IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GREGORY FRAZIER — APPELLANT

VS. — NO. 2009-KA-0113

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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IN THE COURT OF APPEALS OF MISSISSIPPI

GREGORY FRAZIER — APPELLANT

VERSUS — NO. 2009-KA-0113-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Gregory Frazier was convicted in the Circuit Court of Bolivar County, Second Judicial District, on a charge of aggravated assault and was sentenced to a term of 20 years in the custody of the Mississippi Department of Corrections. (C.P.51-53) Aggrieved by the judgment rendered against him, Frazier has perfected an appeal to this Court.

Substantive Facts

Dr. Evelyn Smith, the Director of Nursing at Coahoma Community College, testified that on April 9, 2008, one of her students, Crystal Wadlington, "burst into" her office. According to Dr. Smith, Ms. Wadlington "was crying and she was saying that her boyfriend was calling her and he was coming to kill her ... " Dr. Smith notified

the local chief of police, who told her that "he would dispatch some officers." After the police arrived and "check[ed] the situation out," Ms. Wadlington "got a call" and "put it on the speaker phone." Dr. Smith heard the voice of "a man threatening this young lady." As Ms. Wadlington "was listening to what he was saying, she was getting more and more upset ... just almost hysterical." Ms. Wadlington was too distraught to continue her classes that day. (T.10-13)

Later that day, Officer Kathy Moore of the Cleveland Police Department was dispatched to the scene of a shooting at 929 Cross Street in Cleveland. When she arrived there, "Officer [Kenny] Millican went out to wait for the ambulance." Officer Moore "went into the bedroom where Mr. Frazier and Ms. Wadlington were." Ms. Wadlington, who "was sitting at the chair," was "not responsive." At one point, Frazier picked up a knife, showed it to Officer Moore, and told him that Ms. Wadlington "was coming at him with this knife when he shot her." (T.17-20)

Officer Millican, the first officer on the scene, testified that Frazier's mother had answered the door and told him that she had "just heard a gunshot from her son's room." Officer Millican "proceeded down the hallway calling Mr. Frazier's name to see if everything was all right." After Frazier "advised" him "to come on into the room," Officer Millican proceeded through the doorway" and observed Frazier "kneeling down in front of the chair holding a rag of some type against the right leg" of the unconscious victim. When Officer Millican "asked him where the weapon was," Frazier told him that it was "on the foot of the bed." Officer Millican "picked the gun up" and "put it in the back" of his pants. He then asked Frazier what had happened. According to Occier Millican, "[H]e told me at that time that him and

Crystal had been in an argument. She had pulled a knife on him and he had shot her." (T.22-24)

When Investigator Veronica Wesley arrived at the scene, the victim had been taken to the hospital. Investigator Wesley photographed a .45 shell casing which had been "found right in front of the bed." She also photographed bloodstains on the chair" and "on the floor right in front of the chair." She did not see blood at any other location in the room. (T.31-33)

Ms. Wadlington testified that in April 2008, she was enrolled in the Registered Nurse program at Coahoma Community College. She had been dating Gregory Frazier for six years. At the time in question, she was 24; he was 40. (T.36-37)

On April 9, Ms. Wadlington "was in a review for the state test." When she "got out of the review," she "checked" her mobile phone and saw that she had missed some 19 messages and four to six calls. Observing that she had a text message from a friend who had never before used this method of communication with her, Ms. Wadlington "figured it was an emergency" and "called her." At this time, Ms. Wadlington and another female friend, the daughter of Dr. Smith, were in the car at a fast food restaurant. Ms. Wadlington asked this friend to call Dr. Smith. After she did so, the police were notified, and Ms. Wadlington "went directly back to the nursing school and went into the director's office." There, Ms. Wadlington told Dr. Smith about her predicament. (T.37-38)

Ms. Wadlington went on to testify that before she had gone to Dr. Smith's office, she had had calls directly from Frazier himself. After he had made numerous attempts to reach her, she finally "called him." During one conversation, he told her

that he was "on his way" to her; that she had "better have" his money; that he had guns; that he was going to kill her and shoot at the police; and that the police would then kill him. He added, "It must be real love. We are going to die today and be buried beside each other." While she was in Dr. Smith's office, she spoke with Frazier again. He essentially repeated what he had said earlier: he was going to kill her; the police would kill him; and they would die together. (T.38-39)

At this point, Ms. Wadlington went to the courthouse in Clarksdale to file for a restraining order against Frazier, but she was told she would have to seek protection in Bolivar County. Thereafter, she "went back to the school just to give Dr. Smith a report of what went on." She then drove to her house in Cleveland, talking with Frazier "most of the way. Once she "made it home," he seemed to have "calmed down" and was no longer threatening her. Toward the end of their phone conversations, he was "crying," telling her that he "needed her" and that he "just wanted to talk," and asking her "to come over" to his house. When she told him that she was "scared," he assured her that he "wasn't going to do anything" to her "because the kids were there and his mom was there." Finally, Ms. Wadlington went to Frazier's house. Frazier's son answered the door, and Ms. Wadlington walked back to Frazier's bedroom. (T.39-42)

Immediately, Frazier became confrontational, accusing her of "playing" and telling her to take her clothes off. Ms. Wadlington replied, "You don't talk to me like that," but she sat down on the bed and removed her shoes, put her purse on the table and put her phone down. When she "picked it [the phone] up to put it on silent," Frazier asked her to hand it to him. When she refused, he said, "I'm not

going to ask you again." At that point, "he came from on the side of the bed with the gun and he pointed it" at her and said, "Let me see your phone." Ms. Wadlington "just threw it on the bed." (T.42-44)

Frazier then "went through" the list of calls and text messages on Ms. Wadlington's phone. As he did so, Ms. Wadlington received a call from a caller designated as "private," which meant that the caller had concealed his identity by pressing *67 before making the call. Frazier became irate, saying, "This is the [expletive] you're leaving me for." She denied this accusation, but Frazier continued to accuse her of seeing another man. As the phone continued to ring, he pointed the gun at her head and demanded that she answer it. She did, but after a brief exchange, the caller "hung up." Frazier continued to demand to know the identity of the caller, and Ms. Wadlngton maintained that she did not know. Frazier took the gun away from her head and shot her in the leg as she sat in the chair. He then put the gun to her head and "asked" her "who it was again." At that time, Frazier's mother "was at the door asking, '[W]hat are you doing in there?'" Frazier then "went to the other side of the bed" and took $270 out of Ms. Wadlington's purse. She told him that she was "getting dizzy," and shortly afterward, she "passed out." (T.44-47)

Ms. Wadlington testified that she did not have anything in her hand at the time she was shot. She testified further that the bullet had hit her femoral artery and vein, causing massive bleeding and loss of consciousness. (T.51-52)

Frazier testified that he had known Ms. Wadlington for "[a]bout six years" prior to the shooting. They had ended their dating relationship approximately two weeks earlier. On April 9, 2008, he discovered that Crystal had taken money from their joint

account. Because he needed these funds to complete a "business deal," he became "upset" and sent Ms. Wadlington a series of increasingly irate text messages. (T.74-76)

Later that evening, according to him, Ms. Wadlington came to his house uninvited, entered his bedroom and "threw the money on the table ... " She attempted to get into bed to "take a nap" with Frazier, but he rebuffed her because he did not trust her and because he believed she had been in the company of another man all day. At first, Ms. Wadlington "sat there with the purse clinched real close to her body. And then she got up and she went in the bathroom." Knowing that she routinely packed "a .40 caliber" in her handbag, that she was "a good shot," and that she was "really angry" at this time, Frazier moved his own gun "from under the mattress to under the covers ... " (T.77-78)

When he was asked to recount what happened after Ms. Wadlington returned from the bathroom, Frazier testified as follows:

> She comes out. And I'm like, "Man, why don't you go on.["] She was like, "Why don't you put me out." And she moves to the recliner. And this is what really, really gets me. Crystal never sits her purse on the floor. She's really superstitious. That particular day she sits her purse on the floor right by her foot. And I say, "You are really, really twisted, young lady." And she went into the purse. She ran her hand in the purse. When she did that, I got my gun up from under the cover. And I roll out of the bed because I'm thinking she's going to come out with the .40 caliber. But she comes out with the knife. And I reaches over across her body with my gun pointed and– this is the way the recliner sits here. And I'm like standing right there. She has the knife right here. I'm reaching across her with the left hand with my gun pointed and she tries to grab my hand and I pull it up and it went through the top, came out through the bottom and towards the floor. It went straight– I had my gun

> point down at– not in a threatening manner. It was pointed down.
>
> (T.79-80)

Asked what happened "after the gun went off," Frazier testified that he "got her purse" because he "thought she had the .40 caliber in it." He "got the phone out" and "called 911." He testified additionally, "I was not trying to harm Crystal. I was just trying to keep her from cutting me with the knife." (T.80-81)

SUMMARY OF THE ARGUMENT

Frazier has not shown that his trial counsel rendered constitutionally ineffective assistance. He has not established that his counsel's performance was so deplorable as to require the trial court to declare a mistrial *sua sponte*.

PROPOSITION:

FRAZIER HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

Frazier argues first that he was denied his constitutional right to effective assistance of counsel at trial. He faces formidable hurdles, summarized 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.**
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> (emphasis added) *Colenburg v. State*, 735 So.2d 1099, 1102-03 (Miss.App.1999).

Furthermore, "[t]here exists a 'strong presumption that the attorney's conduct falls within the wide range of reasonable professional conduct and .... that all decisions made during the course of trial were strategic.'" *Crosby v. State*, 16 So.2d 74, 79 (Miss.2009), quoting *Jones v. State*, 970 So.2d 1316, 1318 (Miss.App.2007)

Because this point is raised on direct appeal, the defendant 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, *Clayton v. State*, 946 So.2d 796 (Miss.796, 803 (Miss.App.2006); *Madison v.* State, 923 So.2d 252 (Miss.App.2006); *Jenkins v. State*, 912 So.2d 165, 173 (Miss.App.2005); *Walker v. State*, 823 So.2d 557, 563 (Miss.App.2002); *Estes v. State*, 782 So.2d 1244, 1248-49 (Miss. App. 2000).

Frazier has not shown that his trial counsel's performance was so deplorable as to require the court to declare a mistrial on its own motion. Because he has not sustained the particular burden he faces when raising this issue on direct appeal, the state submits his first proposition should be denied without prejudice to its being advanced in a motion for post-conviction collateral relief.

For the sake of argument, the state addresses Frazier's particular claims. First, he asserts his trial counsel committed an unprofessional lapse by failing to object to alleged hearsay testimony given by Dr.. Smith. (T.49-52) The state counters that defense counsel's choice of whether "to make certain objections" falls "within the ambit of trial strategy." *Hancock v. State*, 964 So.2d 1167, 1175 (Miss.App.2007). Accord, *Neal v. State*, 15 So.2d 388, 406 (Miss.2009) (counsel's failure to object to alleged hearsay fell within realm of trial strategy). Again, for the sake of argument, the state submits that it cannot be said absolutely that the court would have erred in finding that the testimony embodied an excited utterance, excepting it from the general prohibition of the admission of hearsay. M.R.E. 803(2).[1] By no stretch of the imagination can he establish that the trial court erred in failing to declare a mistrial *sua sponte* due to the admission of this testimony.

Next, Frazier argues that his trial counsel rendered ineffective assistance in failing to object to testimony to the effect that he declined to give a statement immediately after he was given the *Miranda* warnings. This alleged mistake occurred during the cross-examination of Investigator Wesley, after defense counsel asked her whether she had spoken with Frazier on the night in question. (T.34) Although the question required only a yes-or-no answer, Investigator Wesley answered,

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[1]Had the defense objected, the state might have made a plausible argument that the victim was still under the stress of the excitement caused by the startling event. Ms. Wadlington testified that she went "directly" to Dr. Smith's office after having received the threats. She appeared to be distraught, i.e., still under stress, and the statements appeared to be spontaneous. See *Harris v. State*, 979 So.2d 721, 727 (Miss. App. 2008).

"Briefly. When I read him his rights, he refused to give a statement. So, I didn't get a statement from him. We just went along with the process of him being arrested." (T.34)

The state reiterates that the decision whether to make certain objections, and whether to move to strike testimony and ask that the jury be admonished to disregard it, is a matter of trial strategy. There is a strong presumption that defense counsel made the tactical decision to decline to object to avoid calling further attention to these remarks. In any case, the fact that the jury hears of the defendant's refusal to make a statement is subject to harmless error analysis. *Byrd v. State,* 977 So.2d 405, 411 (Miss.App.2008). It follows that the admission of this testimony was not so egregious as to require the trial court to declare a mistrial *sua sponte*.

Finally, Frazier contends his trial lawyer committed an unprofessional lapse in failing to object to Ms. Wadlington's testimony about her injuries. Specifically, Frazier contends that Ms. Wadlington was not qualified to give this evidence. (See T.51-52) Once more, the state asserts that the decision whether to make certain objections falls within the ambit of trial strategy. It must be presumed that counsel made a tactical choice with respect to this evidence.[2] In any case, Frazier cannot show prejudice with respect to this point. The state was required to prove only that

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[2]Counsel might well have concluded that had any objection been sustained, the state would have called Ms. Wadlington's attending physicians and/or other experts to give even more damaging testimony.

the victim sustained "bodily injury." (C.P.3, 35) This issue was uncontested. The defense did not deny the shooting or question the extent of the injury. Rather, the only defense was self-defense. Finally, the state submits the failure to object did not obligate the trial court to declare a mistrial on its own motion.

The state reiterates that Frazier has not shown that his trial counsel's performance was so deficient as to require the trial court to declare a mistrial *sua sponte*. The sole proposition presented on this appeal should be denied.

CONCLUSION

The state respectfully submits the argument presented by Frazier is without merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

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:

Honorable Albert B. Smith, III
Circuit Court Judge
P. O. Drawer 478
Cleveland, MS 38732

Honorable Laurence Y. Mellen
District Attorney
P. O. Box 848
Cleveland, MS 38737

Erin E. Pridgen, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 4th day of December, 2009.

DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680