CERTIFICATE OF INTERESTED PERSONS

PERRY L. MASK — Appellant

Vs. — No. 2006-KA-01014-COA

STATE OF MISSISSIPPI — Appellee

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals, may evaluate possible disqualification or recusal.

1. Hon. Paul Funderburk, Circuit Court Judge, 1st Judicial District
2. Hon. John R. Young, District Attorney, 1st Judicial District
3. Hon. Arch Bullard, Assistant District Attorney
4. Hon. Jim Pounds, Circuit Court Judge, 1st Judicial District, formerly Assistant District Attorney
5. Perry L. Mask, Defendant/Appellant

Attorney of Record for Perry L. Mask

2006-KA-01014 COA T

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STATEMENT OF THE CASE

This case is an appeal by Perry L. Mask from his conviction of the charge of murder in the Circuit Court of Alcorn County, Mississippi.

On February 29, 2004, Charles A. Bascomb and his son, Jason Zebke, encountered Perry Mask on County Road 306 in Alcorn County, Mississippi.

After some discussion between the parties, an altercation developed. According to the only witness to the event, Jason Zebke, Perry L. Mask shot and killed Charles Bascomb.

Mr. Mask eluded the authorities, but was finally apprehended some twenty (20) days later. On September 3, 2004, the Alcorn County Grand Jury returned an indictment against Perry L. Mask, charging him with one (1) count of murder.

After the consideration of numerous pre-trial motions filed by defense Mr. Mask's trial began on December 12, 2005 in Alcorn County, Mississippi. After a two (2) day trial Mr. Mask was convicted of murder. He was then sentenced to life in prison without the possibility of parole, pursuant to Mississippi Code Annotated section 99-19-81.

Through Counsel, Mr. Mask filed a timely Motion for A New trial,

which the trial court summarily overruled.

It is from this conviction and the assignments of error contained herein that Mr. Mask appeals.

SUMMARY OF THE ARGUMENT

In this Appeal, Perry L. Mask makes five (5) assignments of error.

Initially, Mr. Mask asserts that the trial court erred in granting a flight instruction. It is not contradicted that after the alleged murder Mr. Mask eluded the authorities for a period of time. However, as numerous decisions of this Court have made clear, the granting of a flight instruction is proper only where the flight of the Defendant is unexplained and considerably probative of guilt. Moreover, flight instructions are especially inappropriate when self-defense is claimed.

Mr. Mask would show that though he did not testify at trial to clarify his claim of self defense he did make a statement to Investigator Mike Beckner which implied that he not shot the decedent, the decedent would have shot him. This being the case, the appellant feels that the granting of the flight instruction over his objection was particularly inappropriate.

Further, the Appellant would show that even if the Court found that the initial obstacles to granting the flight instruction could be overcome, the granting of the instruction was still unduly prejudicial to the Defense and should have been excluded under Mississippi Rule of Evidence 403.

Mr. Mask also assigns for error the trial court's refusal to grant a mistrial based on improper comments of the prosecution during its closing statement. Mr. Mask would show that during his closing statement to the jury, the assistant district attorney referred to other witnesses the Defense could have called to prove certain points. At the time these comments were made, Defense counsel objected and moved for a mistrial, which the trial court summarily overruled.

Mr. Mask would show that these comments by the assistant district attorney were inflammatory and highly prejudicial and that the trial court should have granted a mistrial on this basis. The Appellant contends that even though the prosecution did not comment on his refusal to testify, such comments were tantamount to such and left the jury with the impression that he was under an obligation to offer evidence to prove his guilt. The Appellant would show that the relevant case law, as decided by this Court, shows that these comments constituted prosecutorial misconduct, and that the effect of these comments was to unduly influence the jury and leave them with an inaccurate impression of the Defendant's responsibilities and burdens at trial.

Mr. Mask next addresses as error the trial court's refusal to grant a directed verdict at the end of the prosecution's case. Mr. Mask recognizes

that the standard of review in such matters, as previously stated by this Court, is abuse of discretion. However, even if all the evidence offered in this case were viewed in the light most favorable to the prosecution, as is required by the cases on his subject, the Mr. Mask would contend that no reasonable trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. Thus, Mr. Mask would show that the trial court should have directed a verdict of not guilty in his favor and that it constitutes reversible error for the trial court not to have done so.

Mask also raises as error the issue of whether the trial Court erred in denying the Defendant's Motion for New Trial. Mr. Mask contends that in light of all evidence offered at trial, including the relative dearth of witnesses, the inherent prejudice and unreliability of the only eyewitness to the event, and the lack of physical evidence, the trial Court erred in not granting his Motion for New Trial and that this constitutes reversible error.

Finally, Mr. Mask assigns as error the fact that the jury's verdict was contrary to the weight of evidence presented at trial.

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN GRANTING A FLIGHT INSTRUCTION

At the conclusion of the proof, the Court considered various jury instructions offered by both the Prosecution and Defense, as well as its own instructions. Among the instructions which the prosecution offered was jury instruction P-6, which the Court later renamed and read to the jury as C-18. (This instruction will be found at page 160 of Volume 2 of the Index). The Defense mad a contemporaneous objection to this instruction. Despite this, the Court granted said instruction.

During consideration of the instructions, the Defense objected, relying on the case of Shaw v. State, 915 So. 2d. 442 (Miss. 2005), wherein this Court held that flight instructions are inappropriate when there are independent reasons for flight. Shaw, at page 447. The Defense maintained that, under the reasoning of the Shaw decision, P-6 should not have been granted. (pages 409-411 of official trial transcript).

The Appellant would show that in addition to the Shaw case, there are other decisions of this Court which would dictate that the flight instruction

should not have been given. The Appellant would point to the case of Liggins v. State, 725 So. 2d. 180 (Miss. 1998). In that decision, the Supreme Court held that flight instructions should only be allowed when "...flight is unexplained and **considerably** probative of guilt." Liggins, at page 182. (emphasis mine). Further, the Appellant would point to the case of Tran v. State, 681 So. 2d. 514 (Miss. 1996), where this Court held that flight instructions were particularly inappropriate when self-defense is claimed, because the flight is often to avoid retribution. Tran, at page 519.

The Appellant feels that in the present case the instruction was not supported by any of these decisions. Though he did not testify at trial, the Appellant Mask did give a statement to authorities in which he stated that he "had to shoot Mr. Bascomb because Mr. Bascomb was going to shoot him." (Page 320 of official trial transcript). Based on this statement and his fear for his own life, the Appellant feels that the Tran decision especially supports his position that it was error to grant the flight instruction.

Moreover, the Appellant would point this Court to the operative language in the Liggins case, wherein flight instructions were held to be appropriate only when they are considerably probative of guilt. Liggins, page 182. The Appellant contends that even if the trial court did make a determination that the flight instruction was appropriate under the specific

facts in his case, it still should have been excluded because of Mississippi Rule of Evidence 403 as unduly prejudicial. As this Court has held, even though a flight instruction might be admissible under Mississippi Rule of Evidence 404 (b), it still must be filtered through Rule 403. See Ford v. State, 555 So. 2d. 691 (Miss. 1989).

Based on the foregoing analysis of the law and facts of this case, the Appellant feels that it constituted reversible error for this Court to grant Instruction C-18.

II. WHETHER THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENSE'S MOTION FOR A MISTRIAL DUE TO ALLEGED PROSECUTORIAL MISCONDUCT

During the prosecution's closing argument, the Assistant District Attorney stated that "Mr. Comer also alludes to these other witnesses. They put witnesses on the stand that testified. They can call those witnesses also if there is pertinent evidence." (Page 436 of official trial transcript). At this point during the prosecution's closing argument, the Defense objected and moved for a mistrial. The Defense maintained that they were under no obligation to call any witnesses whatsoever and that for the prosecution to allude to their ability to do so was inappropriate. Without comment the trial

court overruled the Defense's objection and denied the motion for mistrial.

As this Court has recently stated, the standard in determining whether there has been any degree of prosecutorial misconduct is ..."whether the natural and probable effect of the improper argument of the prosecuting attorney created an unjust prejudice against the accused as to result in a decision influenced by the prejudice so caused.", Jones v. State, _____So 2d _____, 2007 WL 232597, citing Wells v. State, 698 So. 2d 497, 507 (Miss. 1997). See also, Caston v. State, 823 So.2d 473, (Miss. 2002).

In the case currently before the Court, the Appellant contends that the assistant District Attorney's comments gave the jury the false impression that he was under an obligation to call witnesses or to put on some proof as to his innocence. Though all potential jurors were questioned extensively about their understanding of the presumption of innocence, the Appellant feels that this comment, coming from the prosecutor in the heat of his summation to the jury, made jurors feel that he was under a duty to call witnesses and/or submit proof as to his innocence of the crime charged

This Court has further commented on prosecutorial misconduct by opining that if there is misconduct, the question becomes whether the natural and probable effect of the improper argument is the creation of unjust prejudice against the accused so as to result in a decision influenced

by the prejudice so created. Ormond v. State, 599 So. 2d 951, 961. (Miss. 1992).

The Appellant would concede that it might be difficult, if not impossible, to quantify exactly what degree of impact the prosecution's comments had on the verdict of the jury. However, since the Appellant did not testify at trial, he is deeply concerned by whatever image may have been left in the minds of the jurors after these references.

Attorneys are not allowed to employ tactics that are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury. Sheppard v. State, 777 So. 2d 659 (Miss. 2000). The Appellant contends that when the prosecution made the reference to witnesses that might be called he was in fact using tactics which were inflammatory and highly prejudicial, both of which fly in the face of what is proper for the prosecution during closing arguments and violate the spirit and holdings of the cases cited herein. For this reason, the Appellant contends that it was error for the trial court to deny his motion for mistrial.

III. WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL

As this Court has stated, a Motion for a New trial challenges the weight of evidence presented. Sheffield v. State, 749 So. 2d 123, 127 (Miss. 1999). The Appellant contends that even if all the evidence presented were viewed in the light most favorable to the prosecution, as is required in the Court's analysis, the trial court in this case erred in not awarding the Appellant a new trial.

The Appellant would point this Court to the evidence and testimony produced at trial, which is contained in the official trial transcript. For example, the Appellant would ask this Court to consider that the only witness to the alleged murder was Jason Zubke, the son of the decedent who by his own admission was under the influence of illegal narcotics when the event transpired. The Appellant feels that this in itself should have been fatal to the prosecution's case. Certainly the testimony of more than one (1) drug impaired witness should be required to convict a person of murder.

Further, the Appellant would ask the Court to consider the fact that the investigating authorities never retrieved a gun or a casing from the scene

of the offense. Though Zubke was categorical in his insistence that it was a black automatic pistol with which the Appellant shot the decedent, such a weapon would have discharged a casing, which should have been located. It was not. The Appellant feels that this hole in the evidence presented at trial, which casts further doubt on the credibility of Zebke, should have been another factor which mandated a new trial

Finally, the Appellant would point to his own statement to authorities wherein he stated that he had to shoot the decedent or the decedent was going to shoot him. Though the Appellant did not testify, he feels that his version was not rebutted by the prosecution; certainly not in a fashion sufficient to support conviction beyond a reasonable doubt.

IV. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR DIRECTED VERDICT

This assignment of error, related to the previous one, centers on the trial court's refusal to grant the Defendant's Motion for Directed Verdict. At the conclusion of the prosecution's case, the defendant made a motion for a Directed Verdict of Not Guilty. (Page 361 of the official trial transcript). The trial court summarily denied the motion.

As this Court has stated, the standard of review in determining whether a trial court erred in not granting a directed verdict is one of abuse of discretion. Smith v. State, 925 So. 2d 825, 832 (Miss. 2006). For many of the reasons set forth in the previous assignment of error, the Appellant contends that the trial court did in fact abuse its discretion in failing to grant the Defendant's Motion for Directed verdict and would ask that the case be reversed and remanded for a new trial on that basis.

In considering whether or not to grant the defendant's motion for Directed Verdict, the question for the reviewing Court is whether, in viewing evidence in a light most favorable to the prosecution, any reasonable trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. Smith, *supra*, at 830. See also, Jackson v. Virginia, 443 U.S. 307, 315.

Based on the standards of review enunciated in the foregoing cases, the Appellant contends that the trial court erred in failing to grant the Motion fro Directed Verdict. In support of his position the Appellant would point to the paucity of evidence presented at trial, as well as the inherent bias of the only witness to the crime, Jason Zebke. Further , the Appellant would remind this Court of the drug impaired condition of this witness when he had allegedly seen the crime. Finally, the appellant would reiterate

his previous position that though he did not testify at trial, he did make statements to the authorities wherein he made a claim of self-defense. Bases on all of the foregoing, the Appellant [illegible] could have found the essential elements of the crime beyond [illegible] doubt, and, as a result, the trial court should have granted his Motion for Directed Verdict.

V: WHETHER THE JUDY'S VERDICT WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Perry Mask would also ask that his case be reverse and remanded to the Circuit Court of Alcorn County due to the fact that the verdict of guilty was contrary to the overwhelming weight of the evidence.

Mr. Mask recognizes that this Court will disturb a verdict only when it is so contrary to the overwhelming weight of evidence that to allow it to stand would promote an unconscionable injustice. Conley v. State, 948 So. 2d 462, 464 (Miss. App. 2007). Bush v. State, 895 So. 2d 836, 844 (Miss. 2005). The reluctance of this Court to disturb the jury's verdict notwithstanding, the Appellant feels that this is a case where that should in fact occur. As we have previously shown, there was only one (1) witness to the offense, who happened to be the decedent's son. Additionally, and

perhaps more importantly, this witness was by his own admission under the influence of illegal narcotics at the time of the event.

This lack of direct, competent evidence, coupled with Mr. Mask's statement about the danger he felt from the decedent, should dictate that this Court remand the case currently before the Court for a new trial. The Appellant would contend that not to do so would indeed constitute the unconscionable injustice contemplated by Conley and Bush, *supra*.

CONCLUSION

Perry L. Mask, Appellant in this cause, would respectfully ask this Court to reverse and remand his case to the Circuit Court of Alcorn County, Mississippi for a new trial based on the following errors, with have been addressed in the body of his brief:

1. That the Trial Court erred in granting a flight instruction.

2. That The Trial Court erred in Not granting the Defense's Motion for a Mistrial Due to Alleged Prosecutorial Misconduct

3. That the Trial Court erred in Denying the Defendant's Motion for a Directed verdict of Not Guilty

4. That The Trial Court Erred in Not Granting the Defendant's Motion for a New trial.

5. That the jury's verdict was contrary to the overwhelming weight of the evidence.

The Appellant respectfully requests that this Court, upon consideration of the brief presented herein, and consideration of the facts and law relevant to the issues presented, reverse and remand this case to the Circuit Court of Alcorn County, Mississippi.

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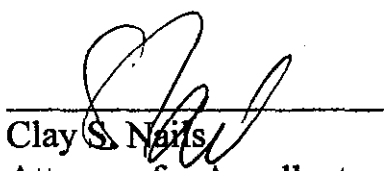


Clay S. Nails
Attorney for Appellant
MSB#[redacted]

CERTIFICATE OF SERVICE

I, CLAY S. NAILS, hereby certify that I have this day mailed a copy of the Appellant's Brief to the following:

Hon. Paul Funderburk
P.O.Drawer 1100
Tupelo, MS 38802-1100

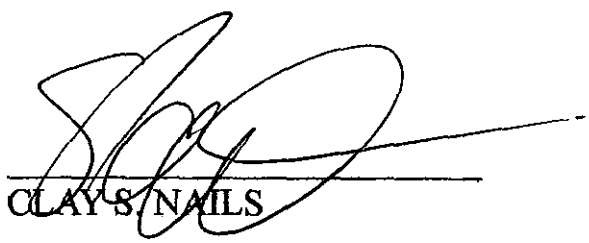
WITNESS MY SIGNATURE, this the 24th day of September, 2007.

CLAY S. NAILS
Attorney for Appellant

CERTIFICATE OF SERVICE

I, CLAY S. NAILS, attorney for appellant in the foregoing cause, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and complete copy of the foregoing Appellant's Brief to the Office of the Attorney General, P. O. Box 220, Jackson, Mississippi 39205-0220, as well as sent by facsimile.

This the 24th day of September, 2007.



CLAY S. NAILS