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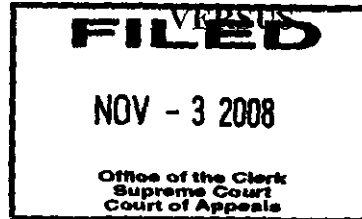
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-00226-COA

RODNEY MENDENHALL

APPELLANT

STATE OF MISSISSIPPI



APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI**

BRIEF ON THE MERITS BY APPELLANT

Appellant Will Seek Oral Argument

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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So certified, this the 3rd day of November, 2008.


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STATEMENT OF THE ISSUES

- I. The trial court erred in refusing to permit Mr. Mendenhall to stand before the jury in closing, a refusal which impermissibly interfered with his fundamental right to present his theory of defense, misidentification;
- II. The trial court fatally prejudiced the cause of Mr. Mendenhall in granting the state's *Motion in Limine* to bar impeachment of key state witness Curtis Addison with medical records showing alcohol consumption the night of the incident and
- III. The evidence was insufficient as a matter of law as the state failed to show beyond a reasonable doubt that Mr. Mendenhall assaulted and robbed Curtis Addison.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Rodney Mendenhall was indicted by the grand jury of the 1st Judicial District of Hinds County, Mississippi for aggravated assault with a weapon in connection with the July 6, 2006 shooting of Curtis T. Addison Jr., at Addison's Body Shop, 828 Gallatin Street, in Jackson. CP 4. Mr. Mendenhall refused a plea offer on the first indictment handed down in this cause, then proceeded to trial August 13, 2007 on the second indictment, Cause No. 07-0-584, which included the additional charges of armed robbery and business burglary, all alleged to have transpired in the same continuous series of events. CP 4; MISS.CODE ANN. §§ 97-3-79; 97-3-7(2)(b); 97-17-33.

After initially deadlocking on all counts, Mr. Mendenhall was found guilty by the jury on each of the three counts of Indictment No. 07-0-584 on August 15, 2007. CP 74-76; RE 12-14; T. 407-408. The trial court immediately sentenced Mr. Mendenhall to twenty-five (25) years on Count 1 of armed robbery, twenty (20) years on Count 2 of aggravated assault, to be served consecutive to the sentence in Count 1 and seven (7) years on Count 3 of business burglary, to be served concurrent with the sentence in Count 1, all in the custody of the Mississippi Department of Corrections. CP 74-76; RE 12-14; T. 407-408.

B. STATEMENT OF FACTS

On the morning of July 5th, 2006, Curtis T. Addison Jr. noticed two motor scooters missing from his business, Addison's Body Shop at 828 Gallatin Street in Jackson. T. 202. Addison called his long-time friend James Ronnie Hampton to see if Hampton had by chance borrowed the scooters over the July 4th holiday; Hampton had not but promised Addison he would be on the look-out for the missing scooters, which Hampton testified had a distinctive motor sound. T. 202; 252. Hampton had spent the night of July 4th at his mother's home in

Jackson and believed he had heard one of the scooters early that morning between 4 and 5 A.M. T. 247; 252; 253. Hampton then rode through the neighborhood listening and looking for the scooter, finding Mr. Mendenhall on one of the missing scooters. T. 253. Hampton testified he had a gun visible but did not draw on Mr. Mendenhall. T. 254. Hampton retrieved the scooter, took it back to Addison's business, then returned to work. T. 257.

The night of July 5, Addison was at his business where he dozed off in a chair in front of the television. T.207; Addison testified he awoke about midnight to man masked with a scarf across the bottom half of his face and a baseball cap pointing a gun at him. T. 207; 231-233; 237. The intruder motioned with the gun for Addison to follow him from the television room, which was dim, into the hallway which Addison testified was very well lit. T. 208. Once in the hallway, the intruder told Addison to take off his pants; Addison testified he kept trying to talk to his assailant, who grew more "aggressive" about removal of his trousers. T. 210. The individual had on a scarf like a bandanna; Addison could testify he could see him from the nose up. T. 210.

Once Addison removed his pants and the assailant took them, Addison testified he knocked the man to the ground; predictably, the intruder fired twice, hitting Addison in the leg. T. 211. When the assailant snatched the pants, Addison testified his small Derringer pistol fell out of the pocket on the floor; Addison testified he dove behind a shop counter and the man left through the heavy metal swinging shop doors. T. 213; Exhibits 2; 6. Addison testified he went into the office area of his shop to try and call 911, but the intruder returned and shot him twice more. T. 214. Addison testified they carried on a conversation for about five minutes with his assailant about eight feet away before the man shot him once again. T. 216. Addison then managed to leave the office, go through the hallway and hide in the kitchen; he thought his intruder had left so he tried once again to use the phone and the man returned a third time, now threatening to kill Addison. T. 217. The suspect shot Addison twice more, firing until the gun

clicked on an empty chamber. T. 218. At this point, Addison testified he reached for his rifle and the man fled for the third and final time out through the rear of the shop through the heavy metal doors. T. 219. Addison finally managed to call 911 to summon help, although first responding officers were forced to break the glass of his shop front door in order to render aid. T. 269.

At trial, Addison testified that he got a good look at his assailant's facial features, despite the mask; he told investigating officers that the man had "muggy eyes with deep dark concepts [sic] under them." T. 240. His trial testimony, however, was in complete contrast to his contemporaneous statement, which was void of specific characteristics. Addison acknowledged his statement totally lacked descriptions of facial features, including nose and eyes, stating only that he was able to see nose, eyes and the inner circle of his face. T. 233. At trial, however, Addison insisted that the investigating officer did not write what he described during a later interview. T. 233-234. Investigating detective Reginald Cooper also admitted that in a video-taped statement Addison described his assailant as between 180 and 190 lbs and in his statement to police, Exhibit 5, Addison described the intruder only as dark brown complexion color and wearing a scarf or bandana obscuring the lower part of his face. T. 325. Despite no earlier mention of this physical characteristic, Addison testified at trial that the intruder's eyes stuck out to him; but not once does Addison mention anywhere the most prominent physical feature of Mr. Mendenhall, his very large and rather bulbous nose. T. 341.

Although the intruder went through large, metal swinging doors three times, nothing at the scene was dusted for fingerprints. T. 295; 297. Crime Scene Investigator James Chambers, who arrived at 12:30 A.M., less than an hour after the shooting, testified he took no prints of the doors (Exhibit 6) because the doors could have been opened by someone other than the suspect. T. 297. Chambers acknowledged that the rear door, through which the suspect was thought to have gained entry, could have been dusted for possibly identifiable fingerprints. Chambers

testified he recovered two weapons from the scene, a .38 caliber Derringer pistol and a rifle. T. 295.

On the night of July 8, police were dispatched to Capitol Street in response to a report that someone was riding the scooter who may have been involved in the robbery and assault. T. 304. Officer Ben Williams noticed a yellow scooter coming down Capitol Street and gave chase in his car. T. 305. The rider, whom Williams could not identify, lost control and crashed the scooter before he fled on foot. T. 305; 307.

Det. Cooper ultimately arrested Mr. Mendenhall for the crimes, after Hampton and Addison identified him through photographic arrays. Det. Cooper took a photographic array about 11:10 A.M. July 13, 2006 to Hampton's workplace, where Hampton identified Mr. Mendenhall as the one from whom he retrieved the scooter on July 5. T. 262; 335. At 3:17 P.M., Addison identified Mr. Mendenhall as his assailant from a similar photographic array. T. 335. Det. Cooper admitted under cross-examination, however, that he didn't know whether Hampton and Addison had talked or gotten together before Cooper showed Addison the photographic array. T. 335.

No physical evidence connected with Mr. Mendenhall with the robbery, assault and business burglary. Only identifications from an array of photographs by Hampton and Addison, two long-time friends, implicated Mr. Mendenhall in the crime.

SUMMARY OF THE ARGUMENT

Mr. Mendenhall submits that the refusal of the trial court to permit to stand before the jury to display during closing his most prominent feature, his large nose, deprived of the right to mount a complete defense of misidentification to the charges lodged against him. Our criminal justice scheme permits the accused to mount a defense but does not require that it necessarily be testimonial.

It was also error to deny Mr. Mendenhall the right to impeach Addison with hospital emergency records which demonstrate he was drinking the night of the incident, which could have adversely impacted his ability to clearly identify his attacker. Addison denied any consumption of alcohol and claimed he did not drink. This information is crucial for the jury to evaluate the credibility of testimony of a witness and assign it appropriate weight, particularly on such a crucial point for the state's key witness. Finally, the evidence adduced was insufficient to show that Mr. Mendenhall was indeed the individual who robbed and assaulted Addison the night of July 5th.

ARGUMENT

I. The trial court erred in refusing to permit Mr. Mendenhall to stand before the jury in closing, a refusal which impermissibly interfered with his fundamental right to present his theory of defense, misidentification;

At closing arguments, defense counsel requested of the trial court that he be permitted to proffer Mr. Mendenhall to the jury for their examination. T. 365. The reason was simple. The defense of Mr. Mendenhall was misidentification; the only evidence that tied him to the crime was testimony by Addison and Hampton that he was the individual who possessed the stolen scooter then returned that night to rob and shoot Addison at the body shop. No fingerprints, no other direct or physical evidence linked Mr. Mendenhall to the crimes.

The state argued that such a proffer was testimonial in nature and therefore subject to the confrontation clause requirements as outlined most recently in *Crawford v. Washington*, 541 U.S. 36 (2004). The trial court ultimately agreed and refused to permit presentation of Mr. Mendenhall to the jury at closing arguments due to the testimonial nature of the presentation. T. 369; RE 19.

In *Michael Wayne Williams v. State*, 2007-KA-00135-SCT, the state Supreme Court held definitively that such a presentation was not testimonial and it was an abuse of discretion to refuse Mr. Williams to stand before the jury and display his heavily decorated and very prominent gold, bucked teeth. *Williams*, at ¶¶ 19-20. Nevertheless, the Court ruled it was a harmless error considering the entire record. Mr. Mendenhall would submit that such is not the case here. After some time of deliberation, the jury sent word to the trial court that it was hopelessly deadlocked on all three counts against Mr. Mendenhall. CP 70. “A criminal defendant is entitled to present his defense to the finder of fact, and it is fundamentally unfair to

deny the jury the opportunity to consider the defendant's defense where there is testimony to support the theory. *Terry v. State*, 718 So.2d 1115 (Miss. 1998) [internal citations omitted].

Washington v. Texas, 388 U.S. 14 (1967) held that the right of an accused to present a defense in state court is fundamental under the Fifth, Sixth and Fourteenth amendments. *Crane v. Kentucky*, 476 U.S. 683 (1986) builds on that fundamental theory: Defendants must have a “*meaningful* opportunity to present a *complete* defense.” [emphasis added] Mere mention to the jury in questions and arguments of counsel is insufficient presentation of a defense, as juries are routinely instructed to ignore the questions and arguments of counsel as they are not considered evidence. “Evidence” comes from the witness chair; the law by which to evaluate that evidence comes from the trial court, the law-giver. In this case, the law-giver was patently incorrect and abused his discretion in denying to Mr. Mendenhall this right to provide legitimate support for his defense, a fundamental and substantial right that was seriously prejudiced by that ruling. His defense was that both Addison and Hampton misidentified him and that neither of them ever mentioned in statements to police or at trial to the jury the size of his admittedly very large nose, surely something one would remember as an identifying characteristic if the rest of his face was obscured by a bandanna.

Therefore, Mr. Mendenhall humbly submits the trial court erred, depriving him of a fundamental right, and necessitating reversal.

II. The trial court fatally prejudiced the cause of Mr. Mendenhall in granting the state’s *Motion in Limine* to bar impeachment of key state witness Curtis Addison with medical records showing alcohol consumption the night of the incident and

At trial, the trial court granted the state’s *Motion in Limine* to bar impeachment of Addison regarding his consumption of alcohol the night the incident took place. T. 182; 230; RE 20; 21. Addison denied consuming alcohol and said he did not drink. T. 241. These were records subpoenaed by the state and turned over to Mr. Mendenhall as required by court rules governing

discovery. A hospital emergency room record indicated that Addison said that he had had alcohol, necessary for treating physicians to know in medicating him for the pain from his numerous wounds. These were statements which absolutely qualify under MISSISSIPPI RULE OF EVIDENCE (MISS.R.EVID) 803(4) regarding statements made for purposes of medical diagnosis or treatment. In such cases, the availability of the declarant is immaterial; these were records the state originally obtained, showing Addison's condition and treatment after he was shot. Addison made these statements, according to the record, for purposes of treatment. What is critical for Mr. Mendenhall, however, is how much alcohol had he consumed and what impact such consumption had upon Addison's ability to clearly comprehend what was happening and to accurately remember details later. Under *Malone v. State*, 486 So.2d 367 (1986) impeachment material comes within the ambit of the so-called *Brady* rule governing prosecution's duty to release exculpatory information. *Brady v. Maryland*, 373 U.S. 83 (1963). *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) holds wrongful denial of a defendant's right to impeach is violative of the Sixth Amendment right to confront witnesses, although it is subject to a harmless error analysis. This cannot be considered harmless error, however, given the complete lack of other evidence tying Mr. Mendenhall to the crime and the jury's initial deadlocked vote. See also the case of *Douville Davis v. State*, 970 So.2d 164 (Miss.Ct.App. 2006), reversed for failure to permit full cross-examination of a state witness who had criminal charges pending in Hinds County. "The jury is judge of the weight and credibility of the witnesses." *Tyler v. State*, 478 So.2d 315, 317 (Miss. 1985).

The ruling by the trial court amounted to an abuse of discretion which arguably affected the outcome, given their deadlocked state on all three counts after lengthy deliberation. Therefore, Mr. Mendenhall respectfully requests this cause be reversed and remanded for a new

trial due to the prejudice of his substantial right to fully cross-examine and impeach Addison, the chief witness against him.

III. The evidence was insufficient as a matter of law as the state failed to show beyond a reasonable doubt that Mr. Mendenhall assaulted and robbed Curtis Addison.

In *Bush v. State*, 895 So.2d 836, 843 ¶ 16, (Miss. 2005), the standard of review regarding sufficiency of the evidence comes down to whether "...the critical inquiry is whether the evidence shows "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction."

An essential element of any crime is that the prosecution prove "beyond a reasonable doubt the identity of the defendant as the one guilty of the offense charged." *Evans v. State*, 382 So.2d 1084, 1085 (Miss. 1980). Mr. Mendenhall submits the state has failed to meet that burden, given the refusal of the trial to examination by the jury of Mr. Mendenhall and the denial of the right to impeach Addison with the hospital record showing alcohol consumption. T. 350; RE 22.

Given these serious violations of fundamental, constitutional rights, Mr. Mendenhall contends the prosecution failed to prove beyond a reasonable doubt that he was indeed the individual who robbed and assaulted Addison, particularly in light of any other evidence linking him to the crime and the jury's initial deadlocked vote. CP 70.

CONCLUSION

Mr. Mendenhall respectfully submits the trial court's refusal to permit him to stand next to counsel for part of closing to permit the jury to judge for itself the credibility of his identification by Addison and Hampton was reversible error due to its impermissible hindering of his defense. It was also error to deny Mr. Mendenhall the right to impeach Addison with the hospital emergency room records as to whether or not he was drinking the night the incident occurred. Full cross-examination, including impeachment, is a fundamental right. Finally, Mr. Mendenhall would humbly contend the evidence was woefully lacking to show beyond a reasonable doubt that he robbed and shot Addison the night of July 5th.

For these reasons and the authority cited in support of his assignments of error, Mr. Mendenhall asks this honorable Court to reverse and remand his conviction and order a new trial consistent with fundamental constitutional guarantees.

Respectfully submitted,


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Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing BRIEF OF APPELLANT ON THE MERITS to the following:

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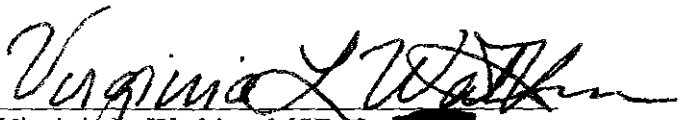
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So certified, this the 3rd day of November, 2008.


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