IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NORBERTO R. MORALES — APPELLANT

VS. — NO. 2007-KA-1645-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Newton County, Mississippi, and a judgment of conviction for the crime of Possession of More than Five Kilograms of Marijuana. Norberto R. Morales was arrested on November 22, 2006, and indicted by the Newton County Grand Jury on May 29, 2007, for violating Miss. Code Ann. § 41-29-139(c)(2)(G), Possession of More than Five Kilograms of Marijuana. (R at 2). Morales proceeded to trial by jury on August 7, 2007, with Honorable Marcus D. Gordon presiding. Morales was found guilty and sentenced to twenty-eight years (28) years in the custody of the Mississippi Department of Corrections and fine of Fifty Thousand Dollars ($50,000.00). (R at 27, 36).

STATEMENT OF THE FACTS

Around 1:00 p.m. on November 22, 2006, Deputy Jeffery Clayton stopped Norberto R. Morales for a traffic violation while traveling on Interstate 20 in Newton County. Morales was driving a freightliner and pulling a trailer. (T at 31). Upon noticing that Morales was acting nervous, Deputy Clayton asked for consent to search the cab of the vehicle and then the trailer. (R at 36).

After Morales read and signed a consent to search form, Clayton began his search. (R at 38, 65). Clayton found marijuana wrapped in garbage bags and placed inside boxes in between the pallets in the trailer. (R at 40).

Clayton stepped out of the trailer and motioned to Deputy Randy Patrick to get his handcuffs. Clayton then walked to Deputy Mark Spence who was standing with Morales, while Clayton conducted the search. (R at 40). All witnesses, including Morales, testified Deputy Spence read Morales his *Miranda* rights. Spence then asked Morales what was in the boxes. Deputies Jeffrey Clayton, Randy Patrick and Mark Spence testified that Morales responded "Marijuana" to which Spence asked "How much?" and Morales responded around 2000 pounds. (R at 44, 54, 60).

Morales testified when Spence asked him what was in the boxes, he responded, what boxes, to which Spence said, we can do this the easy way or we can do this the hard way, and I'm going to ask again, what is in the boxes. Morales then admitted to Spence that it was around 2,000 pounds of marijuana. (R at 63).

Spence handcuffed Morales and took him to the patrol car. (R at 44).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN REFUSING JURY INSTRUCTION D-7.

Morales contends the trial court committed reversible error by denying jury Instruction D-7, which he claims offers his theory of the case. Instruction D-7 provides:

> The Court instructs the jury that if you find from the evidence that someone other than the defendant, exercised conscious control over the substances, or if you have a reasonable doubt that Numberto Morales exercised conscious control over the substances, then you must vote "not guilty." (R at 26)

While a defendant is entitled to have a jury instruction on his theory of the case, the trial court may refuse a jury instruction which incorrectly states the law, is without foundation in the evidence, or is stated in other instructions. See *Murphy v. State*, 566 So.2d 1201 (Miss.1990).

At trial, Judge Gordon properly refused Instruction D-7 as "... not being an instruction applicable to this case and someone else exercised control over the substances when the evidence is, they were stopping you on a public highway with an eighteen wheeler. The substance was found in the trailer under lock and key and lock, no one else being present other than the defendant. Seven is refused and I'm going to give D-6 because it's – read it in conjunction with the instruction that you've been given, Mr. Brooks.. It may explain – you can't convict him with evidence that he was on a public highway, got stopped with forty-nine bales of marijuana, the trailer was locked, and he had the key, he surrendered the key, and a statement that's what's back there is marijuana, and it weighs two thousand pounds. He didn't only know what it was, he knew how much it weighed." (T 121).

Not only is D-7 an incorrect statement of the law, there is no foundation in the evidence to support it. S-1 instructs the jury on reasonable doubt and S-3 and D-6 properly instruct the jury on conscious control.

II. THE COURT DID NOT COMMIT PLAIN ERROR.

Morales claims the prosecutor instructed the jurors on the law during voir dire, which constituted plain error. The prosecutor was describing to the jury panel the type of case they were about to hear, not instructing the jury on the law. If the statement was error, then it was, at best, a marginal error and did not rise to the level of plain error.

Morales acknowledges that no contemporaneous objection to the statement was made by the defense. The failure to make a contemporaneous objection waives this issue on appeal. *Kimble v. State*, 920 So.2d 1058, 1060 (Miss.Ct.App. 2006). However, he contends that it was plain error for the court to allow the prosecutor to make the statement. Plain error may be invoked where (1) a party has failed to preserve an error for appellate review and (2) a substantial right is affected. *Kirk v. Pope,* 973 So.2d 981 (Miss.2007).

This is not a case in which plain error should apply. To prevail under the doctrine of plain error, a defendant has the burden of proving that there was error, that the error resulted in manifest injustice, and that it affected the defendant's fundamental rights. *Hicks v. State*, 973 So.2d 211 (Miss.2007).

In the case at hand, there was no error that resulted in manifest injustice and there was no fundamental right affected. Therefore, Morales plain error argument is without merit.

III. THE COURT PROPERLY ADMITTED MORALES' INCRIMINATING STATEMENT.

Morales contends that the trial court erred in denying his motion to suppress the incriminating statement made to Deputy Mark Spence. Morales testified at the motion to suppress hearing that when Spence asked him what was in the boxes and he responded "what boxes" Spence told him, "We can either do it the easy way or the hard way, and I'm going to ask you again, what's in the boxes." (T at 63). Morales testified that he felt intimidated because Spence "got in front of me." (*Ibid*). Morales argues that Spence's statement reasonably could have been understood as a threat to use violence on Morales to extract a confession.

Deputies Jeffrey Clayton, Mark Spence, and Randy Patrick all testified that Morales was read his *Miranda* warnings before telling Spence there was around two thousand pounds of marijuana in the boxes in the trailer. They all basically testified that Morales (1) understood English, (2) was not threatened in any way, (3) was not made any promises of leniency, and (4) was not coerced into confessing. They further denied that Spence told Morales that they "could do it the easy way or hard way."

The prosecution must prove beyond a reasonable doubt that a confession was made voluntarily, and it meets this burden by producing "Testimony of an officer, or other persons having knowledge of the facts, that the confession was voluntarily made without threats, coercion, or offer of reward." *Green v. State*, 2008 WL, 223717 (Miss.App.2008) citing *Morgan v. State*, 681 Sol2d 82, 86-87 (Miss.1996). When the circuit court expressly or implicitly resolves the issue of admissibility of a confession against a defendant, this Court's scope of review is confined to established limits. So long as the trial court applies the correct legal standards, the appellate court will not overturn a finding of fact made by a trial judge unless it is clearly erroneous. Where, on conflicting evidence, the trial court makes a finding, the appellate court must affirm. *Alexander v.*

State, 610 So.2d 320, 326 (Miss.1992) citing *Stokes v. State*, 548 So.2d 118, 121 (Miss.1989).

In its ruling, the trial court found that Morales was given his *Miranda* warnings and then made a statement. The court found "... nothing in the evidence to be intimidating; the statement was given without the promises of reward or threats of violence, no violence being committed to him, and is admissible." (T at 69). The trial court's decision to admit Morales' statements is proper.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's verdict and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 1st day of April, 2008.

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