IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JERRY DEMETRIUS DELOACH APPELLANT

VS. NO. 2006-KA-2103-COA

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2006-KA-2103-COA**

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STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Lowndes County, Mississippi, in which the Appellant, Jerry D. Deloach, was convicted and sentenced for the felony crime of **BURGLARY OF A CHURCH**, Miss. Code Ann. § 97-17-33 (1972).

STATEMENT OF FACTS

On November 29, 2006, Jerry D. Deloach (Deloach) was found guilty by a jury and a judgement of conviction for the crime of **BURGLARY OF A CHURCH**, Miss. Code Ann. § 97-17-33 (1972), was entered against him, resulting in a sentence of fourteen years (14).

After church service, Maxine Hall, Pastor of Full Gospel Ministry at 1509 19th Street North, Columbus, Mississippi, gave two hundred dollars ($200.00) to Deloach so that he could purchase a car for the purpose of his personal transportation to and from two jobs. That following Monday, upon Pastor Hall's return to Full Gospel Ministry, the church was in shambles. Two of the Church's checks were found. They were made out to Jerry Deloach. There was no reason for the Church to

be issuing any check to Deloach. (T. 88 - 90).

SUMMARY OF THE ARGUMENT

I.

THE JURY INSTRUCTIONS ISSUED BY THE TRIAL COURT WERE PROPER.

Smith v. State, 907 So.2d 292, 300 (Miss.,2005) holds that a jury instruction on a lesser-included offense is to be given only when a defendant points to evidence in the record from which a jury could reasonably find him not guilty of the crime with which he was charged and at the same time find him guilty of the lesser included offense.

The Mississippi Supreme Court held in Smith v. State, 835 So.2d 927, 934 (Miss. 2002) that when considering a challenge to a jury instruction on appeal, the Court does not review jury instructions in isolation; rather, it reads them as a whole to determine if the jury was properly instructed. Dobbs v. State, 950 So.2d 1029, 1033 (Miss. 2006) holds that when read as a whole, if the jury instructions fairly announce the law of the case and create no injustice, then no reversible error will be found.

II.

THE APPELLANT HAD EFFECTIVE ASSISTANCE OF COUNSEL.

Garibaldi v. State, 840 So.2d 793, 796 (Miss. App. 2003) held that each case involving claim of ineffective assistance of counsel should be decided based on the totality of the circumstances, that is, by looking to the evidence in the entire record; the standard of performance used is whether counsel provided reasonably effective assistance and that for purposes of claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct.

THE ARGUMENT

PROPOSITION I.

THE JURY INSTRUCTIONS ISSUED BY THE TRIAL COURT WERE PROPER.

Essentially Appellant's counsel states that a jury instruction should have been issued for vandalism. (Appellant Brief 5). The State contends that Deloach was properly convicted for burglary of a church.

The Mississippi Supreme Court held in Smith v. State, 835 So.2d 927, 934 (Miss. 2002), Kelly v. State, 493 So.2d 356, 359 (Miss. 1986), and in Norman v. State, 385 So.2d 1298, 1303 (Miss. 1980) that when considering a challenge to a jury instruction on appeal, the Court does not review jury instructions in isolation; rather, it reads them as a whole to determine if the jury was properly instructed. Dobbs v. State, 950 So.2d 1029, 1033 (Miss. 2006) holds that when read as a whole, if the jury instructions fairly announce the law of the case and create no injustice, then no reversible error will be found.

Furthermore, Smith v. State, 907 So.2d 292, 300 (Miss.,2005) holds that a jury instruction on a lesser-included offense is to be given only when a defendant points to evidence in the record from which a jury could reasonably find him not guilty of the crime with which he was charged and at the same time find him guilty of the lesser included offense.

Brassfield v. State, 905 So.2d 754 (Miss. App. 2004) holds that instructions should clearly inform the jury of elements of crimes and State's burden of proof, and there was no risk that jury was confused about elements of crime necessary to convict.

Reading the jury instructions as a whole, all elements to the crime of burglary of a church are present, properly stated, and were proved by the State.

It is the State's contention that the trial court's refusal to give requested instructions was not

reversible error. The jury was properly instructed. Furthermore, no where in the record does it show that jury was confused about elements of crime necessary to convict Roberts. Brassfield v. State, 905 So.2d 754 (Miss. App. 2004).

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

PROPOSITION II.

THE APPELLANT HAD EFFECTIVE ASSISTANCE OF COUNSEL.

Garibaldi v. State, 840 So.2d 793, 796 (Miss. App. 2003) held that each case involving claim of ineffective assistance of counsel should be decided based on the totality of the circumstances, that is, by looking to the evidence in the entire record; the standard of performance used is whether counsel provided reasonably effective assistance and that for purposes of claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct. The record shows Appellant's counsel was well within the Garibaldi competency requirements.

Furthermore, this Court is charged with a review of the totality of counsel's performance and the demonstration of resulting prejudice. Stringer v. State, 627 So.2d 326, 329 (Miss. 1993). Mere allegations are insufficient.

In Stevenson v. State, 798 So.2d 599, 601 (Miss. App. 2001), the Court set the standard for the determination of ineffective assistance of counsel as follows:

> The standard for determining whether or not a defendant was afforded effective assistance of counsel was set out in the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052,80 L. Ed. 2d 674(1984). Before counsel can be determined to have been ineffective, it must be shown (1) that counsel's performance was deficient, and (2) that the defendant was prejudiced by his counsel's mistakes... Under Strickland, there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. To overcome this presumption, "the defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result would have

been different. A reasonable probability is sufficient to undermine confidence in the outcome. Strickland. 446 U.S. at 684, 104 S. Ct. at 2068.
Id., at 154.

There is no indication in the record other than the allegations of the Appellant that performance of the counsel fell below the standards as defined by Strickland. In fact the record supports the exact opposite.

On appeal this Court must confine itself to what actually appears in the record, and unless provided otherwise by the record, the trial court will be presumed correct. Shelton v. Kindred, 279 So.2d 642, 643 (Miss. 1973). The Appellant has not presented a claim procedurally alive "substantially showing denial of a state or federal right" and as is apparent from the face of the motion and from the prior proceedings, he was not entitled to any relief. Horton v. State, 584 So.2d 764, 767 (1991).

Clearly, judging on the totality of the performance of counsel that there was no merit to the Appellant's claim that he was denied effective assistance of counsel. Counsel is required to be competent and not flawless.

The substantive principles of law relative to this issue are found in the familiar case of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was not only deficient, but that said deficient performance prejudiced the defense. The State submits that it simply cannot be maintained from the record in this case that counsel's assistance was ineffective, and that said ineffective assistance should have been apparent to the trial court, which would then have had the duty to declare a mistrial or to order a new trial *sua sponte.* The aforementioned has not been shown in this record.

As counsel opposite points out here, this case has a great deal to do with the confession of

Deloach. (Appellate Brief 8). The State agrees with the analysis of the learned trial judge as he found that the motion to suppress the confession of Deloach was not well taken:

> Agee v. State, 185 So.2d 671, 676 (Miss 1966). The State has met its burden where coercion is alleged. What the law requires is that the law enforcement officers that were present when the statement was given be called to the stand and that they be asked whether any coercive or coercion was used either threats, promises of non - prosecution, things such as that. There is apparently a video that also has been offered, but apparently it doesn't depict any promises to reduce the charges or drop the charges either if he signs this document. (T. 128 - 129).

The confession of Deloach of the burglary of the church was admitted. (Tr. 129). The jury heard the evidence and convicted Deloach of burglary of a church.

Nothing in the record evinces that Deloach's trial counsel was deficient or the outcome of case would have been different even with the Appellant's allegations and assertions.

This issue brought by the Appellant is therefore lacking in merit.

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 verdict and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deshun T. Martin, 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 25th day of June, 2007.

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