IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LACORY HARRIS — APPELLANT

VS. — NO. 2006-KA-1695-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 Hinds County, First Judicial District, did indict defendant, Lacory Harris, with two counts of aggravated assault as an habitual offender in violation of *Miss. Code Ann.* §§ 99-19-81 & 97-3-7. (Indictment & amendment, c.p. 5, 11-13). After a trial by jury, Judge Winston L. Kidd presiding, the jury found defendant guilty on both counts beyond a reasonable doubt. (Jury verdicts, c.p.80-81). The trial court sentenced defendant to twenty years on each count concurrent to each other and consecutive to one of his many previous felony convictions.

After denial of post-trial motions and judicial leave to file out-of-time appeal same was duly noticed.

STATEMENT OF FACTS

This case is about one young lady, Shantanner Montgomery, attempting to break up with the defendant, Lacory Harris.

On September the 14th of 2001, she made it painfully clear to the defendant that she no longer wanted to be with him. They had agreed on that sometime before that but he still called her on September 14th while she was at work at Ryan's and told her that I'm going to kill you. She paid him no mind. She was through with him. He was out of her life.

On the morning of September 16th, 2001, a Sunday morning, the defendant showed up at her house. She said, "How did you get here?" "Somebody dropped me off." And she said, "Well, look, I'm going to take you home. I don't want you here." So she gets her 15-month-old child Kennedy and puts her in the back seat of the car and they get in the car and she's taking him home. They're on 220 northbound.

According to Ms. Montgomery, he was playing with the child in the back seat playing patty-cake (it's not his child). And all of a sudden he stops and turns to her and he says: "I'm going to hurt you in the worst way. I'm going to kill you."

At that time he grabbed the steering wheel and he jerks it and causes the car to flipover five or six times down an embankment. Kennedy Montgomery, the 15-month-old child, was thrown from the car and one of her legs was severed. Her right foot was crushed and also severed. The doctors were able to reattach the foot but the leg was lost. Ms. Montgomery had both of her arms broken.

After the car stopped rolling down the embankment, the defendant Lacory Harris jumps out of the car and runs through the woods not to be seen again. He didn't call 911. He didn't try to help anybody. He ran and left.

The evidence will show that several concerned citizens stopped that saw the accident. Sherry Green was following the vehicle when the accident happened and she will testify that she saw the car jerk and roll down the embankment and that's what led to the wreck, the jerking of the car.

She'll say that she stopped and she just blessed that she was a licensed practical nurse. She saw the baby and she saw the baby losing blood and got a scarf from another bystander and applied a tourniquet to stop the bleeding.

[Edited from Prosecution's opening statement, tr. 81, *et seq.*]

The jury heard the testimony and saw the evidence of defendant's actions and found him guilty of both counts of aggravated assault.

SUMMARY OF THE ARGUMENT

Issue I.

DEMONSTRATIVE EVIDENCE OF INJURY IS ALLOWABLE AND ADMISSIBLE.

Issue II.

THE STATEMENT WERE ADMISSIBLE AS EXCITED UTTERANCES OR PRESENCE SENSE IMPRESSIONS.

Issue III.

DEFENDANT HAD TWO CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

Issue IV.

THE TRIAL COURT WAS CORRECT IN DENYING POST-TRIAL MOTIONS BASED ON THE EVIDENCE. THERE WAS AMPLE, CREDIBLE, CORROBORATED, ADMISSIBLE EVIDENCE TO SUPPORT BOTH CONVICTIONS. NO DOUBT.

ARGUMENT

Issue I.

DEMONSTRATIVE EVIDENCE OF INJURY IS ALLOWABLE AND ADMISSIBLE.

Appellate counsel asserts it was error to allow the State to show the injuries the girl suffered – (the child was the subject of one of the counts of aggravated assault). The standard of review for such an evidentiary question, is:

> ¶ 17. As with all evidentiary issues, our standard for reviewing a trial judge's admission or exclusion of evidence is one of abuse of discretion. Shaw v. State, 915 So.2d 442, 445 (Miss.2005). "A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling." Id. at 445 (quoting Jefferson v. State, 818 So.2d 1099, 1104 (Miss.2002)).

Taggart v. State, 2007 WL 1631225 (Miss. 2007).

Further, with regard to demonstrative evidence or injury in cases where such proof is required the review courts have held:

> The admission or exclusion of evidence at trial is addressed to the sound discretion of the judge.... There is no contention that the pictures do not accurately reflect Holmes and his injuries at the time the photographs were taken. There can be no doubt but that they prejudiced the defendant's case in the sense that they were detrimental, but they showed a condition which Holmes was entitled to either describe to the jury in words or by pictures, or a combination of the two. This demonstrative evidence aided the jury in its evaluation of the injuries and pain suffered. It cannot be said that they were introduced in evidence for the sole purpose of inflaming the minds of the jury; they served the proper purpose of bringing vividly to the jurors the details of tremendous injuries. The pictures were certainly admissible as a matter of discretion by the trial judge, if not as a matter of right. We find no error.

Trapp v. Cayson, 471 So.2d 375, 382 (Miss. 1985).

Without belaboring the point the State is entitled, – no, the State is required to offer evidence of serious bodily injury.

> ¶ 15. . . . if the indictment alleges an actual bodily injury to the victim rather than a mere attempt to do bodily injury, there must be some proof that the victim suffered some actual injury, or at least some physical pain as a result of the attack. *Murrell v. State*, 655 So.2d 881, 884-85 (Miss.1995).

Cleveland v. State, 801 So.2d 812 (Miss.App. 2001).

The State was required to offer proof of injury. What better method than to have the victim present. Further, being a victim the child had the constitutional and statutory right to be present. Mississippi Constitution Sec 26A(1) & *Miss. Code Ann.* § 99-43-21. Additionally, the mother of the victim could assert the rights on behalf of her child, or, the prosecutor had the statutory authority to have the victim present.

This issue is without merit and no relief should be granted.

Issue II.

THE STATEMENT WERE ADMISSIBLE AS EXCITED UTTERANCES OR PRESENCE SENSE IMPRESSIONS.

First the State would look at the time frame when one of the victim's was making the statements. The defendant had fled the scene and DID NOT call for help or assistance. Moreover, defendant didn't even offer his own assistance... be that as it may. In summary the State will not even respond to the ludicrous assertion of counsel that one of the victims as she law battered and broken with her child's leg severed and her baby bleeding had time to calmly assess her life and fabricate a story. Ridiculous. SHE WAS HYSTERICAL. As a professional nurse testified, twice. Tr. 126, 127.

It was, without doubt an excited utterance.

> ¶ 8. Mississippi Rules of Evidence Rule 803 provides that certain out-of-court statements will not be excluded as hearsay regardless of whether the declarant is available to testify. The present sense impression exception provides that an out-of-court statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter" will not be excluded by the hearsay rule. M.R.E. 803(1). The excited utterance exception provides that an out-of-court statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" will also not be excluded by the hearsay rule. M.R.E. 803(2).
>
> *Wheeler v. State*, 943 So.2d 106 (Miss.App. 2006).

The judge was correctly in his ruling pre-trial and at trial based upon the testimony. No error here.

Issue III.

DEFENDANT HAD TWO CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

Counsel for defendant cites the appropriate standard and law regarding ineffective assistance of counsel.

A look to the trial record shows defendant represented by two counsel, that by law are presumptively Constitutionally effective.

Appellate counsel would now try and assert otherwise, to wit:

Sub-issue A: Both Trial Counsel failed to subpoena phone records. The decision of trial counsel on witnesses to call or evidence to submit or subpoenas to issues is trial strategy and *presumed* reasonable. *Fair v. State*, 950 So.2d 1108 (¶ 8) (Miss.App. 2007). It is worth noting that, even now, counsel assumes the phone records would show there was a phone call. Or, they would show there was no phone call and defendant was a liar. Hmmmm, let's see . . . get the records that might prove our client's story was fabricated and a he's a liar and to discover same to the State... Oh, yeah it was strategy,... and it was effective.

Next, failure to object to leading questions. Such is part of trial strategy. Plus, just for edification of appellate counsel, most of the questions claimed as 'leading' were not. *Ramsey v. State*, 2006 WL 2947847 (Miss.App. 2006). Oh, and to claim defendant had a 'tainted past'& 'tainted history' ... well, come on, read his testimony... he cleared that up for the jury real well. That is to say, there was absolutely no prejudice.

Defendant has not met either prong of *Strickland*. Consequently, no relief is warranted

on this allegation of error.

Issue IV.

THE TRIAL COURT WAS CORRECT IN DENYING POST-TRIAL MOTIONS BASED ON THE EVIDENCE. THERE WAS AMPLE, CREDIBLE, CORROBORATED, ADMISSIBLE EVIDENCE TO SUPPORT BOTH CONVICTIONS. NO DOUBT.

¶ 8. It is well settled that the jury is the sole arbiter for matters involving the weight and credibility to be accorded the evidence. Spicer v. State, 921 So.2d 292, 311(¶ 38) (Miss.2006). We will reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that "reasonable and fair-minded jurors could only find the accused not guilty." Id.

¶ 9. When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. Herring v. State, 691 So.2d 948, 957 (Miss.1997). We have stated that, on a motion for a new trial, the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. Amiker v. Drugs For Less, Inc., 796 So.2d 942, 947(¶ 18) (Miss.2000). The evidence should be weighed in the light most favorable to the verdict. Herring, 691 So.2d at 957.

White v. State, 2007 WL 1675089 (Miss.App. 2007).

The transcript is replete with consistent testimony, all legally admissible. Every element of both offenses was proved. The jury heard and the jury decided. Remembering they also heard his testimony. He got all the evidence he wanted before the jury – and more.

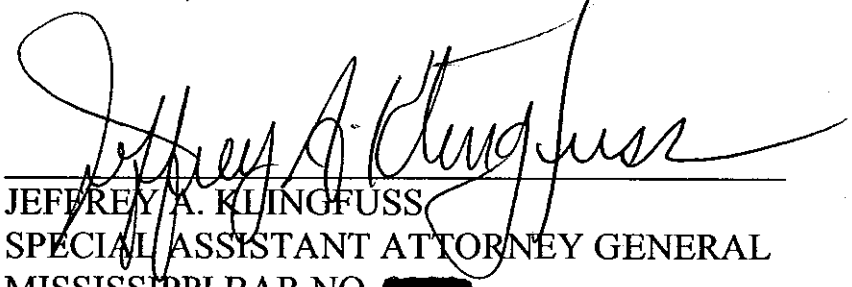
He's guilty and no relief should be granted on this allegation of error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdicts and sentences of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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 22nd day of June, 2007.

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