IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MIGUEL D. MCCALLUM — APPELLANT

V. — NO. 2007-KA-0992-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Miguel D. McCallum, Appellant
3. Honorable Jon M. Weathers, District Attorney
4. Honorable Robert Helfrich, Circuit Court Judge

This the 20th day of December, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE ISSUES

I. THE TRIAL COURT ERRED IN DENY MIGUEL'S MOTION FOR A NEW TRIAL BECAUSE A JUROR WAS SLEEPING DURING THE TRIAL.

II. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

Miguel McCallum was convicted of aggravated assault and sentenced to twenty years in the custody of the Mississippi Department of Corrections. Fifteen years were suspended, leaving McCallum five years to serve. (C.P. 43-48; R.E. 6-10). Miguel McCallum is presently in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

In this case, there was a juror who was sleeping throughout the course of the trial. The issue of the sleeping juror was raised in the Appellant's post trial motions, but the trial court did not conduct a hearing on it, but rather simply entered an order denying the Appellant's motion. There

is no evidence to dispute the assertion that the juror was sleeping, and therefore, pursuant to ***Church v. Massey***, 697 So.2d 407, 414 (Miss. 1997), the Court should reverse and remand for a new trial.

Additionally, the verdict was against the overwhelming weight of the evidence. All of the evidence at trial shows that the Appellant fired at the ground and not the alleged victim. The Appellant had every change to fire directly at the alleged victim, but he did not. The testimony further shows that the Appellant did not intend to cause any bodily injury to the alleged victim, and no reasonable juror could have believed otherwise. ***Murray v. State***, 403 So.2d 149, 153 (Miss. 1981). Therefore, the verdict was against the overwhelming weight of the evidence.

FACTS

Miguel McCallum and his girlfriend, Tammy Jenkins, hired Cliff Clark to replace the transmission in her vehicle. (Tr. 182). Clark got the car taken apart on a Friday. (Tr. 182-83). Hurricane Katrina struck the following Monday. (Tr. 183; 305). Things were in disarray, and Clark left the car at Red Arrow's garage where he had been working, and he went and rented new garage space to work on vehicles. (Tr. 183). Time drug on, and Clark had not completed replacing the transmission in the vehicle because he had to do it in his spare time. (Tr. 183-84).

Eventually, he got the transmission back in the vehicle and told McCallum's girlfriend that the car would be ready the following Monday morning. (Tr. 197-98; 248; 306). When McCallum and his girlfriend arrived, the car was not ready. (Tr. 184-85). He told them to come back in an hour. (Tr. 198; 249). When they did, McCallum brought in a pint of Hennessy Cognac he had purchased to give to Clark as a gift for finally getting the car finished. (Tr. 187; 250; 307). Clark lost his temper when he saw the bottle and told McCallum not to bring alcohol into his shop. (Tr. 200-01; 206; 307-310). McCallum put it back in the car. (Tr. 187; 189-90; 309). He returned to

speak with Clark, who told him the car was still not ready and to come back in an hour. (Tr. 201; 252; 309).

McCallum returned with girlfriend and waited in the parking lot of the garage. (Tr. 202-03; 252-53; 309). At some point, Tammy called Clark to inquire about the delay. (Tr. 189; 254; 310). McCallum got out of the car, and when Clark's phone rang, Clark became enraged, began cursing and threatening, and charged McCallum. (Tr. 256-57; 316). As he got closer, McCallum, fearing for his life, pulled a pistol out and fired at the ground in order to scare Clark. (Tr. 316- 321). It worked. Clark backed off.

McCallum ran back to the car and left. (Tr. 259-61; 321). Later, Clark complained that his feet were injured. He went to the emergency room, and he was treated for wounds caused to his feet either from fragments the bullet or the concrete parking lot. (Tr. 120-131;194-95; 215).

McCallum voluntarily turned himself into the police when he was informed they were looking for him. (Tr. 301-03). He was indicted, tried, and convicted of aggravated assault. He was sentenced to twenty years in the custody of the Mississippi Department of Corrections, with fifteen years suspended, thus leaving him five years to serve. (C.P. 43-48; R.E. 6-10).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENY MIGUEL'S MOTION FOR A NEW TRIAL BECAUSE A JUROR WAS SLEEPING DURING THE TRIAL.

1. Standard of Review.

In ***Woodward v. State***, the Mississippi Supreme Court espoused the standard of review on competency of jurors:

> We have stated that "It is well founded that the trial judge has the discretion to excuse potential jurors for cause if the court believes the juror could not try the case impartially." ***Burt v. State***, 493 So.2d 1325, 1327 (Miss.1986). "This Court will not lightly interfere with a finding of fact made by the trial judge in a criminal case, and it will reverse only when it is satisfied that the trial court has erred in holding a juror

competent, when this Court is clearly of the opinion that he was not a competent juror."

Woodward v. State, 533 So.2d 418, 424 (Miss.1988), *cert. denied*, 490 U.S. 1028 (1989).

2. Juror Ruth Brown Was Sleeping.

In his post trial motions, Miguel alleged that juror Ruth Brown was sleeping during the course of the trial. (C.P. 49-51; R.E. 10-18). He alleged that his trial counsel did not notice it because he was trying the case alone. (C.P. 49-51; R.E. 10-18). Miguel attached affidavits from six individuals who attested to the fact that the juror was sleeping during the course of the trial. (C.P. 49-57; R.E. 10-18).

The trial court, without a hearing, denied Miguel's Motion for Judgment Notwithstanding Verdict and in Alternative for a New Trial. (C.P. 61; R.E. 19). While it is true that the Court has found that the trial court is under no affirmative duty to make a finding that the juror in question was awake, *see* ***Norris v. State***, 490 So.2d 839, 846 (Miss. 1986), the Mississippi Supreme Court has stated that the issue of sleeping jurors causes it great concern. ***Church v. Massey***, 697 So.2d 407, 414 (Miss. 1997).

In ***Church***, the Mississippi Supreme Court observed:

> In ***Woodward***, the trial court dismissed a juror who had been constantly falling asleep and was heavily medicated during the trial. ***Woodward***, 533 So.2d at 424. In ***Hines v. State***, 417 So.2d 924, 925 (Miss.1982), this Court upheld the trial court's determination that even though the juror looked to be asleep he was actually awake enough to hear the testimony of the case. ***Hines***, 417 So.2d at 925. In ***Norris v. State***, 490 So.2d 839, 846 (Miss.1986), this Court did not even require an affirmative finding that the juror was indeed awake. ***Norris***, 490 So.2d at 846.

Church v. Massey, 697 So.2d at 414.

The Court went on to voice its great concern regarding the issue of a sleeping juror:

> The matter of the sleeping juror causes us great concern. Due to the great responsibilities placed by our system of jurisprudence on the shoulders of our jurors, it is imperative that their duties be taken seriously. It is also of extreme importance

> that the attorneys and the court consider carefully the awareness of the jury. In this case, we need not address whether the juror in question was actually asleep since we reverse on other grounds and we presume that the same juror will not be reseated for service on remand.

Church v. Massey, 697 So.2d 407, 414 (Miss. 1997).

In the present case, the trial court did not make any findings regarding the juror who was allegedly sleeping, but rather simply entered an order denying the McCallum's post-trial motion. (C.P. 61; R.E. 19). The prosecution did not file a response to McCallum's post-trial motion, nor does the record reflect there was ever a hearing held the motion. Therefore, there is nothing in the record which disputes McCallum's assertion in his post-trial motion that Juror Ruth Brown was sleeping during the trial.

The Court has previously held that a sleeping juror is a very serious matter. ***Church***. There is nothing in the record which disputes the fact that the juror was sleeping during the trial. Church holds that the trial court and opposing attorneys were also responsible to ensure the jury's awareness. That was not done in this case, and it is undisputed that Juror Brown was sleeping during the trial. Therefore, the Court should reverse and remand for a new trial.

II. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

1. Standard of Review.

In ***Bush v. State***, the Mississippi Supreme Court set forth the standard of review as follows:

> 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 new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and 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 (Miss.2000). However, the evidence should be weighed in the light most favorable to the verdict. ***Herring***, 691

> So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. ***Id.*** This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. ***Id.*** Instead, the proper remedy is to grant a new trial.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005)(footnotes omitted).

2. The Verdict Was Against the Overwhelming Weight of the Evidence.

McCallum was charged with aggravated assault pursuant to Miss. Code Ann. § 97-3-7(2)(b). That code section states that a person is guilty of aggravated assault if he "attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm. . . ."

Here, the weight of the evidence clearly showed that McCallum had no intent to cause any injury to Clark. The evidence showed that McCallum fired into the ground, and that it was either shards from concrete or fragments from the bullet that actually caused Clark's injury. (Tr. 124; 128). In ***Jenkins v. State***, 913 So.2d 1044 (Miss.Ct.App. 2005), the Mississippi Court of Appeals observed:

> The second manner in which the Mississippi legislature intended one to be guilty of aggravated assault is pursuant to subsection (2)(b) which states one may be found guilty of aggravated assault if he "attempts to cause or ***purposely*** **or** ***knowingly*** causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm[.]"

Jenkins v. State, 913 So.2d at 1049 (quoting Miss. Code Ann. § 97-3-7(2)(b)(emphasis added)). Thus, the ***Jenkins*** Court noted, "Mississippi Code Annotated Section 97-3-7(2) delineates **two** separate crimes of aggravated assault." ***Jenkins v. State***, 913 So.2d 1044, 1049 (Miss.Ct.App. 2005)(quoting ***Mason v. State***, 867 So.2d 1058, 1060 (Miss.Ct.App.2004)). (Emphasis in original).

As noted above, McCallum was only charged under subsection (b), and thus the jury was

required to find that he **purposely or knowingly** caused bodily injury to Clark. The testimony was overwhelming that McCallum shot towards the ground. (Tr. 138-140; 151-52; 190-91- 208-213). In fact Clark himself even testified that McCallum shot towards the ground. (Tr. 190-91; 208-213. McCallum testified that he did so in an attempt to scare Clark away and that he did not intend to injure Clark. (Tr. 316- 321; 325).

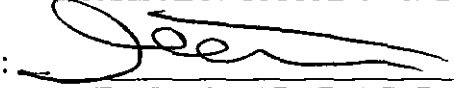
While McCallum was retreating he had the opportunity to fire more shots or shoot Clark directly, but he did not because he did not intend to hurt Clark. In ***Murray v. State***, the Court held that where there were no extraneous events which prevent an inmate from stabbing a corrections officer even though "[h]e had the means and every opportunity to do so" could not be guilty of aggravated assault. ***Murray v. State***, 403 So.2d 149, 153 (Miss. 1981)(citing ***Hydrick v. State***, 246 Miss. 448, 453, 150 So.2d 423, 425 (1963)). The Appellant, therefore, submits that no reasonable juror could have found that Miguel purposely or knowingly caused bodily injury to Clark as is required by the statute, and therefore the verdict was against the overwhelming weight of the evidence. Accordingly, the Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, the Appellant contends that the trial court should have granted his post-trial motion because there is clear evidence that a juror was sleeping during the course of the trial, and further because the verdict was against the overwhelming weight of the evidence. Accordingly, the Court should reverse and remand for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, Glenn S. Swartzfager, Counsel for Miguel D. McCallum, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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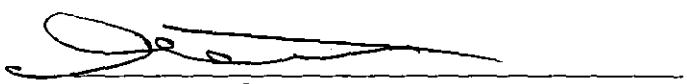
This the 20th day of December, 2007.



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