IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LOI QUOC TRAN — APPELLANT

VS. — NO. 2006-CA-1394-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The grand jury of Harrison County, (2nd Judicial District) indicted defendant, Loi Guoc Tran for Burglary, Armed Robbery & Aggravated Assault in violation of *Miss. Code Ann.* §§ 97-17-23, 97-3-79 & 97-3-7(2)(a). (Indictment, cp.14-15). After a trial by jury, Judge Kosta N. Vlahos, presiding, the jury found defendant guilty on all three counts. (C.p.62-64). Defendant was sentenced to 25 years on Count I and 20 years on Count III to run concurrent to each other. Additionally, defendant was sentenced to 10 years on Count II to run consecutive to the concurrent sentences of Counts ! & III – for a total of 35 years in the custody of the Mississippi Department

of Corrections. (Sentence order, cp. 65-66).

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

A young 19 year old female and her 5 year old little brother were accosted in their home by defendant and another home invader. They tied the victims up. Defendant and his co-hort began seeking money and valuable when, sadly, the father comes home and essentially interrupts the home invasion in progress. The father is shot and seriously wounded. After scuffling the defendant flee on foot, the police arrive and find defendant a short distance away.

The jury heard the evidence, saw photos, took in the compelling eye-witness testimony and found defendant guilty of all charges.

SUMMARY OF THE ARGUMENT

I.

DEFENDANT WAS NOT DENIED HIS STATUTORY RIGHT TO SPEEDY TRIAL.

Issue II.

DEFENDANT WAS NOT DENIED THE OPPORTUNITY TO ARGUE DURESS BEFORE THE JURY.

Issue III.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Issue IV.

THERE BEING NO ERRORS SINGLY THERE CAN BE NONE CUMULATIVELY.

ARGUMENT

I.

DEFENDANT WAS NOT DENIED HIS STATUTORY RIGHT TO SPEEDY TRIAL.

Appellate Counsel for defendant has provided a speedy trial time line which the State will augment in support of the position that defendant was not denied his statutory right to a speedy trial.

It would appear there are several ways to analyze the statutory speedy trial claim. First there is the waiver method, as recently summed up by the Court of Appeals

> ¶ 16. By statute, criminal defendants must be tried within 270 days of arraignment, unless good cause is shown by the State. Miss.Code Ann. § 99-17-1 (Rev.2000). Explicit waiver of arraignment may also be used to trigger the state right. Felder v. State, 831 So.2d 562, 570(¶ 22) (Miss.Ct.App.2002).
>
> ¶ 17. Dora waived arraignment on May 21, 2002. This began the statutory clock. Trial did not commence until over two years later, November 9, 2004. We need not examine whether any of this delay was attributable to Dora, or whether there was no good cause. Dora waited to raise this issue for the first time on appeal, June 13, 2006. Because he did not raise it within the 270 day period, he has acquiesced to any violation of his statutory speedy trial rights. *Little v. State*, 744 So.2d 339, 345(¶ 24) (Miss.Ct.App.1999).
>
> *Dora v. State*, 2007 WL 1413053 (Miss.App. 2007).

Looking to the record defendant waived arraignment on August 10th, 2001. (C.p. 20). Counsel for defendant filed a motion to dismiss based upon denial of his statutory right to speedy trial on September 17th, 2003. (C.p. 28-29). That was 768

days after waiver of arraignment. Under the rationale of *Dora, Little, supra*, such is considered waiver of his statutory speedy trial claim.

Under a second, and quite different analysis of the statutory speedy trial claim, such is reviewed as – total time minus the time for recognized "good cause." If the resultant number is less than 270 then defendant was tried within the statutory period.

Now the State will agree to the time table as set out by defense with notable exceptions in the first three entries between August 10, 2001 and April 15, 2002.

Event	**Date**	**Elapsed Days**
Waiver of Arraignment Within the waiver of arraignment is an acknowledgment and agreement to a trial setting of September 17, 2001. The State is considering such as an agreed continuance.	8/10/2001	0 days
First trial Setting Interestingly, several things appear to be happening. Defendant's bail is lowered, he makes bail, is revoked, defense counsel withdraws (12/10/2001), motion for continuance filed (1/11/02), new defense counsel withdraws and another appointed (1/14/02). Defense attorney acknowledges an order of continuance on April 15, 2001 (C.p. 85). This is supported by a similar notation in the States chronology. (C.p. 69). (See Supplemental Clerk's Papers copy of docket sheets)	9/17/2001	0 days
April 15, 2002 Trial Setting		248 days

So, – appellate defense counsel asserts 255 unaccounted days from August 10, 2001 until April 15, 2002. Well, there appears to be a math, or counting error as that

is only a difference 248 days. (They missed it by a week). Then within those 248 days we can subtract the 38 days for the agreed continuance not acknowledged by defense from the trial setting in the waiver of arraignment. (Aug. 10, 2001 - Sept. 17, 2001 – 38 days) that leaves the State with unaccounted time difference of 210 days between August 10, 2001 and April 15, 2002. Conceding the remainder of the defense counsels time calculations there is an additional 54 unaccounted days for a total of 264 unaccounted days, between April 15, 2002 and Sept. 17, 2003. That count is less than 270 days required by statute.

Additionally, it is obvious that there should be additional days that can be subtracted as there was a motion for continuance filed in January and two changes of counsel within that period. Such would clearly indicate some of the delay was attributable to actions by defendant and counsel. But even without same defendant was tried within the statutory requirement under this method of review.

Accordingly, it is first the State's position that defendant waived his right to his statutory speedy trial claim for failure to raise the issue until time of trial, – well past the 270 statutory period. Second, looking closely to the record, and the calendar, it is apparent there were sufficient days for cause to subtract from the total time between arraignment and trial to fall below the 270 requirement of the statute.

Therefore, the State would ask that no relief be granted on this initial allegation of error.

Issue II.
DEFENDANT WAS NOT DENIED THE OPPORTUNITY TO ARGUE DURESS BEFORE THE JURY.

Defendant asserts the trial court erred in sustaining the objection of the State to the defense argument that the jury should make their decision through the thoughts and beliefs of defendant. Essentially a 'stand in his shoes' or 'Golden Rule' argument. The law on point is clear, and of longstanding:

> ¶ 21. We have succinctly explained the justification for prohibiting a golden rule argument as follows:
>
> It is the essence of our system of courts and laws that every party is entitled to a fair and impartial jury. It is a fundamental tenet of our system that a man may not judge his own case, for experience teaches that men are usually not impartial and fair when self interest is involved. Therefore, it is improper to permit an attorney to tell the jury to put themselves in the shoes of one of the parties or to apply the golden rule. Attorneys should not tell a jury, in effect, that the law authorizes it to depart from neutrality and to make its determination from the point of view of bias or personal interest.
>
> *Outerbridge v. State,* 947 So.2d 279 (Miss. 2006).

Looking to the record just a few sentences later defense argued, correctly about the facts of the case showing the duress exerted on defendant. The pistol whipping, the fear, the beating the gangs and fear of death. All, everything related to duress. Tr. 396-400.

Consequently, there is no merit to this allegation of error and no relief should be granted.

Issue III.
DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Well, counsel for defendant has certainly fulfilled the requirement of *Strickland* in providing examples of supposed ineffective assistance with "specificity and detail." As to the non-conclusory fashion, such is not quite as fulfilling. Be that as it may, defendant was afforded Constitutionally effective assistance of counsel and is not entitled to any relief.

A.

> ¶ 32. . . . [T]he decision whether or not to object to hearsay falls within the broad discretion given to counsel in formulating and carrying out his trial strategy. Carter once again fails to meet the burden set forth by *Strickland.*
>
> *Carter v. State,* 956 So.2d 951 (Miss.App. 2006).

Looking to the numerous examples, some are not erroneously described. For example, an officer reporting on what dispatch told him is admissible to show what he did. *Outerbridge v. State*, 947 So2d 279 (Miss. 2006).

Otherwise all are reasonably within the gambit of trial strategy.

B.

> ¶15. As stated supra, there is a rebuttable presumption that counsel's performance was effective. Id. "**[C]ounsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall[s] within the ambit of trial strategy**." Cole v. State, 666 So.2d 767, 777 (Miss.1995) (citing Murray v. Maggio, 736 F.2d 279 (5th Cir.1984)). We find nothing in the record affirmatively

showing constitutional ineffectiveness. Furthermore, Givens has failed to show prejudice. Thus, Givens has failed to meet his Strickland burden and we find these two issues to be without merit.

Givens v. State, 2007 WL 2446288 (Miss. 2007)(emphasis added.)

Again, the State see all of the examples cited as within reasonable trial strategy. Plus, come one, when an eye-witness, a victim, tells how a defendant acted during the commission of the crime (especially where English may be a second language) that witness is not speculating about the thoughts of defendant. It is a descriptive account taking into consideration all that happened in context. What was said and what happened. All reasonable and within strategy for a defense attorney. It should be remembered defendant sought or claimed duress, such statement on how he reacted would support that contention... reasonable strategy.

C.

Supposed 'medical testimony' can and is oft admitted based upon a person perception or observation. Don't have to be an expert to testify about things medical. Some are just obvious or perceived. M.R.E. 701.

¶ 8. The State then called Officer McNabb. McNabb had transported Walls from the jail to the hospital on November 5, 2003, after Walls complained of genitalia pain. The trial court allowed McNabb to testify to his personal observation during this exam, in accordance with M.R.E. 701, regarding lay testimony. This issue is without merit.

Walls v. State, 928 So.2d 922 (Miss.App. 2006).

Additionally, law enforcement officer are able to testify about their personal

experience and may freely testify about calibers of slugs, etc. if they have acquired that knowledge. The officers need not be qualified as experts. *Holmes v. State,* 754 So.2d 529, (¶ 26)(Miss.App. 1999).

D.

Will it seems repetitive, the strategy of not objecting to supposed leading questions is oft raised but seldom held to be ineffective. The reasons is that such decisions are reasonable trial strategies. The information is redundant, or easily obtainable by asking in a different manner. So why clutter the trial or testimony with objections.

> ¶13. This Court also is mindful that not objecting to leading questions by the State could have been a trial strategy. The procedure used by one attorney is not judged by the "hindsight and method another attorney might have used" under similar circumstances. Al-Fatah v. State, 856 So.2d 494, 503 (¶ 24) (Miss.Ct.App.2003) (quoting Parham v. State, 229 So.2d 582, 583 (Miss.1969)). "This Court must apply a heavy measure of deference to counsel's judgments." Wiley v. State, 517 So.2d 1373, 1379 (Miss.1987). Bullard did not suffer any actual or substantial disadvantage because of this failure to object. The same answers could have been elicited by simply rephrasing the question. Jackson v. State, 614 So.2d 965, 971 (Miss.1993). This Court ruled in Al-Fatah that trial counsel's failure to object to leading questions, without proof that prejudice resulted, does not amount to ineffective assistance of counsel. Al-Fatah, 856 So.2d at 503 (¶ 24).
>
> *Bullard v. State*, 923 So.2d 1043 (Miss.App. 2005).

The very fact that counsel states the elicited testimony "enhanced" the evidence does not make it prejudicial. It just means the evidence or testimony was already

before the jury.

E.

Interestingly, and oddly, counsel has not cited one rule, law or constitutional provision that was violated or in support of his argument that trial counsel should have *voir dire* the witness. *Taggart v. State,* 957 So.2d 981 (¶20)(Miss. 2007).

Without waiving any procedural bar to review of this sub-issue, it is also without merit in law. The reviewing courts of this State have clearly held that a decision whether to *voir dire* or qualify a witness is trial strategy and not ineffective assistance of counsel. *Sanders v. State,* 825 So.2d 53 (¶ 10)(Miss.App. 2002).

F.

And, lastly, counsel for defendant makes the ubiquitous argument that since there was testimony about injuries the photos are redundant – and therefore it was ineffective assistance for trial counsel's failure to object.

The State will assume trial counsel was prescient as to the holding of later cases that would make the same argument now raised:

> ¶ 10. . . . Specifically, Bradley contends that the photograph was admitted in violation of Rules 401, 402, and 403.FN4 Bradley argues *509 that the photograph was improperly admitted because "the proof had already been established that Mr. Jackson had been shot and that the introduction of this photograph into evidence would only go to prejudice the jury in favor of the Appellee."
>
> *Bradley v. State,* 948 So.2d 506 (¶¶10-13)(Miss.App. 2007).

CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 30th day of November, 2007.

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