IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDWARD DONELL BRIGGS — APPELLANT

V. — NO. 2007-KA-1145-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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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. Edward Donell Briggs, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable Lee J. Howard, Circuit Court Judge

This the 29th day of November, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED IN ALLOWING EXPERT OPINION BEYOND THE WITNESS' AREA OF EXPERTISE ?

ISSUE NO. 3: WHETHER TRIAL COURT ERRED IN PERMITTING HEARSAY TESTIMONY OF BRAIN INJURY ?

ISSUE NO. 4: WHETHER THE CUMULATIVE AFFECT OF THE ERRORS COMMITTED BY THE TRIAL COURT DENIED BRIGGS A FAIR TRIAL ?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi, and a judgement of conviction for the crime of aggravated assault against Edward Donell Briggs, a/k/a Edward Donel Briggs, and a resulting sentence of ten years, with five years post release supervision and a fine of $1,000.00. Appellant was also ordered to pay restitution in the amount of $2,851.71.

A jury trial was commenced on May 18, 2007, Honorable Lee J. Howard, Circuit Judge, presiding. Edward Donell Briggs is currently incarcerated with the Mississippi Department of Corrections.

FACTS

Prior to the commencement of trial, the trial court heard three pro se motions, a combined motion concerning speedy trial and the 270 day rule, a motion to "dismiss the indictment" premised on the argument that the indictment charged that "brass knuckles" were utilized in both the charged counts of armed robbery and aggravated assault. Edward Donell Briggs, ["Briggs"] , asserted, through his attorney, that discovery had disclosed that the co-indictee, and not Briggs, was alleged to have wielded the brass knuckles. The trial court concluded that delays in the commencement of trial were attributable to continuances requested by the defendant, and that no prejudice was demonstrated. The motion to dismiss was denied. Briggs' motion for speedy trial was granted, and the case was set for trial was set for the upcoming Monday. (T. 6-18)

Voir Dire and jury selection was conducted without objection to gender or race and the jury was sworn on the record. (T. 19-81)

The State commenced its case with the testimony of Preston Halbert ["Halbert"], the purported victim. Halbert left his sister's house that evening to get her some cigarettes at the nearby farm market. Along the way he met Carol Malone, ["Carol"], a friend. As it was starting to rain, Carol approached a man Halbert called "Donel" for a ride. (T. 104-105) Briggs was the front seat passenger in the car.

At some point as the car approached the farm store, "Donel" (later shown to be co-indictee Tony Ames) turned to Halbert and told him "you know you owe my homey some money..." (T. 106) Halbert was asked how much money he had. (T. 107) "Donel" ["Ames"], then directed Halbert to give his money, twenty dollars, to Briggs, now identified as the "homey." Ames threatened to knock

Halbert's teeth out. (T. 108) Halbert refused the request, stating that the money belonged to his sister. By this point the farm market had been reached. Briggs got out of the car and stood near the front. Carol told Halbert she felt Briggs and Ames were "fixing to start something." (T. 109) As Halbert tried to get out, Ames swung at him with "knuckles"but missed.(T. 109-110) Halbert then claimed that Briggs swung at him with what he believed to be a razor and he was cut. (T. 110) Halbert later admitted he was not cut.

According to Halbert, After he was out of the car, both Ames and Briggs assaulted him, Ames hitting him in the eye with "knuckles" of iron. (T. 111) Halbert said he ran, but was caught and "whooped." (T. 112) At some point Halbert said he passed out. At some time thereafter, he was helped up by Carol and caught a ride home. (T. 113) A deputy sheriff was summoned and Halbert told him what happened. The next day he was advised to go to a doctor. (T. 114) He told the jury his face was "broke" (T. 114) The doctor put pins in his nose. Over objection, Halbert was allowed to testify to hearsay, that the doctor told him he "would have had brain damage..." (T. 115)

Cross examination revealed that initially Halbert had been unable to give deputies names or descriptions. (T. 116-117) He "didn't know what [he] had got hit [with]" when asked about his failure to mention "knuckles" the first night. (T. 118) He denied possessing a knife that night (T. 120-121) He again thought Briggs may have had a razor, but admitted that he was not cut, as he had originally testified. (T. 121)

Redirect showed that Halbert was unable to read the police report he had signed. (T. 131-132)

Halbert's friend, Carol Malone testified next. (T. 134) She knew both Briggs and Ames. (T.135) She asked Briggs for a ride to the store. She and Halbert got in and waited for Ames, who owned the car and drove. (T. 138) Ames took them to the store, then said "you owe my buddy money." (T. 138) As they pulled up to the gas pumps she told Halbert they should get out, that

something was going to happen. (T. 139) She saw Briggs, not Ames, put something silver in his hand. Ames, she said had nothing in his hands. (T. 139-140) When they got out of the car, Briggs swung at Halbert. (T. 140) Halbert ran and Ames and Briggs gave chase. They caught him and hit and kicked him. When the owner of the farm store came out, they stopped. She then helped Halbert up, and Halbert caught a ride and left. (T. 141-143)

She iterated on cross that Ames had nothing in his hands that she saw, and that Briggs had something silver, not brass knuckles. She confirmed it was Ames and not Briggs that asked for money. When confronted with her initial statement, she claimed the police had erred in their synopsis of her statement. The court did not allow admission of that statement as hearsay, even though she was the declarant. (T. 148-153)

The State then called Nell Shaw, a nurse practitioner who saw Halbert at the hospital. Although not listed as a witness, her name was in documents given in discovery, and she tesified without objection. (T. 158) She was tendered as an expert in emergency medicine as a nurse practitioner. After voir dire by defense counsel, objection to her being accepted as an expert was made by Appellant. She admitted to no special training or expertise in orthopedics. She specifically agreed she had no "forensic training as to the cause of injuries." (T. 161-162) Despite this acknowledged lack of special knowledge, she was allowed to give rank speculation, over defense counsel's objection, as to the manner or cause of Halbert's injuries. (T. 165) Further she was permitted over objection to testify to the conclusions found in a report on a CAT scan, made by a radiologist. (T. 164) Her own examination had only revealed swelling, bruising and soreness. (T. 163)

Investigator James Ferris testified that two weeks after the incident he took statements from Halbert and Carol. In was in these statement's that the use of the alleged "brass knuckles" first

emerged. (T. 167-176) The defense proffered the statements of Carol and Halbert, both of whom had just testified. The State's objection to the statements as hearsay was sustained. (T. 179-182)

The State then rested and the defense moved for a directed verdict, which was denied. (T. 186-187)

Jamonica Malone Rogers was the first witness in defense of Briggs. (T. 194) She told the jury that Carol Malone is her sister, Ames is the father of her child and she knows both Briggs and Halbert. (T. 195-196) After the event, Ames had come to her house with a big gash in his hand. (T. 196-197) She also testified that Carole Malone had previously told her that Halbert had a knife . (T. 197) Cross examination attempted to impeach this testimony on the basis that she had not come forward earlier with this information.(T. 200-204)

Eric Granderson, a Lowndes County Sheriff's Deputy testified that he responded to a call on an altercation occurring January 10, 2006. (T.209) Halbert told him he had been jumped by three black men. He made no mention of brass knuckles, nor of Briggs or Ames. (T. 210-211) On cross-examination Granderson said he smelled no alcohol, but did note that Halbert seemed "a little addled." (T.212) Granderson thought he matter was a simple assault (T. 213)

Tony Ames was called to testify. Accompanied by his attorney he took the stand. (T. 216-217) He agreed he and Briggs had given a ride to Halbert and Carol. According to his recollection of the events, after Briggs left the car to relieve himself, Halbert came at him with a knife. It was the only weapon mentioned throughout his testimony. He described it as a sword, approximately two feet in length. Briggs involvement began with his rendering aid to Ames. Ames said that he and Briggs subdued Halbert and made him give the knife to Carol. He agreed that during the altercation, both he and Briggs hit Halbert, (T. 216-239)

Briggs then took the stand in his own defense. (T. 240) He related the events thus. He and

Ames gave a ride to Halbert and Carol. After arriving at the store, he left to relieve himself. He heard loud talking and as he walked back to the car, he saw Halbert take out a large knife and attack Ames. He attempted to protect Ames, hitting Halbert a few times. Halbert fell to the ground and he and Ames got on him, trying to get him to drop the knife. Halbert would not drop it but he would give it to Carol.(T. 241-242)

Briggs said he became involved because he thought Halbert would do "something seriously bad" to his cousin Ames. (T. 242-243) The State's cross examination affirmed that the knife was large (T. 245). His cousin was on the ground when he first came around from the side of the building. (T. 247) His statement was used to attempt to impeach him, quibbling over the difference between "arguing" and loud talking, whether "Hog" (Halbert) pushed Ames down or he slipped, and whether Halbert attempted to slice Ames while he was on the ground. (T. 247-248)

The defense rested and rebuttal pointed out several inconsistencies in the statement given to Investigator Ferris and trial testimony, as brought out in cross.

SUMMARY OF THE ARGUMENT

Both instances of improper evidence by a nurse practitioner are critical and highly prejudicial. Halbert's testimony of iron knuckles was directly controverted his first statement to the deputies and by his own witness, Carol Malone. In the indictment, the charge of aggravated assault specified that the bodily injury was caused "by a means likely to produce death or serious bodily injury, to wit: brass knuckles...and kicking and beating with his fists..." When Nell Shaw testified to the claimed bone fractures, from the radiologist report, and not of her own knowledge, hearsay evidence was admitted over objection that was the only evidence of serious bodily injury. Her unqualified expert opinion that Halbert's injuries were consistent with being struck with a "hard metal object" (T. 165) was evidence of the "means" to cause serious bodily injury. Without her improper testimony, this

case is a matter of simple assault at worse.

Halbert, during his testimony, added an unsolicited and objected to, inflammatory hearsay comment, that the doctor told him he had brain damage. No medical testimony confirmed this hearsay claim.

ARGUMENT

ISSUE NO. 1: WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION WHEN THE TRIAL COURT ALLOWED A NURSE PRACTITIONER TO GIVE HEARSAY TESTIMONY ?

As stated and settled by the United States Supreme Court, the right of a criminal defendant to be confronted by the witnesses against him under the Sixth Amendment's Confrontation Clause is a "bedrock procedural guarantee [that] applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354 (2004) In present case, the conclusions and interpretations of a CT scan, by a radiologist who was not present, were allowed over objection into evidence. The State called Nell Shaw, a nurse practitioner, who initially saw Halbert at the hospital, and tendered her as an expert witness in emergency medicine as a nurse practitioner. She was asked about th CT scan as follows:

> Q. Now, the CT scan, what did you discover upon the scan of his face ?
>
> A. The radiologist that read it read that he had--
>
> BY MR. STARKS: Objection your honor, it's hearsay. She's talking about the radiologist that read it and said.
>
> A. I've got the report.
>
> BY THE COURT: Overruled.
>
> A. And the report to me said that he had a fractured nasal bone, which would be here (indicating). He had a left zygomatic arch

> fracture which would be about there (indicating). A fracture of the anterior and posterior wall of the maxillary sinuses which would be here (indicating).

As seen in this exchange, Shaw is simply relating the conclusions of the radiologist. The opinion or results are not her own. She did not even rely on the work, to reach her own conclusion, as would be permissible under M.R.E 703[1]. Instead she merely makes a statement as to the radiologist conclusions. As such, this is precisely the type of hearsay that deprives a criminal defendant of the right of confrontation. There is no showing that the radiologist was qualified, that he utilized reliable medical and scientific principles, or that he even viewed the correct CT scan.

The Mississippi Supreme Court has addressed the issue of an expert relating as true the conclusions of an unsworn, out of court declarant. In the case of *Flowers v. State,* 842 So. 2d 531 (Miss. 2003) the State's forensics expert was allowed to testify to representations by a shoe's manufacturer as to that manufacturer's conclusions. The hearsay testimony was not used by the forensics expert as part of his own analysis, but merely asserted as the truth of the matter. It was thus condemned by the Court:

> This statement was only offered to prove the truth of the matter asserted-that the Fila Grant Hill II MID shoes were consistent with the impressions found at the crime scene. We, therefore, find that the testimony by Joe Andrews regarding the shoe impressions was based on hearsay and was erroneously admitted by the trial court.

Flowers, Id., at 560.

This situation is analogous to admitting a lab analysis report where it is offered, standing alone, for the truth of the matter, as illustrated by *Kettle v. State,* where the Mississippi Supreme

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[1]The facts or data in the particular case upon which an expert bases an opinion or inference may be perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. M.R.E. 703

Court held:

> We hold that the same principle applies when someone other than the person who conducted the laboratory test attempts to testify in a cocaine possession or sale case over the objection of the defense that in doing so his Sixth Amendment right to confrontation is violated.

Kettle v. State, 641 So.2d 746, 750 (Miss.1994) Shaw offered no opinion of her own, based on this report. The report itself was not entered into evidence. Instead, the evidence of broken facial bones is purely hearsay. It was necessary that Shaw, at a minimum, review the methodology and utilize the report as a tool in forming her own conclusion. "[W]hen the testifying witness is a court-accepted expert in the relevant field **who participated in the analysis in some capacity, such as by performing procedural checks,** then the testifying witness's testimony does not violate a defendant's Sixth Amendment rights." *McGowen v. State,* 859 So.2d 320, 339 (Miss. 2003) Conversely, such a failure clearly violates the Confrontation clause.

Crawford unequivocally denounces the admittance of hearsay, when testimonial in nature and offered for the truth of the matter asserted. "Where testimonial statements are involved, we do not think the framers meant to leave the Sixth Amendment's protection to vagaries of the rules of evidence, much less to amorphous notions of reliability." *Crawford, Id.*, at 60

As noted above, the crux of this case is whether a means capable of producing death or serious bodily injury was employed ion the assault. To have conclusive hearsay testimony of serious injury admitted into evidence, cannot be said to not be prejudicial. For this reason, this case should be reversed and remanded for a fair trial.

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED IN ALLOWING EXPERT OPINION BEYOND THE WITNESS' AREA OF EXPERTISE ?

Nell Shaw, having been qualified as an expert, had great credence with a jury. Thus she should not, have been allowed to introduce hearsay as set forth above, and perhaps worse, to offer

speculative testimony, in an area outside her field of expertise. As previously argued, no element or issue of the crime is more pivotal to this matter than whether any weapon was used that was capable of causing serious bodily injury. Halbert did not mention any brass or iron knuckles when he first talked to law enforcement. The first mention of such a weapon came two weeks later, at the time of Halbert pursuing civil damages.

> Q. So how long after the 10th did that occur when you went to see the justice court judge?
>
> A. It might have–it might have been the next day after it happened. You know they called me a day to do my surgery> And then when I got through I went over there. And then they called me and looked at me and telling me I need to talk about it. The I told them–I told them I wanted to get them to pay for it. But I wasn't trying to make a big thing of it because they know they were wrong> I wasn't trying to make a big thing. I just wanted them to pay my doctor bills. I wasn't trying to make a big thing of nothing.
> You appeared in court on January 24th 2006, didn't you?
>
> *****
>
> A. Yeah I think it was. I wasn't too sure. But I know I went to court. I went to court. (T. 124)

After appearing at justice court, Halbert talked with Investigator Ferris, and it was then that knuckles first came into play. (T. 131, 167-170) The jury was confronted with a serious issue on whether the alleged knuckles were used at the time, or were a later embellishment. Accordingly, when Nell Shaw strayed far afield from her areas of expertise, and opined that Halbert's injuries were consistent with being struck with a hard metal object, Briggs was irreparably damaged, Halbert's testimony was improperly bolstered, and Briggs' and Ames' testimony was contradicted.

Expert testimony is, by its very nature, powerful in its impact on a jury. It can readily sway a contested issue to conform with the experts opinion. This problem of expert's being given free reign to opine on any contested issue has been recently addressed as follows:

> While Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert carte blanche to proffer any opinion he chooses. There was no showing that Dr. Hayne's testimony was based, not on opinion or speculation, but rather on scientific methods and procedures. See, e.g., Moss v. Batesville Casket Co., 935 So.2d 393, 404 (Miss.2006). The State made no proffer of any scientific testing performed to support Dr. Hayne's two-shooter theory. Therefore, the testimony pertaining to the two-shooter theory should not have been admitted under our standards.
>
> A ruling on evidence is not error unless a substantial right of the party is affected. Green v. State, 614 So.2d 926, 935 (Miss.1992). We have no alternative but to find that Tyler's substantial rights were affected by Dr. Hayne's conclusory and improper testimony. Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person. See M.R.E. 702. Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness. See generally Simmons v. State, 722 So.2d 666, 673 (Miss.1998); see also United States v. Benson, 941 F.2d 598, 604 (7th Cir.1991) (an expert's "stamp of approval" on a particular witness's testimony [or theory of the case] may unduly influence the jury). Here, Dr. Hayne's two-shooter testimony impermissibly (because it was not empirically proven) bolstered the State's theory of the case that Kristi helped Tyler to fire the gun. The error was magnified when Dr. Hayne's testimony was the only evidence-other than Tyler's contested confession-to support the State's theory of the case.

Edmonds v. State, 955 So.2d 787, 792 (Miss. 2007)

As shown above in the facts Nell Shaw specifically acknowledged no orthopedic special training, and absolutely no forensic training in the cause of injuries. How she could speculate as to what hit Halbert is no less speculative than an opinion by an expert (one with extensive forensic training) as to the number of fingers on the trigger of a weapon. The error is one of monumental prejudice. For this reason, this matter should be reversed and remanded.

ISSUE NO. 3: WHETHER TRIAL COURT ERRED IN PERMITTING HEARSAY TESTIMONY OF BRAIN INJURY ?

Halbert testified, over objection, that he had incurred brain injury. Again the issue of using means capable of producing death or serious bodily injury is the fulcrum of this case. In response to a question by the prosecutor about fixing his nose, Halbert gratuitously threw out the following inflammatory and otherwise wholly unsubstantiated statement:

A. Yes, sir. The doctor told me I had to–I have some brain–

BY MR. STARKS: Objection ,your honor.

A. –brain damage.

BY THE COURT: Overruled.

This error again is not harmless. No later testimony by any qualified medical personnel mentioned brain damage. As set out in *Peterson v. State*, 671 So.2d 647 (Miss. 1996) when the trial court admits hearsay as evidence the standard of review is abuse of discretion. The trial court is charged with employing the appropriate rules of evidence. Here, what a doctor may have told Halbert is unquestionably hearsay. It was a statement made out of court, by one not under oath and offered for the truth of the matter.[2] It is clearly prejudicial. If it is taken as true it demolishes a critical element of the defense; that no weapons were used, and that the only blows struck were in self defense.

Again, Briggs case is poisoned by inadmissible evidence, and again, this matter must be reversed and remanded for a new trial.

ISSUE NO. 4: WHETHER THE CUMULATIVE AFFECT OF THE ERRORS COMMITTED BY THE TRIAL COURT DENIED BRIGGS A FAIR TRIAL ?

Nothing about the raising of this issue should be construed as a concession that the above errors, referenced and adopted herein, are harmless errors. Even so, when compounded one upon the

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[2]*Hearsay*. "Hearsay" is a statement, other than one made by the declarant while testifying at trial or hearing offered in evidence to prove the truth of the matter asserted. M.R.E. 801(c)

Briggs and bolstered the State's theory.

This trial was a classic they said versus they said case. The two eyewitnesses for the State, claimed, belatedly, that brass knuckles were employed by defendants to attempt a robbery and were a weapon likely to cause death or serious injury when employed in an assault. Two witnesses for the defense testified that no weapons were utilized by the defendants, but instead they were acting in self defense, Halstead being the only armed participant. Hence, improper evidence which bolsters the testimony of the State's witnesses and contradicts the defense is per se prejudicial. The impact would be insurmountable. And worse, the inadmissible evidence was all inflammatory: brass knuckles, brain damage, and serious facial injury caused by a hard metal object. All this accumulated to such a critical mass, that it cannot be ignored.

> The one error ...requires reversal of the entire case. However, even without that one reversible error, this Court is compelled to say that the cumulative effect of all of these assigned actions would require reversal.

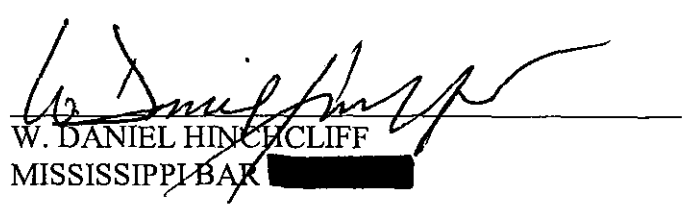
Griffin v. State, 557 So.2d 542, 553 (Miss. 1990)

Accordingly, the errors herein, whether individually, or taken as a whole require that the reviewing Court reverse this case

CONCLUSION

For the reasons set forth in the preceding arguments, this cause must me reversed and remanded for new trial

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

W. DANIEL HINCHCLIFF
MISSISSIPPI BAR [redacted]

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Edward Donell Briggs, 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 29th day of November, 2007.

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