IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DELYNN DELSHAE PITTMAN — APPELLANT

VS. — NO. 2009-KA-0929

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. The trial court correctly allowed Investigator Harper to testify as to his interpretation of Beasley's body language during interrogation.

II. The trial court correctly denied defense counsel's objection to the prosecution's question to Quincy Boyd on direct examination as the question was merely a "yes" or "no" question and was not leading.

STATEMENT OF THE CASE

On or about March 3, 2009, Delynn Delshae Pittman was indicted by a Leake County Grand Jury for aggravated assault of Roshea McCoy by shooting him with a pistol. (C.P. 2) He was tried in the Leake County Circuit Court on May 5, 2009. He was convicted of aggravated assault and was sentenced to eight (8) years with four (4) years to serve, four (4) years suspended and five years (5) of post-conviction supervision. (Tr. 140)

STATEMENT OF THE FACTS

Testimony of Roshea McCoy

Mr. McCoy testified that at about 7:30 or 8:00 p.m. on December 3, 2008 he was at the home of his friend Bernard Denson which was just about 500 yards up the road from her own home. (Tr. 15-17) Pittman was there along with a few other of Mr. McCoy's friends. The group was sitting around drinking, playing dominoes and socializing. (Tr. 15,16) Mr. McCoy had come to the gathering alone and was there an hour and a half to two hours. He left around 9:30 or 10:00 and headed home in her truck. (Tr. 16)

Mr. McCoy testified that He made it to his own house. As he pulled up in the yard and turned off his truck, he saw a car pull up behind him. Pittman, Adrian Calhoun and Quincy Boyd were in the car which belonged to Pittman's girlfriend. Mr. McCoy walked over to the car to see what they wanted. Quincy asked Mr. McCoy whether he was "in for the night" and he replied that he was. (Tr. 18) Pittman then pulled a small handgun and pointed it to Mr. McCoy's face. Pittman told Mr. McCoy to "Give it up." (Tr. 18) Mr. McCoy did not take him seriously because he considered Pittman a friend. He told him, "I ain't giving you nothing. Get out of my yard." Mr. McCoy testified that he was not expecting this kind of behavior from Pittman because of their friendship and because they regularly hung out together. (Tr. 18) He began backing up and going towards his back door. (Tr. 19)

Mr. McCoy testified that he had not had any previous trouble with Pittman that night. Mr. McCoy testified that Boyd stayed in the back seat. (Tr. 19) Pittman kept the pistol pointed at Mr. McCoy's face and got out of the car. Calhoun jumped out of the passenger side and came around and grabbed Mr. McCoy and tried to get into her pockets. Mr. McCoy testified that he did not have any weapons with him that night. (Tr. 19) While Calhoun tussled with him and tried to get into his

pockets, Pittman continued to hold the gun on him. (Tr. 19) Mr. McCoy testified that Pittman was 3-4 feet away from him and that Calhoun was right upon him. (Tr. 19) He testified that he believed that Calhoun was trying to get his money. (Tr. 20) While he and Calhoun were struggling, Pittman began shooting. Pitman shot three times as Mr. McCoy struggled with Calhoun and shot him first in the upper thigh or buttock. Mr. McCoy testified that the bullet is still lodged in his leg. While Calhoun continued to hold him, Pittman shot him again in his calf muscle. Mr. McCoy testified that his girlfriend, Nicole Boyd, came to the back door. Calhoun saw Ms. Boyd, let Mr. McCoy go and took off. Mr. McCoy took off running towards the woods. Pittman continued to shoot at Mr. McCoy and shot him in the back of his arm. The bullet exited through the front of his arm. Mr. McCoy ran into the woods and laid down. (Tr. 21)

Pittman, Calhoun and Boyd left in the vehicle they came in. (Tr. 22) After they left, Mr. McCoy laid out in the woods. He finally crawled out and called to Ms. Boyd that he had been shot. Mr. McCoy crawled to the front yard and Ms. Boyd came out and helped him into the house. (Tr. 22) Mr. Boyd took him to University Hospital that night for treatment. Mr. McCoy remained in the hospital until 6:30 or 7:00 the next morning. (Tr. 23) Mr. McCoy testified that the shooting took placed on Bernard Denson Road in Leake County. (Tr. 23)

Mr. McCoy testified that he had not had any trouble with Mr. Pittman earlier in the evening at the gathering at his friend's house. He testified that he did not do anything to provoke Pittman or to cause him to have an altercation or to shoot him. (Tr. 23) Mr. McCoy testified that he did not at any time make any threats or show any force or weapons towards Pittman. (Tr. 24)

Testimony of Quincy Earl Boyd

Boyd testified that on the evening of on December 3, 2008 his cousin dropped him off at the home of Bernard Denson just as the gathering was breaking up. (Tr. 31) He got into a vehicle with

Pittman and Calhoun intending to get a ride home. (Tr. 31) He testified that it was nighttime and was dark. (Tr. 31) Boyd testified that Pittman was driving, Calhoun was in the passenger seat, and he was in the backseat behind Pittman. (Tr. 31-32) They left and parked across the road from Boyd's father's house at the home of Mr. Roshea McCoy. (Tr. 32) Mr. McCoy came outside and Boyd rolled down the window and made small talk with him. (Tr. 33) After Boyd rolled his window back up, Pittman opened his car door and got out. He talked to Mr. McCoy about $20 he owned him. Mr. McCoy told him don't worry about the $20. McCoy attempted to shake Pittman's hand and Pittman tried to pull McCoy into the car by the hand. (Tr. 33-34) Pittman then jumped out of the car and went over to where Mr. McCoy was standing. Calhoun then got out of the passenger side and ran around to where Mr. McCoy was. (Tr. 34)

Boyd testified that he stayed in the car. He heard argument and gunshots. Boyd testified that he could see fire coming out of the gun and that Pittman had the gun in his hand was shooting at Mr. McCoy. (Tr. 35) After the third shot, Mr. McCoy ran. Pittman and Calhoun jumped back into the car. They intended to go hide out, but Boyd told them to drop him off where he lived, which was on the same road. (Tr. 37) Boyd testified that Mr. McCoy did not do anything to cause Pittman to shoot him. Boyd testified that he saw Nicole Boyd come out onto the porch shooting as they were pulling away in the car. (Tr. 37)

Testimony of Nicole Boyd

Ms. Boyd testified that Mr. McCoy is her boyfriend. She testified that she also knew Delynn Pittman, Adrian Calhoun and Quincy Earl Boyd. She testified that Quincy Boyd is her cousin. (Tr. 42) She testified that she was at Mr. McCoy's residence on the night of December 3, 2008. She testified that at about 9:30 or 10:00 p.m., she and her two children were inside the residence, a mobile home located at 196 Bernard Denson Road. Ms. Boyd testified that she heard a lot of

commotion outside since her bathroom was near where the shooting took place. She had just gotten out of the shower. She put on clothes and ran outside. She asked, "What's going on?" and Mr. McCoy replied, "Baby, they trying to rob me." Ms. Boyd testified that she could see Calhoun tussling with Mr. McCoy. She did not see Delynn Pittman at that time. Ms. Boyd went back into the house and got her gun, a 25. She was headed back outdoors when she heard several shots. She hurried up and ran outdoors and shot in the air twice because they were still tussling. (Tr. 45) They continued tussling and Ms. Boyd went back into the house. Calhoun and Pittman made a break for it about that time. Ms. Boyd went out the back door and called for Mr. McCoy asking him where he was? She found him laying in the bushes. He had been shot three times, in the leg, the hip and the arm. Mr. McCoy told her that he ran in the bushes because he believed Pittman would continue to shoot him if he did not run. (Tr. 46) She testified that she never knew Mr. McCoy to sell marijuana. (Tr. 49)

Testimony of Investigator Johnny Neely

Investigator Neely testified that he was an investigator with the Leake County Sheriff's Office. (Tr. 50) A few minutes after midnight, on the morning of December the 4th, the Leake County Sheriff's Office received a call from the University Medical Center Emergency Room stating that a black male subject had come in with a gunshot wound and they believed him to be from Leake County. (Tr. 51) Neely and the deputies responded to the call. They learned that the victim was Mr. McCoy and that his address was 196 Bernard Denson Road. (Tr. 51) They went to the scene to investigate. They looked for physical evidence and found some blood splattered on the doorknob at the outer screen door area. They found some scrape or scuff marks in the dirt at the south end of the trailer indicating that there had been a struggle there. No other physical evidence was found at the scene. (Tr. 51)

Investigator Neely testified that he called the emergency room and McCoy had been discharged. (Tr. 52) The following day Neely and Investigator Mccombs went to McCoy's residence and spoke to him. Because he was medicated they arranged to get a witness statement at a later date. Neely testified that he got witness statements from Mr. McCoy, Quincy Boyd, Adrian Calhoun and Nicole Boyd. (Tr. 53) Neely testified that he also took a statement from Pittman, who signed a waiver of his Miranda rights. (Tr. 86) Neely testified as to the substance of McCoy's statement regarding the shooting. Pittman's statement alleged that he and McCoy argued over money that Pittman allegedly owed McCoy for marijuana. He alleged that he tried to buy gin from McCoy and McCoy demanded payment for the marijuana. Pittman alleged in his statement that McCoy shoved him and then tried to pull a gun on him. He alleged that he then grabbed McCoy and they struggled for the gun for a while and "a lot of shots went off." Pittman alleged that he did not know McCoy had been shot. Pittman alleged that Nicole Boyd then came to the door with a gun and fired some shots and that he then ran to the car and he drove off because she was trying to shoot him again. (Tr. 86) Investigator Neely testified that they searched the scene for a gun or shell casings and did not find any.

Testimony of Investigator Clay McCombs

Investigator Clay McCombs testified that he assisted Investigator Johnny Neely in the investigation of the case. He testified that he was present at the December 5th interview of Delynn Pittman. (Tr. 94) He testified that Pittman signed a waiver of his Miranda rights. (Tr. 98.) Investigator McCombs further testified that Pittman originally stated that he was alone when the shooting occurred. McCombs testified that he told Pittman that there were statements from other witnesses saying that there were two people with him and that he was not alone. Pittman then said he lied when he said he was alone and that there were two people with him. McCombs testified that

during the interview Pittman stood up to demonstrate how the shooting occurred. (Tr. 99) McCombs said that he played the victim, Mr. McCoy, in the re-enactment. In Pittman's demonstration, he and Mr. McCoy were struggling over the weapon which fell on the ground. As they were picking it up, still struggling, it went off. Pittman told the officers that that weapon went off several time and he wasn't sure how many shots were fired. Pittman's only further statements were in response to a question by Investigator Harper. (Tr. 101) McCoy testified that the interview was concluded after Investigator Harper's question since Pittman, "just . . . kind of dropped down and from his body language, he no longer really wanted to talk to me, so I didn't push it anymore." (Tr. 102)

Testimony of Investigator Michael Harper

Investigator Harper testified that he is an investigator with the Leake County Sheriff's Department. He testified that he was present with Investigator Clay McCombs for the interrogation of Delynn Pittman. (Tr. 104) He further testified that Pittman signed a waiver of rights form prior to the interview. Harper testified that Pittman gave them a demonstration of what he alleged happened the night of the shooting. Pittman described that he and the victim, Mr. McCoy were face to face, about a foot apart, tussling over a gun. Pittman demonstrated that the gun fell to the ground, they both went down to pick it up, both had the gun and shots were fired. Investigator Harper testified that after Pittman's demonstration, he asked Pittman how McCoy was shot in the butt if it happened as Pittman said it did. Pittman stated that he did not know how that happened. Harper testified that after the question about the shot in the butt, Pittman acted as if it "let the air out of him. He kind of slumped down and at that point, that's when he told us he couldn't explain that. (Tr. 106) Investigator Harper was asked what Pittman's body language indicated to him. Defense counsel objected that the Harper was not trained to make such an assessment and the objection was sustained. (Tr. 106) On cross examination, defense counsel asked Investigator Harper if he had any training

in "kinesthesiology." (Tr. 107) Harper testified that he was trained in the technique of reading body language as part of an interview technique. Investigator Harper testified that he attended training at the Naval Station in Meridian for interview using body language. (Tr. 107) On re-direct examination he was asked, based on his training, experience and observations, to interpret Pittman's body language in the interrogation room after the question regarding the shot in McCoy's buttocks. Investigator Harper testified that this is known as a "confessional slump." Harper testified that after he slumped over, Pittman did not say anything else. (Tr. 110)

Testimony of Adrian Calhoun

Calhoun testified for the defense. Calhoun testified that while the group was at Bernard Denson's house the victim, Roshea McCoy, drank at least three beers and some gin. Calhoun testified that he and Pittman were riding up and down the road in Pittman's car, with Pittman driving. He testified that they went back by Denson's house and that Pittman and Mr. McCoy had an argument. He testified that they followed Mr. McCoy to his house. Quincy Boyd was in the car with them by this time. Calhoun testified that he did not get out of the vehicle and grab Mr. McCoy. He testified that he did get out of the car until after shots were fired. He testified that he saw Pittman and Mr. McCoy close to one another. Calhoun testified that after the gun went off, Mr. McCoy ran behind the house. Calhoun, Pittman and Boyd all got back in the car. Calhoun testified that he asked to be dropped off at his house after the shooting. (Tr. 117) Calhoun testified that he never saw a gun. Calhoun testified that Pittman had to be the one who shot McCoy because only the two of them were out there. He testified that it had to have been Pittman who shot Mr. McCoy, "because who else could have shot him?" (Tr. 119)

SUMMARY OF THE ARGUMENT

The trial court correctly allowed Investigator Harper to testify as to his interpretation of Pittman's body language during interrogation since Pittman's defense counsel "opened the door" to the testimony during cross examination. It is [well settled] that a defendant who 'opens the door' to a particular issue runs the risk that collateral, irrelevant, or otherwise damaging evidence may come in on cross-examination." Martin v. State, 970 So.2d 723, 725 (Miss.2007). "[O]nce the defense has opened the door to otherwise improper testimony, the prosecution is permitted to enter and develop the matter in great detail." *Fleming v. State*, 604 So.2d 280, 291 (Miss.1992). "If a defendant opens the door to line of testimony, ordinarily he may not complain about the prosecutor's decision to accept the benevolent invitation to cross the threshold." *Doby v. State*, 557 So.2d 533, 539 (Miss.1990). This issue is without merit.

The question to which Pittman objected was merely a "yes" or "no" question and was not leading. The trial court correctly overruled his objection. Further, allowing the question was within the considerable discretion of the trial court and Pittman suffered no harm. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

ARGUMENT

I. The trial court correctly allowed Investigator Harper to testify as to his interpretation of Pittman's body language during interrogation since Pittman's defense counsel "opened the door" to the testimony during cross examination.

A trial court's decision to admit or exclude testimony is reviewed for abuse of discretion. *McGriggs v. State*, 987 So.2d 455, 457 (Miss. Ct. App. 2008). "Even if this Court finds an erroneous admission or exclusion of evidence, we will not reverse unless the error adversely affects a substantial right of a party." *Id.*

"Relevancy and admissibility of evidence are largely within the discretion of the trial court and [a reviewing court] will reverse only where that discretion has been abused.", 542 So.2d 914, 917 (Miss.1989). Furthermore, error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right is affected by the ruling. M.R.E. 103(a). "If the defendant fails to show what right, if any, was affected by such ruling, no reversible error lies." Johnson v. State, 908 So.2d 758, 765 (Miss.2005) (citing *Simmons v. State*, 805 So.2d 452, 487-88 (Miss.2001)). In his brief on appeal, Pittman simply asserts that the testimony was inadmissible opinion testimony and should not have been admitted. Because Pittman has failed to identify what rights, if any, were affected by the trial court's decision, this argument is without merit.

The supreme court has held that "as a general rule, the issue of whether a party opens the door for an opposing party to inquire about otherwise inadmissible evidence, lies within the sound discretion of the trial court." *Hartel v. Pruett*, 998 So.2d 979, 988 (Miss.2008) (quoting *APAC-Miss., Inc. v. Goodman*, 803 So.2d 1177, 1185 (Miss.2002)). Further, evidence, which is otherwise inadmissible, may be properly presented where the defendant has "opened the door." *Gunnell v. State*, 750 So.2d 1284, 1286 (Miss. Ct. App.1999) (citing *Washington v. State*, 726 So.2d 209, 216 (Miss. Ct. App.1998)). Thus, in a general sense, "a defendant cannot complain of the evidence which he himself brings out." *Weaver v. State*, 996 So.2d 142, 145-46 (Miss. Ct. App. 2008) (quoting *Pruitt v. State*, 807 So.2d 1236, 1241 (Miss. 2002)).

"It is [well settled] that a defendant who 'opens the door' to a particular issue runs the risk that collateral, irrelevant, or otherwise damaging evidence may come in on cross-examination." Martin v. State, 970 So.2d 723, 725 (Miss.2007). "[O]nce the defense has opened the door to otherwise improper testimony, the prosecution is permitted to enter and develop the matter in great detail." *Fleming v. State*, 604 So.2d 280, 291 (Miss.1992). "If a defendant opens the door to line of

testimony, ordinarily he may not complain about the prosecutor's decision to accept the benevolent invitation to cross the threshold." *Doby v. State*, 557 So.2d 533, 539 (Miss.1990).

In the instant case, the witness, Investigator Harper, was trained in kinesics is the interpretation of body language such as facial expressions and gestures — or, more formally, non-verbal behavior related to movement, either of any part of the body or the body as a whole. He was not qualified as an expert witness and was asked on direct examination to interpret the body language of the defendant, Pittman, when Pittman slumped down during his examination and would not answer any further questions. Pittman's counsel objected to the expert opinion testimony and the trial court sustained the objection. (Tr. 106) However, on cross examination of Investigator Harper, the defense counsel elicited information about Harper's training in a series of questions about "kinesthesiology," which defense counsel stated was "the way joints and muscles interact." In response to those questions, Investigator Harper testified that he was trained in he was not trained in the way that joints and muscles interact, but rather in "reading body language as part of an interview." While he did not correct defense counsels mis-statement of the name of his speciality, in response to defense counsel's question he clearly articulated his area of expertise in the area of kinetics by stating that he was trained in the interpretation of body language and facial expressions in the course of an interview. Defense counsel's questions were clearly designed to draw out Investigator Harper's training and expertise and Harper clearly answered the questions with the nature and kind of training he had received. He further testified that he had received that training at the Naval Station in Meridian for interview using body language. (Tr. 107) "The general rule is that defendant cannot complain of evidence which he himself brings out." *Simpson v. State*, 366 So. 2d 1085,1086 (Miss. 1979). He cannot complain of errors invited or induced by himself. *Lewis v. State*, 445 So. 2d 1387 (Miss. 1984); *Jackson v. State*, 432 So. 2d 129 (Miss. 1992); *Reddix v. State*,

381 So. 2d 999, 1009 (Miss. 1980) (" If the defendant goes fishing in the State's waters, he must take such fish as he catches.")

After Investigator Harper's training in the area interpreting body language in the context of an interrogation was firmly established during cross examination, the prosecution, on redirect, asked Investigator Harper, based on his training and experience in reading body language during an interview and his observation of Pittman in the course of the interrogation, to give his opinion about the defendant's body language during the interrogation. (Tr. 110) Defense counsel objected that this was outside the scope of cross. The trial court ruled that defense counsel had developed the issue on cross examination, and that based on that development, Investigator Harper had testified that he had expertise in the area of reading body language in an interview. (Tr. 109)

In his brief, Pittman alleges that Investigator Harper mistook a kinesthesiologist for a kinesologist. However, while counsel for the defense used the apparently incorrect terminology, Investigator Harper was quite clear that his training was in reading body language as an interview technique. This answer clearly addressed the question of the meaning of Pittman's body language in the course of his interrogation. Defense counsel's questions, no matter how poorly worded, were designed to elicit, and did elicit, the nature of Investigator Harper's training which opened the door to his testimony of his interpretation of Pittman's body language during the interrogation.

In *Murray v. State*, 20 So.2d 739 (Miss. Ct. App. 2009), Murray contended that a defendant cannot open the door to incompetent or unqualified expert opinion evidence. Murray relied on *Murphy v. State*, 453 So.2d 1290 (Miss. 1984), which held that one cannot open the door to hearsay because hearsay in incompetent evidence. The Court of Appeals in *Murray* found that *Murphy* was distinguishable from the case at bar because the erroneously admitted evidence in *Murphy* was hearsay and not expert-opinion testimony. *Id.* at 741.

In *Duett Landforming, Inc., v. Belzoni Tractor, Inc.*, 2009 WL 2857106 (Miss App.)), the Mississippi Court of Appeals opined:

> . . . Cook's testimony was in the nature of expert testimony. Cook was neither disclosed as an expert witness prior to trial nor accepted as an expert at trial; therefore, it was improper for him to give expert testimony. We note, however, that Duett Landforming initially brought up this matter by playing a tape recording of Cook's deposition for the jury. Therefore, any objectionable engineering testimony that Cook gave was initiated when the jury heard Cook speak at length about the design of the 9400 tractors, the gudgeon problems they experienced, and the possible effects that Duett's modifications might have had on the gudgeons. The supreme Court has held that "as a general rule that the issue of whether a party opens the door for an opposing party to inquire about otherwise inadmissible evidence, lies within the sound discretion of the trial court." *Hartel v. Pruett*, 998 So.2d 979, 988 (Miss. 2008) (quoting, *APAC-Miss., Inc. v. Goodman*, 803 so.2d 1177, 1185 (Miss. 2002). We find that whether the circuit court found the testimony to be proper layperson testimony or not was not dispositive of the issue. Duett Landforming opening the door for such testimony by playing the tape recording of Cook's deposition for the jury. Therefore, we find it was within the circuit court's discretion to allow the defense to continue the line of questioning.
>
> . . . .
>
> In the present case, we find that although Cook gave improper expert testimony, it was within the circuit court's discretion to allow that testimony because Duett Landforming initiated the line that line of questioning when its attorney played the tape recording of Cook's deposition, which covered the same issue to which Cook testified at trial.

In the instant case, even after the trial court had sustained Pittman's objection to unqualified expert testimony from Investigator Harper, defense counsel proceeding to "voir dire" Harper on his qualifications. Despite defense counsel's misunderstanding of the nature of Harper's training, Harper clearly testified and established that he was trained in the interpretation of reading body language as an interview technique. The Mississippi Supreme Court has held that "[i]f a defendant

opens the door to line of testimony, ordinarily he may not complain about the prosecutor's decision to accept the benevolent invitation to cross the threshold." Doby v. State, 557 So.2d 533, 539 (Miss.1990). The natural extension of this line of questioning was to ask Investigator Harper, based on his training, how he interpreted Pittman's body language during his interrogation.

Further, even if the trial court had exceeded it's discretion in this instance, in order to sustain a claim of reversible error, an appellant must assert that the offending testimony violated a substantial right of the appellant. Pittman makes no such assertion and therefore his claim cannot stand. Furthermore, error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right is affected by the ruling. M.R.E. 103(a). "If the defendant fails to show what right, if any, was affected by such ruling, no reversible error lies." Johnson v. State, 908 So.2d 758, 765 (Miss.2005) (citing *Simmons v. State*, 805 So.2d 452, 487-88 (Miss.2001)). In his brief on appeal, Pittman simply asserts that the testimony was inadmissible opinion testimony and should not have been admitted. Because Pittman has failed to identify what rights, if any, were affected by the trial court's decision, this argument is without merit.

This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

II. The trial court correctly denied defense counsel's objection to the prosecution's question to Quincy Boyd on direct examination as the question was merely a "yes" or "no" question and was not leading.

Pittman complains that the trial court erred in overruling his counsel's objection to leading in the following colloquy:

Q. You heard some gunshots. All right, now, were you looking at them when the gun was drawn?

A. I could kind of see him by Delynn right here and Roshea right here in the middle and Adrian on this side over here.

Q. Was Adrian trying to grab hold of Roshea?

BY MR. SMITH: Your Honor, I object to leading.

BY THE COURT: Overruled.

Q. What was Adrian doing? Were he and Mr. Roshea tussling?

A. It was kind of dark and really you can't see nothing, but they say he was trying to get in his pocket.

Q. That's Roshea and Mr. Calhoun?

A. Uh-huh.

Q. Alright, now you say you heard some shots. Did you see anybody actually shoot?

(Tr. 34)

The question "Was Adrian trying to grab hold of Roshea?" is not leading, but is merely a "yes" or "no" question.. The Mississippi Supreme Court has defined a leading question as one that "suggests to the witness the specific answer desired by the examining attorney." *Tanner v. State*, 764 So.2d 385, 405 (Miss.2000) (quoting *Clemons v. State*, 732 So.2d 883, 889 (Miss.1999)). The question asked by the prosecution did not suggest a specific answers to Boyd. It was a "yes" or "no" question, which is permissible on direct examination. Pittman's contentions to the contrary are without merit.

In *Tanner v. State*, 764 So.2d 385 (Miss. 2000), the State, on direct examination, asked the witness, a friend of the victim, if she had ever known the victim to leave her house without wearing her engagement ring. Tanner asserted that this was a leading question. The Supreme Court held that the question was not leading and merely called for a yes or no answer. There was no suggestion by

counsel as to how the witness should respond, and Tanner suffered no injury as a result. Therefore, Tanner's assertion that he was prejudiced by the State's asking leading questions was held to be without merit.

Even if the Court of Appeals were to decide that the question was leading, it was within the discretion of the trial court to allow the question. The decision to allow leading questions is one that rests clearly within the discretion of the trial court, and Mississippi Appellate Courts will reverse such a decision only upon a showing of abuse of discretion. *Bailey v. State*, 952 So.2d 225, 236 (Miss. Ct. App. 2006) (citing *Hughes v. State*, 735 So.2d 238, 278 (Miss.1999)). In setting forth the authority of the trial judge with respect to the interrogation of witnesses, Mississippi Rule of Evidence 611 provides the trial judge with great discretion, providing the following:

> (c) Leading Questions. Leading questions should not be used on the direct examination of a witness *except as may be necessary to develop his testimony*. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Even if the Mississippi Court of Appeals were to determine that it was error to allow the question, there was no harm to Pittman. The Mississippi Supreme Court has held that "leading questions ... will rarely create so distorted an evidentiary presentation as to deny the defendant a fair trial." Anderson v. State, 904 So.2d 973, 981 (Miss.2004).

In Clemons v. State, 732 So.2d 883, 889 (Miss.1999), the Mississippi Supreme Court held:

> A leading question is one that suggests to the witness the specific answer desired by the examining attorney. Trial courts are given great discretion in permitting the use of such questions, and unless there has been a manifest abuse of discretion resulting in injury to the complaining party, we will not reverse the decision. This is because the harm caused is usually inconsiderable and speculative, and only the trial court was able to observe the demeanor of the witness to determine the harm.

> "To justify a reversal because of the allowance of a leading question, not only is it necessary that there should have been a manifest abuse of discretion, but it is also necessary that the question shall have influenced the answer and that injury resulted." *Palmer v. State*, 427 So.2d 111, 115 (Miss.1983).

A review of the colloquy in question demonstrates that the question did not influence the witness's answer. The witness responded by testifying, "It was kind of dark and really you can't see nothing, but they say he was trying to get in his pocket." This answer did not appear to be influenced by the question, since it did not reference the Pittman and Calhoun "trying to grab" the McCoy or "tussling" with him. The answer was completely independent of anything that might have been suggested by the question. The question did not suggest anything about attempts to get into the McCoy's pockets, which was the substance of the witness's answer.

The question to which Pittman objected was merely a "yes" or "no" question and was not leading. The trial court correctly overruled his objection. Further, allowing the question was within the considerable discretion of the trial court and Pittman suffered no harm. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

CONCLUSION

The issues presented by the Appellant are without merit and the jury's verdict and the rulings of the trial court should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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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Circuit Court Judge
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Decatur, MS 39327

Honorable Mark Duncan
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Edmund J. Phillips, Jr., Esquire
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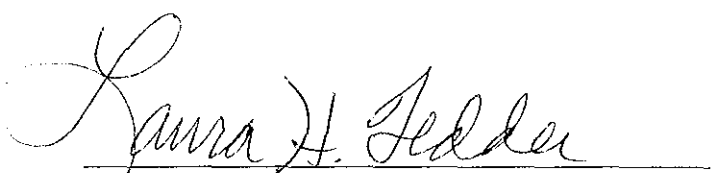
This the 9th day of April, 2010.



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