IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EDGAR PATTON — APPELLANT

VS. — NO. 2008-KP-1699

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Defendant, Edgar Patton was indicted by the Grand Jury of Marion County for False Pretense in violation of *Miss. Code Ann.* § 97-19-39. (Indictment, c.p.4). After a trial by jury, Circuit Judge R.I. Prichard, III, presiding, wherein defendant represented himself, – the jury found defendant guilty. (Verdict, c.p.52). The trial court sentenced defendant to 10 years, 8 suspended, 2 to serve in the custody of the Mississippi Department of Corrections. Further, defendant was ordered to make restitution in the amount of $800 to the victim, pay fines in Marion County Justice Court of $717.50 and pay all costs of court. (Order of conviction and sentence, c.p. 81-84).

After denial of post-trial motions this instant appeal was timely noticed. C.p. 111. It

STATEMENT OF FACTS

Succinctly, the State elicited testimony and produced exhibits that defendant did accept $800 from the victims for the sale of a trailer. St. Ex. 1, 2, 3.

Defendant did not own that trailer, and did not return the money received. Defendant falsely represented that he owned a trailer for sale. Defendant falsely gave information regarding the sale (serial number, description). When in point of fact the trailer belonged to someone else and the serial number was fiction. Tr. 129.

The jury heard the evidence and found defendant guilty.

ARGUMENT

I.

The Indictment Was Legally Sufficient to Put Defendant on Notice as to the Charges Against Him.

Defendant, still representing himself, argues his indictment was defective.

The indictment of defendant charged him with a violation pursuant to *Miss. Code Ann.* § 97-19-39. The applicable statutory provision applicable to this felony indictment is:

> Every person, who with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, with a value of Five Hundred Dollars ($500.00) or more, upon conviction thereof shall be guilty of a felony and punished by imprisonment in the State Penitentiary not exceeding ten (10) years, and by a fine not exceeding Ten Thousand Dollars ($10,000.00).

Miss. Code Ann. § 97-19-39(2).

Recently the Mississippi Court of Appeals reviewed and reiterated the law regarding the legal requirements of an indictment, stating:

> ¶ 14. [. . .]
> The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them.

An indictment that "reasonably provides the accused with actual notice and ... complies with Rule 7.06 of the Uniform [Rules of] Circuit and County Court" is sufficient to charge the defendant with the crime. Turner v. State, 864 So.2d 288, 293(¶ 22) (Miss.Ct.App.2003); see also McNeal v. State, 658 So.2d 1345, 1350 (Miss.1995).

Issue II.
Defendant Chose to Represent Himself and Was Aware of the Perils.

> ¶ 5. [. . .] This Court has held that "[a] waiver of the right to assistance of counsel may occur at any time, before or during the trial, but it must be made with a full understanding of its disadvantages and consequences." *Davis v. State*, 811 So.2d 346, 350(¶ 6) (Miss.Ct.App.2001) (citations omitted). Jackson claims that because the trial judge did not adequately warn him of the disadvantages and consequences of self-representation, his waiver was not knowing and intelligent.

Jackson v. State, 1 So.3d 921, 924 -925 (Miss.App. 2008).

Looking to the record the trial court mentions on page 2 and page 12 that defendant is going to represent himself. It also appears this issue had been addressed earlier and often -- though not fully recorded in the trial court record now before this court on appeal. It is apparent that defendant was exercising his right to counsel.

Further, it is clear from the record that the trial court, gently, made sure that defendant was not prejudiced by his unfamiliarity with the rules and the law. Tr. 12, 29, 42.

The State would ask that no relief be granted on this allegation of error.

Issue IV.

This Issue Is Procedurally Barred as Not Supported by Argument and Citation to Authority and as Having Been Waived.

The day of trial the judge asked defendant if he was ready to go to trial – defendant replied in the affirmative. Tr. 15.

> It is the duty of the movant, when a motion or other pleading is filed, including motions for a new trial, to pursue said motion to hearing and decision by the court. Failure to pursue a pretrial motion to hearing and decision before trial is deemed an abandonment of that motion; however, said motion may be heard after the commencement of trial in the discretion of the court.

This Court has repeatedly held that "it is the responsibility of the movant to obtain a ruling from the court on motions ... and failure to do so constitutes a waiver." Evans v. State, 725 So.2d 613, 708 (Miss.1997) (quoting Johnson v. State, 461 So.2d 1288, 1290 (Miss.1984)). "Issues not brought before the trial court are deemed waived and may not be raised for the first time on appeal." Tate v. State, 912 So.2d 919, 928 (Miss.2005) (citing Wilcher v. State, 479 So.2d 710, 712 (Miss.1985)).

> ¶ 17. We find no record of a ruling by the trial court on Smith's motion for severance nor any evidence that the motion was noticed for hearing by the defendant. By failing to pursue a hearing or ruling on the motion from the trial court, Smith effectively abandoned the motion and waived this issue for appeal.

Smith v. State, 986 So.2d 290, 296 (Miss. 2008).

The State would assert this issue was waived when not raised at the trial court level. Further, while there is a listing of claimed errors, there is no citation to authority or development of argument of any kind. Further, other than a claim of prejudice there is no showing of how the defense was affected and if it was actual prejudice. *Young v. Guild,* 7

Issue V.

The trial court did not improperly exclude evidence as irrelevant.

At trial defendant sought to elicit testimony from Det. Albert Lee Preston the original investigating officer. The State had, apparently, subpoenaed Preston but decided they did not need his testimony. While defendant asserts he had him on his witness list defendant did not subpoena this witness.

The trial court inquired as to the type of testimony to be elicited from this witness. Defendant responded and the trial court ruled it was irrelevant. Tr. 158-59.

> ¶ 15. The standard of review for the admission or exclusion of evidence is abuse of discretion. Brown v. State, 969 So.2d 855, 860 (Miss.2007) (citing Poole v. Avara, 908 So.2d 716, 721 (Miss.2005)). "The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." Johnston v. State, 567 So.2d 237, 238 (Miss.1990) (citing Hentz v. State, 542 So.2d 914, 917 (Miss.1989); Monk v. State, 532 So.2d 592, 599 (Miss.1988)).

Croft v. State, 992 So.2d 1151, 1155 (Miss. 2008).

At trial and from the entire transcript it is claimed by defendant that Preston would have testified that defendant had offered a refund of the money but the victim's refused his offer. And, two witnesses did testify that defendant did not offer the money back.

> "On the principle that the injury is to the state, accused cannot plead that prosecutor has condoned the crime and settled with accused, unless the statute permits such a settlement. It is no defense that the prosecutor has recovered, or could recover, for any loss he has sustained, or that accused has offered to pay for the property obtained, or has paid for it, or that he has offered to return, or has returned, the property obtained, or that the prosecutor has regained possession thereof, or that its loss has been made good to him, or that accused

Issue VI.

The Defendant Was Not Prevented from Eliciting Testimony about the Prior Conviction of a Witness.

Defendant tried to impeach a witness with a prior conviction. Tr. 138. And, if defendant had a reasonable belief of a prior conviction (which he apparently did and still does) he merely would have had to ask the question. But for reasons not apparent from the record defendant did not pursue the question.

Perhaps the conviction was not one that could be used to impeach. Regardless, it was not that he was prevented from impeaching the witness – defendant either did not know how to use a prior conviction to impeach, or chose not to pursue the issue. *Robert v. State,* 821 So.2d 812 (¶ 13)(Miss. 2002).

Such is not error by the State, or the trial court. Consequently no relief should be given on this claim of error.

two witnesses (or any other for that matter).

If this issue were not procedurally barred it would alternatively be without merit in fact and law.

Issue IX.

The Jury Was Properly Instructed.

Lastly, defendant asserts it was error for the court to give an instruction that told the jury that if certain proof was not proved by the State (that defendant obtained $800) then the jury was do find defendant non guilty. (Instruction 4, c.p. 49). Defendant claims it was instruction #5, but the State believes, based on the language quoted, he is arguing about Instruction #4.

The reviewing courts of this State have oft heard this argument that instructing the jury on finding the defendant not guilty of certain charges is permitted by law.

> ¶ 174. Russell argues first that defense counsel was ineffective for submitting an instruction, D-17, which states that "if you find that the State has failed to prove any one of the essential elements of the crime of capital murder, you must find the Defendant not guilty of capital murder and you will proceed with your deliberations to decide whether the State has proved beyond a reasonable doubt all the elements of a lesser crime of manslaughter." Russell points out that counsel actually argued the matter the other way around to the jury, urging them to consider manslaughter first. The State points out that we have found that this type of instruction, an "acquit-first" instruction, is not prohibited by the law of this State. Gray v. State, 728 So.2d 36, 75 (Miss.1998).

Russell v. State, 849 So.2d 95 (Miss. 2003).

The jury was properly instructed on the elements to the offense and even instructed on a defense to the crime charged. This was certainly allowed by law, and not prejudicial to defendant. The State would argue such guidance to the jury is beneficial to defendant.

Be that as it may, there was no error in the giving of July 3, 2009.

CERTIFICATE OF SERVICE

I, Jeff 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:

Honorable R.I. Prichard, III
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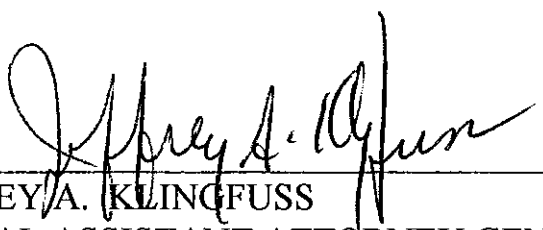
This the 3rd day of July, 2009.



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