IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL GENE RAY — APPELLANT

VS. — NO. 2008-KA-0401

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VERSUS — NO. 2008-KA-0401-COA

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STATEMENT OF THE CASE

Procedural History

Michael Gene Ray was convicted in the Circuit Court of Lowndes County on a charge of murder and was sentenced to a term of life imprisonment in the custody of the Mississippi Department of Corrections. (C.P.126) Aggrieved by the judgment rendered against him, Ray has perfected an appeal to this Court.

Substantive Facts

Renee Taylor testified that she was acquainted with the defendant in this case and had been acquainted with the victim, Daniel Keith "Danny" Hudson. According to Ms. Taylor, at the time of this homicide, the defendant Michael Ray and his mother were living in a trailer "diagonally across the road from the Slab House," a bar in Caledonia. The night of June 17, 2005, Ms. Taylor went to the Slab House, where she saw Hudson and Ray "on the ground

fighting" in the parking lot. "[S]everal guys .. broke it up," and the pair were asked to leave the premises. (T.50-54)

Later that night, Ms. Taylor "was sitting at the bar" when Sheila Ray, Michael Ray's sister and Hudson's girlfriend, came into the establishment. Ms. Ray, who was "very upset" and "crying," was "asking for somebody to come help because they [Hudson and Ray] were fighting again." Ms. Ray left the bar for a minute or so and returned, reporting that her brother "had a knife" and that he and Hudson were continuing to fight each other. Ms. Taylor "got up and walked out there" ... across the highway, where she observed that Hudson and Ray were face to face, having a verbal altercation, cursing each other. Alicia Ray, the 11-year-old daughter of Hudson and Ms. Ray, "was standing in the middle of them crying and begging them to stop." Ms. Ray assisted her daughter in trying to "break them up." Ms. Taylor testified that she saw "Mike Ray with a knife, ... like kitchen knife, like a steak knife but one of the bigger steak knives." She told the men something to the effect of, "Y'all shouldn't be doing this in front of that child." Ray then held the knife up and told her to "shut" her "fucking mouth." As Ms. Taylor "backed away," Ray "turned, and ... stabbed Danny." Ms. Taylor went on to testify that she had "seen no licks passed," but that Hudson and Ray "were both standing their ground." (T.54-59)

After he was struck with the knife, Hudson "grabbed his side and took a couple of steps and fell to one knee." Ms. Taylor flagged down a vehicle driven by James Wright and "told him that Mike had just stabbed Danny and he needed to call 911." (T.63)

On redirect examination, Ms. Taylor reiterated that she was acquainted with the families of both the victim and the defendant, and that she was not in court "to side with one side or the other." She testified additionally that at the time Hudson was stabbed, she "never saw anything

in his hand." Furthermore, Hudson was not advancing toward the defendant. When she was asked, "And this defendant went directly front pointing the knife at you and stabbed it directly toward Danny?" she answered, "Yes." (T.77-78)

Thresa Sorrells testified that she frequently patronized the Slab House and that she had been acquainted with Michael Ray. On the date in question, she arrived at this bar at about 10:00. When she "first arrived," Hudson was oustide the bar, "having an argument with the lady he was dating." Hudson "finally come [sic] into the building and left Sheila outside." Approximately ten minutes later, "Danny and Mike got in a fight in the parking lot." The combatants were "separated" by several men, including James Wright, the owner of the bar. (T.80-82)

About 15 minutes later, Ms. Sorrells was "standing outside the bar on the side on the cell phone" when she "heard a scream." When she "stepped around the side of the building," she saw that "Danny's daughter was there. And she had run up to the building screaming ... that her daddy had been stabbed." Ms. Sorrells ran across the highway to try to render aid to Hudson. "He was holding his side. He just started going down," and Ms. Sorrells "helped him down to the ground." She observed a "rather large" wound "from his belly button all the way to his side," and saw that his "large intestine had already started protruding out of the wound." Ms. Sorrells directed Ms. Ray, who was understandable "hysterical," to go "into the house after some towels." When she was asked "Did you do anything to try to figure out what had happened?" Ms. Sorrells answered, "I had asked Sheila when I went across the street what had happened, and she said that Mike had stabbed him." Ms. Sorrells did not see the defendant at this scene that night. (T.82-86)

James Wright, the owner and operator of the Slab House, testified that he knew both the defendant and the victim. On the day in question, Mr. Wright left the bar at about 4:00 p.m. and

went back to his residence, which was 125 yards away "at the most." Later that night, he heard "some hollering" and "went back up there to check out what was going on." He found Hudson and Ms. Ray on the porch of the establishment, embroiled in a verbal altercation. Thereafter, "a little after ten," he observed" just a basic fight" between Hudson and Ray. Mr. Wright "and two more boys" separated the pair "very fast." Hudson had nothing in his hands, but Ray was wielding "a piece of thin conduit pipe," which Mr. Wright confiscated and threw "in the dumpster." Mr. Wright then "told them both to leave the property." Both Hudson and Ray complied. (T.94-97)

Between 20 and 30 minutes later, Mr. Wright "was called on the two-way radio to come to the trailer, ... [n]ot to stop at the bar." When he arrived there, Ms. Taylor was running toward him, waving her arms. Appearing "[t]errified, scared to death," she told him that Hudson had been stabbed and that he (Mr. Wright) should "call 911." After he did so, Mr. Wright went back to his house to pick up his wife, a nurse, who he thought might be able to render aid to Hudson. Mr. Wright and his wife remained at the scene with Hudson and Ms. Sorrells until the police and medical personnel arrived. According to Mr. Wright, "Only thing [Hudson] said at the end was that he loved Alicia and he loved Sheila." (T.98-100)

Detective Ryan Rickert of the Lowndes County Sheriff's Department was dispatched to the scene of this crime that night. When he arrived, the victim had already "been transported by the ambulance." According to Detective Rickert, "We still had several witnesses on scene, and they advised that Michael Ray had stabbed Daniel Hudson." Deputies advised Detective Rickert "that Mr. Ray ... had already left the scene." (T.113-16)

Dr. Steven Timothy Hayne, accepted by the court as an expert in the field of forensic pathology, testified that he had performed the autopsy on the victim's body. (T.132) Dr. Hayne

testified that Hudson had sustained a stab wound some five and a half to six inches deep which had injured the pancreas, spleen and kidney and had produced "a massive intraabdominal hemorrhage." This wound had caused his death; the manner of death was homicide. (T.137-39)

The defendant testified that he "went out to the beer joint" to confront Hudson after his sister, Ms. Ray, had told him that Hudson had been "beating up on" her. According to Ray, Hudson immediately "tackled" him "in the gravel," and shortly thereafter, they "were separated." Ray went back "to the house." (T.217-18) Later that evening, Hudson approached Ray, threatened to kill him, and threw a rock, which "glanced off" Ray's head and shoulder. (T.220) Ray "kind of swung at him," and Hudson then "backed up and went and got another rock." When Hudson "[p]ut it over his head" and said, "I'm going to kill you you son-of-a-bitch," Ray struck him with the knife. Ray testified that he was in "bad fear" for his life when he did so. (T.227-28) Ray's sister, Sheila Ray, corroborated this testimony. (T.195-96)

In rebuttal, Renee Taylor testified that she "was very close" to Hudson when he was stabbed. According to Ms. Taylor, Hudson "was standing there"; he had nothing in his hands. She testified that Ray told her to "shut" her "fucking mouth" and then "turned and stabbed Danny." (T.244-26)

SUMMARY OF THE ARGUMENT

First, the state contends the verdict is based on legally sufficient proof and is not contrary to the overwhelming weight of the evidence. The state presented ample proof that Ray was guilty of murder. Ray's evidence to the contrary simply created issues of fact properly resolved by the jury.

Next, the state asserts that Ray's speedy trial issues are not properly before this Court. His failure to pursue his motions for a hearing and to obtain rulings thereon leave this Court with nothing to review with respect to these questions.

Finally, the state submits Ray cannot establish on this record that his trial counsel rendered ineffective assistance. While he alleges unprofessional lapses, he cannot show that his counsel's performance was so deplorable as to have required the trial court to declare a mistrial *sua sponte*.

PROPOSITION ONE:

THE VERDICT IS BASED ON LEGALLY SUFFICIENT PROOF AND IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Ray's Issues One, Two, Three and Four present an attack on the sufficiency and weight of the evidence undergirding his conviction of murder. The state addresses those issues within this single proposition.

To prevail on the assertion that he is entitled to a judgment of acquittal, Ray must satisfy the following formidable standard of review:

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might

> have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> *Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss.App.1999).

See also *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991) (on appellate review the state "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence"), and *Noe*, 616 So.2d at 302 (evidence favorable to the defendant should be disregarded). Accord, *Harris v. State*, 532 So.2d 602, 603 (Miss.1988) (appellate court "should not and cannot usurp the power of the fact-finder/ jury"). "When a defendant challenges the sufficiency of the evidence to support a conviction, the evidence which supports the verdict is accepted as true by the reviewing court, and the State is given the benefit of all reasonable inferences flowing from the evidence." *Dumas v. State*, 806 So.2d 1009, 1011 (Miss.2000).

This rigorous standard applies to the claim that Ray is entitled to a new trial:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the

> circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss.Ct.App.2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss.App.2004),

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As the Supreme Court reiterated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

Ray contends that the overwhelming weight of the evidence supports a finding that he acted in self-defense and, alternatively, that the proof supports at best a finding that he was guilty of manslaughter rather than murder. The state counters that the jury was he "ultimate judge" of whether question whether this killing was murder, manslaughter, or committed in self-defense. *Webster v. State,* 817 So.2d 515, 518-19 (Miss.2002). The jury was instructed on all three options (C.P.104-110) and, as the prosecutor pointed out during closing argument, resolution of the issue boiled down to a determination of credibility of the witnesses. (T.267-72) We incorporate that argument by reference, as well as evidence summarized in our Statement of

Substantive Facts, in asserting that the testimony of Renee Taylor amply supported a finding that Ray committed murder as defined by Instruction S-2A..[1] (C.P.104) Ms. Taylor testified consistently and unequivocally that while Ray and Hudson each was standing his ground, Hudson had nothing in his hands and was not advancing on Ray at the critical moment; that Ray raised the knife, a deadly weapon; that he "held it up for her to see," looked at her and told her to be quiet; and that he then turned and stabbed Hudson in the abdomen. Immediately afterward, he fled the scene. (See T.269)

The evidence was not such that a reasonable juror could have returned no verdict other than not guilty, or guilty of manslaughter. To the contrary, the proof amply sustains the jury's determination that this killing was not manslaughter, that it was not justified by necessary self-defense, but that it was in fact murder. *See Jordan v. State*, 995 So.2d 94, 2008 WL 4427202 (Miss., decided October 2, 2008); *Chandler v. State*, 967 So.2d 47, 50 (Miss.App.2006). Ray's evidence to the contrary simply created an issue of fact which was properly resolved by the jury. No basis exists for disturbing its verdict.

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[1]That instruction authorized the jury to return a verdict of guilty of murder if it found beyond a reasonable doubt that Ray killed Hudson "without authority of law and not in necessary self-defense" *either* with the deliberate design to effect Hudson's death, or "[w]hile engaged in an act eminently dangerous to others, and evincing a depraved heart, disregarding the value of human life, ... whether or not he had any intention of actually killing Daniel Hudson."

PROPOSITION TWO:

RAY'S CLAIM THAT HE WAS TRIED IN VIOLATION OF HIS STATUTORY AND CONSTITUTIONAL RIGHTS TO SPEEDY TRIAL ARE NOT PROPERLY BEFORE THE COURT

Ray contends additionally that he was tried in violation of his constitutional and statutory rights to speedy trial. At the outset, the state submits the indictment was returned on August 10, 2005. (C.P.3) Ray was arraigned the following August 18. (C.P.1) On August 19, 2005, the Ray moved a mental examination to determine his competency to stand trial. (C.P.27) That motion was granted, and the court entered an agreed order of continuance so that this examination could be performed. (C.P.1, 28-30) Several orders of continuance were entered between December 12, 2005, and October 4, 2007, when Mississippi State Hospital returned its finding that the defendant was competent to stand trial. (C.P.1-2, 62-64)

Ray did not assert his right to speedy trial until November 9, 2007.[2] (C.P.65) By an order filed November 19, 2007, the court continued the case on the motion of defense counsel. The case was set for February 19, 2008. (C.P.67) Ray was brought to trial on February 21, 2008.

With respect to this issue, Ray never brought his motions on for a hearing. His failure to do so leaves this Court with no findings or orders to review. Accordingly, the following language demonstrates the lack of merit in Ray's claims:

> As pointed out by the State, although Kolberg filed a motion to dismiss or prevent the second trial asserting speedy trial

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[2]On September 24, 2007, Ray filed a *pro se* motion to dismiss this case for failure to provide a speedy trial, but this did not constitute an effective assertion of the right. *Stark v. State*, 911 So.2d 447, 452 (Miss.2005).

> violations, there were no hearings or orders on these motions. Thus, Kolberg is not appealing to us from an erroneous decision of the trial judge. In *Rushing v. State*, 711 So.2d 450, 456 (Miss.1998), we stated: "It is the responsibility of the movant to obtain a ruling from the court on motions filed by him and a failure to do so constitutes a waiver of the same." (citations omitted). Accordingly, this assignment of error is without merit.
>
> *Kohlberg v. State*, 829 So.2d 29, 88 (Miss.2002).

Here, as well, Ray is not appealing an allegedly erroneous decision of the trial court. To the contrary, Ray's failure to obtain a hearing and ruling leaves this Court with nothing to review. Ray's fifth and sixth propositions should be rejected.

Solely in the alternative, the state submits for the sake of argument that the record shows the overwhelming bulk of the delay was occasioned by the orders of continuances entered upon the necessity of obtaining a mental evaluation which the defense had requested. See Elder v. State, 750 So.2d 544 (Miss. App. 1999). The defendant did not move to dismiss the charge until September 24, 2007, some 25 months after arraignment.[3] See *Guice v. State*, 952 So.2d 129 (Miss.2007). He did not demand a speedy trial until November 9, 2007, and even then, he filed a motion for continuance ten days later. Ultimately, he was tried within five months, some 150 days, of his motion to dismiss; the period is considerably shorter when one factors in the November 9, 2007, motion for continuance. The trial court simply cannot be put in error on this point in light of this record. See *Riley v. State*, 855 So.2d 1004, 1008 (MIss.App.2003); *Wesley v. State*, 872 So.2d 763, 767-68 (Miss.App.2004).

In light of *Kohlberg*, Ray's fifth and sixth propositions should be considered waived and should be rejected summarily.

PROPOSITION THREE:

RAY HAS NOT SHOWN THAT HIS TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE

Ray finally contends that his trial counsel rendered constitutionally ineffective assistance. To prevail, he must satisfy the following standard:

> The Mississippi Supreme Court has adopted the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) in determining whether a claim of ineffective assistance of counsel should prevail. . . . *Rankin v. State*, 636 So.2d 652, 656 (Miss.1994) enunciates the application of *Strickland*:
>
> > The *Strickland* test requires a showing that counsel's performance was sufficiently deficient to constitute prejudice to the defense. . . . **The defendant has the burden of proof on both prongs. A strong but rebuttable presumption, that counsel's performance falls within the wide range of reasonable professional assistance, exists. . . . The defendant must show that but for his attorney's errors, there is a reasonable probability that he would have received a different result in the trial court. . . .**
> >
> > Viewed from the totality of the circumstances, this Court must determine whether counsel's performance was both deficient and prejudicial. . . . Scrutiny of counsel's performance by this Court must be deferential. . . . If the defendant raises questions of fact regarding either deficiency of counsel's conduct or prejudice to the defense, he is entitled to an evidentiary hearing. . . . Where this Court determines defendant's counsel was constitutionally ineffective, the appropriate remedy is to reverse and remand for a new trial.
>
> **In short, a convicted defendant's claim that counsel's assistance was so defective as to require reversal has two components to comply with *Strickland*. First, he must show that counsel's performance was deficient, that he made errors so serious that he was not functioning as the "counsel"**

> **guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that counsel's errors deprived him of a fair trial with reliable results.**
>
> (emphasis added) *Colenburg v. State*, 735 So.2d 1099, 1102-03 (Miss.App.1999).

Because this point is raised for the first time on direct appeal, Ray encounters an additional obstacle: the pertinent question

> **is not whether trial counsel was or was not ineffective but whether the trial judge, as a matter of law, had a duty to declare a mistrial or to order a new trial, sua sponte on the basis of trial counsel's performance.** "Inadequacy of counsel" refers to representation that is so lacking in competence that the trial judge has the duty to correct it so as to prevent a mockery of justice. *Parham v. State*, 229 So.2d 582, 583 (Miss.1969). **To reason otherwise would be to cast the appellate court in the role of a finder of fact; it does not sit to resolve factual inquiries.** *Malone v. State*, 486 So.2d 367, 369 n. 2 (Miss.1986). *Read [v. State*, 430 So.2d 832 (Miss.1983)] clearly articulates that the method that the issue of a trial counsel's effectiveness can be susceptible to review by an appellate court requires that **the counsel's effectiveness, or lack thereof, be discernable from the four corners of the trial record. This is to say that if this Court can determine from the record that counsel was ineffective, then it should have been apparent to the presiding judge, who had the duty, under *Parham*, to declare a mistrial or order a new trial sua sponte.**
>
> (emphasis added) *Colenburg*, 735 So.2d at 1102.

Accord, *Madison v.* State, 923 So.2d 252 (Miss.App.2006); *Jenkins v. State*, 912 So.2d 165, 173 (Miss.App.2005); *Walker v. State*, 823 So.2d 557, 563 (Miss.App.2002); *Estes v. State*, 782 So.2d 1244, 1248-49 (Miss.App.2000).

Ray has not shown that his trial counsel's performance was so deplorable as to require the court to declare a mistrial on its own motion. Because he has not sustained the particular burden

he faces when raising this issue on direct appeal, the state submits his final proposition should be denied without prejudice to its being advanced in a motion for post-conviction collateral relief.

In the alternative, for the sake of argument, the state submits that even if the alleged lapses were deemed unprofessional, Ray cannot establish *Strickland* prejudice on the basis of this record. There is no showing that the delay from November 2007 to February 2008, the result of defendant's last motion for continuance, had any effect on the outcome of the trial.

Moreover, we dispute the conclusion that defense counsel was conceding the defendant's guilt when he stated during opening statements, "It happened." (T.48) Defense counsel went on to give a preview the proof in the light most favorable to the defense and to conclude, "the evidence will show that it was self-defense." (T.48-49) The state submits that under these circumstances, Ray has not shown that this comment constituted an unprofessional error.

Finally, the state contests the assertion that defense counsel was vouching for Dr. Hayne when he referred to him as a "brilliant medical technologist or expert" and asked him to "put this in language that Mama can understand." (T.140) Nothing suggests that these comments were anything other than strategic.

We reiterate that Ray has not established that his counsel's performance was so deficient as to require the trial court to declare a mistrial or grant a new trial *sua sponte* on this basis. Ray's final proposition should be denied.

CONCLUSION

The state respectfully submits that the arguments presented by Ray have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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BY: DEIRDRE McCRORY
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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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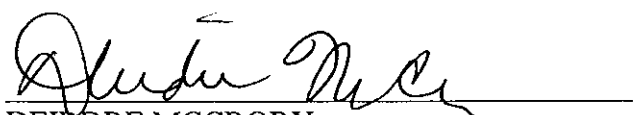
This the 18th day of November, 2008.



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