IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFFREY J. JACKSON — APPELLANT

VS. — NO. 2007-KA-0154-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 Bolivar County indicted defendant, Jeffrey J. Jackson in a multi-court indictment for Aggravated Assault (3 counts) and Murder in violation of *Miss. Code Ann.* §§ 97-3-7(2)(a) & 97-3-19. (Indictment, cp.1-2). After a trial by jury, Judge Kenneth L. Thomas, presiding, the jury found defendant guilty. (C.p.38). Defendant was sentenced to Life for the Murder, 15 years on two of the aggravated assaults 20 years on the other. The aggravated assault sentences run concurrent to each other and consecutive to the life sentence. (Sentence order, cp. 50-52).

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

STATEMENT OF FACTS

The statement of facts proffered by appellate counsel adequately outlines the variety of facts, evidence and testimony presented at trial.

SUMMARY OF THE ARGUMENT

I.

THE TRIAL COURT DID NOT ERROR IN GIVING THE JURY A FLIGHT INSTRUCTION.

II.

THERE WAS LEGALLY SUFFICIENT EVIDENCE TO SUPPORT ALL FOUR VERDICTS.

III.

A MANSLAUGHTER INSTRUCTION WAS NOT REQUIRED NOR REQUESTED.

IV.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERROR IN GIVING THE JURY A FLIGHT INSTRUCTION.

In this initial allegation of error appellate counsel avers it was error for the trial court to grant a flight instruction. (S-2, c.p. 36).

Interestingly, it would appear we have a case here of 'double flight' by this defendant. First, there is evidence in the transcript that after the shooting outside the Ventura Lounge defendant fled the scene in an effort to allude police. Second, defendant absented himself mid-trial of his charges. This evidence of double flight was of concern to the court – but as the trial judge noted... .the flight was unexplained. Tr. 164.

> ¶ 29. In determining whether error lies in the granting of jury instructions, the instructions must be read as a whole. Johnson v. State, 823 So.2d 582, 584(¶ 4) (Miss.Ct.App.2002). "When so read, if they fairly announce the law of the case and create no injustice, no reversible error will be found." Id.
>
> ¶ 30. Our supreme court has consistently held that "flight is admissible as evidence of consciousness of guilt." Fuselier v. State, 702 So.2d 388, 390(¶ 4) (Miss.1997) (citing Williams v. State, 667 So.2d 15, 23 (Miss.1996)). However, a flight instruction "is appropriate only where that flight is unexplained and somehow probative of guilt or guilty knowledge." Id. (quoting Reynolds v. State, 658 So.2d 852, 856 (Miss.1995)). Therefore, evidence of flight is inadmissable where there is an independent reason for the flight. Id. at 390-91(¶ 7).
>
> *Anderson v. State,* 2008 WL 4139384 (Miss.App. 2008).

Without belaboring the point there was evidence of flight of defendant from the scene after he fired multiple shots injuring three and killing one. Tr. 90. The reasons for the flight was never explained – even by an inference. Consequently, it is the succinct position there was an evidentiary basis for the giving of the flight instruction.

Now, appellate counsel, makes an attempted argument that there was evidence in the transcript that the defendant was being shot which was the reason for his retreat. However, a better reading of the transcript is that such statements were hearsay at best and contradicted by the testimony of eye-witnesses.

Consequently, the trial court after carefully balancing the evidence and applying the law did not err in the granting of the flight instruction.

II.

THERE WAS LEGALLY SUFFICIENT EVIDENCE TO SUPPORT ALL FOUR VERDICTS.

In this next allegation of error defendant seeks to challenge the evidence supporting all the verdicts.

Now, on appeal, defendant asserts that as to all four counts the evidence is too unreliable to support the conviction. Specifically, the description of the color of defendant's jacket and whether he was actually shooting. Also, as far as the metal detector, there was testimony elicited that they "...didn't know if the thing works or not." Tr. 34.

> ¶ 10. "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." Bush v. State, 895 So.2d 836, 844(¶ 18) (Miss.2005). The evidence is weighed in the light most favorable to the verdict. Id. The power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. Id. If the verdict is against the overwhelming weight of the evidence, the proper remedy is to grant a new trial. Id.
>
> Jackson v. State 969 So.2d 124, 127 (Miss.App.,2007)

In this case, we have evidence – direct eye witness -- that saw defendant shot. It is the position of the State where the witness knew the defendant by name, saw him shoot – it doesn't matter what defendant was wearing or if the witness even remember what he was wearing. Tr. 52.

Looking at all of the evidence, and all the evidence, testimony there was legally sufficient evidence of such character and nature to amply support each verdict. In fact, the trial court's overruling the motion for new trial did not sanction an unconscionable injustice.

No relief should be granted based on this allegation of error.

III.

A MANSLAUGHTER INSTRUCTION WAS NOT REQUIRED NOR REQUESTED.

In this case, trial counsel for defendant did NOT ask for a manslaughter instruction. Counsel pointedly explained his position and did not request a manslaughter instruction per defendant's directive. Tr. 162.

> ...This is not the sort of case in which we would relax our general rule that no error may be predicated upon the Court's refusal to give an instruction defense counsel never requested. See Carney v. State, 525 So.2d 776, 778 (Miss.1988); Cummins v. State, 515 So.2d 869, 872 (Miss.1987); Fairman v. State, 513 So.2d 910, 913 (Miss.1987); Wetz v. State, 503 So.2d 803, 809 (Miss.1987); Patterson v. State, 289 So.2d 685, 686 (Miss.1974).
>
> *Williams v. State,* 566 So.2d 469, 472 (Miss. 1990).

With the facts in the transcript the trial court cannot be held in error for doing what was requested. The defense did NOT want a manslaughter instruction.

This presents an interesting scenario. The State did not want one given, neither did defense. Had the court given such an instruction and had the jury found defendant guilty of manslaughter – defendant could now make the argument he would have been acquitted of Murder and was prejudiced by the giving of the manslaughter instruction.

Consequently, the trial court did not err and no relief should be granted on this claim of error.

IV.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

Lastly in a challenge to all four of his conviction defendant through appellate counsel asserts ineffective assistance of counsel for failing to object to testimony.

> ¶ 36. Mississippi "recognizes a strong but rebuttable presumption that counsel's conduct falls within a broad range of reasonable professional assistance." McQuarter v. State, 574 So.2d 685, 687 (Miss.1990) (citing Gilliard v. State, 462 So.2d 710, 714 (Miss.1985)). To overcome this presumption, the defendant "must show that there is a 'reasonable probability that, but for counsel's unprofessional errors,*142 the result of the proceedings would have been different.' " Handley v. State, 574 So.2d 671, 683 (Miss.1990) (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068). In addition to the presumption that counsel's conduct is reasonably professional, there is a presumption that counsel's decisions are strategic in nature. Leatherwood v. State, 473 So.2d 964, 969 (Miss.1985) (citing Murray v. Maggio, 736 F.2d 279, 282 (5th Cir.1984)). In sum, "counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy." Cole v. State, 666 So.2d 767, 777 (Miss.1995) (citing Murray v. Maggio, 736 F.2d 279 (5th Cir.1984)). Ratliff has failed to demonstrate the likelihood of a different outcome had counsel performed in a different manner; therefore, Ratliff's argument on this issue fails.
>
> *Ratliff v. State*, 906 So.2d 133 (Miss.App. 2004).

Counsel has made, and the reviewing courts of this State have reviewed this similar claim and not found error. *Anderson v. State,* 2008 WL 4139384 (¶¶24-27)(Miss.App. 2008)(petition for certiorari filed with Mississippi Supreme Court).

The State would argue the factual situation is similar and the rationale of the

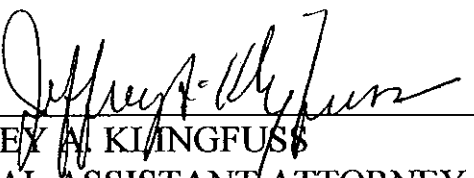
Court of Appeals as expressed in *Ratliff* is legally supported. Consequently, no relief should be granted on this allegation of error.

CONCLUSION

Based on the transcript, exhibits and testimony presented at trial the State would ask that no relief be granted, the verdict of the jury and the sentence of the trial court affirmed.

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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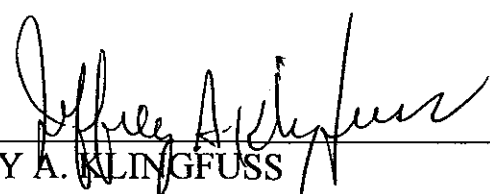
This the 19th day of December, 2008.



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