IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RUSSELL ANTONIO THOMAS — APPELLANT

VS. — NO. 2007-KA-1031-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2007-KA-1031-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On March 13 and 14, 2007, Russell Antonio Thomas, "Thomas" was tried for armed robbery and burglary of a dwelling by a Harrison County Circuit Court jury, the Honorable Roger Clark presiding. R. 1. Thomas was found guilty on both counts and given a thirty five and a concurrent twenty year sentence in the custody of the Mississippi Department of Corrections. R. 188. From these convictions, Thomas appealed to the Mississippi Supreme Court. C. P. 50-51.

ISSUES ON APPEAL

I.

WAS THE JURY PROPERLY INSTRUCTED?

STATEMENT OF THE FACTS

On January 26, 2004, Thomas was indicted by a Harrison County Grand Jury for armed robbery and burglary of a dwelling on July 23, 2003 in Gulfport, Mississippi. C.P. 6.

On March 13 and 14, 2007, Thomas was tried for armed robbery and burglary of a dwelling

by a Harrison County Circuit Court jury, the Honorable Roger T. Clark presiding. R. 1. Thomas was represented by Mr. Robert C. Stewart. R. 1.

Mr. John Cook testified that he resided at 1919 20th Avenue in Gulfport. On July 23, 2003 someone knocked on his door. It was after 11:00 P.M. R. 78. When he opened it, he saw three men he did not recognize. The one at the door asked for Bobby. He wanted to buy some drugs. R. 79. Cook told them he was not Bobby and he knew nothing about any drugs. When Cook tried to close the door, the man "pushed back open on me." R. 79. He also swung "a metal baton" toward Cook. Cook threw up his arm for protection. His left arm was struck and later found to be broken.

The men forced their way inside demanding money. Cook was struck on his legs with the baton which caused him to bleed. Cook identified Thomas as the person who struck him with the baton and asked for money. R. 80. A second man held a gun to his head and struck him with it. Cook threw the money he had in his pockets, three dollars, out on the floor. He never saw the money again. R. 111.

Ms. Jacquelin Griffin was Cook's next door neighbor. Griffin testified that she was sleeping in her recliner. It was around 11:30 P.M.. She was awakened by "horrible noises." It was coming from the direction of Cook's apartment. She heard Cook's scream, and "a thumbing" sound which moved objects on her wall. She heard Cook say "please stop." Griffin called 911. She believed the police arrived in about 10 to 15 minutes.

When Cook returned from the hospital, Ms. Griffin testified that he was "beaten and bruised." R. 116. His face "was mushy." The white portions of his eyes had turned red, his lips were swollen, and his arms were swollen and in splints. She had to help him light and smoke a cigarette. R. 116-117.

Officer Keith Walker, a patrolman with the Gulfport Police Department, testified that he went

to Mr. Cook's house in Gulfport on the night in question. When Walker found the house, the front door was open. After entering the house, and being told by Cook that "he's got a gun," Walker drew his firearm. He aimed it at a black male in the house holding a weapon. Walker told him to put the weapon down. "He threw the weapon in the recliner." R. 137. Walker identified Thomas as the person he encountered with the weapon in Cook's apartment. R. 137. Another man still inside the house, went out of the house through a bed room window.

Officer Walker identified state's exhibit 8 as being the metal baton he saw in Thomas's hands. R. 138. He described it as an "expandable" baton used by police "to strike hard objects or to take down suspects." R. 138. He also testified that: "It causes a great deal of pain if you hit somebody with it." R. 138.

State's photographic evidence 1 through 10 was introduced into evidence. Photograph 1 shows the front of the house where Thomas was living. Photo 2 shows blood splatter on the floor where Cook was allegedly attacked. Photo 5 and 6 shows Cook's possessions on the floor. The drawers to his dressers are seen on the floor. Cook's clothes are also on the floor . Photo 7 shows the metal baton which the suspect threw on to the recliner when Officer Walker ordered the suspect to drop it. R. 137.

During jury instruction selection, there was no objection to jury instruction S-1. R. 156-157. S-1 stated the elements for armed robbery, which included use of a ASP collapsible baton as a deadly weapon. C.P. 29. The defense objected to S-3. The objection was that the jury did not need an instruction concerning the exhibition of a baton as a deadly weapon. They believed that this was a matter of common sense. The trial court overruled the objection, and granted S-3 along with the other instructions. S-3 stated that whether the baton was a deadly weapon "is a question of fact for you to determine..." C.P. 30. The instruction informed the jury that it was the jury's responsibility

to determine if an ASP baton used in the manner claimed in the testimony was a deadly weapon. C.P. 30. Instruction C-1 informed the jury that: "you are not to single out one instruction alone as stating the law but you must consider the instructions as a whole." C.P. 18.

Thomas was found guilty and given a thirty five and a concurrent twenty year sentence in the custody of the Mississippi Department of Corrections. R. 188. From these convictions, Thomas appealed to the Mississippi Supreme Court. C. P. 50-51.

SUMMARY OF THE ARGUMENT

1. This issue was waived for failure to raise it with the trial court. The record reflects there was no objection to jury instruction S-1. This covered the elements for armed robbery. While there was an objection to S-3, the record reflects that it was not on the same grounds being raised on appeal. R. 156-157. **Gray v. State**, 728 So. 2d 36, 60 (Miss. 1998).

This issue is also lacking in merit. It is lacking in merit because jury instructions S-1 and S-3 were granted along with all the other instructions. Instruction S-3 clearly informed the jury whether the metal baton was a deadly weapon was "a question of fact for you to determine" in your collective deliberations. C.P. 30. Also given was instruction C-1 instructing the jury that: "you are not to single out one instruction alone as stating the law but you must consider the instructions as a whole." C.P. 18. See **Taylor v. State**, 597 So. 2d 192, 195 (Miss. 1992).

2. In response to an additional pro se brief filed by Thomas, the record reflects that Thomas was given effective assistance of counsel. This was for the services rendered by both his trial and his separate appeal counsel.

The record reflects overwhelming evidence of guilt. Thomas was identified not only by the victim of his attack, but also by Officer Walker who saw him inside Cook's apartment with the baton at issue in his hands. R. 80;137. Thomas' appeal counsel filed a brief on behalf of Thomas

based upon the record of this cause. There is no evidence that she did anything to interfere with Thomas' filing his own pro se motion based upon his allegations of ineffective assistance. There were no affidavits from anyone in support of any of Thomas's allegations, not even his own.

There is a presumption that appeal counsel, like trial counsel, was competent. The choice of appeal counsel to raise one issue or issues on appeal is a matter of appeal strategy. **Cole v. State,** 666 So. 2d 767, 777 (Miss. 1995). These unsupported allegations by Thomas are not sufficient for overcoming that presumption. Therefore, this issue is also lacking in merit.

ARGUMENT

PROPOSITION I

THIS ISSUE WAS WAIVED. AND THE JURY WAS PROPERLY INSTRUCTED GIVEN ALL THE INSTRUCTIONS TAKEN TOGETHER.

Thomas believes that the trial court erred in granting jury instruction S-1 and S-3. She believes that these instructions were peremptory instructions. She believes they were peremptory because jury instruction S-1 which stated the elements of the crime included the language "by the exhibition of a deadly weapon, to-wit: an ASP collapsible baton." She believes this language improperly removed from the jury their responsibility for determining if the baton was a deadly weapon. Appellant's brief page 1-7.

To the contrary, the record reflects that there was no objection to jury instruction S-1. And the objection to instruction S-3 differs from that which is being raised on appeal. In fact, it was an objection to the granting of the instruction S-3 which the trial court properly overruled. R. 156-157.

As stated in the record:

> Court: All right. **How about S-1, Mr. Stewart, any objection?** That's an elements instruction.
>
> Stewart: **No objection, your Honor.**

Court: All right. That will be given.

Bourgeois: S-2 is withdrawn, you Honor.

Court: All right. S-2 is withdrawn. **S-3, Mr. Stewart?**

Stewart: Object.

Stewart: **Judge, I think this is—the jury can determine whether a baton is a deadly weapon or not. I don't think the Court needs to instruct them.** I think that the jury can–they have common sense. They testified to that at voir dire. Whether a baton is a deadly weapon or not should be left up to the jury.

Court: **Well, I think that's what this instruction does. It says it is a question of fact for the jury to determine whether or not a deadly weapon was used.** State?

Bourgeois: **It is–that's exactly what it is.**

Court: **All right. It will be given.** R. 156-157. (Emphasis by Appellee).

In **Gray v. State**, 728 So. 2d 36, 60 (Miss. 1998), this Court stated that objecting to instructions at trial on different grounds from that raised on appeal waived that issue. An objection on one ground waives all other grounds on appeal. An objection can not be expanded upon on appeal. As stated:

> An objection on one or more specific grounds at trial constitutes a waiver of all other grounds for objection on appeal. **Lester**, 692 So. 2d at 773; **Walker v. State**, 671 So. 2d 581, 605-06 (Miss. 1995); See **Conner v. State**, 632 So. 2d 1239, 1255 (Miss. 1993). The procedural bar is applied. Gray objected to the instruction being given because he thought the evidence was insufficient to grant such an instruction. He never complained that Instruction S-6 did not specifically enumerate the elements of the crime of rape such the jury was improperly instructed. The Court will not allow him to expand his objection at trial to encompass other claims for the first time on appeal.

The record reflects that jury instruction S-1 was given along with S-3 and other instructions. C.P. 18-38. Jury instruction S-3 specifically states that whether the ASP collapsible baton was a deadly weapon was a factual issue that the jury was responsible for resolving from all the evidence presented before them. C.P. 30 Also given was instruction C-1 instructing the jury that: "you are not

to single out one instruction alone as stating the law but you must consider the instructions as a whole." C.P. 18.

Jury instruction S-3 states as follows.

> The Court instructs the jury that the defendant, Russell Antonio Thomas, has been charged with the crime of armed robbery. It is a question of fact for you to determine whether the deadly weapon, to wit: an ASP collapsible baton claimed to have been used was a deadly weapon in the manner claimed to have been used or threatened to be used in this case. A deadly weapon may be defined as any object, article or means which, when used as a weapon under the existing circumstance is reasonably capable of producing or likely to produce death or serious bodily harm to a human being upon whom the object, article or means is used. C.P. 30.

In **Taylor v. State**, 597 So. 2d 192, 195 (Miss. 1992) the Mississippi Supreme Court stated that the trial court's instructions must be "read together" as a whole. One of the instructions need not cover every point of importance as long as the point is fairly presented in another instruction.

> Our well settled rule is that on appeal we consider complaints of error in jury instructions by reading the instructions as a whole. All instructions "are to be read together and if the jury is fully and fairly instructed by other instructions the refusal of any similar instruction does not constitute reversal error." **Laney v. State**, 486 So. 2d 1242, 1246 (Miss. 1986). Not every instructions need cover every point of importance, so long as the point is fairly presented elsewhere.

In **Russell v. State** 832 So.2d 551, *555 (Miss. App. 2002), relied upon by Thomas, the court of appeals found that language "a stun gun, a deadly weapon" in the instruction for aggravated assault was flawed because as written it relieved the jury of their responsibility to determine if a stun gun was a deadly weapon.

> We look to our standard of review concerning jury instructions: "In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." **Coleman v. State**, 697 So.2d 777, 782 (Miss.1997). The instruction listed above is a peremptory instruction since it instructs the jury that a stun gun is indeed a deadly weapon. We find that the judge erred in giving this instruction, and for this reason we reverse and remand.

The Appellee would submit that this issue was waived for failure to object on the same grounds raised on appeal. In addition, the record clearly shows that jury instruction S-1 was given along with instruction S-3. Instruction C-1 informed the jury that: "you are not to single out one instruction alone as stating the law but you must consider the instructions as a whole." C.P. 18. The jury were instructed that it was there responsibility to determine all the factual issues, which included the factual issue of whether a metal baton as used in the manner described in the testimony was a deadly weapon likely to produce "death or serious bodily harm."

In **Folk v. State** 576 So. 2d 1243, *1250 (Miss. 1991), the Mississippi Supreme Court found that there is a presumption that jurors follow the court's instructions.

> There are cynics among us who have long suspected many jurors do not read-much less follow-the instructions of the court. The law answers the cynics with a presumption that the jury follows the instructions, see, e.g., **Atwood v. Lever**, 274 So.2d 146, 148 (Miss.1973); **Johnson v. Richardson**, 234 Miss. 849, 859, 108 So.2d 194, 198 (1959). This presumption is not nearly so much grounded in empirical proof as in the institutional imperative that we accept that jurors are fair-minded and conscientious and will do the duty the constitution devolves upon them.

The Appellee would submit that this issue was waived for failure to object on the same grounds being argued on appeal. It is also lacking in merit. The record reflects that jury instruction C-1 instructed the jury to take the jury instructions together as a whole. C.P. 18. Jury Instruction S-3 instructed them that it was there responsibility to determine if the metal baton allegedly used to attack and injure was a deadly weapon. This was a question of fact for them to determine in their deliberations. C.P. 30. This issue was therefore lacking in merit.

PROPOSITION II

THOMAS WAS GIVEN EFFECTIVE ASSISTANCE OF COUNSEL.

Thomas filed a "supplemental brief." In that brief, he claims ineffective assistance of counsel. He complains of improper jury selection, prosecutorial misconduct, incredible witnesses, and unconnected evidence used against him resulting in his not receiving a fair trial. He also claims non-responsiveness by his appeal counsel in not apparently including in her previously filed brief any of the aforementioned issues. Supplemental brief page 1-7.

To the contrary, the record of the instant cause under Proposition I indicates that Thomas was given a fair trial by a jury of his peers. There was overwhelming evidence of guilt.

For Thomas to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Thomas must prove: (1) that his counsel's performance was "deficient," and (2) that this supposed deficient performance prejudiced his defense. The burden of proving both prongs rests with Thomas. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990).

Finally, Thomas must show that there is "a reasonable probability" that but for the alleged errors of Mr. Stewart and Ms. Patterson , the result of his trial or appeal would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**,, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is a reasonable probability that but for the errors of his trial and appeal counsel, the result of his trial and appeal would have been different.

This is to be determined from "the totality of the circumstances" involved in his case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is "a reasonable probability" that either Mr. Stewart or Ms. Patterson erred in their representation of Mr. Thomas.

As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991):

> Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

Thomas bears the burden of proving that both parts of the tests have been met. **Leatherwood v State**, 473 So. 2d 964, 968 (Miss. 1985).

> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (6 (Miss. 1998); **Smith v State**, 490 So. 2d 860 (Miss. 1986).

In **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden of showing prejudice could not be met by merely alleging it.

> Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. *Earley*, 595 So. 2d at 433.

> Johnston has failed on the second prong of **Strickland**. Having failed to meet either prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

The record reflects that Thomas was identified not only by the victim but also by Officer Walker who saw him with the metal baton in his hand. R. 80;137. There was also no evidence of any improprieties during jury selection or of any prosecutorial misconduct as alleged by Thomas. The evidence against Thomas included not only testimony from Cook, the victim, and his next door neighbor, Ms. Griffith, who heard the violence and screams coming from Mr. Cook, but also photographic evidence of the crime scene, and the metal baton used in beating Cook. And the baton itself, as state's exhibit 8, was included in the evidence for the jury's examination along with their jury instructions. Thomas chose not to testify or present any witnesses in his behalf.

In **Cole v. State**, 666 So. 2d 767, 777 (Miss. 1995), the Supreme Court found no evidence of ineffective assistance for failure to make certain objections during the trial. In doing so the Court also stated that failure to call certain witnesses would not be considered ineffective assistance.

> Complaints concerning counsel 's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy

The Appellee would submit that there is a lack of evidence under the **Strickland, supra**, standards of either deficient performance or of prejudice to Thomas' defense as a result of any alleged improprieties, or misfeasance by his trial and appeal counsel. There are no affidavits or names of witnesses in support of any of Thomas' various claims. This issue is also lacking in merit.

CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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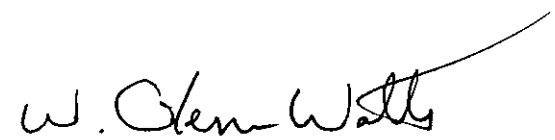
This the 16th day of November, 2007.



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