IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALFRED KIRKHAM — APPELLANT

VS. — NO. 2009-KA-0112-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Bolivar County and the judgment of conviction of Alfred Kirkham for aggravated assault. Defendant Kirkham was indicted for aggravated assault in violation of *Miss. Code Ann.* ¶ 97-3-7(2)(b). (Indictment c.p. 4). After a trial by jury, the Honorable Alfred B. Smith III, the jury found defendant guilty. (Jury Verdict, c.p.38). Subsequently, defendant was sentenced to 20 years in the custody of the Mississippi Department of Corrections. (Sentencing order, c.p. 117-120).

After denial of post-trial motions and the trial court granting of pauper status this instant appeal was timely noticed. (C.p. 127).

STATEMENT OF FACTS

Defendant Kirkham and his co-defendant Lawonda Shepherd (a.k.a "Cabbage Patch") were at a party when they both left the party to gather more refreshments. Defendant was confronted by an acquaintance with whom he had 'issues' and had previously encountered the day before. Words were exchanged. Heated words, threats and name calling, gesturing and threats were, apparently, coming from all sides. Kirkham turned and asked co-defendant Lawonda Shepherd to give him the gun, or "hand me the .38". Which she did. Kirkham claimed he thought the guy was going for a gun, shot him in the chest. Tr. 196-97.

Kirkham admitted the shooting but that it was in self-defense. Ms. Shepherd, disavowed any involvement, only physical proximity claiming if anything vicarious self-defense.

The jury heard all the facts, testimony, conflicting stories and spin offered by the State and defense witnesses. After full and proper instruction from the court the jury retired to deliberate. After a little less then two hours consideration of the evidence the jury found both defendant's guilty beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

Issue I.

DEFENDANT KIRKHAM WAS NOT DENIED A FAIR BY THE COMMENTS OF THE TRIAL COURT.

> While there are numerous instances where the judge – and attorneys – elicited laughter from the jury or the gallery, such were not so shocking or offensive as to deny this defendant a fair trial.

Issue II.

DEFENDANT CANNOT TESTIFY AS TO A VICTIM'S CHARACTER. THE TRIAL COURT NEVER PREVENTED SUCH EVIDENCE FROM BEING ADMITTED.

> Character evidence of the victim is generally irrelevant. In claims of self-defense where there is evidence of an act against defendant specific prior instances between the victim and defendant are possibly admissible.

ARGUMENT

Issue I.

DEFENDANT KIRKHAM WAS NOT DENIED A FAIR BY THE COMMENTS OF THE TRIAL COURT.

In this initial allegation of error the State is confronted with a claim of error, that this attorney at least, had not addressed in any previous appeal.

First, and not unexpected by anyone, the State will argue this issue is procedurally barred. Looking to the record of all the 'comments' cited, the State could not find any objection by defense counsel for either defendant.

> ¶ 52. Finally, in a totally unrelated allegation, Lattice complains that the trial judge made improper comments as the jurors prepared to deliberate. Again, Lattice made no contemporaneous objection. It follows that his complaint, made for the first time on appeal, is procedurally barred. Christmas, 700 So.2d at 271.

Lattice v. State, 952 So.2d 206 (Miss.App. 2006).

And yet, at some point after the verdict it must have been brought to bear on counsel as it is – rather generically – raised as a claim in his motion for new trial, to wit: "The Court's comments during voir dire and cross-examination were inappropriate." (Kirkham Motion for New Trial, c.p. 121).

Without waiving any viable procedural bar to review the State will argue, the comments taken in context are not so inappropriate or so egregious to have denied Kirkham a fair trial by jury.

The reviewing Courts of this State have heard a similar claim before. In

Robertson v. State,185 So.2d 667, 670 (Miss. 1966), the trial court was asked to correct the transcript to include his comment made during trial. The trial judge said he'd made the comment in a jocular manner. The comment the trial judge admitted making, in the presence of the jury, was directed to defense counsel as he prepared to have the defendant testify: "Are you going to let him testify after having sat here all day and learned what to say?" *Id.* Defendant chose not to testify.

The reviewing court was not amused, holding:

> Jocularity and humor, by a court, should not be indulged in when a man's liberty is at stake. The officers of a court, and especially the judge, district attorney and sheriff, because of the attributes of the offices they hold, unconsciously exert tremendous influence in the trial of a case, and they should be astutely careful so that unintentionally the jurors are not improperly influenced by their words and actions. Rogers v. State, 243 Miss. 219, 136 So.2d 331 (1962). We cannot say with assurance that the jury was not influenced by the incompetent testimony of the sheriff and inadvertent statements of the court.

Robertson v. State,185 So.2d 667, 670 (Miss. 1966).

Now, to be sure there are numerous instances in the record where the jury, responded with laughter (as noted by the court reporter). In fact one instance cited in the brief at page 42, the jury had just expressed laughter to a question by Ms. Shepherd's defense counsel. The court added a quip, and it would appear the laughter just continued. Tr. 42. This portion was during voir dire, later (a day or so later) the jury took their oath, were sworn in and starting hearing testimony. Tr. 56.

At another point when Kirkham's counsel was cross-examining the victim he had the victim step down and asked his defendant to step over next to him. The trial court asked the Deputy to step and directed the deputy saying: "Don't get'em too close together." Tr. 85. And, again the clerk noted (laughter), – it is not clear at this point if it is from the gallery, or the jurors. But considering this was the victim that was testifying this defendant shot him with a gun... well, such a comment is not joking or jocular – at least as can be ascertained from the record.

Defendant now asserts the trial court inferred trial counsel was trying to confuse the jury. The exchange can be found in the record at page 152 of the transcript. Quite honestly, the questions and answers were a bit confusing as to who was who... it would have been unclear to most jurors (or spectators).. So the Judge interjected a question to help clarify, and defense counsel recognized his confusion. The trial judge just commented in a jocular manner, for him not to confuse things. Tr. 152. This attorney for the State would not view that as demeaning or casting aspersions on defense counsel.

In fact defense counsel used levity with one of his witnesses. Tr. 177. This had to do with evidence that was given to counsel (his office secretary, apparently) and the originals were now missing. This elicited laughter ... as noted by the court reporter. Again, it is not clear if it was from the jury or the spectators, or both.

Now as to the comment at page 181 of the transcript, appellate counsel seems to argue the jury could infer the judge was indicating, or inferring by his comment that there was enough evidence to convict the defendant. Again, there is no objection and the State just doesn't see that, even when viewed from a juror's perspective that such was a comment on the overall evidence to convict. It could be argued just as convincingly, the judge was trying to limit the impeachment of photographic evidence that did offer some evidentiary support for Kirkham's claim that he was attached and acted in self-defense.

> ¶ 14. "The very position of a judge during trial makes each comment unusually susceptible of influencing a juror or the jury." Hannah v. State, 336 So.2d 1317, 1321 (Miss.1976). See also Thompson v. State, 468 So.2d 852, 854 (Miss.1985); Stubbs v. State, 441 So.2d 1386, 1389 (Miss.1983). However, Rule 614(b) of the Mississippi Rules of Evidence makes it clear that the court has the power to interrogate witnesses. It reads: "the court may interrogate witnesses, whether called by itself or by a party." M.R.E. 614(b). The judge only abuses this authority when he abandons his judicial detachment and assumes an advocacy position. Jones v. State, 223 Miss. 812, 79 So.2d 273 (1955). In the case of Griffin v. State, the Court said: "The circuit judge has an undoubted right to interrogate witnesses in the interest and for the purpose of developing the truth of the matter at issue, and he likewise has a discretion to determine when a necessity or propriety therefor exists." Griffin v. State, 171 Miss. 70, 156 So. 652, 653 (Miss.1934). See also Hannah v. State, 336 So.2d 1317, 1322 (Miss.1976); Jones, 223 Miss. 812, 79 So.2d 273; Breland v. State, 180 Miss. 830, 178 So. 817 (1937).
>
> Davis v. State, 811 So.2d 346 (Miss.App. 2001).

This issue and record present some very subjective facts and circumstances.

However, it is the position of the State this trial was fundamentally fair. No prejudice is actually shown (as in *Robertson, supra*), and no comment appears to have affected the rights of defendant. Further none of the comments or responses in laughter were at the 'expense' of defendants. No one was demeaned. Nothing appears to even approach a sense of 'shock' or is even remotely uncomfortable.

Accordingly, looking at the total context of the record, the State asks that no relief should be granted on this allegation of error.

Issue II.

DEFENDANT CANNOT TESTIFY AS TO A VICTIM'S CHARACTER. THE TRIAL COURT NEVER PREVENTED SUCH EVIDENCE FROM BEING ADMITTED.

In this last allegation of trial court error counsel for Kirkham avers the trial court erred when trial counsel was prohibited from eliciting from the defendant the victim's 'character' – specifically any propensity for violence.

Applicable here is the general rule regarding character evidence of the victim:

> ¶ 23. An examination of M.R.E. 404(a)(2) and 405(a) is helpful in resolving this issue. Regarding Rules 404 and 405, this Court has stated:
>
> > The general rule is that character evidence may not be admitted to prove action in conformity therewith. Rule 404, M.R.E. However, Rule 404(a)(2) specifically authorizes inquiry by a criminal defendant into a victim's character. This exception enables defendants to prove that the victim was the initial aggressor and that the defendant acted in self-defense. Comment, Rule 404, M.R.E. Once Rule 404 has been satisfied, character evidence in the form of opinion or reputation evidence is admissible without further restriction. Rule 405(a), M.R.E. However, when character evidence passes through Rule 404(a)(2), and is offered in the form of specific instances of conduct, it is admissible only on cross-examination. Rule 405(a).
>
> * * *
>
> However, specific instances of conduct in cases where character or the trait of character is "an essential element of a charge, claim, or defense ..." are admissible whether on cross or direct examination. Rule 405(b). According to Heidel v. State, 587 So.2d 835 (Miss.1991), past acts are admissible in cases where a defendant alleges self-defense, concluding that the character trait of violence was an "essential element" of the defense under 405(b).
>
> * * *

> Rule 405(b) allows specific instances of conduct to be admitted if its restriction is satisfied, without regard to whether it was first admissible under Rule 404. Rule 405(a) begins, "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation...." Hence, 405(a) is connected to 404; but, since 405(b) has no such qualifying clause, it admits evidence independently of Rule 404, even though the overlap may yield mirrored results.
>
> *Newsom v. State*, 629 So.2d 611, 613-14 (Miss.1993).
>
> ¶ 24. Jackson cites Newsom in support of his proposition that the testimony regarding the victim's propensity for violence should have been admitted. In Newsom the defendant claimed that he shot and killed the victim in self-defense. Id. at 612. A defense witness testified that he had seen the victim in a number of previous fights. Id. at 613. The trial judge excluded this testimony, and this Court held the judge in error for doing so. Id. at 613-14. However, this Court found the error harmless since the victim's violent nature was admitted through other testimony including that of the defendant. Id. at 614. A similar situation is presented in the case sub judice.
>
> *Jackson v. State*, 784 So.2d 180 (Miss. 2001).

Now at the juncture where this happened at trial, the victim had testified, as had all the other State's witnesses, defendant had presented his self-defense claim and an overt act by the victim towards defendant. Defense counsel sought to get the defendant to testify as to the victim's reputation in the community for peacefulness. Tr. 189.

In a bench conference outside the presence of the jury, the judge ruled such evidence would possibly be admissible, but not at that point. Tr. 191.

Under the rationale of *Jackson*, at this point in the trial defendant probably could have testified as to specific instances of violence with the victim. General evidence of reputation in the community would not be relevant. But specific past acts with this defendant would be admissible.

Here however, defense was trying to get in general character evidence not limited to prior events between victim and this defendant.

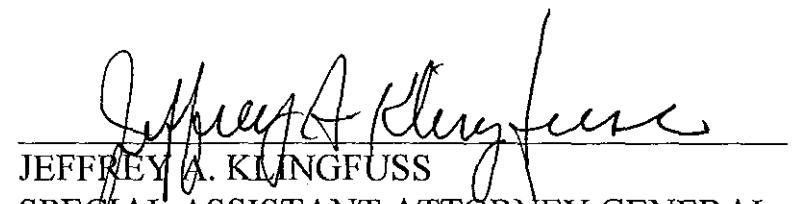
Based upon the rationale of *Jackson*, the trial court was not in error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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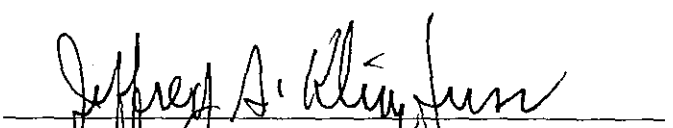
This the 14th day of May, 2010.



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