IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NANCY BYRD
WENDY GAYLE BYRD MILLER — APPELLANT

VS. — NO. 2006-KA-2044-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 Kemper County indicted defendants, Nancy Byrd &Wendy Gayle (Gail) Byrd Miller were each charged with aggravated assault and Wendy with an additional charge of felon in possession of a firearm. (Indictment, cp.1-3). After a trial by jury, Judge Lester F. Williamson, Jr., presiding, the jury found defendants guilty on all counts. (C.p. 60 & 61). Wendy was sentenced to fifteen years, 12 suspended & five years post release supervision on for aggravated assault with an additional 3 years, 2 suspended, 5 years post-release supervision on the possession of firearm charge (time consecutive, supervision concurrent). Nancy was sentenced to fifteen years, 12 suspended & five years post release supervision on for aggravated

assault. In addition both defendants were assessed fines, fees, restitution and court costs. (C.p.64-79).

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

STATEMENT OF FACTS

Oh, my...where to begin.... to start we have an on-going divorce, angry wife and daughter. Angry wife and daughter drive to trailer of husband/father. Words ensue. Angry words. There is a truck involved, a house trailer, a pocket knife, an axe handle, six-shooter revolver (.22 caliber), a convicted felon (daughter) and a hammer (20 ounce, long handle). There is also an unrelated female bystander and her two year old son present in the aforementioned trailer.

Push came to shove came to window breaking, hiding, falling, throwing, shooting, missing, knife pulled, falling, axe-handle throwing, shooting, hit by bullet, playing dead, 911 calls, deputies arriving...arrest, trial and convictions.

Yes, it is that simple and yet, that confusing...

SUMMARY OF THE ARGUMENT

I.

THE CROSS-EXAMINATION OF DEFENDANT WAS WELL WITHIN LIMITS TO SHOW RECENT FABRICATION.

Issue II.

THERE WAS NO IMPROPER COMMENT ON DEFENDANTS POST-ARREST SILENCE.

Issue III.

THERE WAS AMPLE LEGALLY SUFFICIENT CREDIBLE EVIDENCE TO SUPPORT ALL THE GUILTY VERDICTS AS TO EACH DEFENDANT.

ARGUMENT

Issue I.

THE CROSS-EXAMINATION OF DEFENDANT WAS WELL WITHIN LIMITS TO SHOW RECENT FABRICATION.

In this initial allegation of error counsel avers the prosecutor improperly cross-examined defendant (Wendy) when she testified and supposedly commented on the same issue during closing.

The later first. There was no objection to the argument during closing so it is procedurally barred from consideration.

> Notwithstanding the broad scope of permissible argument available during closing argument, trial counsel has an obligation, if he believes the prosecutor has violated the wide boundaries afforded counsel during closing argument, "to promptly make objections and insist upon a ruling by the trial court." Johnson v. State, 477 So.2d 196, 209-10 (Miss.1985). Furthermore, as a procedural matter, "contemporaneous objections 'must be made to allegedly prejudicial comments during closing argument or the point is waived.' " Dunaway v. State, 551 So.2d 162, 164 (Miss.1989) (citations omitted). Accordingly, Strahan is procedurally barred from raising this issue on appeal.

Strahan v. State, 955 So.2d 968 (Miss.App. 2007).

Now, to defendant's main complaint specifically the prosecutor commenting and cross-examining the defendant (Wendy) about her attorney's opening statement. Trial counsel objected and the court overruled the objection with a brief comment. Tr. 288-89.

> ¶ 12. . . . "The new-found relevance of this evidence is that it serves to impeach the witness's credibility by demonstrating his untruthfulness on one point while on the stand, which can then impeach his credibility as to other matters under the doctrine of *falsus in uno, falsus in omnibus* -a different proposition from the theory supporting Rule 609, which is that the previous criminal activity itself suggests the untrustworthiness of the sworn word of the witness." Sanders v. State, 755 So.2d 1256, 1258(¶ 7) (Miss.Ct.App.2000).
>
> *Harris v. State*, 892 So.2d 830 (Miss.App. 2004).

Basically, the prosecutor was trying to determine what defendant had told her attorney that was the basis for his opening argument. Now, on the stand the prosecutor perceived a different version. Such is proper cross-examination and not prejudicial. The jury heard both the opening and the cross of defendant Wendy and could draw their on conclusion based upon the evidence that came from her (the defendant's) mouth.

There is no error here and no relief should be granted.

Issue II.

THERE WAS NO IMPROPER COMMENT ON DEFENDANTS POST-ARREST SILENCE.

At trial during the re-direct examination of the investigating office the prosecutor tried to clarify about the people at the scene the from whom the officer got statements. The prosecutor used the word 'they' (as there were several people present and not all defendants). Trial counsel objected, preemptively, and the prosecutor asked the question as allowed by the court and moved on. Tr. 238-39.

It was not a direct comment on defendant's silence at the scene. It was an investigating officer trying to gather information. In response to cross-examination testimony the prosecutor was trying to show the officers did, in fact, try and get information and facts from several sources.

This similar situation has been seen before:

> ¶20. We find Sacus's argument unpersuasive. The motion in limine properly concerned only the invocation of Sacus's right to remain silent, not his refusal to write or record a statement before he invoked this right. A refusal to write or record a statement which is ultimately given to police orally is not equivalent to an invocation of one's Fifth Amendment rights. During trial, the State's examination of Officer Shumpert properly stopped at the point of the interview where Sacus invoked his right to remain silent and went no further. Officer Shumpert's testimony about Sacus's refusal to write or record a statement was merely a part of the preceding police interview. Sacus waived his privilege to remain silent regarding his refusal to make a written or recorded statement. He gave an oral statement to police, not to mention testifying at trial. Additionally, since Sacus gave an oral statement to

> police, we fail to understand how testimony of refusal to write or record a statement would prejudice him further. Additionally, this refusal is probative as to why there is no handwritten or recorded statement by Sacus in the record.
>
> *Sacus v. State,* 956 So.2d 329 (Miss.App. 2007).

It is the succinct position of the State there was no comment on defendant's post-arrest silence and no error occurred at trial.

Consequently, no relief should be granted on this allegation of error as supported by the rationale of *Sacus.*

Issue III.

THERE WAS AMPLE LEGALLY SUFFICIENT CREDIBLE EVIDENCE TO SUPPORT ALL THE GUILTY VERDICTS AS TO EACH DEFENDANT.

Looking to the relatively short transcript there is ample evidence that both Wendy and Nancy did attempt (Nancy actually did) shot Ernest. Well, Wendy tried but missed and because Wendy had the gun in her hand and had previously been convicted of a felony she was guilty of the additional charge. There you have it: one actual assault (Nancy), one attempted assault (Wendy) and felon in possession of firearm (Wendy).

Simple actually. Now, appellate counsel avers there was no evidence of motive.

> ¶ 6. . . . Evidence of a motive for a particular criminal act may often prove to be extremely persuasive, but motive is not an essential element of the crime of assault. The lack of an explanation for Page's actions does not, of itself, fatally undercut the credibility of Hendrix as a prosecution witness. Generally, issues of witness credibility are submitted to the jury, sitting as finders of fact, for resolution. Billiot v. State, 454 So.2d 445, 463 (Miss.1984). On appeal, those findings are entitled to substantial deference. Id. It has long been established that the testimony of only one eyewitness, if believed to be credible by the jury, is sufficient evidence to sustain a conviction. Holmes v. State, 660 So.2d 1225, 1227 (Miss.1995); Witt v. State, 159 Miss. 478, 482, 132 So. 338, 339 (1931).

Page v. State, 843 So.2d 96 (Miss.App. 2003).

As to the inconsistencies (relatively few, or of no real consequence) the jury heard them all and made their decision.

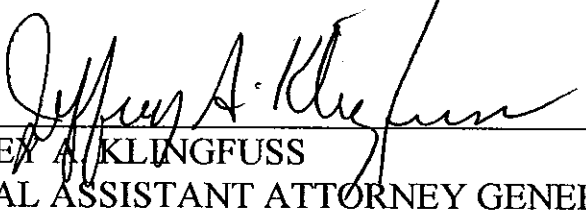
Accordingly, there is no error here and abundant evidence to support the jury's verdicts.

CONCLUSION

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

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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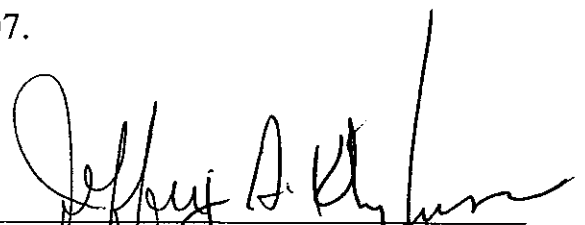
This the 17th day of September, 2007.



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