* (quoting *Bullock*, 391 So. 2d at 614). “The law is clear that persons committing crime in concert may be found equally guilty by the jury.” *Callahan v. State*, 419 So. 2d 165, 175 (Miss. 1982) (citing *Anderson v. State*, 397 So. 2d 81 (Miss. 1981)). Accordingly, Ware fails to show how the outcome of his trial would have been different if an aiding-and-abetting or a concert-of-action instruction had been given.

C. *Gunshot-Residue Expert*

¶52. Ware last argues that his counsel “should have objected to the [State]’s gunshot

residue expert.” “With respect to the overall performance of the attorney, ‘counsel’s choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy’ and cannot give rise to an ineffective assistance of counsel claim.” *Carr v. State*, 873 So. 2d 991, 1003 (Miss. 2004) (quoting *Cole v. State*, 666 So. 2d 767, 777 (Miss. 1995)).

¶53. Here, Ware’s counsel’s decision not to object to Burchfield “fall[s] within the ambit of trial strategy” and does not rise to ineffective assistance of counsel. *Id.* (internal quotation mark omitted) (quoting *Cole*, 666 So. 2d at 777). Additionally, the record shows that Ware’s argument is without merit.

¶54. Ware argues that while “Burchfield may have been an expert in his field,” his “testimony was not reliable or helpful to the jury in this case.” In support, Ware asserts (1) the gunshot residue test “did not prove by scientific probability that [he] fired a gun,” and (2) the FBI no longer uses gunshot-residue kits. But Ware’s counsel addressed these concerns at trial. Indeed, the record shows that defense counsel thoroughly cross-examined Burchfield regarding the reliability of gunshot-residue tests. Burchfield acknowledged that he was unable to tell the jury whether Ware fired a gun on the night in question. And he further acknowledged that the FBI no longer processes gunshot-residue kits.

¶55. Nothing in the record suggests that Burchfield’s testimony was unreliable. Burchfield was accepted as an expert in gunshot-residue analysis, and he has previously testified as an expert. Burchfield merely testified as to his findings of the gunshot-residue test. Burchfield did not opine as to guilt, and his testimony was clear that the particles indicative of gunshot

residue did not prove that Ware had fired a gun.

¶56. Ware further argues that Burchfield's testimony was improper under Mississippi Rule of Evidence 403, which states,

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

MRE 403.

¶57. While Burchfield discussed three scenarios that could result in the presence of gunshot residue on a person's hands, he clearly explained that the presence of gunshot residue on Ware's palms did not unequivocally prove that Ware had fired a gun. Because Burchfield's testimony was explained, there is little risk that the jury was confused or misled by the testimony. Accordingly, Burchfield's testimony was not improper under Rule 403.

¶58. Ware fails to show that his counsel's performance was deficient and that the deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687. Thus, his ineffective-assistance-of-counsel claim fails.

CONCLUSION

¶59. The record shows that sufficient evidence was presented to support the verdict, that the verdict was not against the overwhelming weight of the evidence, and that Ware did not receive ineffective assistance of counsel. Accordingly, Ware's conviction and sentence are affirmed.

¶60. **AFFIRMED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND ISHEE, JJ., CONCUR.