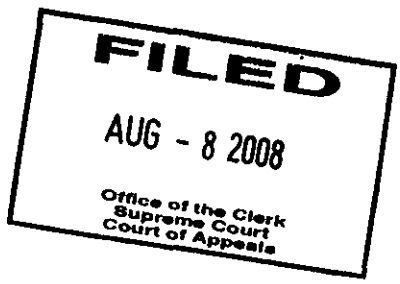
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIE PRATER — APPELLANT



VS. — NO. 2008-KA-0489-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2008-KA-0489-COA**

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STATEMENT OF THE CASE

On July 17, 2002, Willie Prater was indicted by the Grand Jury in Oktibbeha County for the murder of Juanita Miller, pursuant to Miss. Code Ann. § 97-3-19 [C.R. 7] and was subsequently convicted of the same crime by a jury of his peers in the Circuit Court of Oktibbeha County, honorable Lee J. Howard, presiding. [C.R. 143]. Prater was sentenced on August 3, 2006 to serve the rest of his natural life in the custody of the Mississippi Department of Corrections without the possibility of parole. [C.R. 149]. Defendant filed a motion for Judgment NOV or, alternatively, a new trial. [C.R. 160]. That motion was denied. [C.R. 161]. Defendant filed notice that he intended to appeal the final judgment and the denial of the motion. [C.R. 163].

FACTS

The home of Wynetta Miller was burglarized and burned on August 20, 2001. [T. 422]. Firefighters who responded found Mrs. Miller with severe head injuries on the floor of her home. [T. 380-90]. She was rushed to the hospital in Columbus where she died. [T. 251]. The cause of death was attributed to the severe head wounds she received from being beaten with a steam iron found on the scene. [T. 298-302].

On January 6, 2006, five months after the burglary and arson, Bentoire Riley called 911 unsolicited and related previously unknown details to Starkville Police "[b]ecause [he] felt like . . . [he] would want somebody to do it for [him]." [T. 316]. Riley, indicted in the murder of Wynetta Miller, testified that Willie Prater, the appellant here, was standing near the home of Wynetta Miller with Devail Hudson, James Paster, Destiny Moore, Derrick Turner, and Marcus Evans. [T. 306-07]. Hudson told the men just mentioned that he intended to enter the home of Wynetta Miller to "see what that old woman had in her house" and to kill her if necessary. [T. 308-09]. Riley denied involvement in the burglary [T. 309] but saw the other men dash out of the house "like something had scared [them]" from his vantage point at nearby Landers' Trailer Park. [T. 312]. After Riley had declined to participate in the burglary, Prater told him "to stop being a punk, stop being a bitch." [T. 374]. Prater and Hudson were the last ones to leave the house, and later Riley saw the men passing among themselves what he speculated to have been the loot. [T. 312]. Denise Stephens, volunteer with Meals on Wheels, saw four or five men gathered in Landers' Trailer Park near the time that Wynetta Miller's smoke alarms automatically notified authorities. [T. 379]. Stephens was able to identify two of the men as Bentoire Riley and Devail Hudson. [T. 381, 379].

While these men gathered at the trailer park, Wynetta Miller's house burned. [T.394]. Rodger Mann, Starkville Fire Marshall, testified that the fire had multiple points of origin. [T. 398].

He further testified that all points of origin at six different points in the house were intentionally set. [T. 407, 410, 413, 414, 415, 416]. Jamie Bush, forensic scientist with the state crime lab, testified that "[i]t would be extremely difficult for one individual to conduct the activities that we saw in this scene, the looting type activities, the actual assault on Mrs. Miller, and set six separate fires in a short period of time. I don't think it would be physically possible for one individual to do that." [T. 449].

Consistently, Willie Prater told authorities that he was with Hudson, Paster, Moore, Turner, Evans, and Riley before they burglarized and murdered Wynetta Miller. [T. 491]. He denied involvement when first questioned on January 6, 2002. [T. 492]. On February 19, 2002, Prater was arrested, and police took another statement from him. [T. 493]. However, when this statement was taken, Prater admitted that he had agreed to be the lookout during the burglary. [T. 496]. Prater's statement then said he called Pilot mini bus to take him to Discovery House (where he received counseling). [T. 497]. Prater's mother testified that she saw Prater board a similar bus to Discovery House that morning at 7:00, and that she did not see him again until about 2:30. [T. 544-45]. Jackie Bush, a friend of Prater's mother, testified that Prater boarded the Pilot bus that morning and saw him again around 1:30, but, although she had previously been "close" to the Sheriff, did not feel compelled to volunteer this information until the date of the trial (when Prater had been in custody more than four years). [T. 570-71, 579]. Prater's aunt, Joanne Minor, offered similar testimony. [T. 594]. No testimony other that the statements made by Prater, himself, and Riley linking Prater to the crimes was given to the jury to account for Prater's whereabouts during the time of the crime.

SUMMARY OF THE ARGUMENT

The trial court did not err in excluding defense witness Tommy Scales. Scales exclusion was a sanction for a defense discovery violation that was intended to gain a strategic advantage. Defendant's counsel was not constitutionally deficient, and nevertheless, such deficiency did not sufficiently prejudice the finders of fact. The State's closing arguments were not inflammatory because they did not absolve the jury of their responsibility nor were they a charge to "send a message." The trial court did not commit error by admitting the testimony of a bloodhound handler because the dog's reliability was well-established by the State. The trial court did not err in excluding the lesser included offense of burglary instruction to the jury because such instruction would have been an inaccurate statement of the law. The trial court did not err in refusing an instruction for a directed verdict because the evidence presented by the State was sufficient for a conviction. The trial court did not err in admitting the statement's of the defendant given to the police implicating himself in the criminal enterprise because the defendant's statements were voluntary. And the trial court did commit reversible error in finding the defendant competent to stand trial based on the unanimous opinion of defendant's psychiatrists from the state mental hospital.

ARGUMENT

I. THE COURT DID NOT ERR IN EXCLUDING DEFENSE WITNESS, TOMMY SCALES.

Sanctions rendered for violations of the disclosure rule are reviewed according to an abuse of discretion standard. *Young v. State*, 791 So. 2d 875, 78 (Miss. App. 2001). The court must be definite and firm in its conviction that the trial court "committed a clear error of judgment in the conclusion it reached upon weighing relevant factors." *Id.*

The case *sub judice* presents a decided issue, but without a particularly instructive fact pattern. There is ample Mississippi case history dealing with defendant's inability to comply with the rules of disclosure. See *Lindsey v. State*, 965 So. 2d 712 (Miss. App. 2007) (court affirmed exclusion when defense failed to provide statements taken from witnesses or summary of testimony without offering reason for such neglect); *Morris v. State*, 927 So. 2d 744 (Miss. 2006) (court affirmed exclusion when defense simply neglected to find defense witnesses until the week before the trial); and *Byrom v. State*, 863 So. 2d 836 (Miss. 2003) (defendant's counsel admitted to withholding evidence "purposefully . . . to use it to our fullest advantage"); *Coleman v. State*, 749 So. 2d 1003 (Miss. 1999) (defendant purposefully withheld knowledge of an alibi witness from his own counsel until trial, court excluded witness testimony). Where the court has not been presented with evidence that the discovery violation was willful and motivated to obtain a tactical advantage, it has reversed trial court decisions to exclude. *Sandefer v. State*, 952 So. 2d 281 (Miss. App. 2007); *Skaggs v. State*, 676 So. 2d 897 (Miss. 1996). This case is unique because defense counsel claims to have been ignorant of the existence of the witness until the Friday before the trial began on a Monday and ignorant of the substance of the testimony of the witness until the morning of the first day of the trial. [T. 627]. However, the witness had, shortly after the murder, confided in one Jackie

Bolton (who was not then, but at the time of the trial was employed by defense counsel) the details of his testimony. [T. 628-30].

The decision before the court under this issue cannot be resolved in favor of the defendant when the standard of abuse of discretion is applied. The trial court was presented with conflicting evidence regarding defense counsel's knowledge of the existence of the witness. It reasoned that defense counsel's ignorance of the existence of this witness, after having represented the defendant for five years and employing someone who had actual knowledge of a purported alibi for the defendant was an unlikely scenario. [T. 639]. If the appellate court decides here that the trial court abused its discretion, it will effectively remove exclusion from the trial court's arsenal of sanctions available when defense violates the disclosure rule. Except for the plea from defense counsel, the totality of evidence and circumstances justify an assumption that the testimony of the witness was a known commodity to the defendant and purposefully withheld from the State. A reversal here would cast a long shadow of doubt if, under any circumstances, defense counsel ever so much as claimed ignorance and would provide further incentive to the defendant to unfairly cloak witnesses, statements, and testimony from the court and the State until after the eleventh hour.

The defendant cites, in support, *Sandefer*, where the Court of Appeals found no evidence that the discovery violation had been willful. *Sandefer*, 952 So. 2d at 293. That, however, is the clear distinguishing factor between *Sandefer* and the case before the court - evidence. Here, the court is, in fact, provided with the troubling and suspicious fact that an employee of defense counsel had actual knowledge of the existence of this alibi witness. The defendant now argues that this fact pattern shows "neglect" by counsel, but not willful violation. The State respectfully submits that a willful lack of disclosure might reasonably be judged the more likely scenario than the startling lack of interoffice communication proposed by the defendant.

The defendant argues further that the failure to disclose did not prejudice the State. This contention is not meritorious. Forrest Allgood, counsel for the State, apprised the court that timely disclosure would have given his office time to make an effort to conclusively determine the veracity of the testimony of the witness. [T. 622]. The Brief of Appellant charges, accurately, that the State knew the witness might be called when it received (untimely) the witness list on the morning of the first day of the trial. However, defense counsel non-compliantly failed to disclose to the State the substance of the testimony, and such substance was not determined until the second day of the trial, leaving no time to verify the truth of the testimony. [T. 622]. In fact, the State was forced to approach the trial with only an assumption about whom, if anyone, the defense would call [T. 602], had never heard of the witness until Monday, July 31, 2006, when the trial began [T. 602], and from that point even until the third day of the trial, the State was under the impression (because the defendant had not compliantly disclosed his knowledge otherwise) that the witness could only testify to having seen the defendant two hours before the murder [T. 605], testimony which would not have established an alibi. [T. 636]. Defendant cites *Hall v. State* as support for his contention that the violation was not prejudicial to the State, *Hall*, though, hardly supports this contention. In *Hall*, the defendant attempted to introduce physical evidence without discovery notice in violation of URCCC 4.06. *Hall v. State*, 546 So. 2d 673, 677 (Miss. 1989). That court, contrary to the Brief of the Appellant, does not speak to prejudice to the State. Furthermore, *Hall* is distinguishable from the present case because, though the State had not been properly notified pursuant to Rule 4.06, it was aware of both the existence of the physical evidence and its substantive meaning in the context of the case, diminishing potential prejudice to the State. Here the witness and his testimony were "literally off the chart." [T. 603].

II. DEFENDANT'S COUNSEL WAS NOT CONSTITUTIONALLY DEFICIENT.

The defendant relies on *Ransom v. State*, 919 So. 2d 887 (Miss. 2005) in his argument that the assistance of trial counsel was ineffective. Specifically, Prater alleges that his trial counsel's neglect in filing timely disclosure of witnesses-in-chief constituted inadequate representation that prejudiced his defense. In *Ransom*, the Court found the counsel of Marvin Ransom, convicted of strong-arm robbery, to have been ineffective, but declined to overturn the conviction doubting that ineffective counsel had prejudiced the defense. But the court crystalized the standard for finding ineffective assistance of counsel when it said in *Ransom* that "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Ransom*, 919 So. 2d at 890 *quoting Stringer v. State*, 454 So. 2d 468, 476 (Miss. 1984). *Stringer* laid out the two-pronged test for overturning convictions based on claims of ineffective counsel - showing that the counsel was, in fact, deficient and that the deficiency prejudiced the defense. *Stringer*, 454 So. 2d at 476.

It is for, basically, the same reason that the trial court doubted that the undisclosed witness, Tommy Scales, had only been lately identified that this court should look skeptically upon defendant's claim that this was not simply a strategic movement by the defense. The record reflects that in previous cases defense counsel had not requested discovery in a strategic effort to "hide his hand." [T. 606]. The record also reflects that defense counsel and counsel for the State had a history of overlooking discovery violations of this nature as a professional courtesy. [T. 608]. It is reasonably probable that defense counsel was counting on using this courtesy to his advantage in the trial now being reviewed. It is well-settled that counsel's choices of whether to file certain motions, call witnesses, ask questions, or make objections fall within the ambit of trial strategy. *Cole v. State*, 666 So. 2d767, 777 (Miss. 1995). This rule recognizes that counsel operates within the system at

it truly exists, not simply as it exists on paper. Defense counsel probably intended to rely upon the history of professional courtesy between himself and the attorney for the State.

Defendant also relies on *Payton v. State*, 708 So. 2d 559, 560-64 (Miss. 1998) where the court found ineffective assistance of counsel and a complete lack of pre-trial investigation. *Payton*, though, is a fairly extreme case where the court could not even factually determine who, if anyone, represented Mr. Payton from the time he was arrested in April of 1988 until September of that same year. *Payton*, 708 So. 2d at 561. It might be fairly difficult to determine if the attorney of record was adequately doing his or her job, when the court cannot even determine who was the attorney of record. It is clear from the clerk's papers that defense counsel at trial had been the counsel of record since at least March of 2002 [C.P. 9]. The court must examine the issue of ineffective assistance of counsel within the "four corners of the record." *Colenberg v. State*, 735 So. 2d 1099, 1102 (Miss. App. 1999). There is nothing in the record so compelling as to defeat the presumption that trial counsel's decision was one of strategy and to replace that presumption with a suggestion that trial counsel simply neglected investigation.

McGregory v. State is instructive on this issue. There, a defendant-appellant alleged that his trial counsel's discovery violation pertaining to certain witnesses, which caused those witnesses to be excluded, constituted ineffective assistance of counsel. *McGregory v. State*, 979 So. 2d 12, 21-22 (Miss. App. 2008). At the time of the trial, counsel contended that he did not disclose the witnesses to the State because he was unsure whether he was going to call them or not. *Id.* The court found that counsel's decision was a strategic decision and not constitutionally deficient performance. *Id.* at 22.

Furthermore, defendant has not proved the second prong on the *Stringer* test - prejudice. The testimony of the excluded witness during the evidentiary hearing was shaky and unreliable. The

witness testified that when questioned by an investigator for the district attorney (on the second day of the trial) and asked "did [he] see [the defendant] that morning (of the murder)," he somehow neglected to mention that claimed to have seen the defendant standing in the parking lot of Discovery House at the time of the murder. [T. 627]. The witness claimed to have relayed all this to Jackie Bolton, an employee of defense counsel, shortly after the murder, when she was not yet an employee of defense counsel, and then sat on this information for six years while a supposedly innocent man was detained in Whitfield. [T. 629]. This all, of course, severely impeaches the credibility of the testimony of the witness and diminishes the probability that Prater would have been acquitted but for the ineffectiveness of counsel. In *McGregory*, the court noted that while the exclusion of witnesses limited the defendant's argument (there, self-defense), the accused was still able to advance his defense. *McGregory*, 979 So. 2d at 18. Here, though he was denied a witness supporting his assertion of alibi, defendant could still suggest, through testimony and evidence, that he was not where the State claimed he had been.

III. APPELLANT'S COMPLAINT OF INFLAMMATORY CLOSING ARGUMENTS IS PROCEDURALLY BARRED SINCE TRIAL COUNSEL DID NOT SUBMIT A TIMELY OBJECTION.

Defendant next objects to "inflammatory closing arguments." During closing arguments, the prosecutor said:

> And you're told . . . people get convicted of crimes that they didn't commit. And I've had those. I've had those. I tried a woman in Columbus for killing her baby. The case got appealed to [the] Supreme Court. The Supreme Court refused to allow some of the evidence that was introduced in the first trial in at a second trial. The second trial jury never got to hear that evidence and they found her not guilty. Does that mean that she is subjective not guilty? No, it doesn't. What it means is, that the second jury didn't hear the same case the first jury did. [T. 767-68].

For support, the defendant cites *Wiley v. State*, 449 So. 2d 756, 762 (Miss. 1984) and *Howell v. State*, 411 So. 2d 772 (Miss. 1982). In *Wiley*, the prosecutor explicitly told the jury in closing arguments that their sentence of death would be reviewed by the Supreme Court, clearly obfuscating the responsibility of the jury, and the defense offered a timely objection. *Wiley*, 449 So. 2d at 761. *Howell*, additionally offered a direct exhortation to the jury that they were not the final arbiters of the fate of the defendant, followed, again, by a timely objection. *Howell*, 411 So. 2d at 773.

The State would offer, first of all, that this point of appeal is procedurally barred. Generally, the failure to object to prosecution's statements during closing arguments operates as a procedural bar to appeal on those grounds. *Spicer v. State*, 921 So. 2d 292, 309 (Miss. 2006). Without waiving the procedural bar, the State would argue alternatively that the objection would have been meritless. The court has refused to consider all references to the appeal process as objectionable. *De La Beckwith v. State*, 707 So. 2d 547, 589 (Miss. 1997). In *De La Beckwith*, the prosecutor had asked that a list detailing which FBI agents would have been unavailable to testify at trial be marked as an "appellate" exhibit. *Id.* The defense timely reserved the right to object, but waited until the prosecution had used the term three more times before it finally objected. *Id.* The Supreme Court

noted that this strategy by the defense noted either a tactical decision or an inherent admission by the defense counsel that these indirect references to the appellate process were not nearly so prejudicial as the defendant would later attempt to paint them. *Id.*

In *Howell*, the court said that prosecutors were not allowed to tell juries "that if they should make a mistake, it would be corrected." *Howell*, 411 So. 2d at 777. The State contends that no such relief was offered by the district attorney here. The State is loathe to "put thoughts into the mind" of the district attorney after the fact, but the worst inference a juror might have drawn from this indirect reference was that the court might have suppressed some evidence advantageous to the prosecution. Had the defense objected to the statements at the time and assuming the statements are, in fact, prejudicial, justice could have relied upon the discretion of the trial judge to order appropriate relief. When asked, though, to judge the ideas advanced in closing arguments, this court has long respected both the wide latitude given to attorneys and the position of the trial judge to weigh the consequences of objectionable arguments. *Johnson v. State*, 477 So. 2d 196, 210 (Miss. 1985). Overlooking a procedural bar to disturb that respect would be a bold new course.

Defendant further objects to, as a "send-a-message argument," the following statements made during closing:

> We have long held in the law the man's home is his castle. The one refuge you have from the world we spoke of . . . And on August 20th, 2001, castle was breached and slaughtered and pillage fall on its heels [sic] . . . And now the question becomes, whatever are you going to do about it? You take the jury instructions, you find the facts, that's your job. And what all the State of Mississippi ask [sic] of you is justice, that's all. Nothing more and I hope nothing less.

However, this too is a procedurally barred complaint. *Spicer*, 921 So. 2d at 309. Without waiving the procedural bar, the State would argue alternatively that the defendant's supporting cases are clearly distinguishable. In *Payton v. State*, the prosecutor actually used the verbiage, "send a

message." *Payton v. State*, 785 So. 2d 267, 270 (Miss. 1999). In *Brown v. State*, the prosecutor charged the jury to "do something about the crime in [Washington C]ounty," to "rid the crime from our streets," and, after being repudiated by the trial judge, *instructed the learned judge* (emphasis added) - inaccurately, of course - that "every Supreme Court opinion I have read has said the latitude given to prosecutors in cross-examination, even to use that send a message argument, is proper[.]" *Brown v. State*, --- So. 2d ---, 2008 WL 2522499 (Miss. 2008). The court, granting Defendant's relief, said it had "searched in vain for a case [of improper closing argument] as egregious as the one before us today." *Id.* The State asserts that a charge of "what are you going to do about it," hardly measures up to these gold standards, especially when the presumably objectionable language was followed up with an accurate and fair representation of the jury's role in the case ("You take the jury instructions, you find the facts[.]").

IV. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN APPROVING OPINION TESTIMONY ABOUT CANINE OLFACTORY EVIDENCE.

Defendant questions the reliability of a bloodhound introduced as evidence tracing a previously convicted co-conspirator, Devail Hudson, from his trailer park to the home of the victim, relying upon *Harris v. State*, 143 Miss. 102, 108 So. 446, 446-47 (1926) and *Hinton v. State*, 175 Miss. 308, 166 So. 762, 763-64 (1936). In *Harris*, a murder conviction was overturned because the court did not consider the bloodhound to be reliable and said bloodhound tracking is "admissible only after preliminary proof that the bloodhound which tracked to the accused is pure bred, has been well trained to track human beings, has been well tested by tracking other men and found reliable, and that the track from which the bloodhound tracked to the accused was made by the person who committed the crime." *Harris*, 108 So. at 446-47. But, the very case cited as support for defendant's assertion, *Hinton*, affirmed a conviction under a fact pattern similar to that of the present case. In *Hinton*, a conviction of larceny supported by evidence obtained through bloodhound tracking was upheld, even though the owner of the dog did not present its registration papers in open court. *Hinton*, 166 So. at 764. In fact, *Hinton* relies on the language of the *Harris* court in upholding the conviction: "One, and probably the only sure, test of the reliability of a bloodhound in tracking human beings is to put it repeatedly in a track known to have been made by a particular person, and see if it will track therefrom to that person. These tests should be so made as to demonstrate that the dog will continue to follow the same track and not leave it for another." *Harris*, 108 So. at 447. The training and repeated tracking required by both the *Harris* and *Hinton* courts was testified to in great detail at trial. [T. 455-59]. However, more recent case law is more instructive on this issue. In *Byrom v. State*, the court relied solely upon the training of Kietchi, a German Shepherd in the custody of the police, to determine the reliability of evidence produced by him. *Byrom v. State*, 863

So. 2d 836, 879 (Miss. 2003). In citing *Hinton*, the court has generally referenced only the "training and experience" test of *Hinton*, indicating that it will seriously investigate the pedigree of dogs when confronted with solid evidence of the dog's training and reliability. See *Chisholm v. State*, 529 So. 2d 630. Even case citations can speak to the reliability of the dog in question. In *Hudson v. State*, the trial of Devail Hudson (the leader of this band of burglars), the reliability of this very dog on the very mission testified to in this trial was questioned by the defendant there and affirmed by the Mississippi Court of Appeals. *Hudson v. State*, 977 So. 2d 344, 345-46 (Miss. App. 2007).

V. THE TRIAL COURT SHOULD NOT HAVE INCLUDED THE LESSER OFFENSE INSTRUCTION FOR BURGLARY.

Review of jury instructions to determine if a defendant was entitled to a lesser included instruction is a question of law, and this court reviews such questions de novo. *Ostrander v. State*, 803 So. 2d 1172, 1174 (Miss. 2002). Lesser included offense instructions should be given if there is an evidentiary basis in the record that would permit a rational jury to find the defendant guilty of the lesser offense and to acquit him of the greater offense. *Welch v. State*, 566 So. 2d 680, 684 (Miss. 1990). But, the court should refuse instructions that incorrectly state the law. *Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990). They should not be granted indiscriminately. *Gangl v. State*, 539 So. 2d 132, 136 (Miss. 1989). A burglary instruction would have been an incorrect application of the law, as well as, without rational evidentiary basis.

Prater was convicted under Mississippi's capital murder statute which reads:

> The killing of a human being without authority of law by any means in any manner shall be capital murder in the following cases . . . (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnaping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or non consensual unnatural intercourse with mankind, or in any attempt to commit such felonies[.]
>
> Miss. Code Ann. 97-3-19(2)(e).

The law is well-settled that a defendant need not strike the fatal blow, so long as it was struck by one of his confederates in the commission of the underlying crime. *Carrol v. State*, 183 Miss. 1, 183 So. 703, 704 (1938). The Court of Appeals explained why in *Dean v. State*. There, the murderous partner not wielding the deadly tire iron claimed to have become squeamish and urged his cohort to desist. *Dean v. State*, 746 So. 2d 891, 893 (Miss. App. 1998). This did not, however, constitute abandonment because it is nonsensical for one to absolve oneself of liability by unilaterally abandoning the enterprise in mid-occurrence, while the other participant proceeds,

unhindered, to its completion. *Dean*, 746 So. 2d at 896. In short, the passive defendant's second thoughts do not make the victim any less dead, and, but for the conspiring and execution of the general criminal plan, the victim would still be alive.

The defendant argues, though, that the burglary and murder were separate crimes. However, even if the murder was completed after all others had left the house, it was done as part of the entirety of the crime and to cover up the involvement of the actors. In *Mangum v. State*, 762 So. 2d 337 (Miss. 2000), the driver of the getaway car was convicted of capital murder, even though he had only taken part in the planning of an armed robbery and was completely unaware before the criminal enterprise that there would be any murder. *Mangum*, 762 So. 2d at 342. The defense was not able to mount an evidentiary basis even for their contention that the murder might have taken place when Hudson returned to the house except for Riley's statement that "I think Devail went back into the house to kill the old lady and burn the house down." [Ex. D-1]. Even if that is true, the defense put forward no evidence indicating that Prater had been there, but was no longer there when Hudson, supposedly, went back in the house alone. If the jury were to believe that Prater was there (as they would have had to do to convict him of burglary), they would not have had an evidentiary basis upon which to determine that he even did so much as develop *Dean*-like squeamishness.

The trial judge in a recent case was presented with similar circumstances and refused to include a lesser included instruction. In *Dampier v. State*, Deandre Dampier was convicted of capital murder as an accomplice to a murder committed during a robbery. *Dampier v. State*, 973 So. 2d 221, 223 (Miss. 2008). In refusing his a lesser included offense instruction for accessory after the fact, the trial judge said, "all the way through [Dampier]'s statement . . . maintain[s] his innocence that he didn't have anything to do with it . . . [I]f he maintains that position, I don't know what evidence there is in the record that would support the lesser included verdict." *Dampier*, 973 So. 2d at 231.

Here there is no credible evidence in the record to suggest that Prater participated in the burglary, but later absented himself before someone else, unilaterally, brutally murdered the victim.

A lesser included charge of burglary here would not be rational from a legal standpoint. If Prater is guilty of the burglary, then he is, by extension, guilty of the murder committed in the course (or attempted cover-up) of that burglary.

VI. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR A DIRECTED VERDICT.

The court considers reviews of motions for directed verdicts in the light most favorable to the State. *Shaw v. State*, 915 So. 2d 442, 448 (Miss. 2005). The record reflects evidence sufficient to convict Prater under Miss. Code Ann. 97-3-19. The brief for the appellant cites *Shaw v. State*, *Walker v. State*, 671 So. 2d 581 (Miss. 1995), and *West v. State*, 553 So. 2d 8 (Miss. 1989) to support his contention that the State showed no temporal nexus between the burglary of the victim's home and her subsequent murder.

Specifically, the defendant argues, "[e]ven if Prater knowingly participated in a burglary, there was no showing that he knew that Hudson would go back in the house to possibly murder Mrs. Miller and set her house on fire nor aided or assisted Hudson in any homicide." This assertion is inaccurate. First, if the evidence is taken in the light most favorable to the State, then this court must assume that the written statement of Bentoire Riley given on January 6, 2002 was an accurate accounting of the events. Mr. Riley's statement reads:

> Willie Prater said to Devail (Hudson), "Are you gonna kill that old lady?" Devail said, "Yeah, I'm gonna kill her." Devail wanted to see what the old lady had . . . I saw all them go into the old lady's house. Then a little later, I saw Devail run out the house and fall down . . . But I saw Devail go back into the house again. I didn't see him leave this time. I walked down to the store to see my mother. I think Devail went back into the house to kill the old lady and burn the house down.

Willie Prater's statement from the same day reads:

> I heard Devail say he was gonna break in the Miller house. I agreed to be the lookout . . . I didn't know they were gonna kill Ms. Miller . . . They were in the house 5 to 10 minutes. Devail Hudson was the first to come out of the house and then Josh Williams was the second person out of the house. Both Devail and Josh had blood on them.

Hudson returned to the house to cover up the evidence of their corporate criminal act. Whether the victim was dead by that time is immaterial. The testimony and the evidence presented

by the State, and taken in the light most favorable to the State, show a defendant that (1) conspired to burglarize the victim, (2) knew of Hudson's intent to kill the victim, and (3) executed his assigned task in the criminal enterprise. If these three facts, demonstrated in evidence by the State, are assumed, as they must be under the court's standard of review, then the evidence convicting Prater is sufficient.

VII. THE TRIAL COURT DID NOT ERR IN ADMITTING THE STATEMENTS MADE BY PRATER TO THE POLICE IMPLICATING HIMSELF.

The defendant claims that because of his "mental weakness," he was unable to understand the waiver of rights presented to him by the police, that he did not write the things in his statement, and that he was coerced into signing the waiver

The State does not dispute Prater's "mental weakness," but disputes vigorously that this mental weakness rendered his confession involuntary. The defendant's bedrock support, is *Carley v. State*, 739 So. 2d 1046 (Miss. App. 1999). In *Carley*, a 14-year-old with diagnosed mental illness confessed to killing his parents, only after having first denied involvement and then being told that God would forgive him if he confessed and he would see his parents again. *Id.* at 1053. As noted in the defendant's brief, "the accused's mental weakness may not be the sole reason to exclude a confession, when coupled with overreaching interrogation tactics, it may become the basis for the exclusion of a confession" *Id.*

The defendant has not provided evidentiary support, besides 11th hour allegations of coercion, that the police were anything but fair and procedurally standard in their interrogation. *Carley* is difficult to apply to the facts of this case because this court neither can nor should assume misconduct on the part of the police in interrogating the defendant when such misconduct is not reflected by the record.

For further support, the defendant cites *Neal v. State*, 451 So. 2d 743 (Miss. 1984). Neal, a mildly mentally retarded adult, confessed to kidnaping and killing a young girl. *Id.* at 747, 52. The Mississippi Supreme Court there upheld the trial court's decision to admit Neal's confession because the trial judge had applied the law correctly and considered the totality of circumstances. *Id.* at 756-57. Of further interest is the *Neal* court's reminder that "[a] *per se* involuntariness finding may be

appropriate in the case of moderate or severe retardation. It clearly is not appropriate where, as here, the individual is mildly mentally retarded." *Id.*

The defendant relies most heavily on the *Neal* court's iteration that in voluntariness determinations, the trial court must determine whether the accused, prior to the confession, understood the content and substance of the *Miranda* warning and the nature of the charges of which he was accused or with respect to which he was under investigation. *Id.* at 755. There, Neal denied having been present in Mississippi for the previous two or three years, recognizing that if he admitted to having been in the State "they will kill me." *Id.* at 756. The court relied on this and other statements by the defendant to determine that Neal had an "intelligent appreciation for the jeopardy he was in." *Id.*

Here, the defendant argues that there was not a sufficient inquiry by the trial judge into the defendant's mental state to determine whether he could have voluntarily waived his rights. Defendant urges that because no such inquiry was, allegedly, levied here, the court is not bound by its strict standard of clear error. However, to claim that there was no inquiry is disingenuous. Prater testified directly during the motion to suppress and demonstrated knowledge and understanding about his rights and what it meant to waive them. [T. 93-96]. The same trial judge had ruled over Prater's competency hearing. [T. 11-48]. Dolph Bryant, the Sheriff of Oktibbeha County, who sympathetically told the judge that "Willie would be real easy to lead in which ever direction you wanted to take him in,"[T. 110] had to admit that Willie gave no indication that he could not understand the substance of the rights waiver. [T. 103]. Prater evidenced his understanding of his statement when he asked that the police take another to clarify. [T. 87]. During the suppression hearing, three law enforcement officials and Willie Prater testified. The trial judge in his ruling referenced an earlier unanimous determination by physicians at Whitfield that Prater understood the

nature and quality of his acts at the time of the offense and that those acts were wrong. [T.123]. Those physicians were unanimous in their determination that Prater was not under the influence of any extreme mental or emotional disturbance. [T. 123]. And as the ruling indicated, the defendant at trial indicated not that he could not understand the rights waiver, but rather that he understood and was coerced. [T. 127]. The testimony of the law enforcement officials, as well as the cognizance by the trial judge of the defendant's mental capacity at various stages of this affair, all indicate a sufficient inquiry by the trial judge to give rise to the normal standard of clear error. The finding of fact of the trial court, therefore, cannot be disturbed. *Ratliffe v. State*, 317 So. 2d 403, 405 (Miss. 1975).

VIII. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE DEFENDANT WAS COMPETENT TO STAND TRIAL.

The standard for appeal of a decision that a defendant was mentally competent to stand trial is an abuse of discretion standard. *Snow v. State*, 800 So. 2d 472, 489-490 (Miss. 2001).

Though the unfortunate details of the defendant's mental history do give rise to some sympathy, they are, please remember, details with which the trial judge was exceedingly familiar. Knowing the many difficulties outlined in the defendant's brief, the fact-finder, nevertheless, found the defendant to be competent to stand trial. [T. 45]. This determination was based on periodic reports received by the trial judge from physicians at Whitfield over a 14-month period. [T. 44].

In *Martin v. State*, 871 So. 2d 693 (Miss. 2004), the trial court was presented with conflicting testimony regarding the competency of the defendant. In the present case, all medical testimony presented at the competency hearing unanimously told the court that Prater was competent. [T. 45]. Other than recounting the ailments that effect Prater, the brief for the appellant does not support its argument that Prater fails the test for competency laid out in *Martin* (defendant has ability to "perceive and understand the nature of the proceedings," can "rationally communication with his attorney about the case," and "recall relevant facts," and is able to "testify in his own defense if appropriate" all "commensurate with the severity of the case."). *Martin*, 871 So. 2d at 697.

The defendant quotes one of those physicians, Dr. Mavaugh, who was unable to conclude whether Prater's competency could withstand the rigors of the trial, saying, "I'm not sure what he's going to do under the stress of a trial. My best estimate is that with the medications he's going to do a lot better, but I absolutely cannot guarantee that under the stress of a trial he may not decompensate again." [T. 18]. This is a noble concern, but the unfortunate event that a defendant might become incompetent during his trial is dealt with under Rule 9.06 of the Uniform Rules of

Circuit and County Courts, which charges trial judges to sua sponte order a mental examination should they be confronted with reasonable grounds to believe that the defendant has become incompetent. The defendant makes no specific allegation of error concerning a trial court neglect of URCCC 9.06. The court could have engaged in the type of soothsaying suggested here by the defendant. If the trial judge had found reasonable grounds to find the defendant incompetent during the trial, he would have ordered a mental examination, or else the trial counsel should have moved for such a hearing or the appellate counsel should have alleged error in this appeal. None of those things happened.

To say that the trial court abused its discretion is stretching uncomfortably. The trial judge was clearly sympathetic to the condition of the defendant, since he had declared a mistrial in a previous trial for concern that the defendant was not competent. [T. 44]. With this previous experience and the testimony of the state psychiatrists selected by the court, the court obviously made a well-informed decision. Questioning that factual inquiry would be beyond the court's standard of review.

CONCLUSION

For the reasons herein expressed, the State respectfully requests that the judgment and sentence of the lower court be affirmed.

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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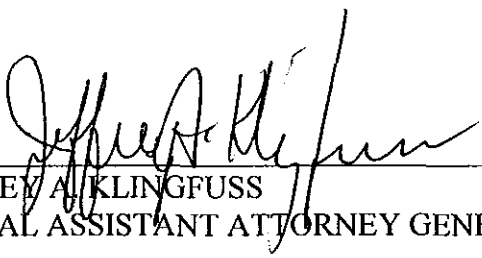
This the 8th day of August, 2008.



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