IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT MCKINNEY — APPELLANT

V. — NO. 2007-KA-1734-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. Robert McKinney, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Albert B. Smith, III, Circuit Court Judge

This the 7th day of July, 2008.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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STATEMENT OF THE ISSUES

ISSUE NO. 1 : WHETHER THE DEFENSE WAS PREVENTED FROM ADEQUATELY DEVELOPING ITS THEORY OF THE CASE.

ISSUE NO. 2: WHETHER MULTIPLE EXTRANEOUS AND INAPPROPRIATE COMMENTS BY THE TRIAL COURT DIMINISHED THE SOLEMNITY OF THE PROCEEDINGS THEREBY DENYING DEFENDANT ROBERT McKINNEY A FAIR TRIAL.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Quitman County, and a judgement of conviction for the crimes of aggravated assault, murder and possession of a firearm by a convicted felon against Robert McKinney following a jury trial on September 10, 2007, the Honorable Albert B. Smith, III, Circuit Judge presiding. McKinney was acquitted by the jury on a second count of aggravated assault. McKinney was sentenced to a term of twenty years for the crime of aggravated assault, a term of life for the crime of murder, and a term of three years for the crime of felon in

possession of a firearm.[1] Robert McKinney is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

Several Motions were filed prior to trial, and heard before the Honorable Charles E. Webster, Circuit Judge. (See Supplemental Transcript, Vol. I) In part, the rulings in said motions were adopted by the trial judge, Albert B. Smith, III.. (T. 14-17) Among said motions were a motion to severe Count IV of the Indictment and a motion for change of venue. The motion to severe was denied upon a *Corley*[2] analysis and found that the multicount indictment complied with the statutory requirements. However, the issue of severance was revisited during the trial. The motion for change of venue was conducted after voir dire was held. The court found that a change of venue was not warranted pursuant to the factors enunciated in *Howell v. State*, 860 So. 2d 704 (Miss. 2003). However, the matter was then continued upon motion of the defendant, and the court reserved the right to revisit the issue.

Trial was then commenced on the 10th day of September, 2007. The motions heard previously were revisited, with the prior rulings being adopted, except that the motion for change of venue was "procedurally" denied as having been raised "too late." (T. 18)

In the motion hearings conducted by Judge Webster, a defense motion to prohibit any references to gangs was granted, the matter having no apparent gang connection. At trial, the matter of "gangs" was broached by the trial judge during voir dire, in the following extrinsic comment:

> I ask this in every case. We've had a couple of these little gangs that

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[1]The sentencing order, in conflict with the sentencing hearing, does not recite that the sentences are to run consecutive to one another; and further, errantly reports the sentences as having come upon pleas of guilty.

[2]*Corley v. State,* 584 So. 2d 769 (Miss. 1991)

> were around Clarksdale, Mississippi, and those jurors- -you know, we made sure- - I would also ask the jurors, "Anybody tried to talk to you about the case?" We convicted a couple of those guys over there and things have really cooled down some. (T. 60-61)

No objection was entered to this statement to the jury panel.

Nor was any objection entered to several remarks made by the State during voir dire that were commensurate with extracting a promise from the jury:

> But the State is entitled to a fair trial. Don't y'all agree on that? (T. 65)

> Now, if the State meets that burden of proving all the elements of the case, what would the jury do, if we meet that burden. It would find that person guilty. You see what I am saying? (T. 65-66)

> In other words, if the State meets its burden of proving all four, can I count on the jury to come back with a verdict of guilty in all four? (T. 68-69)

Without objection, this writer does not believe these comments by the prosecutor rise to the level of an arguable issue for the purposes of this appeal.[3]

According to trial testimony, Hessie Taper, ["Hessie"] was the proprietress of a "mom and pop store" in Lambert, Mississippi. She was in the store when the Appellant, Robert McKinney ["McKinney"], the father of her granddaughter stopped by to see his daughter and the mother. (T. 114-116) Her ex-husband, William Taper, nicknamed "Shang", ["Shang"], also stopped by. Her daughter and McKinney had entered an agreement with Shang in which they were pay him for furniture purchased under his name.(T.117-118) Len Huddleston, ["Huddleston"], had also been in the store at some point. (T. 123)

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[3]Questions seeking a commitment from jurors are never necessary to accomplish the basic purpose of securing fair and impartial juries. Harris, 532 So.2d at 607. Because the line between a proper and an improper question is not always easily drawn, it is manifestly a process in which the trial judge must be given considerable discretion. Id. at 606 (citing *Murphy v. State*, 246 So.2d 920, 921 (Miss.1971)).*Ross v. State*, 954 So.2d 968, 989 -990 (Miss. 2007)

Hessie was inside the store when she heard shots. (T. 119) Looking outside she saw McKinney shooting. She saw her son attempting to move out of the line of fire. (T. 120-121) She also observed McKinney throw the pistol in his car, get in himself and depart.(T. 125-126) She testified that neither Shang, nor her son had a weapon.

The ex-husband Shang was the next witness. He and Hessie had been married for twenty years. They had a son named Antonius or Tony Taper, ["Tony"], and a daughter, Marvella Taper, ["Marvella"], the mother of Mckinney's offspring. On that day, April 3, 2007, Shang encountered McKinney at the store and talked to him McKinney about making payments on the furniture.(T. 146) The discussion became louder. (T. 149) Shang admitted being scared of McKinney, as McKinney was large while he was a "little bitty guy." (T. 153-154)

Shang had also observed that Huddleston was there hanging around talking along with several other people. (T. 147-148) At some point McKinney went out to his car. (T. 149) Shang came out of the store, believing McKinney to be leaving. Instead McKinney turned and shot. Shang "went up under [his] truck." (T. 154) It was somewhat unclear whether Shang saw McKinney shoot Huddleston or saw him shooting as he walked towards Huddleston. He did see Huddleston fall. (T. 154, 156, 157, 160) He further observed his son , Tony, approach McKinney who said to him, "I've got something for you , too." McKinney then shot at Tony. (T. 154) In accord with his father's instructions, Tony ran.

A somewhat confusing exchange occurred in the testimony:

> Q. Did you see Lee Stevenson during the shooting?
>
> A. Tony, yes, Ma'am. I know him as Tony. Yes Ma'am. When that--when I- - seen him trying to approach his back, I said "Y'all better run. Y'all better run." So when Tony's son came up with that gun, Tony, he ran east into that alley right down beside that store and he left... (T. 157)

Lee Stevenson was the other person with a nine millimeter pistol that day. The testimony, as shown here, is somewhat conflicted as to the exact time he exhibited his weapon.

Shang testified that McKinney left in an "old blue car." (T. 158) It was unclear from Shang's testimony, whether McKinney shot him or whether he just shot mighty close. (T. 161). He was more certain that McKinney shot at Tony (his son).

On cross examination Shang noted that Laterria Joy was with his daughter in the apartment attached to the store. (T. 165) He remembered that Hessie had come in and out of the apartment, telling them to "cut that mess out", referring to the discussion over furniture payments. (T. 166) He stated that numbered among the people outside of the store were Huddleston, Tony, Lee Stevenson.

Jeanette Willis, ["Willis"], is the sister of Shang and Tony's aunt. She was at Hessie's grocery store on April 3rd, 2007. She was aprked across the street, waiting for Shang to bring her money. (T. 182-184) Lee Stevenson was outside the store with his blue car. She observed the loud talk over the overdue furniture payments and that the argument drew a crowd. (T. 187-188) She saw McKinney draw, with some difficulty, a big black and silver gun. (T. 189) People scattered. McKinney shot twice near the blue car (T. 189) later described as two shots down into the blue car (T.196) , then shot at Tony, as "everyone" hollered for Tony to run. She saw McKinney shoot at Tony, but not at Shang. She also saw shots at the "crowd." She only saw one gun displayed. She did not observe the "crowd" as threatening (T. 205-206)

Antonius "Tony" Taper was then called as a witness. After the family relationships were again explained, Tony related his version of the events. He had been talking to friends when he observed McKinney talking "rough" to his father, Shang. (T. 215-216). Tony was walking towards his car when the shooting started. He "turned around, the gun was pointed at[him]."(T. 216-218) Tony began "running for [his] life." (T. 219) Tony denied being armed, affirmatively averring that

the outcome would have been different had he been armed. (T. 221)

Attorney's for McKinney requested a bench conference, seeking to impeach Tony by asking 'if he ever carried a gun." Tony apparently had a prior felony "for possession of a firearm." (T. 223) The trial court required the defense only inquire if he had a gun that day, saying any other time would be a "red herring." (T. 224) Counsel reserved the right to make a proffer.

Lee Stevenson, who also goes by "Tony", was at the store that day hanging out with friends. (T. 248-249) He was parked at the store in his blue 1980 chevrolet. Huddleston was at his door. He saw McKinney shooting and took off running. After the shooting, he observed his driver side window shot out. (T. 250-256) Although he ran, the court allowed the State to use a prior statement to refresh his memory as to who it appeared was being shot at. The objection to speculation was overruled. (T. 258) After off the record argument, the State introduced evidence that Stevenson had pistol which, according to his testimony, he went and got after the shooting and brought it back.

Coss examination on Stevenson's gun was limited to a question on whether Stevenson's weapon came upon the scene after the shooting and whether or not he knew of any other weapon on the scene. The State, from the onset, had attempted to keep the knowledge of a second gun from the jury. The defense made a proffer that they would have shown that Stevenson had a 9 mm. pistol, the same kind used in the shooting, and that the gun had been confiscated at the scene. Later testimony would show a very limited time for Stevenson to have run away and returned with a gun as he claimed. (T. 307, 309-310) Further, McKinney testified to the presence of another gun. (T. 484) Apparently, in accordance with the trial court's ruling, the defense only asked Stevenson, if to his knowledge, was there another gun on the scene at the time of the shooting, thereby limiting cross examination and the right to confront witnesses against him. (T. 279)

Witness Cornelius Conley was a police officer with the Lambert Police department. He was

on patrol nearby when he heard three rapid shots, followed by a single shot. He saw a man standing near a blue pickup holding a pistol in a firing position.[4] This person was the only person Conley saw with a weapon. He pursued a green car with Tennessee tags. He had not seen that car before. He saw a pistol thrown from the window of the green car.(T. 288-291) Conley then initiated a "felony stop" pulling in front of the green car.(T. 292)

After aiding in McKinney's arrest, Conley went with Investigator Milton Williams to retrieve the pistol.

Cross examination emphasized that Conley's view of the scene was limited to the dimensions and capabilities of his rear view mirror.(T. 300-304)

Thomas Simpson was first examined outside the presence of the jury. (T. 305-312) Important to note is that Simpson was on the scene at the time of the shooting. He saw someone with a pistol get into a blue car and leave the scene. It was a matter of seconds or minutes" between the shooting and his seeing the man in the blue car with a gun. (T. 309)

Simpson testified he was a Lambert town supervisor. He heard the shots, saw the victim fall and saw a man in a red and white shirt run to a green car and drive away. (T. 312-313) He heard numerous shots. He could not say if the shots came from any other source. (T. 314-316) While at the scene he saw a man with a pistol get into a blue car. He asked him not to leave the scene, but backed off because of the pistol. (T. 320) The man with the blue car and a pistol was at the scene right after the shooting. (T. 326-327)

Chief Rena Wade of the Lambert Police Department identified shell casings recovered from the scene. (T. 332-336)

Milton Williams, a veteran of the Mississippi Bureau of Investigation, assisted in the

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[4] It should be noted that other witnesses placed McKinney near a blue car.

apprehension of McKinney and in the recovery of the pistol thrown from McKinney's car. The weapon contained one round. Williams recovered shell casings and two projectiles. (T. 339-345) Counsel for McKinney asked to approach the bench and made a second request that the second pistol, which was also recovered by Williams be admitted. This was denied, despite being part of the res gestae and testimony placing it at the scene very near the time of the shooting.[5] While being denied the opportunity to introduce the weapon, the fact that it was a 9 mm and recovered from Stevenson was adduced upon cross examination. (T. 372-373) On redirect, Williams testified that none of the casings or projectiles recovered matched the second weapon, without objection. Starks Hathcock, with the crime lab, matched the casings and projectiles to the gun thrown from McKinney's car. (T. 382-400.)

A hearing on the probative versus gruesome nature of the autopsy photographs was held outside of the juries presence. As the jury returned the court commented to the jury: "We can wake back up now. We've had our afternoon nap." (T. 400) Thereupon Dr. Hayne pronounced the cause and manner of death of the victim Len Huddleston as a homicide, caused by a gunshot wound to the head. He identified the bullet recovered from Huddleston's body, completing the chain of custody for that projectile.

The State rested and the defense moved for a directed verdict. After denial of said motion, the defense began its case.

Marvella Taper, ["Marvella"], testified to her recollection of that day. (T. 414) Her testimony contradicted her brother Tony's testimony. She said Tony had indeed been involved in the discussion over the furniture debt. (T. 415-418) His language was insulting and antagonistic. (418-

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[5]McKinney's defense is, at least in large part, self defense, thus making a second gun both highly relevant and probative.

422) Further, as the situation escalated, Tony made verbal provocations of a gun fight, telling McKinney to "Pull it, pull it out, Bitch." while indicating th he, Tony, was armed. Marvella described it as reaching under his shirt, as if he had a firearm under his shirt, while asking McKinney if he wanted pistol play. It was at this point Marvella heard gunshots. (T. 427)

On cross examination by the State, Marvella asserted that her brother Tony was intimidating McKinney. (T. 435)

Latteria Joy ["Laterria"], was the next defense witness.(T. 447) She was present when McKinney came to visit his infant child and it's mother. According to Latteria, Tony started an argument with McKinney. Tony went and got Shang and they both accosted McKinney. (T. 448-450). She specifically affirmed that Tony was challenging McKinney to "pistol play." while making motions as if he was going for a gun. (T. 452)

The State's cross examination revealed that she had not noticed McKinney with a gun while playing with the baby, but had seen the gun when Marvella pulled up McKinney's shirt. She was along time friend with Marvella. She denied ever making the statement that McKinney had drawn a gun on Marvella. (T. 459-460)

LaKizzy Ransom was the next defense witness. A police officer at the time, she was just down the street at the time of the shooting. She contradicted earlier testimony that there were only four or so persons outside. She was prevented from telling the jury that McKinney had stated to her that he was defending himself. As her testimony was that this occurred later in the day, it was unlikely an excited utterance, nor was it a statement against interest. However, the State strongly infers that McKinney made up his defense, but no argument was made that the statement should be admitted under MRE 801 (d)(1)(B). She did see the person in the photo (McKinney) shooting.

Robert McKinney took the stand in his own defense. (T. 474) He went to visit his baby and

her mother and trouble began almost immediately upon his arrival. First Tony came up to him, confronting with the late furniture payments, saying "What's up with that furniture?" (T. 476) Tony then went and got Shang. Shang told him he was going to get the furniture. Meanwhile Tony came in and out "looking crazy" and cursing him. (T. 476-478) Apparently due to Tony's hostile behavior, Shang suggested they talk outside, and that's when the trouble began. Shang became confrontational. A crowd of people were milling about. McKinney went back in Marvella's apartment. He then tried to leave. In short order McKinney was confronted with Shang again approaching him, an intimidating crowd and Tony threatening "pistol play" and reaching up under his shirt. Meanwhile, McKinney who was already terrified saw an individual, part of the crowd, trying to pull his weapon. Another man appeared to him to reaching into a car for a weapon. All of this is occurring in a millisecond. McKinney shot at the man with the gun and the man at the car door. His terror was not just for himself, but the baby and her mother. (T. 483-486) He said that he shot intentionally, but due to the danger he perceived was threatening him.(T. 500)

Still in fear, McKinney got in his car and ran.

Cross examination, primarily an attempt to discredit McKinney's defense as fabricated also uncovered that he had only been to Lambert once before

The defense rested upon McKinney's testimony and the State finally rested

A tendered manslaughter instruction was refused due to McKinney's statement that he shot intentionally, despite the evidence of heated and insulting words. None-the less, the theory of the defense was self-defense, despite the presence of provocation.

Upon the jury verdict of guilty in Counts II, III and IV, McKinney was sentenced, from which this appeal ensues.

SUMMARY OF THE ARGUMENT

The trial court limited the defense in its cross examination concerning whether a second weapon was present. The second weapon was a critical element of McKinney's self-defense defense. Further, the trial court refused to let the weapon be introduced into evidence. Finally, the trial court refused McKinney's tendered jury instruction on the defense theory of the case. These rulings significantly hindered McKinney's defense and accordingly denied him a fair trial.

Multiple extraneous judicial comments, which detracted from the solemnity of murder and aggravated assault charges and thereby, influenced the jury, denying the Appellant a fair trial.

ARGUMENT

ISSUE NO. 1 : WHETHER THE DEFENSE WAS PREVENTED FROM ADEQUATELY DEVELOPING ITS THEORY OF THE CASE.

"It is a basic tenet of our criminal system that a defendant is entitled to fully develop his theory of the case and, so long as there is some supporting evidence in the record, to have the jury instructed on the law on that theory." *Miller v. State*, 733 So 2d 846, 848-849 (Miss App. 1998)

In the present case, McKinney's defense was that he was acting in self defense. In three separate rulings the trial court hindered McKinney from being able to full develop his defense, thereby giving the jury all the relevant facts and law. Specifically, McKinneys constitutional right to cross examine a witness on his possession of a firearm was severely restricted, contrary to his constitutional right to confrontation. Unquestionably, a second gun was recovered from the scene. Yet McKinney was prevented from introducing the gun into evidence. McKinney sought jury instructions on self defense, one that was specifically pertained to Len Huddleston, who was killed at the scene. This was denied by the court. Alternate theory instructions were also denied.

McKinney's defense was premised on several factual issues that needed to be resolved by the jury. One issue was whether Lee Stevenson displayed a firearm at the time of the shooting or

after. Cross examination of Lee was restricted and limited by the court, upon motion of the State. Lee was found with a weapon at the scene and the weapon was confiscated by the police. According to Lee, he went and got the gun after the shooting and came back with it. He somehow managed to do this in a matter of seconds or at most scant minutes. (T. 307, 309-310) As set forth in the facts above, McKinney's opportunity to advance the facts concerning his theory was severely circumscribed. Thus a critical Constitutional right, that of confrontation was abridged. The Mississippi Supreme Court has stated:

> The United States Supreme Court has noted:
>
> > [there] are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.
>
> Lee v. Ill., 476 U.S. 530, 540, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) (quoting Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)). The right to confrontation:
>
> > (1) insures that the witness will give his statements under oath-thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility.

Smith v. State, ___So. 2d___, 2008 WL 2522467 (Miss.June 26,2008) The trial court further restricted the right to confrontation when it refused to let the defense impeach Tony Taper with his prior conviction on a firearm charge. Though the conviction was ten years old, that is not an absolute bar to admission into evidence. Instead the trial court is obliged to consider the probative value. In this case, evidence was introduced

that Tony had given McKinney reason to believe he was going for a gun. Conversely, Tony testified that he was a passive victim. As such his credibility on the issue was squarely before the jury as a critical factor. Yet the trial courts ruling was perfunctory. Relying on MRE 609 (b) the trial court ruled the evidence inadmissable per se without considering the probative value.(T. 19-21, 223-224) The rule states:

> b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, **unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect.**

M.R.E. Rule 609 Toner Taper was a convicted gun packer, he denied having a gun on the day in question. The probative value of his prior conviction was critical and should have been weighed by the trial court.

Proof clearly showed Lee Stevenson was in possession of a firearm, at the scene. A factual question of when was left to the jury. Yet the trial court limited cross examination of Stevenson and denied admission of the gun into evidence. Evidence that is part of the res gestae or found at the scene are admissible. *Wilkins v. State*, 264 So. 2d 411, 413 (Miss. 1972), *Pendergraft v. State*, 213 So. 2d 560 9Miss. 1968, *Hubbard v. State,* 437 So. 2d 430, 436 (Miss. 1983) McKinney's defense was self defense. He should have been allowed to have the second gun admitted into evidence in support of his testimony.

Finally, McKinney tendered jury instructions D-6, D-15, (T. 514, C.P. 15) The court premised its refusal on its own belief that self defense cannot involve someone reaching into a car. This was a factual determination for the jury. It can be argued that self defense is

adequately covered in other instructions, and as a whole the jury received sufficient instruction, but when added to the evidence supporting the defense theory of the case, failure to give the tendered instructions, it is urged, must be resolved in favor of McKinney, and the reversal of this case for a new trial. Had the jury believed McKinney and his witnesses, he would have been entitled to an acquittal. *Lester v. State*, 862 So. 2d 582, 585 (Miss. App. 2004) In the same light, the trial court erred in not submitting McKinney's alternate theory of the case, his two tendered lesser included offense of manslaughter instructions, D-11 and D-12. (C.P. 145-146) "Litigants in all cases are entitled to assert alternative theories, even inconsistent alternative theories." *Love v. State,* 441 So.2d 1353, 1356 (Miss.1983) Certainly there was evidence the jury could have construed as either heat of passion or recklessness provocation.

McKinney was effectively prevented from fully developing his theory or theories of the case, or getting an instruction on his theories. Hence, this case should be reversed and remanded.

ISSUE NO. 2: WHETHER MULTIPLE EXTRANEOUS AND INAPPROPRIATE COMMENTS BY THE TRIAL COURT DIMINISHED THE SOLEMNITY OF THE PROCEEDINGS THEREBY DENYING DEFENDANT ROBERT McKINNEY A FAIR TRIAL.

"The great danger, particularly in a criminal case, is that the weight and dignity of the court accompanies each question or comment, although not so intended by the judge..." *Thompson v. State*, 468 So.2d 852, 854 (Miss. 1985)

The trial court made numerous comments and quips, undoubtably without any improper intention. However, in this case, McKinney faced potential life imprisonment, and as such, his trial was a solemn occasion.

> Jocularity and humor, by a court, should not be indulged in when a man's liberty is at stake. The officers of a court, and especially the judge, district attorney and sheriff, because of the

> attributes of the offices they hold, unconsciously exert tremendous influence in the trial of a case, and they should be astutely careful so that unintentionally the jurors are not improperly influenced by their words and actions. Rogers v. State, 243 Miss. 219, 136 So.2d 331 (1962).

Roberson v. State, 185 So.2d 667, 670 (Miss. 1966)

The following ad libs an instances of levity are offered to support this contention.

The trial court, during voir dire used the following simile to explain giving preference to the testimony of one witness:

> THE COURT : It's not like my momma is on that witness stand, I don't care what anyone else says, I'm going to believe momma, you know what I'M saying
>
> (Laughter)
>
> THE COURT : If momma says it's raining outside and it's sun shining, I'm going to say it's raining outside because momma says so. (T. 43)

Later in voir dire an explanation the court explained bias toward a witness as follows:

> THE COURT : Now this next question is more general. Living in a small place, you get to know everybody. That's good and bad. I mean, you might live next to somebody and they have a dog that barks all night, and boy that just gets on your nerves, you wish they would move, and you don't like them (T. 47)

Serious treatment of the case was already beginning to erode at this point, as could be seen in the jury panel's behavior.

> THE COURT : Y'all are giggling and whispering over there. Now that's not right. You know in school, they get on to folks about that.
>
> (Laughter.)

On the issue of fairness, the following inappropriate comment was shared with the jury.

> THE COURT : I ask this in every case. We've had a couple of these little gangs that were around Clarksdale, Mississippi, and

> those jurors - - you know, we made sure - - I would also ask the jurors, "Anybody tried to talk to you about the case?" We convicted a couple of the guys over there and things have really cooled down some. (T. 60-61)

Such a comment prejudiced McKinney in two ways, it introduced a suggestion that McKinney's matter had a possible gang nexus and told the jury a conviction would "cool down" a community. As such it was a judicial equivalence of send a message. Again, the argument in no way intends to suggest any wrong intent, but the "very position of a judge" has great sway with jurors. *Davis v. State*, 811 So. 2d 346, 353 (Miss. App. 2001) Thus one off the cuff comment deals McKinney's right to a fair trial two separate blows.

Later during trail, as one witness apparently slumped in his seat, the trial court admonished the witness thusly:

> THE COURT : Mr. Taper, do we need to - -
>
> Deputy come here and help me move this microphone closer to him. He's laying back there like he's in the back seat of a car. The thing is everybody gets on the front and they lay back in them cars and you can't - - they are in the back seat.
>
> Man, what are you doing? You are in court. Try to sit up right.
>
> (Court laughing.)

Such levity in a murder trail lessens the gravity of a trial for the crimes of murder and manslaughter. A judge "cannot be too careful and guarded in his language and conduct in the presence of the jury." *Beyersdorfer v. State,* 520 So. 2d 1364, 1366 (Miss. 1988)

Another comment, as shown in the facts above concerned the jury having nap time during the trial. (T. 400) Again, this lessens the solemnity of a trial for the crime of murder.

No objection by defense was entered to any of the courts comments. Therefore, this issue must be analyzed under a plain error analysis. As demonstrated by the above cited cases,

a murder trial is a solemn occasion. The defendants liberty is at stake. A conviction results in a life spent in prison. As such, a substantial injustice results if the jury is induced to treat the matter with light-mindedness. In such an instance it is not up to the defendant to demonstrate that harm resulted.

> The Court will not stop to inquire whether the jury was actually influenced by the conduct of the judge. All the authorities hold that, if they were exposed to improper influences, which might have produced the verdict, the presumption of law is against its purity; and testimony will not be heard to rebut this presumption. It is a conclusive presumption."

Fulgham v. State, 386 So.2d 1099, 1101 (Miss. 1980) Plain error exist and is is reversible where it affects "the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano,* 507 U. S. 725, 113 S.Ct. 1770, 1773 (1993).

For these reasons, this case should be reversed and remanded.

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Robert McKinney, 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:

Honorable Albert B. Smith, III
Circuit Court Judge
8619 Highway 51 North
Cleveland, MS 38732

Honorable Laurence Y. Mellen
District Attorney, District 11
Post Office Box 848
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Honorable Jim Hood
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Jackson, MS 39205-0220

This the 7th day of July, 2008.

W. Daniel Hinchcliff

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