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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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COURT OF APPEALS

TAVARES FLAGGS — APPELLANT

VS. — CAUSE NO. 2006-KA-01702-COA

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM
THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY

APPELLANT'S REPLY BRIEF

By: Donald W. Boykin
515 Court Street
Jackson, Mississippi 39201
601-969-3015
MB[redacted]
Attorney for Appellant

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ISSUE ONE

FLAGGS' MOTION OF CONTINUANCE SHOULD HAVE BEEN GRANTED.

The State's position, with respect to this issue, is in part, substantially based on its assertion and the trial judge's assertion that even if the victim was on cocaine, that was not necessarily exculpatory. As stated in the Brief for Appellant, Flaggs told the police that the victim was acting paranoid and strange, rushed at Flaggs with a screwdriver and knife, and that those actions of the victim were attributable to him being on cocaine. Obviously, without a toxicology report, it was not known whether the victim was on cocaine, and if so, to what extent. Had there been a toxicology report on the victim, the results of that report may have led Flaggs to present other evidence at his trial concerning the effect cocaine would have had on the victim, and in particular, if it would have caused him to act aggressively as Flaggs told the police.

ISSUE THREE

THE TRIAL COURT SHOULD HAVE GRANTED FLAGG'S CHALLENGE FOR CAUSE OF JUROR BYRD.

The State cites Duncan v. State, 939 So. 2d 772 (Miss. 2006) in support of its position that the trial judge correctly denied Flaggs' challenge for cause of Juror Byrd. Duncan, at p. 779 says:

> To the extent that any juror, because of his relationship to one of the parties, his occupation, his past experience, or whatever, would normally lean in favor of one of the parties, or be biased against the other, or

> one's claim or the other's defense in the lawsuit, to this extent, of course, his ability to be fair and impartial is impaired.

Juror Byrd was related to neither of the parties, but he definitely had a relationship with Detectives Amos Clinton and Perry Tate and Dr. Hayne. That coupled with his occupation and experience at the Jackson Police Department strongly suggests he would lean in favor of the State. As argued in the Brief for Appellant, p. 12, the standard to be applied in this situation is not whether Juror Byrd definitely could not be impartial, but whether it would be likely he would not be impartial.

ISSUE FOUR

DR. STEVEN HAYNE WAS NOT QUALIFIED AS A BLOOD SPATTER EXPERT AND SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY CONCERNING SUCH.

In its Brief, the State says, "Indeed, the defendant has not even alleged how this testimony might have affected the outcome of this trial." (Brief for the Appellee, p. 16). The State contended that a significant number of the victim's wounds were as a result of him trying to defend himself. During direct examination, Dr. Hayne stated:

> Q: How much blood would you expect to come out of his body if he was being attacked in the way that you found that he had been?
> A: I think the two major injuries, counsellor, that would produce some blood spatter would be off his right forearm and off his hand. I would expect that hand to be moving since we show changes consistent with defensive posturing injury. I think, also, that there is a possibility that there would be some blood splatter coming out or ejected from the right side of the neck, counsellor, that would be coming out under some pressure. (underline supplied).

Thus, Dr. Hayne's testimony, with respect to blood spatter, was that the victim was defending himself and certain wounds were incurred.

The testimony of Dr. Hayne does not satisfy the requirements of M.R.E. 702 and its application as enunciated in Mississippi Transportation Commission v. McLemore, 863 So. 2d 31 (Miss. 2004). Citing M.R.E. 702 cmt., McLemore says Rule 702, "does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge." The State clearly failed to establish that Dr. Hayne was qualified to speak an opinion concerning blood spatter, and that it was within his field of knowledge. Prior to permitting Dr. Hayne to testify concerning matters related to blood spatter, the trial court should have conducted a preliminary inquiry pursuant to M.R.E. 104 to determine if Dr. Hayne was qualified as a blood spatter expert and if his testimony was admissible (McLemore, at p. 36).

McLemore, at p. 35 says:

> Under Rule 702, expert testimony should be admitted only if it withstands a two-pronged inquiry, Kansas City S. Ry. v. Johnson, 798 So. 2d 374, 382 (Miss. 2001). First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. Id. (citing M.R.E. 702). Second, the witness' scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue. Id. In addition, Rule 702 "does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge." M.R.E. 702 cmt.

As required by McLemore, the State did not show that Dr. Hayne's blood spatter testimony was based "on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation." McLemore at p. 36.

In McLemore, the disputed "expert" testimony was that of an appraiser who had been qualified as an appraiser. However, the specific issue in that case was whether the appraiser's testimony, with respect to a particular method he employed, satisfied the requirements of M.R.E. 702. In McLemore, the Court said the appraiser's testimony was not admissible under the "modified Daubert standard," and the "non-exhaustive, illustrative list of factors set out in Daubert and Kumho Tire." Likewise, the State in the case sub judice failed to establish that Dr. Hayne's blood spatter testimony was admissible under the modified Daubert standard.

ISSUE FIVE

THE TRIAL COURT ERRED IN OVERRULING FLAGGS' OBJECTION TO THE INTRODUCTION INTO EVIDENCE OF THE SHOULDER SURGERY APPARATUS.

The State says that the procedures outlined in Box v. State, 437 So. 2d 19 (Miss. 1983) only applies when there has been a discovery violation, presumably suggesting that discovery violations are limited to instances wherein the prosecution has deliberately withheld or not timely provided a defendant with discovery information. At least two opinions have been rendered by this Court which state otherwise. Russell v. State, 789 So. 2d 779 (Miss. 2001); Isom v. State, 928 So. 2d 840 (Miss. 2006). In Isom,

the prosecution provided the defendant the names of additional witnesses and the substance of their testimony relatively soon after the prosecution learned of them and prior to trial. The Court's opinion stated that there was no evidence that the prosecution deliberately withheld that information from Isom. Likewise, in the case sub judice, there was no suggestion that the prosecution deliberately withheld information from Flaggs concerning the shoulder apparatus. In Isom the Court never said that the prosecution committed a discovery violation in the sense that it deliberately withheld discovery information or did not timely provide it to Isom once the prosecution learned of it, but yet said that the trial court should have granted a continuance to allow Isom to investigate the witnesses and their testimony. The Court said that was error by the trial court, but that it was harmless error.

In Russell, the defendant objected to testimony of which he was not aware prior to trial. The prosecution claims that it was unaware of the new testimony until minutes before the witness took the stand. In Russell, the trial judge determined there had been no discovery violation. The Mississippi Supreme Court in Russell stated:

> We have articulated no requirement in Box or Ramos (Ramos v. State, 710 So. 2d 380 (Miss. 1988) that the trial court find a discovery violation before allowing the Defendant to interview the witness and proceed through the steps outlined above. (underline supplied). Thus, the Mississippi Supreme Court has clearly articulated that there need not be a discovery violation, in the sense that the

prosecution has deliberately withheld or not timely provided discovery information, before the Box procedures be invoked.

Respectfully submitted,

TAVARES FLAGGS

BY: 
DONALD W. BOYKIN
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, Donald W. Boykin, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Appellant's Reply Brief to:

1. Honorable Bobby B. DeLaughter
   Circuit Judge;

2. Honorable Jim Hood
   Attorney General; and

3. Philip Weinberg
   Assistant District Attorney

This the 5th day of September, 2007.


DONALD W. BOYKIN