

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RODNEY MENDENHALL

APPELLANT

VS.

NO. 2008-KA-0226-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I.	
Whether a Trial Court's Refusal to Allow a Non- testifying Defendant to Display His Nose Before the Jury Violated the Defendant's Right to Present a Defense.	4
II.	
Whether the trial court erred in granting a motion <i>in</i> <i>limine</i> to prevent impeaching the victim with his medical records regarding alcohol consumption on the night of the armed robbery, aggravated assault during the burglary of his business.	6
III.	
There was legally sufficient evidence of the identification of defendant as the assailant to support the jury verdict.	8
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

FEDERAL CASES

Neil v. Biggers, 409 U.S. 188, 199 200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972)	8
---	---

STATE CASES

Baine v. State, 606 So.2d 1076, 1078 (Miss.1992)	8
Horne v. State, 825 So.2d. 627	5, 8
Jackson v. State, 924 So.2d 531 (Miss.App. 2005)	6
Jones v. State, 856 So.2d 285 (Miss. 2003)	6, 7
Tran v. State, 962 So.2d 1237, 1247 (Miss.2007)	4
Wade v. State, 583 So.2d 965, 967 (Miss.1991)	8
Williams v. State, 991 So.2d 593 (Miss. 2008)	4, 5
York v. State, 413 So.2d 1372, 1381 (Miss.1982)	8

STATE STATUTES

Miss. Code Ann. §§ 97-3-7(2)(b)	1
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STATEMENT OF THE CASE

The grand jury of Bolivar County indicted defendant, Rodney Mendenhall in a multi-count indictment with Armed Robbery, Aggravated Assault and Business Burglary in violation of *Miss. Code Ann.* §§ 97-3-7(2)(b), 97-3-79 & 97-17-33. (Indictment, cp.4-5). After a trial by jury, Judge W. Swan Yerger, presiding, the jury found defendant guilty of all charges. (C.p.71-73). Defendant was sentenced, to wit: Count I, Armed Robbery, 25 years; Count II, Aggravated Assault, 20 years consecutive to Count I; and, Count III, Business Burglary, 7 years, concurrent to Count I, all to be served in the custody of the Mississippi Department of Corrections. (Sentence orders, cp.74-76). After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

Defendant entered the business of the victim, forced him to disrobe, robbed him shot him as the victim testified "I was shot once in the arm. He shot me once in the chest right here, come out my back. Shot me one time in the leg. Shot me one time in the stomach, and shot me through this hip, come out through this hip over here." Tr. 215. Defendant was identified by the much shot-up victim from a photo array and through in-court identification.

The jury found defendant guilty of all charges.

SUMMARY OF THE ARGUMENT

I.

Whether a Trial Court's Refusal to Allow a Non-testifying Defendant to Display His Nose Before the Jury Violated the Defendant's Right to Present a Defense.

Trial counsel instructed the jury to look at defendant's nose and had a photograph of defendant (including the nose) and was able to argue his defense of misidentification. Any error by the trial court was harmless.

II.

Whether the trial court erred in granting a motion *in limine* to prevent impeaching the victim with his medical records regarding alcohol consumption on the night of the armed robbery, aggravated assault during the burglary of his business.

The emergency room medical report does not fall within a hearsay exception.

III.

There was legally sufficient evidence of the identification of defendant as the assailant to support the jury verdict.

There was ample legally sufficient evidence from testimony of the victim to support the jury verdict.

ARGUMENT

I.

Whether a Trial Court's Refusal to Allow a Non-testifying Defendant to Display His Nose Before the Jury Violated the Defendant's Right to Present a Defense.

Trial counsel for defendant claimed the defense of misidentification. Prior to closing arguments counsel for defendant sought to have defendant stand before the jury so they could see him closely -- specifically defendant's nose -- which defense counsel described as ... "It's as big as Rudolph the red nosed reindeer's nose." Tr. 386.

The trial court denied the request. Since the time of the trial a Mississippi Supreme Court decision has deemed such denial to be error. *Williams v. State*, 991 So.2d 593 (Miss. 2008).

¶ 20. When faced with an error, this Court must review the record de novo to determine whether reversal is warranted. *Tran v. State*, 962 So.2d 1237, 1247 (Miss.2007). "Harmless-errors are those which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.*

Williams v. State, 991 So.2d 593 (Miss. 2008).

In *Williams* the review court looked at whether defendant was denied the opportunity to present his defense.

In this case now before this court counsel for defendant was able to present his chosen defense and argue it to the jury. The word nose appears more than a dozen

times in the transcript has having been brought to the attention of the jury. Further witnesses were extensively questioned about the nose, it's placement on the face, and how visible and noticeable it would be under the circumstances described by the victim. Additionally, during closing defense counsel drew specific attention to defendant by stating to the jury – "...I want you to look at this photograph of Rodney Mendenhall, and I want you to look at him now. Look at him closely." (Tr. 386).

It is the position of the State counsel for defendant was clearly and demonstrably able to point out the nose to the jury and had photographic evidence in addition to demanding they "look at him closely." Such analysis and rationale are clearly supported by similar facts and holding affirming the conviction. *Horne v. State*, 825 So.2d. 627 (¶¶49-53)(any error in not allowing defendant to show jury the color of his eyes unless he testified was harmless).

Any error was harmless and no relief should be granted on this allegation of error. *Williams*, supra.

II.

Whether the trial court erred in granting a motion *in limine* to prevent impeaching the victim with his medical records regarding alcohol consumption on the night of the armed robbery, aggravated assault during the burglary of his business.

Counsel for defendant claimed that the medical records from the victim's hospitalization were within an hearsay exception and could be used to impeach the victim. The court ruled, *in limine*, that defense could ask the witness if he was drinking on the night of the attack but could not impeach with the victim's medical records. (Tr. 175-184). At trial, defense did ask the victim if he had been drinking and the victim said no. (Tr. 241).

The reviewing courts have heard this argument in similar factual situations before and found it to be without error. *Jones v. State*, 856 So.2d 285 (¶¶21-26)(Miss. 2003). See also, *Jackson v. State*, 924 So.2d 531 (Miss.App. 2005).

To reiterate the holding of *Jones*: under Rule 806 concerning the admissibility of a hearsay statement as a prior inconsistent statement for the purposes of attacking a witnesses credibility, the emergency report proffered by defense does not qualify the medical report containing the victim's statements as admissible. Under Rule 805 not only must emergency report containing the victim's statement meet a hearsay exception; but also the victim's statement (and it is not clear the victim made any statement regarding alcohol use) therein must also meet a hearsay exception.

As analyzed in *Jones* and adopted by the medical report does not meet the hearsay exception provided in Rule 803(4) or any other hearsay exception contained in the Rules of Evidence. The report defense sought to use impeach the victim does not qualify under a hearsay exception. *Jones*, supra.

There being no error by the trial court no relief should be granted on this allegation of error.

III.

There was legally sufficient evidence of the identification of defendant as the assailant to support the jury verdict.

In this last allegation of error defendant asserts the evidence was insufficient as a matter of law to support the conviction. Specifically defendant asserts lack of identification testimony. Counsel for defendant also conflates the claim regarding the legal sufficiency with a weight and credibility of the evidence assertion.

And just to clear up on point emphasized repeatedly in the brief of defendant – it matters not a whit to the verdict what the voting history of the jury was prior to reaching a verdict. Deadlock or no, it doesn't matter as to the sufficiency of the evidence or the weight and credibility of the evidence. If the jury were *truly* deadlocked it would have ended in a mistrial.

¶ 31. The admission of evidence rests within the discretion of the trial court. *Baine v. State*, 606 So.2d 1076, 1078 (Miss.1992); *Wade v. State*, 583 So.2d 965, 967 (Miss.1991). A court must consider five factors in evaluating the validity, reliability and admissibility of identification testimony: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty exhibited by the witness at the confrontation; and (5) the time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199 200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972); *York v. State*, 413 So.2d 1372, 1381 (Miss.1982).

Horne v. State, 825 So.2d 627 (Miss. 2002).

The transcript is rife with evidence supporting the identification of this vicious

criminal. Defendant entered the shop of the victim and confronted the victim as he napped by sticking a gun in his victim's fact. Tr. 207. The gunman forced his victim into a well lit hallway, (tr. 208), where the victim pleaded for about 5 minutes at a distance of about 8 feet.. (Tr.216). While defendant did wear a scarf (covering from below his nose), the victim could see the rest of his fact, eyes and forehead. During the course of several minutes and the victim struggling to disarm defendant the victim received 5 bullet entrance wounds and 2 exit wounds. Tr. 215. Defendant identified a photo of defendant as the man who burgled, robbed and shot him. Tr. 224. Further, the victim made an in-court identification of the defendant as the man who burgled, robbed and shot him. Tr. 225. See also testimony on re-direct at tr. 243-44.

It is without equivocation the State contends such testimonial evidence is legally sufficient evidence to support the identification of defendant and the jury verdicts of guilty.

There being no error no relief should be granted.

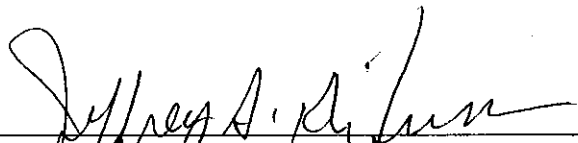
CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdicts and sentences of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

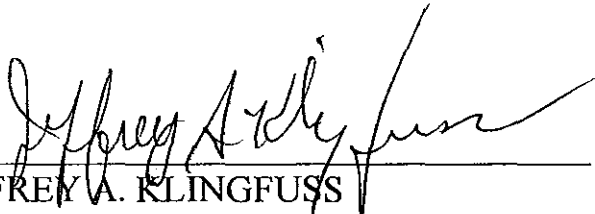
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 28th day of January, 2009.



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