

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY BENNETT

APPELLANT

FILED

VS.

JUN 3 0 2008

NO. 2008-KA-0153-COA

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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COURSE OF PROCEEDINGS BELOW

The Grand Jury for Wayne County, Mississippi, indicted Johnny Bennett for setting fire and burning Sharlameshia Arrington and Eddie James Poole's trailer on November 25, 2006 pursuant to Mississippi Code Annotated § 97-17-1 (1972). CP 8. The jury convicted the defendant of arson. T. 218; CP 39. The court sentenced the defendant to twenty (20) years. T. 268; CP 53. The defendant appeals his conviction and now appears before this honorable court. CP 43.

STATEMENT OF FACTS

On November 24, 2006, Edward Williamson, Jameer Everett, and Legarrian Blakely rode around in Williamson's car with Johnny Bennett, the defendant. T. 73, 94, 114. Everett and Blakely both testified they went to Eddie Poole's trailer because the defendant had a problem with him. T. 95, 115-16. According to Williamson and Everett the defendant carried an assault rifle in his car. T. 75, 95

When the defendant discovered Mr. Poole was not home, the defendant requested they drive to Everett's house to retrieve a gas jug. T. 74, 97, 116. Everett, the defendant's son, exited his house with a clear jug like one that would contain orange juice. T. 72, 92, 97, 116-17. The thugs arrived at a gas station. At the defendant's request, Williamson pumped four (4) dollars of gas into the car and one (1) dollar into the jug. T. 74, 99.

After leaving the gas station, Blakely's father phoned and requested Blakely come home. T. 77, 99, 117. The thugs dropped Blakely off at home. T. 79, 99, 117. Both Williamson and Everett requested Everett not be involved. T. 80, 101. The two remaining men dropped Everett off at the defendant's house. T. 101.

After dropping Everett off, the two criminals drove to Mr. Poole's trailer. T. 81. The defendant exited the car, kicked in Mr. Poole's front door, doused the living room with the gas from the jug, and lit the trailer on fire. T. 81.

The criminals fled home. T. 82. The defendant told Everett and Williamson to lie that the defendant purchased the gas for his girlfriend's car. T. 103.

Jennifer Reed, neighbor to Mr. Poole, witnessed a car parked across the street from her. T. 129. Ms. Reed heard witnessed her neighbor's house on fire and called 911. T. 128-30.

Sharlameshia Arrington lived with Eddie Poole and their four children. T. 122. Ms. Arrington dropped off Christmas presents at the trailer earlier in the day. T. 123. Ms. Arrington left to visit her mother. T. 123. Early in the morning of November 25, Ms. Arrington received a call that her trailer caught on fire. T. 124. Ms. Arrington and Mr. Poole's home burned completely. T. 124. They had no insurance. T. 125.

Mike Mazingo, an arson investigator with Wayne County Sheriff's Department, investigated the fire. T. 143. Officer Mazingo determined the fire was arson. T. 144.

Officer Mazingo interviewed Williamson, Everett, and Blakely. T. 149. They all eventually told Officer Mazingo the same series of events. T. 149. The defendant called Everett while Mazingo interviewed Everett. Mazingo listened to the conversation and heard the defendant tell Everett to stick to the original plan. T. 105, 146.

Officer Mazingo obtained a warrant to search the defendant's trailer. T. 150.

Officer Mazingo discovered an assault weapon, a gas jug, and Vice Lords constitution. T. 150-51. Everett informed Officer Mazingo the gas jug was not the one used that night. T. 150.

During the trial, both the State and defendant repeatedly asked about the night of November 25th instead of November 24th. The State asked Williamson if the arson was a gang initiation. T. 76. Williamson denied it related to a gang. T. 76. The defendant's attorney asked Williamson about a gang to squash the motive the State tried to establish. T. 90. The State also questioned Everett about the defendant's involvement in a gang. T. 107. Everett claimed he had no knowledge of any gang affiliation. T. 109-11.

The State questioned Williamson, Everett, and Blakely about an assault rifle. T. 83, 95, 116. When questioning Everett, the defendant's attorney objected to the questions about the assault rifle. T. 101.

The defendant called Amy Wilson to the stand. T. 170. The defendant questioned Ms. Wilson to establish an alibi. During the period when the defendant committed the crime, Ms. Wilson lived with the defendant. T. 171. Ms. Wilson testified the defendant, his son, and another boy were at the defendant's house when she arrived home from work on November 25. T. 173. Ms. Wilson went to bed soon after arriving home. T. 174. She awoke at one point in the night, and the defendant

was there. T. 176. The judge refrained from granting an alibi instruction because Ms. Wilson testified about November 25th and not November 24th. T. 195. The jury convicted the defendant of arson. T. 218.

STATEMENT OF THE ISSUE

Issue I.

Whether the trial judge properly refrained from granting an alibi instruction?

Issue II.

Whether the defendant's counsel effectively assisted him with jury instructions and objections?

SUMMARY OF THE ARGUMENT

The trial judge properly refrained from granting an alibi instruction. The alibi witness testified about the day after the crime occurred. She did not give him an alibi for the night of the actual crime. Additionally, the alibi witness slept through the time in question. The defendant could have left and came back without the alibi witness ever knowing. Therefore, the trial judge properly refrained from granting an alibi instruction.

The defendant's counsel effectively assisted the defendant. The defendant did not perform deficiently. Additionally, any alleged deficiency did not prejudice the defendant. Therefore, the defendant's counsel effectively assisted the defendant.

ARGUMENT

Issue I.

THE TRIAL COURT PROPERLY REFUSED TO GRANT AN ALIBI INSTRUCTION BECAUSE THE ALIBI WITNESS NEVER PRESENTED AN ACTUAL ALIBI.

The trial court properly refused to grant an alibi instruction. The alibi witness never presented an actual alibi. Since no alibi existed, the trial court should not instruct the jury about an alibi. Therefore, the court should affirm.

When reviewing jury instructions, the standard of review requires the Court to read and take the instruction as a whole. *Smith v. State*, 835 So.2d 927, 934 (Miss. 2002). If the jury instructions fairly announce the law, they are sufficient. *Id.*

When instructing the jury, the court does not grant an alibi instruction if the evidence does not support an alibi. *Cochran v. State*, 913 So.2d 371, 375 (Miss. Ct. App. 2005). Evidence does not support an alibi “if the asserted alternate location is such that, based on version of events contended for by the defense, it would remain within the realm of physical possibility for the defendant to have committed the crime.” *Owens v. State*, 809 So.2d 744, 747 (Miss. Ct. App. 2002).

In *Cochran*, a witness testified that the defendant was at home. *Cochran*, 913 So.2d at 375. During cross, the witness admitted that the defendant may have spent the night elsewhere. *Id.* The Court held the trial court properly refrained from granting an alibi instruction. *Id.*

In *Owens*, the defendant testified he was asleep when the murder occurred. The Court found his testimony was a denial and not an alibi. *Owens*, 809 So.2d at 747.

According to precedent, the trial properly refrained from granting an alibi instruction. The defendant's attorney asked the alibi witness to testify about the defendant's whereabouts on day after the defendant committed the crime. T. 175. Providing the whereabouts for the next day does not provide the defendant with an alibi.

Additionally, Wilson did not provide an alibi. She testified she arrived home around eight in the evening. T. 172. Wilson saw the defendant, his son, and another boy sitting around the living room. T. 173. Wilson testified she went to sleep around nine and awoke once in the evening. T. 174-76. The defendant could have left at any time and lit the trailer on fire and returned without Wilson knowing he ever left. Testifying that the defendant was home when she went to sleep did not provide the defendant with an alibi.

Wilson did not testify to the correct evening. Wilson did not provide an alibi. Therefore, the Court should affirm.

Issue II.

THE DEFENDANT'S COUNSEL EFFECTIVELY ASSISTED THE DEFENDANT BECAUSE THE COUNSEL DID NOT PERFORM DEFICIENTLY AND ANY ALLEGED DEFICIENCY DID NOT PREJUDICE THE DEFENDANT.

The defendant's counsel effectively assisted the defendant. The counsel did not perform deficiently. Any alleged deficiency did not prejudice the defendant. Therefore, the defendant's counsel effectively assisted the defendant, and the Court should affirm.

As decided by the United States Supreme Court, the standard of review for ineffective counsel is set out as a two-part test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must prove the following: (1) the counsel performed deficiently and (2) the deficiency prejudiced the defendant. *Id.*

A rebuttable presumption exists where an attorney's behavior lies within the "ambit of reasonable professional standards." *Hulburt v. State*, 803 So.2d 1277, 1279 (Miss. 2002) (quoting *McQuarter v. State*, 574 So.2d 685, 687 (Miss. 1990)). To rebut the presumption, the defendant must prove the proceedings would have ended differently. *Wynn v. State*, 964 So.2d 1196, 1200 (Miss. Ct. App. 2007); *Jones v. State*, 911 So.2d 556, 560 (Miss. Ct. App. 2005). Many of the things an attorney does or does not do during a trial are considered part of his trial strategy. *Anderson v. State*, 904 So.2d 973, 980 (Miss. 2004).

First, the defendant's counsel effectively assisted him with an alibi. Although the defendant's counsel may have been deficient when asking the alibi witness the wrong date, the deficiency did not prejudice the defendant. Amy Wilson testified the defendant was at home. T. 173. Wilson went to sleep. T. 174. The defendant could have left and returned without Wilson ever knowing. This is not an alibi. Even with the alibi instruction, the outcome of the trial would have been the same. Failure to ask the witness about the correct date did not prejudice the defendant. Therefore, the defendant's counsel effectively assisted the defendant.

Next, the defendant's counsel effectively assisted him when he allowed gang-related questions. According to Mississippi Rules of Evidence, character evidence is admissible to establish motive. M.R.E. § 404(b). According to *Hoops*, counsel can introduce gang evidence to prove motive. *Hoops v. State*, 681 So.2d 521, 530 (Miss. 1996). Although no case exists directly on point in Mississippi, the Fifth Circuit decided a case dealing with gang evidence and ineffective counsel. In *Henderson*, the State introduced gang related evidence. *Henderson v. Cockrell*, 333 F.3d 592, 602 (5th Cir. 2003). The defendant's counsel did not object. *Id.* The court held counsel effectively assisted the defendant because no reasonable probability existed that the jury would acquit him. *Id.*

In this case, the State questioned the witnesses about gang affiliation to

establish a motive. The State tried to establish gang initiation as the motive. T. 76. The State did not succeed in establishing a motive. T. 76. Both of the witnesses with the defendant on the night of the crime denied it involved a gang initiation. T. 76, 90, 107. According to precedent, the State can mention gang affiliation to establish a motive. The defendant's attorney properly assisted the defendant in relation to the gang evidence. Not objecting was part of his trial strategy. He wanted to make sure the jury knew the crime did not involve a gang. If he had objected, all the jury would remember is the State asking witnesses about a gang and not their answers. Therefore, he did not perform deficiently.

Even if the court finds the defendant's counsel performed deficiently, the deficiency did not prejudice the defendant. A surplus of testimony established the defendant committed the crime. Removing the gang-related questions would not change the result of the trial. Therefore, the gang-related questions did not prejudice the defendant.

The defendant's counsel did not perform deficiently when he did not object to the gang-related questions. The counsel's lack of objections did not prejudice the defendant. Therefore, the defendant's attorney performed effectively.

Finally, the defendant's counsel properly dealt with testimony about an assault rifle. The defendant's counsel objected to the questions about the assault rifle. T.

101. He did not think the questions were relevant to the case. T. 101. The defendant's counsel could do nothing more than object. Therefore, the defendant's counsel performed effectively.

Even if the Court finds deficiency, the deficiency did not prejudice the defendant. The defendant did not prove eliminating this testimony would change the outcome of the trial. Therefore, the deficiency did not prejudice the defendant.

In conclusion, the defendant's counsel effectively assisted him with alibi instructions, gang-related evidence, and irrelevant testimony. Therefore, the Court should affirm.

CONCLUSION

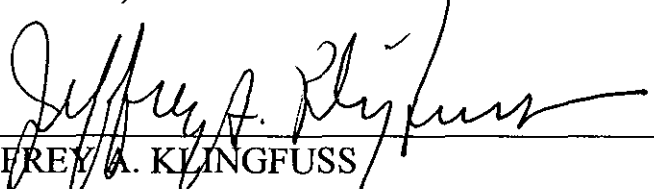
The defendant's witness did not provide the defendant an alibi. She testified to the wrong date. She slept through the time period she claimed the defendant was at home. Therefore, the trial court properly refused to grant an alibi jury instruction. The Court should affirm on the alibi issue.

The defendant's counsel effectively assisted him throughout the trial. The defendant's counsel did not perform deficiently when questioning the alibi witness. If the trial court granted an alibi instruction, the jury's verdict would remain the same. The defendant's counsel did not perform deficiently by allowed the State to introduce gang-related evidence. Removal of the gang-related evidence would not change the outcome of the trial. The defendant's counsel did not perform deficiently when he objected to irrelevant questions about an assault weapon. The outcome of the trial would remain the same if the State never asked a question about the assault weapon. Therefore, the defendant's counsel effectively performed. The Court should affirm the defendant receive effective assistance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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 30th day of June, 2008.



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