IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SCOTTY B. LYLES — APPELLANT

VS. — NO. 2007-KA-0993-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

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STATEMENT OF THE CASE

Scotty B. Lyles was convicted in the Oktibbeha County Circuit Court in violation of Miss. Code Ann. § 97-19-55 for obtaining merchandise of a total value of $100.00 or more under false pretenses by knowingly and intentionally writing a bad check. After the indictment was amended to reflect § 99-19-83, the habitual offender law, Mr. Lyles was sentenced to serve a term of life imprisonment in the Mississippi Department of Corrections without the possibility of parole. Mr. Lyles then filed an appeal to which the state responds.

STATEMENT OF THE FACTS

On December 23, 2005, Mr. Scotty B. Lyles purchased $105.79 of liquor from the Starkville Discount Liquor Store. Mr. Lyles used a check from his AmSouth bank account which had been closed some three months prior on September 9, 2005. He wrote the exact dollar amount in the correct area, but dated the check December 23, 2008 and left the rest of the check blank. The cashier at the store, Mr. Gerald Richardson, instructed Mr. Lyles to write his telephone number, driver's license number, and social security number, and Mr. Richardson then filled in the "Pay To" line with the name of the store, "Starkville Discount Liquor." Mr. Lyles then signed the check on the memo line rather than the drawer line and handed it to Mr. Richardson. Mr. Richardson initialed the check and gave Mr. Lyles the liquor.

The check presented by Mr. Lyles was later returned "Account Closed." Mr. Richardson was required by the store to pay for the merchandise out of his own pocket and the check was turned over to the district attorney's bad check unit. T. 93-98.

STATEMENT OF THE ISSUES

1. THE EVIDENCE WAS SUFFICIENT TO FIND MR. LYLES GUILTY OF FALSE PRETENSES.

II. THE INTRODUCTION INTO EVIDENCE OF MR. LYLES' BANK RECORD WAS NECESSARY TO SHOW KNOWLEDGE AND INTENT, AND THE PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY THE POSSIBILITY OF UNFAIR PREJUDICE.

III. THE INDICTMENT WAS PROPER IN ITS WORDING AND WAS NOT FATALLY DEFECTIVE

IV. LIFE IMPRISONMENT WITHOUT PAROLE WAS CONSISTENT WITH THE MISSISSIPPI HABITUAL OFFENDER LAW

V. THE INSTRUCTION GIVEN TO THE JURY WAS CORRECT AND CONTAINED ALL ELEMENTS OF THE INDICTED CHARGE AND THE ISSUE IS BARRED FROM APPEAL

SUMMARY OF THE ARGUMENT

Mr. Lyles was properly charged under Miss. Code Ann. § 97-19-55. The evidence presented was sufficient to show that on December 23, 2005, he unlawfully and with fraudulent intent issued a check for over $100 on an account he knew to be closed. Mr. Lyles tendered the check and contemporaneously received the merchandise with no evidence of a promise to pay in the future. Accordingly, Mr. Lyles' bank records were properly admitted into evidence to show that not only was his account closed, but he knew of the account closure and therefore had the requisite intent to issue a fraudulent check. Also, the indictment and the jury instructions were correct in charging Mr. Lyles under Miss. Code Ann. § 97-19-55.

Finally, Mr. Lyles was correctly sentenced to life imprisonment without parole under Miss. Code Ann. § 99-19-83 considering the amount and nature of his past criminal history.

ARGUMENT

1. THE EVIDENCE WAS SUFFICIENT TO FIND MR. LYLES GUILTY OF FALSE PRETENSES.

Mr. Lyles' appeal initially asserts that the conviction should be reversed because he did not violate the statute as he was unaware that he did not have sufficient funds to cover the check. However, the transcript of the direct examination of Sammy Slaughter clearly establishes that from the beginning of Mr. Lyles' account he received monthly account statements as well as a notice of account closure on September 9th of 2005. T. 122-128. This is uncontroverted evidence that Mr. Lyles knew that his account had a negative balance and that it had been closed almost four months prior to the writing of the check.

Mr. Lyles also contends that this case should be reversed because the check he wrote was dated for December 23, 2008, thus making it a future obligation to pay on a date three years later than the date he received the merchandise. In Op.Atty.Gen. No. 2002-0532, Couch, September 20, 2002, it was stated that a post-dated check returned for non-sufficient funds may not fall under the "bad check" law, however a check that was not cashed because of a closed account may result in criminal prosecution under the statute. Fraudulent intent should still be found in light of the fact that Mr. Lyles not only lacked sufficient funds, but the check was written on an account that was closed 3 months prior. It would be impossible for that check to ever be honored from the AmSouth bank account it was written on.

Additionally, Mr. Lyles cites a number of cases that contain express agreements to pay in the future as a defense to the law, but in this case the check was exchanged for present value and no evidence was offered to show any sort of agreement to pay in the future. For example, Mr. Lyles cites *Henderson v. State,* 534 So.2d 554 (Miss. 1988). In that case the defendant was convicted

under Miss.Code Ann. § 97-19-55 for a bad check. The check was written on October 4th with an express agreement that it would not be cashed until October 28th. Thus, the court decided that the defendant lacked the present intent to commit the crime of false pretenses. The court also expressed doubt as to whether the one year option contract constituted "money, services or any article of value" as contemplated by the statute. *Id* at 556. The questions raised in Henderson are completely absent here. There is no question as to whether an article of value was presently exchanged for the check offered by Mr. Lyles, and there was no such agreement as to the date of the check other than the check itself.

In the case of *Hindman v. State,* 378 So.2d 663 (Miss. 1980), the defendant was convicted under § 97-19-55 after writing a bad check for the services of an emcee at a wedding. While the case was reversed because the check was written for services performed in the past, the court discussed the essential elements of the crime under § 97-19-55. In order to commit a "bad check" offense, the check must have been given for the "purpose of obtaining money, or any article of value, or to obtain services except payment or payments on past due accounts." The court rephrased the quote by saying, "In other words, reliance upon the check must have been the efficient inducement which moved the party receiving it to part with something of value, including valuable services, relying upon its validity." *Id* at 665.

In this case, the check was fraudulently presented and accepted on the belief that it was good. There was no evidence of an agreement to cash the check at a later date or to hold it for a specific time, and no evidence to show that the post-dating of the check from a closed account was anything other than fraud. There was sufficient evidence to prosecute Mr. Lyles under § 97-19-55.

II. THE INTRODUCTION INTO EVIDENCE OF MR. LYLES' BANK RECORD WAS NECESSARY TO SHOW KNOWLEDGE AND INTENT, AND THE PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY THE POSSIBILITY OF UNFAIR PREJUDICE.

The trial court did not abuse its discretion in allowing the bank records of Mr. Lyles into evidence. The records were properly admitted into evidence under M.R.E. 404 (b) and 403. The evidence was not admitted to prove conformity with other bad acts, but it was allowed in for the purpose of showing intent and knowledge required under § 97-19-55. While M.R.E. 404 (b) states that other crimes are inadmissible to prove "the character of a person in order to show that he acted in conformity therewith," the rule does allow the introduction of past crimes for the purpose of "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Here the AmSouth bank record marked as State Exhibit 2 (S-2) showed a negative balance as well as other returned checks. The negative balance shows both knowledge and intent. The bank records and the accompanying statements that were sent to Mr. Lyles should have made him aware that there was no money in his account and that it was subsequently closed. If Mr. Lyles knew he no longer had an account then it is impossible for him to have anything other than fraudulent intent when he presented the check at Starkville Discount Liquor. Additionally, the evidence was not overly prejudicial since the bank record did not include any information regarding other indictments, it was accompanied by a limiting instruction, and the prosecutor did not emphasize other bounced checks.

In the case of *Riley v. State*, 180 So.2d 321 (Miss. 1965), the defendant had been caught and prosecuted under Mississippi's "peeping tom" law. The defendant offered evidence to support his claim that he was unaware of his actions. To rebut this claim, the prosecution introduced other instances of "peeping." In determining the admissibility of the prior acts under 404(b), the court

found that;

> "evidence of the conduct of the accused on other occasions, though disconnected from the offense on trial, is frequently admitted in cases of conspiracy, uttering forged instruments and counterfeit coin, and receiving stolen goods,--not, however, for the purpose of inducing the jury to believe the accused guilty of the crime for which he is on trial, because he had committed another similar crime, but for the purpose of excluding him from setting up the defense that he did the act innocently and without knowledge of its guilt"

Id at 96 citing *Raines v. State*, 33 So. 19 (Miss. 1902). In this case the bank records were not introduced to prove that Mr. Lyles was guilty because of his past history. The evidence was introduced to aid in proving Mr. Lyles' knowledge of the account closure and his then intent to commit the crime of false pretenses.

Mr. Lyles cites *Elmore v. State*, 510 So.2d 127 (Miss. 1987) to show that unrelated crimes should not be allowed in. However, the crimes in *Elmore* did not fall under any of the listed exceptions. Mr. Elmore was being charged with crimes against a single defendant, the other crimes did not fall into any of the listed exceptions by merely being sexual in nature. This case might be similar to *Elmore* had the prosecution sought to bring in evidence and discuss each individual bad check, instead they introduced a bank record that proved that the account had been closed as a result of a negative balance. The evidence was brought in with a limiting instruction to be used solely as proof that the account was closed and no evidence of other indictments resulting from the negative balance was introduced. *Elmore* provides that the test for relevance is whether, "the jury was improperly diverted from the only issue in this case." *Id* at 131. In *Elmore* the issue was the single sexual battery, here it is the single bad check. It is hard to imagine that any jury of peers would be that distracted or prejudiced against a defendant who has a negative balance in an account, as opposed to a jury that is given a list of prior sexual offenses.

Mr. Lyles also cites *Sumrall v. State*, 272 So.2d 917 (Miss. 1973), a case that was reversed

and remanded not only because of evidence of other crimes but also because of the District Attorney's continued questioning about unrelated criminal acts and hints that the defendant was living with a 15 year old girl. *Id* at 919. After numerous warnings from the bench the court found that the repeated interjections were highly prejudicial, and that often, repeated admonishments can draw attention to prejudicial matters. Here there is no such problem. The other bad checks were never referred to outside of the document and the court gave a single limiting instruction to the jury. (Jury Instruction D-7). Nowhere in the court record does it appear that the prosecution emphasized or even mentioned any other bad checks.

Finally, Mr. Lyles cites *Eubanks v. State*, 419 So.2d 1330 (Miss. 1982) and states that Mississippi follows the general rule that distinct crimes from the crime alleged in the indictment should not be admitted against the accused. However, Mr. Lyles fails to note that shortly thereafter *Eubanks* also states that the court is "mindful that this general rule has many exceptions." *Id* at 1331 citing *Tanner v. State,* 61 So.2d 781 (Miss. 1953).

The cases cited by Mr. Lyles are extreme by comparison. In this case there are no unrelated crimes being described, no repeated interjections, and no unnecessary emphasis on other crimes. The other crimes that the Mr. Lyles seeks to find admitted in error are the words "overdraft"on a bank record, not explicit details of criminal acts. Without any substantial prejudicial effect, the bank records are within the exception and were correctly admitted to prove knowledge and intent.

III. THE INDICTMENT WAS PROPER IN ITS WORDING AND WAS NOT FATALLY DEFECTIVE

Contrary to Mr. Lyles' position, the indictment does allege an intent to cheat or defraud by its use of the word "willfully." Miss. Code Ann. § 97-19-55 requires that the person issuing the check have fraudulent intent. Not only does the indictment allege that Mr. Lyles cheated the victims by way of his false and fraudulent representation, it also includes that he "unlawfully, willfully & feloniously" obtained the merchandise. The word intent is not specifically used, but Black's Law Dictionary (8th ed. 2004), defines willful as "Voluntary and **intentional**, but not necessarily malicious." (emphasis added).

Mr. Lyles cites *McBride v. State,* 104 So. 454 (Miss. 1925) in support of their argument that intent to defraud must be included in the indictment. However, that case cites specifically to an indictment under the same law (§ 97-19-55) that only included the words "unlawfully and feloniously " without mention of willfulness, intent or fraudulent representation. *Id.* In this case, all that is required under the law is included in the indictment, and the argument that no words of intent to defraud are included is incorrect. Willful should be viewed as a statement of fraudulent intent and therefore the indictment is proper under the decision in *McBride*.

IV. LIFE IMPRISONMENT WITHOUT PAROLE WAS CONSISTENT WITH THE MISSISSIPPI HABITUAL OFFENDER LAW

"It is well settled in this State that the imposition of sentence in a criminal proceeding is within the sole discretion of the trial judge, and that this Court will not reverse a sentence where it is within the limits prescribed by statute." *Corley v. State,* 536 So.2d 1314 (Miss.,1988) citing *Johnson v. State*, 461 So.2d 1288, 1292 (Miss.1984). The Mississippi habitual criminal law allows for life imprisonment where the person has been;

> "convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation."

Miss. Code Ann. § 99-19-83. In this case, the law allows for a sentence of life imprisonment for Mr. Lyles' crimes.

Mr. Lyles takes the position that writing a bad check for a little over $100 is not worthy of life in prison. It isn't, sentencing guidelines allow for a maximum of only fifteen (15) years. However, the sentence of life in prison was **not** given solely for the most recent crimes, rather it was in light of his prior offenses. In *McGruder v. Puckett*, 954 F.2d 313 (1992), the defendant was charged with burglary of an automobile, specifically for stealing twenty cases of beer from a delivery truck. He was then sentenced under Mississippi's habitual offender law to life in prison without hope for parole. The court affirmed by examining his list of five prior felony charges and found that the sentence was not disproportionate. *Id* at 316. Mr. Lyles brings with him a laundry list of thirteen felonies, all of a fairly serious nature. While the $100 was less severe than his previous convictions, taken in light of his history, the imposition of life in prison was appropriate. As a matter of policy,

surely the type of offender considered by the repeat offender law is the person who has an extensive criminal history and only leaves prison long enough to commit another crime. Mr. Lyles is clearly in this category with his thirteen past crimes. Life imprisonment without the possibility of parole was justified under Mississippi law and was not disproportionate when viewed in conjunction with his prior criminal history.

V. THE INSTRUCTION GIVEN TO THE JURY WAS CORRECT AND CONTAINED ALL ELEMENTS OF THE INDICTED CHARGE AND THE ISSUE IS BARRED FROM APPEAL

Mr. Lyles is procedurally barred from asserting on appeal that the jury instruction S-2 was incorrect. Mr. Lyles did not object to the issue he now raises, nor did the instruction he offered preserve the argument. When objecting to jury instructions, "an objection on one or more specific grounds constitutes a waiver of all other grounds." *Conner v. State*, 632 So.2d 1239, 1255 (Miss.1993). In his appeal, Mr. Lyles quotes a number of discussions between his attorney, Ms. Mallette, and the Court regarding the language in the indictment, but the only objections raised are to the reading of the indictment to the jury "at the beginning of voir dire." **T. 156.** Additionally, *Duplantis v. State*, 708 So.2d 1327 (Miss. 1998) held that there was no reason to require a party "to object to the denial of instructions that they themselves have offered, " but in this case, Mr. Lyles' jury instruction D-5 does not present the same issues as he presents on appeal. On appeal Mr. Lyles argues that Miss. Code Ann. § 97-19-57 is the correct charge, but his jury instruction D-5 is an attempt to mirror the language in the indictment. Therefore neither by objection nor jury instruction is this issue preserved for appeal.

In the alternative, the jury instructions S-2 were proper in that they included all elements of the crime charged under Miss. Code Ann. § 97-19-55. The statute is as follows;

It shall be unlawful for any person with **fraudulent intent**:

> (a) To make, draw, issue, utter or deliver any check, draft or order for the payment of money drawn on any bank, corporation, firm or person, knowing at the time of making, drawing, issuing, uttering or delivering said check, draft or order that the maker or drawer has **not sufficient funds** in or on deposit with such bank, corporation, firm or person for the payment of such check, draft or order in full, and all other checks, drafts or orders upon such funds then outstanding;
> (b) To **close an account** without leaving sufficient funds to cover all outstanding checks written on such account.

Id (emphasis added). Mr. Lyles' contention that the jury instruction S-2 referred to Miss. Code Ann.§ 97-19-57 is unfounded. The given instruction S-2 correctly states to the jury to find Mr. Lyles guilty if with "fraudulent intent unlawfully, willfully, and feloniously" issued a check knowing at the time that he didn't have adequate funds. This is a correct instruction. Had the instruction been written with § 97-19-57 in mind there would have been some mention of the notice requirement and that fraudulent intent should be presumed following proper notice. The evidence of the closed account was used not to comply with § 97-19-57, but to prove that Mr. Lyles intentionally issued a check on a closed account. The only difference between the indictment and the jury instruction is that the words "did not have sufficient funds" replaced the indictment wording of "closed account." However, both closed account and not sufficient funds are found in Miss. Code Ann. § 97-19-55.

In accordance with *Schaffer v. Mississippi*, 740 So.2d 273 (Miss. 1998), all elements of the crime charged are found in both the indictment and the jury instructions. There should have been no confusion among the jury since the requirements for fraudulent intent are clearly within the jury instruction, and the jury was properly instructed on what it was they were deciding. Mr. Lyles was properly convicted under Miss. Code Ann. § 97-19-55 and all of the elements of the crime were properly detailed to the jury.

CONCLUSION

Mr. Lyles was properly convicted under Miss. Code Ann. § 97-19-55 as he intentionally issued a check for value with knowledge that his account was closed. His check was not a future promise to pay. To prove this, the trial court was within its discretion in allowing a bank record into evidence that showed a negative balance. Additionally, the indictment alleged all of the elements of the crime, as did the jury instructions, and under Mississippi law, Mr. Lyles was properly sentenced to life imprisonment without the possibility of parole. Therefore, the ruling in the case should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa L. Blount, 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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