IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CRAIG LASHOUN MCBEATH — APPELLANT

VS. — NO. 2008-KA-0754

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Procedural History

A grand jury impaneled in the Circuit Court of Scott County returned an indictment charging Craig Lashoun McBeath with one count of capital murder and one count of kidnapping. (C.P.2) He was tried and convicted of murder and kidnapping and was sentenced to consecutive terms of imprisonment of life and 40 years. (C.P.86-87) Aggrieved by the judgment rendered against him, McBeath has perfected an appeal to this Court.

Substantive Facts

Mary Carpenter testified that in February 2007, she lived in Forest with her husband, Keith Carpenter, and her younger son from her first marriage, Shannon Torrance [hereinafter "Shannon"]. Shannon was a senior at Scott Central High School. (T.60-61)

The morning of February 23, 2007, started typically in the Carpenter house. Mrs. Carpenter left for work at 6:15 a.m. Her husband "had already left for work." When she departed, she saw that Shannon was sleeping. After she arrived at her place of employment, she and Shannon spoke on the phone. He told his mother that he "was up and getting dressed for school." That afternoon, however, Shannon failed to call her, as was his routine. As the afternoon wore on, Mrs. Carpenter began "really getting upset." She called several of his friends as well as his school to check on him, but "nobody had" seen Shannon. Finally, at about 2:00, she went "straight home." (T.62-65)

When she arrived there, she found several indications that something had gone very wrong. Although Shannon had been planning to spend the weekend with his girlfriend, he had failed to pack his clothes. Furthermore, the family house cats had been left outside. The back door was unlocked, and "[e]very light in the house was on." Additionally, "Shannon's cell phone was laying [sic] on the counter with forty-three missed calls on it ... " The house was in general disarray, and a ".22 pistol" as well as Shannon's Grand Prix automobile were missing. She called law enforcement, and Deputy Otis Craig responded. (T.66-69)

Mrs. Carpenter went on to testify that Shannon and a classmate, Isaac Nelson, were friends, and that Nelson regularly visited Shannon at their house and had dinner with the

family. McBeath, another classmate, "had been over a couple of times." Mrs. Carpenter never saw her son alive again. His body was found a few days later. (T.69-70)

Billy Patrick, a patrol deputy as well as an investigator for the Scott County Sheriff's Department, testified that he "was off that weekend" after Shannon was reported missing on Friday, February 23. When he returned to work the next Monday, he, Chief Deputy Roger Thompson, and Deputy Gerald Greer "came up with a plan to go out there and search some dirt roads and stuff out in the Midway Community." After they did so, they found Shannon's body "[p]robably about a hundred and fifty to two hundred yards down this log road" in a wooded area. The body was "[n]ude, had a plastic bag over the head." Deputy Patrick took photographs of the body and the surrounding scene. They also secured the scene and called for assistance from the Mississippi Crime Lab. (T.73-79)

Deputy Greer testified that between the time Shannon went missing and the discovery of the body, he talked with several people who had known the victim. The day before the body was found, he and Officer Steven Crotwell interviewed McBeath. Having received the *Miranda* warnings and executed a waiver of his righits, McBeath told the deputies that he had been with Shannon, but that he had "deposited them at somebody else's house" in Chinatown "on Friday, and then he left, and they had no idea of his whereabouts." (T.84-90)

On Sunday, February 25, Deputy Greer took a statement from McBeath. Although McBeath was not under arrest, he was given the *Miranda* warnings. Afterward, he executed a waiver of his rights and agreed to answer questions. During the questioning, Deputy Steven Crotwell came into the room. McBeath told the officers that Shannon "had dropped him and Isaac Nelson off at another place, another location, and as far as he

knew ... they didn't knew where he went, but he had said that he was going to his girlfriend's." (T.104-07)

The day after Shannon's body was found, Deputy Greer and Agent Danny Knight interviewed McBeath at the Scott County Sheriff's Office. Again, McBeath was informed of his rights and executed a waiver of them. Shortly thereafter, Deputy Greer was informed that Shannon's vehicle had been found in a parking lot at East Central College. He then "left the room" and went to that location, where he found the vehicle, secured it, had it towed to a garage in Morton, and remained with it until the Mississippi Crime Lab personnel arrived. (T.129-34)

Agent Danny Knight of the Mississippi Bureau of Investigation testified that after Deputy Greer left the interview room to attend to other business, he (Knight) continued to take McBeath's statement, which "was recorded" by an "official State digital recorder." The recording and the transcript thereof were admitted into evidence. (T.138-44)

Deputy Steven Crotwell testified that on Tuesday, February 27, he "brought Craig over from the jail" to be interviewed. McBeath "put his hands up, and said I'm going to tell y'all everything, but I just want my mother here." Deputy Crotwell then "left to retrieve his mother." McBeath's mother and stepfather attended the interview. (T.152-54)

Dr. Steven Timothy Hayne performed the autopsy on Shannon's body. Dr. Hayne testified that the body exhibited signs of "early decomposition" and that there was a "black plastic bag covering the mother and nose with ... silver ... duct tape that was taped around that." He found "evidence of acute trauma, injury, on the external surface of the body, including abrasions of small size over the forehead, one over the nose, one to the far side of the right eye, one located in the left eyebrow. There was a large contusion over the left

cheek ..." Dr. Hayne also observed "a bruise located over the left back of the head" as well as "abrasions or scrapes of the skin ... on the right side of the neck" and "near the right armpit and the left armpit." Smaller abrasions were found "on the lower right side of the back" and on the right forearm and hand. These wounds were "consistent with defensive posturing injuries." (T.172-74)

Internal examination of the neck area revealed "hemorrhages at multiple sites, specifically ... around the esophagus ... " Dr. Hayne concluded that Shannon died of "incomplete strangulation with terminal suffocation" and that "there was intent to ... induce manual strangulation with compression of the neck and that was followed by taping this individual's nares and mouth shut which would produce suffocation." (T.178-79) In Dr. Hayne's opinion, the linear marks on the left side of the back indicated "that this individual was alive when they were inflicted." (T.181) Dr. Hayne ruled that manner of death as homicide. (T.184)

SUMMARY OF THE ARGUMENT

Initially, the state submits McBeath cannot show on this record that he was deprived of the effective assistance of counsel. By no stretch of the imagination was his trial lawyer's performance so deplorable as to require the court to grant a mistrial or new trial *sua sponte*. In any event, his claim is purely speculative and cannot be established on the basis of this record. At this juncture, his first proposition should be denied without prejudice to its being raised in a motion for post-conviction collateral relief.

In light of *Nelson v. State*, 10 So.3d 898, 903 (Miss.App.2009), the state has no objection to the remanding of this case for resentencing on the kidnapping conviction.

Furthermore, McBeath's challenge to Dr. Hayne's testimony is procedurally barred and substantively without merit.

Additionally, McBeath's challenge to the sufficiency and weight of the evidence of his guilt has no merit. The proof is not such that a reasonable juror could have returned no verdict other than not guilty. Moreover, the defendant's failure to testify or to put on any evidence left the jury free to give full effect to the testimony of the state's witnesses.

Moreover, McBeath's convictions of murder and kidhappning did not violate the Double Jeopardy Clause. The crimes of murder and kidnapping each required an element of proof not necessary to the other.

Furthermore, the trial court should not be put in error for failing to grant a lesser-included offense instruction which was not requested. In any event, there was no evidentiary basis for an instruction on culpable negligence manslaughter

Finally, McBeath's invocation of the cumulative error doctrine is procedurally barred and substantively meritless.

PROPOSITION ONE:

McBEATH CANNOT SHOW ON THIS RECORD THAT HIS TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE

McBeath first contends that his counsel rendered constitutionally ineffective assistance. He faces formidable hurdles, recently outlined as follows:

> 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, McBeath 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, *Townsend v.* State, 933 So.2d 986, 989 (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).

McBeath has not begun to show that his lawyer's performance was so deplorable as to require the court to declare a mistrial on its own motion. While he alleges unprofessional lapses, he has not shown that his trial counsel's overall performance mandated the declaration of a mistrial *sua sponte*. Because he has not shouldered the particular burden that he faces on direct appeal, his second proposition should be denied without prejudice to the raising of this issue in a motion for post-conviction collateral relief.

Although no further discussion should be required, the state submits for the sake of argument that McBeath's challenge boils down to a complaint that his trial counsel failed to make an adequate pretrial investigation. This contention is "'insufficient as a matter of

law.'" *Ward v. State*, 821 So.2d 894, 900 (Miss. App. 2002), quoting *Harveston v. State*, 597 So.2d 641, 642 (Miss.1992). In any case, it cannot be decided within the four corners of this record.

For these reasons, McBeath's first proposition should be denied.

PROPOSITION TWO:

THE STATE DOES NOT OBJECT TO A REMAND FOR RESENTENCING ON THE KIDNAPPING CONVICTION

McBeath was sentenced to a term of 40 years on his conviction of kidnapping. The controlling statute authorizes a maximum term of 30 years if, as here, the jury has failed to agree to fixing the sentence at imprisonment for life. MISS. CODE ANN. § 97-3-53 (Rev.2006).

The identical issue was raised and found to be meritorious in McBeath's companion case, *Nelson v. State*, 10 So.3d 898, 903 (Miss. App. 2009). Accordingly, the state does not object to the remand of this case for resentencing on the kidnapping conviction.

PROPOSITION THREE:

McBEATH'S CHALLENGE TO DR. HAYNE'S TESTIMONY IS PROCEDURALLY BARRED

McBeath argues next that his convictions should be reversed because Dr. Hayne testified outside the realm of his expertise. The record reveals that during the direct examination of Dr. Hayne, the defense interposed only two objections, both challenging not the content of the testimony, but the admissibility of the photographs of the victim's body. (T.175-76, 180) The issue argued on appeal was not presented to the trial court and is, accordingly, procedurally barred. *Keys v. State*, ____ So.3d ____ , 2009 WL 3260582

(Miss.App.), citing *Cavett v. State*, 717 So.2d 722 (Miss.1998), and *Bogan v. State*, 754 So.2d 1289, 1294 (Miss.App.2000).

Solely in the alternative, the state submits it is absurd to suggest that the pathologist who performed the autopsy could not testify as to the cause of death. McBeath's third proposition is procedurally barred and plainly devoid of substantive merit.

PROPOSITION FOUR:

THE VERDICTS ARE BASED ON LEGALLY SUFFICIENT PROOF AND ARE NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Under his fourth and sixth propositions, McBeath challenges the sufficiency and weight of the evidence undergirding his conviction. To prevail, he must satisfy the following formidable standards of review:

> "If there is sufficient evidence to support a verdict of guilty, this Court will not reverse." *Meshell v. State*, 506 So.2d 989, 990 (Miss.1987). [other citations omitted] This Court should reverse only where, "with respect to one or more elements of the offense charged, the evidence so considered is such that reasonable and fair minded jurors could only find the accused not guilty." *Alexander v. State*, 759 So.2d 411, 421(¶ 23) (Miss.2000) (quoting *Gossett v. State*, 660 So.2d 1285, 1293 (Miss.1995)).
>
> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is also 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." *Collins v. State*, 757 So.2d 335, 337(¶ 5) (Miss.Ct.App.2000) (quoting *Dudley v. State*, 719 So.2d 180, 182(¶ 9) (Miss.1998)). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Collins*, 757 So.2d at 337(¶ 5) (citing *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." *Collins*, 757 So.2d at 337(¶ 5) (quoting *Dudley*, 719 So.2d at 182).
>
> *Carle v. State*, 864 So.2d 993, 998 (Miss.App.2004).

In this case, "[t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify" or put on any otherproof. *White v. State*, 722 So.2d 1242, 1247 (Miss.1998). The defendant's failure to do so left the jury free to give "full effect" to the testimony of the state's witnesses. *Id.*

We incorporate by reference the evidence set out under our Statement of Substantive Facts to support our position that the proof is not such that reasonable jurors could have returned no verdict other than not guilty, or that to allow the judgment to stand would constitute an unconscionable injustice. We also adopt the District Attorney's closing argument, supported by the evidence, to the effect that the state's proof showed that two people working together, i.e., Nelson and McBeath, committed these crimes and that each was therefore liable for the actions of the other. Moreover, it was inconceivable that one person alone could have committed these offenses. By his own statement, McBeath was present and had Shannon "in a headlock" for two to three minutes."[1] (T.226, 237-39)

The proof amply supports the jury's finding that McBeath was guilty of simple murder and kidnapping. The trial court did not err in refusing to disturb the verdicts. McBeath's fourth and sixth propositions have no merit.

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[1]This admission obviated the need for a circumstantial evidence instruction. *Smith v. State*, 981 So.2d 1025, 1032 (Miss. App. 2008).

PROPOSITION FIVE:

McBEATH'S CONVICTIONS OF MURDER AND KIDNAPPING DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

McBeath contends additionally that the Double Jeopardy Clause barred his prosecution for murder and kidnapping. The same issue was raised in the companion case, *Nelson*, 10 So.3d 907-908, where, as here, the accomplice was tried on charges of capital murder committed in the course of a robbery and kidnapping and was convicted of simple murder and kidnapping. The Court of Appeals rejected Nelson's argument with this analysis:

> Furthermore, Nelson's contention that the kidnapping occurred as part of the murder and therefore, double jeopardy bars the prosecution of murder and kidnapping, is without merit. Murder and kidnapping have separate statutory elements, requiring different facts.
>
> In Bannister v. State, 731 So.2d 583, 586 (Miss.1999), this Court held:
>
> Although the state may freely define crimes and assign punishments, it is not allowed to punish a defendant for a crime containing elements which are completely enveloped by an offense for which a defendant was previously convicted. See *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). "If an individual is charged with two offenses, and all the elements of one are included within and are part of a second greater offense, *Blockburger* intervenes. It charges that we compare statutory offenses, as indicated, and see whether each requires proof of a fact which the other does not." *Meeks v. State*, 604 So.2d 748, 751 (Miss.1992). "Even though there may be a substantial overlap in the proof supporting the convictions of the different crimes, the *Blockburger* test is met where each offense requires proof of an element not necessary to the other." *Holly v. State*, 671 So.2d 32, 44 (Miss.1996) (citing Brock v. State, 530 So.2d 146, 150 (Miss.1988)).
>
> Bannister, 731 So.2d at 586.

Nelson was charged with capital murder pursuant to Mississippi Code Annotated Section 97-3-19(2)(e) for murder and the underlying crime of robbery, which provides:

> (2) The killing of a human being without the authority of law by any means or 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, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies....

Miss.Code Ann. § 97-3-19(2)(e) (Rev.2006).

Nelson also was indicted for the crime of kidnapping pursuant to Mississippi Code Section 97-3-53, which provides, in part:

> Any person who, without lawful authority and with or without intent to secretly confine, shall forcibly seize and confine any other person, or shall inveigle or kidnap any other person with intent to cause such person to be confined or imprisoned against his or her will, or without lawful authority shall forcibly seize, inveigle or kidnap any child under the age of sixteen (16) years against the will of the parents or guardian or person having the lawful custody of the child....
>
> Miss. Code Ann. § 97-3-53 (Rev.2006).

The crimes of capital murder and kidnapping each require proof of an element not necessary to the other. See *Bannister*, 731 So.2d at 586 (quoting Holly, 671 So.2d at 44) (*Blockburger* is met when each crime "requires proof of an element not necessary to the other"). Accordingly, this issue is without merit.

(emphasis added) *Nelson*, 10 So.3d at 907-08.

The same reasoning applies in this case. Accordingly, the state submits McBeath's fifth proposition plainly lacks merit.

PROPOSITION SIX:

THE TRIAL COURT SHOULD NOT BE PUT IN ERROR FOR FAILING TO GRANT A LESSER-INCLUDED OFFENSE INSTRUCTION WHICH WAS NOT REQUESTED

McBeath contends additionally that the trial court committed reversible error in failing to grant an instruction authorizing the jury to find him guilty of the lesser-included offense of manslaughter by culpable negligence. This proposition need not detain this Court long, inasmuch as no such instruction was submitted. "It is well established that '[e]rror cannot be predicated on failure of the court to give instructions not requested.'" *Blocker v. State*, 809 So.2d 640, 646 (Miss. App. 2002), quoting *Lindsey Wagon Co. v. Nix*, 108 Miss. 814, 67 So. 459 (1915). Ellis's second proposition plainly lacks merit.

Solely for the sake of argument, the state submits in the alternative that trial counsel's failure to request such an instruction is not surprising inasmuch as there existed no evidentiary basis for it. The state's proof showed that the victim died of strangulation and suffocation, with a plastic bag secured with duct tape over his head. It strains credulity to surmise how the acts causing this death could have been done negligently. Furthermore, the defense offered no evidence at all, much less evidence to justify an instruction authorizing the jury to find him guilty of culpable negligence manslaughter. *Goodin v. State,* 787 So.2d 639, 657 (Miss.2001), citing *Burns v. State*, 729 So.2d 203, 225 (Miss. 1998). The state reiterates that this issue is not properly before the Court. McBeath's seventh proposition should be denied.

PROPOSITION SEVEN:

McBEATH'S INVOCATION OF THE CUMULATIVE ERROR DOCTRINE IS PROCEDURALLY BARRED AND SUBSTANTIVELY MERITLESS

McBeath finally contends that "in the event this Honorable Court [does not] hold that each other aforesaid claims raised, standing alone, does not constitute cause to grand relief, the cumulative effect of each acted to deprive Appellant Craig McBeath of his constitutional right to a fair trial ... " (Brief for Appellant 34) He did not present this argument at any time in the trial court and may not raise it for the first time on appeal. *Maldonado v. State*, 796 So.2d 247, 260-61 (Miss.2001); *Gibson v. State*, 731 So.2d 1087, 1098 (Miss.1998). Accordingly, McBeath's eighth proposition is procedurally barred.

In the alternative, the state incorporates its arguments under Propositions One through Six of this brief in asserting that the lack of merit in McBeath's other arguments demonstrates the futility of his final proposition. *Gibson*, 731 So.2d at 1098. See also *Holland v. State*, 705 So.2d 307, 356 (Miss.1997) ("twenty times zero equals zero"). "[W]here there is no reversible error in part, there is no reversible error to the whole." *Russell v. State*, 924 So.2d 604 (Miss.App.2006). For these reasons, McBeath's final proposition should be denied.

CONCLUSION

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

Respectfully submitted,

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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 25th day of February, 2010.

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