IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SENICA MATTHEW FRANKLIN — APPELLANT

VS. — NO. 2007-KA-1436

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Procedural History

Senica Matthew Franklin was convicted in the Circuit Court of the First Judicial District of Harrison County on two counts of murder and one count of arson. On the murder convictions, he was sentenced to two terms of life imprisonment, to be served concurrently; on the arson conviction, he received a sentence of 20 years, also to be served concurrently to the life terms. Aggrieved by the judgment rendered against him, Franklin has perfected an appeal to this Court.

Substantive Facts

THE STATE'S CASE

Lori Ann Smith, a resident of Gulfport, testified that on the night of October 31, 2001, she took her children to a Halloween carnival. At about 9:00, she "left and went to north Gulfport" to take "a little girl home." Ms. Smith drove down "Polk Street to Martin Luther King," and "then ... turned on Texas." When she "got past the Fire Department about a block down," she saw "a window sill, a fan, and the window was on fire." She recognized the house, in which Brenda Mason resided. Ms. Smith "tried to call 911," but could not "get through." She then "jumped out" of her car and ran onto the porch and into the house. After she made "one step in the house," she saw "a female" lying "on the couch or a bed or something." Ms. Smith "assumed" this woman was Brenda Mason. The woman did not move, and her hair "looked like it was melted or wet or some gel or something." As Ms. Smith stood there, only the window sill appeared to be on fire, but soon "the house started crumbling ... like popping and stuff ... [P]ieces started falling." Ms. Smith ran toward her car and managed to get through to the 911 dispatcher, who informed her that "someone had already called and reported it." After Ms. Smith "took the little girl on home," she "went back down to the scene." She remained there until "one or two in the morning" and watched as the house continued to burn. She saw no one in the house except the woman on the couch; nor did she hear any cries for help. (T.824-29)

Tosha Johnson, also a resident of Gulfport, took her two toddlers trick-or-treating that night. As they were "going towards the project way," Ms. Johnson saw Senica Franklin "running from that way." She asked him. "[B]oy, what you running for." He answered, "[B]ecause I'm running. You better go." He also said something to the effect of, "[I]t's two

peoples in that house." When she "got further off," Ms. Johnson saw "some fire coming up." (T.836-42)

James Maston, Jr., resided at 8330 Florida Avenue, one street east of Texas Avenue. Mr. Maston returned home from work at "[a]bout four or five" on the afternoon of October 31, 2001. "[B]etween eight and nine" that night, he heard gunfire; about 30 minutes later, he heard sirens. Thereafter, he went outside his house and observed "a house on fire" on Texas Avenue. (T.849-52)

On the night in question, Michael Francis McCoy was employed as a fire fighter/ paramedic with the City of Gulfport Fire Department. He was dispatched to the scene of the Ms. Mason's house, which was already "heavily involved" when he arrived. "Because there was too much fire to do an initial attack on the inside," the fire fighters on the scene "had to do an initial attack trhough some windows to try and knock some of the fire down ... " Thereafter, Mr. McCoy and two of his colleagues crawled into the house and "started a search pattern using a right hand search, where you make entry keeping contact with the wall and just follow the floor plan around the side of the walls..." The began at the northeast corner of the house. When they reached a doorway, they "found a victim ... [o]bviously deceased" with "severe third degree burns." Continuing the search, they reached the front room, where they found a second victim "[p]retty much the same as the first, severe third degree burns, obviously dead." (T.856-63)

David Dry, a Deputy State Fire Marshal, was dispatched to the scene that night. When he arrived, "the working fire was out," and the fire fighters were "mopping up, making sure the fire was completely out and getting their equipment together, doing what is called salvage and overhaul." Also on the scene were the medical examiner and officers of the

Gulfport Police Department. "[T]he pathologist, Dr. Paul McGarry, was called to the scene." There were "two victims inside the house." (T.866-67)

With personnel from the police and fire departments, Mr. Dry "conducted an initial examination of the scene" that night. Thereafter, "[t]he victims were removed" and "[t]he scene was secured." The next morning, they returned and continued their investigation. Mr. Dry observed that although this was a dwelling house, "there were no utilities connected to it." (T.868-69) Asked to describe what he had seen when he first entered the house, Mr. Dry testified as follows:

> Again, initially you had a house. There was a fire, heavy fire damage. In the front living room area of the house one of the victims, the female victim was on a futon. At the front of the house a male victim was at the back of the living room in between the door going from the kitchen to the living room.
>
> (T.870)

Mr. Dry determined that the fire had started in "a room inside the front porch ... " (T.872) When the prosecutor inquired whether he had been able to ascertain how the fire started, Mr. Dry gave this testimony:

> We did an examination of the scene. Of course, we had no utilities, no accident ignition sources of gas or electricity, so that was immediately ruled out. The only ignition source left for the fire left something caused by a human hand. There would have been things, candles, lights, stuff like that. We didn't find candles and lighters. There was one candle that we found near a heating at the back of the living room. Looked like in had a melted candle down on it.
>
> You had some real heavy burn pattern in the area of the futon at the front of the house with– coupled with some witness indication was indicative of a very rapidly developing fire. As far as being able to say somebody lit a match or a specific ignition source for the fire, I can't do that. I can say the sum total of everything leads me to believe that the fire was

> incendiary in nature, which is a fire set by human hands under circumstances which the person knows it should not be set.
>
> (T.872)

The fire pattern indicated that "the fire originated ... right here at the futon where the female victim was laying [sic]." (T.873) Asked to tell the jury "about the speed of the fire," Mr. Dry testified as follows, in pertinent part:

> Again, it appeared to have developed rapidly ... [T]here was a witness that Gulfport PD interviewed that said that he went up to the house, he saw a fire inside the house ... [T]here was enough fire that he could see the female victim there, that he could tell she had been shot. She was laying [sic] on the futon. He went to get a bucket of water across the street. By the time he returned, the fire developed so that he couldn't actually get inside the house. So that to me is an indication that something was going on to progress very rapidly.
>
> (T.873)

Although samples from the house "came back negative for ignitable liquids," this fact was not uncommon and did not rule out the scenario that an accelerant had been used.[1] Ultimately, Mr. Dry concluded, and wrote in his report, that the fire was incendiary, "set by human hand under circumstances the fire should not have been set." (T.875-77)

Grady Sumrall was a former resident of Gulfport; at the time of trial, he was an inmate of the George County Jail. Sumrall testified that he had been a friend of defendant, Senica Franklin, since they "were little boys." On October 31, 2001, Sumrall, Franklin, and Franklin's girlfriend "Dusty" were "just kicking it, as usual," in North Gulfport. At one point,

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[1]Mr. Dry testified that any accelerant utilized in starting the fire could have been washed away by the water used to put out the fire; or, perhaps "the quantity of the accelerant" could have prevented its being "pick[ed] up" by "the lab equipment." (T.876)

they spoke to Brenda Mason at Yager's Store. Sumrall heard that Ms. Mason owed Franklin money for drugs that he had sold her. (T.888-92)

The threesome then went to Franklin's house at the corner of Madison and Mississippi Streets. Sumrall waited in the car while Franklin went inside; he returned with a .380 firearm "in his waist side." Franklin said something to the effect of, "I got to do Brenda something about my money," but Sumrall maintained that this was "just a figure of speech." (T.893-95)

Billy Patton was a native a North Gulfport but an inmate of the federal penitentiary in Oakdale, Louisiana, at the time of trial. When he was asked how long he had known the defendant, Patton testifid, "All my life." From January until "about May," 2002, Patton and Franklin were "roommates" in cell block CC in the Harrison County Jail. They got along well. Patton was aware of the double homicide that had been committed on Halloween night, 2001; he knew both victims. During this period, Franklin gave Patton unsolicited information about the killings.[2] (T.901-05) In Patton's words,

> I think the first thing he said, like him and Brenda had a heated conversation on Mississippi Avenue across the street from the residence, and conversation died, he went back home. He left later, went down to her house, and that's when he say that he shot Brenda, shot Ronald, and he set the house on fire.
>
> (T.905)

Franklin went on to tell Patton that after he committed these crimes, he "went to Ashton

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[2]When the prosecutor inquired, "Do you have any idea why he would tell you about what happened?" Patton answered, "I guess it was bothering him or he needed to talk to somebody about it." (T.905)

Park Apartments," off Airport Road, "[a]bout five minutes away" from the crime scene. He "did witness a drug bust going down there in Ashton Park Apartments, so it was more like he made it in time to see that, so that would be an alibi for him." When he was asked whether Franklin said "what he shot them with," Patton answered, "I think it was a .380 ... I think he say [sic] he threw the gun in a septic tank on the side of the house." Patton did not reveal this information to anyone until a federal agent questioned him in 2004. (T.905-07)

Christopher Thompson, too, was a native of North Gulfport but currently residing in the federal penitentiary in Oakdale, Louisiana. Approximately 14 years older than Franklin, Thompson had known the defendant "since he was about ten years old." At approximately "quarter to six or quarter to seven" on Halloween night, 2001, as he was driving his truck, preparing to "go home" and take his children trick-or-treating, Thompson saw Franklin on foot "on Mississippi and Madison." Thompson "thought" Franklin "was wearing a black hooded Starter jacket, some jeans." According to Thompson, "[T]here was some smoke in the sky. He was looking up at the smoke." When the prosecutor asked, "Did y'all make contact with each other?" Thompson answered, "Yeah ... Well, he owed me some money, and I didn't know– by the hood he had on his head, I didn't know that it was him. So as I got ready to turn, he flagged me down and told me that he had the money that he owed me." Franklin, who had a .380 automatic "on his side," got into the truck and told Thompson that he wanted to pay him the money he owed him. Again, Thompson noticed "a real big smoke and fire" about six blocks away. Finally, Thompson stopped the truck at a stop sign; Franklin got out; and Thompson "went on about" his "business." (T.917-22)

From September 2002 until January 2003, Thompson and Franklin were in "C block

C" in the county jail. On one occasion Franklin told Thompson that Brenda Mason "owed him some money, that they had got into a heated conversation about some money that she owed him." (T.922-24)

Eventually, Thompson was transferred to Oakdale, where he encountered Patton. At one point, while Thompson and Franklin were playing dominoes, Thompson told Franklin that "Billy Patton was thinking about going to the authorities about who murdered Brenda Mason." Franklin "slammed his hands on the table, said I wish he would, I touch the closest thing to him I could get my hands on." (T.924-25)

Reginald Merritts, who was in federal custody in Yazoo City at the time of trial, resided on Madison Street in North Gulfport in October 2001. He was acquainted with Franklin, who lived "in the apartment in the back" of Merritts' apartment. The evening of October 31, when "it was almost dark," Merritts "pulled up" in the driveway of the apartment complex. He saw Franklin "leaning on" a neighbor's truck. Merritts got out of his car, spoke to Franklin, "and went on in the house." Ten to 30 minutes later, Merritts "came out to go to the store to get some beer." Franklin asked him for a "ride to some apartments over by the apartment." Merritts, accompanied by his girlfriend, agreed to give Franklin a ride. They "proceeded down the street, and a couple of blocks down," they "could see this fire going on."[3] Thereafter, Merritts drove to a convenience store, "and then after that dropped him off" at "some new apartments" near the airport. (T.933-39)

On September 19, 2002, Merritts was arrested and incarcerated in the Harrison

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[3]Merritts, who was acquainted with Brenda Mason, testified that the fire was "in the direction of her house ... " (T.940)

County Jail in the cell block also occupied by Franklin. (T.940) At one point, Franklin asked Merritts "what it would take to be convicted of a murder if they couldn't find the murder weapon." (T.943) Ultimately, Franklin told Merritts that he had shot Brenda Mason. (T.945)

Dr. Paul McGarry, accepted by the court as an expert in the field of forensic pathology, testified that he went to the scene of the crime on that Halloween night. (T.965-61) When he was asked to describe the scene as he had found it, Dr. McGarry testified as follows:

> What I saw when I arrived on the scene was a small house. It was still smoking. It had been burned. The fire was pretty much out. Place was wet and charred and still smoking a little bit. On the floor was a small bed, on which there was a burned woman facing face up with a charring of the front of her body from the top of her head to her feet. Close by her, face down on the floor was a man, who was simply charred and burned over the back of his body. When I examined them at the scene, they each had a bullet wound at the back of the head going almost in the midline low on the head. On the man going into his brain, with a configuration of a contact wound.
>
> The woman had a slightly higher wound, but was also in the back of her head near the midline, bullet going into her brain. The evidence at the scene was that both had been shot at contact range, meaning that the gun was held against the head when the trigger was pulled, and the gun was fired and that both had then been burned.
>
> After examining the bodies as they lay, the bodies were then transported to the funeral home for autopsies.
>
> (T.967)

After he conducted the autopsies, Dr. McGarry concluded that Brenda Mason had sustained a contact gunshot wound "about an inch to the left of the midline of the back of her head." The bullet "went through the brain, to the right side of the brain." It "[h]ad a

typical configuration of a contact wound, meaning that the muzzle of the gun was held against the head and fired. There was no evidence in her body that she had been alive in the fire." From the female victim's brain, Dr. McGarry recovered a bullet .38 inches in diameter, with a brass jacket, consistent with a bullet fired from a .380 caliber handgun. (T.968-69)

The male victim, Ronald Brock, "was burned blacked, charred through the skin into the underlying tissues." He had sustained "a gunshot wound ... almost directly in the midline of the back of his head, that went upward into his brain... " Dr. McGarry recovered "a similar bullet" from Mr. Brock's brain; this bullet, too, had a brass jacket and was consistent with one having been fired from a .380 caliber handgun. Additionally, Mr. Brock had sustained "a grazing wound to the left scalp," which had gone "from front to back, whereas the fatal wound went from back to front." It was "very likely that" that this impact would have "knock[ed] him down." Dr. McGarry concluded that both victims had died of contact gunshot wounds to the head. (T.969-70)

Detective Sergeant Charles E. Bodie, Jr., of the Gulfport Police Department, testified that he had arrived the crime scene at approximately 11:00 that Halloween night. Initial investigatory efforts yielded no significant results. The next morning, Detective Brodie and his colleagues returned to the house and found spent Federal brand .380 shell casings. "Two rounds were recovered in this north quandrant right here along the north wall. recovered inside the kitchen ... " (T.975-81)

THE DEFENDANT"S CASE

Ronald Brock's mother, Ruby Brock, testified that she drove by his residence the night of October 31, 2001, "between five and ten minutes after seven." She saw three men, none of whom she recognized, standing on the front porch. She did not see Brenda Mason. (T.1035-36)

Kevin Keys testified that he had been incarcerated "[i]n the county jail" in the "same zone" with Billy Patty and Senica Franklin in 2002. (T.1037-38) When defense counsel asked him to relate what he had "head occur between Mr. Franklin and Mr. Patton," Keyes testified as follows, verbatim:

> I got a cousin. Her name Anyana Hawthorne. Like Billy Patton got a baby by her, a little girl. I guess Franklin was talking to her or whatever, like he went behind his back messing with her, I don't know. But that's what it all started up about. I just heard them say a few words. They didn't get in no fight or nothing like that, but they just had a few words that I know of.
>
> (T.1038)

Keys went on to testify that Patton and Franklin "got to arguing ... about Miss Hawthorne." (T.1039)

Anthony Shade testified that at about 7:00 the night of October 31, 2001, he and Franklin "were standing on the corner [of Martin Luther King and Texas] together." They "stood up there all the time talking" and "drinking on some liquor" until "[a]bout eight." Franklin then left, going "east on Martin Luther King." At approximately 8:30, just after "it .. got dark," Mr. Shade saw "the smoke and the flame." (T.1044-47)

The defendant did not testify.

SUMMARY OF THE ARGUMENT

The trial court did not err in overruling the motion for new trial. The verdicts are not contrary to the overwhelming weight of the evidence.

Franklin cannot demonstrate on this record that his trial counsel was constitutionally ineffective. This claim should be denied without prejudice to its being raised in a motion for post-conviction collateral relief.

The trial court properly refused Franklin's circumstantial evidence instruction. The state's case was not based solely on circumstantial evidence.

Finally, no error has been shown in the trial court's sustaining an objection to a question posed by the defense during the cross-examination of Tosha Johnson. For all that is shown by the record, the pertinent question was asked and answered, and defense counsel did not pursue the matter further.

PROPOSITION ONE:

THE TRIAL COURT DID NOT ERR IN OVERRULING THE MOTION FOR NEW TRIAL

Franklin contends first that the trial court committed reversible error in overruling his motion for new trial inasmuch as the verdicts are contrary to the overwhelming weight of the evidence. To prevail, he must satisfy the rigorous standard of review set out below:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to

> allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss. Ct. App. 2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss. App. 2004),

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss. App. 1999).

Accord, *Ford v. State*, 975 So.2d 859, 869 (Miss. 2008). As this Court recently reiterated in *Hales v. State*, 933 So.2d 962, 968 (Miss. 2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

In this case, "[t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify." *White v. State*, 722 So.2d 1242, 1247 (Miss.1998). While a defendant has the absolute right to decline to take the witness stand, "and no

presumption is to be indulged against him for exercising that right, still the testimony of the witnesses against him may be given full effect by the jury, and the jury is likely to do so where it is undisputed and the defendant has refused to explain or deny the accusations against him." *Russell v. State*, 844 So.2d 506, 509 (Miss. App. 803), quoting *McGilvery v. State*, 497 So.2d 67, 68 (Miss.1986).

The state respectfully submits that Franklin's challenge to the weight of the evidence presented is essentially an improper attempt to relitigate factual issues, including the credibility of the witnesses, properly resolved by the jury. Incorporating by reference the facts set out under the Statement of Substantive Facts, the state asserts the trial court did not abuse its discretion in refusing to set aside the jury's verdicts. Both victims died of gunshot wounds caused by .380 caliber bullets. The deputy fire marshal testified that the fire was incendiary in nature and set by human hand. Tosha Johnson testified that she saw the defendant running from the area of the porch of the burning house and heard him say something to the effect of, "There's two bodies in that house." Earlier that afternoon, Grady Sumrall saw the defendant go into his house and return with a .380 handgun. Sumrall then heard him say, in effect, that he was going to have to "do Brenda" because she owed him money. After he was incarcerated, the defendant confessed to Billy Patton and made other self-incriminating statements to fellow inmates, the credibility of whom was a matter for the jury's determination.[4] Indeed, the credibility of all of the witnesses was

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[4]The murder weapon was never recovered, but Patton's recounting of Franklin's confession is corroborated in part by Merritts, who testified that after the fire had started, he dropped Franklin off at a new apartment complex near the airport. (T.939)

properly resolved by the jury.

The evidence is not such that reasonable jurors could have returned no verdicts other than not guilty, or such that to allow the verdicts to stand would be to sanction an unconscionable injustice. No basis exists for disturbing the trial court's denial of the motion for new trial. Franklin's first proposition should be rejected.

PROPOSITION TWO:

FRANKLIN HAS FAILED TO DEMONSTRATE THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

Franklin argues additionally that he was denied his constitutional right to effective assistance of counsel at trial. He faces formidable hurdles, summarized follows:

> The Mississippi Supreme Court has adopted the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) in determining whether a claim of ineffective assistance of counsel should prevail. . . . *Rankin v. State*, 636 So.2d 652, 656 (Miss.1994) enunciates the application of *Strickland*:
>
> > The *Strickland* test requires a showing that counsel's performance was sufficiently deficient to constitute prejudice to the defense. . . . **The defendant has the burden of proof on both prongs. A strong but rebuttable presumption, that counsel's performance falls within the wide range of reasonable professional assistance, exists. . . . The defendant must show that but for his attorney's errors, there is a reasonable probability that he would have received a different result in the trial court. . . .**
> >
> > Viewed from the totality of the circumstances, this Court must determine whether counsel's performance was both deficient and prejudicial. . . . Scrutiny of counsel's performance by this Court must be deferential. . . . If the defendant raises questions

> of fact regarding either deficiency of counsel's conduct or prejudice to the defense, he is entitled to an evidentiary hearing. . . . Where this Court determines defendant's counsel was constitutionally ineffective, the appropriate remedy is to reverse and remand for a new trial.
>
> **In short, a convicted defendant's claim that counsel's assistance was so defective as to require reversal has two components to comply with *Strickland*. First, he must show that counsel's performance was deficient, that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that counsel's errors deprived him of a fair trial with reliable results.**
>
> (emphasis added) *Colenburg v. State*, 735 So.2d 1099, 1102-03 (Miss. App. 1999).

Because this point is raised for the first time on direct appeal, the defendant encounters an additional obstacle: the pertinent question

> **is not whether trial counsel was or was not ineffective but whether the trial judge, as a matter of law, had a duty to declare a mistrial or to order a new trial, sua sponte on the basis of trial counsel's performance.** "Inadequacy of counsel" refers to representation that is so lacking in competence that the trial judge has the duty to correct it so as to prevent a mockery of justice. *Parham v. State*, 229 So.2d 582, 583 (Miss.1969). **To reason otherwise would be to cast the appellate court in the role of a finder of fact; it does not sit to resolve factual inquiries.** *Malone v. State*, 486 So.2d 367, 369 n. 2 (Miss.1986). *Read [v. State*, 430 So.2d 832 (Miss.1983)] clearly articulates that the method that the issue of a trial counsel's effectiveness can be susceptible to review by an appellate court requires that **the counsel's effectiveness, or lack thereof, be discernable from the four corners of the trial record. This is to say that if this Court can determine from the record that counsel was ineffective, then it should have been apparent to the presiding judge, who had the duty, under *Parham*, to declare a mistrial or order a new trial sua sponte.**

(emphasis added) *Colenburg*, 735 So.2d at 1102.

Accord, *Clayton v. State*, 946 So.2d 796 (Miss.796, 803 (Miss. App. 2006); *Madison v.* State, 923 So.2d 252 (Miss. App. 2006); *Jenkins v. State*, 912 So.2d 165, 173 (Miss. App. 2005); *Walker v. State*, 823 So.2d 557, 563 (Miss. App. 2002); *Estes v. State*, 782 So.2d 1244, 1248-49 (Miss. App. 2000).

The state submits Franklin has not shown that his lawyer's performance was so deplorable as to require the court to declare a mistrial on its own motion. Defense counsel filed numerous pretrial motions, made an opening statement and a sound closing argument, and conducted extensive cross-examinations of the state's witnesses. Nothing in his performance should have prompted the trial court to declare a mistrial *sua sponte*.

While Franklin alleges unprofessional lapses, he has not shown that his trial counsel's overall performance mandated the declaration of a mistrial *sua sponte*. Indeed, he cannot make this showing on this record. Because he has not shouldered the particular burden that he faces on direct appeal, his second proposition should be denied without prejudice to the raising of this issue in a motion for post-conviction collateral relief.

PROPOSITION THREE:

THE TRIAL COURT PROPERLY REFUSED FRANKLIN'S CIRCUMSTANTIAL EVIDENCE INSTRUCTION

Under his third proposition, Franklin argues that the trial court committed reversible error in refusing Instruction D-6, which would have required the jury to "exclude every reasonable hypothesis consistent with innocence" in other to find the defendant guilt. (C.P.277) When this instruction was tendered, the prosecutor objected on the ground that the case was not based solely on circumstantial evidence, but that it contained direct evidence, i.e., Franklin's confession to Billy Patton, as well as the statements to Grady

Sumrall made after Franklin armed himself. The court ultimately found, "I think the state is right. There is some direct evidence in this case." Accordingly, the instruction was refused. (T.1069-70)

It is well-settled that an instruction requiring the jury to find the defendant guilty beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence is not required unless the state's case is entirely circumstantial. *Vince v. State*, 844 So.2d 510, 515 (Miss. App. 2003), citing *Sullivan v. State*, 749 So.2d 983, 992 (Miss.1999). Indeed, this Court has held that such instructions "should be given only when the prosecution is without a confession or eyewitness to the gravamen of the offense charged." *Moore v. State*, 787 So.2d 1282, 1288 (Miss.2001) (emphasis added) "The existence of any direct evidence eliminates the need for a circumstantial evidence instruction." *Sullivan,* 749 So.2d at 992, cited in *Leedom v. State*, 796 So.2d 1010, 1020 (Miss. 2001).

At the outset, the state submits Patton's testimony alone would have provided a proper basis for the refusal of the circumstantial evidence instruction. Patton testified unequivocally that Franklin told him that he (Franklin) had "shot Brenda, shot Ronald, and he set the house on fire." (T.905) This constitutes a confession which is deemed direct

evidence for the purpose of analyzing the issue presented. The credibility of the testimony regarding this confession was a matter for the jury's determination, but, at bottom, it is direct evidence obviating the circumstantial evidence instruction.[5]

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[5]As Franklin points out, the Mississippi Supreme Court in *McNeal v. State*, 551 So.2d 151, 159 (Miss.1989) (decided on other grounds), questioned whether a jailhouse informant's testimony "should be considered as direct evidence which would prevent th granting of a circumstantial evidence instruction." The question was answered adversely to Franklin's position in *Ladner v. State*, 584 So.2d 743, 750 (Miss.1991). "Ladner settled the matter, holding that when the type of testimony" given by Patton is present, "circumstantial evidence instructions are not necessary." *Moore*, 787 So.2d at 1288. For the record, the state points out additionally that the Court in *McNeal* "strongly question[ed] the reliability of testimony which was given in exchange for a reduced sentence." 551 So.2d at 158. In this case, Patton testified that he had received neither a reward or a promise of a reward for his testimony in this case. (T.908, 911)

Moreover, Grady Sumrall testified that on the day in question, he saw Franklin go into his house and return with a .380 handgun. He then heard Franklin say, "I got to do Brenda something about my money."[6] (T.893-95) This statement, which coincided with Franklin's arming himself, reasonably could be considered an admission, i.e., direct evidence of his intent to kill, removing the need for a circumstantial evidence instruction. *Smith v. State*, 897 So.2d 1002, 1009 (Miss.App.2004), citing *Lynch v. State*, 877 So.2d 1254 (Miss.2004). Accord, *Moffett v. State*, 938 So.2d 321, 328 (Miss.App.2004) .

Because it is clear that the state's case was not based solely on circumstantial evidence, it is not necessary to analyze extensively the testimony of Reginald Merritts.[7] For the sake of argument, the state acknowledges that Merritts characterized his conversations with Franklin as "rapping." However, he testified that this was simply "a kind of language that we have amongst each other," i.e., "that's how we talk." There is no indication that "rapping" was based on fantasy; it was simply a style of verbal communication. (T.941-42)

In conclusion, the state submits the case against Franklin was based on direct as well as circumstantial evidence. Accordingly, the trial court did not err in refusing

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[6]The jury was not required to believe the witness's speculation that this was "a figure of speech."

[7]Merritts testified that while he and the defendant were incarcerated in the Harrison County Jail, Franklin told him that he had "shot" Brenda Mason. (T.945)

Instruction D-6. Franklin's third proposition should be denied.

PROPOSITION FOUR:

NO ERROR HAS BEEN SHOWN IN THE TRIAL COURT'S SUSTAINING AN OBJECTION TO A QUESTION POSED BY THE DEFENSE DURING THE CROSS-EXAMINATION OF TOSHA JOHNSON

Franklin finally contends the trial court committed reversible error in limiting his cross-examination of Tosha Johnson. This issue implicates the following excerpt, taken during that cross-examination:

> Q. All right. Ms. Johnson, I'm not trying to embarrass you or anything, but you said you were unemployed. Why is that?
>
> A. I draw disability, mental.
>
> Q. What do you draw disability for?
>
> A. Mental.
>
> MR. SCHMIDT: Object to relevancy, judge.
>
> THE COURT: Sustained.
>
> MR. GEISS: One moment, please, your Honor.
>
> No further questions.
>
> (T.846-47)

As demonstrated by the foregoing portion of the transcript, Ms. Johnson testified initially, without objection, that she was drawing disability benefits due to a "mental" condition. There was no motion to strike this testimony or to have the jury instructed to disregard it; therefore, the jury was able to consider it for what it was worth. When defense counsel essentially asked Ms. Johnson to repeat her original answer, the court sustained the state's objection on the ground of relevancy. The defense then declined to make a

proffer of what it sought to bring out through further cross-examination on this point. For all that is shown by the record, the pertinent question was asked and answered, and defense counsel did not pursue the matter further. Had he wished to pursue this line of questioning, he was obligated to make a proffer.

Under these circumstances, the following language shows Franklin's final proposition to be meritless:

> "The right of confrontation and cross-examination extends to and includes the right to fully cross examine the witness on every material point relating to the issue to be determined that would have bearing on the credibility of the witness and the weight and worth of his testimony." *Myers v. State*, 296 So.2d 695, 700 (Miss.1974). However, here, Kolberg was not denied his right to confront the witnesses against him based on the trial court's sustaining the objection to one question. After the sustaining of the objection, defense counsel continued the cross-examination of the witness on misidentification and then for whatever reason, Kolberg's counsel chose at some point to move to another line of questioning. No proffer was made as to what evidence would have been offered by Kolberg but for the trial court's purported limiting of cross-examination of a State's witness. Accordingly, this assignment of error is without merit.
>
> *Kolberg v. State*, 829 So.2d 29, 74 (Miss.2002).

Accord, *Mosley v. State*, 822 So.2d 589, 594 (Miss.App.2002).

In light of these authorities, the state respectfully submits Franklin's final proposition is meritless.

CONCLUSION

The state respectfully submits that the arguments presented by Franklin have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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