IN THE SUPREME COURT OF MISSISSIPPI

JERMAINE NEAL — APPELLANT

VS. — NUMBER 2007-KA-01899-SCT

STATE OF MISSISSIPPI — APPELLEE

APPEAL
FROM
THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF
TALLAHATCHIE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

James A. Williams
MSB # [redacted]
Attorney for Appellant
Post Office Box 5002
Meridian, Mississippi 39302
Telephone: (601) 693-3881

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF OF APPELLANT

In General

There is an excessive numerosity of facts that are not developed below by the trial court due to failures of counsel, and, in particular, the State, in its brief on the ineffective counsel issue has said these claims must wait for another day, assuming an affirmance. That position is shared by Appellant counsel and justified by the Court's approach to a sparse record when issues are raised. In **Britt v. State**, 520 So.2d 1377, 1379 (Miss.1988) (citing **Mason v. State**, 440 So.2d 318, 319 [Miss.1983]) the Court stated the rule:

> We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise, we cannot know them.(citations omitted)

For example, we do not know if the "intruder defense" was revealed to the State before trial. And we must assume it wasn't, because Defense counsel did not cross examine of the State's witnesses on that position. If such was not divulged by Defense, then was there a discovery violation if the State did not disclose the testimony of Senior Crime Scene Analyst Arthur Chancellor that the front door was not functioning and his expert opinion that it was a "staged crime scene". This testimony was to rebut the promised "intruder defense" and implicate Neal in the staging, all of which identify him as the killer.

Another thing we do not know, and again the fault of counsel but shared by the State since this conversation is not disclosed(See Discovery in the Court file) is the content of the conversation between Neal, once he was handcuffed and put in the patrol car by Officer Weekly and Investigator Davis and Hodges talked to Neal. We do know from Investigator Brandon Hodges (T140) that Neal was under arrest and in custody at that time. We also know that Neal was not read nor did he waive his Miranda Rights before that questioning. Miranda occurs at 3:15 A.M. two hours after Mary

Loerker, the neighbor calls the Sheriff at 1:11 while the body is found at 1:48A.M. by first deputy Weekly.(See CP 72, "underlying facts and circumstances" of the Affidavit for Search Warrant.

We know that the Search warrant was issued before its return which reveals the search was made at 3:55 A.M.(CP 76). The underlying Facts and Circumstances show that Neal had probably incriminated himself during this nearly 2 hour period. He has already told the officers that he has Lakeshia' cell phone in her truck that he had driven to work. The typed account of the video confession(RE 53) shows that Neal had used Lakeisha phone to "text" her sister as a means of cover up. Before Miranda Neal had told the officers to look in the well for the head (CP73).

These "underlying facts" also reveal that Neal had given a Consent to Search at 3:22, which of course, is after Miranda, but also probably a product of the interrogation in the car, right after Weekly arrived, without benefit of Miranda nor a Waiver.

A further thing, we do not know, and thus the Right to Testify Issue cannot be resolved, is whether that decision was made before the State put on its case in chief. The reason for the speculation is that Defense Counsel did not interrogate the officers on the intruder defense, did not object to the front door testimony of Chancellor nor his opinion.

The State's withdrawal of a heat of passion jury instruction belies revelation of that defense. That State's instruction was ready if Neal testified to a fight over his having found the DNA paternity tests showing he had been supporting a child that wasn't his. As he admitted culpability to the officers, ostensibly, about 10:00 P.M. on the day after Lakeshia's murder on August 21, 2006, he agreed with their discovery from their investigation there was rumors he wasn't the father and he did acknowledge he had the idea she was cheating on him.

What we do know and Defense should have known was that Pathologist Seven Hayne had opined that the decapitation was "post mortem" and the probable immediate cause of death was trauma to the head. (CP 146, RE 61) We do know that Defense counsel did not cross examine

Chancellor on his "blood spurting" description of what are just blood spatters on Lakeshia's white pants. What we don't now is whether the "bone fragments" would prove two shots to the missing head, or whether they were from the knife. We don't know whether the bone fragments would have shown the bullets' penetration of a portion of the brain that would have instantly killed Lakeshia and thus the "jerking" was involuntary muscle contractions or such.

I. Reply to Issue of Decapitation Charged in the Indictment But Absence from the Element Instruction.

The only reply needed here, since the law and all other facts were fully explained in the Defendant's original Brief, is the statement by the State on p. 8 of its brief that the Autopsy said the cause of death was undetermined, referring the Autopsy at CP 146. Dr. Hayne concludes"

"CAUSES OF DEATH AND PATHOLOGIC FINDINGS:

A. Immediate Cause of Death: Undetermined

B. Probably Immediate Cause of Death: Trauma to the Head

C. Significant Pathologic Findings: Post Mortem Decapitation

MANNER OF DEATH: Homicide(CP 146)

DISCUSSION OF THE CASE:

The decedent was noted to succumb from a probable head injury. The manner of death is ruled Homicide. The decedent is noted to have been decapitated in the post mortem state."

II. Reply to Jury Striking.

Because Defense Counsel made no objections to the issues raised here about jury selection, then "plain error" is advanced to allow review. The Judge has a duty to assure a fair trial and he is implicitly clothed with more than an observer role. See **Butler v. State,** 608 So.2d 314, at 318(Miss. 1992)(Circuit Judge should perceive and declare "plain error"; **Whigham v. State**, 611 So.2d 988, at 996(Miss. 1992)("plain error" in closing argument); **Brooks v. State**, 209 Miss. 150

at 155, 46 So.2d 94 at 9(1950)("Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal.")The plain error doctrine has been construed to include anything that "seriously affects the fairness, integrity or public reputation of judicial proceedings." **United States v. Olano**, 507 U.S. 725, 732-735, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Other the Appellant relies upon the authorities and exposition of the record facts set forth in his original Brief.

III. Reply to Issue of Change of Venue.

Again, the only reply here is a request that the Court utilize "plain error".

IV. Reply to Issue of Juror Who Left Courtroom.

As said in the first section of this Reply, there are facts unknown on this record, but Appellant would disagree with the assumption in the State's Brief that the bailiff immediately "followed" the juror out into the hallway.

V. Reply to Issue of Hearsay Statement Identifiable Circumstances.

There is no doubt that the statement of the child was purposefully used as identification and admission of conduct testimony and struck at the heart of any intruder defense. The only two adults that knew of the window use by the child and had exclusive access to the inside of the house, were Neal and Lakeshia. Lakeshia was dead. She could not have locked the window. Neal left the house and thus locked the window to keep the young child from entering to play the Playstation.

Again, as to duty to review, the Appellant invokes "plain error" principles.

VI. Reply to Issue of Ineffective Assistance.

Appellant has already agreed or suggested that there are many facts unknown and surely those surrounding ineffective counsel would need fleshing out. However, he strongly disagrees and rejects any claim that the actions of counsel were "strategy", because, of necessity, to have any force or

effect, such a claim of "strategy" must produce results that are arguably in favor of Appellant's claim of innocence or otherwise enforce his constitutional rights. We have seen by the accounts of the actions of the Deputies in the time frames shortly after discovering the body that Neal had not waived his right to silence and an attorney and evidence was collected from him that was useful to the State either in proving culpability or rebutting any defense.

VII. Reply to Issue of Judge's Failure to Adjudicate Defendant Guilty.

Appellant makes no Reply but relies upon his original Brief on this Issue.

VIII. Reply to No Manslaughter and No Desecration of a Human Corpse Instructions.

No doubt Defense counsel did not request a manslaughter nor the lesser included Instruction on desecration of a human Corpse. The only instructions he offered(CP 34-35) were a peremptory instruciton and one on reasonable doubt. We know from the record, Defense counsel did not even object to the jury instruction on elements that failed to require the jury to find that "decapitation" was the cause of death. The only refuge, apart from ineffective counsel, left to the Defendant is to rely upon the principle that the trial court sits to guarantee a fair trial. In **Duvall v. State**,634 So.2d 524, 526(Miss.,1994) the Court excused lack of objection by defense counsel and stated:

> We again hold that when the circuit court grants instructions clearly erroneous and which deny the accused a fair and objective evaluation of the evidence by the jury, we will reverse, even though there was no objection by defense counsel. **McMullen v. State**, 291 So.2d 537, 541 (Miss.1974). A circuit judge has a responsibility to see that the jury is properly instructed. **Peterson v. State**, 518 So.2d 632, 637-638 (1987); **Harper v. State,** 478 So.2d 1017, 1018, 1022-1023 (Miss.1985); **Newell v. State**, 308 So.2d 71, 78 (Miss.1975).

The State cites **Livingston v. State**, 943 So.2d 66, 71(Miss.App.,2006) says:

> This Court employs the following standard when reviewing a trial court's denial of a jury instruction,
> Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. When so read, if the instructions fairly announce

the law and create no injustice, we will not find reversible error. Jones v. State, 912 So.2d 501, 505-06(¶ 13) (Miss.Ct.App.2005) (quoting Harris v. State, 861 So.2d 1003, 1012-13(¶ 18) (Miss.2003); Johnson v. State, 823 So.2d 582, 584(¶ 4) (Miss.Ct.App.2002)).

Surely this rule must apply when the State's theory justifies the instruction, which Neal also argues was the only instruction allowed under the Indictment, i.e. the desecration of a human corpse. Under the indictment specifying the act of "decapitation", with Steven Hayne's autopsy saying probable cause of death was trauma to the head and the decapitation was "postmortem" , then the jury should have been instructed on the desecration theory.

IX. Reply to Issue of Cumulative Error

Appellant makes no Reply to this Issue but again relies upon the exposition in his original Brief.

X. Reply to Issue of Sufficiency of the Evidence.

Again, hamstrung by the lack of counsel performance, Appellant relies upon his original Brief.

CONCLUSION

The Appellant Neal urges this Honorable Court to conclude that he did not receive a fair trial and his conviction must be reversed and he be discharged.

Respectfully submitted,

James A. Williams, MSB[redacted]
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned James A. Williams, counsel for the Appellant, in the above styled and numbered cause, do hereby certify that a true and correct copy of the above and foregoing Reply Brief of Appellant has been mailed by United States Mail, postage prepaid to the following:

Honorable Andrew C. Baker
Circuit Judge
P.O. Drawer 368
Charleston, Mississippi 38921

Honorable John W. Champion
District Attorney
365 Losher Street
Suite 210
Hernando, Mississippi 38632

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220

Done this the 29th day of September, 2008.

James A. Williams MSB # [redacted]
Attorney for Appellant
Post Office Box 5002
Meridian, Mississippi 39302
Telephone: (601) 693-3881

CERTIFICATE OF MAILING

I, the undersigned, Attorney for Appellant hereby certify, that I have actually mailed this date the Original and three copies of the Reply Brief of Appellant.

This the 29th day of Sept Broker, 2008.

James A. Williams
Attorney at Law