IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES MICHAEL STRICKLAND — APPELLANT

VS.

NO. 2006-KA-1573

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Procedural History

James Michael Strickland was convicted in the Circuit Court of Lowndes County on a charge of armed robbery and was sentenced as an habitual offender to a term of 30 years in the custody of the Mississippi Department of Corrections. (C.P.129-32) Aggrieved by the judgment rendered against him, Strickland has perfected an appeal to this Court.

Substantive Facts

On May 10, 2000, Amy Wright was working as the night clerk at Penny Ridge Grocery in Caledonia. Shortly before the 8:00 p.m. closing time, Ms. Wright "walked out to get a newspaper out of the box." At that time, "[a] little silver car" pulled up, and a "young lady ... in a green bikini top" got out and said, "'we're just in time.'" Two of the men

accompanying this young woman followed Mrs. Wright into the store and approached the beer cooler. (T.81-85)

As the men were "getting beer out of the cooler, ... [t]he vehicle drove off and left them." Mrs. Wright commented something to the effect of, "Your ride just left," but "they said they didn't care." (T.90) Mrs. Wright testified to what happened next as follows:

> They got two six-packs of Bud Light beer in the bottle and started to approach the front of the register. And the younger gentleman passed money to the defendant. And at that point knowing that he didn't look old enough to buy beer and should not have given money to another gentleman to purchase it, I asked both gentlemen for ID.
>
> * * * * *
>
> The defendant went– came behind the counter to a little table that was behind the ice cream cooler and got my purse, my personal purse. The only personal object that I had in the store. And he took my personal purse and told me he guessed that I would give them the beer now.
>
> * * * * *
>
> I struggled with them for my purse. He could have anything that belonged to Penny Ridge Grocery. I didn't see the need to take my personal possessions.
>
> * * * * *
>
> In the midst of the struggle, the other defendant who I now know is Mr. Burnett slapped me and pulled a gun on me.
>
> (T.90-92)

Mrs. Wright went on to testify, "I was still trying to get my purse away from the defendant, and the other gentleman began to beat on the cash register to try to get it to come open." Mrs. Wright was "so close" to the revolver that she "could see that it had a cylinder with bullets in it ... " Apparently irritated and angry, the defendant told his confederate at least six times, "Just shoot the bitch." Mrs. Wright was [b]egging him" not to shoot her and to

return her purse. Unable to open the register, the men "[t]hrew it on the floor." When the register still did not open, the defendant said, "Fuck it, take it with us." They took the beer, the cash register and Mrs. Wright's purse and ran out of the store. (T.93-96)

"A little over $900" was in the register at this time. Mrs. Wright's purse contained, among other things, mail and family photographs. (T.97)

Mrs. Wright identified the defendant, James Michael Strickland, as the assailant who was "yelling for the younger guy" to shoot her. (T.101-02)

After the robbers left the store, Mrs. Wright called 911. (T.113) Officer Donnie Elkin of the Columbus Police Department was on duty when he heard the report of the armed robbery and the description of the suspect vehicle. Officer Elkin "started heading in the general direction of the Penny Ridge Grocery ... " Two or three minutes later, he observed a vehicle matching the description provided. He "made a U-turn" and turned on his blue lights. A t that point, he "saw the cash register come out the drier's side window." While Officer Elkin "continued trying to stop the car," he "announced ... over" his "radio so that other units ... would come and secure the cash register." (T.116-19)

After the car failed to stop, Officer Elkin turned on the siren and advised his other units "that they were not yielding." After a relatively high-speed chase down a curvy road, Officer Elkin pursued the car back toward Columbus on Highway 45. Another officer utilized the "Stringer spike system" to try to stop the vehicle. Finally, having been chased essentially "all over Lowndes County," the suspect car was stopped. (T.120-26)

Officer Rhonda Sanders of the Columbus Police Department recovered "the bottom of the cash register" from "the middle of the street." (T.129-32) While processing the

car, Lowndes County Deputy Sheriff Kevin Petrie found a six back of Bud Light, "bottle beer"; some mail and photographs of Mrs. Wright's family. (T.141-44)

Strickland testified that he and Jonathan Burnett went into the Penny Ridge Grocery to buy beer. When the cashier asked to see his identification, Strickland "went back and forth" with her. Strickland grabbed her purse, and he and Mrs. Wright struggled over it. Burnett slapped her and pulled a gun from his pocket. Strickland claimed that he "had no idea he was going to do that." Burnett tried in vain to open the cash register. He finally threw it on the floor, picked it up and took it out of the store. (T.179-81)

SUMMARY OF THE ARGUMENT

No error has been shown in the trial court's determination that the defense failed to establish a prima facie case of discrimination in the prosecution's exercise of its peremptory challenges to the veniremen. Strickland's first proposition lacks merit.

Furthermore, the trial court did not abuse its discretion in allowing the state to impeach Strickland with evidence of a prior conviction. Strickland's second issue has no merit.

Finally, the court did not err in refusing the lesser-included offense instruction, which had no basis in the evidence. Strickland's third proposition should be denied.

PROPOSITION ONE:

NO ERROR HAS BEEN SHOWN IN THE COURT'S DETERMINATION THAT THE DEFENSE FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION IN THE PROSECUTION'S EXERCISE OF ITS PEREMPTORY CHALLENGES

After the parties had exercised their peremptory challenges to the jury panel, defense counsel moved the court "to have a Batson based on those six jurors." A brief discussion ensued. The prosecutor then stated, "[t]here were 11 strikes if I'm not mistaken

exercised by the State. Four of them were exercised on members of the white race. Seven of them were exercised on members of the black race." (T.68-69) The court then made this ruling:

> Court is of the opinion that that is not sufficient to show that the State in exercising its peremptory challenges has exercised the peremptories in a racial manner.
>
> * * * * *
>
> The Court finds that the defendant has not made a prima facie case that the State has exercised its peremptory challenges in a racial manner to exclude members of any particular class.
>
> (T.69)

At the outset, the state submits the court's ruling is to be afforded great deference. *Smith v. State*, 835 So.2d 927, 941 (Miss.2002). Indeed, it is presumed to be correct and will not be reversed absent a showing that it is against the overwhelming weight of the evidence or clearly erroneous. *Chandler v. State*, ___ So.2d ___ (Miss. App., decided October 24, 2006) (2006 WL 3008140); *Johnson v. State*, 721 So.2d 650, 655 (Miss. App.1998).

Strickland has not attempted to show error in the court's finding that the defense, as the party challenging the strikes, had failed to sustain its burden of establishing a *prima facie* case of purposeful discrimination. See *Carter v. State*, 799 So.2d 40, 46 (Miss.2001). Rather, the essence of his argument is that the court the court erred in failing to require the state to articulate racially neutral reasons for its strikes against black veniremen. This point begs the question inasmuch it is the establishment of a *prima facie* case which triggers the requirement of such articulation. *Carter*, 799 So.2d at 46.

Strickland plainly has failed to sustain his burden of showing that the trial court's ruling on this issue was against the overwhelming weight of the evidence or clearly erroneous. Accordingly, his first proposition should be denied.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO IMPEACH STRICKLAND WITH EVIDENCE OF A PRIOR CONVICTION

Proceeding pursuant to M.R.E. 609,[1] the state sought to impeach Strickland with

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[1]That rule is set out in pertinent part below:

> **RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME**
>
> **(a) General Rule. For the purpose of attacking the credibility of a witness,(1) evidence that (A) a nonparty witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and (B) a party has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the party; and(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.**
>
> **(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. ...**

evidence that he had been convicted on March 5, 1993, of theft, and sentenced to serve a term of 15 years in the custody of the Alabama Department of Corrections. (T.152) The defense objected on the ground that this conviction was more than ten years old. (T.154) In response, the state pointed out that the defendant could have been brought to trial well within this ten-year limit had he not "failed to show up for Court."[2] (T.155-56)

The prosecutor went on to argue that analysis of the *Peterson* factors[3] favored

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[2]The prosecutor elaborated,

> [I]t seems to be a bit of an injustice that the defendant can fail to show up, run, hide out until the period of time in which his ten-year time limit has expired, and then show up finally when he's apprehended and say State can't use these convictions because it's longer than ten years.
>
> (T.156)

[3]Those factors are set out below:

> (1) The impeachment value of the prior crime.
>
> (2) The point in time of the conviction and the witness's subsequent history.
>
> (3) The similarity between the past crime and the charged crime.
>
> (4) The importance of the defendant's testimony.
>
> (5) The centrality of the credibility issue.

Peterson v. State, 518 So.2d 632, 636 (Miss.1987), cited in *Adams v. State*, 772 So.2d 1010, 1022 (Miss.2000).

admissibility of the conviction:

> It is a theft of property, which I assume we would call a larceny, which the impeachment value for that crime is high. The defendant's conduct since that particular case happened in 1993 has been poor. He has been indicted for armed robbery, skipped bond, been on the run until he was apprehended I believe sometime in 2003. The impeachment value is high. The centrality of his testimony should be elect to testify is very high as well. Right now it's undisputed evidence that he was an aider and an abettor to an armed robbery. And essentially it's going to be a believability contest should he elect to testify between this defendant and Ms. Amy Wright. Therefore, his credibility is directly at issue.
>
> I believe when the Peterson factors are weighed, the probative value of allowing this particular conviction in outweighs any prejudicial effect of the defendant. ...
> (T.157)

Ultimately, the court made these findings and conclusions:

> I have, in fact, gone over the Peterson factors; that is, the impeachment value of the prior crime, the point in time between the past crime and the charged crime, the importance of his testimony, and the centrality of the credibility issue. **I find that all of these factors weigh in favor of allowing impeachment with this particular crime ...**
>
> Having found that the State will be allowed to impeach him by the prior conviction in exhibit C for ID, I must now consider whether Rule 403 comes into play. Rule 403 is the balancing of relevant evidence on the grounds of prejudice, confusion, or waste of time. Rule 403 states: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
>
> The Court finds that it is relevant and will not be excluded because I do find that the probative value is not substantially outweighed by the danger of unfair prejudice.
>
> (emphasis added) (T.161-62)

The trial court carefully analyzed each *Peterson* factor and concluded that all of the factors weighed in favor of allowing impeachment with this conviction. The court went on to find that pursuant to M.R.E. 403 These findings are supported by the record. Strickland has failed to show that the trial court abused its discretion in admitting this conviction. See *Henderson v. State*, 641 So.2d 1184, 1186 (Miss.1994), cited in *Adams*, 772 So.2d at 1022. Accordingly, Strickland's second proposition should be denied.

PROPOSITION THREE:

THE TRIAL COURT DID NOT ERR IN REFUSING INSTRUCTION D-2

Strickland argues finally that the trial court erred in refusing Instruction D-2, set out below:

> THE COURT INSTRUCTS THE JURY that if you find from the evidence, beyond a reasonable doubt, that the Defendant, JAMES MICHAEL STRICKLAND, did not commit the crime of armed robbery on May 10, 2000 at the Penny Ridge Grocery, but instead you find beyond a reasonable doubt that he did feloniously take the personal property of Amy Wright, to-wit her purse, in her presence and off her person and against her will, by violence to her person or by putting her in fear of some immediate injury to her person, you shall find him guilty of the lesser included offense of robbery.
>
> (C.P.122)

When this instruction was tendered, the prosecution objected, stating its position as follows:

> I don't believe there's any basis in the evidence. **The undisputed testimony is that there was a gun that was used, and that there was property that was taken after the display of that weapon. I believe there's no basis in the evidence.**
>
> * * * * *
>
> May I point out, Your Honor, that he is not charged in

> this indictment with taking her purse. The robbery of the purse as I see it as set forth in this instruction is not necessarily a lesser included offense. It is a separate crime. He's charged in the indictment from taking a cash register containing money and beer. He's not charged with taking her purse by putting her in fear of some immediate injury. But, even if it is a lesser included offense, I would object very strongly to the lesser included offense being given– instruction being given. **I believe there's no basis in the evidence. It is undisputed from Ms. Wright and from this defendant that there was a weapon that was displayed; that after the display of that weapon, the cash register containing money and beer were taken.**
>
> (emphasis added) (T.204-05)

The court found that the defendant had admitted that a gun was used in the robbery. The court went on to state, "If a defendant participated in any regard even in the aspiration of the property, it would be armed robbery and cannot be robbery." (T.205) Finally, the court issued this conclusion and ruling:

> **The taking of this purse and the cash register occurred after the display of the weapon, after this defendant testified that he had seen the weapon and saw that it was drawn by his confederate.** He testifies that prior to that, that he had no knowledge that the man was going to pull a weapon and use it for a robbery. **However, by his own testimony, he joined it once it was.**
>
> I agree with the State. S-2 [sic] is refused. There is no evidence in the record that will justify the granting of a lesser included.
>
> (emphasis added) (T.206-07)

"In numerous cases this Court has not hesitated to find that a lesser included instruction was not required where the instruction was not supported by the evidence. ... Such instructions should not be granted indiscriminately. " *Wilson v. State*, 639 So.2d 1326, 1329 (Miss.1994). The defendant is not entitled to a lesser-included offense

instruction unless there is an evidentiary basis that would permit a rational jury to find him not guilty of the charged offense but guilty of the lesser crime. *Chandler v. State*, 946 So.2d 355, 360 (Miss.2006)

The state submits the trial court, applying the appropriate legal standard, properly analyzed this issue and determined that no evidentiary basis existed for Instruction D-2. The defendant himself testified that a gun was used in this robbery. Thus, "there was no affirmative evidence produced to even insinuate that the robber did not brandish a gun." *King v. State*, 772 So.2d 1076, 1078 (Miss. App. 2000).

"Participation in an armed robbery is sufficient to make one a principal regardless of whether the participant was the person holding the weapon." *Harrington v. State*, 859 So.2d 1054, 1057 (Miss. App. 2003), citing *Moore v. State*, 493 So.2d 1295, 1298-99 (Miss.1986). Taken in the light most favorable to the defense, the evidence shows that a deadly weapon was displayed and that the defendant participated in the robbery. As the trial court observed, Strickland's participation in this crime made him a principal, regardless of his protestation that he did not know the armed robbery was to occur. *Smothers v. State*, 761 So.2d 887, 890 (Miss. App. 2000) . Accordingly, the lesser-included offense instruction was properly refused. *Harrington*, 859 So.2d at 1057; *King*, 772 So.2d at 1078.

For these reasons, Strickland's final proposition lacks merit.

CONCLUSION

The state respectfully submits the arguments presented by Strickland are without merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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 29th day of June, 2007.

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