IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EDGAR LEE COMMODORE, JR. — APPELLANT

VS. — NO. 2007-KA-1268

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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SUMMARY OF THE ARGUMENT

The trial court correctly denied Commodore's Motion for New Trial since ample evidence was presented at trial to support the jury's verdict. A rational trier of fact could find Commodore guilty of attempted aggravate assault beyond a reasonable doubt. Brian Hill's testimony established that Commodore deliberately drove his vehicle at Hill with intent to hit him. Commodore is unable meet the proof requirements of either prong of Strickland and the trial court correctly dismissed his claim of ineffective assistance of counsel. There is a strong presumption that the decisions of trial counsel are strategic and Commodore cannot overcome that presumption. Further, he cannot show any prejudice due to any alleged error of his trial counsel. The Trial Court correctly allowed the State to amend the indictment in order to sentence the defendant as an habitual offender since pursuant to Rule 7.08 of the Uniform Rules of Circuit and County Court and amendment to change the indictment to reflect the defendant's status as an habitual offender is a change in form and not in substance. The Trial Court did not err in allowing Brian Hill's testimony as to Commodore's intent to run over Hill with his vehicle since a witness can testify from his own perceptions and personal knowledge.

ARGUMENT

I. The trial court correctly denied Commodore's Motion for New Trial.

Commodore argues that the trial court erred by denying his motion for new trial. A motion for new trial challenges the weight of the evidence. *Jones v. State*, 962 So.2d 1263, 1277(54) (Miss.2007). Appellate courts review the denial of a motion for new trial under an abuse of discretion standard of review. *Id.* On appeal, the court views the evidence in the light most favorable to the verdict and will not reverse unless "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 (Miss.2005).

The standard of review of a denial of a motion for new trial has recently been stated as such:

> [w]hen 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. 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. However, the evidence should be weighed in the light most favorable to the verdict. 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." Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.
>
> *Jones v. State*, 962 So.2d 1263, 1277 (Miss.2007) (quoting *Bush v.*

State, 895 So.2d 836, 844 (Miss.2005)) (internal citations omitted).

Ample evidence was presented at trial to support Commodore's conviction. Eye-witness Brian Hill testified that he found Commodore and Roosevelt Hill at his neighbor's unoccupied home late in the evening and that the two fled when he approached, with Commodore attempting to run over him as he left the property. Deborah Hill saw their vehicles back up to the neighbor's garage and saw the men run from the house when her husband went to check on things. Officer Danielle Beith testified that when she encountered Commodore after he left the house, he had a juvenile in the truck with him. He told Beith that he was the look-out for another guy and that they were there to steal a dishwasher from a house under construction. Steve Cannon testified that he was the owner of the home that was burglarized and that the microwave/vent-a-hood and cook-top were missing, that the double oven was pulled away from the wall and that the dishwasher was pulled out from under the cabinet. Roosevelt Hill testified that he and Commodore met at Hill's mother's house that night and were discussing a way to get some money. He testified that Commodore said he knew how to get some money by going to a house and getting something to sell. Hill testified that Commodore and a guy who was with him went into the house while he was look-out. Hill testified that when the neighbor came, he got out of his car. Commodore and the other guy came running out. The neighbor pulled a gun and Hill got in his van and took off. He looked in his mirror and saw the neighbor trying to dodge Commodore's truck. Officer Todd Pierce testified that he questioned Mr. Commodore after he was stopped by Officer Beith. Pierce testified that Commodore said he followed Roosevelt Hill from Memphis to the house and that Roosevelt Hill was going to steal a dishwasher. He said he was to serve as look-out.

Based on the foregoing, the jury's verdict was supported by the overwhelming weight of the evidence and the Trial Court correctly denied Commodore Motion for a New Trial.

II. A rational trier of fact could find Commodore guilty of attempted aggravate assault beyond a reasonable doubt.

Review of a motion for a directed verdict or judgment notwithstanding the verdict tests the sufficiency of the evidence. *Bush v. State*, 895 So.2d 836, 843 (Miss.2005). The court must determine whether the evidence shows "beyond a reasonable doubt that the accused committed the act charged and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Id.* at 843 (*quoting Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). Taking the evidence in the light most favorable to the verdict, the question is not whether the court believes the evidence established guilt beyond a reasonable doubt but whether a rational trier of fact could have found all the elements of the offense existed beyond a reasonable doubt. *Id.* at 844 (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

To avoid a directed verdict or judgment notwithstanding the verdict on the armed robbery charge, the State had to put on evidence that Commodore attempted to cause serious bodily injury to another, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life or that he purposely or knowingly attempted to cause bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm. Pursuant to Miss.Code Ann. § 97-3-7(2), the State was required to put on evidence of each of these elements sufficient to allow a rational trier of fact to find Commodore guilty beyond a reasonable doubt.

In the case sub judice, the State proved the elements of attempted aggravated assault against Commodore. The testimony of Brian Hill, who caught Commodore and Roosevelt Hill in the Cannon's new home, establishes that Commodore put his vehicle in gear and came straight towards Brian Hill even though there was an alternate path. (Tr. 116-118) Commodore's vehicle came directly at Hill, who had to push himself off of the vehicle to keep from being hit and run over. There was nothing to prevent Commodore from seeing him. Hill testified that if he had not moved, the vehicle would have struck him. This testimony is sufficient to prove all elements of attempted aggravated assault. Hill's testimony establishes that Commodore intentionally aimed his vehicle at Hill and that Commodore attempted to strike Hill and run over him as he left the scene. Whether the jury viewed this attempt to cause serious bodily harm as a "knowing and reckless" attempt "manifesting extreme indifference to human life", or whether they considered it a "purposeful and knowing" attempt with a "deadly weapon" is not pertinent, since either set of requirements is proven by this testimony. It is the jury's province to judge the credibility of the witnesses and the jury clearly found this witness to be believable.

From the evidence presented at trial, it is clear that the trial court correctly denied Commodore's motion for directed verdict and judgment notwithstanding the verdict. Taken in the light most favorable to the verdict, there was sufficient evidence to prove each element of the crime of attempted aggravated assault and for a rational trier of fact to find beyond a reasonable doubt that Commodore committed the crime of attempted aggravated assault.

III. Commodore is unable meet the proof requirements of either prong of Strickland and the trial court correctly dismissed his claim of ineffective assistance of counsel.

Commodore argues that his trial counsel was ineffective and that his sixth amendment

right to counsel was therefore violated. The test to determine whether a criminal defendant's right to assistance of counsel has been satisfied is one of reasonableness, that is, whether counsel provided "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, in order to prevail on a claim of ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*

The burden to prevail on a claim of ineffective assistance of counsel is two-fold. A defendant must show not only that his counsel's performance was deficient, but also that he was prejudiced by the deficient representation. This second burden requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. There is a strong presumption of competence in favor of the attorney. *Havard v. State*, 928 So.2d 771, 780-81 (Miss.2006) (citing *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991)). No detailed rules are set forth to regulate counsel's conduct, for "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Wilcher v. State*, 863 So.2d 776, 803 (Miss.2003) (quoting *Strickland*, 466 U.S. at 688-89, 104 S.Ct. 2052.)

The Sixth Amendment provides a right to effective assistance of counsel, not errorless counsel. *Hall v. State*, 735 So.2d 1124, 1127 (Miss.Ct.App. 1999). There is a strong presumption than an attorney's conduct is a result of trial strategy. *Donerson v. State*, 812 So.2d 1081, 1087 (Miss.Ct.App. 2001). Trial strategy generally includes an attorney's decision whether or not to file certain motions, call witnesses, ask certain questions, or make certain

objections. *Foreman v. State*, 830 So.2d 1278, 1281 (Miss.Ct.App. 2002)

Commodore first argues that his counsel failed to adequately prepare him to give testimony and failed to adequately investigate his case. Commodore argues that because he was not advised by his counsel not to offer information. He argues that as a result of that omission by his counsel, that he then opened the door for the State to impeach him by stated under oath "my intentions was not to steal. I don't steal." At which time the state impeached Commodore with a previous conviction for robbery. Commodore then testified that he thought that the robbery charge had been dismissed and that he had served time for assault only.

Attorney Sidney F. Beck represented Commodore at trial and later testified at the hearing on Commodore's Motion for New Trial. Beck testified that he discussed Commodore's trial testimony with him on at least two occasions. (Tr. 390). Beck testified that he talked with Commodore about the potential for sentencing as a habitual offender and all so that he advised Commodore about cross-examination and that he could be impeached if he offered certain information. Beck testified that he did talk to Commodore about the possibility that he could be impeached with his previous crimes. Beck specifically testified that he advised and counseled Commodore not do indicate his goodness or that he did not steal and he advised Commodore about what testimony he should be cautious about on cross-examination. (Tr. 391-392)

Beck testified that he did advise Commodore not to volunteer any information at all and to answer all questions as briefly as possible. He testified that Commodore was a difficult client because he would not come in to meet with his counsel. Beck stated that he would call and write Commodore that ask him to come and make and appointment, but that Commodore might or might not show up. (Tr. 392) Beck testified that he did a thorough job of investigating the case

and that he believed that he adequately represented Commodore at trial. (Tr. 393.)

Beck testified that he presented Commodore with an opportunity to plead as a nonhabitual offender, but that Commodore and his father insisted that they wanted a trial even though they were aware that the State would follow through and pursue him as an habitual offender. (Tr. 395).

There is every indication that from the record that Commodore was well-advised prior to giving his testimony and that he simply chose not to follow the advice of counsel. It is further evident from the record that Commodore's attorney thoroughly investigated the case. These issues are without merit and the decision of the trial court should be affirmed.

Commodore also argues that his trial attorney rendered ineffective assistance of counsel by failing to adequately question and cross examine witnesses and failing to offer curative instructions following improper testimony. Commodore is unable to overcome the "strong presumption that the attorney's conduct falls within the wide range of reasonable professional conduct and strategy." *Lattimore v. State*, 958 So.2d 192, 200 (Miss.2007) (*citing Leatherwood v. State*, 473 So.2d 964, 969 (Miss.1985)). Nor can Commodore overcome the presumption "that all decisions made during the course of trial were strategic." *Id.* (*citing Leatherwood*, 473 So.2d at 969).

Commodore argues that the testimony of Deborah and Brian Hill is contradictory and that his trial counsel should have attempted to impeach them. He alleges that their testimony was the "only evidence in the case" and that this omission cannot be considered trial strategy. However, a clear review of their testimony reveals they were thoroughly cross examined and discrepancies in testimony were highlighted for the jury. Commodore's trial counsel deliberately characterized

Commodore's flight as fleeing from Hill, who had a gun, and emphasized Hill's speculation as to Commoore's intent. He emphasized that Hill placed himself directly in front of Commodore's vehicle with a drawn gun. He in fact got an admission from Hill that Commodore was fleeing.

Deborah Hill had little evidence to give except that at about 11:00 p.m. she heard a loud vehicle and saw a headlight shine in her window. She looked out the window and saw "some" vehicles back up to her neighbor's unoccupied house with their tailgates facing the garage. Her husband went over to check and see if it was people getting ready to move into the house. She saw "a few" men come out of the house when her husband went over to check on things. (Tr. 129-130) She was unable to identify any of the men who came out of the house. The value of impeaching a witness with so little testimony to offer is questionable and certainly a question of strategy for the trial lawyer.

Commodore also argues that trial counsel failed to request a curative instruction following Officer Beith's testimony on rebuttal examination that Commodore confessed to being a lookout man. An objection as to hearsay was sustained. Again, this is a strategic decision by trial counsel. Further, the trial court instructed the jury to disregard all evidence which was excluded from consideration during the course of trial. (C.P. 134) Reviewing courts presume that jurors follow the instructions of the circuit court. *King v. State*, 857 So.2d 702, 724 (Miss.2003). Commodore has not overcome this presumption or the presumption that the actions of his trial counsel in questioning witnesses and making trial motions were strategic. There is no merit to these issues and the ruling of the trial court should be affirmed.

Commodore argues that his trial counsel did not adequately protect his rights when after the trial court had ruled that only the robbery conviction could be used for impeachment purposes

and Commodore then took the stand and testified as to his other prior conviction. However, the record of the hearing on Commodore's Motion for New Trial reflects that Commodore's trial counsel did advise Commodore that is he testified he could be impeached with his crimes if he offered information. (Tr. 391) Commodore's trial counsel testified that he advised Commodore that if he was going to take the witness stand not to volunteer any information at all and to answer the questions asked as briefly as possible. (Tr. 392) Further, Commodore's trial counsel adamantly testified that he conveyed numerous plea offers to Commodore and that Commodore was aware that he would be pursued as a habitual offender if he went to trial. (Tr. 394.) Commodore's assignments of error are without merit and the rulings of the trial court should be affirmed.

Commodore alleges that these assignments of error as to his counsel's adequacy at trial constitute cumulative error. However, the record reflects that Commodore's trial counsel ably represented a recalcitrant and uncooperative defendant and these assignments of error are without merit whether taken singly or as a whole. Where there is no error in any part, there can be no cumulative error that demands reversal. *Wilson v. State*, 936 So.2d 357, 365 (Miss.2006).

Finally, Commodore has not shown error on the part of his counsel, nor any prejudice as the result of any alleged error. There is a strong presumption that an attorney's conduct falls within the wide range of reasonable professional assistance. Ross v. State, 954 So.2d 968 (Miss. 2007). Perfect representation in hindsight is not the standard, and Commodore was not entitled to errorless counsel. *Stringer v. State*, 454 So.2d 476 (Miss.). The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. *Strickland*, 466 U.S. at 689.

IV. The Trial Court correctly allowed the State to amend the indictment in order to sentence the defendant as an habitual offender.

Commodore argues that the trial court erred when it allowed the State to amend the indictment to charge Commodore as an habitual offender. The purpose of amending an indictment to include the language regarding an accused's previous convictions is to change the accused's status during sentencing, not to add an additional element to the charged crime. "[P]rior offenses used to charge the defendant as an habitual offender are not substantive elements of the offense charged." *Swington v. State*, 742 So.2d 1106, 1118 (Miss.1999). As in *Shumaker v. State*, 956 So.2d 1078, 1087 (Miss.Ct.App.2007), the indictment was not amended until after the trial verdict but before sentencing. "The test for whether an amendment to the indictment will prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made." *Shumaker*, 956 So.2d at 1087. Rule 7.08 of the Uniform Circuit and County Court Rules provides that:

> All indictments may be amended as to form but not as to the substance of the offense charged. Indictments may also be amended to charge the defendant as an habitual offender or to elevate the level of offense where the offense is one which is subject to enhanced punishment for subsequent offences and the amendment is to assert prior offenses justifying such enhancement. . . . Amendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.

Furthermore, in *Sowell v. State*, 970 So.2d 752 (Miss.Ct.App. 2007), the Mississippi Court of Appeals opined:

> Rule 7.09 of the Uniform Rules of Circuit and County Court allows the amendment of indictments to charge a defendant as an habitual offender. *See also Gray v. State*, 926 So.2d 961, 974 (Miss.Ct.App.2006). However, according to Rule 7.09, any amendments to the indictment "shall be allowed only if the

> defendant is afforded a fair opportunity to present a defense and is not unfairly surprised." The trial court found that there was no evidence of surprise as Sowell had been notified of the motion to amend the indictment early in the proceedings against him to charge him as a Section 99-19-83 habitual offender. We agree with the trial court and find no merit to this issue.
> Sowell also makes broad assertions that his due process rights were violated when the indictment was amended to reflect his habitual offender status because he had no opportunity to object. However, although Sowell did not provide this Court with a transcript of his plea colloquy, Sowell admits that he was informed of sentencing recommendations prior to his guilty plea. Again we refer to the trial court's order finding that Sowell was aware early in the proceedings that he was to be charged as an habitual offender. This issue is without merit.
>
> *Sowell* at 39.

Here, Commodore was advised, prior to trial, of the consequences of going to trial and receiving a guilty verdict in light of his past criminal history. Commodore was not prejudiced by the change in the indictment, since he was already advised of the risk of proceeding to trial, and was aware of all of his previous convictions. Amendments to indictments to charge the defendant as an habitual offender are permissible at any time prior to sentencing since they affect only the form and not the substance of the charge. This error is without merit and the judgement of the trial court should be affirmed.

V. <u>The Trial Court did not err when it allowed the amended indictment to stand where the State had not filed the indictment.</u>

Prior to trial, the State moved to amend Commodore's indictment to sentence him as an habitual offender. Commodore had been offered a plea agreement which would have allowed him to be sentenced as a non-habitual offender, but he had declined the plea. Therefore, when the plea agreement was rejected, the State then determined to try Commodore as an habitual

offender and moved the Trial Court to allow the amendment. The Trial Court correctly held that a motion to amend the indictment to habitual offender status is one of form and not substance and that is its timely, if ordered by the court, even after the trial on the merits but before the sentencing of the defendant. (Tr. 95, 96). On the date of the sentencing hearing, the State had not yet filed the amended indictment. However, the Trial Court had granted the amendment prior to trial. The State produced certified copies of Commodore's prior convictions to prove beyond a reasonable doubt that Commodore had convictions for statutory rape and aggravated assault.

Commodore was properly noticed and the Trial Court permitted the indictment to be amended, which finding was subject to the Court making a finding as a matter of fact and a matter of law that Commodore was an habitual offender within the meaning of A formal order amending indictment, signed by the court was filed on the November 29, 2005, the date the original motion was made prior to trial. The order noted that the amendment contained the quote "against the peace and dignity". Commodore's counsel argued that Commodore was not served with a formal amended indictment, however the Trial Court held that was not fatal, since Commodore was present in the courtroom and represented by counsel for the motion and when the order was presented. There was, therefore, no surprise to the defendant. The Trial Court therefore held that Commodore was properly before the Trial Court as an habitual offender, noting the prior certified convictions which meet the requirements of Miss. Code Ann. § 99-19-81 were contained in the record.

In *Jones v. State*, 902 So.2d 593 (Miss.Ct.App. 2004), the Court of Appeals opined:

> Jones argues that the circuit court erred in failing to quash the habitual offender portion of the indictment as void. He explains that the circuit court's order which amended his original indictment

failed to include the language of "against the peace and dignity of the state" and therefore violates section 169 of the Mississippi Constitution. The original indictment concluded with the phrase, "against the peace and dignity of the state." Jones concludes that since the original indictment was amended to charge Jones as an habitual offender, the amendment was defective because of the omission of the required language. *Citing McNeal v, State*, 658 So.2d 1345 (Miss.1995), Jones concludes that the circuit court should have held that the habitual portion of his indictment was fatally defective, granted his motion to quash the indictment, and vacated his habitual offender sentence. The State counters that *McNeal* is not applicable and that the amendment to the indictment conformed with constitutional requirements.

We agree with the State that *McNeal* is not applicable to the case sub judice. In *McNeal*, the defendant challenged the validity of his indictment as an habitual offender because the habitual portion was preceded by the language of "against the peace and dignity of the State of Mississippi." *Id.* at 1348-49. In fact, the part of the indictment charging McNeal as an habitual offender was on a separate page from the rest of the indictment. Finding that Section 169 of the Mississippi Constitution of 1890 requires an indictment to conclude with the language, "against the peace and dignity," our supreme court vacated the habitual charge against McNeal. *Id.* at 1350. In the case before us, the indictment was amended to charge Jones as an habitual offender. As previously stated, Jones's original indictment was proper, concluding with the required language. A separate order amended the indictment. There was no new indictment. Jones equates the separate order with the separate page in McNeal. The separate order stated that the indictment was amended to include the language charging Jones as an habitual offender. However, it did not state or indicate any point of insertion in the indictment, just that the indictment was amended to include the habitual offender language.

We have not been able to find a case addressing the exact question presented here, that is, whether an indictment-which has been amended by a court order but which order does not conclude with the language, "against the peace and dignity of the state"-comports with the requirement of Section 169 of the Mississippi Constitution of 1890 that "all indictments shall conclude 'against the peace and dignity of the state.' " Although we have found no authority, we

> need not resolve the issue today. It is sufficient to say that Jones never objected to the amended indictment on the ground upon which he now objects in his appellate brief. While he objected to the State's motion to amend the indictment and again raised the issue in his post-trial motion, he never questioned the legality of the amendment on the basis he now presents. The closest he came was his assertion in his post-trial motion that the indictment "was spliced together." He never explained what he meant by the phrase.
>
> Rule 7.09 of the Uniform Circuit and County Court Rules permits the amendment of indictments to charge a defendant as an habitual offender. That is what was allowed by the trial judge. We find no merit in this issue.

As in Jones, the original indictment in the case sub judice contained the phrase "against the peace and dignity of the State of Mississippi." (C.P. 10-12) Further, the Order amending the indictment to charge Commodore as an habitual offender pursuant to Section 99-19-81 requires that the amendments be inserted into the indictment in Counts 1, 2, 3 and 5, subsequent to the elements of the offense and preceding the mandated language, "against the peace and dignity of the State of Mississippi." Therefore, there is no merit to this assignment of error and the ruling of the Trial Court should be affirmed.

VI. The Trial Court did not err in allowing Brian Hill's testimony as to Commodore's intent to run over Hill with his vehicle.

Commodore cites no authority for this position. Therefore, this argument is procedurally barred for a lack of relevant authority. Arguments advanced on appeal must "contain the contentions of the appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on." M.R.A.P. 28(a)(6). "Failure to comply with [Mississippi Rule of Appellate Procedure] 28(a)(6) renders an argument procedurally barred." Birrages v. Ill. Cent. R.R., 950 So.2d 188, 194

(Miss.Ct.App.2006).

However, should the court reach the merits of this issue, Mississippi Rule of Evidence 701 permits opinion testimony from lay witnesses when that testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness...." According to the comment to Mississippi Rule of Evidence 701, a lay opinion "must be based on first-hand knowledge." As the Mississippi Supreme Court has stated repeatedly, "[t]he requirement of personal knowledge as a prerequisite to lay opinion testimony is absolute." *Wells v. State*, 604 So.2d 271, 278-279 (Miss.1992). Commodore argues that the Trial Court allowed improper testimony as to Commodore's intent as he drove toward Hill.

Commodore objects to the following testimony:

> **A.** [I] fired one shot at the back tire of the vehicle. I . . . did not hit the tire because I was afraid the vehicle was going to come back and try to run over me again.
>
> **BY MR. BECK:** Objection. He can't testify as to what he's worried about. He can testify as to what actually happened.
>
> **BY THE COURT:** Overruled. I'll allow it. (T. 118)

Commodore argues that this was speculative testimony and witness opinion regarding a material issue in the case. However, this testimony merely asserts Hill's state of mind during the course of events, specifically, his fear that the truck would back over him. It is based on his perception and first hand knowledge of the events. This is proper testimony of the witness's state of mind at the time of the events to which he testified. Commodore objects again to Hill's testimony about what would have happened if he had not moved out of Commodore's path:

> **Q.** Given the path that the vehicle took, Mr. Hill, if you had not moved, would you have been struck?

A. I wouldn't be here today if I wouldn't have moved.

By Mr. Beck: Objection. It would be an opinion, Your Honor.

By The Court: I'll overrule the objection. Obviously, Mr. Hill does not know what his actually injuries would have been. However, I think his answer is clear to the jury. I'll overrule the objection.

This colloquy does not involve the witness's opinion as to Commodore's intent. This testimony only reflects that Hill was in the path of the vehicle and that he believed that his injuries would be severe if he were hit. Again, this is proper testimony based on Hill's perception and first hand knowledge of the events to which he testified.

Commodore complains that he was prejudiced by the following testimony by Roosevelt Hill:

A. I was looking in my rearview mirror, and I seen the guy trying to dodge Edgar (Commodore).

. . . .

A. Because he was in front of him. I guess he was trying to run over him or something.

BY MR. BECK: Objection, Your Honor, that's opinion.

BY THE COURT: I'll overrule the objection as to what he guessed was going on. He can testify as to what he saw.

The witness testified as to what he saw – that Hill was trying to dodge Commodore and it appeared to the witness that Commodore was trying to run over Hill. This is what Hill saw. It is based on his perception and personal knowledge of the events to which he testified. As the Trial Court ruled, a witness is permitted to testify as to what he sees.

CONCLUSION

Commodore's assignments of error are without merit and the jury's verdict and the rulings of the Trial Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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 14th day of April, 2008.

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